Joyce Hagen Mundy

From: Anita Bates [abates@winbury.com]
Sent: Tuesday, April 07, 2009 9:16 AM
To: Joyce Hagen Mundy; Dennis Enslinger
Subject: T-Mobile Cell Tower

Joyce and Dennis, please distribute to all the planning commissioners.

I adamantly oppose the latest T-Mobile cell tower application at Faith Lutheran church, 67th and Roe. I oppose the tower because it does not fit into neighborhood architecture in any way, is too close to personal property lines, will negatively impact property values, is a health concern, is aesthetically unattractive and in opposition to goals set forth in the Village Vision, and sets a dangerous precedent for similar towers in residential neighborhoods. As decided by the Planning Commission and City Council on earlier tower applications, this is not an appropriate site.Please consider the Prairie Village residents and neighborhoods.

Anita Bates 4815 W. 68th St., Prairie Village, KS; 913-362-1081

Anita Bates
Retail Services
Grubb & Ellis|The Winbury Group
4520 Main Street, Suite 1000, Kansas City, MO 64111
Direct: 816.556.1123 • Cell: 913-645-7757 • Fax: 816.531.5409
abates@winbury.com
www.winbury.com

Joyce Hagen Mundy

From: Palmer,Max [MPALMER@CERNER.COM]
Sent: Tuesday, April 07, 2009 10:34 AM
To: Joyce Hagen Mundy; Dennis Enslinger
Cc: Palmer,Max
Subject: T-Mobile Cell Tower

Joyce and Dennis, please distribute to all the planning commissioners.

I adamantly oppose the latest T-Mobile cell tower application at Faith Lutheran church, 67th and Roe.

I oppose the tower because it does not fit into neighborhood architecture in any way, would be too close to personal property lines, would negatively impact property values, is a health concern and aesthetically unattractive. Allowing this cell tower to be located at this location is in opposition to goals set forth in the Village Vision, and sets a dangerous precedent for similar towers in our residential neighborhoods.

As decided by the Planning Commission and City Council on two earlier tower applications, this is not an appropriate site for a cell tower. Please consider seriously the Prairie Village residents and neighborhoods that would be effected should this unfettered use of church property be permitted.

Thank you,

Max Palmer

4815 W. 68th St.

Prairie Village, KS

PH: 913.362.1081

Joyce Hagen Mundy

From: Dennis Enslinger
Sent: Monday, April 06, 2009 9:46 AM
To: Joyce Hagen Mundy
Subject: FW: PC 2009-06

Here is another letter.

Dennis

Dennis J. Enslinger, AICP
Assistant City Administrator
Municipal Building
7700 Mission Road
Prairie Village, Kansas 66208
913-385-4603 (office)
913-381-7755 (fax)
denslinger@pvkansas.com

From: katherine faerber [mailto:faernett5@gmail.com]
Sent: Sunday, April 05, 2009 10:06 PM
To: Dennis Enslinger
Subject: PC 2009-06

John and I are against the proposed cell tower at Faith Lutheran Church. Our home has been Prairie Village for the past 23 years. We have agreed with the efforts to improve and invigorate our lovely city. We know not everyone is emotionally attached to Prairie Village the way we are and appreciate the efforts behind the "Village Vision" to encourage new families to move into Prairie Village. On that note, the proposed tower at Faith Lutheran goes completely in the opposite direction of those efforts.
1. It is not in keeping with the aesthetics of our neighborhood.
2. This tower will reduce residential property values.
3. Topographically low lying location.
4. Not allowing for set back or fall line, if the tower were to fall. It would land on neighbors yards, dog and heaven forbid, a child.
5. It would be the first stand alone tower in Prairie Village on residentially zoned property. It would set a precedence for all of Prairie Village. In some cities, the cell companies are buying houses and erecting towers in the backyards.

I can't think of one Prairie Village resident who would be proud to show you their neighbor's 145' cell tower, nor do I know any realtors who would have it listed out on the specs of a home for sale.

We do appreciate the many volunteer hours you have given our community. Thank you for your consideration to deny PC 2009-06.

Kate and John Faerber

Joyce Hagen Mundy

From: Doug Flora [doug.flora@hwins.com]

Sent: Monday, April 06, 2009 1:39 PM

To: Mayor; Al Herrera; Bill Griffith; David Voysey; Ruth Hopkins; Michael Kelly; Andrew Wang; Laura Wassmer; Dale Beckerman; David Morrison; Charles Clark; David Belz; Diana Ewy Sharp; Council Members

Dear City Council & Mayor:

I adamantly oppose the latest T-Mobile cell tower application at Faith Lutheran church, 67th and Roe. I oppose the tower because it does not fit into neighborhood architecture in any way, is too close to personal property lines, will negatively impact property values, is a health concern, is aesthetically unattractive and in opposition to goals set forth in the Village Vision, and sets a dangerous precedent for similar towers in residential neighborhoods. As decided by the Planning Commission and City Council on earlier tower applications, this is not an appropriate site.

Please do not push co-location at this site which was not previously sought after by the other cell companies due to the poor location. It has only now become attractive to them as they would be able to piggyback on T-Mobile's tower. Please hold true to the Village Vision and deny this unreasonable application.

Please help strike a balance between the importance of this type of infrastructure and the necessity to protect your citizens and their property values. We appreciate your diligent efforts and immense work on this issue.

Douglas B. Flora
4908 W 68th Street
913-432-2452

Joyce Hagen Mundy

From: Dennis Enslinger

Sent: Friday, April 03, 2009 5:11 PM

To: Mary Cordill; Casey Housley; faernett5@gmail.com; randy.cordill@stiprepaid.com; doug.flora@hwins.com

Cc: cschultzr@aol.com; sroth@southwindcapital.com; Michelene Krueger; Wyatt Cobb; sro6801@sbcglobal.net; SueGoldman@bv.com; JHousley@lockton.com

Subject: T-Mobile application and 4-7-09 Planning Commission Agenda

Attachments: 4-7-09 PC Agenda and T-Mobile Application.pdf; T-Mobile Packet.pdf

You have expressed interest in the T-Mobile Request at 4805 W. 67th Street.

I have attached the Planning Commission agenda for the April 7th meeting at which the T-Mobile application will be considered. You will find all the information submitted as of today and the associated staff report. I also wanted to provide you with a copy of a document which the applicant has requested the Planning Commission Receive (T-mobile Packet).

Please let me know if you have any questions.

Dennis

Dennis J. Enslinger, AICP
Assistant City Administrator
Municipal Building
7700 Mission Road
Prairie Village, Kansas 66208
913-385-4603 (office)
913-381-7755 (fax)
denslinger@pvkansas.com

Joyce Hagen Mundy

From: Dennis Enslinger

Sent: Friday, April 03, 2009 5:07 PM

To: Trevor Wood; Curtis Holland; Garth.Adcock@T-Mobile.com; CEdwards@ssc.us.com

Cc: Stephen B. Horner; Ronald A Williamson; JAnderson@ssc.us.com; wam@hhc-law.com; Luke.Willenbring@T-Mobile.com

Subject: T-mobile application

Attachments: 4-7-09 PC Agenda and T-Mobile Application.pdf

I have attached the Planning Commission Agenda and all of the documents sent to the Planning Commission regarding the T-mobile Request. Let me know if you have any questions.

Dennis

Dennis J. Enslinger, AICP
Assistant City Administrator
Municipal Building
7700 Mission Road
Prairie Village, Kansas 66208
913-385-4603 (office)
913-381-7755 (fax)
denslinger@pvkansas.com

Dear Prairie Village Officials,

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church – 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most – in our homes and neighborhoods. Thank you.

Sincerely,

Name JANE CORLEY Signature Jane Corley

Address 5300 West 68 St.

City Prairie Village State Ks. Zip 66208

E-mail Corleyja@hotmail.com Phone 913-710-5263

☒ Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments: We need this! My reception in my home is not good.

PV 527

EXHIBIT A
PUBLIC HEARING
BY CLERKS
HOLLAND

Dear Prairie Village Officials,

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church – 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most – in our homes and neighborhoods. Thank you.

Sincerely,

Name Karen Vaughan Signature Karen Vaughan

Address 7926 Nordwood

City Prairie Village State Ks Zip 66208

E-mail vaughan@kc.rr.com Phone

X Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments: Yes, there needs better/consistent service w/out raising our rates

PV 528

PV 529

[redacted]

Dear Prairie Village Officials,

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church - 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most – in our homes and neighborhoods. Thank you.

Sincerely,

Name Mrs. Hal M. Quinn Signature Mrs. Hal M. Quinn

Address 6515 Belinder Rd.

City Mission Hills, KS 66208 State Zip

E-mail Phone 913-677-3777

☑ Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments: As our reception is currently, it is impossible to use our cell phone from our residence. We are very much in need of a cell site.

PV 530

Dear Prairie Village Officials,

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church - 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most - in our homes and neighborhoods. Thank you.

Sincerely,

Name Kathy Migneron Signature Kathy Migneron

Address 2911 W. 67th Street

City Mission Hills State KS Zip 66208

E-mail K.Migneron@gmail.com Phone (913) 362-0632

☐ Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments: Frustrating Service Here!

PV 531

Dear Prairie Village Officials,

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church – 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most – in our homes and neighborhoods. Thank you.

Sincerely,

Name Jill Barnett Signature Jill Barnett

Address 4806 W. 64th Street

City Prairie Village State Kansas Zip 66204

E-mail jbarnett@kc.rr.com Phone 913-384-5103

☐ Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments: I don't currently have service inside my own home, and I would like to see that change.

PV 532

[redacted]

Dear Prairie Village Officials,

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church – 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most – in our homes and neighborhoods. Thank you.

Sincerely,

Name TIFFANY LYMAN Signature [redacted]

Address 4107 PRAIRIE LN

City PV State KS Zip 66208

E-mail [redacted] Phone 816-876-2513

☐ Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments: I'D LIKE A TOWER FOR BETTER RECEPTION IN MY HOME.

PV 533

Dear Prairie Village Officials;

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church - 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most - in our homes and neighborhoods. Thank you.

Sincerely,

Name Britt Strick Signature Britt Strick

Address 6817 Granada Road

City Prairie Village State KS Zip 66208

E-mail _____ Phone 913.710.5168

☒ Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments: I often lose cell phone coverage walking through my home, which is annoying when I'm on an important phone call.

PV 534

[redacted]

Dear Prairie Village Officials,

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church - 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most - in our homes and neighborhoods. Thank you.

Sincerely, Marilyn Daugherty

Name W. R DAUGHERTY Signature WR Daugherty

Address 5149 W 64 TERR.

City PRAIRIE VILLAGE State KS Zip 66208

E-mail _____ Phone _____

☒ Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments: NEED A CLEAR SIGNAL AT MY HOME, TO PREV
DROPPED CALLS AND ALLOW USE OF CELL
PHONE THROUGH OUT THE HOUSE

Dear Prairie Village Officials,

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church – 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most – in our homes and neighborhoods. Thank you.

Sincerely,

Name Yvonne Peckman Signature Yvonne Peckman

Address 4330 W 62nd Ter

City Prairie Vilg State KS Zip 66208

E-mail _____ Phone 913-722-2592

☒ Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments: It is a real nuisance when I have to stand at the end of my driveway to make a phone call. Also, cold!

PV 535

PV 536

[redacted]

Dear Prairie Village Officials,

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church - 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most - in our homes and neighborhoods. Thank you.

Sincerely,

Name Jenny Willeford Signature Jenny Willeford

Address 5201 W. 71st St

City Prairie Village State KS Zip 66208

E-mail _____ Phone _____

☑ Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments: Always lose service at 71st & Nall - Need a new cell site in that area!

PV 537

Dear Prairie Village Officials,

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church – 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most – in our homes and neighborhoods. Thank you.

Sincerely,

Name Judith Beneberight Signature Judith Beneberight

Address 4519 W. 72 Terr

City Prairie Village KS 66208 State KS Zip 66208

E-mail _____ Phone 913 432 7373

☑ Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments: My bars are 3 or less in my home We need this cell tower

Dear Prairie Village Officials,

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church ~ 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most – in our homes and neighborhoods. Thank you.

Sincerely,

Name Bette Tiernan Signature Bette Tiernan

Address 4806 W. 67 St

City Prairie Village State KS Zip 66208

E-mail bettebte yahoo.com Phone 913 831 0187

☒ Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments: Great News

PV 538

PV 539

[redacted]

Dear Prairie Village Officials,

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church – 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most – in our homes and neighborhoods. Thank you.

Sincerely,

Name Mackender Signature Stephanie Mackender

Address 7623 Chadwick Dr.

City P.V. State KS Zip 66208

E-mail smackender@yahoo.com Phone

[X] Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments: 2 other T-Mobile phones = Total of 3 lines @ this address. Calls always drop out & disconnect in area.

[redacted]

Dear Prairie Village Officials,

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church – 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most – in our homes and neighborhoods. Thank you.

Sincerely,

Name MICHAEL MOW Signature Michael Mow

Address 6301 ABERDEEN-RD

City SHAWNEE MISSION State KS Zip 66208

E-mail _____ Phone 913-362-0598

☒ Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments: Can you convert one of the existing light poles into a combination cell tower light fixture?

PV 540

PV 541

[redacted]

Dear Prairie Village Officials,

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church – 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most – in our homes and neighborhoods. Thank you.

Sincerely,

Name DAVID KIRK Signature [signature]

Address 7600 TOMAHAWK

City PRAIRIE VILLAGE State KS Zip 66208

E-mail dkirk50@kc.rr.com Phone 913. 381.0531

☐ Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments: GOOD REVENUE FOR THE CHURCH TOO.

PV 542

Dear Prairie Village Officials,

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church – 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most – in our homes and neighborhoods. Thank you.

Sincerely,

Name Kelly Brandmeyer Signature Kelly Brandmeyer

Address 6645 Nottingham Rd

City Mission Hills State KS Zip 66208

E-mail kbrandmeyer@kc.rr.com Phone 913-722-1201

☐ Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments: _____

PV 543

Dear Prairie Village Officials,

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church – 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most – in our homes and neighborhoods. Thank you.

Sincerely,

Name Joan Altieri Signature Joan Altieri

Address 4236 W. 73 Terrace

City Prairie Village State KS Zip 66208

E-mail _____ Phone _____

☒ Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments: _____

PV 544

Dear Prairie Village Officials,

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church – 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most – in our homes and neighborhoods. Thank you.

Sincerely,

Name Charlene Barling Signature Charlene Barling

Address 7815 Chadwick

City P.V. State KS Zip 66208

E-mail Cbarling@kc.rr.com Phone 913-341-8470

☑ Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments: _____

Dear Prairie Village Officials,

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church – 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most – in our homes and neighborhoods. Thank you.

Sincerely,

Name SHERYL GOLDANSKY Signature Sheryl Goldansky

Address 7648 HIGH DRIVE

City PRAIRIE VILLAGE State KANSAS Zip 66208

E-mail goldiejo@kc.rr.com Phone 913-709-6619

☒ Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments: _____

PV 545

Dear Prairie Village Officials,

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church – 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most – in our homes and neighborhoods. Thank you.

Sincerely,

Name Cindy Haskell Signature Cindy L Haskell

Address 4402 W 77th Place

City Prairie Village State Kansas Zip 66208

E-mail chaskell@earthlink.net Phone 913/642-4497

☑ Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments: We also belong to Faith Lutheran Church and see this a great opportunity.

PV 546

[redacted]

Dear Prairie Village Officials,

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church – 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most – in our homes and neighborhoods. Thank you.

Sincerely,

Ms. Elizabeth Bernier
2611 W 71st Terrace
Shawnee Mission, KS 66208-3128

Signature [signature]

_____

_____ State _____ Zip _____

E-mail _____ Phone _____

☒ Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments: _____

_____

_____

PV 547

Dear Prairie Village Officials,

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church – 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most – in our homes and neighborhoods. Thank you.

Sincerely,

Name Joanne McBride Signature Joanne McBride

Address 7700 Tomahawk Rd

City P.V. State KS Zip 66208

E-mail _____ Phone 913-383-0777

☐ Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments: _____

PV 548

Dear Prairie Village Officials,

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church – 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most – in our homes and neighborhoods. Thank you.

Sincerely,

Name Brian Sexton Signature

Address 2900 Vccan Rd

City Mission Hills State KS Zip 66208

E-mail Delsoltravel1@aol.com Phone 913 831 · 2490

☒ Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments:

PV 549

Dear Prairie Village Officials,

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church – 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most – in our homes and neighborhoods. Thank you.

Sincerely,

Name Dan J & Jan Wertz Signature Jan Wertz

Address 3030 W 69th St

City Mission Hills State KS Zip 66208

E-mail dan.ertz@nmfn.com Phone 913 831-2283

☒ Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments:

PV 550

Dear Prairie Village Officials,

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church - 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most - in our homes and neighborhoods. Thank you.

Sincerely,

Name Sara Schlueter Weiche Signature _____

Address 7401 Springfield Street

City Prairie Village State KS Zip 66208

E-mail bobsta@kc.rr.com Phone 913-645-8948

☒ Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments: _____

PV 551

PV 552

[redacted]

Dear Prairie Village Officials,

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church – 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most – in our homes and neighborhoods. Thank you.

Sincerely,

Name. Lois A Scanlon-Geffert
Addres 2805 W 73rd St
Prairie Village KS 66208-3204

Signature [signature]

City _____ State _____ Zip _____

E-mail lsgeffc@sw bell.net Phone 913-708-5040

☐ Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments: _____

[redacted]

Dear Prairie Village Officials, Can you put flags on them - Boy Scout troops.

I support T-Mobile's proposed cell site to be located at Faith Lutheran Church – 4805 West 67th Street in Prairie Village. Having the best wireless coverage is important to me. Please do everything you can to ensure that citizens like me have reliable coverage, especially where we need it most – in our homes and neighborhoods. Thank you.

Sincerely,

Name RON CLEVENGER Signature Ron Clevenger

Address 6601 Rainbow Ave

City SM State Kan Zip 66208

E-mail [redacted] Phone 913 362 8727
Cell 913 636 3227

☒ Other members of my household are also T-Mobile customers and would like to have the best wireless coverage possible in Prairie Village.

Comments: For years we have endured poor cell service due to unreasonable restrictions on these unobtrusive towers

PV 553

To: City Planning Commission
Prairie Village

From: Sharon Hunzeker

Re: 120 ft cell tower at Faith Lutheran Church

Date: 3/3/2008

I am writing because I received a notice against the above cell tower.

I AM VERY MUCH FOR THE CELL TOWER. Let me tell you why:

I was shocked when I moved here 5 years ago to find that cell phone service does not work in my neighborhood. My neighbors have to step outside to use their cell phones, no matter what the weather, (my service doesn't even work then). When there are power outages, I am unable to communicate with the outside world. I've found this to be true with all services.

I feel we should have a tower somewhere in the area so that we can join the 21st Century and be able to use cell phones in our homes!

The Faith Lutheran location would be a good one. There are mature trees and very large lots around this area so any impact would be minimal for the 3 or 4 homeowners who would be "affected".

As far as the aesthetics of the tower is concerned, what is the difference between it and the water tower? Both are necessary.

I urge the committee to vote for the tower.

Thank you for considering my opinion,

Sharon Hunzeker
6730 Granada Ln.
Prairie Village, KS 66208
913-384-5134

Ronald A Williamson

From: Kathy Migneron [kmigneron@gmail.com]
Sent: Wednesday, March 26, 2008 11:49 AM
To: Ronald A Williamson
Cc: Migneron, William C.
Subject: cell phone towers

Good morning!

Just read the article in today's Star regarding cell phone towers in Prairie Village. My husband and I just moved back here from Minneapolis and we seem to be in a technological black hole on our block. Our cell phones are pretty much useless unless we go outside and turn to the north about three degrees, then cross our fingers...
Since you are probably getting lots of comments against cell phone towers in the area, I thought you should hear from the other side as well. We would welcome towers in PV and believe that they can be installed in an aesthetically acceptable way.

Thanks for your time and your service to the community.

Kathy and Bill Migneron
2911 W. 67th Street
Mission Hills, Kansas 66208
913 362-0632

Joyce Hagen Mundy

From: Ronald A Williamson [rwilliamson@bwrcorp.com]
Sent: Wednesday, February 27, 2008 8:48 AM
To: Joyce Hagen Mundy
Subject: FW: Bruce Williamson-Planning Dept

FYI

From: Chris Engel [mailto:cengel@pvkansas.com]
Sent: Tuesday, February 26, 2008 5:24 PM
To: Ronald A Williamson
Subject: FW: Bruce Williamson-Planning Dept

I believe this email was intended for you.

Christopher C. Engel
Assistant to the City Administrator
City of Prairie Village
7700 Mission Road
Prairie Village, KS 66208
(913) 381-6464 ext. 4206
(913) 381-7755 - fax
cengel@pvkansas.com
www.pvkansas.com

From: Lyman [mailto:lpeckman@kc.rr.com]
Sent: Tuesday, February 26, 2008 2:14 PM
To: Chris Engel
Subject: Bruce Williamson-Planning Dept

We understand that there will be a meeting concerning the addition of antenna at the 70th & Roe location. Unfortunately we will be unable to attend. However we wish to lend our voices to the support of this project by T-mobil. Numerous times we have missed important calls because of poor reception in our area (63rd & Delmar). It is our understanding that the new antenna will resolve or at least help alleviate the problem.

Lyman & Yvonne Peckman

Cheri Edwards

From: Adcock, Garth [Garth.Adcock@T-Mobile.com]
Sent: Tuesday, June 24, 2008 7:19 AM
To: Cheri Edwards
Subject: another advocate from Prairie Village

Cheri,

Pls enter this e mail into the record on July 1st

Thank you

Garth

From: Rebecca Reardon [mailto:rebeccareardon@gmail.com]
Sent: Monday, June 23, 2008 9:04 PM
To: Adcock, Garth
Cc: Tim Reardon
Subject: Prairie Village

Garth,

Please add my name -
Rebecca Reardon and my husband Tim Reardon to the support of adding tmobile coverage to Prairie Village.
8018 El Monte / PV / KS 66208

Thank you,
Rebecca and Tim

Adcock, Garth

From: Dan Cloughley [Dcloughley2@kc.rr.com]
Sent: Tuesday, January 29, 2008 10:28 AM
To: Adcock, Garth
Subject: Prairie Village Cell Tower

I support the T-Mobile proposed cell site at Faith Lutheran Church.

Dan Cloughley
5206 W. 70th Terr
Prairie Village, Ks. 66208
913-236-7972

Adcock, Garth

From: Lois Scanlon-Gefferl [lsgeff@swbell.net]
Sent: Sunday, January 27, 2008 2:46 PM
To: Adcock, Garth
Subject: Improvements in Prairie Village, Kansas

Dear Mr. Adcock:

As a resident of Prairie Village, Kansas and a T-Mobile user, I am all for the proposed new cell site at Faith Lutheran Church.

It is often difficult to carry on conversations with my family in Connecticut and Fort Bragg, California. Right here in Prairie Village, KS it is hard to talk with my daughter in Kansas City, MO especially if I am traveling:

- east on 67th street between Quivera Road and Neiman Road
- south on Neiman between 67th street and 75th street
- south on Nall between 75th and 83rd

Sincerely,

Lois A. Scanlon-Gefferl
2805 West 73rd Street
Prairie Village, KS
913-708-5640

Adcock, Garth

From: - [mflkz@sbcglobal.net]
Sent: Monday, January 21, 2008 5:11 PM
To: Adcock, Garth
Subject: proposed cell site

Dear Mr. Adcock,

Just a quick note to let you know I support the proposed cell site at Faith Lutheran Church in Prairie Village. It looks like an out-of-the way location and I can tell a lot of thought went into choosing this location and the design of the tower itself.

Carol Myers

Adcock, Garth

From: jbarnett@kc.rr.com
Sent: Sunday, January 20, 2008 8:33 AM
To: Adcock, Garth
Subject: proposed cell site

Mr. Adcock.

I support the proposed cell site at 4805 West 67th Street in Prairie Village at Faith Lutheran Church. I have had T-Mobile service for three years and I would like to see the coverage area improved. I currently do not have service inside my own home. I have to go outside to use my cell phone. I would like to see that change. Please let local officials know that Prairie Village residents support the new cell site. Thank you.

Sincerely,
Jill Barnett

PV 437

Adcock, Garth

From: jane corley [corleyja@hotmail.com]
Sent: Saturday, January 19, 2008 9:32 PM
To: Adcock, Garth

We desperately need better cell service at our home on 68 Street! The proposed cell tower at Faith Lutheran Church will provide this service. Please approve this measure for the good of the neighborhood!! Jane Corley

Adcock, Garth

From: Jill Wilder [jwilder@lagarde.com]
Sent: Saturday, January 19, 2008 11:36 AM
To: Adcock, Garth
Subject: Prairie Village cell site

Garth,

As a Prairie Village resident and a long time T-Mobile customer, I'm in favor of a cell site at Faith Lutheran Church.

I continue to be very happy with my T-Mobile service. Thank you for all your hard work.

Jill Wilder
7100 Mission Road
Prairie Village, KS 66208
913.963.2344

Jill Wilder
Marketing Manager
Office: (913) 469.0810
Fax: (913) 469.0833
Toll Free (800) 943.5823
jwilder@lagarde.com
E-business software and solutions

LAGARDE
25055 West Valley Pkwy
Olathe, KS 66061
www.lagarde.com

Adcock, Garth

From: Kathleen Leighton [kaleighton2001@yahoo.com]
Sent: Saturday, January 19, 2008 10:40 AM
To: Adcock, Garth
Subject: Cell Site

Garth-
I fully support a new cell site for T Mobile in Prairie Village at Faith Lutheran Church. I want better cell service at home-
Thanks
Kathleen Collison

Kathleen Leighton
Leighton Communications
Prairie Village KS 66208
913-262-7157

9-1-1

REGIONAL PUBLIC SAFETY COMMUNICATIONS

ISSUES & ANSWERS

9-1-1 Wireless Legislation

Wireless communications are now a cultural norm, with over 80 percent of all Americans using wireless communications devices. Today there are an estimated 272 million wireless phone subscribers in the U.S., according to the CTIA (Cellular Telecommunication & Internet Association).

More and more, long distance and local communications are moving from wireline to wireless technology. For the first time in the U.S., cellular spending exceeded wireline spending in 2007. Landline revenues have fallen since 2000 and the Telecommunications Industry Association (TIA) estimates there will be more than 110 million more wireless than landline subscribers in the U.S. by 2009.

In 2008, 60 percent of all 9-1-1 calls in the Kansas City region came from wireless devices, and some communities experience much higher rates.

Current Status in Missouri*

- **17** counties currently have no 9-1-1 service
- **6** counties are currently in the process of installing 9-1-1 service
- **91** counties currently have 9-1-1 service
- **58** of those 91 counties currently have wireless 9-1-1 capabilities

Missouri is the last state in the nation to enact a funding mechanism to support wireless 9-1-1 services.

*Statistics from the Missouri Office of Administration.

The Issue

Even though such a high percentage of 9-1-1 calls come from wireless devices, currently only landline telephone customers in Missouri pay for 9-1-1 services.

The Centers for Disease Control estimates that 17 percent of households in the U.S. are now totally wireless. As more consumers move from landline to wireless communications, 9-1-1 revenues are dropping, and local communities are facing financial hardships to maintain and improve their 9-1-1 systems.

Many Missouri counties need wireless revenues to install and support 9-1-1 systems that can keep up with new and changing communications technologies.

State legislation is needed to allow a statewide 9-1-1 wireless surcharge that would support enhanced 9-1-1 services throughout Missouri.

MARC
Mid-America Regional Council

600 Broadway, Suite 200, Kansas City, MO 64105 • 816/474-4240 • www.marc.org

*Sources: "Cellular spending exceeded wireline spending in US in 2007." *IT Facts.* December 18, 2007; and Mead, Jennifer, "U.S. Telecommunications Transport Services Revenue Totals $310.8 Billion in 2005; Expected to Reach $372.7 Billion by 2009." *CTIA.* March 23, 2006.

http://www.marc.org/publicsafety/wirelesslegislationFeb09.pdf

In this Section:
- Animal Control
- Citizens' Police Academy
- CodeRED
- Crime Prevention
- Dialing 911
- Jobs in Law Enforcement
- Records & Reports
- Sponsor a Block Party
- Staff Directory

The City of Prairie Village, Kansas and the City of Mission Hills, Kansas have instituted the CodeRED® Emergency Notification System - an ultra high-speed telephone communication service for emergency notifications.

This system allows the Police Department to telephone either all subscribers or geographically-targeted areas of the Cities in case of an emergency situation that requires immediate action (such as a boil-water notice, missing child, or evacuation). The system is capable of dialing up to 60,000 phone numbers per hour. It then delivers a recorded message to either a live person or an answering machine, making three attempts to connect to any number.

THIS MESSAGE SYSTEM WILL ONLY BE USED FOR EMERGENCY PURPOSES

Examples of times when the CodeRED system could be utilized:

- Drinking water contamination
- Evacuation notice
- Missing or endangered person
- Bomb threat
- Hostage situation
- Chemical spill or gas leak
- Other emergency incidents where rapid and accurate notification is essential for life safety

Residential and Business Data Update Page Residents and business are able to input an unlisted number, cell phone number, or other secondary phone number into the system for contact during an emergency situation. Registration is simple, just click on CodeRED.

City of Prairie Village
7700 Mission Road
Prairie Village, Kansas 66208-4230
Disclaimer & Terms of Use

Voice: 913-381-6464
Fax: 913-381-7755
info@pvkansas.com

Employee Services

Prairie Village Planning Commission Meeting
April 7, 2009

1. Newspaper Articles Regarding Prior Denials
   (a) May 10, 2008
   (b) July 6, 2008

2. Cell Tower Policy for Prairie Village, Kansas

3. Zoning Regulations, Chapter 19.28, Prairie Village, Kansas

4. Affidavit of Don Gossman, Appraiser

5. Study from Appraisal Journal

6. Cell Tower Height Comparison

7. Alternative Location Communications

8. Case Law
   (a) *Voice Stream PCS I, LLC v. City of Hillsboro,* 301 F.Supp.2d 1251 (D.Or., 2004)
   (b) *Voice Stream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818 (C.A.7 (Wis.), 2003
   (c) *Cellco Partnership, d/b/a Verizon Wireless v. The Town of Grafton, MA.,* 336 F.Supp.2d 71 (D.Mass., 2004)
   (d) *Nextel Comm. Of the Mid-Atlantic, Inc., d/b/a Nextel Comm. v. City of Cambridge, et al.,* 246 F.Supp.2d 118 (D.Mass., 2003)

Planning commission turns down cell tower

T-Mobile wants to erect a 120-foot tower on church property at 67th Street and Roe Avenue.

By JENNIFER BHARGAVA
The Kansas City Star

Prairie Village won't have a cell phone tower near 67th Street and Roe Avenue any time soon.

The Planning Commission on Tuesday unanimously rejected T-Mobile's request for a special use permit to place a 120-foot cell phone tower at Faith Lutheran Church, located at the intersection.

Planning commissioners said the tower was too high and out of character for a residential neighborhood.

They were also uncomfortable with approving a proposal that upset many neighboring residents. More than 300 residents signed a petition opposing the tower.

Dozens of residents attended the hearing Tuesday and voiced their objections to the tower, which they said would decrease property values and be a safety hazard.

"The idea of a 120-foot tower

He said the absence of a cell phone tower at that location could be dangerous for T-Mobile users who rely on their cell phones rather than land lines.

"Cell phones make up 49 percent of all 911 calls made," he said. "In 2007, T-Mobile averaged 151 of the 911 calls per month in Prairie Village. We are dealing with adding a wireless facility to enhance coverage where it's desperately needed."

Cindy Haskill was one of the few residents at the meeting who wanted the cell tower.

She said she would rather have safety over aesthetics.

"We get no cell service in the church — it's all dead space," said Haskill, a member of Faith Lutheran. "And I'm a Girl Scout troop leader there. If those parents can't get a hold of their daughters, that's tragedy."

Planning Commission chairman Ken Vaughn said he was concerned about the lack of coverage as well.

"I do realize that it's cost effective for people to use their cell phones, rather than their land lines," he said. "And it's a risk by not having 100 percent coverage everywhere in the city."

But the height of the tower made him uncomfortable, he added.

In response, Beeler said that after a few days of driving past the tower residents wouldn't even notice it anymore, a remark that drew laughter from the audience.

The Planning Commission asked Beeler if other locations had been considered for the tower.

Beeler said that during the past four years T-Mobile had approached several other locations for the tower — other churches, a country club, a park, a fire station and a water tower. Negotiations with those locations failed.

He had been hoping to put an end to the search Tuesday night.

The Planning Commission's denial will be reviewed by the City Council at a later meeting.

To reach Jennifer Bhargava, call 816-234-7737 or e-mail jbhargava@kcstar.com.

cell phone tower at Faith Lutheran Church, located at the intersection.

Planning commissioners said the tower was too high and out of character for a residential neighborhood.

They were also uncomfortable with approving a proposal that upset many neighboring residents. More than 300 residents signed a petition opposing the tower.

Dozens of residents attended the hearing Tuesday and voiced their objections to the tower, which they said would decrease property values and be a safety hazard.

"The idea of a 120-foot tower just 24 feet behind my home is frightening," said Kate Faerber at the meeting. "I have three sons, and we all use our back yard. What if the pole has ice falling from it in the winter or if it happened to fall onto my property?"

A few of her neighbors said they wouldn't invest money to renovate their homes if they were so near a 120-foot tower.

Some also thought T-Mobile only wanted the tower there to beat its competitors.

"I'm very opposed to this tower," said Randy Cordill, a Prairie Village resident. "I must have been asleep when it became an inalienable right to have cell phone service in homes. They (T-Mobile) are trying to enhance their coverage for monetary gain — that's the only reason they're doing this."

Scott Beeler, the attorney for T-Mobile, argued that several Prairie Village residents have been seeking better coverage in that area.

"T-Mobile has no interest in setting up a tower, for thousands of dollars, just for the heck of it," he said. "They want to do it because the public demands it, and for 911 calls, it's needed."

who wanted the cell tower.

She said she would rather have safety over aesthetics.

"We get no cell service in the church — it's all dead space,"

city."

But the height of the tower made him uncomfortable, he added.

In response, Beeler said that

Planning board again rejects plan for cell tower

T-Mobile cuts height of tower, but Prairie Village commission isn't swayed.

By JENNIFER BHARGAVA
The Kansas City Star

Plans for a cell phone tower near 67th Street and Roe Avenue were shot down again by the Prairie Village Planning Commission.

Commissioners this week unanimously denied T-Mobile a special-use permit for an 85-foot cell phone tower to be placed at Faith Lutheran Church, located at the intersection.

The application came more than a month after T-Mobile's first proposal for a 120-foot tower at the same spot was denied by the Planning Commission.

To meet the Planning Commission's concerns, T-Mobile had reapplied, decreasing the length of the pole by 35 feet and placing it farther away from residential property.

The Planning Commission, however, was unimpressed.

The members thought T-Mobile chose an inappropriate location for the tower, since it would be surrounded by a residential neighborhood.

"The cell phone tower does not meet the value of the neighborhood and would not fit the character of the neighborhood," said Planning Commission member Marlene Nagel. "And approving this application would tell current and future property owners that Prairie Village is not maintaining its neighborhoods, which would have a detrimental effect on the residents."

The commission was also unhappy the tower would only house one cell phone company: T-Mobile.

T-Mobile representative Scott Beeler said several other cell phone companies had been approached, to see if they would be interested in sharing the tower.

Most declined, because they thought an 85-foot tower was too small, he said.

The commissioners were worried that approving the cell phone tower for T-Mobile would open up a dam — with towers for other companies popping up all over the community in the future.

Several residents were against the cell phone tower as well.

One of them, Casey Housley, spoke for his family and neighbors at Tuesday's meeting.

"Even though they reduced the tower, it is still eight-and-a-half stories tall and will be the tallest thing in the area," he said. "I think it would inspire more towers, and I'm worried it would reduce property values."

The Planning Commission's denial of the application will be reviewed during a future Prairie Village City Council meeting.

CENTER

FROM PAGE 1

"We can catch from here what is going on at that location," Tim Lynch, administrator for Homeland Security and Emergency Management for Overland Park, said while standing in a basement with 11 screens glowing on white walls.

spond to emergencies by clearing out their training rooms. Set-up like that could take up to four hours.

"This is light years ahead," Lynch said.

Most cities name their rooms Emergency Operation Centers, but Overland Park calls its the Command and Control Center because the city uses it not just to respond to disasters but also

works departments that the center hosts can use cameras from area companies to expand their view. The city signed agreements to use Black and Veatch and the Jewish Community Center cameras, for example. During a bank robbery the department may tap into the bank's cameras before sending in officers.

One year ago, the police department gained 17 search war-

dictions to work together to respond to natural disasters and emergencies, including acts of terrorism.

Officers do not have to physically be in the control room to use its system functions.

The room is imperative, however, for phase three alerts — the highest level. The city might go into such alert for a severe tornado, ice storm or a power outage. A conference center to

MAYOR

FROM PAGE 1

tinue her goals.

"Like Teresa, one of my top priorities is to bring more businesses to the city," he said. "I also hope the city can build a better relationship with Westwood View."

He has spent the past week getting up to speed on city busi-

PLANNING COMMISSION POLICY FOR THE APPROVAL OF WIRELESS COMMUNICATION TOWERS
Adopted December 10, 1996

At the time the application is filed, the applicant shall submit the following information:

1. A study comparing potential sites within an approximate 1/2 mile radius of the proposed application area. The study shall include the location and capacity of existing towers, potential surrounding sites, a discussion of the ability or inability of the tower site to host a communications facility and reasons why certain sites were excluded from consideration. The study must demonstrate to the City's satisfaction that alternative tower sites are not available due to a variety of constraints. It must also contain a statement explaining the need for the facility in order to maintain the system and include a map showing the service area of the proposed as well as and other existing and proposed towers.

   If the use of current towers is unavailable, a reason or reasons specifying why they are unavailable needs to be set out and may include one or more of the following: refusal by current tower owner; topographical limitations; adjacent impediments blocking transmission; site limitations to tower construction; technical limitations of the system; equipment exceeds structural capacity of facility or tower; no space on existing facility or tower; other limiting factors rendering existing facilities or towers unusable.

2. A photo simulation of the proposed facility as viewed from the adjacent residential properties and public rights of way.

3. A signed statement indicating the applicant's intention to share space on the tower with other providers.

4. A copy of the lease between the applicant and the land owner containing the following provisions:

   a. The land owner and the applicant shall have the ability to enter into leases with other carriers for co-location.

   b. The land owner shall be responsible for the removal of the communications tower facility in the event that the lease holder fails to remove it upon abandonment.

5. A site plan prepared in accordance with Chapter 19.32 Site Plan Approval.

6. Description of the transmission medium that will be used by the applicant to offer or to provide services and proof that applicant will meet all federal, state and city regulations and law, including but not limited to FCC regulations.

7. Description of services that will be offered or provided by the applicant over its existing or proposed facilities including what services or facilities the applicant will offer or make available to the City and other public, educational and governmental institutions.

8. Indication of the specific trees, structures, improvements, facilities and obstructions, if any, that the applicant proposed to temporarily or permanently remove or relocate.

9. Preliminary construction schedule including completion dates.

10. Sufficient detail to establish the applicant's technical qualifications, experience and expertise regarding communications or utility facilities and services described in the application.

11. Information to establish the applicant has obtained all other government approvals and permits to construct and operate communications facilities, including but not limited to approvals by the Kansas Corporation Commission.

12. Any other relevant information requested by City staff.

13. An application fee. The applicant must agree to and reimburse the City for all costs related to the application for franchise to use or to occupy the public right-of-way including any legal, financial or administrative activities. Such application fee shall not be charged against the regular compensation to be paid to the City.

14. Copies of letters sent to other wireless communication providers notifying them of the proposed request and inquiring of their interest to co-locate.

The Planning Commission will consider and may require any or all of the following conditions to be a part of the approval of the Conditional Special Use Permit.

1. The initial approval of the conditional use permit shall be for a maximum of five years. At the end of the five year period, the applicant shall resubmit the application to the Planning Commission and shall demonstrate to the satisfaction of the Planning Commission that a good faith effort has been made to cooperate with other providers to establish co-location at the tower site, that a need still exists for the tower, and that all the conditions of approval have been met. The application may then be extended for an additional five years.

2. All towers shall maintain a hot dipped galvanized finish, and shall be a mono-pole design unless otherwise approved by the Planning Commission.

3. Communication towers may be only illuminated if required by the Federal Communications Commission and/or the Federal Aviation Administration. Security lighting around the base of the tower may be installed provided that no light is directed toward an adjacent residential property.

4. The maximum height for a wireless communication tower shall be 150 feet plus a lightning rod not exceeding ten feet (10') unless otherwise approved by the Planning Commission.

5. Any tower that is not operated for a continuous period of six months shall be considered abandoned and the owner of such tower shall remove the same within 90 days after receiving notice from the city. If the tower is not removed within that 90 days period, the governing body may order the tower removed and may authorize the removal of such tower at the owner's expense. The applicant shall submit a bond to the city in an amount adequate to cover the cost of tower removal and the restoration of the site.

   The City may, at its option, claim the abandoned tower for its own use, instead of having it removed and the City may sell or lease the tower to other companies or use it for its own needs. If the City chooses this option, it shall release the applicant's bond.

6. The plans for the tower shall be prepared and sealed by a structural engineer licensed in the State of Kansas. Construction observation shall be provided by the design engineer provided that said engineer is not an employee of the tower's owner. If the design engineer is an employee of the owner, an independent engineer will be required to perform construction observation.

7. Adequate screening of the equipment cabinets located at the tower base shall be provided by a solid or semi-solid wall or fence or a permanent building enclosure. All equipment cabinets shall be adequately secured to prevent access by other than authorized personnel.

8. Adequate landscaping shall be provided at the base of the tower.

9. The applicant shall have a structural inspection of the tower performed by a licensed professional engineer prior to every five year renewal and submit it as a part of the renewal application.

10. Any permit granted which is found not to be in compliance with the terms of the Conditional Use Permit will become null and void within ninety days of notification of noncompliance unless the noncompliance is corrected. If the Conditional Use Permit becomes null and void, the applicant will remove the towers and all appurtenances and restore the site to its original condition.

CHAPTER 19.28 - SPECIAL USE PERMITS

Sections:

19.28.005 General.

Special uses are those types of uses which, due to their nature, are dissimilar to the normal uses permitted within a given zoning district or where product, process, mode of operation, or nature of business or activity may be detrimental to the health, safety, welfare or property values of the immediate neighborhood and its environs unless it is designed in a manner that is compatible with surrounding properties. Within the various zoning districts, specific uses may be permitted only after additional requirements are complied with as established within this section. In no event shall a Special Use Permit be granted where the Special Use contemplated is not specifically listed as a Special Use in the Zoning Regulations.

19.28.010 Applicant.

A special use permit application shall be initiated by the owner of the property affected. If such application is made by the owner's agent, said agent shall enter upon the application the name and current mailing address of the owner. If the property is under contract or option to purchase, the name and current mailing address of the purchaser shall also be shown on the application. All applications shall be made on forms prescribed by the City Planning Commission and duly filed with the City Clerk.

19.28.015 Filing Fee

A fee as established by the City Council shall accompany each application for a Special Use Permit. In addition, the applicant is obligated to pay all costs incurred by the City, including publication costs, consultant's charges for application review, if necessary, court reporter costs, costs of the original transcript of the hearing of the Planning Commission and as many copies of the transcript as necessary. Simultaneously with the payment of the filing fee, the applicant shall accompany each application with a cost advance as specified by the City Council to be used by the City to pay for said costs. If the costs are less than the stipulated cost advance, the City shall refund the difference to the applicant. If the costs are more than the stipulated cost advance, the City shall so notify the applicant who is obligated to pay such excesses forthwith.

19.28.020 Public Hearing Notice

All such applications shall be scheduled for hearing not later than the second regular monthly meeting of the Planning Commission following the date of the earliest publication period available as required by law. Any such hearing may, for good cause, in the discretion of the Planning Commission, be continued for a definite time to be specified in the record of the Commission. Notice of such hearing shall be published in one issue of the official newspaper of Prairie Village, such notice to be published not less than twenty (20) days or more than forty (40) days, exclusive of the days of the publication and hearing, prior to the date of said hearing before the Commission. The application area shall be designated by legal description or a general description sufficient to identify the property under consideration. If a general description is used, said notice shall include a statement that a complete legal description is available for public inspection and shall indicate where such information is available. In addition to such publication, the applicant shall be responsible for mailing notice of such proposed special use permit to all the owners of lands located within two hundred feet, except public streets and ways, of the application area at least twenty (20) days prior to the hearing, thus providing an opportunity to all interested parties to be heard. Such mailed notice shall be given by certified mail, return receipt requested, and shall be in the form of a letter describing the proposed special use. A copy of the publication notice shall be included and such mailed notices shall be addressed to the owners of land mentioned above and not to non-owner occupants. Failure to receive such notice shall not invalidate any subsequent action taken. The applicant shall file with the City Clerk, not less than six (6) days prior to the date of the hearing, an affidavit to the effect that such notices were indeed mailed in compliance with this title.

In the case of an application for a special use which may, in the opinion of the Commission or Governing Body, substantially change traffic patterns, or create traffic congestion, either body may, by motion, require that the applicant procure the services of a competent professional traffic engineer for the purpose of preparing a traffic study. Such study shall show whether or not the traffic generated by the proposed development will be handled on the site in an orderly and efficient manner and that vehicular ingress and egress from the site onto public streets will function in an orderly and efficient manner.

19.28.025 Posting of Property.

Each applicant for a special use permit shall within forty-eight (48) hours of filing such application, place a sign upon the lot, tract or parcel for which the application was filed. Said sign shall be furnished by the city and the applicant shall firmly affix and attach the sign to a wood or metal backing or frame and place the sign as hereinafter set forth. Said signs shall read as follows:

SPECIAL USE PERMIT
APPLICATION NUMBER. . . .
PUBLIC HEARING AT CITY HALL
BEFORE PLANNING
COMMISSION ON
. . . . . .
CITY OF PRAIRIE VILLAGE, KANSAS
Unauthorized Removal, Defacing, or Destruction of
this Sign Punishable upon Conviction by
Fine not Exceeding $100.00 and/or not more than 30 days imprisonment.

Said sign shall be maintained and kept in place by the applicant until the conclusion of the public hearing before the Planning Commission, or until withdrawal of the application, at which time the

sign shall be removed by the applicant. The applicant shall file an affidavit at the time of said public hearing before the Planning Commission that the sign was placed and maintained to said hearing date as required by this title. No application shall be heard by the Planning Commission unless such affidavit has been filed.

The bottom of said sign shall be a minimum of two feet above the ground line. Said sign shall be placed within five feet of the street right-of-way line, in a central position on such lot, tract or parcel of land and shall have no visual obstructions thereto. If the lot, tract or parcel of land has more than one street abutting thereto, the sign shall face the street with the greatest traffic flow. If the lot, tract, or parcel of land is larger than five acres, a sign as required by this title shall be placed so as to face each of the streets abutting thereto.

It is a misdemeanor for any person to remove, deface or destroy any sign provided for by this title. Any person, upon conviction thereof, shall be fined a sum not to exceed one hundred dollars ($100.00), or imprisoned in jail for not more than thirty (30) days or be both so fined and imprisoned.

19.28.030 Application Information.

A. The applicant shall submit a statement in writing justifying the special use permit applied for, and indicating under which Article and Section of the Zoning Regulations the special use is specifically listed.

B. The applicant shall prepare and submit fourteen (14) copies of the site plan at the time of filing the application as specified in Chapter 19.32 Site Plan Approval as well as any other information which would be helpful to the Planning Commission in consideration of the application.

C. The applicant shall have first applied for a license(s) or official accreditation from the appropriate agency if required by law, submitting written evidence of such action with the application for the special use permit.

19.28.035 Factors for Consideration.

The Planning Commission and City Council shall make findings of fact to support their decision to approve or disapprove a Special Use Permit. (Ord. 1973, Sec. I, 1999)

In making their decision, consideration shall be given to any of the following factors that are relevant to the request: (Ord. 1973, Sec. I, 1999)

A. The proposed special use complies with all applicable provisions of these regulations, including intensity of use regulations, yard regulations and use limitations;

B. The proposed special use at the specified location will not adversely affect the welfare or convenience of the public;

C. The proposed special use will not cause substantial injury to the value of other property in the neighborhood in which it is to be located;

D. The location and size of the special use, the nature and intensity of the operation involved in or conducted in connection with it, and the location of the site with respect to streets giving access to it are such that the special use will not dominate the immediate neighborhood so as to hinder development and use of neighboring property in accordance with the applicable zoning district regulations. In determining whether the special use will so dominate the immediate neighborhood consideration shall be given to:

   1. The location, size, nature and height of buildings, structures, walls, and fences on the site; and
   2. The nature and extent of landscaping and screening on the site.

E. Off-street parking and loading areas will be provided in accordance with the standards set forth in these regulations, and such areas will be screened from adjoining residential uses and located so as to protect such residential uses from any injurious effect.

F. Adequate utility, drainage, and other such necessary facilities have been or will be provided.

G. Adequate access roads or entrance and exit drives will be provided and shall be so designed to prevent traffic hazards and to minimize traffic congestion in public streets and alleys.

H. Adjoining properties and the general public shall be adequately protected from any hazardous or toxic materials, hazardous manufacturing processes, obnoxious odors or unnecessarily intrusive noises.

I. Architectural style and exterior materials are compatible with such style and materials used in the neighborhood in which the proposed building is to be built or located.

It is not necessary that a finding of fact be made for each factor described herein. However, there should be a conclusion that the request should be approved or denied based upon consideration of as many factors as are applicable. (Ord. 1973, Sec. I, 1999)

19.28.040 Planning Commission Action.

After the public hearing, the Planning Commission, by a majority of members present and voting, shall be required to recommend approval, approval subject to conditions or denial of the special use permit to the City Council. If the Planning Commission fails to make a recommendation it shall be deemed to have made a recommendation of disapproval. The Planning Commission shall submit its recommendation and the reasons therefore to the City Council.

19.28.045 City Council Action.

After receipt of the Planning Commission's recommendation, the City Council may:

A. Adopt such recommendation by ordinance;

B. Override such recommendation by a 2/3 majority vote of the membership of the City Council; or

C. Return such recommendation to the Planning Commission with a statement specifying the basis for the City Council's failure to approve or disapprove.

If the City Council returns the recommendations, the Planning Commission may resubmit its original recommendations giving the reasons therefore or submit a new and amended recommendation. If the Planning Commission fails to deliver its recommendation to the City Council following the Planning Commission's next regular meeting, such inaction shall be deemed a resubmission of the original recommendation. Upon the receipt of any such recommendation, the City Council may adopt or may revise or amend and adopt such recommendation by a simple majority thereof or it need take no further action.

19.28.050 Conditions of Approval.

In granting a Special Use Permit, the Planning Commission and City Council may impose such conditions, safeguards and restrictions upon the premises benefited by the special use as may be necessary to reduce or minimize any potentially injurious effect of such special uses upon other property in the neighborhood, and to carry out the general purpose and intent of these regulations.

19.28.055 Expiration of Special Use Permits

All special use permits shall be valid for the length of time set forth in the approving ordinance provided, however, that all such permits shall expire when the use for which the permit has been issued is discontinued or abandoned, for a period of six (6) consecutive months. Such use shall not thereafter be reestablished or resumed, unless a new permit is issued following the procedures set forth herein.

19.28.060 Assignment

Special use permits may be assigned, conveyed or transferred to another owner or operator subject to a signed statement by the new owner or operator that he/she has read the conditions of approval and agrees to be bound by the terms of approval. (Ord. 1973, Sec. II, 1999)

19.28.065 Revocation of Special Use Permits

Special use permits may be revoked by the City Council for:

A. A violation of the ordinances of this City including, but not limited to, the zoning regulations;
B. A violation of the district regulations; and
C. A violation of non-compliance with the conditions, limitations or requirements contained in the special use permit or these regulations.

19.28.070 Specifically Listed Special Use Permits

Any of the following uses may be located in any district by special use permit in accordance with Section 19.28.005: unless otherwise noted:

A. Country clubs, or private clubs or clubs which serve food and alcoholic, wine and cereal malt beverages;
B. Cemeteries;
C. Columbariums;
D. Hospitals;
E. Nursery sales office, building, greenhouse, or area (wholesale or retail);
F. Nursing and convalescent homes as defined by state statutes; but not including group homes;
G. Buildings, structures, towers and premises for public utility services or public service corporations whether located in public right-of-way or on easements on private property except that the following shall be specifically excluded from the Special Use Permit requirements: utility poles; utility boxes; and underground utility lines. (Ord. 2029, Sec. II, 2002)
H. Assembly halls;
I. Dwellings for senior adults, as defined herein, and including handicapped adults. Dwellings may be in the form of townhouses, apartments or congregate type living quarters. Nursing care or continuous health care services may be provided on the premises as a subordinate accessory use. Not less than seven hundred square feet of land shall be provided for each occupant in an apartment or congregate dwelling unit and not less than five hundred square feet of land shall be provided for each bed in a nursing or continuous care facility. Not less than three off-street parking spaces shall be provided on the premises for every four apartments or congregate living units, one space shall be provided for every five beds in any nursing facility, and not less than one space shall be

provided for each employee on the premises on the maximum shift, provided, however, that this section shall not apply to group homes;
Standards for height and setback of buildings applicable to such dwellings shall be those permitted in residential zoning districts R-1 through R-4;

J. Service stations in C-1, C-2 & C-3 Districts only; not including automatic car wash; provided that all gasoline storage tanks shall be located below the surface of the ground. Display and service racks for new stock normally carried by filling stations, including oils and tires, may be placed outside the building during business hours;

K. Automatic and semiautomatic car washes, continuous line car washes, self-service car washes, manual car washes and all other car washing facilities located separately or in relation to the operation of a service station in C-1, C-2 & C-3 Districts only;

L. Skating rinks, arcades and similar commercial recreation facilities in C-1, C-2 & C-3 Districts only provided such use shall be not less than two hundred feet from any existing clinic, hospital, school, church or district R-1 to R-4 inclusive, unless approved by the Governing Body under such restrictions as seem appropriate after consideration of noise and other detrimental factors incidental to such use;

M. Mortuaries and funeral homes - in C-0, C-1, C-2 & C-3 Districts only;

N. Day Care Centers in residential districts;

O. Drinking Establishments - Bar or Night Club - C-1, C-2, & C-3 Districts only:
   a. The initial approval shall be for a period of three years;
   b. Subsequent renewals may be for periods up to ten years but shall not be in excess of the lease term or options thereof;

P. Accessory uses to motels includes but not limited to restaurants, banquet rooms, liquor, notions and magazine counters, vending machines, beauty and barbershops, flower and gift shops; provided all are within the main building and designed to serve primarily the occupants and patrons of the motel or hotel;

Q. Accessory uses to hospitals including, but not limited to, residential quarters for staff and employees, nursing or convalescent quarters, storage and utility buildings, food service and vending machines, laundry and other similar services for hospital personnel, visitors and patients;

R. Utility or Storage Buildings: Detached storage or utility buildings for nonresidential uses.

S. Wireless Communications Towers and antennas constructed or installed for use by commercial carriers (Ord. 1909, Sec. II, 1997)

T. Private Schools, Colleges and University Education Centers (Ord. 1919, Sec. I, 1997)

AFFIDAVIT OF DONALD GOSSMAN

State of Kansas)
) ss
County of Johnson)

Donald Gossman, being first duly sworn upon his oath, deposes and states as follows:

1. I am of sound mind and I am competent to provide the testimony contained herein.

2. I am employed by Metro Real Estate Services, LLC.

3. My qualifications and resume are attached to this Affidavit as Exhibit A.

4. I have been retained by various homeowners in Prairie Village, Kansas to evaluate and provide an expert opinion regarding the Special Use Permit Application ("SUPA") PC2008-02 from T-Mobile, represented by SSSC, Inc. concerning the addition of a 120-foot wireless cell phone tower located at 4805 West 67th Street on the southwest corner of that lot occupied by the Faith Lutheran Evangelical Church.

5. The subject property is legally described as:

> ALL OF THE PART OF THE SOUTHWEST ¼ OF SECTION 16, TOWNSHIP 12, RANGE 25 IN JOHNSON COUNTY, KANSAS, DESCRIBED AS FOLLOWS:
>
> Beginning at the Northeast corner of said Southwest ¼; thence South along the East line of said Southwest ¼ a distance of 390'; thence South 90° West a distance of 275.54'; thence North parallel to the East line of said Southwest ¼ a distance of 153.27'; thence South 50°10'30" West a distance of 203.79'; thence North and parallel to the East line of said Southwest ¼ a distance of 335' to the North line of said Southwest ¼; thence East along the North line of said Southwest ¼ a distance of 450.60' to the point of beginning, except that part used or dedicated for streets, roads or highways.

6. In the course of my evaluation and in forming my opinions I have reviewed SUPA PC2008-02.

7. In the course of my evaluation and in forming my opinions I have also reviewed the Prairie Village Zoning Regulation, Chapter 19.28 regarding Special Use Permits.

8. Section 19.28.035 of the Prairie Village Zoning Regulation provides factors for consideration for the Planning Commission and City Council to approve or disapprove a Special Use Permit. The regulation provides *inter alia:*

> "The proposed special use will not cause substantial injury to the value of other property in the neighborhood in which it is to be located."

9. The proposed 120' monopole design contemplated in the SUPA PC2008-02 would in my opinion be considered a visual obsolescence in the surrounding neighborhood.

10. A visual obsolescence, to a reasonable degree of real estate appraising certainty, will cause injury to the value of property in the neighborhood where the visual obsolescence is contained.

11. If constructed, the cell phone tower contemplated in SUPA PC2008-02 would cause injury to the value of property in the neighborhood in which it is contained to a reasonable degree of real estate appraising certainty.

12. I hold these opinions based upon a reasonable degree of real estate appraising certainty based upon my education, training and experience in residential real estate appraising as indicated in my attached qualification.

FURTHER AFFIANT SAITH NOT.

DONALD GOSSMAN

Subscribed and sworn to before me this 18th day of April, 2008.

Notary Public

My Commission expires:

8/21/2010

State of Kansas, Notary Public
Janice S. Tittel
My Appt. Expires 8/21/2010

GOSSMAN AND ASSOCIATES INC
APPRAISALS

Donald J. Gossman

Gossman and Associates, Inc.
P.O. Box 480343
Kansas City, MO 64148-0343
Phone 816-941-4750 Fax 816-941-7122

Licenses/Certificates

SRA Designation, Appraisal Institute
Certified Residential Appraiser, State of Missouri, RA001031
Certified Residential Appraiser, State of Kansas, R-324

Professional Experience

Gossman and Associates, Inc., Kansas City, Missouri
President, Owner and Appraiser
May 1979 to Present

Professional Education

The National USPAP Update
Bobbitt and Company, April 2006

Market Analysis and The Site To Do Business
Appraisal Institute, March 2006

The Professional Guide to the Uniform Residential Appraisal Report
Appraisal Institute, May 2005

Real Estate Finance Today
Bobbitt and Company, April 2005

Red Flags in Property Inspection
Bobbitt and Company. April 2005

Training as a Contract Appraiser/Reviewer for the Kansas Real Estate Appraisal Board
May 2004

National Uniform Standards of Professional Appraisal Practice Update
Bobbitt and Company, March 2004

Be Flood Alert in 2003
FEMA, December 2003

EX A

NFIP
FEMA, December 2003

Donald J. Gossman

Professional Education Continued

Residential Appraisal Review Procedures and Guidelines
Bobbitt and Company, June 2003

National Uniform Standards of Professional Appraisal Practice Update
Bobbitt and Company, June 2003

Understanding Limited Appraisals and Reporting Options: Residential
Bobbitt and Company, June 2002

Physical Inspection and the Appraisal
Bobbitt and Company, June 2002

National Uniform Standards of Professional Appraisal Practice
Bobbitt and Company, May 2002

Valuation of Detrimental Conditions in Real Estate
Appraisal Institute, May 2000

Standards of Professional Practice, Part C
Appraisal Institute, April 2000

Case Studies in Residential Highest and Best Use
Appraisal Institute, April 2000

FHA and the Appraisal Process
Appraisal Institute, August 1999

Litigation Skills for Appraisers
Appraisal Institute, September 1998

Manufactured Housing Seminar
Appraisal Institute, June 1998

Fundamentals of Relocation Appraising
Appraisal Institute, May 1998

Alternative Residential Reporting Forms
Appraisal Institute, May 1997

The High Tech Appraisal Office
Appraisal Institute, May 1997

Donald J. Gossman

Professional Education Continued

Single Family 203K Appraisal Processing
Department of Housing and Urban Development, May 1996

Uniform Standards of Professional Appraisal Practice, Part A
Appraisal Institute, April 1996

Single Family Valuation Appraisal Training
Department of Housing and Urban Development, October 1994

Understanding Limited Appraisals and Appraisal Reporting Options
Appraisal Institute, August 1994

Uniform Standards of Professional Appraisal Practice, Part B
Appraisal Institute, December 1993

Appraisal Regulations of Federal Banking Agencies
Appraisal Institute, May 1993

Appraising Complex Residential Properties
Appraisal Institute, February 1993

Review Appraisal Seminar
Appraisal Institute, April 1992

Professional Practice Seminar
Society of Real Estate Appraisers, June 1991

Advanced Demonstration Seminar
Society of Real Estate Appraisers, March 1990

Narrative Writing Seminar
Society of Real Estate Appraisers, January 1990

SREA Course 102, Challenged
Society of Real Estate Appraisers

SREA Course 101
Society of Real Estate Appraisers, March 1989

Introduction to Real Estate Appraising
American Institute of Real Estate Appraisers, December 1981

Single Family Residential
American Institute of Real Estate Appraisers, May 1980

Donald J. Gossman

Professional Achievements

-Appointed a Contract Appraiser/Reviewer for the Kansas Real Estate Board, 2004

-Elected President of the Kansas City Chapter of the Appraisal Institute, 2000

-Elected Vice President of the Kansas City Chapter of the Appraisal Institute, 1999

-Johnson County Community College Real Estate Advisory Board, 1997-1998

-Appointed to the Missouri Appraiser Advisory Council, 1997-1998

-Secretary of the Kansas City Chapter of the Appraisal Institute, 1997-1998

-Education Chairman of the Kansas City Chapter of the Appraisal Institute, 1997-1998

-Appointed to the Missouri Housing Industry Alliance, 1997 to Present

-Board of Directors, Kansas City Chapter of the Appraisal Institute, 1996-1997

Client References

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321 N. Central Expressway, Suite 250
McKinney, TX 75070
877-320-4278

Argent Mortgage
Salvador Ortiz
1701 W. Golf Road, 10th Floor
Continental Towers, Tower 2
Rolling Meadows, IL 60008
800-369-5117

First Federal Bank
Alan White
6900 N. Executive Drive
Kansas City, MO 64141
816-245-4200

National Bank of Kansas City
Donna Lydon
10740 Nall Avenue
Overland Park, KS 66211
913-338-0777

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The Effect of Distance to Cell Phone Towers on House Prices in Florida

Bond, Sandy

HEADNOTE

ABSTRACT

This article outlines the results of a study carried out in Florida in 2004 regarding the effect that cell phone tower proximity has on residential property prices. The study involved an analysis of residential property sales transaction data. Both GIS and multiple regression analysis in a hedonic framework were used to determine the effect of linear distance of homes to towers on residential property prices. The results of the research show that prices of properties decreased by just over 2%, on average, after a tower was built. This effect generally diminished with distance from the tower and was almost negligible after about 656 feet.

The siting of cellular phone transmitting antennas, their base stations, and the towers that support them (towers) is a public concern due to fears of potential health hazards from the electromagnetic fields that these devices emit. Negative media attention to the potential health hazards has only fueled the perception of uncertainty over the health effects. Other regularly voiced concerns about the siting of these towers are the unsightliness of the structures and fear of lowered property values. However, the extent to which such attitudes are reflected in lower property values affected by tower proximity is controversial.

This article outlines the results of a cell phone tower study carried out in Florida in 2004 to show the effect that distance to a tower has on residential property prices. It follows on from several New Zealand (NZ) studies conducted in 2003.[1] The first of the NZ studies examined residents' perceptions toward living near towers, while the most recent NZ study adopted GIS to measure the impact that distance to a tower has on residential properly prices using multiple regression analysis in a hedonic pricing framework. The study presented in this article was conducted to determine if homeowners in the United States make price adjustments that are similar to those of NZ homeowners when buying properties near towers, and

hence, whether the results can be generally applied.

The article commences with a brief literature review of the previous NZ studies for the readers' convenience. The next section describes the research data and methodology used. The results are then discussed. The final section provides a summary and conclusion.

Literature Review

Property Value Effects

First, an opinion survey by Bond and Beamish2 was used to investigate the current perceptions of residents towards living near towers in the case study city of Christchurch, New Zealand, and how this proximity might affect properly values. second, a study by Bond and Wang3 that analyzed property sales transactions using multiple regression analysis was conducted to test the results of the initial opinion survey. It did this by measuring the impact of proximity to towers on residential property prices in four case study areas. The Bond and Xue4 study refined the previous transaction-based study by including a more accurate variable to account for distance to a tower.

The city of Christchurch was selected as the case study area for all the NZ studies due to the large amount of media attention this area had received in recent years relating to the siting of towers. Two prominent court cases over the siting of towers were the main cause for this attention.5 Dr. Neil Cherry, a prominent and vocal local professor, brought negative attention to towers by regularly publishing the possible health hazards relating to these structures.6 This media attention had an impact on the results of the studies outlined next

The Opinion Survey

The Bond and Beamish opinion survey study included residents in ten suburbs: five case study areas (within 100 feet of a cell phone tower) and five control areas (over 0.6 of a mile from a cell phone tower). Eighty questionnaires7 were distributed in each of the ten suburbs in Christchurch (i.e., 800 surveys were delivered in total). An overall response rate of 46% was achieved.

The survey study results were mixed, with responses from residents ranging from having no concerns to being very concerned about proximity to a tower. In both the case study and control areas, the impact of proximity to towers on future property values is the issue of greatest concern for respondents. If purchasing or renting a property near a tower, over one-third (38%) of the control group respondents would reduce the price of their property by more than 20%. The perceptions of the case study respondents were less negative, with one-third of them saying they would reduce price by only 1%-9%, and 24% would reduce price by between 10% and 19%.

Transaction-Based Market Study

The Bond and Wang market transaction-based regression study included 4283 property sales, in four suburbs, that occurred between 1986 and 2002 (approximately 1000 sales per suburb). The sales data from before a tower was built was compared to sales data after a tower had been built to determine any variance in price, after accounting for all the relevant independent variables.

Interestingly, the effect of a tower on price (a decrease of between 20.7% and 21%) was very similar in the two suburbs where the towers were built in 2000, after the negative media publicity given to towers following the two legal cases outlined above. In the other two suburbs, the results indicated a tower was either insignificant or increased prices by around 12%, where the towers had been built in 1994, prior to the media publicity.

The main limitation affecting this study was that there was no accurate proximity measure included in the model. A subsequent study was performed using GIS analysis to determine the impact that distance to a tower has on residential property prices. The results from that study are outlined next.

Proximity Impact Study

The Bond and Xue study conducted in 2004 involved analysis of the residential transaction data using the same hedonic framework as the previous Bond and Wang study. It also included the same data as the previous study, but added six suburbs to give a total often suburbs: five suburbs with towers located in them and five control suburbs without towers. In addition, the geographical (x, y) coordinates that relate to each property's absolute location were included. A total of 9,514 geocoded property sales were used (approximately 1000 sales per suburb).

In terms of the effect that proximity to a tower has on price the overall results indicate that this is statistically significant and negative. Generally, the closer a properly is to the tower, the greater the decrease in price. The effect of proximity to a tower reduces price by 15% on average. This effect is reduced with distance from the tower and is negligible after 1000 feet.

The study reported here, outlined next, adds to the growing body of evidence and knowledge from around the world on property value effects from cell phone towers.

Florida Market Study

The Data

Part of the selection process was to find case study areas where a tower had been built that had a sufficient number of property sales to provide statistically reliable and valid results. Sales were required both before and after the tower was built to study the effect of the existence the tower had on the surrounding prop-

erty's sale prices.

Case study areas were selected using both GIS maps that showed the location of cellular phone towers, and sale price and descriptive data about each property located in Orange County. The maps and sales data were obtained from the Florida Geographic Data Library (FGDL).8

Approximately 60% of the towers located in Orange County were constructed between the years 1990 and 2000. Additionally, frequency distributions of properties sold during that period indicate that twenty of the towers have the greatest potential for impact on the price of residential properties, based on the greatest number of residential properties close to each tower. These twenty towers were selected to construct a data set for the study.

Parcel data recorded in the FGDL was collected from the Office of the Property Appraiser for Orange County, Florida.9 Besidential properties that sold between 1990 and 2000 (the years the towers were constructed) and that are closest to the twenty towers were selected. Areas close to Interstate 4 and limited access roads were avoided to ensure sale prices (i.e., home buyers' choices) were not affected by highway access or traffic noise variables. Similarly, properties south of Colonial Drive were avoided due to the lower socioeconomic nature of that location. The final areas were selected after site visits had been made to verify that each mapped tower existed, to confirm the location of the homes to the tower, and to ensure nonselected towers were not located near the homes that might impact on the study results. Overall, 5783 single-family, residential properties were selected from northeast Orange County (see the Location Map in the Appendix).

Variables

The study investigates the potential impact of proximity to a tower on the price of residential properly, as indicated by the dependant variable SALE_PRICE.m The study controls for site and structural characteristics by assessing the impact of various independent variables. The independent data set was limited to those available in the data set and known to be related to properly price, based on other well-tested models reported in the literature and from valuation theory. The independent variables selected include lot size in square feet (LOT), floor area of the dwelling in square feet (SOFT), age of the dwelling in years (AGE), the time of construction (AFTERJTWR), the closest distance of each home to the associated tower (DISTANCE), and the dwelling's absolute location is indicated by the Cartesian coordinates (XCOORD) and (YCOORD).11
The effect of construction of a tower on price is taken into account by the inclusion of the dummy, independent variable AFTER_TWR. By including AFTERJTWR, property prices prior to tower construction can be compared with prices after tower construction.12 Frequency distributions indicate that among the residential properties sold between 1990 and 2000, approximately 80% of the residential properties were sold after tower construction.

Based on the parcel and tower data for Orange County, the mean sale price of single-family, residential property that sold between 1990 and 2000 is $113,830. The mean square footage is 1535 square feet, the mean lot size is 8525 square feet, and the mean age is 14 years. The mean distance from a residential properly to a tower is 1813 feet15 Descriptive statistics for select variables are presented in Table 1.

Research Objectives and Methodology

The study hypothesis is that in areas where a tower is constructed, it will be possible to observe discounts made to the selling prices of homes located near these structures. Such a discount will be observed where buyers of homes close to the towers perceive them in negative terms due to, for example, the risk of adverse health, or aesthetic and property value effects.

The literature dealing specifically with the measurement of the impact of environmental hazards on residential sale prices (including proximity to transmission lines, landfill sites, and groundwater contamination) indicates the popularity of hedonic pricing models, as introduced by Court14 and later Grilichesl5 and further developed by Freeman16 and Rosen.17 The standard hedonic methodology was used to quantify the effect of cellular phone towers on sale prices of homes located near these. GIS was also adopted to aid the analysis of distance to the towers.

IMAGE TABLE

1

Table 1 Descriptive Statistics for Selected Variables, Orange County, Florida

IMAGE FORMULA

2

Sometimes the natural logarithm of land area and floor area is also used. The parameters are estimated by regressing property sales on the property characteristics and are interpreted as the households' implicit valuations of different property attributes. The null hypothesis states that the effect of being located near a tower does not explain any variation in property sale price.

To address the many difficulties in estimating the composite effects of externalities on property price an interactive approach is adopted.18 To allow the composite effect of site, structure, and location attributes on the value of residential property to vary spatially, they are interacted with the Cartesian coordinates that are included in the model.19

Unless the hedonic pricing equation provides for interaction between aspatial and spatial characteristics, the effects of the explanatory variables on the dependant variable will likely be underestimated, misspecified, undervalued, or worse, over-

valued. Including the Cartesian coordinates in the model is intended to increase the explanatory power of the estimated model and reduce the likelihood of model misspecification by allowing the explanatory variables to vary spatially and by removing the spatial dependence observed in the error terms of aspatial, noninteractive models.

Empirical Results

The model of choice is one that best represents the relationships between the variables, and has a small variance and unbiased parameters. Adhering to the methodology proposed by Fik, Ling, and Mulligan,20 various empirical models were selected and progressively tested. The models were based on other welltested hedonic housing price equations reported in the literature to derive a best-fit model.

To test the belief that the relationship between SALEJPRICE and other specific independent variables such as SOFT, AGE, and DISTANCE is not a linear function of SALE_PRICE, the variables were transformed to reflect the correct relationship. It was found that the best result was obtained from using the log of SALEJPRICE and the square of SOFT, AGE, and DISTANCE.

The methodology progresses from an interactive model specification, which controls for site and structural attributes of residential property as well as the effects of absolute location, to a model that incorporates the impact of explicit location to measure the effects of the proximity to towers (as indicated by DISTANCE) on the sale prices of residential property.

Preliminary tests of each model, proceeding from interactive aspatial and spatial estimates, were executed to identify an appropriate polynomial order, or a model that provided the greatest number of statistically significant coefficients and the highest adjusted if-squared value.21 Like the study by Fik, Ling, and Mulligan, sensitivity analyses suggested the use of a fourth-order model, at most Similarly, the following model specifications are estimated with a stepwise regression procedure to minimize the potential for model misspecification due to multicollinearity and to ensure that only the independent variables offering the greatest explanatory power are included in the second model. The study used Levene's test for equality of variances. The assumption of homoskedasticity, like the assumption of normality, has been satisfied.

Model 1 was utilized as a benchmark for the second model. The sale price (SALE_PRICE) is estimated using the following independent variables: lot size (LOT); square footage of the dwelling (SOFT); age of the dwelling in years (AGE); and the dwelling's absolute location (XCOORD) and (YCOORD). To investigate the effect of tower construction on the price of homes, the dummy variable (AFTER _TWR) was also included. Residential sale prices prior to tower construction (AFTERJTWR = 0) were compared to sale prices after tower construction (AFTERJIWR= 1). With the addition of the absolute location, Model 1 was used to provide a sound model

specification, to maximize the explanatory value of the study and minimize the potential for misspecification in the estimated second model.

Model 2 includes distance-based measures indicating the property's explicit location, with respect to the closest tower. Both explicit distance and the distance squared were included. Model 2 integrated the base model (Model 1) with the distance from the tower to the properly. The independent variable DISTANCE is introduced in the model and interacted with the variables from Model 1. This model is used to assess the variation in sale price due to proximity to a tower.

Table 2 shows the development of a spatial and fully interactive model specification to estimate the effects of the proximity to towers on the price of residential property, according to Model 1, the base model.

In the semilogarithmic equation the interpretation of the dummy variable coefficients involves the use of the formula 100(e sup b n -1), where b sub n is the dummy variable coefficient22 This formula derives the percentage effect on price of the presence of the factor represented by the dummy variable.

Results from Model 1 suggest that the price of residential properties sold after the construction of a tower increases by 1.47% (i.e., AFTERJTWR = 1.46E-02). Interactions with AFTERJTWR and other variables also suggest an increase in the price for single-family residential properties sold after tower construction. Among the control variables, SOFT increases price by 0.039% with each additional square foot of space (i.e., SQFT= 3.88E). AGE reduces price by 0.25% for each additional year of age. The t-statistics for the explanatory variables SOFT, AGE, XCOORD, and YCOORD suggest significant explanatory power within the specification (i.e., SQFT= 47, AGE sup 2 = 7, XCOORD = -7.105 and YCOORD = 6.799). Model 1 accounts for 82% of the variation in the SALEJPRICE (i.e., Adj. iJ-Squared = 0.8219987).

Model 2 introduces the independent variable DISTANCEto assess the variation in sale price due to the external effect of a tower. The Model 2 results are presented in Table 3; Table 4 provides a summary of the distance results.

IMAGE TABLE

3

Table 2 Model 1 Results

The results clearly show that the price of residential property increases with the distance from a tower. The independent variable, DISTANCE, estimates a coefficient with a positive sign, which increases with increasing distance from the tower (i.e., DISTANCE= 5.69E-05). As distance from the tower increases by 10 feet, price of a residential property increases by 0.57%. Moreover, the t-statistic associated with the estimated coefficient indicates the significance of the explanatory power

of this variable (i.e., t-statistic= 10.751).

DISTANCE presents significant interactions with the other independent variables. The t-statistics associated with these interactions provide strong evidence that the price of residential property, while highly associated with site and structural characteristics, may be significantly impacted by proximity to towers (i.e., AFTERJTWR*DISTANCE = 3.519; DISTANCE sup 2 = -12.258; DISTANCE*AGE = 4.829).

Further, although the estimated effect of the explanatory variable AFTERJTWR continues to suggest that the value of residential property increases with the distance from towers, the interactive nature of AFTERJTWR with DISTANCE sup 2 suggests that the effect of AFTERJTWR may vary due to varying distances from the tower. Indeed, the estimated coefficient for AFTERJTWR from Model 1 is diminished in Model 2 when the explicit, distance-based locational attribute is included in the model specification (i.e., Model 1, AFTERJTWR= 1.46E-02 (1.47%); Model 2, AFTERJTWR = 0.012722(1.28%)).

IMAGE TABLE

4

Table 3 Model 2 Results

IMAGE TABLE

5

Table 4 Summary of Model 2 Location Results

Limitations

This study analyzed residential property sales from different but neighboring suburbs as an entire data set, i.e., the suburbs were grouped together and analyzed as a whole. The absolute location was included in the model to take into account composite externalities as well as to allow these and other independent variables in the model to vary spatially, and therefore preclude the need to analyse neighborhoods separately. However, it is possible that not all neighborhood differences were accounted for.

For example, when comparing these results to those from the NZ study by Bond and Xue, it appears the results from both studies based on an analysis of the whole data set were similar. Towers have a statistically significant, but minimal, effect on the prices of proximate properties. However, what the NZ study showed by analyzing the suburbs separately was that substantive differences exist in the effect that towers have on property prices between suburbs, since the distribution of the property sale prices is quite different in each. It is possible that if the current study had analyzed suburbs separately that similar differences would have been found.

Summary and Conclusions

This article presents the results of a study carried out in Florida in 2004. The study involved the analysis of market transaction data of single-family homes that sold in Orange County between 1990 and 2000 to investigate the effect on prices of property in close proximity to a tower. The results showed that while a tower has a statistically significant effect on prices of property located near a tower, this effect is minimal.

Each geographical location is unique. Residents' perceptions and assessments of risk vary according to a wide range of processes including psychological, social, institutional, and cultural. The results of this study may vary with the NZ results not only due to the differences in study design (for example, this study excluded an analysis at a neighborhood level), but also due to differences in the landscape. In New Zealand, there are fewer structures such as high voltage overhead transmission lines, **cell phone towers**, and billboards than there are in the United States. As a result, it is possible that U.S. residents simply have become accustomed to these features and so notice them less.
The **value** effects from **towers** may vary over time as market participants' perceptions change due to increased public awareness regarding the potential (or lack of) adverse health and other effects of living near a **towers**. Further research into factors that impact on the degree of negative reaction from residents living near these structures could provide useful insights that help explain the effects on **property** price. Such factors might include, for example, the kinds of health and other risks residents associate with **towers**; the height, style, and appearance of the **towers**; how visible the **towers** are to residents and how they perceive such views; and the distance from the **towers** residents feel they have to be to be free of concerns.

As the results reported here are from a case study conducted in 2004 in a specific geographic area (Orange County, Florida) the results should not be generally applied. As Wolverton and Bottemiller explain,

The limits on generalizations are a universal problem for real property sale data because analysis is constrained to properties that sell and sold properties are never a randomly drawn representative sample. Hence, generalizations must rely on the weight of evidence from numerous studies, samples, and locations.25

Thus, many similar studies in different geographic locations would need to be conducted to determine if the results are consistent across time and space. Such studies would need to be of similar design, however, to allow valid comparison between them. As suggested by Bond and Wang, the sharing of results from similar studies would aid in the development of a global database to assist appraisers in determining the perceived level of risk associated with **towers** and other similar structures from geographically and socioeconomically diverse areas.

FOOTNOTE

1. Sandy Bond and Ko-Kang Wang, "The Impact of **Cell Phone Towers** on House Prices in Residential Neighborhoods," The Appraisal Journal (Summer 2005): 256-277; S. G. Bond, and K. Beamish, "Cellular **Phone Towers**: Perceived Impact on Residents and **Property Values**," Pacific Rim **Property** Research Journal 11, no. 2 (2005): 158-177; and S. G. Bond, and J. Xue, "**Cell Phone Tower** Proximity Impacts on House Prices: A New Zealand Case Study" (European Real Estate Society and International Real Estate Society Conference, Dublin, Ireland, June 15-18, 2005).

2. Bond and Beamish, "Cellular **Phone Towers**: Perceived Impact on Residents and **Property Values**."

3. Bond and Wang, "The Impact of **Cell Phone Towers** on House Prices in Residential Neighborhoods."

4. Bond and Xue, "**Cell Phone Tower** Proximity Impacts on House Prices: A New Zealand case Study."

5. McIntyre v. Christchurch City Council, NZRMA 289 (1996), and Shirley Primary School v. Telecom Mobile Communications Ltd., NZRMA 66 (1999).

6. For example see Neil Cherry, Health Effects Associated with Mobil Base Stations in Communities: The Need for Health Studies, Environmental Management and Design Division, Lincoln University (June 8, 2000); available at http://pages.britishlibrary.net/orange/cherryonbasestations.htm.

7. Approved by the University of Auckland Human Subjects Ethics Committee (reference 2002/185).

8. The FGDL is an assemblage of virtually every geographic data set for Florida that the GeoPlan Center of the University of Florida was able to obtain, this mostly from government sources, including the Federal Communications Commission.

9. As reported to the Florida Department of Revenue.

10. Model 1 and Model 2 estimate the log of the SALE_PRICE.

11. For further discussion of the significance of the absolute location in the form of {x, y) coordinates see Timothy J. Fik, David C Ling, and Gordon F. Mulligan, "Modeling Spatial Variation in Housing Prices: A Variable Interaction Approach," Real Estate Economics 31 (Winter 2003): 647-670.

12. Dummy variables for each year of residential sales were also incorporated into both model specifications to control for the potential effects of time on the price of residential property.

13. Initially, HEIGHT was also included among the explanatory variables. However,

the HEIGHT variable provided no significant explanatory power.

14. A. T. Court, "Hedonic Price Indexes with Automotive Examples," in The Dynamics of Automobile Demand (New York: General Motors, 1939).

15. Zvi Griliches, ed., Price Indexes and Quality Change (Cambridge, Mass.: Harvard University Press, 1971).

16. A./Myrick Freeman, III, The Benefits of Environmental Improvement: Theory and Practice (Baltimore: Johns Hopkins University Press, 1979).

17. Sherwin Rosen, "Hedonic Prices and Implicit Markets: Product Differentiation in Pure Competition," Journal of Political Economy 82, no. 1 (Jan/Feb 1974): 34-55.

18. Externalities include influences external to the property such as school zoning, proximity to both amenities and disamenities, and the socioeconomic make-up of the resident population.

19. Model misspecifications could include inaccurate estimates of the regression coefficients, inflated standard errors of the regression coefficients, deflated partial t-tests for the regression coefficients, false nonsignificant p-values, and degradation of the model predictability.

20. Fik, Ling, and Mulligan.

21. Ibid., 633.

22. Robert Halvorsen and Raymond Palmquist, "The Interpretation of Dummy Variables in Semilogarithmic Equations," American Economic Review 70, no. 3 (June 1980): 474-475.

23. Marvin L. Wolverton and Steven C Bottemiller, "Further Analysis of Transmission Line Impact on Residential Property Values," The Appraisal Journal (July 2003): 252.

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by Sandy Bond, PhD

AUTHOR_AFFILIATION

Sandy Bond, PhD, MBS, DipBusAdmin, SPINZ, is a senior member of the Property Institute of New Zealand (PINZ) and a past president of the Pacific Rim Real Estate Society (PRRES). She was awarded the PRRES Achievement Award in 2002 and the New Zealand Institute of Valuers' Presidential Citation in 1997. Before commencing her academic career in 1991 she worked as an appraiser in both New Zealand and the United Kingdom.

Bond is currently a senior lecturer at Curtin University of Technology. Her doctoral research was on the assessment of stigma relating to remediated contaminated **property**. Her current areas of research interest include the valuation of contaminated land, the impact of **cell phone towers** and high voltage transmission lines on residential **property values**, and public sector asset valuation. She has published numerous articles in journals in New Zealand, Australia, Malaysia, the United Kingdom, and the United States, and was responsible for drafting the NZPI Practice Standard on the Valuation of Contaminated Sites. Contact: dr_sandybond@yahoo.com

IMAGE CHART

6

Appendix

Location Map, Orange County, Florida

---- INDEX REFERENCES ----

COMPANY: HOUSING AND DEVELOPMENT BOARD; HARVARD UNIVERSITY PENSION PLANS AND TRU; GENERAL MOTORS CORP; ASSOCIATION GROWTH ENTERPRISES INC; LINCOLN UNIVERSITY; HOUSING AND CONSTRUCTION HOLDING CO LTD; BOND; DISTANCE; FEDERAL COMMUNICATIONS COM-

MISSION; MBS MULTIMODE INC; UNIVERSITY AND STATE EMPLOYEE CREDIT UNION OF SAN DIEGO

INDUSTRY: (Residential Real Estate (1RE67); Wireless Equipment (1WI69); Housing (1HO38); Phone Towers (1PH67); Science (1SC89); Science & Engineering (1SC33); Telecom (1TE27); Physical Science (1PH15); Real Estate (1RE57))

REGION: (Americas (1AM92); New England (1NE37); North America (1NO39); New Zealand (1NE69); Australasia (1AU56); Massachusetts (1MA15); USA (1US73); Oceania (1OC40); Florida (1FL79))

Language: EN

OTHER INDEXING: (ABSTRACT; AFTERJTWR; AFTERJTWR*DISTANCE; AGE; AMERICAN ECONOMIC; APPRAISAL JOURNAL; AUTHOR; AUTOMOBILE DEMAND; BEAMISH; BOND; CARTESIAN; CELL PHONE TOWER PROXIMITY; CELL PHONE TOWERS; CELLULAR PHONE TOWERS; CONTAMINATED SITES; CURTIN UNIVERSITY OF TECHNOLOGY; DIPBUSADMIN; DISTANCE; DUMMY VARIABLES; ECONOMIC JUSTIFICATION FOR MUNICIPAL ZONING; ESTATE SOCIETY CONFERENCE; EUROPEAN REAL ESTATE SOCIETY; FEDERAL COMMUNICATIONS COMMISSION; FGDL; FLORIDA DEPARTMENT OF REVENUE; FOOTNOTE; GENERAL MOTORS; GEOPLAN CENTER; GIS; HARVARD UNIVERSITY PRESS; HEADNOTE; HEDONIC HOUSING PRICES; HEDONIC PRICES; HEIGHT; HOUSE PRICES; HOUSING; HOUSING PRICES; J XUE; JOHNS HOPKINS UNIVERSITY PRESS; JOURNAL OF POLITICAL; KO KANG WANG; LAND ECONOMICS 56; LEVENE; LINCOLN UNIVERSITY; LOCATION MAP; MBS; MODELING SPATIAL VARIATION; NEW ZEALAND INSTITUTE OF VALUERS PRESIDENTIAL CITATION; NZ; OPINION SURVEY; PACIFIC RIM REAL ESTATE SOCIETY; PERCEIVED IMPACT; PHD; PRICE; PROPERTY INSTITUTE; PROXIMITY IMPACT; PRRES; PRRES ACHIEVEMENT AWARD; REAL ESTATE; REAL ESTATE FINANCE; REFERENCE; RIM PROPERTY RESEARCH; SALE; SALEJPRICE; SELECTED VARIABLES; SHIRLEY PRIMARY SCHOOL; SOFT; SPATIAL; SPINZ; TELECOM MOBILE COMMUNICATIONS LTD; TOXIC WASTE SITES; TRANSMISSION LINE IMPACT; UNIVERSITY; UNIVERSITY OF AUCKLAND HUMAN SUBJECTS ETHICS COMMITTEE; URBAN; URBAN PROPERTY MARKETS; VARIABLE INTERACTION APPROACH; WANG; XCOORD; XUE; YCOORD) (Anisotropic Autocorrelation; Beamish; Bond; Crecine, J. P., O. Davis; Design Division; Econometric Estimation; Eighty; Elements; Fik; Gillen; Gordon F. Mulligan; H. J. Brown; J. E. Jackson; K. Beamish; Kohlase, J. E.; Li; Micro-Neighborhood Externalities; Mulligan; Neil Cherry; Objectives; Price Indexes; Raymond Palmquist; Regional; S. G. Bond; S. Wachter; Sandy Bond; Steven; T. G. Thibodeau; Table; The; Theodore M.; Timothy J. Fik; Walter D.) (Florida; United States--US)

KEYWORDS: (Telecommunications towers); (Studies); (Housing prices); (Health hazards); (Residential buildings); (Perceptions)

Word Count: 5902
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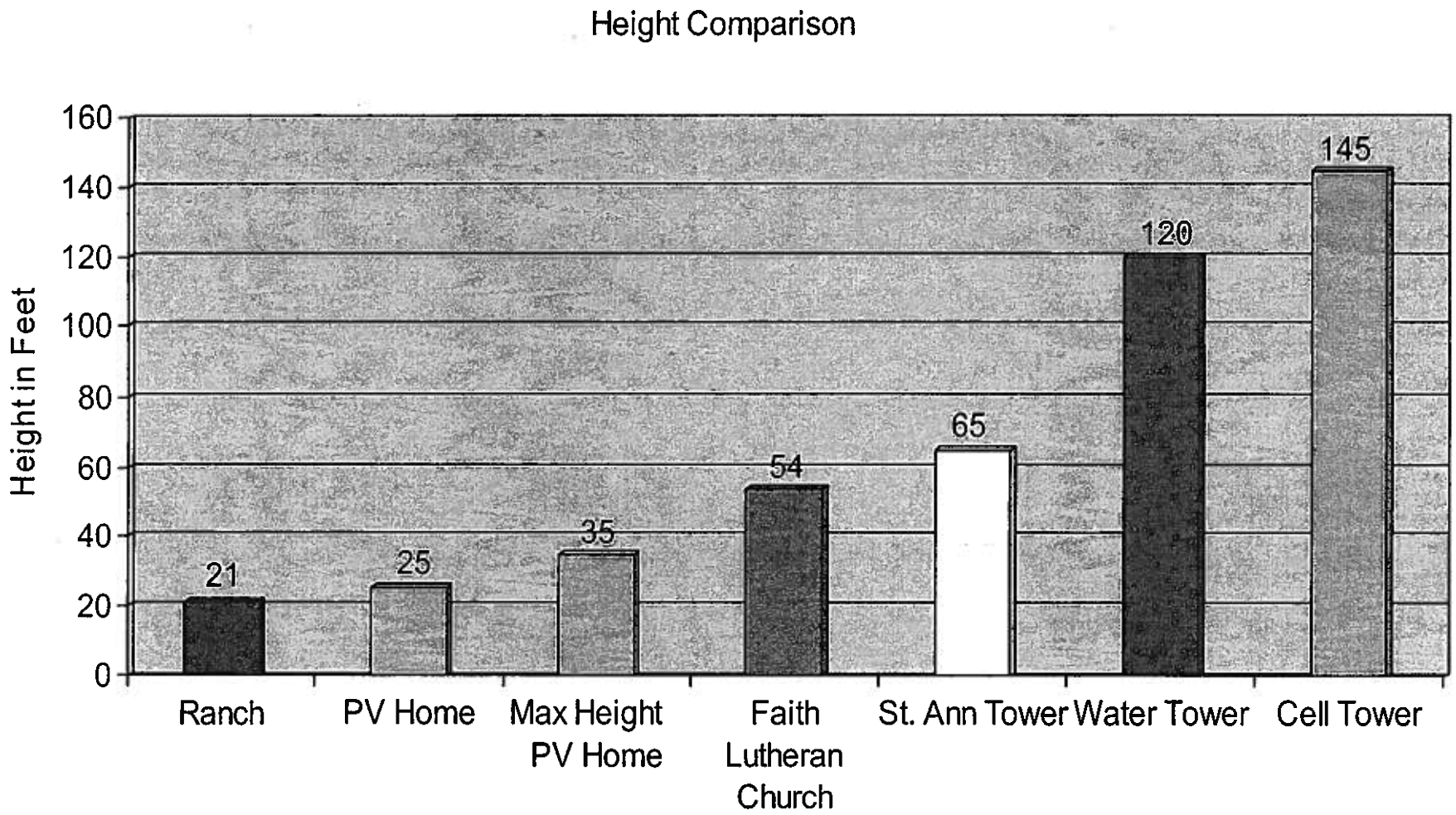
Height Comparison
Height in Feet
160
140
120
100
80
60
40
20
0
21
25
35
54
65
120
145
Ranch
PV Home
Max Height PV Home
Faith Lutheran Church
St. Ann Tower
Water Tower
Cell Tower

Casey Housley

From: Doug Flora [doug.flora@hwins.com]
Sent: Thursday, April 02, 2009 10:54 AM
To: Mary Cordill
Cc: Casey Housley
Subject: FW: Nall Avenue Baptist Church & T-Mobile

Confirmation from Nall Avenue Baptist.
DBF

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From: Bob Clark [mailto:bob@nallave.org]
Sent: Thursday, April 02, 2009 10:32 AM
To: Doug Flora
Subject: RE: Nall Avenue Baptist Church & T-Mobile

This was the jist of our discussion.

Bob Clark
Associate Pastor
Nall Avenue Baptist Church
6701 Nall Avenue
Prairie Village, KS 66208
913.432.4141

From: Doug Flora [mailto:doug.flora@hwins.com]
Sent: Wednesday, April 01, 2009 3:10 PM
To: Bob Clark
Subject: Nall Avenue Baptist Church & T-Mobile

Mr. Clark,
Thank you for your time today. Please confirm the following summary of our discussion:

Nall Avenue Baptist Church (NABC) entered discussions with T-Mobile during the spring/summer of 2008 regarding erecting a cell tower on your property located at 67th and Nall. During summer 2008, T-Mobile issued a formal proposal/lease agreement inconsistent with your discussions and interest of locating the tower near the southeastern area of your property and parking lot. NABC communicated to T-Mobile the proposed location near Nall in middle of parking lot was unacceptable and left negotiations open for them to reconsider. To date, T-

Mobile has not provided NABC any alternative locations or offers consistent with your original discussions.

Please let me know if there are any errors or misrepresentations in my summary. We welcome your feedback.

Regards,
Douglas B. Flora
4908 W.68th Street
913-432-2452

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Westlaw.
301 F.Supp.2d 1251
301 F.Supp.2d 1251
(Cite as: 301 F.Supp.2d 1251)

H

Voice Stream PCS I, LLC v. City of Hillsboro D.Or.,2004.

United States District Court,D. Oregon.
VOICE STREAM PCS I, LLC, d/b/a T-Mobile, Plaintiff,
Golden Road Baptist Church, Involuntary Plaintiff,
v.
CITY OF HILLSBORO, Defendant.
Civil No. 03-365-MO.

Feb. 2, 2004.

Background: Wireless telecommunications service provider brought action under Telecommunications Act (TCA) seeking to overturn city's decision to deny its conditional use application to erect wireless telecommunications tower in residentially zoned area.

Holdings: The District Court, Mosman, J., held that:
(1) substantial evidence supported city's decision to deny application on aesthetic grounds;
(2) city's decision did not effectively prohibit wireless services in city; and
(3) city did not unreasonably discriminate against provider.

Judgment for city.

West Headnotes

[1] Zoning and Planning 414 ⇨708

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)4 Questions of Fact
414k708 k. Permissions, and Certificates. Most Cited Cases
Court reviewing local zoning decision affecting wireless telecommunications towers pursuant to Telecommunications Act (TCA) must examine entire record, including evidence contradictory to local government's decision, in determining whether substantial evidence supports decision. Communications Act of 1934, § 332(c)(7)(B), 47 U.S.C.A. § 332(c)(7)(B).

[2] Zoning and Planning 414 ⇨36

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(A) In General
414k36 k. Aesthetic Considerations. Most Cited Cases
Under Oregon law, city can prohibit proposed use of property on sole ground that use is offensive to aesthetic sensibilities.

[3] Zoning and Planning 414 ⇨384.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases
Under Telecommunications Act (TCA), local zoning board is entitled to make aesthetic judgment in ruling on conditional use application for wireless telecommunications tower, as long as judgment is grounded in specifics of case, and does not evince merely aesthetic opposition to cell-phone towers in general. Communications Act of 1934, § 332(c)(7)(B), 47 U.S.C.A. § 332(c)(7)(B).

[4] Zoning and Planning 414 ⇨384.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases
Substantial evidence supported city's decision to

deny, on aesthetic grounds, conditional use application for wireless telecommunications tower in residentially zoned area, despite applicant's contention that decision was based solely on general, unsubstantiated aesthetics concerns, in light of evidence that city considered specific scene in which proposed tower would appear, city gave consideration to proposed tower's distance from surrounding homes, and proposed tower would not have filled complete void in coverage but instead would only have improved indoor coverage. Communications Act of 1934, § 332(c)(7)(B), 47 U.S.C.A. § 332(c)(7)(B).

[5] Zoning and Planning 414 ⚿685

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)3 Presumptions
414k680 Burden of Showing Grounds for Review
414k685 k. Permissions or Certificates. Most Cited Cases

In seeking to overturn city's decision to deny conditional use application for wireless telecommunications tower in residentially zoned area, burden is on applicant. Communications Act of 1934, § 332(c)(7)(B), 47 U.S.C.A. § 332(c)(7)(B).

[6] Zoning and Planning 414 ⚿642

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)2 Additional Proofs and Trial De Novo
414k642 k. Trial De Novo in General. Most Cited Cases

District court reviews record de novo to determine whether it supports applicant's claim that city's rejection of application for wireless communications tower effectively prohibits such towers in city. Communications Act of 1934, § 332(c)(7)(B)(i), 47 U.S.C.A. § 332(c)(7)(B)(i).

[7] Zoning and Planning 414 ⚿384.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases

Single zoning decision can give rise to effective prohibition of wireless services in violation of Telecommunications Act (TCA). Communications Act of 1934, § 332(c)(7)(B)(i), 47 U.S.C.A. § 332(c)(7)(B)(i).

[8] Zoning and Planning 414 ⚿384.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases

City's decision to deny conditional use application for wireless telecommunications tower in residentially zoned area did not effectively prohibit wireless services in city, in violation of Telecommunications Act (TCA), where proposed tower would have simply improved existing indoor coverage, not filled complete void in coverage, applicant could have achieved its objectives by installing two towers at other locations, and city's decision was based on specific circumstances presented, not on unsubstantiated general observations. Communications Act of 1934, § 332(c)(7)(B)(i), 47 U.S.C.A. § 332(c)(7)(B)(i).

[9] Zoning and Planning 414 ⚿384.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited

Cases
City's decision to deny conditional use application for wireless telecommunications tower in residentially zoned area did not unreasonably discriminate against applicant, in violation of Telecommunications Act (TCA), even though city had previously granted conditional use permits for two other wireless communication facilities in residential areas, where there was no evidence of any relevant similarity other than common zoning designation. Communications Act of 1934, § 332(c)(7)(B)(i)(I), 47 U.S.C.A. § 332(c)(7)(B)(i)(I).

[10] Zoning and Planning 414 ⇐685

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)3 Presumptions
414k680 Burden of Showing Grounds for Review
414k685 k. Permissions or Certificates. Most Cited Cases
Unsuccessful applicant for conditional use application for wireless telecommunications tower bears burden of establishing that city engaged in unreasonable discrimination in violation of Telecommunications Act (TCA). Communications Act of 1934, § 332(c)(7)(B)(i)(I), 47 U.S.C.A. § 332(c)(7)(B)(i)(I).

*1253 Christopher P. Koback,Davis Wright Tremaine, LLP, Portland, OR, for Plaintiff.
Pamela J. Beery, Paul C. Elsner, Beery & Elsner, LLP, Portland, OR, for Defendant.

OPINION AND ORDER

MOSMAN, District Judge.
Plaintiff Voice Stream PCS I, LLC ("plaintiff") brings this lawsuit under the Telecommunications Act of 1996 ("TCA"), seeking to overturn the City of Hillsboro's decision to deny plaintiff's conditional-use application to erect a wireless-telecommunications (or, as commonly called, a "cell-phone") tower in a residentially zoned area. The issues in this case pit the TCA's intention to deregulate the wireless telephone industry against the traditional control over local land use maintained by municipalities. For the reasons discussed below, municipal control prevails in this case.

I. Background

Personal wireless services are dependent upon low power, high frequency radio signals that are transmitted from antennae placed on preexisting structures, such as water towers, or on newly constructed towers. See generally *Southwestern Bell Mobile Sys. v. Todd,* 244 F.3d 51, 56-57 (1st Cir.2001); *Sprint Spectrum, L.P. v. Willoth,* 176 F.3d 630, 634-35 (2d Cir.1999). As a subscriber travels within a cellular provider's service area, the cellular call in progress is transferred from one cell site to another without noticeable interruption. To increase quality of service and therefore attract subscribers, providers usually have an incentive to increase the number of cells and correspondingly decrease the geographic coverage of each cell. In furtherance of this plan to improve service, coverage within an area is maintained by arranging antennae in a honeycomb-shaped grid. When the grid is placed over a city map, desired tower locations of course often fall in residential areas. And because wireless technology is relatively low-powered and requires line-of-sight to a tower, the necessary antennae generally must be placed on towers which loom over the landscape, commonly giving rise to opposition especially in residential areas.

Plaintiff submitted an application for a conditional-use permit to construct and maintain a 120-foot tower on residentially zoned property owned by the Golden Road Baptist Church in the City of Hillsboro. The church site is surrounded on all sides by residentially zoned property. Many of the surrounding homes are between 100 and 200 feet from the proposed site. As revealed by the record, the proposed site is in an area commonly described as scenic, as it is surrounded by fir trees and is near wetlands and a greenway. Neighbors, therefore,

banded together to oppose plaintiff's permit application.

The City's Zoning Hearings Board held public hearings and accepted neighbors' opposition letters. The board also accepted a petition of over 50 residents expressing opposition. In addition, the board had before it maps, simulated photographs, and a chart depicting the location of the city's wireless-telecommunications facilities. The board applied Hillsboro Zoning Ordinance ("HZO") No.1945, Section 83(9). This ordinance provides as follows:
The Commission or Hearings Board shall grant approval only if the proposal, ***1254** as conditioned, is determined to conform to the following criteria:
(a) The granting of the application would meet some public need or convenience.
(b) The granting of the application is in the public interest.
(c) The property in question is reasonably suited for the use required.
(d) The use requested would not have a substantial adverse effect on the rights of the owners of surrounding properties.
(e) The use requested would conform to the maps and the goals and policies of the Hillsboro Comprehensive Plan.

The board ultimately issued a written decision denying plaintiff's application. Plaintiff appealed the board's denial to the city council. The city council issued a written decision, adopting in part the board's written decision and affirming the board's denial. The council found granting the application would meet a public need or convenience, because the tower would improve indoor cellular telephone coverage (although the council found the plaintiff did not prove its assertion the tower would improve communications for public-safety personnel). The council further found the property was suited for the proposed use, since the church's lot is large enough to accommodate the tower and no other infrastructure would be necessary to service the site. As for requirement (e) the council found this was met.

The council denied the permit because it determined the proposal would not be in the public interest and would have a substantial adverse effect on surrounding property owners' rights. Both of these findings were based on generally the same evidence: There was no showing denying the application would harm the public interest since the tower would only improve what plaintiff calls "urban" coverage, meaning coverage indoors. In addition, both plaintiff and opponents testified plaintiff alternatively could have erected two towers at other sites, although plaintiff suggested this alternative would not have served its needs. The council further found the proposed tower would negatively affect the aesthetic character of the neighborhood, relying primarily on residents' concerns about the tower's effect on the neighborhood's natural surroundings, which include an undeveloped greenway. The council further relied on simulated pictures showing what the tower would look like. In addition, the council adopted the board's findings distinguishing two prior permits that had been granted to wireless providers for residential-area facilities: One of the facilities, the board found, was placed on an existing light pole at an athletic field. The board also observed that the other facility is located near a busy street and across from a commercial district.

While the council found there would be a negative aesthetic impact, it found the evidence inconclusive as to whether the tower would cause property values to decline. Plaintiff had submitted an expert report which studied the effects of towers in other neighborhoods and which concluded there would be no adverse effect. In response, residents submitted three letters from local realtors who concluded the tower would negatively affect property values. Based on this conflicting evidence, the council did not base its decision on property devaluation and determined property devaluation was not necessary for it to deny the application.

II. Discussion

The TCA permits parties to bring cases like this in federal court:
Any person adversely affected by any final action or failure to act [regarding siting a cell-phone tower] by a State or ***1255** local government or any instrumentality thereof ... may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction.

47 U.S.C. § 332(c)(7)(B)(v). Congress therefore expressly intended for local zoning decisions which affect cell-phone towers to be reviewed by federal courts. A driving force behind this decision was Congress's conclusion that " 'siting and zoning decisions by non-federal units of government[ ] have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit' " the development and growth of wireless services. *Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Township,* 181 F.3d 403, 407 (3d Cir.1999) (quoting H.R. Rep. 104-204, at 94 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 61). Thus, generally speaking, the TCA reflects Congress's intent to expand wireless services and increase competition among providers. *Todd,* 244 F.3d at 57; see also H.R.Rep. No. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 124 (stating TCA intended "to provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications ... and services to all Americans by opening all telecommunications markets to competition").

But despite Congress's intention to advance competition among wireless providers, Congress also acknowledged "there are legitimate state and local concerns involved in regulating the siting of such facilities ... such as aesthetic values and the costs associated with the use and maintenance of public rights-of-way." H.R. Rep. 104-204, at 94-95 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 61. Consequently, the TCA expressly preserves local zoning authority regarding the placement of equipment such as cell-phone towers:

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

47 U.S.C. § 332(c)(7)(A).[FN1] However, the TCA restricts zoning boards' authority to base their denials on perceived adverse environmental effects, since that issue is heavily regulated by the federal government. *Id.*§ 332(c)(7)(B)(iv). Congress also delineated three situations at issue in this case in which federal courts can reverse a local zoning board's denial of a permit for a cell-phone tower: (1) when the board's denial is not "supported by substantial evidence contained in a written record," (2) when the board's decision "prohibit[s] or ha[s] the effect of prohibiting the provision of personal wireless services," and (3) when the board's decision "unreasonably discriminate[s] among providers of functionally equivalent services." *Id.*§ 332(c)(7)(B). Plaintiff contends that the city's denial violates each of these three provisions.[FN2]

FN1. Notably, the House version of the bill would have given the FCC (rather than local zoning entities) authority to regulate tower siting. See generally *Sprint Spectrum L.P. v. Parish of Plaquemines,* No. 01-0520, 2003 WL 193456, at *5 (E.D.La. Jan. 28, 2003) (discussing TCA's legislative history). But, as Section 332(c)(7)(A) shows, Congress made a conscious decision to reject any scheme revoking local control over zoning decisions, even at the cost of inhibiting the growth of wireless services.

FN2. Although no formal motions have been filed with the court, the parties agreed at oral argument the case is ready to be decided.

A. Substantial Evidence

Plaintiff argues that the city's denial of plaintiff's conditional-use application was not supported by "substantial evidence." ***1256** Plaintiff essentially argues that the city's decision was improperly based on nothing more than general, speculative aesthetics concerns.

[1] While the Ninth Circuit has not yet decided a case under the TCA provisions at issue in this case, other federal courts agree "substantial evidence," as used in the TCA, was meant generally to track the standard of the same name set forth in the Administrative Procedures Act. See, e.g., *Preferred Sites, LLC v. Troup County,* 296 F.3d 1210, 1218 (11th Cir.2002); *Todd,* 244 F.3d at 58; *Omnipoint Corp.,* 181 F.3d at 407-08; *Cellular Tel. Co. v. Town of Oyster Bay,* 166 F.3d 490, 494 (2d Cir.1999); *MetroPCS, Inc. v. City & County of San Francisco,* 259 F.Supp.2d 1004, 1009 (N.D.Cal.2003). Although the TCA does not itself define "substantial evidence," legislative history supports the decision to follow the Administrative Procedures Act standard. See H.R. Conf. Rep. 104-458, at 208, *reprinted in* 1996 U.S.C.C.A.N. 124, at 223 (stating TCA standard is intended as "the traditional standard used for judicial review of agency actions"). Substantial evidence, therefore, means " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Pierce v. Underwood,* 487 U.S. 552, 565, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938)). Substantial evidence is not "a large or considerable amount of evidence," and the fact two different conclusions could have been reached does not mean there is not substantial evidence. *Id.;* see also *Todd,* 244 F.3d at 58-59. As measured by degree, substantial evidence is usually considered to be "more than a mere scintilla" and less than a preponderance. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477, 71 S.Ct. 456, 95 L.Ed. 456 (1951). In short, the governing standard is "highly deferential" to the local government's decision but does not amount to a mere rubber stamp. *Second Generation Props., L.P. v. Town of Pelham,* 313 F.3d 620, 627 (1st Cir.2002). The court must examine the entire record, including evidence contradictory to the local government's decision, in determining whether substantial evidence supports the decision. See *Todd,* 244 F.3d at 58; *MetroPCS,* 259 F.Supp.2d at 1010.

In searching for substantial evidence, the government's decision is analyzed under the applicable zoning ordinance; " '[t]he TCA's substantial evidence test is a procedural safeguard which is centrally directed at whether the local zoning authority's decision is consistent with the applicable zoning requirements.' " *VoiceStream Minneapolis, Inc. v. St. Croix County,* 342 F.3d 818, 830 (7th Cir.2003) (quoting *ATC Realty, LLC v. Town of Kingston,* 303 F.3d 91, 94 (1st Cir.2002)). The party seeking to overturn the local government's decision carries the burden of showing the decision was not supported by substantial evidence. See *id.* at 830.

At the outset, the terms of the applicable zoning ordinance must be evaluated. The ordinance at issue here directs the city to reject a proposed conditional use when it concludes permitting the use would not be in the "public interest" or would have "a substantial adverse effect on the rights of the owners of surrounding properties." HZO § 83(9). In this case, the city made both of these findings, which plaintiff challenges.

The city council interpreted "public interest," as used in the ordinance, to contemplate a consideration of the public health, safety, and welfare of the community. R.38. The council further concluded the ordinance's "substantial adverse effect" language does not require any property-value devaluation but instead contemplates a consideration of whether an ***1257** owner's property use and enjoyment will be affected by the proposed use. R.40.

[2] As with most such zoning ordinances, the open-ended nature of the ordinance's conditional-use criteria evinces an intent to grant wide discretion to the zoning board when making conditional-use decisions. Cf. *Schad v. Borough of Mt. Ephraim,* 452

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U.S. 61, 68, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) ("The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life...."); *Berman v. Parker,* 348 U.S. 26, 33, 75 S.Ct. 98, 99 L.Ed. 27 (1954) ("The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy ...." (citation omitted)). And under well-established Oregon law, a city can prohibit a proposed use of property "on the sole ground that the use is offensive to aesthetic sensibilities." *Oregon City v. Hartke,* 240 Or. 35, 46, 49, 400 P.2d 255 (1965). Accordingly, in light of the applicable ordinance's broad language, the city had the power to deny plaintiff's permit on grounds of "aesthetic considerations." *Oregon City,* 240 Or. at 49, 400 P.2d 255. The TCA, however, requires this court to evaluate the evidence to ensure the city's decision was not "irrational or substanceless." See *Todd,* 244 F.3d at 57.

As plaintiff recognizes, even under a substantial evidence review, zoning decisions based on aesthetic concerns can be valid. See *St. Croix County,* 342 F.3d at 831; *Troup County,* 296 F.3d at 1219; *Todd,* 244 F.3d at 61; *Pine Grove Township,* 181 F.3d at 408; *AT & T Wireless PCS, Inc. v. City Council of the City of Virginia Beach,* 155 F.3d 423, 430-31 & n. 6 (4th Cir.1998); see also H.R. Conf. Rep. 104-458, at 208, *reprinted in* 1996 U.S.C.C.A.N. 124, at 222 (contemplating that localities properly can base decision on aesthetic impact). Plaintiff does not cite, and the court could not find, any authority holding that the TCA renders aesthetic concerns an invalid basis upon which to base a permit denial. As summarized by the Seventh Circuit, "[n]othing in the Telecommunications Act forbids local authorities from applying general and nondiscriminatory standards derived from their zoning codes, and ... aesthetic harmony is a prominent goal underlying almost every such code." *Aegerter v. City of Delafield,* 174 F.3d 886, 891 (7th Cir.1999). Moreover, consistent with traditional zoning standards, local government is "entitled to make an aesthetic judgment" about the proposal "without justifying that judgment by reference to an economic or other quantifiable impact" such as property value. *Todd,* 244 F.3d at 61.

Plaintiff, however, correctly observes that cases have found general, unsubstantiated aesthetics concerns to have marginal evidentiary value. See, e.g., *PrimeCo Personal Communications, LP v. City of Mequon,* 352 F.3d 1147, 1150-51 (7th Cir.2003) ("The only 'evidence' bearing on aesthetic considerations was the testimony of three or four residents that they don't like poles in general; they didn't say they would object to a flagpole in the church's [the proposed site's] backyard.... [T]here is no evidence that Verizon's proposed flagpole would if erected in the churchyard be considered unsightly by the neighbors...."); *Troup County,* 296 F.3d at 1219 (finding insufficient petitions which gave "no articulated reasons for the opposition" and a single affidavit reciting "generalized concerns" about the tower's negative aesthetic impact when there was no other evidence in the record); *Oyster Bay,* 166 F.3d at 492, 495-96 (finding insufficient evidence of visual blight because ***1258** "[v]ery few residents expressed aesthetic concerns at the hearings," comments suggested that the "residents who expressed aesthetic concerns did not understand what the proposed cell sites would actually look like," and health concerns, a basis generally improper under the TCA, "dominated the speakers' state- ments").

[3] But even under the TCA, the board is entitled to make an aesthetic judgment as long as the judgment is "grounded in the specifics of the case," and does not evince merely an aesthetic opposition to cell-phone towers in general. *Todd,* 244 F.3d at 61; see also *Petersburg Cellular P'ship v. Bd. of Supervisors of Nottoway County,* 205 F.3d 688, 695 (4th Cir.2000) ("[If a zoning board] denies a permit based on the *reasonably-founded* concerns of the

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community then undoubtedly there is 'substantial evidence' " (emphasis in original)). Accordingly, when the evidence specifically focuses on the adverse visual impact of the tower at the *particular location at issue* more than a mere scintilla of evidence generally will exist.

Plaintiff nevertheless insists the evidence before the city in this case amounted to no more than unsupported and vague objections. See Plaintiff's Pre-Hearing Memorandum at 9. But a proper review of the record shows there was more than a scintilla of evidence "grounded in the specifics of the case." *Todd,* 244 F.3d at 61.

For example, neighboring residents submitted letters objecting to the tower's proposed location because the tower would infringe upon the neighborhood's prized natural setting, comprised of fir and evergreen trees as well as a greenway. See, e.g., R. 191, R.195, R.197, R.205, R.207, R.220, R.222, R.407, R.420. At the site, there is no significant commercial development; nor are there existing commercial towers or above-ground power lines. R.26, R.205, R.407, R.420. In addition, on each side of the tower is a single-family residential zone; the record shows the tower would be surrounded by existing residences. See, e.g., R.247-58, R.769, R.816. Residents stated they relied on the natural, residential character of the neighborhood in purchasing their homes, which they would not have purchased had plaintiff's proposed tower been standing. R.191, R.199, R.205. The city properly relied on the evidence showing the tower would be incompatible with the character of this particular neighborhood. See, e.g., *Todd,* 244 F.3d at 61 ("The five limitations upon local authority in the TCA do not state or imply that the TCA prevents municipalities from exercising their traditional prerogatives to restrict and control development based upon aesthetic considerations...."); *Aegerter,* 174 F.3d at 890-91 (upholding zoning board's denial of cell-phone tower because the tower would be "unsightly" and "inconsistent" with the neighborhood, in which residents bought their homes in reliance on the neighborhood's existing residential character). In sum, although opponents made general assertions about the nature of cell-phone towers, they also considered the specific scene in which the proposed tower would appear.

Moreover, the city also gave consideration to the proposed tower's distance from surrounding homes. The city council cited an appraiser's testimony that no other cell-phone facility in the city sits as close to residences as would plaintiff's proposed tower. R.39. In the board's words, "the cell tower in this case would be in the heart of an R-7 single family residential neighborhood and would be the functional equivalent of placing a cell tower in the center of a subdivision." R.27. In addition, the board specifically distinguished the two other previously approved cell-phone facilities which sit in single-family residential zones. R.27. The board observed that one of the existing facilities was placed on an existing light pole at an athletic field and ***1259** that the other sits in a busy section of the city across from a commercial district. R.27. At the proposed site, the record indicates that many of the neighboring houses are between 100 and 200 feet from the proposed tower. As one witness observed, "[t]he proposed cell tower site regardless of where placed on the property would be within 100 feet of a single-family site." R.769.

In fact, in an attempt to compare the proposed site to other sites where homes are near cell-phone facilities, plaintiff's own expert witness picked four "subject" homes which are no less than 350 feet from the nearest cell-phone facility. R.265, R.269-70, R.279, R.289. Each of the expert's four subject homes is in Washington County (which includes the City of Hillsboro) and one of the homes is in the city. Notably, Washington County records indicate three of the expert's chosen homes actually are over 450 feet from the nearest cell-phone facility, with one of these three homes being 900 feet away. R.138-39. Thus the city had before it plaintiff's own evidence indicating the proposed site is significantly different from the area's most com-

parable sites.[FN3]

> FN3. The court recognizes another appraiser mentioned three other homes which are within 100 feet of a cell-phone tower. R.137. However, these sites are not in Washington County. Moreover, as indicated above, the court finds it significant that plaintiff's own expert-"[a]fter filtering the number of sites for research," R.269-chose four homes which are at least 350 feet from cell-phone towers as the sites most appropriate for purposes of drawing a comparison to plaintiff's proposed site.

Coupled with the city's aesthetic judgment is the fact the proposed tower would not fill a complete void in coverage but instead would only improve indoor or, in plaintiff's term, "urban" coverage. R.16; see Plaintiff's Reply Memorandum at 3. In determining whether the tower would be in the "public interest," the city was within its authority to weigh the benefit of merely improving the existing coverage against the negative aesthetic impact the tower would cause. See, e.g., *City of Mequon,* 352 F.3d at 1149 ("A reasonable decision whether to approve the construction of an antenna for cell-phone communications requires balancing two considerations. The first is the contribution that the antenna will make to the availability of cellphone services. The second is the aesthetic or other harm that the antenna will cause."). Such a policy-based decision is precisely the type of decision Congress left to local zoning boards.

[4] Keeping in mind the standard is merely "more than a scintilla," and less than a preponderance, the city based its denial on sufficient evidence. Certainly, as plaintiff contends, it is possible to conclude the proposed tower would not be a visual blight, judging by the simulated photographs in the record. This court's role, however, is not to interject its own judgment, but rather to apply the deferential standard of substantial evidence to the city's judgment. See *Todd,* 244 F.3d at 58 ("the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."); *Aegerter,* 174 F.3d at 888 ("While the conclusions the City reached may not be the only possible ones, they find support in the written record and therefore must be respected."). While the court is obligated to review the evidence, given the TCA's express reservation of local control, the court also must be sensitive to the difficulties involved in applying inherently policy-based standards such as "in the public interest" to tower-siting decisions. See, e.g., ***1260***Sprint Spectrum, L.P. v. Parish of Plaquemines,* No. 01-0520, 2003 WL 193456, at *19-20 (E.D.La. Jan. 28, 2003) (finding substantial evidence to satisfy the ordinance's "public interest" standard where many residents expressed aesthetic concerns, keeping in mind that even under the TCA " '[l]and use decisions are basically the business of state and local governments' ") (quoting *Am. Tower, L.P. v. City of Huntsville,* 295 F.3d 1203, 1206 (11th Cir.2002)).

[5] In sum, plaintiff does not carry its burden to show the City of Hillsboro's decision was not supported by substantial evidence. The city grounded its decision to deny plaintiff's application in "the specifics of the case," *Todd,* 244 F.3d at 61, not on merely unsupported and vague objections about cell-phone towers in general, as plaintiff contends.FN4

> FN4. Plaintiff argues "[i]f the City had concerns other than aesthetics, those concerns could have been addressed by a conditional approval." See Plaintiff's Pre-Hearing Memorandum at 14-15. Specifically, plaintiff argues, "had the City had lingering concerns over either the lighting requirements or maintaining the large trees bordering the Golden Road location" the city should have conditioned approval on plaintiff's taking measures to alleviate those concerns. *Id.* But because the city's decision was not based on the issue of

lighting or trees, the court need not consider this issue. Moreover, plaintiff does not point to evidence in the record showing what, if any, "reasonable conditions" were feasible and that would have effectively alleviated the city's concerns. See ORS § 197.522 (providing that local government can deny a permit application when it "cannot be made consistent through the imposition of reasonable conditions of approval"). In seeking to overturn the city's decision, the burden is on plaintiff. See *St. Croix,* 342 F.3d at 830; cf. *United States Cellular Tel. of Greater Tulsa, LLC v. City of Broken Arrow,* 340 F.3d 1122, 1137-38 (10th Cir.2003) (" 'We doubt that Congress intended local zoning boards to pay for experts to prove that there are alternative sites for a proposed tower.' ") (quoting *Petersburg Cellular P'ship,* 205 F.3d at 695). In any event, as discussed above, the city's decision is supported by sufficient evidence.

B. Effective Prohibition

Plaintiff further argues the city's denial effectively prohibits wireless services. Plaintiff specifically argues that because the city's denial was based on general aesthetic concerns, no tower could pass the city's review, since no one would praise the aesthetic virtue of a cell-phone tower. See Plaintiff's Pre-Hearing Memorandum at 17.

[6] The TCA permits a federal court to overturn a local government's zoning decision when the decision has the "effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i). Unlike the substantial evidence inquiry, a district court reviews the record *de novo* to determine whether it supports an effective prohibition claim. *St. Croix,* 342 F.3d at 833; *Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals,* 297 F.3d 14, 22 (1st Cir.2002).

[7] Most cases have held that a single zoning decision can give rise to an effective prohibition of wireless services. See, e.g., *Second Generation Props., LP v. Town of Pelham,* 313 F.3d 620, 629 (1st Cir.2002) (citing *Town of Amherst v. Omnipoint Communications Enters., Inc.,* 173 F.3d 9, 14 (1st Cir.1999)); *APT Pittsburgh LP v. Penn Township Butler County of Pa.,* 196 F.3d 469, 479-80 (3d Cir.1999); *MetroPCS, Inc.,* 259 F.Supp.2d at 1013; *Airtouch Cellular v. City of El Cajon,* 83 F.Supp.2d 1158, 1167 (S.D.Cal.2000). The Fourth Circuit, however, has held that *only* blanket bans of wireless services implicate the TCA's effective prohibition provision. See *City Council of Va. Beach,* 155 F.3d at 428. The weight of authority, and the more persuasive reasoning, concludes that an effective prohibition can be shown either with a blanket ban or a single decision. As courts have recognized, construing the effective prohibition clause " 'to apply only ***1261** to general bans would lead to the conclusion that, in the absence of an explicit anti-tower policy, a court would have to wait for a series of denied applications before it could step in and force a local government to end its illegal boycott of personal wireless services.' " *St. Croix,* 342 F.3d at 833 (quoting *Sprint Spectrum, LP v. Willoth,* 176 F.3d 630, 640-41 (2d Cir.1999)). Thus the court should consider whether, as plaintiff contends, the city's denial in this case amounts to an effective prohibition.

In invoking the effective prohibition clause, " 'the burden for the carrier ... is a heavy one.' " *Second Generation,* 313 F.3d at 629 (quoting *Town of Amherst,* 173 F.3d at 14); see also *MetroPCS,* 259 F.Supp.2d at 1013 (stating a provider challenging a permit denial on effective prohibition grounds "bears a 'heavy' burden of proof").

[8] As an initial matter, in determining whether a denial is an effective prohibition, courts have looked to whether the proposed tower would close a "significant gap" in coverage. *St. Croix,* 342 F.3d at 835 n. 7; *Omnipoint Communications Enters., L.P. v. Zoning Hearing Bd. of Easttown Township,* 331 F.3d 386, 397-98 (3d Cir.2003); *Second Genera-*

tion, 313 F.3d at 631. In addition, the provider must show, not just that this permit application was denied, but that further " 'reasonable efforts are so likely to be fruitless that it is a waste of time even to try.' " *Second Generation,* 313 F.3d at 629 (quoting *Town of Amherst,* 173 F.3d at 14); accord *St. Croix,* 342 F.3d at 834. Under this standard, the provider must show its " 'existing application is the only feasible plan' and ...'there are no other potential solutions to the purported problem.' " *St. Croix,* 342 F.3d at 834 (quoting *Town of Pelham,* 313 F.3d at 630, 635). Plaintiff cannot meet the applicable standard.

First, plaintiff does not establish its proposed tower would close a "significant gap" in coverage. A significant gap does not exist simply because an area with coverage also has "dead spots" (*i.e.,* " '[s]mall areas within a service area where the field strength is lower than the minimum level for reliable service' "). *Second Generation,* 313 F.3d at 631 (quoting 47 C.F.R. § 22.99). It is undisputed plaintiff's tower would simply improve existing indoor coverage, not fill a complete void in coverage. See, e.g., Plaintiff's Reply Memorandum at 3. This at most appears to be a dead spot. More important, plaintiff does not show "further reasonable efforts are so likely to be fruitless that it is a waste of time even to try." *Second Generation,* 313 F.3d at 629. For instance, the record indicates plaintiff could have achieved its objectives by installing two towers at other locations. R.117, R.513-15. Although the record suggests one of the two alternative towers would be three feet above FAA regulatory limits, R.425, R.517-19, plaintiff does not point to any evidence showing the effect reducing the one tower by three feet would have on service provided by the two-tower alternative. Instead, in response to the FAA regulatory limits, it appears plaintiff submitted a proposal taking into account only *one* proposed tower. R.425, R.575. Such an attempt does not suffice to carry plaintiff's burden to show any further reasonable efforts would be fruitless. Similarly plaintiff does not attempt to show that the proposed tower was the "only feasible plan" or that "there are no other potential solutions to the purported problem." *St. Croix,* 342 F.3d at 834.[FN5]

> FN5. That the possible alternative would have required two towers does not make the Golden Road proposal the only feasible option. Although plaintiff might believe its one-tower alternative is the more attractive option, the city could have reasonably believed two towers in other locations is better than one tower in the proposed location. See, e.g., *Parish of Plaquemines,* 2003 WL 193456 at *19-20 (noting, even though the alternative site would require "two towers at other locations," the city could reasonably prefer "two or more towers" at other locations instead of one tower at the location Sprint chose); see also *Town of Amherst,* 173 F.3d at 15 ("Ultimately, we are in the realm of tradeoffs: on one side [is] the opportunity for the carrier to save costs, pay more to the town, and reduce the number of towers; on the other are more costs, more towers, but possible less offensive sites and somewhat shorter towers.").

***1262** And contrary to plaintiff's contention that the city rejected the tower simply because the tower would have been visible to the neighbors, the city based its decision on the specific circumstances presented in the case, not on unsubstantiated general observations equally applicable to any cell-phone tower. In short, plaintiff does not carry its burden to show the city's denial has the effect of prohibiting wireless services.

C. Discrimination

[9] Plaintiff generally contends the city's denial results in unlawful discrimination, because the city previously has granted conditional-use permits for two other wireless-communication facilities in residential areas. Plaintiff speculates that the city denied the Golden Road permit simply because the

neighborhood at issue is affluent. Plaintiff contends a municipality should not be permitted to deny a conditional-use application on the sole ground the proposed location is in a neighborhood more affluent than others. While plaintiff's position may be laudable, it points to no evidence showing the city based its decision on the alleged wealth of the residents. As discussed below, plaintiff does not otherwise offer sufficient evidence supporting its argument the city engaged in unreasonable discrimination.[FN6]

> FN6. It is worth noting that plaintiff's argument regarding discrimination, i.e., that other, similar permits have been granted, is at least partially inconsistent with its argument regarding effective prohibition, i.e., that the city is effectively prohibiting wireless services.

The TCA prohibits zoning boards from unreasonably discriminating "among providers of functionally equivalent services." 47 U.S.C. § 332(c)(7)(B)(i)(I). As with claims under the effective prohibition clause, there is no deference to the local government's findings. *Airtouch,* 83 F.Supp.2d at 1164 (citing *Cellular Tel. Co. v. Zoning Bd. of Adjustment of Ho-Ho-Kus,* 197 F.3d 64, 71 (3d Cir.1999)).

[10] The TCA allows discrimination among providers as long as the discrimination is reasonable. See *Willoth,* 176 F.3d at 638. Plaintiff bears the burden of establishing the city engaged in unreasonable discrimination. See *MetroPCS,* 259 F.Supp.2d at 1011-12. Plaintiff must show "other providers have been permitted to build similar structures on similar sites while it has been denied." *Id.* at 1012 (citing cases). That is, plaintiff must show the city treated a competitor more favorably "for a functionally identical request." *Id.* In determining whether unlawful discrimination occurred, a court must remain mindful that cities retain " '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.' " *Id.* at 1011 (quoting H.R. Conf. Rep. No. 104-458, at 208, *reprinted in* 1996 U.S.C.A.A.N. at 222). Thus a zoning board can treat one provider's application differently from another provider's application based on "traditional bases of zoning regulation." *City of Va. Beach,* 155 F.3d at 427.

Plaintiff does not carry its burden to establish unreasonable discrimination. Plaintiff cites a map showing the city has ***1263** approved two other permits for wireless facilities in residential zones. R. 779-81. However, neither this map nor plaintiff establishes any relevant similarity (other than the common zoning designation) between those other two locations and the Golden Road location at issue here. The record shows the other facilities are "at different locations within the [city]." *MetroPCS,* 259 F.Supp.2d at 1012 (holding that a mere showing facilities were permitted in different locations within a district was not "unreasonable discrimination under the Telecommunications Act, as a matter of law"). In fact, the board specifically distinguished the other two sites. See *infra* at 1259-60. Nor does plaintiff show that the two other residential area permits were approved, as in this case, to improve indoor coverage rather than to fill a complete void in coverage. In sum,

> There is no evidence that the City Council had any intent to favor one company or form of service over another. [Instead] 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 the Act, an obviously absurd result.

City of Va. Beach, 155 F.3d at 427.

III. Conclusion

For the reasons discussed above the court affirms the city's denial of plaintiff's application for a con-

ditional use. The city's decision was based on more than a scintilla of evidence, does not effectively prohibit wireless services, and does not discriminate among providers.

IT IS SO ORDERED.

D.Or.,2004.
Voice Stream PCS I, LLC v. City of Hillsboro
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VoiceStream Minneapolis, Inc. v. St. Croix County
C.A.7 (Wis.),2003.

United States Court of Appeals,Seventh Circuit.
VOICESTREAM MINNEAPOLIS, INCORPORATED, formerly known as APT Minneapolis, Incorporated, a Delaware corporation, Plaintiff-Appellant,
v.
ST. CROIX COUNTY, a Wisconsin political subdivision, and its Board of Adjustment, Defendant-Appellee.
No. 02-2889.

Argued Feb. 18, 2003.
Decided Sept. 8, 2003.
Rehearing En Banc Denied Nov. 13, 2003.

Provider of personal communication services (PCS) brought action against county, alleging that county's denial of PCS provider's request for a special exception permit under county zoning ordinance for construction of proposed telecommunications tower was not supported by substantial evidence as required by the Telecommunications Act (TCA) and had the effect of prohibiting the provision of personal wireless services in violation of the TCA. The United States District Court for the Western District of Wisconsin, Barbara B. Crabb, Chief Judge, 212 F.Supp.2d 914, granted county's motion for summary judgment, and PCS provider appealed. The Court of Appeals, Ripple, Circuit Judge, held that: (1) as required under the TCA, substantial evidence supported county's denial of PCS provider's request for special exception permit under county zoning ordinance for construction of proposed 185-foot telecommunications tower in scenic river district, on ground that tower would be inconsistent with county zoning ordinance, and (2) PCS provider failed to meet its heavy burden, under TCA provision that bars state and local regulation of the placement of and construction of personal wireless facilities from prohibiting or having the effect of prohibiting the provision of personal wireless services, of showing that its proposal to build a 185-foot tower in scenic river district was the only feasible plan for closing gap in its coverage so as to render county's denial of special exception permit for construction of the tower a violation of the TCA provision.

Affirmed.

West Headnotes

[1] Zoning and Planning 414 ⚿703

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)4 Questions of Fact
414k703 k. Substantial Evidence. Most Cited Cases
Substantial evidence review under the Telecommunications Act (TCA) does not create a substantive federal limitation upon local land use regulatory power, but rather, is a procedural safeguard which is centrally directed at whether a local zoning authority's decision is consistent with the applicable local zoning requirements, and is highly deferential to the local board. Communications Act of 1934, § 332(c)(7)(B)(iii), as amended, 47 U.S.C.A. § 332(c)(7)(B)(iii).

[2] Zoning and Planning 414 ⚿703

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)4 Questions of Fact
414k703 k. Substantial Evidence. Most Cited Cases
Substantial evidence review under the Telecommunications Act (TCA) is the same standard of review used by courts when reviewing the decision of an administrative agency, i.e., such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Communications Act of 1934,

§ 332(c)(7)(B)(iii), as amended, 47 U.S.C.A. § 332(c)(7)(B)(iii).

[3] Zoning and Planning 414 ⚿680.1

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)3 Presumptions
414k680 Burden of Showing Grounds for Review
414k680.1 k. In General. Most Cited Cases

Zoning and Planning 414 ⚿703

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)4 Questions of Fact
414k703 k. Substantial Evidence. Most Cited Cases
The party seeking to overturn a local zoning board's decision on a matter under the Telecommunications Act (TCA) has the burden of proving that the decision is not supported by substantial evidence. Communications Act of 1934, § 332(c)(7)(B)(iii), as amended, 47 U.S.C.A. § 332(c)(7)(B)(iii).

[4] Zoning and Planning 414 ⚿384.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases
As required under the Telecommunications Act (TCA), substantial evidence supported county's denial of personal communication services (PCS) provider's request for special exception permit under county zoning ordinance for construction of proposed 185-foot telecommunications tower in scenic river district, on ground that tower would be inconsistent with county zoning ordinance, a stated purpose of which was to minimize adverse visual effects of wireless communication facilities through careful siting and design standards; county conducted on-site investigation and documented that the tower would predominate scenic landscape and be visible for several miles along riverway, and had much supporting testimony that tower would interfere with area's unique scenery and adjacent historic district. Communications Act of 1934, § 332(c)(7)(B)(iii), as amended, 47 U.S.C.A. § 332(c)(7)(B)(iii).

[5] Zoning and Planning 414 ⚿642

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)2 Additional Proofs and Trial De Novo
414k642 k. Trial De Novo in General. Most Cited Cases
The issue of whether a local zoning authority has prohibited or effectively prohibited the provision of wireless services in violation of the Telecommunications Act (TCA) is determined de novo by a reviewing court. Communications Act of 1934, § 332(c)(7)(B)(i)(II), as amended, 47 U.S.C.A. § 332(c)(7)(B)(i)(II).

[6] Zoning and Planning 414 ⚿605

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)1 In General
414k605 k. Decisions of Boards or Officers in General. Most Cited Cases
Whether a particular local zoning decision violates provision of the Telecommunications Act (TCA) that bars state and local regulation of the placement of and construction of personal wireless facilities from prohibiting or having the effect of prohibiting the provision of personal wireless services is a question that a federal district court determines in the first instance without any deference to the local zoning board. Communications Act of 1934, §

332(c)(7)(B)(i)(II), as amended, 47 U.S.C.A. § 332(c)(7)(B)(i)(II).

[7] Zoning and Planning 414 ⚿641

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)2 Additional Proofs and Trial De Novo
414k641 k. Additional Proofs. Most Cited Cases
In resolving issue whether a particular local zoning decision violates provision of the Telecommunications Act (TCA) that bars state and local regulation of the placement of and construction of personal wireless facilities from prohibiting or having the effect of prohibiting the provision of personal wireless services, the district court may require evidence to be presented in court that is outside of the administrative record compiled by the local authority. Communications Act of 1934, § 332(c)(7)(B)(i)(II), as amended, 47 U.S.C.A. § 332(c)(7)(B)(i)(II).

[8] Zoning and Planning 414 ⚿14

414 Zoning and Planning
414I In General
414k14 k. Concurrent and Conflicting Regulations. Most Cited Cases
Provision of the Telecommunications Act (TCA) that bars state and local regulation of the placement of and construction of personal wireless facilities from prohibiting or having the effect of prohibiting the provision of personal wireless services is not restricted to blanket bans on cell towers, and may, at times, apply to individual zoning decisions. Communications Act of 1934, § 332(c)(7)(B)(i)(II), as amended, 47 U.S.C.A. § 332(c)(7)(B)(i)(II).

[9] Zoning and Planning 414 ⚿14

414 Zoning and Planning
414I In General
414k14 k. Concurrent and Conflicting Regulations. Most Cited Cases
In order to show violation of provision of the Telecommunications Act (TCA) that bars state and local regulation of the placement of and construction of personal wireless facilities from prohibiting or having the effect of prohibiting the provision of personal wireless services, a provider of wireless services need not show a consistent pattern of denials or evidence of express hostility to personal wireless facilities, but must show more than that it was denied an opportunity to fill a gap in its service system. Communications Act of 1934, § 332(c)(7)(B)(i)(II), as amended, 47 U.S.C.A. § 332(c)(7)(B)(i)(II).

[10] Zoning and Planning 414 ⚿14

414 Zoning and Planning
414I In General
414k14 k. Concurrent and Conflicting Regulations. Most Cited Cases
In order to establish a violation of provision of the Telecommunications Act (TCA) that bars state and local regulation of the placement of and construction of personal wireless facilities from prohibiting or having the effect of prohibiting the provision of personal wireless services, a provider of wireless services must first show that its proposed facility will close a significant gap in coverage. Communications Act of 1934, § 332(c)(7)(B)(i)(II), as amended, 47 U.S.C.A. § 332(c)(7)(B)(i)(II).

[11] Zoning and Planning 414 ⚿384.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases
So long as a personal wireless service provider has not investigated thoroughly the possibility of other viable alternatives, the denial of an individual permit for a telecommunications facility does not prohibit or have the effect of prohibiting the provision

of personal wireless services in violation of the Telecommunications Act (TCA). Communications Act of 1934, § 332(c)(7)(B)(i)(II), as amended, 47 U.S.C.A. § 332(c)(7)(B)(i)(II).

[12] Zoning and Planning 414 ⚿384.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases

Personal communication services (PCS) provider failed to meet its heavy burden, under Telecommunications Act (TCA) provision that bars state and local regulation of the placement of and construction of personal wireless facilities from prohibiting or having the effect of prohibiting the provision of personal wireless services, of showing that its proposal to build a 185-foot tower in scenic river district was the only feasible plan for closing gap in its coverage so as to render county's denial of special exception permit for construction of the tower a violation of the TCA provision; although several alternatives to the proposed site were suggested by both the county and the PCS provider, the PCS provider did not thoroughly investigate the viability of the alternatives. Communications Act of 1934, § 332(c)(7)(B)(i)(II), as amended, 47 U.S.C.A. § 332(c)(7)(B)(i)(II).

***821** Gary A. Van Cleve (Argued), Larkin, Hoffman, Daly & Lindgren, Bloomington, MN, for Plaintiff-Appellant.
Mark J. Steichen (Argued), Anita T. Gallucci, Boardman, Suhr, Curry & Field, Madison, WI, for Defendant-Appellee.

Before RIPPLE, DIANE P. WOOD and EVANS, Circuit Judges.

RIPPLE, Circuit Judge.
VoiceStream Minneapolis, Inc. ("VoiceStream") brought this action against the County of St. Croix, Wisconsin, and its Board of Adjustment (collectively, "the County") under § 704 of the Telecommunications Act of 1996, 47 U.S.C. § 332. The County had denied VoiceStream's application for a special exception permit to construct and operate a telecommunications tower. The district court granted summary judgment in favor of the County. It held that the County's denial of VoiceStream's application was supported by substantial evidence and that VoiceStream had failed to demonstrate that the County's decision had the effect of prohibiting personal wireless services. VoiceStream asks us to reverse the judgment of the district court and to direct that an injunction be granted, directing the County to issue the requested permit. For the reasons set forth in the following opinion, we affirm the judgment of the district court.

I

BACKGROUND

A. Facts

VoiceStream, formerly known as APT Minneapolis, Inc., is a provider of personal communication services ("PCS"). St. Croix County is a political subdivision of the State of Wisconsin. The St. Croix County Board of Adjustment ("Board of Adjustment") is a quasi-judicial arm of the County with the responsibility for reviewing applications for special exception permits ("SEP") under the County's zoning ordinance. VoiceStream is licensed by the Federal Communications Commission ("FCC") to provide PCS to customers in several states, including Wisconsin and Minnesota. The County is included within the geographic boundaries of VoiceStream's license for providing PCS in Wisconsin.

VoiceStream's commercial license requires it to provide adequate PCS coverage to its customers within the geographic boundaries of its license. *See*

R.22 at 5-6. The technology that VoiceStream is licensed to implement requires the construction and placement of antennas that are capable of receiving and transmitting wireless communication signals in accordance***822** with radio frequency standards. *See id.* at 7. The location of these antennas "takes into account several factors including (a) population demands (residential, commercial, and vehicular), (b) topographical constraints of the land, such as uneven terrain, buildings, extensive tree cover or vegetation, (c) the height of the proposed antenna, and (d) the proximity to and height of other antennas." *Id.* In order for PCS to function properly, the antenna must be elevated to allow a relatively unimpeded line of sight to the end users' telecommunications equipment. *See id.* This goal often is attained by locating the antenna on an existing structure such as a water or fire tower. *See id.* Where no such structure is available, a communications tower must be constructed to elevate the antenna to the proper height. *See id.* Although the signal from the antenna can penetrate trees and buildings, it cannot penetrate hills. *See* R.29 at 22. Thus, in order to provide PCS in an area with hills, the service provider must either increase the elevation of the antenna or increase the number of antenna locations. *See* R.20, Ex.4 at 21.

VoiceStream began seeking a location for an antenna that would fill a gap in its PCS coverage along Wisconsin Highway 35, Minnesota Highway 95, the St. Croix River Valley and the surrounding area. *See* R.16, Ex.B at 1. VoiceStream determined that, in keeping with its goal of meeting "full coverage objective[s] with only one tower," R.16, Ex.EE, § 2 at 1, the best site was on the agriculturally zoned property owned by William and Opal Haase ("Haases") in Somerset Township, Wisconsin ("Somerset site"). Somerset is located in St. Croix County.

The Somerset site sits on a bluff overlooking the St. Croix River and the Lower St. Croix National Scenic Riverway (the "Riverway"). In fact, the proposed tower would be located just 660 feet east of the Riverway boundary. *See* R.16, Ex.C at 2. The Riverway runs north to south as the river flows past the Somerset site. The river serves as the boundary between Wisconsin and Minnesota. *See* R.20, Ex.4J. The National Park Service ("Park Service") owns and manages the Riverway, which includes the St. Croix River and approximately 1/4 mile of land on either side in Minnesota and in Wisconsin. *See* R.29 at 5-6. The County has exercised its zoning authority over that portion of the Riverway that is within its boundaries and has created a zoning district bordering the river called the "Riverway District." *See* R.20, Ex.1 at 4. The Riverway "was designated under the Wild and Scenic Rivers Act in 1972 (Public Law 90-542) [16 U.S.C. § 1271*et seq.*] to protect its outstandingly remarkable scenic, recreational and geologic values for present and future generations." R.16, Ex.D.

Directly across the river from the Somerset site is the City of Marine on St. Croix ("Marine") and the Marine on St. Croix Historic District ("Historic District"). *See id.* The Historic District includes the Marine Mill ruins, which is the site of the first sawmill in Minnesota and the birthplace of the Minnesota lumbering industry. *See id.* The Historic District was nominated to the National Register of Historic Places in 1974. *See id.*

In 1997, the County enacted Ordinance No. 440, which regulates the placement of wireless communication facilities in the County and provides a specific application process for new facilities. *See* R.16, Ex.F. One of the stated purposes of the ordinance is to "[m]inimize adverse visual effects of wireless communication facilities through careful siting and design standards." *See id.* at 1. Wireless communication facilities are regulated according to the zoning district in which the property is ***823** located. *See id.* at 3. When property is located in an agricultural district, anyone seeking to attach an antenna to an existing structure where the antenna extends more than 20 feet above the structure, or seeking to construct a new tower with a maximum height of 300 feet, must submit a SEP application

to the Board of Adjustment pursuant to § 17.70(7) of the County ordinance. *See id.* at 4. A SEP application also must be submitted in order to place an antenna in the Riverway District. *See id.* However, the zoning ordinance regulating the Riverway District only permits an antenna to be attached to an existing structure, and the antenna must not extend more than 20 feet above the structure. *See id.* No other towers or antennas are permitted in the Riverway District. *See id.*

On February 9, 2000, VoiceStream entered into a lease agreement with the Haases. The agreement gave VoiceStream permission to build and maintain a communications facility on the Haases' agriculturally-zoned property, subject to the requirement that VoiceStream obtain all necessary permits from local and federal land use jurisdictions. *See* R.16, Ex.A. The most prominent feature of the proposed facility would be an 185-foot tower upon which the PCS antennas would be located. *See* R.16, Ex.H.FN1

> FN1. At its base the proposed tower is over five feet in diameter. *See* R.16, Ex.H. The diameter of the tower tapers gradually as it extends upward and measures three feet in diameter at the midpoint, and two feet in diameter at the top. *See id.* Atop the tower sits a triangular array of antennas. *See* R.16, Ex.G. Each of the three sides of this array extend outward from the tower and span approximately fifteen to twenty feet. *See id.*

On March 7, 2000, VoiceStream sent a letter to the Planning Commission for the Town of Somerset, requesting approval for its tower. *See* R.16, Ex.B. The town planning commission met on March 15, 2000, to consider the tower proposal. *See* R.16, Ex.C at 2. At this meeting, several members of the local community expressed concern that the proposed tower was not in keeping with the pristine scenic nature of the Riverway. *See id.* at 3. A Park Service representative also testified concerning the millions of dollars that had been spent to preserve the scenic qualities of the Riverway. He opined that allowing a 185-foot tower in this location would be a visual intrusion on the Riverway and would pose a serious threat to the scenic values that the Riverway was designed to protect. *See id.* The Planning Commission, in its advisory role to the Somerset Town Board, voted six-to-one to deny the proposed tower because of "the visual impact on the area and a lack of clarity in the presentation." *Id.* at 4. Despite this negative recommendation, the Somerset Town Board voted two-to-one to approve the Somerset site with the provision that the Haases and VoiceStream further consider what specific tower design would be least obtrusive at that location. *See* R.16, Ex.E. The Somerset Town Board also noted that County approval would be necessary for the proposed tower. *See id.*

In short order, VoiceStream filed a SEP application for the Somerset site with the County Zoning Office. *See* R.16, Ex.G. The Board of Adjustment promptly scheduled a hearing to review the application. However, because the FCC informed VoiceStream that its proposed tower may have adverse effects on the local environment and historical properties, VoiceStream requested that its application be removed from the Board of Adjustment's agenda. *See* R.16, Ex.K. Subsequently, VoiceStream held several public meetings to discuss the impact of the tower on the Historic District and on the Riverway. At one of these meetings, which was held on ***824** May 24, 2000, VoiceStream presented two alternatives to its one-tower Somerset site proposal. *See* R.16, Ex.N at 2. The first of these alternatives was a two-tower system with one 250-300 foot tower two miles west of the Riverway and one shorter tower located within the Riverway. *See id.* Also proposed was a four-tower system with three 80-100 foot towers located directly adjacent to Minnesota 95 and another 80-100 foot tower located along Wisconsin 35. *See id.* In a May 31, 2000, memorandum summarizing this meeting, VoiceStream's attorney, Greg Korstad, indicated that either of these multiple-tower alternatives would provide adequate coverage for the area

sought to be covered by the Somerset site. *See id.* at 1-2.

VoiceStream worked with the local historical societies, both in Wisconsin and in Minnesota, to determine if the proposed Somerset site would have substantially adverse effects on their respective historical sites. *See* R.16, Ex.O, P. As part of this effort, VoiceStream conducted a "crane test" on June 27, 2000, which consisted of extending a crane to the proposed height at the Somerset site, as well as two other alternative single-tower sites, in order for local residents to get a better idea of the potential visual impact of the proposed tower at each site. *See* R.16, Ex.P. Photos were taken at different locations in the Historic District and in the Riverway and submitted to the Board of Adjustment as exhibits to the SEP. A follow-up meeting was held on August 10, 2000, to discuss the results of the crane test with the local residents, historical society representatives, Park Service representatives and local government officials. *See* R.22 at 15.

The Board of Adjustment scheduled a hearing on September 28, 2000, to consider the Somerset site SEP application. *See* R.16, Ex.S. Included in the record before the Board of Adjustment were several letters from local residents expressing concern over, among other things, the aesthetic impact of the proposed tower. *See* R.16, Ex.U. The record also contained a report written by Jeff Nelson, a consultant retained by the County to review VoiceStream's SEP application. *See* R.16, Ex.V. Nelson found that there was a gap in VoiceStream's coverage that needed to be filled. *See id.* at 2. He also was unable to find any suitable existing structures upon which antennas could be located to fill the gap. *See id.* He concurred with the position advocated by the Park Service that the tower would indeed be visible from water level in the Riverway and from the Historic District across the river. *See id.* He also opined that VoiceStream had "an economic interest in limiting the number of towers to cover" the area and that VoiceStream could achieve its coverage objectives with multiple shorter towers in lieu of a single 185-foot tower. *Id.* at 3. Finally, Nelson further stated that the proposed tower was a "standard" design, which did not attempt to minimize the adverse visual effects on the Riverway or on the adjacent Historic District. *See id.* Also in the record before the Board of Adjustment was a letter from the Park Service expressing concern about the height and location of the proposed tower, a letter from the Minnesota Historical Society requesting more information on the proposal, a petition signed by some of the neighbors of the Haases in support of the tower, a letter from Marine with a resolution objecting to the proposed tower because of aesthetic considerations, a petition from twelve residents living near the Somerset site opposing the tower for aesthetic and other reasons, as well as several maps and diagrams showing the Somerset site and the proposed tower design. *See* R.16, Ex.T at 1.

At the public hearing, Attorney Korstad testified that there was a gap in VoiceStream's***825** coverage in the area surrounding the Riverway and that VoiceStream needed to fill the gap with a wireless communications facility. He also discussed the two alternative single-tower proposals explored during the crane test and explained why the Somerset site would be the least intrusive of the three proposals. *See* R.16, Ex.W at 7-8. Attorney Korstad made no mention, however, of the multiple-tower alternatives that VoiceStream had proposed earlier during the May 24, 2000, meeting. *See id.*

Also at the September 28, 2000, hearing, several individuals testified under oath about the proposed tower. The Haases testified in favor of the tower, as did their two sons Jason and Matt. Likewise, Brandon Johnson, a Radio Frequency Engineer, and Dan Menzer, a Senior Manager for Regulatory Affairs, both testified as employees of VoiceStream in favor of the tower. Charles Lederer, a neighbor to the Haases, also testified on behalf of the tower. Speaking against the tower were Paul Roelandt, a Park Service representative, as well as Nancy Nelson, Jack Warren, Glen Mills and Rosemary Pontuti, neighbors of the Haases who raised aesthetic,

health, wildlife and property value concerns. *See id.* at 1-28.

Following the hearing, the Board of Adjustment voted unanimously to table the proposal and to require additional information from VoiceStream. R.16, Ex.X at 8. The County Zoning Office sent a letter to VoiceStream detailing the Board of Adjustment's decision. *See* R.16, Ex.Y. Among other requirements, the letter stated that VoiceStream should "provide information on alternative sites with explanations of why they do or do not work for [VoiceStream's] intended purpose." R.16, Ex.Y at ¶ 5. The letter also specifically requested that "a plan be prepared (with a narrative, map and mock-up) that shows more towers at lesser heights to lessen the visual impact on this national scenic area." *Id.* The Board of Adjustment also requested a detailed plan covering "stealth" concealment that would lessen the visual impact of the proposed tower to the Riverway and to the Historic District. *See id.* at ¶ 4. Finally, the Board of Adjustment requested a detailed response to the concerns raised by Jeff Nelson's report. *See id.* at ¶ 7.

In the months that followed, VoiceStream held another series of public meetings in an attempt to resolve concerns surrounding the visual impact of the proposed tower on the Historic District. Although the record shows continued concern by several members of the community regarding the aesthetic impact of the tower on the Historic District, VoiceStream did succeed in obtaining letters from historical societies on both sides of the river that state that the proposed tower would have "no adverse impact to properties listed or eligible for listing on the National Historic Register" in the area. R.16, Ex.LL at App.D. Likewise, VoiceStream commissioned Pinnacle Engineering, Inc. to prepare an environmental assessment in accordance with 47 C.F.R. § 1.1311. *See* R.16, Ex.LL at 1. This assessment evaluated the environmental effects of the proposed installation in accordance with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. § 4321*et seq.* *See* R.16, Ex.LL at 1. The assessment concluded that the tower planned for the Somerset site did not "appear to present a significant adverse environmental impact." *Id.* at 10.

VoiceStream representatives also met with Jeff Nelson in an effort to address each of the concerns listed in his September 27, 2000, letter. *See* R.16, Ex.OO at 5. In a meeting on October 9, 2000, Nelson ***826** informed VoiceStream that the thrust of his written analysis to the Board of Adjustment "was that VoiceStream should investigate the use of a series of smaller structures to be used in the aggregate rather than one standard tower to meet its coverage objectives." R.23 at ¶ 4; *see also* R.24 at ¶¶ 3-4. Nelson met again with VoiceStream on October 25, 2000, and he once more emphasized the negative visual impact of the single-tower approach and suggested that VoiceStream investigate alternatives using multiple, shorter structures that would be "less conspicuous and more easily concealed and camouflaged." R.23 at ¶ 5; *see also* R.24 at ¶ 5. Nelson also recommended several existing structures as potential antenna locations. *See* R.16, Ex.OO at 6. Later, on June 20, 2001, Nelson was contacted by Steve Ramberg, the senior VoiceStream radio frequency operator who had conducted a review of alternative locations for placing an antenna. Nelson's conversation with Ramberg led him to conclude that VoiceStream only had considered single-tower alternatives, and had not considered whether an aggregation of sites could be used to meet VoiceStream's coverage objectives. *See* R.23 at ¶ 7.

In a letter dated May 10, 2001, VoiceStream responded to the Board of Adjustment's request for additional information. *See* R.16, Ex.OO. Among other things, VoiceStream explained why the existing structures suggested by Nelson as possible antenna locations would not work using a single-tower approach. However, VoiceStream did not discuss in any meaningful way the feasibility of using a combination of these structures in a multiple-antenna system to achieve its coverage objectives.

Nelson later reviewed this letter and concluded that VoiceStream had not investigated the use of multiple, shorter structures, inasmuch as no supporting information had been submitted to the Board of Adjustment that depicted coverage performance from a multi-site coverage solution. *See* R.23 at ¶ 6.

In a letter dated June 20, 2001, the County Zoning Office sent VoiceStream a copy of the staff report sent to the Board of Adjustment for the upcoming hearing on June 28, 2001. This report concluded that VoiceStream had not responded adequately to the Board of Adjustment's request for additional information regarding alternative stealth designs and had not submitted alternative mock-up plans. The report also set forth concerns about the lack of effort on VoiceStream's part to look into less visually intrusive alternatives to the Somerset site. *See* R.16, Ex.QQ.

Nelson sent a letter to the County Zoning Office on June 25, 2001, in which he stated that VoiceStream had not seriously considered multiple-tower options. R.16, Ex.TT. Ramberg responded to Nelson's conclusion in a memo, also dated June 25, 2001, in which he asserted: "We have as recommended by the County's consultant evaluated whether the service could be accomplished by increasing the number of sites using existing tall structures as antenna locations. We have concluded that it will not [ ] meet coverage objectives in the riverway area. Because of this, no multiple site configuration is presented." *See* R.26, Ex.UU.

The public hearing originally scheduled for June 28, 2001, was moved, at the request of VoiceStream, to July 26, 2001. R.16, Ex.VV. The record previously before the Board of Adjustment during the September 28, 2000, hearing was supplemented with additional letters from residents opposing and supporting the tower, including letters from the City of Marine, the Town of Somerset, and various local organizations and historical societies. *See* R.16, Ex.XX. Attorney Korstad again testified*827 on behalf of VoiceStream. In particular, he explained that VoiceStream's alternatives for constructing shorter towers were limited because of the County's ordinance prohibiting the construction of towers in the Riverway. *See* R.16, Ex.ZZ at 30-38. Steve Ramberg also testified on VoiceStream's behalf. When asked if he was aware that VoiceStream might be able to locate antennas within the Riverway, Ramberg replied, "No, not to my knowledge." R.16, Ex.ZZ at 44. Ramberg explained that he was told by VoiceStream that it could not locate antennas in the Riverway because of the local zoning ordinance. *See id.* When asked whether locating towers in the Riverway sounded like a viable option, Ramberg testified: "No, not really" because "we're trying to cover a broad area with as minimal [a] number of towers as we can." *Id.*

Also at the July 26, 2001, hearing, several individuals testified against VoiceStream's proposed tower. Tony Anderson, a superintendent of the Park Service at the St. Croix National Scenic Riverway in St. Croix Falls, testified that VoiceStream's proposed tower would "have a major and drastic impact upon the Riverway" and that less visually intrusive alternatives needed to be pursued. *See id.* at 38. Jill Medland, a planning and compliance specialist with the Park Service, testified that VoiceStream had not adequately explored the alternative of shorter towers with stealth designs. *See id.* at 39. Medland, along with Paul Roelandt, another representative of the Park Service, pointed out that VoiceStream could locate antennas within the Riverway with the permission of the Park Service, and that the Park Service repeatedly had offered to consider granting permission if the overall visual impact on the Riverway would be lessened. *See id.* at 39-40.[FN2] Jack Warren, a member of the planning commission for the City of Marine, also testified in opposition to the proposed tower. He stated that the City of Marine was in favor of utilizing multiple, shorter, more easily concealed towers as a means of minimizing the visual impact on the Riverway; he also indicated that he did not believe such an alternative had been adequately considered. *See id.* at 41. Charles Arneson, a resident of the City of Marine and a member of a committee ap-

pointed by the city to work on the tower proposal, further testified that the proposed tower would have an adverse visual impact on the scenic and historic resources of the St. Croix River Valley. *See id.* at 42. At the conclusion of the hearing, the Board conducted an on-site inspection of the Somerset site.

> FN2. In a letter dated August 27, 2001, Robert J. Karotko, a superintendent of the Park Service at the St. Croix National Scenic Riverway in St. Croix Falls, described an enclosed right-of-way permit issued to a wireless telecommunications provider for two wireless telecommunications facilities at Rock Creek Park in Washington D.C. *See* R.25, Ex.A. Superintendent Karotko also expressed his willingness to review an application for a telecommunications facility in the Riverway, but emphasized that any proposal could not be in derogation of the values and purposes for which the Riverway was established. *See id.*

On July 27, 2001, the five-member Board of Adjustment reconvened to vote on VoiceStream's SEP application. The Board of Adjustment voted three-to-two against granting the proposal for the Somerset site. *See* R.16, Ex.AAA at 16. On September 19, 2001, the Board of Adjustment issued a formal written decision, including findings of fact and conclusions of law, denying the application. *See* R.16, Ex.BBB. In its written decision, the Board of Adjustment concluded that "granting [ ] the request would not be consistent with the spirit and intent of the Zoning Ordinance." *Id.* The Board of Adjustment supported***828** its conclusion with the following findings:

1. The 185-foot cell tower would be visible from the Lower St. Croix National Scenic Riverway.
2. The applicant has not adequately researched or brought forth information on an alternative site or multiple alternative sites to lessen the visual impact on the Lower St. Croix National Scenic Riverway.
3. The National Park Service (NPS) has provided testimony stating that they would work with the applicant to explore and develop stealth sites within NPS riverway areas.

* * * * * *

5. This tower and this location had tremendous public and agency opposition.
6. Of any area in St. Croix County, the Lower St. Croix National Scenic Riverway and riverway valley is one of the most scenic areas in the region. This region requires careful wireless communication service facility siting and design to minimize adverse visual effects. This proposal does not minimize adverse visual effects.
7. The record will indicate the various concerns that the public and agencies had with this application. The various concerns are found in the public testimony and the exhibits brought forth by the public and governmental agencies.

Id. at 1-3. In finding number 4, the Board of Adjustment indicated its agreement with the conclusions in the zoning staff report. *See id.*

B. District Court Proceedings

Following the County's denial of VoiceStream's request for a SEP to construct its proposed tower, VoiceStream brought this action in the district court under the Telecommunications Act of 1996. It alleged that the County's decision was not supported by substantial evidence as required by 47 U.S.C. § 332(c)(7)(B)(iii) and that the denial has the effect of prohibiting the provision of personal wireless services in violation of 47 U.S.C. § 332(c)(7)(B)(i)(II). The parties filed cross-motions for summary judgment and the district court granted the County's motion. The court held (1) that substantial evidence in the record supported the County's determination that VoiceStream's proposed telecommunications tower would have an adverse visual impact on the Lower St. Croix National Scenic Riverway and that VoiceStream had not shown the infeasibility of other, less visually intrusive alternatives for closing its coverage gap, and (2)

that VoiceStream failed to meet its burden of proof to show that the County's decision effectively prohibited personal wireless services.

II

DISCUSSION

A. Introduction

Congress enacted the Telecommunications Act of 1996 ("TCA"), 47 U.S.C. § 151*et seq.*,"to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub.L. No. 104-104, 110 Stat. 56, 56 (1996). Among the technologies addressed by Congress in the TCA was wireless communications services. In regard to this technology, Congress found that "siting and zoning decisions by non-federal units of government" had "created an inconsistent and, at times, conflicting patchwork of requirements" that was inhibiting the deployment of wireless communications services. H.R. Rep. 104-204, at 94 (1995), ***829** *reprinted in* 1996 U.S.C.C.A.N. 10, 61. At the same time, Congress recognized that "there are legitimate State and local concerns involved in regulating the siting of such facilities ..., such as aesthetic values and the costs associated with the use and maintenance of public rights-of-way." *Id.* To address the problems created by local zoning decisions, the House version of the TCA would have given authority to the FCC to regulate directly the siting of wireless communications towers. The Conference Committee, however, decided against complete federal preemption, opting to "preserve[ ] the authority of State and local governments over zoning and land use matters except in [ ] limited circumstances." *See*H.R. Conf. Rep. No. 104-458, at 207-08 (1996). Therefore, § 704(a) of the TCA, 47 U.S.C. § 332(c)(7), strikes a delicate balance between the need for a uniform federal policy and the interests of state and local governments in continuing to regulate the siting of wireless communications facilities. Under that section, state and local governments retain the authority to regulate the siting of wireless telecommunications facilities, but their decisions are subject to certain procedural and substantive limitations. *See*47 U.S.C. § 332(c)(7).[FN3] Only two of those limitations are relevant here. First, the County's denial of VoiceStream's permit must be "supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). Second, the County's denial of the permit must not "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II).

FN3. 47 U.S.C. § 332(c)(7) provides:
Preservation of local zoning authority
(A) General authority
Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.
(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.
47 U.S.C. § 332(c)(7).

B. Substantial Evidence

VoiceStream contends that the district court erred when it granted summary judgment in favor of the County because the County's decision to deny VoiceStream's SEP application was not supported by substantial evidence. According to VoiceStream, it demonstrated to the County that the proposed tower at the Somerset site would not have an adverse visual impact on the area and that the proposal was the only legally and technologically viable ***830** alternative available to close the undisputed coverage gap. The County, on the other hand, maintains that the district court properly granted summary judgment in the County's favor because its decision was supported by substantial evidence that VoiceStream's proposed tower would have an adverse visual impact on the extraordinary scenery of the Lower St. Croix National Scenic Riverway and because VoiceStream failed to show the infeasibility of less visually intrusive alternatives for closing the coverage gap.

[1][2][3] The TCA requires that "[a]ny 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." 47 U.S.C. § 332(c)(7)(B)(iii).[FN4] "Substantial evidence review under the TCA does not create a substantive federal limitation upon local land use regulatory power." *Southwestern Bell Mobile Sys., Inc. v. Todd,* 244 F.3d 51, 58 (1st Cir.2001) (internal quotation marks omitted); *see also Preferred Sites, LLC v. Troup County,* 296 F.3d 1210, 1219 (11th Cir.2002); *Aegerter v. City of Delafield,* 174 F.3d 886, 890 (7th Cir.1999); *Cellular Tel. Co. v. Town of Oyster Bay,* 166 F.3d 490, 494 (2d Cir.1999). Rather, "[t]he TCA's substantial evidence test is a procedural safeguard which is centrally directed at whether the local zoning authority's decision is consistent with the applicable [local] zoning requirements." *ATC Realty, LLC v. Town of Kingston,* 303 F.3d 91, 94 (1st Cir.2002) (internal quotation marks omitted); *see also Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Township,* 181 F.3d 403, 408 (3d Cir.1999); *Town of Amherst v. Omnipoint Communications Enters., Inc.,* 173 F.3d 9, 16 (1st Cir.1999). "The substantial evidence test is highly deferential to the local board." *Second Generation Props., L.P. v. Town of Pelham,* 313 F.3d 620, 627 (1st Cir.2002). It is the same standard of review used by courts when reviewing the decision of an administrative agency-"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *City of Delafield,* 174 F.3d at 889 (internal quotation marks omitted); *see also Town of Kingston,* 303 F.3d at 94; *Troup County,* 296 F.3d at 1218; *Telespectrum, Inc. v. Pub. Serv. Comm'n of Kentucky,* 227 F.3d 414, 423 (6th Cir.2000). "[T]he party seeking to overturn the local zoning board's decision has the burden of proving that the decision is not supported by substantial evidence." *American Tower LP v. City of Huntsville,* 295 F.3d 1203, 1207 (11th Cir.2002); *see also Todd,* 244 F.3d at 63; *MetroPCS, Inc. v. City and County of San Francisco,* 259 F.Supp.2d 1004, 1009-10 (N.D.Cal.2003); *Primeco Pers. Communications, Ltd. P'ship v. City of Mequon,* 242 F.Supp.2d 567, 575 (E.D.Wis.2003); ***831***APT Minneapolis, Inc. v. Eau Claire County,* 80 F.Supp.2d 1014, 1022 (W.D.Wis.1999).[FN5]

FN4. VoiceStream does not dispute that the Board of Adjustment's decision was "in writing" for purposes of the TCA; accordingly, we have no occasion to consider the "in writing" requirement of § 332(c)(7)(B)(iii) at this time. *Compare New Par v. City of Saginaw,* 301 F.3d 390,

395 (6th Cir.2002) ("[F]or a decision by a State or local government or instrumentality thereof denying a request to place, construct, or modify personal wireless service facilities to be 'in writing' ..., it must (1) be separate from the written record; (2) describe the reasons for the denial; and (3) contain a sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record that supports those reasons."), *and Southwestern Bell Mobile Sys., Inc. v. Todd,* 244 F.3d 51, 60 (1st Cir.2001) (same), *with AT & T Wireless PCS, Inc. v. City Council of City of Virginia Beach,* 155 F.3d 423, 430 (4th Cir.1998) ("The 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 therefor.").

FN5. As stated in the text, the Eleventh Circuit has held squarely that the burden is on the party seeking to overturn the decision. *See American Tower LP v. City of Huntsville,* 295 F.3d 1203, 1207 (11th Cir.2002). The First Circuit also appears to place the burden of proof on the party seeking to overturn the decision. *See S.W. Bell Mobile Sys., Inc. v. Todd,* 244 F.3d 51, 63 (1st Cir.2001) ("The 'substantial evidence' requirement does nothing more than allow applicants to overturn denials if they can prove that the denial lacks adequate evidentiary support in the record."). The Second and Sixth Circuits have indicated that it is unclear which party bears the burden of proof and have declined to resolve the issue because the evidence before the courts was insufficient to support the denial either way. *See Laurence Wolf Capital Mgmt. v. City of Ferndale,* Nos. 01-1142, 01-1457, 2003 WL 1875554, at *17 (6th Cir. Apr.10, 2003); *Cellular Tel. Co. v. Town of Oyster Bay,* 166 F.3d 490, 496-97 (2d Cir.1999). The district courts are split on the issue, but several recent cases have held that the burden rests with the party seeking to overturn the decision. *See, e.g., MetroPCS, Inc. v. City and County of San Francisco,* 259 F.Supp.2d 1004, 1009 (N.D.Cal.2003); *Primeco Pers. Communications, Ltd. P'ship v. City of Mequon,* 242 F.Supp.2d 567, 575 (E.D.Wis.2003).

In this case, the County concluded that VoiceStream's request "would not be consistent with the spirit and intent of the Zoning Ordinance." *See* R.16, Ex.BBB at 1. One of the stated purposes of the County's Wireless Communication Facilities Ordinance is to "[m]inimize [the] adverse visual effects of wireless communication facilities through careful siting and design standards." *See* R.16, Ex.F. The County specifically found that the proposed "185-foot cell tower would be visible from the Lower St. Croix National Scenic Riverway," that "the Lower St. Croix National Scenic Riverway and riverway valley is one of the most scenic areas in the region," that "[t]his region requires careful wireless communication service facility siting and design to minimize adverse visual effects" and that VoiceStream's proposed tower "does not minimize adverse visual effects." R.16, Ex.BBB at 1-3.

In *City of Delafield,* we stated that "[n]othing in the Telecommunications Act forbids local authorities from applying general and nondiscriminatory standards derived from their zoning codes, and ... aesthetic harmony is a prominent goal underlying almost every such code." *City of Delafield,* 174 F.3d at 891. Indeed, every circuit to consider the issue has determined that aesthetics may constitute a valid basis for denial of a wireless permit if substantial evidence of the visual impact of the tower was before the board. *See Troup County,* 296 F.3d at 1219; *Todd,* 244 F.3d at 61; *Pine Grove Township,* 181 F.3d at 408; *AT & T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment,* 172 F.3d 307, 316 (4th Cir.1999); *Town of Oyster Bay,* 166 F.3d at 495. Of course, a "few generalized expres-

sions of concern with aesthetics," standing alone, cannot serve as substantial evidence on which to base a wireless permit denial. *New Par v. City of Saginaw,* 301 F.3d 390, 398 (6th Cir.2002) (internal quotation marks omitted); *Troup County,* 296 F.3d at 1219; *Town of Oyster Bay,* 166 F.3d at 496. Because "[f]ew people would argue that telecommunications towers are aesthetically pleasing," a local zoning board's "aesthetic judgment must be grounded in the specifics of the case." *Todd,* 244 F.3d at 61.

[4] In this case, the district court correctly determined that substantial evidence supported the County's conclusion that the design and location of VoiceStream's tower as proposed would have an adverse visual impact on the Lower St. Croix Riverway and surrounding area. The district court discussed thoroughly the ***832** specific aesthetic concerns raised by numerous citizens and organizations in opposition to VoiceStream's proposed tower:

> Although some of the comments from the public consisted of general statements that the tower was an eyesore and would have a negative impact on property values, most of the concerns about aesthetics were focused on the incompatibility of a 185-foot tower on the river bluff extending noticeably above the tree line with the extraordinary scenery of the National Scenic Riverway and with the historic district in the City of Marine on St. Croix. In particular, the National Park Service voiced strong opposition to the tower, asserting that the unspoiled view of the St. Croix River Valley was a unique natural resource that deserved unusual protection. The park service supported its position with maps developed during the crane testing that showed that a tower on the Haase site would be visible from locations up to four miles away on the St. Croix River and Minnesota Highway 95 and from the [City of] Marine on St. Croix Historic District. The tower's visibility from various sites in the City of Marine on St. Croix was confirmed by photographs submitted to the board by local residents.
>
> Contrary to [VoiceStream's] assertion, the National Park Service was not the only
> the tower on grounds that it wa
> the character and scenery of the St. C
> way.... [T]he City of Marine on St. Croix, the St. Croix River Association, the Minnesota-Wisconsin Boundary Area Commission and several members of the public expressed the view that the riverway was a unique scenic resource that would be harmed by [VoiceStream's] proposed tower. Several of these groups and individuals expressed a preference for a multiple-tower approach utilizing towers that were more consistent in height and appearance with existing features in the landscape. This view was supported by zoning board staff, who concluded that the St. Croix Riverway and nearby historic preservation areas such as Marine on St. Croix possessed extraordinary scenic qualities that demanded special consideration for proposed wireless telecommunication service facilities.
>
> R.32 at 41-42.

[5] The County's determination that the proposed tower would adversely impact the aesthetic harmony of the Lower St. Croix Riverway was "grounded in the specifics of the case." *Todd,* 244 F.3d at 61. The decision was not based on speculation or conjecture; the County conducted an on-site investigation, and a map prepared by the Park Service based on VoiceStream's crane test documented that the 185-foot tower would be visible for several miles along the Riverway. Photographs taken during the crane test showed that the proposed tower would predominate the landscape of the bluff overlooking the Riverway. Additionally, Park Service representatives, local residents and various state and local entities, many of whom observed the crane test, testified that VoiceStream's proposed tower would interfere with the unique scenery of the Lower St. Croix Riverway. Based on this evidence, the district court correctly determined that the County's decision did not violate the substantial evidence requirement of § 332(c)(7)(B)(iii).[FN6]

> FN6. The County's conclusion that VoiceStream "has not adequately re-

> searched or brought forth information on an alternative site or multiple alternative sites to lessen the visual impact on the Lower St. Croix National Scenic Riverway," is addressed below in connection with the TCA's anti-prohibition clause. *See* R.16, Ex.BBB at 1. "Unlike the substantial evidence issue, the issue of whether the [County] has prohibited or effectively prohibited the provision of wireless services is determined de novo" by a reviewing court. *Second Generation Props. L.P. v. Town of Pelham,* 313 F.3d 620, 629 (1st Cir.2002).

***833 C. Effective Prohibition**

VoiceStream submits that the district court erred when it granted the County's motion for summary judgment because the County's denial of VoiceStream's SEP application had the effect of prohibiting personal wireless services. VoiceStream maintains that it adequately demonstrated that the Somerset site is the only legally and technologically viable alternative to close the undisputed coverage gap. The County, on the other hand, maintains that the district court properly granted summary judgment in its favor because VoiceStream did not meet its burden of proving the absence of other feasible alternatives to fill the coverage gap.

[6][7] The TCA provides that, in regulating the placement and construction of personal wireless facilities, a state or local government "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). Whether a particular zoning decision violates the TCA's anti-prohibition clause is a question "that a federal district court determines in the first instance without any deference to the [local zoning] board." *National Tower, LLC v. Plainville Zoning Bd. of Appeals,* 297 F.3d 14, 22 (1st Cir.2002). In resolving this issue, the district court may "require evidence to be presented in court that is outside of the administrative record compiled by the local authority." *Id.* This court reviews de novo the district court's grant of summary judgment to the County. *See id.*

[8] We have not addressed squarely the meaning of the TCA's anti-prohibition clause. *See Aegerter,* 174 F.3d at 890 (holding that the city's decision to deny the provider's request to replace an existing tower was supported by substantial evidence and declining to comment on "how broad the duty is on any given municipal entity to ensure that wireless services remain available" because the provider conceded that it could continue to provide service with the existing tower). Other circuits have determined that the clause "is not restricted to blanket bans on cell towers," and that "[t]he clause may, at times, apply to individual zoning decisions." *Second Generation Props.,* 313 F.3d at 629; *see also 360 Degrees Communications Co. of Charlottesville v. Bd. of Supervisors of Albemarle County,* 211 F.3d 79, 86 (4th Cir.2000); *APT Pittsburgh Ltd. P'ship v. Penn Township Butler County,* 196 F.3d 469, 479 (3d Cir.1999); *Sprint Spectrum, L.P. v. Willoth,* 176 F.3d 630, 640 (2d Cir.1999); *but see AT & T Wireless PCS, Inc. v. City Council of City of Virginia Beach,* 155 F.3d 423, 427 (4th Cir.1998) (concluding that the TCA's anti-prohibition clause applies only to "blanket prohibitions" and "general bans or policies," not to individual zoning decisions). Those courts properly have recognized that "[c]onstruing subsection B(i)(II) to apply only to general bans would lead to the conclusion that, in the absence of an explicit anti-tower policy, a court would have to wait for a series of denied applications before it could step in and force a local government to end its illegal boycott of personal wireless services." *Willoth,* 176 F.3d at 640-41.

[9][10][11] Although an individual zoning decision is capable of violating the anti-prohibition clause and the provider need not show "a consistent pattern of denials ***834** or evidence of express hostility to personal wireless facilities, ... it is necessary for the provider to show more than that it was denied an opportunity to fill a gap in its service system." *Penn Township,* 196 F.3d at 480; *see also Al-*

bemarle, 211 F.3d at 86 ("[C]ase-by-case denials of permits for particular sites cannot, without more, be construed as a denial of wireless services.").[FN7] The First Circuit has held that the provider carries the "heavy" burden to show "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." *Town of Pelham,* 313 F.3d at 629 (quoting *Town of Amherst,* 173 F.3d at 14); *see also Plainville,* 297 F.3d at 20. Under this standard, the provider must show that its "existing application is the only feasible plan" and that "there are no other potential solutions to the purported problem." *Town of Pelham,* 313 F.3d at 630, 635; *see also Albemarle,* 211 F.3d at 86-87 (stating that, "conceptually, if wireless service could feasibly be provided from only one site, a denial of a permit for a facility at that site could amount to a prohibition of wireless services, in violation of (B)(i)(II)," but noting that such a situation is "unlikely in the real world").[FN8] We agree with the First ***835** Circuit's formulation of the statutory requirement and hold that, so long as the service provider has not investigated thoroughly the possibility of other viable alternatives, the denial of an individual permit does not "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C § 332(c)(7)(B)(i)(II).

FN7. In order to establish a violation of the TCA's anti-prohibition clause, the service provider must first show that its proposed facility will close a "significant gap" in coverage. *See Omnipoint Communications Enters., L.P. v. Zoning Hearing Bd. of Easttown Township,* 331 F.3d 386, 399-400 (3d Cir.2003); *Second Generation Props.,* 313 F.3d at 631-32; *Sprint Spectrum, L.P. v. Willoth,* 176 F.3d 630, 643 (2d Cir.1999). In this case, however, it is undisputed that there is a significant gap in coverage that needs to be closed by a telecommunications facility. Accordingly, we have no occasion to consider what constitutes a significant gap in coverage.

FN8. The Third Circuit has held that the provider must show "that the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve." *APT Pittsburgh Ltd. P'ship v. Penn Township Butler County,* 196 F.3d 469, 480 (3d Cir.1999). In order to make such a showing, the provider must demonstrate that "a good faith effort has been made to identify and evaluate less intrusive alternatives, e.g., that the provider has considered less sensitive sites, alternative system designs, alternative tower designs, placement of antennae on existing structures, etc." *Id.* Consistent with the Third Circuit's approach, the Second Circuit had held that "[a] local government may reject an application for construction of a wireless service facility in an under-served area without thereby prohibiting personal wireless services if the service gap can be closed by less intrusive means." *Willoth,* 176 F.3d at 643.

The Fourth Circuit has criticized the "interpretive rule" of the Second and Third Circuits on the grounds that it unduly limits the discretion of the local zoning entity and that the statutory question requires no additional formulation:

This interpretive rule effectively creates a presumption, shifting the burden of production to the local government to explain its reason for denying such an application. But, as an interpretation of the Telecommunications Act, we believe this rule reads too much into the Act, unduly limiting what is essentially a fact-bound inquiry. A community could rationally reject the least intrusive proposal in favor of a more intrusive proposal that provides better service or that better promotes commercial goals of the community.

Even if we were to apply the rule formulated by the Second and Third Circuits, determinations about what constitutes the "least intrusive means" and "a significant gap" in services, would, we believe, quickly devolve into the broader inquiry indicated by the language of the statute: "Does the denial of a

permit for a particular site have the effect of prohibiting wireless services?" We believe that this statutory question requires no additional formulation and can best be answered through the case-by-case analysis that the Act anticipates. *360 Degrees Communications Co. of Charlottesville v. Bd. of Supervisors of Albemarle County,* 211 F.3d 79, 87 (4th Cir.2000). We share much of the Fourth Circuit's concern regarding the "interpretive rule" expounded by the Second and Third Circuits and agree that the proper inquiry is the one indicated by the statute: "Does the denial of a permit for a particular site have the effect of prohibiting wireless services?" *Id.*

[12] The district court correctly determined that VoiceStream failed to meet "its heavy burden of showing that its proposal to build a 185-foot tower on the Haase property is the only feasible plan for closing the gap in its coverage along Highways 95 and 35 and the St. Croix River." R.32 at 29. Although several alternatives to the Somerset site were suggested by both the County and VoiceStream, these alternatives were not pursued such that VoiceStream thoroughly investigated the viability of other alternatives. Although VoiceStream did investigate, at least partially, two single-tower alternatives to the Somerset site in its crane test, there is no evidence in the record to indicate that VoiceStream made a significant effort to investigate any multiple-tower alternatives despite the repeated requests of the Board of Adjustment. In particular, there is no evidence in the record to indicate that VoiceStream pursued adequately either of the multiple-tower alternatives that it mentioned during the May 24, 2000, meeting. *See* R.16, Ex.N at 2. The first of these multiple-tower alternatives included a tower in the Riverway. VoiceStream argues that such a placement is legally impermissible. It has not explained, however, why the repeated offers of both the Park Service and the County to consider favorably such an alternative would not permit adequate compliance. Moreover, the second multiple-tower alternative did not require the placement of any towers in the Riverway. Rather, this second alternative consisted solely of a series of towers along Minnesota 95 and Wisconsin 35. *See id.* In sum, VoiceStream indicated that both of these multiple-tower configurations might be viable alternatives to the Somerset site. Consequently, it was obligated to undertake further investigation to determine the feasability of each.

After the first hearing, the Board of Adjustment requested that VoiceStream "provide information on alternative sites with explanations of why they do or do not work for [VoiceStream's] intended purpose." R.16, Ex.Y at ¶ 5.[FN9] In particular, the Board of Adjustment requested that "a plan be prepared (with a narrative, map and mock-up) that shows more towers at lesser heights to lessen the visual impact on this national scenic area." *Id.* Later, in a meeting held on October 9, 2000, Nelson reiterated that the Board of Adjustment wanted VoiceStream to investigate the use of a "series of smaller structures to be used in the aggregate rather than one standard tower to meet its coverage objectives." R.23 at ¶ 4; *see also* R.24 at ¶¶ 3-4. Nelson met again with VoiceStream on October 25, 2000, and once more emphasized the negative visual impact of the single-tower approach and suggested that ***836** VoiceStream investigate alternatives using multiple, shorter structures that would be "less conspicuous and more easily concealed and camouflaged." R.23 at ¶ 5; *see also* R.24 at ¶ 5.

> FN9. The Board of Adjustment's request for additional evidence was proper under the County's Ordinance, which provides that "[t]he Zoning Administrator or Board of Adjustment may, at his/her or its discretion, require visual impact demonstrations, including mock-ups and/or photo montages; screening and painting plans; network maps; alternative site analysis; lists of other nearby wireless communication facilities; or facility design alternatives for the proposed facilities." R.16, Ex.F at 6.

VoiceStream responded to the Board of Adjustment's request by a May 10, 2001, letter in which it

stated that it had "already applied stealth technology and reconfigued its project to improve aesthetics under the current proposal," and that "VoiceStream engineers have evaluated alternative means to meet the coverage objective using shorter towers." *See* R.16, Ex.OO at 4. VoiceStream went on to explain that the zoning ordinances along the river are very restrictive and the topography is difficult because of the undulating terrain. *See id.* VoiceStream then concluded that the height of the proposed Somerset site tower "is the minimum that will provide acceptable coverage within the river area." *Id.*

Shortly after reviewing this response, the County Zoning Office sent a staff report to VoiceStream in which it concluded that VoiceStream had not adequately responded to the Board of Adjustment's request for information regarding multiple-tower alternatives. Specifically, the staff report stated that "[i]t is unclear[ ] to what extent other sites were actually considered [,] investigated[, or] analyzed. Alternative mock-up plans have not been provided." *See* R.20, Ex.7A at 2. Later, on June 20, 2001, Nelson was contacted by Steve Ramberg, the senior VoiceStream radio frequency operator who had conducted a review of alternative locations for constructing a tower. Nelson's conversation with Ramberg led him to conclude that VoiceStream had only considered single-tower alternatives, and had not considered whether an aggregation of sites could be used to meet VoiceStream's coverage objectives. *See* R.23 at ¶ 7. In the intervening weeks between VoiceStream's receipt of the staff report and the second hearing, VoiceStream failed to submit any additional information to the Board of Adjustment regarding multiple-tower configurations as alternatives to the Somerset site proposal. Based on this incomplete response, the Board of Adjustment determined that VoiceStream had "not adequately researched or brought forth information on an alternative site or multiple alternative sites to lessen the visual impact on the Lower St. Croix National Scenic Riverway." See R.16, Ex.BBB at 1.

The disparity in substance between what the Board of Adjustment received from VoiceStream on the Somerset site and what they received on multiple-tower alternatives is telling. Although VoiceStream provided extensive maps, diagrams, environmental assessments and historic assessments for the Somerset site, VoiceStream provided no maps, diagrams, or any type of assessment on multiple-tower configurations as alternative sites. Instead, the record contains only conclusory statements. Such conclusory statements by the applicant, without more, are insufficient to establish that the applicant has exhausted thoroughly the possibility of other viable alternatives. VoiceStream's conclusory statements that multiple-tower alternatives are not feasible are insufficient to prove that the Board of Adjustment's denial of its Somerset site application "prohibit[s] or ha[s] the effect of prohibiting the provision of personal wireless services." 47 U.S.C § 332(c)(7)(B)(i)(II).

Conclusion

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

C.A.7 (Wis.),2003.
VoiceStream Minneapolis, Inc. v. St. Croix County
342 F.3d 818, 30 Communications Reg. (P&F) 388

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MetroPCS, Inc. v. City of San Francisco
N.D.Cal.,2003.

United States District Court,N.D. California.
METROPCS, INC., Plaintiff,
v.
CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants.
No. C-02-3442 PJH.

April 25, 2003.

Wireless telecommunications service brought action against city, alleging violation of Telecommunications Act, following denial by city planning commission of conditional use permit (CUP), which prevented telecommunications service from mounting antennas on roof of parking garage. Both parties moved for summary judgment. The District Court, Hamilton, J., held that: (1) planning commission's written denial met the Telecommunication Act's requirement of a written decision for local government's denial of request to construct wireless facility; (2) telecommunications service had burden of proof; (3) substantial evidence supported planning commission's determination that city did not need the antennas; (4) planning commission did not discriminate against telecommunications service; and (5) genuine issues of material fact precluded summary judgment in claim that city's denial of CUP violated Telecommunications Act's prohibition on coverage gaps.

Motions granted in part, and denied in part.

West Headnotes

[1] Zoning and Planning 414 ⚿439

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(C) Proceedings to Procure
414k436 Hearing and Determination
414k439 k. Findings, Conclusions, Minutes, or Records. Most Cited Cases
Formal findings of fact and conclusions of law are not required by the Telecommunications Act requirement of a written decision for local government's denial of request to construct wireless facility, but local planning and zoning boards are required to issue a written denial separate from the written hearing record. Communications Act of 1934, § 332(c)(7)(B)(iii), as amended, 47 U.S.C.A. § 332(c)(7)(B)(iii).

[2] Zoning and Planning 414 ⚿439

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(C) Proceedings to Procure
414k436 Hearing and Determination
414k439 k. Findings, Conclusions, Minutes, or Records. Most Cited Cases
City planning commission's written denial of wireless telecommunications service's application for conditional use permit (CUP) to mount antennas on roof of parking garage met the Telecommunication Act's requirement of a written decision for local government's denial of request to construct wireless facility, where denial was separate from the written hearing record, it summarized the proceedings, it articulated the reasons it rejected the application, and it provided sufficient information for judicial review in conjunction with the written record. Communications Act of 1934, § 332(c)(7)(B)(iii), as amended, 47 U.S.C.A. § 332(c)(7)(B)(iii).

[3] Zoning and Planning 414 ⚿685

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)3 Presumptions
414k680 Burden of Showing Grounds for Review
414k685 k. Permissions or Certificates. Most Cited Cases
Telecommunication service had burden of proof to

show that city planning commission's denial of application by telecommunication service for conditional use permit (CUP) to allow mounting of antennas on parking garage roof was not based upon the substantial evidence on the record. Communications Act of 1934, § 332(c)(7)(B)(iii), as amended, 47 U.S.C.A. § 332(c)(7)(B)(iii).

[4] Zoning and Planning 414 ⚿703

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)4 Questions of Fact
414k703 k. Substantial Evidence. Most Cited Cases
A decision by the local governing board will be considered supported by substantial evidence, as required by the Telecommunications Act, if the record contains such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Communications Act of 1934, § 332(c)(7)(B)(iii), as amended, 47 U.S.C.A. § 332(c)(7)(B)(iii).

[5] Zoning and Planning 414 ⚿703

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)4 Questions of Fact
414k703 k. Substantial Evidence. Most Cited Cases
"Substantial evidence" necessary to support local governing board's decision, under the Telecommunications Act, requires more than a scintilla of evidence but less than a preponderance. Communications Act of 1934, § 332(c)(7)(B)(iii), as amended, 47 U.S.C.A. § 332(c)(7)(B)(iii).

[6] Zoning and Planning 414 ⚿703

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)4 Questions of Fact
414k703 k. Substantial Evidence. Most Cited Cases
In determining whether zoning decision is supported by substantial evidence, as required by the Telecommunications Act, the district court must review the entire record of the local governing board's hearing as a whole in making its determination, including all evidence unfavorable to the decision. Communications Act of 1934, § 332(c)(7)(B)(iii), as amended, 47 U.S.C.A. § 332(c)(7)(B)(iii).

[7] Zoning and Planning 414 ⚿606

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)1 In General
414k606 k. Permissions or Certificates, Decisions Relating To. Most Cited Cases
If any one ground for denial of an application by a telecommunication service to construct wireless facility is supported by substantial evidence, the denial is proper. Communications Act of 1934, § 332(c)(7)(B)(iii), as amended, 47 U.S.C.A. § 332(c)(7)(B)(iii).

[8] Zoning and Planning 414 ⚿231

414 Zoning and Planning
414V Construction, Operation and Effect
414V(A) In General
414k231 k. Construction of Regulations in General. Most Cited Cases
A municipality's interpretation of its own zoning laws is entitled to great weight, upon judicial review of denial by municipal board of an application by a wireless telecommunication service to construct wireless facility, and should be respected by the district court unless it is clearly erroneous or unauthorized. Communications Act of 1934, § 332(c)(7)(B)(iii), as amended, 47 U.S.C.A. § 332(c)(7)(B)(iii).

[9] Zoning and Planning 414 ⚿708

414 Zoning and Planning

414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)4 Questions of Fact
414k708 k. Permissions, and Certificates. Most Cited Cases
When evaluating the evidence to determine whether municipality's denial of permit to construct telecommunications service facilities is supported by substantial evidence, local and state zoning laws govern the weight to be given the evidence. Communications Act of 1934, § 332(c)(7)(B)(iii), as amended, 47 U.S.C.A. § 332(c)(7)(B)(iii).

[10] Zoning and Planning 414 ⚿384.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases
Substantial evidence supported city planning commission's determination that city did not need the antennas that wireless telecommunications service proposed to mount on roof of parking garage, warranting denial of telecommunications service's conditional use permit (CUP) on that basis, under the Telecommunications Act, where residents of community made statements that they had adequate wireless services in that area. Communications Act of 1934, § 332(c)(7)(B)(iii), as amended, 47 U.S.C.A. § 332(c)(7)(B)(iii).

[11] Zoning and Planning 414 ⚿384.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases
In determining whether a conditional use permit (CUP) should be granted to a telecommunications services provider, some discrimination among providers of functionally equivalent services is allowed, under the Telecommunications Act; any discrimination need only be reasonable. Communications Act of 1934, § 332(c)(7)(B)(i), as amended, 47 U.S.C.A. § 332(c)(7)(B)(i).

[12] Zoning and Planning 414 ⚿384.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases
Under the Telecommunications Act, municipalities retain the flexibility to treat telecommunications facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable local zoning requirements, even if those facilities provide functionally equivalent services. Communications Act of 1934, § 332(c)(7)(B)(i), as amended, 47 U.S.C.A. § 332(c)(7)(B)(i).

[13] Zoning and Planning 414 ⚿384.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases
To show that city planning commission discriminated against wireless telecommunications service, in denying its conditional use permit (CUP) to mount antennas on roof of parking garage, in violation of the Telecommunications Act, the telecommunications service was required demonstrate that the city treated a competitor of the telecommunications service differently than city treated it for a functionally identical request. Communications Act of 1934, § 332(c)(7)(B)(i), as amended, 47 U.S.C.A. § 332(c)(7)(B)(i).

[14] Zoning and Planning 414 ⚖384.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases
Under the Telecommunications Act, a valid zoning decision may properly form the basis of a denial of a telecommunications service's request to provide services in the area. Communications Act of 1934, § 332(c)(7)(B)(i), as amended, 47 U.S.C.A. § 332(c)(7)(B)(i).

[15] Zoning and Planning 414 ⚖384.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases
City planning commission did not discriminate against wireless telecommunications service, in denying its application for conditional use permit (CUP) to mount antennas on roof of parking garage, as would violate Telecommunications Act, where city made valid zoning decision, based upon community's lack of need for the proposed services, in denying telecommunications service's application, and none of service's competitors were permitted to build antennas on parking garages in the area. Communications Act of 1934, § 332(c)(7)(B)(i), as amended, 47 U.S.C.A. § 332(c)(7)(B)(i).

[16] Zoning and Planning 414 ⚖384.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases
Telecommunications service could not show that city had general ban on any new providers of wireless telecommunications services in area, as would violate Telecommunications Act provision, precluding municipalities from prohibiting wireless telecommunications services, where telecommunications service was permitted to install 30 antennas and was granted 18 conditional use permits within the city. Communications Act of 1934, § 332(c)(7)(B)(I), as amended, 47 U.S.C.A. § 332(c)(7)(B)(I).

[17] Telecommunications 372 ⚖1045

372 Telecommunications
372IV Wireless and Mobile Communications
372k1044 Construction, Equipment and Maintenance; Towers
372k1045 k. In General. Most Cited Cases
(Formerly 372k461.5)
To prevail on a claim under Telecommunications Act provision prohibiting wireless service gaps, a telecommunications services provider must demonstrate that its facility will fill an existing significant gap in the ability of remote users to access the national telephone network, and that the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve. Communications Act of 1934, § 332(c)(7)(B)(i)(II), as amended, 47 U.S.C.A. § 332(c)(7)(B)(i)(II).

[18] Telecommunications 372 ⚖1046

372 Telecommunications
372IV Wireless and Mobile Communications
372k1044 Construction, Equipment and Maintenance; Towers
372k1046 k. Local Government Regulation; Proceedings. Most Cited Cases
(Formerly 372k461.5)

Zoning and Planning 414 ⚖384.1

414 Zoning and Planning

414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases
Availability of coverage from any wireless telecommunications provider in area of purported coverage gap does not preclude finding that municipality has effectively prohibited personal wireless services in violation of Telecommunications Act; it is enough for one provider to show a significant gap in coverage. Communications Act of 1934, § 332(c)(7)(B)(i)(II), as amended, 47 U.S.C.A. § 332(c)(7)(B)(i)(II).

[19] Federal Civil Procedure 170A ⚿2504

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2504 k. Land and Land Use, Cases Involving in General. Most Cited Cases
Genuine issue of material fact as to whether wireless telecommunications service had a "significant gap" in coverage in area in which it proposed to mount antennas on parking garage, or if the service merely had certain dead spots in its current coverage for that area, precluded summary judgment in claim by service that city's denial of conditional use permit (CUP) to mount the antennas violated provision of Telecommunications Act, preventing city from effectively prohibiting wireless coverage.

***1007** Duffy Carolan,Davis Wright Tremaine LLP, San Francisco, CA, Martin L. Fineman, Treg Tremont,Davis Wright Tremaine LLP, San Francisco, CA, for Plaintiff.
Glenn A. Harris, William K. Sanders, City Attorney's Office, San Francisco, CA, for Defendants.

ORDER

HAMILTON, District Judge.
The parties' cross-motions for summary judgment came on for hearing on April 16, 2003 before this court, the Honorable Phyllis J. Hamilton presiding. Plaintiff ***1008** MetroPCS appeared through its counsel, Martin Fineman, and defendants City and County of San Francisco et al. ("the City") appeared through its counsel, William Sanders. Having read the papers and carefully considered the relevant legal authority, the court hereby rules as follows.

BACKGROUND

MetroPCS provides wireless telecommunication services in the Bay Area. On January 15, 2002, MetroPCS applied to the City for a conditional use permit ("CUP") to build a base station at the Geary Boulevard Mall Parking Garage. Nahmanson Decl. Exh. 1. MetroPCS claims it needs this installation to better serve its customers in the Richmond district. *Id.*

The parking garage is located at 5200 Geary Boulevard, between 16th and 17th Avenue. MetroPCS proposed to mount six antennas on an existing light pole on the roof of the garage, with equipment cabinets built behind an existing wall. The antennas would be painted the color of the garage. Nahmanson Decl. Exh. 1; *see also* G642; MetroPCS Opening Br. Exh. A (photo simulations of the installation).

The San Francisco Planning Commission conditionally approved MetroPCS's application on April 18, 2002. G20-G32.[FN1] The San Francisco Board of Supervisors subsequently received protests filed by approximately 80 property owners representing 58.95% of the land area within 300 feet of the garage, a petition in opposition signed by hundreds of local residents, and an appeal of the Planning Commission's decision filed by a local resident, Robert Blum. G43-58; G-59-60, G61-G149; G209, G210-G484.

FN1. The portions of the administrative record relevant to this motion were filed by

> the City as "Certified Copy of the Administrative Record (with Exhibit B)," and Bates labeled with a G prefix (for Geary).

On June 17, 2002, the Board of Supervisors held a public hearing concerning MetroPCS's application.FN2 At the hearing, a number of community members and supervisors indicated their disapproval of the application. *See, e.g.,* Tr. 176-77, 180-83. The Board of Supervisors then voted to deny MetroPCS the CUP. G688. Those findings were then adopted in a written denial on June 24, 2002. G694-G698.

> FN2. The hearing transcript ("Tr.") is provided at Exhibit C of the City's Certified Copy of the Administrative Record.

MetroPCS claims the City violated section 332(c)(7) of the Telecommunications Act of 1996, 47 U.S.C. § 151 et seq., when it denied the CUP and moves for summary judgment on their first cause of action only. The City has also moved for summary judgment on the first cause of action, claiming it acted properly.

DISCUSSION

A. Legal Standard-Summary Judgment

Summary judgment is appropriate when the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The court will resolve all disputed issues of fact in favor of the non-moving party. *Id.* at 255, 106 S.Ct. 2505.

B. Written Decision

A local government's decision to deny a request to construct a wireless facility must be "in writing." 47 U.S.C. § 332(c)(7)(B)(iii). MetroPCS claims as a preliminary matter that the City's denial does not meet this requirement.

Courts are split on interpretations of the "in writing" requirement. *See, e.g.,* ***1009***New Par v. City of Saginaw,* 301 F.3d 390, 395 (6th Cir.2002) (explaining the range of requirements adopted); *Southwestern Bell Mobile Systems v. Todd,* 244 F.3d 51, 59 (1st Cir.2001) (same). Some courts have held that the governing local body must issue full findings of fact and conclusions of law, *see, e.g., Omnipoint Communications, Inc. v. Planning & Zoning Comm'n,* 83 F.Supp.2d 306, 309 (D.Conn.2000), while others state that merely stamping the word "DENIED" on an application is sufficient, *AT & T Wireless PCS v. City Council of Virginia Beach,* 155 F.3d 423, 429 (4th Cir.1998).

In *Todd,* the First Circuit reviewed these precedents, and noted that "[b]oth of these approaches seem flawed." 244 F.3d at 59. On the one hand, the statutory language does not require detailed findings of fact and conclusions of law, and the court acknowledged that local governing boards are staffed by laypersons and not attorneys. On the other hand, the board must give sufficient information in its written denial to permit judicial review, and the statute requires a denial separate from the hearing record. *Id.* at 59-60.

[1] Accordingly, *Todd* adopted a standard that "requires local boards to issue a written denial separate from the written record." 244 F.3d at 60. Furthermore, "[t]hat written denial 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.* (but specifically permitting a court to review the record as well). *See also New Par,* 301 F.3d at 395 (Sixth Circuit adopting *Todd* standard). The *Todd* standard thus reconciles both the statutory language and Congressional intent of the "in writing" requirement, and the court adopts it here.

[2] The City here has issued a written denial separate from the written record, G692-700, which summarizes the proceedings, articulates the reasons it

rejected MetroPCS's application, and provides sufficient information for judicial review in conjunction with the written record. This opinion meets the "in writing" requirement of 47 U.S.C. § 332(c)(7)(B)(iii), and summary judgment in favor of the City is granted on this issue.

C. Substantial Evidence

A local government's decision to deny a request to construct a wireless facility must also be based upon "substantial evidence." 47 U.S.C. § 332(c)(7)(B)(iii). This standard under the Telecommunications Act is intended as "the traditional standard used for judicial review of agency actions." H.R. Conf. Rep. 104-458 at 208, *reprinted in* 1996 U.S.C.A.A.N. 124 at 223 (Conference Committee for the Telecommunications Act); *see also. e.g., Preferred Sites, LLC v. Troup County,* 296 F.3d 1210, 1218 (11th Cir.2002) (citing Congressional intent and listing cases across several circuits adopting traditional "substantial evidence" standard for review of Telecommunications Act cases arising under § 332(c)(7)(B)(iii)). MetroPCS claims that the City's decision does not meet this standard.

[3] Preliminarily, the parties dispute whether MetroPCS bears the burden of proof in demonstrating that the City's decision is not supported by substantial evidence, or whether the City bears the burden of demonstrating that its decision is supported by substantial evidence. The case law is split on this issue. *See, e.g., El Cajon,* 83 F.Supp.2d at 1164-65 (noting split and stating that Ninth Circuit has not yet reached the issue); *Cellular Telephone Co. v. Town of Oyster Bay,* 166 F.3d 490, 496-97 (2d Cir.1999) (noting split and expressly declining to resolve the issue since prevailing party would prevail either way). Because this decision should be evaluated ***1010** like any other administrative decision, the court agrees with the First Circuit in placing the burden of proof on MetroPCS. *See, e.g., Second Generation Properties. L.P. v. Town of Pelham,* 313 F.3d 620, 627 (1st Cir.2002) ("The substantial evidence test is highly deferential to the local board"), *citing Todd,* 244 F.3d at 58 ("The substantial evidence standard of review is the same as that traditionally applicable to a review of an administrative agency's findings of fact.").

[4][5][6][7] The City's decision will be considered supported by substantial evidence if the record contains "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Preferred Sites,* 296 F.3d at 1218 (citation omitted); *Telespectrum v. Public Service Commission of Kentucky,* 227 F.3d 414, 423 (6th Cir.2000); *Airtouch Cellular v. City of El Cajon,* 83 F.Supp.2d 1158, 1164 (S.D.Cal.2000). This requires "more than a scintilla of evidence but less than a preponderance." *El Cajon,* 83 F.Supp.2d at 1164 (citation omitted); *see also. e.g., Preferred Sites,* 296 F.3d at 1218 (citation omitted). In conducting such a review, the court must examine the entire record, including evidence unfavorable to the City. *See, e.g., El Cajon,* 83 F.Supp.2d at 1164 (citations omitted). The court may only review the material that was before the City at the time of decision.[FN3] *Id.* If any one ground provided by the City is supported by substantial evidence, the denial is proper. *See Oyster Bay,* 166 F.3d at 495.

> FN3. For this reason, the Court will not consider the declaration of Suki McCoy, or any other extrinsic evidence, in determining the sufficiency of the Board's decision.

[8][9] Finally, when evaluating this decision, "local and state zoning laws govern the weight to be given the evidence." *Oyster Bay,* 166 F.3d at 494 (because Telecommunications Act not intended to preempt state and local zoning regulations). The City's interpretation of its own zoning laws "is entitled to great weight and should be respected by the court unless it is clearly erroneous or unauthorized." *Carson Harbor Village Ltd. v. City of Carson,* 70 Cal.App.4th 281, 290, 82 Cal.Rptr.2d 569 (1999).

One of the grounds for the City's denial was the

finding that "there is no necessity for the proposed six panel antennas to be approved and installed for residential or business purposes in the neighborhood." G696. MetroPCS argues that there is insufficient evidence to support a finding that the Richmond district did not need another wireless telecommunications service provider.

The City is permitted to consider the adequacy of the services already present in an area, and thus the necessity of the proposed services in question, when determining whether to grant a CUP for additional services. San Francisco Planning Code § 303(c)(1) (City may consider whether proposed development "is necessary or desirable for, and compatible with, the neighborhood or community").FN4 Thus, the only question is whether the record demonstrates substantial evidence in support of the City's determination.

> FN4. Copies of the San Francisco Planning Code are found at the City's Request for Judicial Notice ("City RJN") Exh. A.

[10] A significant number of community members that opposed the installation indicated that they had adequate wireless services in their district. *See, e.g.,* G43, G210, G214, G235, G236, G255; [FN5] *see also* Tr. 104:4-7; 128:12-17; 137:7-15; 146:18-20. Statements of community members ***1011** speaking from their own experience is considered substantial evidence in evaluating the record. *See, e.g., El Cajon,* 83 F.Supp.2d at 1165 (city may rely on statements when "they are based on personal experience and not mere speculation"). Thus, there is substantial evidence supporting the City's determination that, on balance, the Richmond district did not need the MetroPCS antenna.[FN6] Summary judgment in favor of the City is granted on this issue.

> FN5. The remainder of the letters raising this issue were identical to these. *See* G44-G58, G493, G494, G497-G511, G514-535 (identical to G43); G224 (identical to G214); G241, G242, G246, G247, G251, G253, G260, G261 (identical to G235); G237, G243, G248, G248, G250, G252 (identical to G236).
>
> FN6. For this reason, the court need not reach the question of whether there is substantial evidence supporting the Board's determination that MetroPCS's installation would cause visual blight, or that MetroPCS did not need the antennas for its own service. The court notes, however, that much of the evidence concerning visual blight consisted solely of non-admissible generalized aesthetic concerns. *Todd,* 244 F.3d at 61 (generalized complaints applicable to any installation and that do not note the installer's attempts to mask the structure may be disregarded); *see, e.g.,* G214, G236 (describing antennas generally as "an eyesore," without noting that antennas would be camouflaged). The specific concerns raised appeared mistakenly to be based on the belief that MetroPCS would be installing a 50 foot antenna on top of the 40 foot garage. Tr. at 112:1-5; *see also* 113:13-16 ("The 50-foot-tall antennas on top of a 40-foot high building are an undesirable eyesore, and it is totally out of ... character with the neighborhood."); *see also* G226, G233. Concerns that misunderstand the visual impact of the installation may not be relied upon as substantial evidence. *Oyster Bay,* 166 F.3d at 495; *New Par,* 301 F.3d at 398.

On the question of MetroPCS's need for the antenna, the court notes that while MetroPCS may not have adequately explained its methodology when explaining its service coverage analysis to the board, neither did the Blums. MetroPCS also credibly explained why the 5200 Geary location was, while not ideal, workable with the antennas installed on the light pole, despite its initial belief that the location was too low to be technologically feasible. Tr. 163:18-10; 169:6-9 (MetroPCS was willing to accept 5200 Geary as a compromise between its technological needs and those of the community).

Without a further showing, the record does not appear to support the board's decision that MetroPCS did not need the installation.

D. Discrimination

MetroPCS next argues that by claiming lack of necessity for its antenna installation, the City has essentially taken the position that the existing wireless services providers already established in the Richmond district are sufficient and thus will not permit a competitor to enter that market, citing Supervisor Yee's comments that "residents ... say there is not a need ....Does that mean that every single new company that wants to open up shop in San Francisco ... that we should let them?" Tr. 180:10-25. MetroPCS argues that this improperly discriminates among providers of wireless services, in violation of 47 U.S.C. § 332(c)(7)(B)(i)(I).

[11][12] Title 47 U.S.C. § 332(c)(7)(B)(i) states that "[t]he 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." In determining whether a CUP should be granted to a telecommunications services provider, "some discrimination among providers of functionally equivalent services is allowed. Any discrimination need only be reasonable." *Sprint Spectrum v. Willoth,* 176 F.3d 630, 638 (2d Cir.1999), *quoting Virginia Beach,* 155 F.3d at 427. Cities retain "the 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." H.R. Conf. No. 104-458 at 208, *reprinted in* 1996 U.S.C.A.A.N. at 222 (legislative history of Telecommunications Act).

***1012** [13] In order to prevail on this claim, MetroPCS must show that the City "discriminated among providers of functionally equivalent services and that these providers were treated unequally." *Omnipoint Comm., Inc. v. City of White Plains,* 175 F.Supp.2d 697, 717 (S.D.N.Y.2001) (citation omitted). In other words, MetroPCS must demonstrate that the City treated a MetroPCS competitor differently than it treated MetroPCS for a functionally identical request. *Sprint Spectrum L.P. v. Board of Zoning Appeals of the Town of Brookhaven,* 244 F.Supp.2d 108, 117 (E.D.N.Y.2003).

[14][15] The City is permitted under the Planning Code to take the community's need for the proposed services into account when making zoning decisions, and under the Telecommunications Act, a valid zoning decision may properly form the basis of a denial of a telecommunication company's request to provide services. *See, e.g., Willoth,* 176 F.3d at 639 ("discrimination based on traditional bases of zoning regulation ... is not unreasonable") (citation omitted); *Virginia Beach,* 155 F.3d at 427; *AT & T Wireless PCS, Inc. v. Town of Porter,* 203 F.Supp.2d 985, 1000 (N.D.Ind.2002). Because the city made a valid zoning decision when it denied MetroPCS's claim, MetroPCS's claim of unreasonable discrimination fails.[FN7]

FN7. To the extent that MetroPCS claims that the City had discriminatory intent against MetroPCS based on Supervisor Yee's comments, that is not a proper basis for a claim under section 332(c)(7)(B)(i)(I). *Sprint Spectrum L.P. v. Town of Easton,* 982 F.Supp. 47, 51 n. 2 (D.Mass.1997) (intent alone insufficient to prevail on 332(c)(7)(B)(i)(I) claim). In any event, the City correctly points out that, when the comments are read in their entirety, it is clear that Supervisor Yee was addressing the community's need for the proposed services as a traditional zoning concern and not expressing any particular animus towards MetroPCS. Tr. 180:10-181:9. *See also* Tr. 183:1-21 (Supervisor Peskin stating that the Board's decision was "not a judgment on whether we want MetroPCS or not, but in this par-

> ticular instance, I do not believe that those findings [of necessity under the zoning laws] have been adequately met").

Furthermore, to prevail on this claim, MetroPCS must show that other providers have been permitted to build similar structures on similar sites while it has been denied. *See, e.g., Brookhaven,* 244 F.Supp.2d at 117; *White Plains,* 175 F.Supp.2d at 718; *Bellsouth Mobility, Inc. v. Parish of Plaquemines,* 40 F.Supp.2d. 372, 381 (E.D.La.1999). The other telecommunications services providers that have been permitted to build antennas in the Richmond district are differently situated from MetroPCS because they have sought to place their antenna structures at different locations within the district. *See* Tr. 174:12-22 (Supervisor McGoldrick explaining that another antenna had been approved in the Richmond district because it was located at a Preference 1, or more ideal, site). This does not constitute unreasonable discrimination under the Telecommunications Act, as a matter of law.[FN8] Summary judgment in favor of the City is granted on this issue.

> FN8. The two cases cited by MetroPCS finding discrimination are distinguishable. In *Western PCS II Corp. v. Extraterritorial Zoning Authority of the City and County of Santa Fe,* 957 F.Supp. 1230, 1237-38 (D.N.M.1997) and in *Easton,* 982 F.Supp. at 51, unreasonable discrimination was found based on the defendants' improper consideration of unsubstantiated evidence and misapplication of the relevant zoning laws. Here, the City based its decision on proper zoning concerns and substantiated evidence of the Richmond district's lack of necessity for these particular MetroPCS services.

E. Prohibiting Provision of Personal Wireless Services

MetroPCS next claims that the City's decision has the effect of prohibiting the ***1013** provision of wireless services, in violation of 47 U.S.C. § 332(c)(7)(B)(i)(II). Section 332(c)(7)(B)(I) states that: "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof-(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services."

MetroPCS, as the party challenging the locality's ruling, bears a "heavy" burden of proof on this issue. *See Town of Amherst, New Hampshire v. Omnipoint Communications Enterprises, Inc.,* 173 F.3d 9, 14 (1st Cir.1999) (carrier must show "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."); *360 Communications Co. of Charlottesville v. Board of Supervisors of Albemarle Cty.,* 211 F.3d 79, 88 (4th Cir.2000).

1. General Ban

[16] MetroPCS claims that the City has imposed a general ban on any new entrants into the San Francisco wireless communications market. The City has demonstrated that MetroPCS has been permitted to install 30 antennas within San Francisco, and has been granted 18 CUPs as well. Ionin Decl. ¶¶ 4-5; Exh. A. MetroPCS in fact has already entered, and offers service, in the Bay Area market. McCoy Decl. Exh. C. MetroPCS thus cannot show that it has been denied entry into the San Francisco telecommunications market. Summary judgment in favor of the City on this issue is warranted.

2. Service Gap

[17] MetroPCS claims next that while it offers some service in the Bay Area, the City's refusal to permit it to install the antenna at the 5200 Geary site creates a gap in its service that is sufficiently wide to constitute a denial of service. To prevail on a claim under § 332(c)(7)(B)(i)(II) based on a service gap, MetroPCS must show first that "its facil-

ity will fill an existing significant gap in the ability of remote users to access the national telephone network," and next, that "the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve." *APT Pittsburgh Ltd. Partnership v. Penn Township Butler County of Pennsylvania,* 196 F.3d 469, 480 (3rd Cir.1999); *see also Cellular Telephone Co. v. Zoning Board of Adjustment of the Borough of Ho-Ho-Kus,* 197 F.3d 64, 69 (3rd Cir.1999).

a. "Significant Gap"

There is a circuit split as to what constitutes a "significant gap" in services. The Third Circuit has held that a "significant gap" is a gap in coverage that no provider has been able to fill-so if any provider has provided coverage for the area, no significant gap exists. *APT Pittsburgh,* 196 F.3d at 480. The First Circuit has held, on policy grounds, that a "significant gap" exists if any provider cannot provide general service in a certain area, even if other providers can. *Second Generation,* 313 F.3d at 634 (reviewing case law of other circuits, legislative history, and policies behind Telecommunications Act). In other words, *APT Pittsburgh* holds that a "significant gap" in services is a gap as perceived by all the users of a network, and *Second Generation* holds that a "significant gap" in services is a gap as perceived by a service provider, or an individual user subscribed to a specific service provider, in the network.

The court finds the First Circuit position more persuasive. *Second Generation* argues that the policy considerations behind the Telecommunications Act were to encourage competition in the wireless telecommunications marketplace, and that the Third Circuit's position does not adequately do so.
***1014** To use an example from this case, it is of little comfort to the customer who uses AT & T Wireless ... who cannot get service along the significant geographic gap which may exist along Route 128 that a Cingular Wireless customer does get some service in that gap. Of course, that AT & T Wireless customer could switch to Cingular Wireless. But were the rule [the Third Circuit rule] adopted, the same customer might well find that she has a significant gap in coverage a few towns over, where AT & T Wireless, her former provider, offers service but Cingular Wireless does not. The result would be a crazy patchwork quilt of intermittent coverage. That quilt might have the effect of driving the industry towards a single carrier. When Congress enacted legislation to promote the construction of a national cellular network, such a consequence was not, we think, the intended result....*The fact that some carrier provides some service to some consumers does not in itself mean that the town has not effectively prohibited services to other consumers.*

313 F.3d at 633-34 (citations omitted) (emphasis added).

[18] Thus, the court finds that a "significant gap" is a gap in any individual service provider's coverage in a specific area. This gap, however, must be a significant gap and not merely individual "dead spots" within a greater service area.[FN9] Therefore, once a provider has some general coverage in an area, even if certain "dead zone" holes exist in certain specific locations, no "significant gap" exists. *Willoth,* 176 F.3d at 643-44.

> FN9. De minimus "dead spots," or specific, small locations in a service area without coverage, are permissible under the Telecommunications Act and are not considered to be a "significant gap." *360 Comm.,* 211 F.3d at 87; 47 C.F.R. §§ 22.911(b), 22.99.

[19] Here, questions of fact exist as to whether MetroPCS has a "significant gap" in coverage for the Richmond district, or if MetroPCS merely has certain dead spots in its current coverage for that area. *Compare* McCoy Decl. (indicating general coverage in the Richmond district with MetroPCS service, and only certain dead spots); McCoy Decl.

Exh. C (MetroPCS marketing materials claiming coverage throughout the Bay Area) *with* Nahmanson Decl. ¶ 19 (describing "significant gap" in Richmond coverage); Schwartz Decl. ¶ 7 (describing degrading of network based on "seemingly small coverage holes and weak spots"); Tr. 163:1-7 (MetroPCS claiming it "can't service this neighborhood" without 5200 Geary installation). Summary judgment on this issue for both parties is thus denied.

b. Other Options

In addition, even if MetroPCS prevails on the "significant gap" issue, MetroPCS must next demonstrate that its proposed installation at 5200 Geary is the only acceptable option to provide coverage for the Richmond district.

Again, there is a circuit split on this issue. The Second and Third Circuits require that the city accept "the least intrusive proposal" that allows coverage in the area. *APT Pittsburgh,* 196 F.3d at 480; *Willoth,* 176 F.3d at 643. The Fourth Circuit, though, has rejected that approach, noting that "[a] community could rationally reject the least intrusive proposal in favor of a more intrusive proposal that provides better service or that better promotes commercial goals of the community." *360 Comm.,* 211 F.3d at 87.[FN10] The ***1015** court reconciles these authorities by adopting a fact-based test that requires the provider to demonstrate that its proposed solution is the most acceptable option for the community in question.

> FN10. Other courts have noted that "commentators have noted the national trend away from the Fourth Circuit on this issue." *USCOC of Virginia RSA#3, Inc. v. Montgomery County Board of Supervisors,* 245 F.Supp.2d 817, 827 (W.D.Va.2003).

There are questions of fact concerning whether MetroPCS's antenna installation is in fact the most acceptable option. Community members have suggested that MetroPCS enter into licensing agreements to use the antennas of other providers who already have antennas installed in the Richmond district, Tr. 103:4-9, or install an antenna in an area specifically zoned for antenna installations, Tr. 95:12-16. MetroPCS has claimed these options are unacceptable, but does not explain why, or if it has attempted to do so and failed. Tr. 169:14-17. MetroPCS also does not address whether an alternate site in the Richmond could close its alleged service gap. Questions of fact thus exist on the issue of alternate options for MetroPCS, and summary judgment on this issue at this time for either party is not warranted.

F. Environmental Issues

Finally, MetroPCS claims that the City based its denial on the purported adverse environmental effects of radio frequency omissions, in violation of 47 U.S.C. § 332(c)(7)(B)(iv). Section 332(c)(7)(B)(iv) states: "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." *See also Telespectrum,* 227 F.3d at 424; *Iowa Wireless Services, L.P. v. City of Moline,* 29 F.Supp.2d 915, 924 (C.D.Ill.1998) (emissions may not be the sole reason for the denial of a permit).

While many people did express concerns about radio frequencies at the hearing, *see, e.g.,* Tr. 109:14-110:3; 128:18-21; 130:13-20; 133:21-23, 141:9-12; 155:18-19; *see also* G46-G58; G210-G277; G493-G535; G690-G691 (almost all letters submitted in opposition mentioning concerns over radio frequency emissions), the party opposing the CUP, Blum, specifically stated that his opposition was not based on radio emission concerns. "First, I want to make it clear that we are not arguing adverse health effects here [from radio emissions]. I can't, you know, stop people from talking

about their concerns. They have First Amendment rights. But that is not our argument. Our argument is the lack of necessity." Tr. 171:18-23. Similarly, the City makes no mention of environmental concerns motivating its decision in its written denial. G696-698. There is no evidence that environmental concerns formed any role, much less the only role, in the denial of MetroPCS's application. Summary judgment in the City's favor is warranted on this issue.

G. Conclusion

Both parties' motions for summary judgment on the first cause of action are DENIED, but solely on the issue of whether the City's adverse decision against MetroPCS violates 47 U.S.C. § 332(c)(7)(B)(i)(II) on the question of whether a service gap exists in the San Francisco Richmond district. Summary judgment on the remainder of the issues raised in these motions, namely, MetroPCS's two § 332(c)(7)(B)(iii) claims (written decision and substantial evidence), MetroPCS's § 332(c)(7)(B)(i)(I) claim (discrimination) and § 332(c)(7)(B)(iv) claim (environmental effects), is GRANTED as to the City and DENIED as to MetroPCS.

***1016** This order fully adjudicates the matters listed at nos. 31, 35, and 43 on the clerk's docket for this case.

IT IS SO ORDERED.

N.D.Cal.,2003.
MetroPCS, Inc. v. City of San Francisco
259 F.Supp.2d 1004

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336 F.Supp.2d 71
336 F.Supp.2d 71
(Cite as: 336 F.Supp.2d 71)

C

Cellco Partnership v. Town of Grafton, Massachusetts
D.Mass.,2004.

United States District Court,D. Massachusetts.
CELLCO PARTNERSHIP d/b/a Verizon Wireless, Plaintiff,
v.
THE TOWN OF GRAFTON, MASSACHUSETTS, the Grafton Planning Board, and Robert Hassinger, Robert Mitchell, Keith Regan, Martin Temple, and Stephen Dunne, as they are the Members of the Planning Board of the Town of Grafton, Massachusetts, Defendants.
No. CIV.A.02-11600-RCL.

Sept. 29, 2004.

Background: Telecommunications company sued town and individual town officials, alleging that town board's denial of special permit to erect wireless telecommunications facility violated Telecommunications Act, and asserting several federal and state constitutional claims. Defendants moved for summary judgment.

Holdings: The District Court, Lindsay, J., held that:
(1) town board's denial of special permit for placement of proposed tower within low-density residential district was supported by substantial evidence, especially objections under governing ordinance's "minimum visual impact" requirement, and
(2) board did not effectively prohibit provision of wireless services in violation of Act, given applicant's failure to investigate several feasible alternatives.

Motion granted.

West Headnotes

[1] Telecommunications 372 ⇐1055

372 Telecommunications
372IV Wireless and Mobile Communications
372k1055 k. Judicial Review or Intervention. Most Cited Cases
(Formerly 372k461.5)
Review of claim made under Telecommunications Act's requirement that denial of request to construct wireless telecommunications facility be in writing and be supported by substantial evidence is conducted with deference to local authority. Communications Act of 1934, § 332(c)(7)(B)(iii), 47 U.S.C.A. § 332(c)(7)(B)(iii).

[2] Telecommunications 372 ⇐1055

372 Telecommunications
372IV Wireless and Mobile Communications
372k1055 k. Judicial Review or Intervention. Most Cited Cases
(Formerly 372k461.5)
Review of claim made under Telecommunications Act's requirement that local regulation may not "prohibit or have the effect of prohibiting the provision of personal wireless services" is conducted de novo. Communications Act of 1934, § 332(c)(7)(B)(i)(II), 47 U.S.C.A. §332(c)(7)(B)(i)(II).

[3] Telecommunications 372 ⇐1046

372 Telecommunications
372IV Wireless and Mobile Communications
372k1044 Construction, Equipment and Maintenance; Towers
372k1046 k. Local Government Regulation; Proceedings. Most Cited Cases
(Formerly 372k461.5)
Town board's denial of special permit for placement of wireless services facility within low-density residential district was supported by substantial evidence, as required by Telecommunications Act; governing ordinance required "minimum visual impact" and board received numerous particularized expressions of opposition to proposed 120-foot

tower's aesthetic impact on town's historic district less than one-quarter mile away, proposed facility as "new tower in [residential] district" was seventh out of eight site-type preferences listed in ordinance, and applicant failed to consider alternative sites as board requested. Communications Act of 1934, § 332(c)(7)(B)(iii), 47 U.S.C.A. § 332(c)(7)(B)(iii).

[4] Telecommunications 372 ⇐1046

372 Telecommunications
372IV Wireless and Mobile Communications
372k1044 Construction, Equipment and Maintenance; Towers
372k1046 k. Local Government Regulation; Proceedings. Most Cited Cases
(Formerly 372k461.5)
Telecommunications Act section proscribing effective prohibition of personal wireless services can be violated regardless of existence of substantial evidence supporting denial of individual permit under terms of governing ordinance. Communications Act of 1934, § 332(c)(7)(B)(i)(II), 47 U.S.C.A. §332(c)(7)(B)(i)(II).

[5] Telecommunications 372 ⇐1046

372 Telecommunications
372IV Wireless and Mobile Communications
372k1044 Construction, Equipment and Maintenance; Towers
372k1046 k. Local Government Regulation; Proceedings. Most Cited Cases
(Formerly 372k461.5)
In order to establish claim of effective prohibition of personal wireless services under Telecommunications Act, plaintiff must prove that: (1) zoning decisions and ordinances prevent closing of significant gaps in availability of wireless services, and (2) from language or circumstances, not only has application for proposed wireless services facility been rejected but further reasonable efforts are so likely to be fruitless that it is waste of time to try. Communications Act of 1934, § 332(c)(7)(B)(i)(II), 47 U.S.C.A. §332(c)(7)(B)(i)(II).

[6] Telecommunications 372 ⇐1046

372 Telecommunications
372IV Wireless and Mobile Communications
372k1044 Construction, Equipment and Maintenance; Towers
372k1046 k. Local Government Regulation; Proceedings. Most Cited Cases
(Formerly 372k461.5)
Town board did not effectively prohibit provision of wireless services in violation of Telecommunications Act by denying application for special permit for erection of new 120-foot tower, contrary to applicant's contention that its proposal was only feasible plan to close existing coverage gap; applicant failed to investigate whether combination of single tower located elsewhere together with increased signal strength at other of applicant's facilities might close gap, failed to investigate whether existing tower on less objectionable site might have sufficient structural strength to support wireless equipment, and failed to consider possibility of reconfiguring its network or using cell sites from outside town to provide service within town. Communications Act of 1934, § 332(c)(7)(B)(i)(II), 47 U.S.C.A. §332(c)(7)(B)(i)(II).

[7] Telecommunications 372 ⇐1046

372 Telecommunications
372IV Wireless and Mobile Communications
372k1044 Construction, Equipment and Maintenance; Towers
372k1046 k. Local Government Regulation; Proceedings. Most Cited Cases
(Formerly 372k461.5)
Individual denial of application to place wireless services facility may have effect of prohibiting personal wireless services, in violation of Telecommunications Act, when: (1) local authority sets or administers criteria which are impossible for any applicant to meet, or (2) existing application is the only technically feasible, as opposed to most desirable, plan. Communications Act of 1934, § 332(c)(7)(B)(i)(II), 47 U.S.C.A. §332(c)(7)(B)(i)(II).

***72** Joseph C. Cove, Uxbridge, for The Grafton Planning Board, The Town of Grafton, Massachusetts, Keith Regan, Martin Temple, Robert Hessinger, Robert Mitchell, Stephen Dunne, Defendants.
Deborah I. Ecker, Brody, Hardoon, Perkins & Keston, Boston, MA, for The Grafton Planning Board, The Town of Grafton, Massachusetts, Keith Regan, Martin Temple, Robert Hessinger, Robert Mitchell, Stephen Dunne, Defendants.
Sarah Louise McGinnis, Robinson & Cole LLP, Boston, MA, for Cellco Partnership, Plaintiff.
David Bliss Wilson, Robinson & Cole, LLP, Boston, MA, for Cellco Partnership, Plaintiff.

MEMORANDUM AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

LINDSAY, District Judge.
Before the court are cross-motions for summary judgment filed by Cellco Partnership d/b/a Verizon Wireless ("Cellco") and the Town of Grafton ("the Town").

Cellco alleges in its complaint that the Grafton Planning Board (the "Board") wrongfully denied its application for a special permit to place a wireless telecommunications***73** facility at 27 Upton Street, in Grafton, Massachusetts (the "Upton Street Property"). The defendants are the Town; the Board; and Robert Hassinger, Robert Mitchell, Keith Regan, Martin Temple and Stephen Dunne, as they are members of the Board. In counts I and II, Cellco claims that the Board's denial of the special permit amounted to an effective prohibition of personal wireless services, in violation of the Telecommunications Act of 1996 ("TCA"), 47 U.S.C.A. § 332(c)(7)(B)(i)(II), and was not supported by substantial evidence also in violation of the TCA at 47 U.S.C.A. § 332(c)(7)(B)(iii).

Cellco also claims, in count III, that the Board's denial of the specific permit constituted a deprivation of rights secured by federal law, and that a cause of action for money damages exists under 42 U.S.C. § 1983. In count IV, Cellco claims that the Board's refusal to waive or modify certain zoning requirements lacked a rational relationship to a legitimate government interest and thus violated Cellco's substantive due process rights secured by the Fifth and Fourteenth Amendments to the U.S. Constitution, and Part I, Article X of the Massachusetts Declaration Rights. Finally, in count V, Cellco claims that the Board's denial of the special permit was arbitrary and capricious, not based upon the evidence, and in excess of the Board's authority under both Mass. Gen. L. c. 40A and the Grafton Zoning By-Law (the "ZBL").

Both sides have moved for summary judgment on all counts. For the reasons stated below, I GRANT the Town's motion for summary judgment on all counts and DENY Cellco's corresponding motion.

I. FACTS

A. Background

Unless otherwise noted, the following facts are undisputed.

Cellco, a personal wireless service provider, is licensed by the Federal Communications Commission to provide cellular telephone services to a geographic area that includes the Town of Grafton, Massachusetts. Cellular telephones work by transmitting a low power signal between a mobile telephone and a wireless telecommunications facility, or "cell site." A cell site consists of antennae mounted on a tall structure such as a tower or building. As a caller moves out of the coverage range of one cell, the signal is "handed off" from the cell site in one cell to the cell site of an adjacent cell. For there to be continuous service, it is critical that the facilities within each cell be located in accordance with radio frequency ("RF") principles, taking into account overall network design. RF design must accommodate such features as the height of the proposed antennae, topographical concerns, the geographic distance and direction of the proposed facility to other facilities in the network, and customer demands for service.

There is currently a "coverage gap" in certain areas of Grafton, including the center of the Town ("Grafton Center"). The existence of a coverage gap means that there is currently not enough signal strength to allow Cellco customers reliably to initiate or hold calls when located within or traveling through these areas of Grafton. Using the RF principles described above, Cellco's RF engineers determined that a facility located within Grafton Center would remedy the coverage gap.

The Board of Selectmen of the Town (the "Selectmen") issued a "request for proposal" ("RFP") for the construction of a telecommunications facility on a portion of the Upton Street Property. After submitting a bid on the RFP, Cellco was awarded a contract, and, on August 27, 2001, entered into a lease with the Town, acting through the Selectmen, for the construction of a wireless telecommunications facility*74 on the Upon Street property. Paragraph ten of the lease states:
It is understood and agreed that LESSEE'S ability to use the Premises as contemplated by this Agreement is contingent upon obtaining all of the certificates, permits and other approvals required by any federal, state and local authorities. Notwithstanding the above, LESSEE must apply for and receive a Special Permit from the Planning Board, and nothing in this lease shall be construed as warranty that LESSEE shal [stet] receive any required Special permit from the Planning Board, or required permit from the Building Inspector.

The Upton Street Property is located in a Low Density Residential (R40) zoning district, and is approximately one-quarter mile from the Grafton Common Historic District. It is owned by the Town and is currently used by the Grafton Department of Public Works ("DPW") as a highway maintenance facility, where salt, sand, and public works equipment are stored. A Cumberland Farms convenience store is across the highway, and a wooded area is at the rear of the property.

Under the ZBL, a telephone service provider must apply for a special permit to construct and operate a cell site within an R40 zoning district. In November of 2001, Cellco filed an application with the Board for a special permit to erect a 150-foot monopole and accompanying externally mounted antennae, two dish antennae and certain ground-based equipment, within a fence enclosure, on the Upton Street Property. Cellco later modified the proposal, changing the 150-foot monopole with external antennae to a 120-foot pole, with internal antennae, designed to resemble a flagpole ("flagpole design"). Cellco also offered to paint the pole a color of the Board's choice.

A public hearing was opened by the Board on January 14, 2002, and further hearings were held on February 11, March 11, April 8, and April 29 of that year. At the hearings, Cellco presented evidence demonstrating a gap in its service coverage and represented that the proposed tower would decrease the number of towers needed in Grafton because another wireless service would be able to co-locate (*i.e.,* share the tower).[FN1] At the first hearing, Board member Robert Hassinger suggested that the parties conduct further investigation regarding possible alternative sites. At the February 11th hearing, Cellco submitted the results of a balloon test,[FN2] in which the company hung blue, yellow, and red balloons at 150, 120, and 100 feet, respectively, to allow the public to view the proposed height of the tower. Hassinger again noted that he was not satisfied that Cellco had exhausted all possible options and suggested alternative sites that Cellco could consider.

> FN1. The parties appear to dispute the number of additional facilities that could be accommodated by the flagpole. Cellco suggests it might be able to accommodate two additional facilities; the Town suggests it is only one. It is undisputed that the modification in the design from a monopole to a flagpole reduced the extent to which other providers could co-locate.
>
> FN2. The balloon test is required by the ZBL. Town of Grafton, Massachusetts

Zoning By-Law 5.8.4(e).

At Cellco's expense, the Town retained David Maxson of Broadcast Signal Lab, a wireless engineering and consulting expert, to provide technical assistance to the Town in reviewing Cellco's application. Maxson drafted a report ("Maxson report") summarizing his conclusions as to the evaluation of alternative sites.[FN3] Maxson*75 testified at the hearing on April 29, 2002.

> FN3. I will refer to the Maxson report in the discussion below where necessary, but feel no need to belabor the present statement of facts by reciting his conclusions now. I note that the Maxson Report is dated June 4, 2002, after the close of public hearings before the Planning Board on April 29, 2002. The report is not listed as a numbered exhibit in the administrative record, and I will not consider it part of the record when I discuss Cellco's substantial evidence claim.

After hearing Maxson's testimony, the Board requested that the hearing be continued until after the annual meeting of the Town Water District Commission on April 30, 2002, in order to give that body an opportunity to vote on whether to permit wireless telecommunications facilities to be placed on facilities or property within its jurisdiction (specifically, on the water standpipe on Pigeon Hill). Cellco's representatives requested that the hearing be closed and stated that Cellco was not interested in other locations.

Prior to the Board's decision denying the special permit, but after the close of the public hearings on April 29, 2002, Cellco submitted a letter from the Massachusetts Historic Commission in which that agency concluded that the proposed flagpole design would have no adverse effect on the historical features of Grafton Center and Grafton Common. Cellco also applied for three waivers (and a fourth that later became moot) in conjunction with its application. All of the applications were denied by the Board.

Throughout the hearing process, a number of abutters to the proposed site and other Grafton residents expressed opposition to the construction of the facility on the Upton Street Property, based on their concerns about the visibility of the monopole from the historic town green.[FN4] Additionally, the Grafton Historic District Commission ("GHDC") submitted several letters expressing opposition and citing the negative visual impact that the cell tower would have on Grafton Common.

> FN4. Cellco points out that these residents may not have known at this time that the proposal had been changed to a flagpole.

On July 23, 2002, the Board issued an unanimous decision denying Cellco's application for a special permit.

Since 1994, the Board has granted ten applications for special permits for cell sites (eight since the adoption of the By-Law). There are, however, no cell sites in Grafton Center. There has been only one other application for a cell site in Grafton Center, and that application was withdrawn.

B. The Zoning By-Law

The relevant portions of the ZBL are as follows:

5.8.3 *Site Selection Preferences*

These regulations are written to indicate that the Town of Grafton preferences for facility locations are as follows, in descending order of preference:
1. On existing structures such as buildings, communications towers, smokestacks, utility structures, etc.
2. In locations where existing topography, vegetation, buildings or other structures provide the greatest amount of screening
3. On new towers in the CB, OLI and I zoning districts

4. On government or educational institution structures in the CB, OLI and I zoning districts
5. On government or educational institution structures in the A or R40 zoning districts
6. On government or educational institution structures in the R20, RMF or NB zoning districts
*76 7. On new towers in the A and R40 zoning districts
8. On new towers in the R20, RMF and NB zoning districts

5.8.4 *Additional Submittal Requirements*

b) Site Justification or Appropriateness Statement, including a description of the narrowing process that eliminated other potential sites.
d) Support materials that show: the location of structures of similar or greater elevation within one-half-mile ... radius of the proposed site/parcel; that the owners of those locations have been contacted and asked for permission to install the facility on those structures, and denied, or that such other locations do not satisfy requirements to provide the service needed. This would include, but not be limited to, smoke stacks, water towers, tall buildings, antenna or towers of other wireless communications companies, other wireless communications facilities (fire, police, etc.) And all other tall structures. Failure to present evidence of a good faith effort on the part of the applicant to utilize existing facilities shall be grounds for denial of the application.

5.8.5 *Conditions for Granting*

[T]he planning Board shall make findings on which to base its determination on the specific issues of:
b) if the proposed facility is to be located in a residential zoning district ..., whether the applicant has provided substantial evidence that the facility cannot, by technical necessity, feasibly be located in a non-residential zone.
c) whether the proposal would sufficiently screen the facility from view, both through landscaping, placement and design, in order to minimize the visual appearance of the entire facility from areas within a [1,320'] radius of the proposed facility location.
d) whether the proposed facility will be housed within or upon a special structure, which will be architecturally compatible with the surrounding residential area (including, for example, bell tower or church steeple), or whether, by virtue of its design, no such special structure is required in order to minimize the visual impact within a one-quarter-mile (1,320') radius. This provision applies to facilities in a residential (A, R40, R20, or RMF) zoning district ...

5.8.6 *General Requirements*

5.8.6.1 Any principal part of the facility ... shall be setback from the nearest property line by a distance of twice the height of the facility ... or a distance of three hundred feet (300'), whichever is greater.
5.8.6.4 A tower shall be of monopole or similarly unimposing design.... The applicant shall successfully demonstrate to the satisfaction of the Board that the proposed facility will have minimal visual impact.
5.8.6.9 All utilities proposed to serve the facility shall be installed underground.
5.8.6.13 Landscaping shall be provided around the base of the facility.... The landscaping shall consist of a planting strip at least 25 feet wide .... Applicants may substitute alternative landscape plans that meet the purposes of this subsection to limit the visual impact of the lower portion of the tower and adjoining accessory facilities for the Board's consideration.

C. Denial of Cellco's Application

In the relevant portions of its written decision, the Board found:
F9.) That the proposed facility is for the construction of a new tower within a R-40 zoning district, and that a proposal of this type is one of the least

preferred *77 with regard to the list of preferred facility locations in Section 5.8.3 of the ZBL. The Board further finds that a number of alternative sites were identified during the public hearing, of which several appear preferable with regard to Section 5.8.3 of the ZBL.

F13.) That with regard to Section 5.8.4b, the Applicant submitted the letter identified as EXHIBIT 8 of this Decision in response to the requirements for a Site Justification or Appropriateness Statement, as described in said section. No justification of the proposed site was included in this narrative. The Board further finds that although additional sites were mentioned, the description of the narrowing process is inadequate.

F15.) That with regard to Section 5.8.4.d., regarding suitable existing structures, the Applicant submitted material (EXHIBITS 6 and 8 of this Decision) to address this requirement. The Board further finds that this material does not satisfy this requirement. The Board further finds that it provided the Applicant with the opportunity to address these submittal deficiencies during the public hearing process. The Board finds that the Applicant responded to the Board by submitting the letter identified as EXHIBIT 44 of this Decision, which indicated at that time the Grafton Water District Board of Water Commissioners had voted not to allow wireless facilities on the Pigeon Hill Tank or on property of the Water District. The Board further finds, however, that said EXHIBIT indicated that a vote was scheduled to occur on April 30, 2002, which would consider whether to allow wireless facilities on Water District tanks. The Board finds that based on this EXHIBIT, and during the hearing on April 29, 2002, the Board asked the Applicant to consider continuing the public hearing until the next Planning Board meeting in order to learn the outcome of the vote regarding wireless facilities on the Water Commission's tanks, and the possible inclusion of this site as a viable alternative. The Board finds that the Applicant informed the Board at the hearing on April 29, 2002, that they were not interested in further evaluating any alternative sites, referenced in Find # F9 of this Decision, and that the Applicant requested the public hearing be closed. The Board finds that based on the original submittal and the events described above, the Applicant failed to provide a good faith effort to utilize existing facilities. The Board further finds that as noted in Section 5.8.4.d. of the ZBL, such failure constitutes grounds for denial of the Application.

F24.) The Board further finds with regard to Section 5.8.6.4, that the structure is visible from the historic district encompassing the Town Common. It is approximately one quarter mile from the locus of the Town Common and is visible above the skyline from several points of view within the Historic District. Both the 120-foot and 100-foot flagpole designs are visible from the visually sensitive Historic District, and this visibility includes projection above the rooflines of historic buildings. This visual impact is different from that caused by other development in the area outside the District, and is not minimal, and is unacceptable. The Board further finds with regard to Section 5.8.6.4, that the Applicant did not satisfy the requirement to successfully demonstrate to the satisfaction of the Board that the proposed facility will have a minimal visual impact, as required by said Section.

In addition, the Board found that the proposed facility did not meet the minimum setback requirement (F44), was not "generally compatible" with adjacent properties*78 (F45), and did not protect historic, cultural and scenic landscapes (F48). The Board also found that Cellco did not "provide substantial evidence that the facility cannot, by technical necessity, feasibly be located in a non-residential zone" (F50); that the "proposal [did] not sufficiently screen the facility from view" (F51); and that the "structure will not be architecturally compatible with the surrounding residential area" (F52).

The Board denied each of the four waivers requested by Cellco, and gave its reasons as follows:

1) Respecting the setback requirement: "[T]he setback requirement of [Section 5.8.6.1] serves an important role to minimize impacts to visually sensit-

ive areas, in addition to the buffering and screening requirements of the By-law."
2) Respecting the requirement that accompanying facilities be located underground: "Applicant did not state or explain why the utilities could not be located in accordance with the By-law in a different area on the site, further away from the wetlands."
3) The request for a waiver for external antennae became moot with the revision of the design to resemble a flagpole.
4) Respecting the landscaping requirement: "[T]he Applicant did not satisfy [Section 5.8.6.13] as to substituting alternative landscape plans that meet the purposes of said Section to limit the visual impact of the lower portion of the tower and adjoining accessory facilities."

II. DISCUSSION

Cellco claims that the Board's denial of its application for a special permit to locate a telecommunications facility on the Upton Street Property was unsupported by substantial evidence and constituted an effective prohibition of personal wireless services in Grafton Center. In response, the Town argues that Cellco's application was denied because Cellco's proposal was inconsistent with the purpose and intent of the ZBL. Moreover, the Town contends that Cellco has not sustained its burden of establishing that the Upton Street Property is the only site from which wireless services may be provided to Grafton Center (*i.e.,* that there are no available, feasible alternatives), and that further reasonable efforts to obtain a permit are so likely to be fruitless that it is futile even to try.

A. Counts I and II: The Telecommunications Act

[1][2] The TCA strikes a compromise between the federal interest in establishing a national network of wireless services and the local interest in retaining authority to make zoning decisions. *See Town of Amherst v. Omnipoint Communications Enters., Inc.,* 173 F.3d 9, 13 (1st Cir.1999). The Act preserves local authority to make decisions regarding the siting of telecommunications facilities, but imposes several limitations. *See Second Generation Properties v. Town of Pelham,* 313 F.3d 620, 627 (1st Cir.2002). Two such limitations are (1) that a decision to deny a request to construct a wireless telecommunications facility be in writing and be supported by substantial evidence, 47 U.S.C.A. § 332(c)(7)(B)(iii); and (2) that local regulation may not "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C.A. § 332(c)(7)(B)(i)(II). The standard of review under the TCA depends upon the nature of the claim. In reviewing a claim made under the substantial evidence limitation, a court must be deferential to the local authority; claims under the anti-prohibition limitation are reviewed *de novo. See Southwestern Bell Mobile Sys., Inc. v. Todd,* 244 F.3d 51, 58 (1st Cir.2001).

1. Substantial Evidence

Under the TCA, the denial of a request for a permit to locate a telecommunications ***79** facility must be supported by substantial evidence contained in a written record. *See Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals,* 297 F.3d 14, 20 (1st Cir.2002). As in judicial review of any administrative action, the court is limited to the information contained in the administrative record, and "[s]ubstantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *See id.* at 22 (quoting *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477, 71 S.Ct. 456, 95 L.Ed. 456 (1951)). Essentially, "[t]he TCA's substantial evidence test is a procedural safeguard which is centrally directed at whether the local zoning authority's decision is consistent with the applicable local zoning requirements." *Omnipoint Communications MB Operations, LLC v. Town of Lincoln,* 107 F.Supp.2d 108, 115 (D.Mass.2000).

Simply put, local governments are required to state clearly and in writing the reasons for a denial of

336 F.Supp.2d 71

permission to locate a telecommunications facility, and those reasons must be supported by substantial evidence in the record. *See Southwestern Bell,* 244 F.3d at 60. In this case, the defendants have satisfied the first requirement. In its written decision, the Board, following the requirements of the ZBL, listed at least three independent reasons for denying Cellco's special permit application:
(1) The 120-foot flagpole design proposed by Cellco would be visible above the skyline from several places within the Historic District. The visual impact of the tower would be non-minimal and incompatible with the architecture of the surrounding area;
(2) Construction of a new tower within a R40 zoning district was one of the proposals least preferred by the ZBL, and Cellco did not adequately consider alternative sites; nor did it demonstrate that the facility, by technical necessity, could not be located in a non-residential zone; and
(3) Cellco's proposal met neither the setback and landscaping requirements, nor the requirement that accompanying facilities be located underground.

See Decision of Grafton Planning Bd., Ex. 8, Aff. of Sarah L. McGinnis, Docket No. 30.

The question now raised is whether the reasons proffered by the Board are supported by substantial evidence in the record. In order to make that determination, I must review the entire record, taking into account evidence that is both supportive of and contradictory to the Board's conclusions. *See Penobscot Air Servs., Ltd. v. FAA,* 164 F.3d 713, 718 (1st Cir.1999), *quoted in Nat'l Tower,* 297 F.3d at 22 ("The reviewing court must take into account contradictory evidence in the record. But the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.") (internal quotation omitted). Because I think there is substantial evidence to support the Board's conclusion that the tower would have a negative visual impact on Grafton's historic common, I will discuss in depth only the first reason given by the Board.

[3] The Board's primary reason for denying Cellco's special permit application was its assessment of the aesthetic impact of locating the facility on the Upton Street Property, within a quarter mile of the Grafton Historic District. Relying on opposition from residents and from the Grafton Historic District Commission, as well as its own independent assessment of the photographs from the balloon test, the Board concluded that the proposed 120-foot flagpole design would have a negative visual impact on the historic Town Common. The Board received evidence of opposition*80 to the location of a facility on the Upton Street Property, in the form of letters from three residents, oral protest at the April 29th hearing, and a petition signed by 273 Grafton residents. The Board also received a letter from the Grafton Historic District Commission, expressing that entity's unanimous opposition to the tower because it would "significantly alter the hilltop character of the center of Grafton." *See* Exhibit 38 of the administrative record.

The evidence in the record reflects more than "generalized concerns" about the aesthetic appeal of wireless telecommunications facilities. *See Southwestern Bell,* 244 F.3d at 60. Instead, the tower's opponents were concerned about whether the tower was appropriate for the "particular location" contemplated by Cellco's proposal. *See id.* at 61. For example, the authors of one letter noted:
We think the erection of the proposed phone tower will importantly affect the beauty and historical ambience of the Common. For example, when standing at the south-west quarter of the Common, near its perimeter, the vista framed by the Library to the right, and Grafton Inn to the left was dominated by the test balloons. The sight of a tower would [be] clearly inconsistent with the Common. Another example was the view of the balloons over the McGill building, distracting from the character of that classic Greek Revival structure.

See Exhibit 28 of the administrative record.

To its credit, Cellco did modify the original proposal for a 150-foot monopole to accommodate the Board's desire for a less conspicuous facility and proposed a "stealth" flagpole design instead. However, unless there are indications that visual impact is a pretext for illegitimate biases against facilities, it is exclusively within the purview of the Town to make aesthetic judgments. *See Amherst,* 173 F.3d at 15; *see also Southwestern Bell,* 244 F.3d at 60-61 ("[T]he Board was entitled to make an aesthetic judgment about whether that impact was minimal, without justifying that judgment by reference to an economic or other quantifiable impact."). The Board reasonably concluded that the flagpole design was not architecturally compatible with the surrounding area and was not sufficiently screened from view. *See Southwestern Bell,* 244 F.3d at 62 (finding there was adequate evidentiary support for denial when the "tower was of a different magnitude than anything else in the vicinity" and was "out of keeping with the residential uses in close proximity to it").

Still, Cellco argues that, in reaching its decision on visual impact, the Board did not take into account any of the evidence in the record that supported Cellco's position. Specifically, Cellco claims that the Board ignored both the letter from the Massachusetts Historic Commission, in which the Commission concluded that the facility would have no adverse effect on Grafton's historical areas, particularly in view of the apparently unsightly Cumberland Farms sign across the street from the Upton Street Property. But, as Cellco conceded at the hearing on the present motions, the fact that these matters were not mentioned in the Board's written decision does not mean that the Board failed to consider them. The Board is not required to keep an exhaustive account of its decisionmaking process. *See Southwestern Bell,* 244 F.3d at 59-60 (noting that "it is not realistic to expect highly detailed findings of fact and conclusions of law," and holding that the written denial need only contain a sufficient explanation to allow meaningful review).

I have considered the record as a whole and find that substantial evidence exists to ***81** support the Board's finding that the tower would have a negative visual impact on the historic green. As Cellco conceded at the hearing before me on the present motion, the Board reasonably could have concluded that the tower was simply more unsightly than the Cumberland Farms sign, or that allowing the sign in the first place was a mistake. Moreover, the letter of the Massachusetts Historic District Commission was submitted to the Board after the close of the evidence. Notwithstanding the late submission, the Board reasonably could have chosen to credit the local historic commission's opinion about visual impact over that of the state commission. The Board also found, and it is conceded by Cellco, that the Upton Street Property is located in a R40 zoning district. The Upton Street Property thus is seventh out of eight, in descending priority, on the site preferences listed in Section 5.8.3 of the ZBL.

The Board found further that Cellco had not complied with Section 5.8.5(b) of the ZBL, which requires the applicant to provide "substantial evidence that the facility cannot, by technical necessity, be located in a non-residential zone." There is ample evidence in the record, including Cellco's failure to comply with certain submittal requirements outlined in the by-law, to support the Board's finding that Cellco failed to make a good faith effort to evaluate alternatives or to utilize existing facilities.[FN5] I need not rehearse that evidence here, because I think it sufficient to point out that Cellco's conduct at the hearing on April 29, 2002, adequately supports the Board's conclusion. As noted above, at that final hearing, the Board pointed out that the water standpipe located within the Grafton Water District might provide adequate signal coverage to meet Cellco's objectives and recommended continuing the hearing until after the Water District Board voted on whether to allow telecommunications facilities on its facilities. Instead of agreeing to the continuance as the Board requested, Cellco's representative stated that Cellco was *not interested in further evaluating any alternative sites*

and requested the hearing be closed.[FN6] It was certainly reasonable for the Board to conclude, from Cellco's reaction to the suggestions of a continuance of the hearing and from the absence of contrary evidence in the record, that Cellco had not made a good faith effort to assess all alternative locations for their potential to serve the targeted coverage area.

> FN5. These submittal requirements include: 1) Section 5.8.4(b), which requires submission of a Site Justification and Appropriateness Statement, including a description of the narrowing process that eliminated other potential sites; and 2) Section 5.8.4(d), which requires extensive documentation of efforts to evaluate all sites of similar height or elevation within a half-mile radius of the proposed site for feasibility and availability.
>
> FN6. It is irrelevant to the substantial evidence claim that the Water District Board later voted not to allow the siting of telecommunications facilities within the water district. First, the hearing before the Planning Board was closed on April 29, 2002, at Cellco's request, and no evidence of the Water District Board's decision is contained in the administrative record. Second, the Board was entitled to consider Cellco's refusal to wait until after the meeting of the Water District Board as evidence of Cellco's failure to make good faith efforts to explore alternative sites.

As a concluding note to the foregoing discussion of substantial evidence, I emphasize that the plan proposed by Cellco was at odds with the provisions of the by-law from the very beginning. The proposed site was next to the lowest on the by-law's preference list, was within a quarter mile of a historic district, and required no fewer than three waivers for the granting of a special permit. From the perspective of the purpose and intent of the by-*82 law (which the plaintiffs do not challenge) this was perhaps one of the worst places in Grafton to erect a telecommunications facility. The Board suggested a number of alternatives to Cellco, and only after Cellco refused to consider them further, did the Board ultimately deny the special permit application. Based on the evidence in the administrative record, I GRANT the Town's motion for summary judgment as to count I and DENY the motion of Cellco as to that count.

2. Effective Prohibition of Wireless Services

[4] The TCA also provides that a state or local government "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C.A. § 332(c)(7)(B)(i)(II). This anti-prohibition clause "can be violated even if substantial evidence exists to support the denial of an individual permit under the terms of the town's ordinances." *Nat'l Tower,* 297 F.3d at 20.

Review of a zoning board's decision under the anti-prohibition clause is *de novo.* The district court need not accord any deference to the local board and may review evidence that is not contained in the administrative record. *Nat'l Tower,* 297 F.3d at 22; *see also Amherst,* 173 F.3d at 16n.7. Thus, the effective prohibition claim is treated the same as any other motion for summary judgment filed in this court.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party has the burden of establishing "the lack of a genuine, material factual issue." *Snow v. Harnischfeger Corp.,* 12 F.3d 1154, 1157 (1st Cir.1993), *cert. denied,*513 U.S. 808, 115 S.Ct. 56, 130 L.Ed.2d 15 (1994) (citing *Finn v. Consolidated Rail Corp.,* 782 F.2d 13, 15 (1st Cir.1986)). Where there are cross motions for summary judgment, each cross motion is considered independ-

ently, and, as always, the facts are viewed in the light most favorable to the nonmoving party. *See Continental Cas. Co. v. Canadian Universal Ins. Co.,* 924 F.2d 370, 373 (1st Cir.1991). In this case, Cellco has the burden to establish that the denial of its application for a special permit amounts to an effective prohibition; thus, the defendant need only show that there is an absence of evidence in support of at least one element of the plaintiff's case in, order to succeed on summary judgment. *See Omnipoint,* 107 F.Supp.2d at 117.

[5] The plaintiff must establish two elements in an effective prohibition claim: (1) that the Town's zoning decisions and ordinances prevent the closing of significant gaps in the availability of wireless services, *Nat'l Tower,* 297 F.3d at 20; *see also Cellular Tel. Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus,* 197 F.3d 64, 68-70 (3d Cir.1999); *Sprint Spectrum L.P. v. Willoth,* 176 F.3d 630, 643 (2d Cir.1999); and (2) that "from language or circumstances not just that [its] 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."*Amherst,* 173 F.3d at 14.

Thus, the starting point of the effective prohibition analysis is always to determine whether there is a substantial gap in service that could be addressed by the proposed facility. "A 'gap' in wireless services exists 'when a remote user of those services is unable to either connect with the land-based national telephone network, or to maintain a connection capable of supporting a reasonably uninterrupted communication.' " *Omnipoint,* 107 F.Supp.2d at 118-19 (quoting *Ho-Ho-Kus,* 197 F.3d at 70). It is undisputed that a ***83** coverage gap exists in Grafton Center, and that Cellco customers cannot reliably initiate or maintain calls when they are in that area. Although there are at least ten wireless telecommunications facilities sited within Grafton, all are located outside Grafton Center, and none enables Cellco to provide service to its customers in Grafton Center. Accordingly, I conclude that the coverage gap in Grafton Center qualifies as significant under the TCA.

[6][7] Regarding the second element (the futility of further efforts to reach an accommodation with the Town), Cellco argues that the circumstances surrounding the denial of its application for a special permit indicate that applying for another permit would be fruitless. Obviously, the imposition of a blanket ban on cell towers or facilities would violate the TCA's anti-prohibition clause, but so too can an individual zoning decision. *Amherst,* 173 F.3d at 14. The First Circuit has identified two circumstances in which an individual decision may have the "effect" of prohibiting personal wireless services: (1) when a local authority "sets or administers criteria which are impossible for any applicant to meet;" and (2) when the "plaintiff's existing application is the only feasible plan." *Second Generation,* 313 F.3d at 630 (citing *Nat'l Tower,* 297 F.3d at 23-25, for the first proposition and *Amherst,* 173 F.3d at 14, for the second). In either case, "the burden for the carrier ... is a heavy one." *Amherst,* 173 F.3d at 14. Cellco does not argue that the Town has set criteria that are impossible for any applicant to meet.[FN7] Instead, Cellco argues that the location of facilities on the Upton Street Property is the only feasible and available plan for remedying the coverage gap.

> FN7. Indeed, Cellco admits that other carriers have successfully sought permits to site facilities in the non-residential zones.

"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." *Southwestern Bell,* 244 F.3d at 63 (1st Cir.2001) (emphasis added). The feasibility of alternatives is a fact-intensive determination, and the plaintiff bears a heavy burden to make the appropriate showing. *See Amherst,* 173 F.3d at 14. Cellco has not sustained that burden, because it has not shown that construction of a single facility on the proposed site is the

only "technically feasible" option. *See id.* at 15.

The parties appear to agree that there is no "direct replacement," from an RF perspective, for the Upton Street Property; however, Cellco has not eliminated the possibility that there may be other single or multiple site solutions that will provide adequate coverage to the gap. Other sites suggested by the Town include the steeple of the United Church of Christ located in Grafton Center. Even Jared Robinson, Cellco's RF expert, has acknowledged that the church steeple can accommodate antenna arrays, and that a facility located there would cover the Grafton Center and some of the surrounding neighborhoods. *See* Aff. of Jared Robinson, Ex. 1 at ¶ 11, McGinnis Aff. Although Robinson has stated that the steeple is not tall enough fully to address Cellco's coverage objectives, *see id.,* Cellco seems not to have considered how coverage of areas not addressed by a facility at the church or at other sites proposed by the Town (*e.g.,* the smokestack near the Town Hall office building) might be provided by increasing the signal strength at other Cellco facilities or by seeking permits for more facilities. *See, *84 e.g.,* Dep. of David Maxson at 102-104 (describing how Cellco might be able to reallocate the siting of facilities to cover the gap in Grafton without building a tower at the Upton Street Property).

At the hearing on April 29, 2002, the Town also suggested consideration by Cellco of the State Police tower at 40 Worcester Street. Although Robinson has stated that the State Police tower does not "appear to have sufficient structural strength" to support the necessary equipment, *see* Robinson Aff. at ¶ 8, there is no evidence that Cellco ever tested the structural strength of the tower or sought the opinion of a structural engineer to confirm Robinson's observation. Moreover, there is no evidence that Cellco ever considered the possibility of constructing a replacement tower that would accommodate telecommunications and emergency facilities. *See* Dep. of Robert Hassinger at 85 (stating that the State Police tower was discussed at the hearing, but that it would need to be rebuilt in order to accommodate a cell site). As a final point with respect to the State Police tower, Cellco contends that the State Police are unlikely to agree to sharing a tower with a wireless service provider. There is no evidence, however, that Cellco ever approached the State Police with an offer.

Finally, Cellco does not appear to have adequately considered the possibility of reconfiguring its network, or using cell sites from outside Grafton Center to provide service within Grafton Center. *See Second Generation,* 313 F.3d at 635 (holding that the provider failed to show that other potential solutions, such as a taller tower or a site in another jurisdiction, could not cover the gap in services). Despite the fact that the Board indicated numerous times at the hearings that Cellco should consider whether service could be provided to Grafton Center without building a tower visible from its historic green, only after Cellco's permit application was rejected and this lawsuit filed did Cellco appear to address the Board's suggestion. Still, Cellco does not take that option seriously. Robinson, in his affidavit in the present proceeding, dismisses alternative network designs summarily, stating that "[i]t would not be possible to provide alternative coverage to address the Grafton Center coverage gap without duplicating coverage provided by existing sites and [future] proposed sites" on existing towers owned by other providers. Moreover, Robinson does not directly contradict the Board's expert, David Maxson, who opines that "judicious restructuring of the network appears to still be possible while there is still no facility on Route 140 toward Upton and the coverage to the north and west is likely to demand additional development anyway. Some existing structures may offer meaningful substitution for portions of the proposed facility coverage." *See* Maxson Report at 5.

The First Circuit's analysis in *Amherst* suggests that a Town might require a provider to rethink its network design. *See Amherst,* 173 F.3d at 14-15. In *Amherst,* the court pointed out that although a pro-

vider may desire the most efficient and cost-effective system, using "standard height towers at optimal locations," the provider must be willing to consider and present to localities other feasible alternatives available to them, even those that entail using lower towers and multiple site solutions. *See id.; see also Second Generation,* 313 F.3d at 635 (listing the range of possible solutions that the provider failed to demonstrate were not technically feasible). Additionally, in *Ho-Ho-Kus,* the Third Circuit noted that because the TCA bars local regulation that has the effect of prohibiting *services,* not facilities, it is important to consider whether preexisting facilities located outside the Town could provide adequate coverage inside the Town. 197 F.3d at 71.

***85** Far from foreclosing all of Cellco's options in providing coverage to Grafton Center, the record indicates that the Board tried to work with Cellco by repeatedly suggesting alternative sites Cellco might explore. In offering alternatives, the Board's actions were supererogatory. *See Nat'l Tower,* 297 F.3d at 24 ("We doubt that Congress intended local zoning boards to pay for experts to prove that there are alternative sites for a proposed tower, simply to defend themselves from an easily made accusation in court that an individual denial of a permit amounts to an effective prohibition."). Thus, the record simply does not support any contention that the Board is hostile to wireless telecommunications facilities in general. Rather, the record shows the Board's efforts to avoid constructing a tower that would mar the visual appeal and authenticity of Grafton's historic landmarks, unless Cellco had determined all other alternative to be infeasible.[FN8] Cellco has made no showing of "such fixed hostility by the Board" as to indicate that the Board's concerns about the historic common are "mere camouflage." *See Amherst,* 173 F.3d at 14. "A single denial of an application based on a supportable finding that another location was available would almost certainly fall short of an effective prohibition of wireless services." *Nat'l Tower,* 297 F.3d at 24. The options that remain available to Cellco may be more difficult and expensive than the proposed single site solution. But the TCA does not offer providers the best or cheapest option.[FN9] *See generally Amherst,* 173 F.3d at 15. Such a rule would effectively abrogate the local government's authority to control the siting of wireless telecommunications facilities.

FN8. Cellco's accusations that the Board forced another provider to withdraw its application to locate a facility in Grafton Center is entirely unsupported by any admissible evidence in the record. The only basis for this contention in the record is the affidavit of Kenneth Kelly, president of VitalSite Services, a real estate consulting firm employed by Cellco. Without revealing any basis of personal knowledge, Kelly states only that he is "aware that Nextel withdrew its application after several hearing sessions because the Board had made clear that the application would be denied if it were not withdrawn." Even if true and admissible, there is no indication from this statement that the Board was hostile to Nextel's applications for illegitimate reasons or that any interactions between the Board and Nextel were improper.

FN9. Tellingly, in rejecting the standpipe, Stephen Russell, a property consultant hired by Cellco, vaguely states in his affidavit that the water district property "does not represent an *improvement* over the DPW property ..." Affidavit of Stephen Russell, Exhibit 5 to Affidavit of Sarah McGinnis (emphasis added). Language like this indicates that Cellco may be dismissing alternatives as infeasible because they are not Cellco's first choice. In an effective prohibition claim, the provider must demonstrate that no alternatives are "technically feasible," not just that they are less desirable. *See Amherst,* 173 F.3d at 15.

In summary, Cellco's proposed site was one of the

most objectionable locations in Grafton for a 120-foot tower, and the Board gave Cellco numerous suggestions that would receive favorable consideration by the Board. Thus, it is simply far "too early to give up on the Board." *Id.* at 16. Cellco's "one-proposal strategy may have been a sound business gamble, but it does not prove the Town has in effect banned personal wireless communication." *Id.* at 15 (noting that site planning and procuring leases are both expensive and time-consuming for providers).

Thus, the Town's motion for summary judgment is GRANTED as to count II. The motion of Cellco for summary judgment as to this count is DENIED.

B. Count III: 42 U.S.C. § 1983

Because I have sustained the Board's decision to deny the special permit and ***86** have concluded that the rejection of Cellco's application for that special permit does not constitute an effective prohibition, there is no TCA violation. Accordingly, there can be no § 1983 claim, because no federal right has been infringed.

Moreover, there is disagreement among the courts as to whether § 1983 is preempted by the enforcement scheme of the TCA itself. *Compare Nat'l Telecomm. Advisors, Inc. v. City of Chicopee,* 16 F.Supp.2d 117 (D.Mass.1998) (holding that a TCA claim may not be asserted under § 1983); with *Sprint Spectrum v. Town of Easton,* 982 F.Supp. 47 (D.Mass.1997) (holding that a TCA claim may be asserted under § 1983). The Third Circuit has held that a TCA claim may not be asserted under § 1983. *See Nextel Partners, Inc. v. Kingston Township,* 286 F.3d 687 (3d Cir.2002). Among the circuits, only the Ninth and Eleventh Circuits have held otherwise, but the Eleventh Circuit opinion was later vacated on other grounds. *See Abrams v. City of Rancho Palos Verdes,* 354 F.3d 1094 (9th Cir.2004); *AT&T Wireless PCS, Inc. v. City of Atlanta,* 210 F.3d 1322 (11th Cir.2000), *vacated on other grounds,*223 F.3d 1324 (11th Cir.2000). Given my conclusion that no federal right of Cellco has been violated, I need not weigh in here on the question of whether a § 1983 claim lies under circumstances in which a local government improperly denied a wireless carrier permission to erect a telecommunications facility.

The Town's motion for summary judgment is GRANTED as to count III; the corresponding motion of Cellco for summary judgment on this count is DENIED.

C. Count IV: Substantive Due Process

Cellco claims that the Board's refusal to waive the setback, landscaping, and burying requirements of the ZBL constitutes a violation of substantive due process. As the plaintiffs have cited no cases to support the notion that denial of a waiver request is cognizable as a substantive due process claim, I do not address this claim substantively. *See United States v. Figueroa-Encarnacion,* 343 F.3d 23 (1st Cir.2003) ("Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace."). Thus, the Town's motion for summary judgment is GRANTED as to count IV; Cellco's motion for summary judgment as to count IV is DENIED.

D. Count V: Violation of Mass. Gen. L. 40A and the By-Law

Finally, Cellco claims that the Board's denial was arbitrary and capricious, not based upon evidence, and in excess of the Board's authority under Mass. Gen. L. 40A and the ZBL. A decision of the Planning Board can only be disturbed under chapter 40A § 17 if it is based on a legally untenable ground or is unreasonable, whimsical, capricious or arbitrary. *See Subaru of New England, Inc. v. Board of Appeals of Canton,* 8 Mass.App.Ct. 483, 395 N.E.2d 880 (1979). Because I find that the Board's decision was based on substantial evidence, I rule that the decision was not arbitrary and capri-

cious.

Thus, the Town's motion for summary judgment is GRANTED as to count V, and Cellco's motion for summary judgment as to this count is DENIED.

III. CONCLUSION

The motion for summary judgment of the plaintiff Cellco is DENIED. The motion for summary judgment of the defendant Town of Grafton is GRANTED.

IT IS SO ORDERED.

D.Mass.,2004.
Cellco Partnership v. Town of Grafton, Massachusetts
336 F.Supp.2d 71

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C
Nextel Communications of Mid-Atlantic, Inc. v. City of Cambridge
D.Mass.,2003.

United States District Court,D. Massachusetts.
NEXTEL COMMUNICATIONS OF THE MID-ATLANTIC, INC., d/b/a Nextel Communications, Plaintiff
v.
CITY OF CAMBRIDGE; Planning Board of the City of Cambridge; and Thomas Anninger, Florrie Darwin, Pam Winters, and Hugh Russell in their capacities as members of the Planning Board of the City of Cambridge, Defendants
No. CIV.A. 02-10429GAO.

Feb. 28, 2003.

Provider of wireless telecommunications services brought action against city, alleging violations of the Telecommunications Act (TCA), after city planning board denied its application for special permit allowing it to place wireless telecommunications equipment on its desired location. On cross-motions for summary judgment, the District Court, O'Toole, J., held that: (1) board's decision to deny application for aesthetic reasons was supported by substantial evidence in written record, as required by the TCA, and (2) board did not unreasonably discriminate against provider in violation of the TCA.

Defendant's motion granted.

West Headnotes

[1] Telecommunications 372 ⚿1029

372 Telecommunications
372IV Wireless and Mobile Communications
372k1027 Constitutional and Statutory Provisions
372k1029 k. Purpose. Most Cited Cases
(Formerly 372k461.5)
The Telecommunications Act (TCA) was enacted to expand availability of wireless telecommunications services and to increase competition in wireless telecommunications industry. Communications Act of 1934, § 332(c)(7)(B), as amended, 47 U.S.C.A. § 332(c)(7)(B).

[2] Zoning and Planning 414 ⚿14

414 Zoning and Planning
414I In General
414k14 k. Concurrent and Conflicting Regulations. Most Cited Cases

Zoning and Planning 414 ⚿708

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)4 Questions of Fact
414k708 k. Permissions, and Certificates. Most Cited Cases

Zoning and Planning 414 ⚿709

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)4 Questions of Fact
414k709 k. Variances or Exceptions. Most Cited Cases
Substantial evidence review of ruling on application for permit for wireless telecommunications service facility under the Telecommunications Act (TCA) does not create substantive federal limitation upon local land use regulatory power, but is instead centrally directed to those rulings that local zoning board is expected to make under state law and local ordinance in deciding on variances, special exceptions and the like. Communications Act of 1934, § 332(c)(7)(B), as amended, 47 U.S.C.A. § 332(c)(7)(B).

[3] Zoning and Planning 414 ⚿708

414 Zoning and Planning

414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)4 Questions of Fact
414k708 k. Permissions, and Certificates. Most Cited Cases
Substantial evidence standard of review of ruling on application for permit for wireless telecommunications service facility under the Telecommunications Act (TCA) is same as that traditionally applicable to review of administrative agency's findings of fact, and under that standard, "substantial evidence" is such relevant evidence as reasonable mind might accept as adequate to support conclusion. Communications Act of 1934, § 332(c)(7)(B), as amended, 47 U.S.C.A. § 332(c)(7)(B).

[4] Zoning and Planning 414 ⇐384.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases
Municipality may decide to reject wireless telecommunications project because of aesthetic concerns without justifying that judgment by reference to economic or other quantifiable impact, and municipality's aesthetic judgment is valid, under the Telecommunications Act (TCA), as long as it is grounded in specifics of case and does not reflect generalized negative views that could apply to any wireless technology installation, regardless of location. Communications Act of 1934, § 332(c)(7)(B), as amended, 47 U.S.C.A. § 332(c)(7)(B).

[5] Zoning and Planning 414 ⇐384.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases
City planning board's decision to deny permit application of provider of wireless telecommunications services to place wireless equipment on desired site because of aesthetic concerns was supported by substantial evidence in the written record, as required by the Telecommunications Act (TCA); board provided several objections to aesthetics of proposed project, including its visibility to the public, and suggested alternatives, which were not pursued. Communications Act of 1934, § 332(c)(7)(B), as amended, 47 U.S.C.A. § 332(c)(7)(B).

[6] Zoning and Planning 414 ⇐384.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases
City planning board's decision to deny special permit to provider of wireless telecommunications services to place wireless telecommunications equipment on provider's desired site, which was used by other providers, because of aesthetic reasons was not unreasonable discrimination in violation of the Telecommunications Act (TCA); provider's proposed installation varied significantly from existing installations at site, in that, it was closer to ground and would have jutted out of blank wall, rather than being attached to rooftop sign. Communications Act of 1934, § 332(c)(7)(B), as amended, 47 U.S.C.A. § 332(c)(7)(B).

***119** Steven E. Grill,Esq., Devine, Millimet & Branch, Manchester, NH, for Nextel Communications of the Mid-Atlantic, Inc., d/b/a Nextel Communications, Plaintiff.
Nancy B. Schlacter, Cambridge City Law Department, Cambridge, MA, for City of Cambridge, the Planning Board of the City of Cambridge, Thomas Anninger, Florrie Darwin, Pam Winters, Hugh Russell, Defendants.

***120** *MEMORANDUM AND ORDER*

O'TOOLE, District Judge.

Invoking provisions of the Telecommunications Act of 1996 ("TCA"), 47 U.S.C. § 332(c)(7)(B), Nextel Communications ("Nextel") filed this suit because the defendants denied Nextel's application for a special permit allowing it to place wireless telecommunications equipment on the outside of the Royal Sonesta Hotel in Cambridge, Massachusetts. Nextel alleges that the decision to deny Nextel's application was not supported by substantial evidence contained in a written record and it unreasonably discriminated against Nextel because the defendants had allowed other wireless service providers to place equipment on a sign located on the roof of the same hotel. Both parties have now moved for summary judgment. They agree that the record before the Court adequately establishes the facts in this case and that the issues presented can be decided by the Court as a matter of law. The major area of contention between the parties is to what extent the defendant Planning Board ("Board") was justified in rejecting Nextel's proposal based on aesthetic concerns.

A. *Summary of Facts*

Nextel is licensed by the Federal Communications Commission to provide wireless telecommunications services in various parts of Massachusetts, including the City of Cambridge. To provide such services, Nextel installs antenna facilities throughout its coverage area. The antennas are connected to receivers and transmitters that operate within a limited geographic area known as a "cell." In 2001 Nextel determined that its wireless service in the eastern portion of Cambridge was unreliable because there were not enough antennas in that cell. If there are not enough antennas in a given area, Nextel's customers may not be able to place calls in that area, or their calls may be disconnected. Although Nextel has some antennas in the eastern portion of Cambridge, it found that the number was insufficient for consistent service.

To address these problems, Nextel began searching for existing structures on which it could mount additional antennas. After locating several buildings which might serve as suitable sites, Nextel decided the best location for its antennas would be on several sides of the Royal Sonesta Hotel. Nextel would not have been the first wireless communications provider to place antennas on the Sonesta. One or more other wireless providers currently have antennas installed on the hotel sign on the roof of the Sonesta.

The area in which Nextel wanted to locate its additional antennas is in a portion of the City that has been designated as a "planned unit development district," identified as the PUD-2 District, under the Cambridge zoning by-law. Wireless telecommunications antennas and related equipment are a permitted use in such districts, subject to the grant of a special permit by the appropriate authority. In the case of the PUD-2, the relevant body was the district's Planning Board. The zoning regulations provide some general guidelines that the Board must follow in determining whether to grant such permit applications. *See Kovacs Aff.*, Ex. A, Cambridge, Mass., Zoning Ordinance, art. 4.32(g) n. 49. The criteria include the "extent to which the visual impact of the various elements of the proposed facility is minimized" through "the use of existing mechanical elements on a building's roof or other features of the building as support and background,""the use of materials that in texture and color blend with the materials to which the facilities are attached," and "[o]ther effective means to ***121** reduce the visual impact of the facility from off the site." *Id.*

On September 4, 2001, Nextel submitted an application for a special permit to the Board that proposed a facility consisting of three arrays, each containing four antennas, to be mounted on three sides of the Sonesta, and an equipment shelter which would be located on top of an existing portion of the hotel. The Board held an initial hearing on Nextel's application on November 20, 2001. At this first hearing, the Board reviewed a packet of material

which contained photo simulations and design sketches of Nextel's proposed antennas and equipment shelter. After an initial presentation by Nextel, the Board's members voiced several concerns about the aesthetics of the project. They were particularly troubled by the visibility of the equipment shelter and by the fact that the antennas were in the middle of an otherwise flat, blank brick wall. There also was considerable concern that the antennas were closer to the ground than installations by other wireless providers, and that as a result the antennas would be too visible to passers-by. One of the members commented that this was "one of the most intrusive antenna installations I've seen come before us." *Kovacs Aff.*, Ex. C at 61.

After the hearing, in response to these comments, Nextel made several adjustments to its proposal. It lowered the height of the equipment shelter and moved it farther back from the roofline. Nextel also decided to use fiberglass panels painted to match the color of the building to conceal the antennas, and it removed the antennas that were on the side of the hotel directly facing the street.

A hearing on the revised Nextel proposal was held on January 8, 2002. Although at one point one of the Board members commented that Nextel had done a "great job" at addressing some of the concerns raised at the previous hearing, *Kovacs Aff.*, Ex. F at 128, in the end the Board as a whole was still dissatisfied. The Board felt that the painted fiberglass panel did not remedy the problem that Nextel's project would place visually unattractive protrusions on the face of the hotel's flat brick wall. Although some members were pleased with the changes in the equipment shelter's design, others were concerned that it was still too visible. As the debate about the Nextel project went on, a new thread of concern also appeared in the dialogue. This began when one board member commented:

I am starting to have a concern about the proliferation of [these antenna projects], and it seems like that we see these all the time. We get-you know, and they are sort of-well, that's not so bad, and that one is not so bad, and-but it just-it's creeping. You know, they are on every building and, in this case-in most cases, they are way up out of sight. They are at least over your-you don't see them unless you are looking up and looking for them, but now they are creeping down and getting closer to your normal eye level, and you know, you look at the north elevation of this building, there are two of them on the Royal Sonesta sign already. They aren't even aligned.

I mean, they are just-this stuff is just creeping and I am wondering if maybe this isn't the time to address it, but I think we do have to sort of address what it is going to take for us to start saying no because there seems to be no be no end to it. I can't see where the end is going to be to it. And it may seem unfair to sort of single out one particular vendor to start making a statement about, but I think, at a certain point, enough is going to be enough.

***122** *Id.* at 128-29. Although some Board members agreed with this sentiment and said that they wanted to create a more coherent, perhaps more stringent approach to reviewing permit applications, no consensus on the matter was reached during the hearing. However, the Board members did agree that Nextel's revised proposal was not acceptable. They found that the antennas were too visible because they were too low to the ground and stuck out too far from the building. Some Board members suggested that Nextel should try to develop another proposal after consulting with the Sonesta's architect, but Nextel rejected the suggestion, electing to stand on the proposal as presented. Nextel's representative said to the Board, "The antennas are what they are. They basically have to go in these locations." *Id.* at 154. The Board then called for a vote on the proposal, and the special permit was denied.

On February 13, 2002, the Board formalized its denial of the permit by filing a written notice of decision with the Office of the City Clerk. The five-page written notice detailed the Board's views of the aesthetic shortcomings of Nextel's proposal. It

stated, "Mounting the antennas on the flat face of the hotel facade, even with the 'stealth box,' fails to diminish the impact of the installation. The bold projections of either design on an otherwise unadorned wall, which is an important characteristic of the design of the hotel, remains objectionable to the Board particularly at this low elevation close to passers-by." *Kovacs Aff.,* Ex. G at 3. The Board reiterated that the equipment shelter was "a prominent and unattractive addition to the roofline of the one story pool shelter roof." *Id.* The written decision also noted that "the Board suggested that the applicant contact the original architect for the hotel, but the applicant did not indicate an interest in doing so." *Id.* at 3-4. Aggrieved by the denial of the special permit, Nextel commenced this action, claiming that the Board's decision violated important provisions of the TCA.

B. *Discussion*

[1] The TCA was enacted to expand the availability of wireless telecommunications services and to increase competition in the wireless telecommunications industry. *See Southwestern Bell Mobile Sys., Inc. v. Todd,* 244 F.3d 51, 57 (1st Cir.2001). The statute seeks to achieve this goal, in part, by regulating and facilitating the installation of mobile or wireless communication technologies throughout the United States. *See*47 U.S.C. § 332. As part of this regulatory scheme, the TCA places some limits on the ability of local zoning authorities to exclude such technologies from the areas which they control. *See id.* § 332(c)(7)(B). The provisions that are relevant to this dispute state:

(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.

...

(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.

Id. These provisions of the TCA are "a deliberate compromise between two competing aims-to facilitate nationally the ***123** growth of wireless telephone service and to maintain substantial local control over siting of [wireless equipment]." *Town of Amherst v. Omnipoint Communications Enters., Inc.,* 173 F.3d 9, 13 (1st Cir.1999).

1. *The Board's Decision Was Supported By Substantial Evidence Contained in a Written Record*

[2][3] The standard for determining whether the Board's decision was supported by substantial evidence contained in a written record was summarized by the First Circuit in *Todd:*

"Substantial evidence" review under the TCA does not create a substantive federal limitation upon local land use regulatory power, but is instead centrally directed to those rulings that the Board is expected to make under state law and local ordinance in deciding on variances, special exceptions and the like. The "substantial evidence" standard of review is the same as that traditionally applicable to a review of an administrative agency's findings of fact.

Todd, 244 F.3d at 58 (citations and internal quotation marks omitted). Under that standard, substantial evidence "is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Penobscot Air Servs., Ltd. v. Fed. Aviation Admin.,* 164 F.3d 713, 718 (1st Cir.1999) (citations omitted).

[4] The competing goals of providing optimal wireless service and preserving the aesthetic integrity of a cityscape often require balancing and trade-offs, and "subject to an outer limit, such choices are just what Congress has reserved to the [local authorities]." *Omnipoint Communications,* 173 F.3d at 15. A municipality may decide to reject a wireless

project because of aesthetic concerns "without justifying that judgment by reference to an economic or other quantifiable impact." *Todd,* 244 F.3d at 61. The town's aesthetic judgment is valid as long as it is "grounded in the specifics of the case" and does not reflect generalized negative views that could apply to any wireless technology installation, "regardless of location." *Id.*

[5] In this case, the Board's decision to deny the permit application is adequately supported by substantial evidence in the written record. The written decision set forth the Board's reasons for the denial in terms that were specific to the site and the details of Nextel's proposal. It is worth quoting the decision at length, because the Board's explanation of its decision demonstrates that the reasons for the decision were grounded in the specific design details as reflected in the record:

The visual impact of the various elements of the proposed facility has not been sufficiently minimized.

The original NEXTEL antenna and equipment cabinet proposal was very prominent on the façade of the hotel. It consisted of three antenna locations. The array of three antennas mounted on the entry façade of the hotel facing Cambridge parkway is well integrated into the design of that portion of the building and the Planning Board has no objection to that aspect of the proposal.

The two arrays of three antennas each on the Land Boulevard façade of the original high-rise portion of the hotel are not well integrated; they appear to float on the surface at prominent locations low on the building and do not relate well to each other or any details of the building as they are viewed together from the west and southwest. In the original submission each antenna element was visible.

The original equipment cabinet shelter on the pool shelter was large and very prominent. It is a new element unrelated to any existing mechanical elements ***124** or other features of the building in order to minimize its visual impact.

Although the amended proposal attempted to respond to the concerns expressed by the Planning Board, it failed to address and resolve equately.

The amended antenna proposal for those arrays facing Land Boulevard were modified to be presented as a single mechanical box rather than three separate antennas. Mounting the antennas on the flat face of the hotel façade, even with the "stealth box," fails to diminish the impact of the installation. The bold projections of either design on an otherwise unadorned wall, which is an important characteristic of the design of the hotel, remains objectionable to the Board particularly at this low elevation close to passers-by. The hotel façade faces a heavily traveled arterial road and a public park where large numbers of pedestrians also travel.

The amended equipment shelter proposal presented at the subsequent Planning Board meeting was somewhat improved. It nevertheless remains a prominent and unattractive addition to the roofline of the one story pool shelter roof.

The Planning Board made suggestions as to alternative locations, in the approximate vicinity of the locations in the application, which in the Board's view would have mitigated the negative visual impact of the particular installation proposal. Each time the applicant asserted particular technical engineering reasons why the alternate suggestions could not be implemented (including below the overhang of the building where the units would be much less prominent).

It would appear that the applicant team is in need of architectural as well as technical engineering telecommunication advice to adequately address both the Board's visual concerns and the applicant's own technical needs. In fact, the Board suggested that the applicant contact the original architect for the hotel, but the applicant did not indicate an interest in doing so. While the Board was willing to continue the case so that further exploration of options could be undertaken, the applicant chose to have the Board take final action.

Therefore, the Board finds that the requirements of Section 4.40, Footnote 49 have not been met.

Kovacs Aff., Ex. G, at 2-4.

The fact that Nextel does not agree with the Board's views does not make them erroneous. The difficulty is not that the Board's actions are insufficiently supported-the photo simulations in the record adequately demonstrate what Nextel's antennas would look like, according to Nextel. The problem rather is that the application and enforcement of aesthetic standards involves judgments that necessarily have a substantial subjective component. Beauty is in the eye of the beholder, and it is not uncommon for persons to form differing opinions about what is visually pleasing, especially in the mid-range, rather than at the extremes, of the spectrum of possibilities.

Nextel protests that the Board members' subjective opinions do not constitute "substantial evidence" upon which a decision may properly rest. That observation is quite right, but misses the point. The members' "subjective opinions" were the conclusions they drew after evaluating the evidence presented of the details of the proposal, including the graphic representations of what the installation would look like. The Board was called upon by the zoning regulations to judge whether the appearance of the installation would satisfy the applicable criteria. The members' "opinion"-their *decision*-that it did not was grounded in the specifics of the proposal,***125** and that is all that the "substantial evidence" requirement demands. *Todd,* 244 F.3d at 61.

The defendants' decision might have been on shakier ground if Nextel had demonstrated that the Sonesta proposal genuinely was Nextel's only option, and that the proposal was necessary to close a "significant" coverage gap in East Cambridge. *See Second Generation Properties, L.P. v. Town of Pelham,* 313 F.3d 620, 631-35 (1st Cir.2002) (discussing when refusing to permit such a gap to be closed would violate the TCA). Nextel argues in its brief that for financial and technological reasons, the Sonesta was the only feasible location for its antennas, but the record does not support this argument. It is clear that the Sonesta was Nextel's preferred location for a combination of business and technical reasons. Nextel's explanation to the Board why particular alternate sites had been rejected does not clearly establish that there were no feasible alternatives, only that the best alternatives were less desirable that the Sonesta location. *See Kovacs Aff.,* Ex. E (January 7, 2002, letter). The Board could reasonably have concluded that other alternatives merited further exploration, and in fact, both the transcript of the second hearing and the written decision itself showed that the Board was open to further exploration of the issue, but Nextel declined the opportunity.

2. *The Board Did Not Unreasonably Discriminate*

[6] The Board's decision to deny Nextel's special permit application also was not unreasonable discrimination among providers of equivalent services. At least two Circuits have held that the TCA "explicitly contemplates that some discrimination among providers of functionally equivalent services is allowed." *Sprint Spectrum, L.P. v. Willoth,* 176 F.3d 630, 638 (2d Cir.1999) (citing *AT & T Wireless PCS, Inc. v. City Council of Virginia Beach,* 155 F.3d 423, 427 (4th Cir.1998)). The Second Circuit found that a city may subject one provider's proposal to a more searching inquiry than that of a competing provider if the two proposals present different visual, aesthetic, or safety concerns. *Willoth,* 176 F.3d at 638-39. Similarly, the Fourth Circuit held that a city's determination that the plaintiff's tower proposal would be an "aesthetic blight" was not unreasonable discrimination against the plaintiff. *Virginia Beach,* 155 F.3d at 427.

Nextel tries to argue that the Board's actions were unreasonably discriminatory because the Board allowed one of its competitors, Cellular One, to place antennas on the Sonesta that are more of an eyesore than Nextel's proposed antennas. However, the Nextel proposal is not closely comparable to the Cellular One installation. Nextel's antennas would have been much closer to the ground than Cellular One's, and they would have jutted out of the blank wall rather than being attached to the hotel's

rooftop sign, as Cellular One's antennas are. Both of these aesthetic differences were important to the Board, which felt that Nextel's antennas would be much more visible to street traffic than the existing ones. Since Nextel's proposed installation varies significantly from the existing ones, there is no basis for finding that the defendants unreasonably discriminated against Nextel.

C. *Conclusion*

The Board's decision to reject Nextel's proposal did not violate the TCA. The decision was supported by substantial evidence contained in the written record, and it did not unreasonably discriminate against Nextel. Accordingly, the defendants' motion for summary judgment ***126** (docket no. 25) is GRANTED, and Nextel's motion for summary judgment (docket no. 17) is DENIED.

Judgment shall enter in favor of the defendants dismissing the complaint on the merits.

It is SO ORDERED.

D.Mass.,2003.
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