

FIRST CIRCUIT DECISION AFFIRMS LOCAL ZONING AUTHORITY OVER WIRELESS FACILITY SITINGS

By: Robert D. Ciandella, Esquire¹

In only the third case decided by a Court of Appeals and the first case decided by the First Circuit, the United States Supreme Court of Appeals for the First Circuit held recently that the Town of Amherst did not violate the Telecommunications Act of 1996 when it denied applications for special exceptions and variances to enable Omnipoint Communications to site four 190 foot towers within the Town.² The Court of Appeals vacated a decision of the United States District Court of New Hampshire holding that Amherst had violated the Telecommunications Ave of 1996 ("TCA") by effectively prohibiting the provision of wireless services. A number of important lessons and guiding principles can be drawn from the decision of the Court of Appeals.

At the heart of the case is what the Court of Appeals characterizes as "[a] statutory provisions...[which]... is deliberate compromise between tow competing aims -- to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers." The TCA preserves local zoning authority subject to two substantive and three procedural limitations. The substantive limitations are that municipalities may not "...unreasonably discriminate among providers of functionally equivalent services..." and that municipal regulation may "...not prohibit or have the effect of prohibiting the provision of personal wireless services." The three procedural limitations on the exercise of local zoning authority are that municipalities act within a reasonable period of time on applications for placement of wireless facilities, that denials be in writing and supported by substantial evidence contained in a written record and that denials may not be based on radio frequency environmental effects.

The principles that can be drawn from the decision can be summarized as follows:

- Wireless providers, like other developers, are subject to local zoning and must plan their deployment of systems in the context of what local zoning permits. In the Amherst case, the Court of Appeals noted that Omnipoint had a rigid deployment scheme that it refused to modify in the face of the Town's zoning requirements. The Court state: "Omnipoint did not present serious alternatives to the Town...this one proposal strategy may have been a sound business gamble, but it does not prove that the Town has in effect banned personal wireless communication."

¹ Robert D. Ciandella is a partner in the Exeter law firm of Donahue, Tucker & Ciandella, and was counsel to the Town of Amherst in the case that is the subject of this article.

² Town of Amherst, New Hampshire v. Omnipoint Communications Enterprise, Inc., 176 F.3d 9 (1st Cir. 1999).

- The TCA contemplates that municipalities are free to deny applications to site wireless facilities. A single denial or set of denials will not constitute an effective prohibition unless the denials are of a quality and nature that render futile any future applications by the wireless provider for zoning permits or relief. The Court of Appeals stated: "Obviously, an individual denial is not automatically a forbidden prohibition violating the 'effect' provision. But neither can we rule out the possibility that -- based on language or circumstances -- some individual decisions could be shown to reflect, or represent, an effective prohibition on personal wireless service."
- The burden is on the wireless provider to demonstrate that the Town has effectively prohibited personal wireless services. The Court stated: "But the burden for the carrier invoking [the effective prohibition] provision is a heavy one: to show from language or circumstances not just that this application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try."
- Municipalities should be flexible and constructively engaged. The Court of Appeals noted: "Ultimately, we are in the realm of tradeoffs: on one side are 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. Omnipoint may think that even from an aesthetic standpoint, its solution is best. But subject to an outer limit, such choices are just what Congress has reserved to the town. [Citations omitted.] We need not decide now whether and to what extent legitimate zoning requirements could require a carrier to accept a wireless system that is functional but offer less than perfect performance."
- The substantial evidence requirement, one of the procedural limitations placed on local zoning by the TCA, is to be applied based on a municipality's own zoning requirements, as administered under New Hampshire law. The Court of Appeals stated: "...[T]he substantial evidence requirement is 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."

These guiding principles underscore the importance of municipalities acting proactively to establish land use controls governing the siting of wireless facilities. These principles also confirm the importance of municipalities being flexibly and constructively engaged with wireless carriers to site facilities consistent with established zoning. The wireless industry seeks a predictable, certain process. The industry is under significant competitive pressure to deploy its systems. Time is critically important to the industry and the industry has an enlightened self-interest in exploiting zoning ordinances that offer streamlined approval processes for sitings that the municipality favors. This means that a municipality must establish what its land use policy will be governing siting.

That land use policy should create a path for industry that exploits the self-interest of the wireless industry by making the preferred siting alternatives, from the municipality's perspective, the path of least resistance for the wireless provider. This can be done by establishing a hierarchy of siting values that makes it plain in the zoning ordinance that the best siting, from the municipality's point of view, is the easiest siting for the wireless provider to obtain. Conversely, the least desirable permitted siting, from the municipality's point of view, should be the most difficult siting for the wireless provider to obtain.

Moreover, municipalities must act on the basis of New Hampshire's law of zoning. This means that the master plan must be viewed as the foundational document for wireless zoning. Land use controls adopted by municipalities governing the siting of wireless facilities should be fundamentally consistent with the master plan. Finally, municipalities must practically test proposed zoning to determine whether it prohibits or effectively prohibits the provision of wireless services. The test, positively stated, is whether the zoning adopted by the municipality provides a reasonable opportunity for the siting of personal wireless service facilities.

At the close of its opinion, the Court of Appeals celebrates the common interests of the provider and the municipality in finding ways to permit the siting of wireless facilities "... in a way most congenial to local zoning." The Court closes its opinion with the following passage:

"The statute's balance of local autonomy subject to federal limitations does not offer a single 'cookie cutter' solution for diverse local situations, and it imposes an unusual burden on the courts. But Congress conceived that this course would produce (albeit at some cost and delay for the carriers) individual solutions best adapted to the needs and desires of particular communities. If this refreshing experiment in federalism does not work, Congress can always alter the law."