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To the Graduate Council:

I am submitting herewith a thesis written by Todd Kenneth Morgan entitled "The Telecommunications Act of 1996: the policy's impact on southeastern jurisdictions that had lawsuits overturn public hearing decisions." I have examined the final electronic copy of this thesis for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Master of Science, with a major in Planning.

James Spencer, Major Professor

We have read this thesis and recommend its acceptance:

David A. Patterson, M. Cecilia Zanetta

Accepted for the Council:
Carolyn R. Hodges

Vice Provost and Dean of the Graduate School

(Original signatures are on file with official student records.)

To the Graduate Council:

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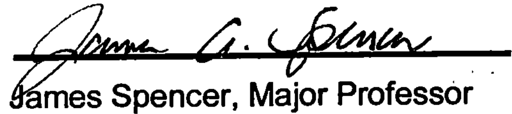

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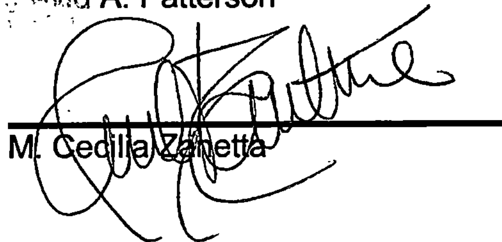

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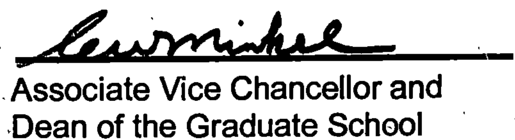

Associate Vice Chancellor and
Dean of the Graduate School

THE TELECOMMUNICATIONS ACT OF 1996: THE POLICY'S IMPACT ON SOUTHEASTERN JURISDICTIONS THAT HAD LAWSUITS OVERTURN PUBLIC HEARING DECISIONS

A Thesis
Presented for the
Master of Science
Degree
The University of Tennessee, Knoxville

Todd Kenneth Morgan
December 1999

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Abstract

This study examines fourteen southeastern Telecommunication Act of 1996 lawsuits, which occurred between February 1996 and September 1998. In order for the lawsuit to be analyzed it had to involve a situation where a telecommunication company had been denied a permit to erect a new tower. The applicable cases analyzed situations where a local-level government had been denied a tower permit through an administrative decision, variance, special use permit hearing, conditional use permit hearing, or moratorium.

Additional research was conducted on the seven local-level jurisdictions that had a Telecommunication Act of 1996 lawsuit overturn one of their decisions. The purpose of this research was to verify if tower ordinances or tower approval rates would change in a specific jurisdiction after a lawsuit had reversed a decision.

This research should be extremely interesting to planners and telecommunication companies because it gives insight into what kinds of cases have been reversed and what kind of cases have been upheld.

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Chapter I

Introduction & Issue Methodology

Statement of the Problem

Telecommunication providers and local governments, throughout the United States, are finding it increasingly difficult to find suitable locations for radio, television, paging, cellular, and Personal Communication Service (PCS) towers. The reason it is becoming more difficult to locate these structures is that the Federal Communications Commission (FCC) auctioned off the new PCS licenses to highest bidding telecommunications companies in March of 1995. As a result of the auctions, there are six additional telecommunications companies trying to site towers in every Basic Trading Area (BTA) throughout the United States. These six telecommunications companies, along with the original two BTA cellular providers, are causing an unprecedented demand for towers along America's Interstates, major thoroughfares, and in residential areas.

Part of the reason there is such a demand for new towers is that the FCC auctioned off higher frequencies and lowered powered systems to PCS providers. As a result of the higher frequency, approximately 1,800 to 1,900 megahertz, PCS providers require more towers to cover the same area as cellular providers, which operate around 800 to 900 megahertz.[1] A typical PCS

[1]Federal Communications Commission, Wireless Telecommunications Bureau, *Fact Sheet #2, New National Wireless Tower Siting Policies*. 1996 (Washington, DC: United States Government Printing Office, 1996), 5-28.

antenna array, depending on the surrounding topography and height it is mounted at, will typically cover a three to seven mile radius.[2] A similar cellular array, mounted at the same height, will typically cover a 5 to 12 mile radius.[3] With the smaller PCS coverage area, radio frequency engineers are forced to design the individual towers in their system closer together. It is important to note, that all PCS and cellular systems work by handing off calls to the closest tower as a person travels. If the towers in a given system are spaced too far apart or a tower cannot be placed in a certain area a hole in phone coverage will result.[4]

Although the PCS system needs more towers than a cellular system, it is highly sought by consumers because of the increased services that are offered. The following list outlines some of the advantages of a PCS system over a conventional cellular system:

1. PCS systems are digitally based while conventional cellular systems use analog technology. The use of digital technology has resulted in much clearer phone calls. PCS subscribers do not experience the static and breakups that cellular subscribers incur. Another benefit of PCS' digital

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[2] Melissa Ness, personal interview, 17 September 1999.

[3] Melissa Ness, personal interview, 17 September 1999.

[4] Melissa Ness, personal interview, 17 September 1999.

technology is security. It is almost impossible for would-be thieves to scan and duplicate the signature of a PCS phone.

2. The second advantage of the PCS system is that it can serve as a home phone, office phone, car phone, and beeper. It is finally possible for a person to be reached at one phone number no matter where they are located. PCS systems also add the convenience of caller identification and a message center for any missed phone calls.

Although the new technology sounds great to most citizens, the fact remains that most people experience the "not in my backyard" syndrome when a tower is proposed in their neighborhood. Many people still have fears that towers will lower their property values, give them cancer, or be an eyesore in their community. While cancer concerns are easy to address because of Federal studies, aesthetics and property values continue to defeat many tower requests at public hearings.

Cellular and PCS providers have requirements they must follow under the FCC license agreements that they were awarded. The licenses the PCS companies were awarded clearly state that certain percentages of the population must be provided with phone coverage within certain intervals of time. If the PCS provider is unable to meet these deadlines they will be in violation of their license agreement. The reason that the FCC enforces such timelines is that wireless

communication systems are essential in emergency situations. For example, during hurricane Andrew in Southern Florida the only way that people and emergency agencies were able to communicate was through the use of wireless communication devices. Without these wireless systems the number of lives lost in the storm probably would have been much greater than it was.

Due to FCC license requirements, the need for competition, and the number of tower sites that were being denied, Congress passed the Telecommunication Act of 1996. This act has been responsible for hundreds of tower ordinances being rewritten throughout the United States. While this act preserves local government authority over the siting of towers, it also provides telecommunications companies an avenue to challenge unfair and exclusionary zoning ordinances and public hearing decisions through "any court of competent jurisdiction."[5]

Although the Telecommunications Act of 1996 has been in existence for over three years it still remains difficult to site telecommunication towers in some municipalities and counties. Numerous local jurisdictions have adapted to the Telecommunications Act by writing more stringent ordinances. The great majority of these ordinance rewrites were warranted because they required telecommunication companies to share tower space and look for alternatives to

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[5] U.S. Congress, *Telecommunications Act of 1996*, 104th Cong., 2d sess., (Washington, DC: United States Government Printing Office, 1996), 97-99.

locating towers in residential zoning districts. However, there are still municipalities and counties that exclude towers. The majority of these jurisdictions accomplish the exclusion by turning the tower down at conditional and special use permit hearings. In most of these cases the application is denied under the grounds that a tower would not be in harmony with the surrounding area. This author has heard some county and town board members state that a telecommunication tower could never be in harmony with the surrounding area. If such opinions continue to persist among public board members then telecommunications companies will have no choice but to challenge hearing decisions under the framework of the Telecommunications Act of 1996.

Description of the Study

The purpose of this study is to find out what impact the Telecommunications Act of 1996 had on municipalities and counties that have had one of their board decisions overturned by a Telecommunication Act of 1996 lawsuit. The study will be regional in scope, for it will look at southeastern Telecommunication Act of 1996 lawsuits, in which the appeal process started between February 1996 and September 1998. For the purpose of this study, the southeastern United States will consist of the following ten states: Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia.

The first step in the research process was to analyze the verdicts, of all the southeastern cases, to see how many of these lawsuits have overturned the municipality or county board's public hearing decision. The next step in the process was to contact each jurisdiction that had its decision overturned to see what impact the lawsuit has had on their telecommunication tower ordinance and public hearing winning percentage for tower requests.

The hypothesis of this study is that a substantial number of the Telecommunication Act lawsuits reversed the local government's decision. Furthermore, it is believed the study will show that a substantial number of the jurisdictions that had their decisions overturned will pass a new telecommunications tower ordinance or grant a higher percentage of the tower proposals that come through the public hearing process. To analyze the hypothesized increase in permit approvals, each overturned jurisdiction's special use or conditional use permit approval rate was compared during two time periods. The first time period looked at the permit requests that were sought nine months prior to lawsuit being settled. The second time period analyzed the permit requests that were heard in the first nine months after the lawsuit was settled.

Primary Question

In terms of ordinance rewrites and public hearing winning percentages, what impact has the Federal Telecommunications Act of 1996 had on municipalities and counties that have had one of their board decisions overturned?

Secondary Questions

1. What is the Federal Telecommunications Act of 1996?
2. Why was the Federal Telecommunications Act passed?
3. How many southeastern municipalities and counties had lawsuits filed against them by telecommunications companies, between February 1996 and September 1998, under the Federal Telecommunications Act of 1996?
4. How many of these appeals have reversed the original municipality or county board's public hearing decision?
5. How many of the overturned jurisdictions adopted new telecommunication tower ordinances after they lost the lawsuit?
6. What was the public hearing success rate of telecommunications companies, nine months prior to the lawsuit being filed?
7. What was the public hearing success rate of telecommunications companies in the first nine months that followed the verdict?

Limitations of Study

The Telecommunication Act of 1996 has already played a huge role in getting towers approved at the local level of government. The author has witnessed

approximately a hundred communication tower ordinance rewrites in North Carolina and South Carolina since becoming a zoning consultant for a telecommunications company in 1995. A great deal of these new tower ordinances have specifically mentioned the Telecommunications Act of 1996 as the primary influence behind the ordinance rewrite. It is evident that many municipalities and counties throughout the nation were fearful that their jurisdiction to regulate communication towers could be taken away if they did not address exclusionary tower language in their ordinances.

Although the Federal Telecommunications Act of 1996 has had a tremendous impact on ordinance rewrites, this study will only be analyzing the rewrites that occurred within the southeastern jurisdictions that had a lawsuit overturn a public hearing decision. Another student could certainly conduct a more detailed study on ordinance rewrites at a future date.

Another possible limitation of the study is that only fourteen lawsuits fall within the study area and term of the timeline. While the fourteen lawsuits are a sufficient amount to study, the number is much smaller than had originally been expected.

The Need and Potential Value of the Study

The Telecommunications Act of 1996 warrants further study because it has had a tremendous impact on local and state government. The passing of the

Telecommunications Act of 1996 has fueled most of the tower ordinance rewrites. Many municipalities and counties, throughout the country, feared that their power to govern tower siting would be taken away if they did not reform their ordinances.

While most jurisdictions have ordinances that are satisfactory for tower siting, there remain some counties, cities, and towns that refuse to reform their ordinances. Some of these jurisdictions are finding the Telecommunications Act of 1996 is nothing to take lightly because they have found themselves trying to explain why they have turned a tower request down to a district court or the Federal Communication Commission.

Most telecommunications companies and local jurisdictions would love to know the percentage of public hearing decisions that have been overturned by a Telecommunication Act of 1996 lawsuit. It is the author's hope that this study will show telecommunication companies and local jurisdictions what they can expect after a lawsuit has reversed a public hearing decision. In order to do this, the author performed a study and analyzed two different time periods. The first time period analyzed the number of tower requests that were approved nine months before the lawsuit was heard. The second time period analyzed the number of tower requests that were approved nine months after the appeal was decided.

Part of this author's job as a zoning consultant was to recommend the best course of action possible for every tower site that was proposed be built. The study on the Telecommunications Act of 1996 will allow this author and others to determine if a lawsuit is a feasible manner to get a tower site located in some of local jurisdictions. The author's experience as a consultant taught him that telecommunications companies will use a lawsuit only as a last resort because they do not want to incur the bad publicity, loss of time, or expense of getting attorneys involved. However, the fact remains that some jurisdictions are making their ordinance requirements so difficult that telecommunications companies are willing to take the risks and file an appeal. Telecommunications towers are not the prettiest things in the world to look at but they are a necessity in today's world.

Methodology

The author's research on the Telecommunications Act of 1996 was comprised entirely of collecting data and analyzing facts to formulate conclusions. The study started by researching the Lexis-Nexis database to find out where the applicable lawsuits were filed. The listing of decisions came from the United States Court of Appeals, United States District Courts, and other courts that had cases remanded back to them by United States District Courts. Once this listing was obtained, it was possible to print out case decisions and determine what the

outcomes of the lawsuits were. The facts of each case were then detailed to show why the court upheld or reversed the local government decision.

The second part of the research was to contact each local jurisdiction that had its decision overturned so the author could determine the best way to collect the public hearing data and ordinances that were relevant to the study. Each jurisdiction provided the public hearing data in different fashions but some information was gathered over the World Wide Web, fax machine, telephone, and in person. To analyze the data collected, the author highlighted numerous telecommunication tower ordinances and compared the percentage of telecommunication towers cases that were approved nine months before the lawsuit was settled and nine months after the lawsuit was settled.

Chapter Outline

I. Introduction & Issue Methodology

This chapter outlines the importance of this study, identifies the questions that will be answered, and describes how the study material was collected.

II. Summary of The Telecommunications Act of 1996

This chapter summarizes Section 704 of the Telecommunications Act of 1996. While this section of the act preserves local government jurisdiction over tower siting, it also sets guidelines that each jurisdiction needs to be aware of.

III. Case Briefs – Southeastern Lawsuits Under The Telecommunications Act of 1996

This chapter is in a legal brief format. It analyzes the fourteen southeastern lawsuits that were filed between February 1996 and September 1998.

IV. Data Collection – Ordinance Rewrites and Tower Success Rates in Local Jurisdictions that had their Public Hearing Decision Overturned

This chapter takes a deeper look at those jurisdictions that had a board decision overturned by a Telecommunication Act of 1996 lawsuit. Interviews with Planners reveal what impact the lawsuits had on tower ordinances and public hearing winning percentages.

V. Data Analysis, Findings, and Conclusion

This chapter contains the conclusions that can be reached from the study.

Chapter II

Summary of Section 704 of the Telecommunications Act of 1996

Section 704 of the Telecommunications Act of 1996 has forever changed the way that states and local governments deal with telecommunication tower siting in their jurisdictions. Section 704 allows states and local governments to keep their authority over the siting, construction, and modification of existing tower sites as long as they agree to the following rules:

I. In no way shall one company or one type of wireless service be allowed to site facilities while other companies and wireless services can not.

II. Zoning ordinances cannot ban wireless facilities or have the affect of doing so.

III. All requests by wireless communication providers must be acted upon in a reasonable amount of time.

IV. All administrative and public hearing decisions, which deny a request to site a new tower or modify an existing one, must be done in writing. The documentation should clearly state why the tower request was turned down.

V. No wireless communications proposal can be turned down on the basis that electromagnetic fields (EMF) will be damaging to human beings and the environment.[6]

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[6] U.S. Congress, 98.

Companies that have a tower request turned down or not acted upon have thirty days to file an appeal with the appropriate state or local court of appeals if they feel that the verdict has violated items I., II., or III. from above. Any company that is turned down on item V., EMF issues, may file an appeal directly to the Federal Communications Commission. Section 704 further states that all appeals will be heard as quickly as reasonably possible.[7]

The reason that article V. was included in the act was due to numerous studies that were done by government agencies, scientists, and engineers. All of these studies found that radio frequency emissions from cellular towers were thousands of times beneath the Maximum Permissible Exposure (MPE) level that was adopted by the American National Standards Institute (ANSI) in 1992. The Telecommunications Act of 1996 also required the Federal Communications Commission to have revised radio frequency exposure guidelines in place by August 7, 1996.[8]

The new radio frequency guidelines, which were adopted on August 1, 1997, were completed with input from the public, Environmental Protection Agency (EPA), Food and Drug Administration (FDA), the Occupational Safety and Health Administration (OSHA), Institute of Electrical and Electronics Engineers (IEEE), and other agencies. These new guidelines are a combination of the 1992 ANSI

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[7] U.S. Congress, 97-99.

[8] Federal Communications Commission, Wireless Telecommunications Bureau, *Fact Sheet #2,* 12-15.

standards and the exposure criteria recommended by the National Council on Radiation Protection and Measurements (NCRP). The new guidelines are tougher on the amounts of radio frequency exposure human beings can receive from antennas mounted on towers or existing structures, and from cellular telephone units themselves.[9]

The new guidelines cover all the major wireless services that are operating in the United States. However, for the purposes of this thesis only detailed explanations for Cellular Radiotelephone Services, Personal Communications Services, and Commercial Paging Services will be provided. These wireless services are three of the most commonly used by the public and the ones that are causing the unprecedented demand for telecommunications towers. The next several paragraphs will give a brief description of the three services and describe how they work.

I. Cellular telephone service license agreements were given out in 734 markets. These 734 markets are comprised of 306 metropolitan statistical areas (MSA) and 428 rural service areas (RSA). The Federal Communications Commission then gave the two highest bidding companies in each of the 734

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[9] Federal Communications Commission, Wireless Telecommunications Bureau, *Fact Sheet #2, 12-15.*

markets a frequency spectrum to operate on, either 824-848 megahertz or 869-894 megahertz.[10]

The cellular telephone service works by reusing the designated frequency over and over again within the assigned license area. Cellular providers simply place antennas on a tower, building, or water tank to cover three sectors (0°, 120°, 240°) and have the site hand-off to nearest adjacent sectored site. As a person travels down the road and is talking on his cellular phone there could be several, unnoticeable hand-offs from site to site. It is also important to consider that cellular systems must have the ability to switch between wireless and wired systems. This is done at a mobile telephone switching office (MTSO) by wire line or a microwave dish that is located at each individual tower or antenna site.[11]

Cellular providers do not have to notify the Federal Communication Commission about any new site it plans to build within its approved license area as long as it is in accordance with the guidelines of the National Environmental Policy Act (NEPA) and the Federal Aviation Administration.[12]

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[10] Federal Communications Commission, Wireless Telecommunications Bureau, *Fact Sheet #1, New National Wireless Tower Siting Policies.* 1996 (Washington, DC: United States Government Printing Office, 1996), 6-7.

[11] Federal Communications Commission, Wireless Telecommunications Bureau, *Fact Sheet #1,* 6-7.

[12] Federal Communications Commission, Wireless Telecommunications Bureau, *Fact Sheet #2,* 27.

II. Personal Communications Services licenses were actually awarded for two different services. Narrowband PCS operates at a frequency of 901-941 megahertz and provides messaging and two-way paging.[13] The more popular service is called Broadband PCS and operates much like cellular phone service. The biggest difference between the two services is that Broadband operates at a frequency of 1850-1990 megahertz. This higher frequency allows the Broadband PCS provider to offer more services, such as digital technology, voice mail, caller identification, and paging.[14] A second difference between cellular and PCS is the way the licenses were allocated by the FCC. The FCC used Rand McNally's mapping scheme and divided the areas into 51 major trading areas (MTA) and 493 basic trading areas (BTA). The Major trading areas were originally auctioned off to the two highest bidding telecommunications companies. Since the original auction occurred four more licenses were awarded in the major trading areas.[15]

III. Commercial Paging Services are classified as personal wireless services if they are made available to the public for profit. The FCC currently licenses

[13] Federal Communications Commission, Wireless Telecommunications Bureau, *Fact Sheet #2,* 28.

[14] Federal Communications Commission, Wireless Telecommunications Bureau, *Fact Sheet #2,* 28.

[15] Federal Communications Commission, Wireless Telecommunications Bureau, *Fact Sheet #1,* 6-7.

paging services by each individual site or transmitter. As a result paging companies must seek a license from the FCC for every one of their sites. Currently, paging systems only have the capacity to be one dimensional, meaning that tones, numeric, and alphanumeric information can only be received and not answered. Commercial paging is offered on the 35, 43, 152, 158, 454, and 931-megahertz frequency bands. It is hoped that the FCC will auction off licenses for two-way paging systems in the near future.[16]

The new EMF rules specify that cellular transmitters will be categorically excluded from evaluation if they are located ten meters or more off the ground (except if located on a rooftop) or if the total power of all the channels is 1,000 watts effective radiated power (ERP) or less. Broadband PCS transmitters are categorically excluded if they are ten meters or more off the ground (except if located on rooftop) or if the total ERP of all the channels is 2,000 watts or less. The following table shows the new guidelines that were created by the FCC. Any service that exceeds its allowed MPE level will be subject to routine environmental evaluations.[17]

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[16] Federal Communications Commission, Wireless Telecommunications Bureau, *Fact Sheet #2,* 29.

[17] Federal Communications Commission, Wireless Telecommunications Bureau, *Fact Sheet #2,* 12-26.

WIRELESS SERVICE	EVALUATION REQUIRED IF:
Paging & Radiotelephone Service	non-rooftop: height above ground level to radiation center < 10 m and power > 1000W ERP rooftop: power > 1000W ERP
Cellular Radiotelephone Service	non-rooftop: height above ground level to radiation center < 10 m and total power of all channels > 1000W ERP (1640 W EIRP) rooftop: total power of all channels > 1000W ERP (1640 W EIRP)
Personal Communications Services	(1) Narrowband PCS non-rooftop: height above ground level to radiation center < 10 m and total power of all channels > 1000W ERP (1640 W EIRP) rooftop: total power of all channels > 1000W ERP (1640 W EIRP) (2) Broadband PCS non-rooftop: height above ground level to radiation center < 10 m and total power of all channels > 2000W ERP (3280 W EIRP) rooftop: total power of all channels > 2000W ERP (3280 W EIRP)

Although the new EMF guidelines are more stringent than the old standards, cellular and PCS facilities will still be categorically excluded from routine

environmental evaluation requirements. Categorical exclusions are allowed under the Environmental Policy Act (NEPA) when it is determined that a certain use, whether individually or collectively, has no effect on the human environment. Numerous studies have shown radio frequency emissions are thousands of times below ANSI's standards. However, this categorical exclusion does not mean that cellular telephone providers can exceed the new MPE emission standards that have been created by the Federal Communication Commission.[18]

It should also be noted that cellular transmission facilities have only been given a categorical exclusion on radio frequency emissions. NEPA still requires wireless communication providers to look at other possible effects a proposed tower will have on the natural environment. NEPA requires communication providers to analyze whether their proposed site will have any effects on:[19]

1. officially designated wilderness areas;
2. officially designated wildlife preserves;
3. endangered species or critical habitats;
4. historical sites or sites that are eligible for listing in the National Register of Historic Places;

[18] Federal Communications Commission, Wireless Telecommunications Bureau, *Fact Sheet #2,* 12-26.

[19] Federal Communications Commission, Wireless Telecommunications Bureau, *Fact Sheet #2,* 12-26.

5. Indian sites;
6. sites that fall within the 100 year floodplain;
7. surface features, such as wetland fills, deforestation or water diversion; and
8. residential neighborhoods (with the proposed use of high intensity white lights).

If a proposed site does fall into any one of the eight criteria then the communication provider must provide an environmental assessment (EA) to the appropriate Bureau of the Federal Communication Commission. The proposed site will not be able to undergo construction until the FCC approves the project. The proposed site will also be placed on public notice for 30 days. This time period gives interested parties an opportunity to submit comments and have questions answered. If the thirty-day time period elapses without findings of significant impact on the environment the tower construction can then proceed.[20]

[20] Federal Communications Commission, Wireless Telecommunications Bureau, *Fact Sheet #2,* 12-26.

Chapter III

Case Briefs – Southeastern Lawsuits Filed under the Telecommunications Act of 1996

United States District Court for the Northern District of Georgia, Atlanta Division. BellSouth Mobility Inc., James Dean and Lanette Dean v. Gwinnett County, Georgia; F. Wayne Hill, Judy Waters, Kevin Kenerly, Tommy Hughes, Patti Muise, individually and, in their capacities as members of the Gwinnett County Board of Commissioners; Michael C. Williams, individually and in his Capacity as Director of the Gwinnett County Department of Planning and Development; and William D. Jascomb, Jr., individually and in his capacity as Director of the Development Division of the Gwinnett County Department of Planning and Development.
944 F. Supp. 923; 1996 U.S. Dist. LEXIS 14175 (August 13, 1996)

Claims

BellSouth Mobility Inc., James Dean, and Lanette Dean contend the defendants violated section 704(a) of the Telecommunications Act of 1996 when they denied their application for a tall structure permit on April 23, 1996. As a result, the plaintiffs are seeking mandamus relief and the right to have their appeal heard on an expedited basis.

Facts[21]

- On June 28, 1995, BellSouth entered into a lease agreement with the Deans' to erect a 197' monopole communication tower. The Deans' parcel was zoned

[21] Lexis-Nexis. Sept. 1998, United States District Court for the Northern District of Georgia, Atlanta Division. BellSouth Mobility Inc., James Dean and Lanette Dean, Plaintiffs v. Gwinnett County, Georgia; F. Wayne Hill, Judy Waters, Kevin Kenerly, Tommy Hughes, Patti Muise, individually, and in their as Members of the Gwinnett County Board of Commissioners; Michael C. Williams, individually and in his Capacity as Director of the Gwinnett County Department of Planning and Development; and William D. Jascomb, Jr. individually and in his capacity as Director of the Development Division of the Gwinnett County Department of Planning and Development, Defendants. 13 Aug. 1996 <http://www.lexis-nexis.com/>.

commercial and contained an auto repair shop, auto parts store, and a tire supply store.

- Section 14-116 of Gwinnett County's Code states that property owners that want to build a tower over 50 feet tall must apply for a tall structure permit. Once the Planning and Development Department review the application a written recommendation is forwarded to County Board of Commissioners.
- The Gwinnett County, Georgia ordinance stipulates that the Board of Commissioners may deny an application if the proposal could endanger public safety, harm aesthetic views, or be unacceptable from an architectural standpoint.
- On February 12, 1996, BellSouth filed their tall structure permit application. Their application included site plans for a 197' monopole tower and prefabricated equipment shelter, an air safety study, and a copy of the lease agreement.
- The Planning and Development Department recommended approval of the tower with the following conditions: (1) that the plaintiffs install a 10' landscaping strip around the base of the tower, (2) that the site remained leased. The Board of Commissioners meeting was scheduled for March 26, 1996.
- The commissioners postponed the hearing from March 26th to April 23rd, when they learned of opposition from residents of a neighboring subdivision.

- After meeting with some of the concerned property owners, BellSouth amended their application. They agreed not to light the tower, to paint it an aesthetically pleasing color, and not to place any microwave equipment on the tower.
- At the April 23rd meeting, BellSouth stated that they planned to lower the height of the monopole to 177 feet. Other BellSouth evidence included a property appraisal, which concluded that the tower would not affect property values, and a line of sight survey, which showed simulated views of the tower from different vantage points.
- Opponents of the project were also given a chance to speak. Mr. Bruce Nelson spoke for River Oak Hills and Pool Creek subdivision. Mr. Nelson stated that residents of these subdivisions were concerned for the following reasons: children could climb the tower, antennas could fall during bad storms, effects of microwave emissions, views of tower from their homes, and other companies could put more equipment on the tower.
- After hearing both sides, the Board of Commissioners voted to deny the application.
- On April 29, 1996, the Board of Commissioners sent notice to the plaintiffs that their request was denied.
- On May 21, 1996, plaintiffs filed their complaint.

Issue #1

Was the Board of Commissioners denial supported by substantial evidence contained in a written record?

Holding

No. Substantial evidence as construed by the courts, means more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[22]

Rationale

The Court found no substantial evidence in the written record that showed why the Board of Commissioners denied the tall structure permit. All the evidence submitted backed the plaintiff's application. The plaintiffs submitted site plans, an air safety report, an emission study, and a property appraisal report. The plaintiffs also agreed to the conditions of the planning staff and imposed more restrictions on themselves after meeting with some of the concerned neighbors. The only evidence supporting the Board's denial was Mr. Nelson's testimony. Mr. Nelson's generalized concerns cannot be considered substantial evidence.[23]

Issue #2

How much relief are the plaintiffs entitled to?

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[22] Lexis-Nexis. Sept. 1998, United States District Court for the Northern District of Georgia, Atlanta Division. BellSouth Mobility Inc., James Dean and Lanette Dean v. Gwinnett County, Georgia.

[23] Lexis-Nexis. Sept. 1998, United States District Court for the Northern District of Georgia, Atlanta Division. BellSouth Mobility Inc., James Dean and Lanette Dean v. Gwinnett County, Georgia.

Holding

The Court found that the Telecommunications Act mandates them to hear and decide cases, which have adversely affected individuals or companies, on an expedited basis. As a result, the Court backed the plaintiffs' claim that the tall structure permit should be awarded.[24]

Rationale

Remanding the case back to a Gwinnett County would only cause a further delay for the plaintiffs. They have already provided sufficient evidence that a tall structure permit should be awarded.[25]

United States District Court for the Western District of Virginia, Roanoke Division. Paging, Inc., Petitioner, V. Board of Zoning Appeals for the County of Montgomery and Montgomery County, Respondents.
957 F. Supp. 805; 1997 U.S. Dist. LEXIS 2028 (January 15, 1997)

Claim

Paging, Inc. claimed that Montgomery County violated the Telecommunications Act of 1996. The specific challenge was that Montgomery County's ordinance was vague and unconstitutional.

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[24] Lexis-Nexis. Sept. 1998, United States District Court for the Northern District of Georgia, Atlanta Division. BellSouth Mobility Inc., James Dean and Lanette Dean v. Gwinnett County, Georgia.

[25] Lexis-Nexis. Sept. 1998, United States District Court for the Northern District of Georgia, Atlanta Division. BellSouth Mobility Inc., James Dean and Lanette Dean v. Gwinnett County, Georgia.

Facts[26]

- Paging, Inc. is a public service corporation that operates numerous telecommunication tower sites. Their sites are marketed to other wireless carriers for co-location.
- On November 3, 1995, Paging applied for a permit to erect a 140' communication tower.
- The Zoning Administrator did not grant the building permit because the ordinance stated that public utilities were the only companies that could build towers, without going through the special use permit process.
- On December 5, 1995, Paging applied to be heard by the Board of Zoning Appeals (BZA). Paging claimed that the Zoning Administrator should not have denied their permit because they were a public utility. Paging also challenged the fact that the Zoning Administrator had approved other wireless telecommunication sites.
- On January 4, 1996, the BZA denied Paging's request.
- On January 29, 1996, Paging challenged the decision to the Circuit Court of Montgomery County, Virginia. The case was still pending when Paging filed suit in district court.

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[26] Lexis-Nexis. Sept. 1998. United States District Court for the Western District of Virginia, Roanoke Division. Paging, Inc., Petitioner, v. Board of Zoning Appeals for the County of Montgomery and Montgomery County, Respondents. 15 Jan. 1997 <http://www.lexis-nexis.com/>.

Issue #1

Should this case be decided at a state level court or district court?

Holding

The case should be held at a state level court.

Rationale

The Court had a difficult time deciding what action to take because the question of whether Paging, Inc. is a public utility was no an easy question to address. After much review, it was determined that the issue should be answered at a state court. However, the different treatment of public utilities and non-utilities is discriminatory and something that should be addressed under the Telecommunications Act of 1996.[27]

Remedy

The Court dismissed Montgomery County's motion that the case should be ousted and remanded the case back to an appropriate order.

Further Information

Mr. Martin McMahon, an attorney for Montgomery County, informed the author that Paging, Inc. never pursued their appeal to the Circuit Court of Montgomery County, Virginia. Paging, Inc. instead filed suit to Federal Court under the

[27] Lexis-Nexis. Sept. 1998. United States District Court for the Western District of Virginia, Roanoke Division. Paging, Inc., Petitioner, V. Board of Zoning Appeals for the County of Montgomery and Montgomery County.

Telecommunications Act of 1996. The Federal Court ultimately turned their request down because Paging, Inc. could not be viewed as a public utility. Public utilities are companies that provide services that are needed for our every day existence. Examples of public services are electric companies, natural gas companies, and water and sanitary sewer authorities. As a result of this ruling, Paging, Inc., was forced to apply for a special use permit.[28]

United States District Court for the Middle District of Florida, Orlando Division. OPM – USA – INC., a Florida corporation, Plaintiff, v. Board of County Commissioners of Brevard County, Florida, a Florida local government.
1997 U.S. Dist. LEXIS 16646 (June 26, 1997)

Claims

OPM claimed that the Board of Commissioners of Brevard County violated the Telecommunications Act of 1996 when they denied their conditional use permit application. OPM is asking the Court to award their permit on the basis that the Brevard County Commissioners denial was not based on facts that can be found in the written record.

Facts[29]

- OPM submitted a special use permit application to erect a 400'

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[28] Martin McMahon, telephone interview, 15 April 1999.

[29] Lexis-Nexis. Sept. 1998. United States District Court for the Middle District of Florida, Orlando Division. OPM – USA – INC., a Florida corporation, Plaintiff, v. Board of County Commissioners of Brevard County, Florida, a Florida local government, Defendant. 26 Aug. 1997 <http://www.lexis-nexis.com/>.

telecommunication tower on an abandoned watermelon farm. The property

- was zoned Agricultural Residential (AU).
- There were two other existing towers within a half-mile of the proposed tower site.
- OPM's application showed that the proposed tower was capable of supporting sixty antennas, thereby reducing the need for future towers. They also submitted pictures, property impact studies, environmental reports, public safety studies, and Federal Aviation Administration (FAA) reports.
- On February 20, 1997, the public hearing was held. A representative of the State of Florida stated that seven different law enforcement agencies planned to co-locate on the tower.
- The planning staff report indicated the tower was consistent with the comprehensive plan but that the commissioners should make note of the visual impact and lighting that would be required. The staff report also noted that eighty to one hundred percent of the parcel was located in a functional wetland and that commercial uses were not allowed in wetlands.
- On January 6, 1997, the Brevard County Planning and Zoning Board unanimously approved OPM's request with the condition that the remainder of the property would not be developed. The Planning and Zoning Board noted that OPM would still have to go to the Natural Resources Office to challenge the ruling that the tower was a commercial use.

- At the public hearing on January 27, 1997, OPM stated that they wished to reduce the tower height 330 feet so they would not infringe upon the wetlands. OPM also furnished a property appraisal study, which indicated that property values would not decrease if a 100' buffer were placed between the tower and adjacent property lines. OPM's plans indicated that the tower was 200' from the closest property line and 600' from the closest house.
- After some discussion, Commissioner Scarborough had OPM's application tabled so he could view the existing towers.
- On February 20, 1997, the public hearing reconvened.
- OPM brought a wetland expert and introduced him to the board. However, the board never asked him any questions.
- Commissioner Higgs stated that she had just attended a regional planning conference and learned that Orange County, Florida was considering several tower ordinance amendments. One of the proposed amendments was setbacks equal to five times the tower height, when the tower adjoined residentially zoned property.
- Three nearby residents spoke against the tower. Their complaints were the tower was in a wetland, it would cause more towers to be built, it would depreciate surrounding land values, and would be an unwanted eyesore in the community.
- Commissioner Scarborough moved to deny and it was seconded. However, on the advice of counsel the application was unanimously tabled so staff could

develop a report consistent with the Telecommunications Act.

- A memorandum dated March 21, 1997, denied the conditional use permit. The memorandum stated the OPM's proposal was not in harmony with the surrounding residential uses for the following reasons:

1. The tower was only 600' from an abutting residential property;
2. The tower could not be effectively buffered;
3. The tower would be unsightly;
4. Adjoining residential property values could decrease if the tower were built and;
5. The cumulative effect of having three towers in the same area.

- On May 15, 1997, Brevard County supplied OPM and the Court with a new memorandum. Their new memorandum read that OPM's proposal was not in harmony with the surrounding residential uses for the following reasons:

1. The tower was only 600' from an abutting residential property;
2. Neither the 400' or 340' tower could be effectively buffered;
3. The tower would be unsightly;
4. Potential decreases in property values could result if a 400' or 340' tower were built;
5. The cumulative effect of having three towers in the same area and;
6. Commercial uses are inconsistent with the comprehensive plan's wetland policies.

Issue #1

Were the six reasons for denial based on substantial evidence that can be found in the written record?

Holding

No. There is no evidence in the written record that supports the county commissioners' denial.

Rationale[30]

The Court found item number one to be invalid because there was no requirement in the Brevard County tower ordinance that required towers to be 600' or more from adjacent property lines. Item two was found to be invalid because there is no way to completely buffer a 340' communication tower. The Court also noted that OPM's property appraiser testified that there would be no effect on property value if there were 100' buffers between the tower and adjacent properties. The Court found items three and five to be invalid because it made the most sense to group the towers as close together as possible. The Court dismissed item number four because OPM's property appraiser was the only expert to speak on the issue. Item six was dismissed because OPM had already agreed to move the tower out of the functional wetland.

[30] Lexis-Nexis. Sept. 1998. United States District Court for the Middle District of Florida, Orlando Division. OPM – USA – INC., a Florida corporation, v. Board of County Commissioners of Brevard County, Florida.

Remedy

The Court ordered the Brevard County Board of Commissioners to approve OPM's request.

United States District Court for the Northern District of Alabama, Southern Division. Sprint Spectrum L.P.; Dial Call Inc., a wholly owned subsidiary of Nextel Communications, Inc., Plaintiffs, v. Jefferson County, a body politic, and the Jefferson County Commission, Defendants.
968 F. Supp. 1457; 1997 U.S. Dist. LEXIS 14497 (July 31, 1997)

Claim

Sprint and Dial Call contend that the Jefferson County Commission violated the Telecommunications Act of 1996 when they passed a moratorium on May 28, 1997. They specific claim was that Jefferson County's moratorium was passed without public notice and was specifically implemented to stop rezoning applications and the issuance of building permits, for cellular towers.

Facts[31]

- Sprint Spectrum obtained a FCC license to provide personal communication services (PCS) in Jefferson County and surrounding areas.
- Dial Call obtained a FCC license to provide specialized mobile radio services (SMR) in the same area.

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[31] Lexis-Nexis. Sept. 1998. United States District Court for the Northern District of Alabama, Southern Division. Sprint Spectrum L.P.; Dial Call Inc., a wholly owned subsidiary of Nextel Communications, Inc., Plaintiffs, v. Jefferson County, a body politic, and the Jefferson County Commission, Defendants. 31 July 1997 <http://www.lexis-nexis.com/>.

- The Telecommunications Act was signed on February 8, 1996.
- Before the act became law, Jefferson County had no specific requirements for cellular towers.
- However, there was a section in Jefferson County's zoning ordinance that permitted radio and television transmission towers on properties that were zoned U-1. Jefferson County allowed cell towers to be built under this classification. As a result, most cellular tower requests had to go through a rezoning process.
- Before the Telecommunications Act was passed, Jefferson County had only received sixteen rezoning applications for the purposes of siting telecommunication towers.
- Between February 8, 1996 and May 21, 1997, Jefferson County received forty-five rezoning applications for cellular towers.
- On December 12, 1995, Jefferson County passed a moratorium on the rezoning of property for cellular towers. This moratorium was passed to enable Jefferson County to update their ordinance, in anticipation of the influx of tower applications.
- On March 6, 1996, Jefferson County passed their new communication tower ordinance. The new ordinance permitted towers in three commercial zones, all industrial zones, and in one utility zone. A meeting with the Site Review Committee, to discuss landscaping buffers, was required if the tower site was within 1000' of a residential dwelling.

- The ordinance also stipulated that a new tower should only be built as a last alternative. Communication providers were supposed to explore existing towers and rooftops before applying for permits to construct new towers.
- Between March 6, 1996 and November 19, 1996, the Jefferson County Land Development Department received twenty-two cellular tower applications. The great majority of these applications were for new towers.
- On November 19, 1996, Jefferson County passed a second 90-day moratorium on rezoning property for telecommunication towers. Tower proposals that met the requirements of the ordinance were not affected by the moratorium.
- The second moratorium expired on February 7, 1997. However, it soon became clear that carriers were not going to co-locate on existing towers.
- Residents that lived closed to commercial, industrial, and utility-zoning districts also became increasingly upset. The residents lobbied their respective commissioners that something needed to be done about the proliferation of communication towers near their homes.
- On May 28, 1997, the Jefferson County Commission imposed a third moratorium on communication tower applications. The moratorium was passed without public notice or public comment. The moratorium affected rezoning applications, Board of Adjustment applications, and the issuance of building permits.
- At the time the third moratorium was announced, Sprint had five submittals pending: two rezoning applications, two landscaping review board meetings,

and one building permit. Dial Call had three submittals pending: two landscaping review board meetings and one building permit.

- Sprint and Dial Call filed their appeal on June 10, 1997.

Issue #1

Did the Jefferson County Commissioners violate state law when they passed the third moratorium?

Holding

Yes. While Act Number 344 of the 1947 General Session of the Alabama Legislature gives Jefferson County the power to regulate and restrict land uses, it also states that they must hold a public hearing and give residents fifteen days notice before adopting policies.[32]

Rationale

There are fifteen states that allow local jurisdictions to adopt temporary zoning codes and moratoriums when there are circumstances that threaten public health and safety. Such temporary measures do not require a public meeting or notice because of the urgency of the situation. In this case, the Court does not recognize a proliferation of towers as an emergency.[33]

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[32]Lexis-Nexis. Sept. 1998. United States District Court for the Northern District of Alabama, Southern Division. Sprint Spectrum L.P.; Dial Call Inc., a wholly owned subsidiary of Nextel Communications, Inc., v. Jefferson County.

[33]Lexis-Nexis. Sept. 1998. United States District Court for the Northern District of Alabama, Southern Division. Sprint Spectrum L.P.; Dial Call Inc., a wholly owned subsidiary of Nextel Communications, Inc., v. Jefferson County.

Issue #2

Were Sprint and Dial Call unreasonably discriminated against?

Holding

Yes. The first waves of wireless communication providers in Jefferson County were not hindered by repeated moratoriums.

Rationale

In order to prove discrimination the Court had to find that Jefferson County's actions were unreasonable. Jefferson County's only reason for imposing the third moratorium was that it was in the best interest of the County that no further communication towers be authorized or permitted pending the consideration and adoption of the proposed amendments. The Court could not endorse this statement because Jefferson County submitted no evidence to show how they came to this conclusion.[34]

Remedy

The Telecommunications Act of 1996 mandates that local government shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable amount of time. In this case, Jefferson County had enacted two previous moratoriums and was attempting to stop the processing of telecommunication tower permits for another five months. The Court

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[34]Lexis-Nexis. Sept. 1998. United States District Court for the Northern District of Alabama, Southern Division. Sprint Spectrum L.P.; Dial Call Inc., a wholly owned subsidiary of Nextel Communications, Inc., v. Jefferson County.

found that Jefferson County had to act on the plaintiffs pending tower applications because they were submitted before the third moratorium was passed.[35]

United States District Court for the Northern District of Georgia, Atlanta Division. AT & T Wireless PCS INC., Plaintiff, v. The City of Chamblee and Kathy Brannon, in her official capacity as City Manager, Defendants.
10 F. Supp. 2d 1326; 1997 U.S. Dist. LEXIS 23005 (August 29, 1997)

Claims

AT & T claimed that the City of Chamblee violated the Telecommunications Act of 1996 when they denied their building permit for a 140' monopole communication tower. AT & T challenged that they met all the requirements listed in the ordinance and should not have been required to meet before the Chamblee City Council.

Facts[36]

- AT & T purchased a FCC license to provide personal communications services in parts of Georgia. The City of Chamblee is located in AT & T's coverage region.
- On January 13, 1997, AT & T applied for a building permit to erect a 140' tower on property zoned light industrial. The request was turned down on the basis that it was not in accord with the City of Chamblee's Zoning Ordinance.

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[35]Lexis-Nexis. Sept. 1998. United States District Court for the Northern District of Alabama, Southern Division. Sprint Spectrum L.P.; Dial Call Inc., a wholly owned subsidiary of Nextel Communications, Inc., v. Jefferson County.

[36]Lexis-Nexis. Mar. 1999. United States District Court for the Northern District of Georgia, Atlanta Division. AT & T Wireless PCS Inc., Plaintiff, v. The City of Chamblee and Kathy Brannon, in her official capacity as City Manager, Defendants. 28 Aug. 1997 <http://www.lexis-nexis.com/>.

- The City of Chamblee Zoning Ordinance does contain a section that governs the siting of telecommunication towers. The ordinance states that tower proposals in industrial zones must meet the following criteria:

1. The setback from off-site residential structures must be equal or greater than the height of the tower;
2. The tower must use a galvanized steel finish;
3. FAA and FCC requirements must be satisfied; and
4. Building codes must be met.

- The City Manager, Ms. Brannon, acknowledged that AT & T's proposal was in compliance with the telecommunication tower ordinance. However, she found three other sections of the ordinance that AT & T's proposal was violating.
- The specific violations were:

1. The zoning ordinance only allows one principal use per lot. The proposed parcel already houses an auto parts store;
2. Chamblee's ordinance only allows non-noxious facilities in light industrial zones. Ms. Brannon classified the communication tower as a noxious use and;
3. The zoning ordinance places a 150' height restriction in the DeKalb-Peachtree Airport Zone.

- AT & T filed an appeal to the Chamblee City Council.
- On February 13, 1998, the Chamblee City Council heard AT & T's appeal. The councilmen did not focus on whether AT & T was meeting the requirements of the telecommunication tower ordinance. The whole discussion time was used

to see if AT & T could move the proposed tower to the front of the parcel, which was further away from some residential dwellings.

- On February 18, 1998, Chamblee City Council reopened the case. AT & T agreed to move the tower to the front of the parcel. However, the city council focused on neighborhood opposition to the project. Two landowners were concerned that the tower would interfere with helicopter landing patterns. As a result, AT & T's case was tabled until March 18.
- After the meeting, Ms. Brannon wrote the FAA a letter expressing concern over the tower and nearby helicopter flight patterns. The FAA replied that the tower would be permitted if it were marked with lights.
- On March 18, 1997, the case was reopened. AT & T furnished a revised site plan showing its compliance with the ordinance and stated that the tower was 670' from the center of the helicopter corridor.
- Despite the evidence, the Chamblee City Council unanimously denied AT & T's request on the grounds that the tower would violate the airport overlay height limitation and would interfere with helicopter traffic.

Issue #1

Was the denial based on substantial evidence?

Holding

No. There was no evidence to support the denial. Ms. Brannon and Chamblee City Council's four reasons for denying AT & T's permit are unfounded.

Rationale[37]

The four reasons given for denying AT & T's application are not valid because:

1. The ordinance states that telecommunications towers can be a primary or secondary use;
2. Ms. Brannon and city council also never proved why the tower should be classified as a noxious use. AT & T supplied evidence that the tower would not emit noise, glare, or odor;
3. The tower did not exceed the 150' airport overlay height limit; and
4. The FAA documented that the tower would not be a threat to helicopters.

Remedy

The Court found that the City of Chamblee had violated the Telecommunications Act. AT & T had already supplied an application that had met all the requirements of the Chamblee ordinance. As a result, the Court issued a writ of mandus directing the City of Chamblee to issue AT & T a permit for its 140' tower.[38]

United States District Court for the Middle District of Florida, Orlando Division. AT & T Wireless Services of Florida, Inc., Plaintiff, v. Orange County, a political subdivision of the State of Florida, Defendant. 982 F. Supp. 856; U.S. Dist. LEXIS 19217 (November 14,1997)

[37]Lexis-Nexis. Mar. 1999. United States District Court for the Northern District of Georgia, Atlanta Division. AT & T Wireless PCS Inc., Plaintiff, v. The City of Chamblee and Kathy Brannon, in her official capacity as City Manager.

[38]Lexis-Nexis. Mar. 1999. United States District Court for the Northern District of Georgia, Atlanta Division. AT & T Wireless PCS Inc., Plaintiff, v. The City of Chamblee and Kathy Brannon, in her official capacity as City Manager.

Claims

AT & T Wireless claimed that the Orange County Board of County Commissioners violated the Telecommunications Act of 1996 when they denied special exception and variance requests to build a ninety-nine foot communication tower. The specific claims were that the decision was not supported by substantial evidence and that the denial prohibited AT & T providing wireless phone coverage. As a result, AT & T is asking the Court to award their requests.

Facts[39]

- On July 17, 1996, AT & T applied to the Board of Zoning Adjustment (BZA) for a special exception and variance to construct a 135' church steeple with concealed antennas.
- On September 5, 1996, the BZA held a public hearing. After AT & T provided evidence of its need for the tower, the BZA tabled the hearing so AT & T could meet with nearby property owners.
- After holding two community meetings, AT & T decided to reduce the structure's overall height to 99'.
- On October 3, 1996, the BZA held another meeting on AT & T's proposal. The board unanimously denied the variance because they found no unnecessary hardship. The board also unanimously denied the special exception because it did not meet the requirements for granting one.

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[39] Lexis-Nexis. Sept. 1998. United States District Court for the Middle District of Florida, Orlando Division. AT & T Wireless Services of Florida, Inc., Plaintiff, v. Orange County, a political subdivision of the State of Florida, Defendant. 14 Nov. 1997 <http://www.lexis-nexis.com/>.

- AT & T filed an appeal to the Board of County Commissioners.
- Prior to the hearing, AT & T held a third community meeting. As a result of this meeting, AT & T agreed to plant a landscape buffer that would shield the adjoining property owners from viewing the steeple.
- On November 12, 1996, the Board of County Commissioners heard AT & T's appeal.
- AT & T submitted a letter explaining the need for the tower and a vicinity map to explain where the tower could and could not operate effectively.
- On November 20, 1996, the Board of County Commissioners sent AT & T a letter denying their appeal. The letter still indicated an overall height of 135' and mentioned that the structure was not meeting the 381' setbacks.

Issue #1

Was the County Commissioners denial of AT & T's application based on substantial evidence contained in the written record?

Holding

No. The decision contains no evidence from the commissioners meeting.

Rationale

Although this was an appeal, the Board of Commissioners still had the responsibility to explain why they denied AT & T's request. The Court was not willing to accept the argument that the Commissioners were going along with the

findings that the BZA had made. On that matter, the Court noted that the BZA had not supplied AT & T with a denial that was based on substantial evidence from the written record.[40]

Issue #2

Did the denial of the special exception and variance requests prevent AT & T from providing wireless phone service?

Holding

No. AT & T was not prohibited from providing phone service because a single denial of an application cannot be viewed as a tendency to ban the wireless phone industry.

Rationale

AT & T submitted no evidence to the Court that proved that the Orange County Board of Commissioners had a history of denying tower requests.

Remedy

While the Court found that the Orange County Commissioners did not provide AT & T with a written decision that was based on substantial evidence, this does not mean that their tower should be approved. The Telecommunications Act of 1996 did preserve local government power to handle decisions regarding the placement, construction, and modification of wireless communication facilities.

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[40] Lexis-Nexis. Sept. 1998. United States District Court for the Middle District of Florida, Orlando Division. AT & T Wireless Services of Florida, Inc., v. Orange County.

The Court noted that Orange County repeatedly found that AT & T's application did not meet code. The Court did not feel that it could award AT & T's application when it violated Orange County's setback and height limitation requirements. As a result, the Court required the Orange County Board of Commissioners to furnish AT & T with a new written decision, within 35 days. The Court planned to review the new written decision to ensure that it met the Telecommunication Act requirements.[41]

United States District Court for the Middle District of Florida, Orlando Division. APT Tampa/Orlando, Inc. and PrimeCo Personal Communications, L.P., Plaintiffs, v. Orange County and the Board of Commissioners, Orange County, Defendants.
1997 U.S. Dist. LEXIS 22096 (December 10, 1997)

Claims

APT and PrimeCo contention was that Orange County's ordinance violated the Telecommunications Act of 1996 because it caused them unreasonable delays, discriminated among wireless providers, and prohibited them from providing service.

Facts[42]

- Both plaintiffs obtained Personal Communications Services licenses from the

[41] Lexis-Nexis. Sept. 1998. United States District Court for the Middle District of Florida, Orlando Division. AT & T Wireless Services of Florida, Inc., v. Orange County.

[42] Lexis-Nexis. Sept. 1998. United States District Court for the Middle District of Florida, Orlando Division. APT Tampa/Orlando, Inc. and PrimeCo Personal Communications, L.P., Plaintiffs, v. Orange County and the Board of Commissioners, Orange County, Defendants. 10 Dec. 1997 <http://www.lexis-nexis.com/>.

FCC to provide wireless phone service in the Tampa Major Trading Area.

- According to their licenses they had to provide specific percentages of the population with phone service within certain intervals of time.
- The plaintiffs asserted that Orange County's amended ordinance, which was enacted on June 17, 1997, prevented them from providing service to certain areas of the county.
- In their suit the plaintiffs claimed that Orange County's Ordinance contained fourteen items that were unreasonable, discriminatory, or arbitrary. Some of major issues were:

1. The amended ordinance contained provisions that made wireless providers co-locate on existing towers. Their argument was that some of these towers did not fit into their coverage needs and would only result in more towers being built;
2. The ordinance required distances between a proposed tower and a residentially zoned area and between a proposed tower and an existing tower. For example, there was a requirement that made the tower be in the center of a fifty-eight acre area, which contained no homes, apartments, or residential zoning;
3. The ordinance treated other tall structures differently. The ordinance did not apply to power transmission lines, water towers, or tall buildings and;
4. The ordinance required a forty-five day waiting period before a wireless provider could co-locate on a tower.

Issue #1

Does the county ordinance cause unreasonable delays, discriminate among wireless providers, and prohibit the plaintiffs from providing service?

Holding

No. In this case, AT & T has not filed an application or been heard by Orange County Commissioners. For a claim to be ripe under the Telecommunications Act and thus entitled to expedited review there must be final action or failure to act by a state or local government.[43]

Rationale

The applicants need to file an application under the framework of the new ordinance. If they cannot meet the requirements then they should file for a variance.[44]

United States District Court for the Eastern District of Virginia, Newport News Division. Virginia Metronet, Inc., and Donna Grissom, Plaintiffs, v. The Board of Supervisors of James City County, Virginia, Defendant.
984 F. Supp. 966; U.S. Dist. LEXIS 4700 (January 15, 1998)

Claims

The plaintiffs claim that the Board of Supervisors of James City County violated

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[43]Lexis-Nexis. Sept. 1998. United States District Court for the Middle District of Florida, Orlando Division. APT Tampa/Orlando, Inc. and PrimeCo Personal Communications v. Orange County and the Board of Commissioners.

[44]Lexis-Nexis. Sept. 1998. United States District Court for the Middle District of Florida, Orlando Division. APT Tampa/Orlando, Inc. and PrimeCo Personal Communications v. Orange County and the Board of Commissioners.

Section 704 of the Telecommunications Act of 1996 when they denied their request for a special use permit to construct a telecommunications tower. Metronet challenged that the Board of Commissioners prohibited them from providing service, failed to act on their application in a reasonable amount of time, and failed to give them written notice, backed with substantial evidence, of the reasons their request was denied.

Facts[45]

- Metronet needed a tower in the southwestern portion of James City County to enhance its coverage to the public.
- Metronet met with planning staff to discuss to best possible locations for the tower.
- On April 18, 1996, Metronet applied for a special use permit.
- Between April 18, 1996 and March 11, 1997 the application was postponed numerous times by the plaintiffs, the planning commission, and the county board.
- The delays, for the most part, were caused by modifications that Metronet made to their application. Metronet was informed that they would not get a favorable recommendation from the planning staff, unless their application met all the requirements of the ordinance.
- On March 11, 1997, the planning staff recommended approval of Metronet's application.

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[45]Lexis-Nexis. Sept. 1998. United States District Court for the Eastern District of Virginia, Newport News Division. Virginia Metronet, Inc., and Donna Grissom, Plaintiffs, v. The Board of Supervisors of James City County, Virginia, Defendant. 20 Jan. 1998 <http://www.lexis-nexis.com/>.

- However, the Board of Commissioners voted to defer Metronet's application.
- The Board of Commissioners advised Metronet to conduct further studies on the visibility of the proposed site and to provide the planning staff a list of alternative sites.
- Metronet supplied planning staff with a visibility report and a study showing why alternative tower locations would not work.
- On June 24, 1997, planning staff recommended approval of Metronet's application. However, the Board of Commissioners unanimously voted to deny the proposal.
- The minutes of the Board of Commissioners meeting read that the denial was based on opposition from nearby property owners, the tower was too visible, and that there were better sites in the vicinity.
- On July 22, 1997, Metronet filed suit against James City County.
- On July 28, 1997, the Planning Director sent Metronet a letter detailing the reasons for denial.

Issue #1

Did James City County prohibit Metronet from providing cellular phone service?

Holding

No. The James City County Board of Commissioners only denied one tower request. This doesn't mean that they have adopted a policy of banning

towers altogether.

Rationale

Metronet did not demonstrate that the James City County Board of Commissioners has a history of denying tower requests. Proof would have to be supplied to the Court that multiple requests were turned down. It is quite possible that the James City County Board of Commissioners would have approved the tower request in a different location.[46]

Issue #2

Did the James City County Board of Commissioners unreasonably delay Metronet's request from being heard?

Holding

Unresolved. The Court did not want to act on this item because planning staff, Board of Commissioners, and Metronet were all responsible for postponements.

Rationale

The Court did note that most of the fourteen month delay was caused by the actions of the James City County planning staff. However, there is no evidence

[46]Lexis-Nexis. Sept. 1998. United States District Court for the Eastern District of Virginia, Newport News Division. Virginia Metronet, Inc., and Donna Grissom v. The Board of Supervisors of James City County, Virginia.

that their motives were unreasonable or improper.[47]

Issue #3

Did the Board of Commissioners of James City County send Metronet a written decision of the hearing? Were their reasons for denial supported by substantial evidence?

Holding

No. The Board of Commissioners did not send Metronet a written decision. The planning staff drafted the letter that was sent. Furthermore, the planning staff letter was sent after the appeal was filed and did not meet the requirements of the Telecommunications Act of 1996.

Rationale

The Court found that the James City County Board of Commissioners were responsible for drafting the letter to Metronet, since they made the decision. The Court noted the Board of Commissioners could seek the assistance of the planning staff. However, the planning staff cannot speak for the Board of Commissioners or explain why they have denied an applicant's request.[48]

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[47] Lexis-Nexis. Sept. 1998. United States District Court for the Eastern District of Virginia, Newport News Division. Virginia Metronet, Inc., and Donna Grissom v. The Board of Supervisors of James City County, Virginia.

[48] Lexis-Nexis. Sept. 1998. United States District Court for the Eastern District of Virginia, Newport News Division. Virginia Metronet, Inc., and Donna Grissom v. The Board of Supervisors of James City County, Virginia.

The Court also found that the planning staff's letter did not reach Metronet in the allotted amount of time. The Telecommunications Act gives local governments thirty days to produce a written decision. In this case, the planning staff sent a letter to Metronet, six days after the appeal was filed. The Court found this unacceptable because it enabled James City County an opportunity to tailor its written decision to the claims that Metronet had made. The biggest problem with James City County's written decision was that it did not indicate what evidence led to the Board of Commissioners denying Metronet's request. The Planning Director, Mr. Sowers, indicated five reasons why the request was turned down:[49]

1. The first reason was that the tower was too visible from Brick Bat Road. However, no evidence was presented to show why the Board of Commissioners went against staff's recommendation. The planning staff had found that a buffer could be installed to cut down the view from Brick Bat Road.

2. The second reason given was that the tower was not consistent with previously approved tower sites. Yet there is no evidence in the meeting minutes to indicate how this site is different from the other sites.

3. The third reason was that the proposed tower would be too visible to nearby residents. Mr. Sowers indicated that this was demonstrated by the balloon test that Metronet conducted. While the issue was raised during the Board of

[49]Lexis-Nexis. Sept. 1998. United States District Court for the Eastern District of Virginia, Newport News Division. Virginia Metronet, Inc., and Donna Grissom v. The Board of Supervisors of James City County, Virginia.

Commissioners meeting, the Court found that aesthetic issues couldn't be the sole reason for denial, based on Virginia law.

4. The fourth reason Mr. Sowers gave was that the proposed tower was not consistent with the rural character of the surrounding area. Mr. Sowers pointed out that the County's Comprehensive Plan tries to protect this character by encouraging significant landscape buffers for any proposed development. However, the Court could not accept Mr. Sowers claim because he was a member of staff that found that Metronet's proposal was in compliance with the wireless communication standards. The Court also notes the James City County's Comprehensive Plan does not specifically mention communication towers.

5. The fifth and final reason that Mr. Sowers gave was that Metronet did not prove why alternative sites were not selected. Metronet did submit evidence at the Board of Commissioners hearing, which showed they had analyzed eighty-six different locations for the tower. No evidence is provided in the written record that shows why the Board of Commissioners dismissed Metronet's report.

Remedy

The Court found that the James City County Board of Commissioners did violate the Telecommunications Act of 1996. As a result, the Court ordered them to approve Metronet's special use permit application.

United States District Court for the Northern District of Georgia, Atlanta Division. Gearon & Co., Inc., and Communication Towers, Inc., Plaintiffs v. Fulton County, Georgia; Fulton County Board of Zoning Appeals; D. Scott Jones, Chairman, Board of Zoning Appeals; Rose McClain; Darius Keene, Jr.; Joe D. Hindman; Karen Thurman; Edward Vaughn; and Dale Reeves, Members of the Board of Zoning Appeals, in their individual and official capacities, Defendants.

5 F. Supp. 2d 1351; 1998 U.S. Dist. LEXIS 8088 (April 23, 1998)

Claims

The Plaintiffs claimed that the Fulton County Board of Zoning Appeals violated the Telecommunications Act of 1996 when they denied their variance request. Specifically, Gearon and Company contends that the written decision was not backed by evidence contained in the written record, that the decision has denied them the opportunity to provide service, and that they were unreasonably discriminated against.

Facts[50]

- In August 1997, Gearon & Company (Gearon) applied for a zoning variance, from the Fulton County Board of Zoning Appeals (BZA), to reduce the buffer yard and setback requirements for a proposed communication tower site.
- Fulton County's ordinance stipulates that a tower shall meet tower size setbacks from all property lines.

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[50]Lexis-Nexis. Sept. 1998. United States District Court for the Northern District of Georgia, Atlanta Division. Gearon & Co., Inc., and Communication Towers, Inc., Plaintiffs v. Fulton County, Georgia; Fulton County Board of Zoning Appeals; D. Scott Jones, Chairman, Board of Zoning Appeals; Rose McClain; Darius Keene, Jr.; Joe D. Hindman; Karen Thurman; Edward Vaughn; and Dale Reeves, Members of the Board of Zoning Appeals, in their individual and official capacities, Defendants. 23 April 1998 <http://www.lexis-nexis.com/>.

- On September 18, 1997, the BZA considered Gearon's request for a 195' monopole tower.
- Gearon already had made arrangement to share the tower with three other users.
- The burden of proof is on Gearon to show that a hardship does exist.
- Gearon claimed the hardship was due to the triangular shape of the parcel, which did not lend itself to meeting the setback and buffer requirements.
- However, Gearon does not own the property, they are proposing to lease it.
- Gearon never demonstrated why they didn't look at other alternatives.
- Gearon also did not explain why a shorter tower could not be used on this parcel.
- The BZA pointed out that the adjoining parcel, owned by the Fulton County School Board, should have been considered.
- The BZA decided that a second hearing would have to be held to decide the matter.
- On October 16, 1997, the BZA denied Gearon's request.
- On October 23, 1997, the BZA sent Gearon written notice of their decision. The letter said the request was denied as a result of the meeting held on October 16, 1997.

<u>Issue #1</u>

Did the defendants violate the Telecommunications Act of 1996 when they issued a written notice that contained no citations of evidence from the public hearing?

Holding

No. Although the BZA's written notice could have been made better by referencing citations of evidence, the Court finds that the written notice satisfies all requirements.

Rationale

After the Court reviewed the BZA meeting minutes, it was clear that their denial was based on substantial evidence. The brevity of the written notice does not warrant overturning the BZA's decision.[51]

Issue #2

Did the BZA's denial prohibit Gearon from supplying Personal Wireless Service?

Holding

No. The BZA is not prohibiting Gearon from providing service.

Rationale

Gearon never proved that there were not other possible locations for the tower. The BZA even tried to direct Gearon to an adjacent parcel, where the tower could meet the setback requirements.

Issue #3

Did the BZA unfairly discriminate against the plaintiffs?

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[51] Lexis-Nexis. Sept. 1998. United States District Court for the Northern District of Georgia, Atlanta Division. Gearon & Co., Inc., and Communication Towers, Inc., Plaintiffs v. Fulton County, Georgia; Fulton County Board of Zoning Appeals.

Holding

No. There is no proof of discrimination.

Rationale

Although, the BZA tried to direct Gearon to an alternative parcel that was owned by the county, this does not prove that they acted with discriminatory intentions. The denial of Gearon's request had the same affect on all the proposed users of the tower.[52]

United States District Court for the Western District of North Carolina, Asheville Division. Cellco Partnership, d/b/a/ Bell Atlantic Mobile, Plaintiff, v. Edwin Russell, Chairperson; Bill Edwards; Grover Lee Bradshaw; Robert Forga; and Jack Rice, as and constituting the Haywood County Board of Commissioners; Kris Boyd, as County Planner; Bruce Crawford, as Building Inspector, and Haywood County, Defendants.
1998 U.S. Dist. LEXIS 11639 (June 23, 1998)

Claims

Cellco Partnership (Bell Atlantic Mobile) claimed the moratorium and tower ordinance passed by Haywood County violated the Telecommunications Act of 1996. They sought relief because they believed the moratorium was illegally passed, prohibited them from providing service, discriminated among providers, and caused them an unreasonable delay. They asked the Court to pass a

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[52]Lexis-Nexis. Sept. 1998. United States District Court for the Northern District of Georgia, Atlanta Division. Gearon & Co., Inc., and Communication Towers, Inc., Plaintiffs v. Fulton County, Georgia; Fulton County Board of Zoning Appeals.

judgement that would direct the Haywood County Building Inspector to award them four building permits.

Facts[53]

- On June 16, 1997, the Haywood County Board of Commissioners enacted a moratorium on communication towers. The moratorium was to last one year or until a new communication tower ordinance could be drafted.
- At the time the moratorium was passed, three communication towers existed within Haywood County, two of these towers were owned by Bell Atlantic Mobile.
- Bell Atlantic Mobile attended several county meetings to help shape the draft ordinance.
- On January 26, 1998, Bell Atlantic Mobile submitted building permit applications to construct four communication towers. The County Planner and Building Inspector informed Bell Atlantic that the permits could not be issued during the moratorium.
- On February 6, 1998, Bell Atlantic filed this suit against the defendants.
- On February 23, 1998, Haywood County passed their new communication tower ordinance.

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[53]Lexis-Nexis. Sept. 1998. United States District Court for the Western District of North Carolina, Asheville Division. Cellco Partnership, d/b/a/ Bell Atlantic Mobile, Plaintiff, v. Edwin Russell, Chairperson; Bill Edwards; Grover Lee Bradshaw; Robert Forga; and Jack Rice, as and constituting the Haywood County Board of Commissioners; Kris Boyd, as County Planner; Bruce Crawford, as Building Inspector, and Haywood County, Defendants. 23 June 1998 <http://www.lexis-nexis.com/>.

- On March 16, 1998, the Haywood County Planning Director sent Bell Atlantic Mobile a letter that the four applications had been reviewed under the new ordinance guidelines. Bell Atlantic was informed to resubmit the applications, with all the required material.

Issue #1

Did Haywood County's moratorium violate the Telecommunications Act of 1996?

Holding

No. The Telecommunications Act of 1996 specifically preserves local government authority over decisions regarding the placement, construction, and modification of personal wireless service facilities. Haywood County, under their police power from the State of North Carolina, is allowed to pass moratoriums without a hearing or public notice when conditions exist that could be detrimental to health, safety, or general welfare of its citizens.

Rationale

The Telecommunications Act of 1996 gave no time frame for local governments to update their ordinances. Haywood County should not be punished because communication providers were seeking more tower sites, sixteen months after the passing of the act.[54]

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[54] Lexis-Nexis. Sept. 1998. United States District Court for the Western District of North Carolina, Asheville Division. Cellco Partnership, d/b/a/ Bell Atlantic Mobile v. Haywood County Board of Commissioners.

Issue #2

Did the moratorium prevent Bell Atlantic Mobile from providing service or cause them an unreasonable delay?

Holding

No. Bell Atlantic Mobile submitted their building permit applications on January 16, 1998 and the new ordinance was passed on February 23, 1998. Bell Atlantic only experienced a delay of five weeks.

Rationale

Bell Atlantic submitted their four building permit applications after the moratorium was in effect. For this reason, the Court could not find that the moratorium had prevented them from providing service. Furthermore, a five-week delay cannot be viewed as an unreasonable amount of time.[55]

Issue #3

Did Haywood County's moratorium discriminate among wireless communication providers?

Holding

No. The moratorium affected all wireless communication providers equally.

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[55] Lexis-Nexis. Sept. 1998. United States District Court for the Western District of North Carolina, Asheville Division. Cellco Partnership, d/b/a/ Bell Atlantic Mobile v. Haywood County Board of Commissioners.

Rationale

The Court could find no evidence that discrimination did occur. No wireless communication providers were awarded building permits during the moratorium.[56]

Issue #4

Did Haywood County's new ordinance comply with the Telecommunications Act of 1996?

Holding

The Court cannot rule. The Telecommunication Act of 1996 will only allow the Court to act on two kinds of cases: (1) cases where the local government has made a final action; or (2) cases that have not been acted upon by a local government.

Rationale

The Court cannot make a ruling because Bell Atlantic Mobile has not resubmitted the four applications back to Haywood County Planning Department. Bell Atlantic will have to go through the proper process before they can claim that they have suffered in any way.[57]

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[56]Lexis-Nexis. Sept. 1998. United States District Court for the Western District of North Carolina, Asheville Division. Cellco Partnership, d/b/a/ Bell Atlantic Mobile v. Haywood County Board of Commissioners.

[57]Lexis-Nexis. Sept. 1998. United States District Court for the Western District of North Carolina, Asheville Division. Cellco Partnership, d/b/a/ Bell Atlantic Mobile v. Haywood County Board of Commissioners.

United States District Court for the Middle District of North Carolina. AT & T Wireless PCS, Inc., Plaintiff, v. The Winston-Salem Zoning Board of Adjustment, Defendant.
1998 U.S. Dist. LEXIS 9304 (June 12, 1998)

Claims

AT & T claimed that the Winston-Salem Zoning Board of Adjustment (ZBA) violated the Telecommunication Act of 1996 when they denied their special use permit request.

Facts[58]

- AT & T applied for a 148' monopole communication tower.
- Winston-Salem's zoning ordinance stipulates that a tower request on a parcel zoned "IP" (Institutional/Public) must go through the special use permit process.
- The subject parcel was 38 acres in size and was heavily wooded. The trees surrounding the proposed site were 60 to 85' in height. The parcel also contained a house that was under consideration for the National Register of Historic Places.
- AT & T held several community meetings. As a result of these meetings, AT & T agreed to conceal the antennas in the tower and landscape the site with an 8' high wooden fence and 54 shrubs.
- AT & T also flew a balloon at 148' to show residents that there would be little or no impact on surrounding properties.

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[58] Lexis-Nexis. Sept. 1998. United States District Court for the Middle District of North Carolina. AT & T Wireless PCS, Inc., Plaintiff, v. The Winston-Salem Zoning Board of Adjustment, Defendant. 12 June 1998 <http://www.lexis-nexis.com/>.

- In October 1997, the City/County Planning Board approved AT & T's site plans. This approval meant that AT & T's request met the requirements of the ordinance.
- On November 6, 1997, AT & T's application was heard before the BZA.
- AT & T supplied the BZA with the following evidence:

1. A letter from the North Carolina Department of Cultural Resources stating that a communication tower would have no effect on a historic structure;
2. Twenty photographs from their balloon test. A few of photographs showed that the top of the tower was visible to surrounding neighbors;
3. Testimony from a property appraiser who stated the tower would not substantially impact the value of adjoining property;
4. Testimony from AT & T's engineer who stated that the tower was needed to fill in a four-tenths of a mile diameter dead spot. The engineer also informed the ZBA that there were no co-location opportunities within the dead spot;
5. A signed petition from nearby property owners, who stated they were not in opposition to the tower.

- Two nearby neighbors spoke against AT & T's request. Their main concerns were that the tower would extend above the tree line and would not be in harmony with the surrounding area.
- The ZBA rejected AT & T's request on the ground that the tower would not be in harmony with the surrounding area. After the hearing was complete, the word "denied" was stamped on AT & T's application.

- On December 5, 1997, AT & T filed this appeal.
- On February 20, 1998, the ZBA supplied AT & T and the Court with a written explanation of why AT & T's application was denied.
- The reasons for denial were that the tower would allow other towers to be built, be visible to surrounding property owners, be located 148' from the historic house, and not be in conformance with Vision 2005.
- The attorneys for the ZBA asked the Court to abstain from ruling on the case because appeals were to be heard by a state court.
- The Court found an abstention would be improper because the Telecommunications Act of 1996 allows parties that have been adversely affected by a local government decision to file an appeal in any court of competent jurisdiction.

Issue #1

Did the Winston-Salem ZBA send AT & T a written denial, based on substantial evidence from the written record?

Holding

No. The ZBA did not furnish AT & T a written decision, based on substantial evidence, in the appropriate amount of time.

Rationale

The ZBA's one word denial does not meet the requirements of the

Telecommunications Act. The ZBA realized this was a violation after the appeal was filed and wrote a more thorough explanation for denying AT & T's application. However, the Court still finds that the ZBA violated this section of the Telecommunications Act because their detailed response was issued 77 days after AT & T filed their appeal. By waiting to issue their response, the ZBA had an opportunity to see if AT & T would file an appeal and to tailor their responses to the claims that were made.[59]

Issue #2

Did AT & T's application meet the four findings of fact that were required for the ZBA to issue a special use permit?

Holding

Yes. AT & T supplied sufficient evidence to demonstrate that they met the four findings of fact. In North Carolina, boards are supposed to issue a special use permit when the applicant meets the requirements. The Winston-Salem/Forsyth County Unified Development Ordinance states that a conditional use will be awarded if the applicant can show:

1. That the use will not endanger the public health or safety;
2. That the use meets all conditions and specifications;
3. That the use will not affect the value of adjoining properties and;

[59] Lexis-Nexis. Sept. 1998. United States District Court for the Middle District of North Carolina. AT & T Wireless PCS, Inc. v. The Winston-Salem Zoning Board of Adjustment. 12 June 1998.

4. That the use will be in harmony with the surrounding area and be in conformance with Vision 2005.

Rationale

A zoning board sits in a quasi-judicial, rather than a legislative, capacity. This means that they cannot deny an application because they think the proposal would adversely affect the public interest. There was no debating that AT & T had met the first, second, and third findings of fact. AT & T began the hearing presuming that the tower was in harmony with the surrounding area because towers are allowed on parcels that are zoned "IP". As a result, the burden of proof falls on the ZBA to show that the tower is not in harmony with area. The only evidence submitted that the tower was not in harmony with the surrounding area came from two property owners, whose main concerns were that the tower would be visible above the tree line. The Court states that such a reason is not sufficient evidence to deny the request. The Court found no evidence to show how the ZBA reached the conclusions that the tower would affect the historic structure and not be in accord with Vision 2005.[60]

Remedy

The Court found that the ZBA had violated the Telecommunications Act. As a result, they were directed to grant AT & T's special use permit.

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[60]Lexis-Nexis. Sept. 1998. United States District Court for the Middle District of North Carolina. AT & T Wireless PCS, Inc. v. The Winston-Salem Zoning Board of Adjustment. 12 June 1998.

United States District Court for the Middle District of North Carolina. AT & T Wireless PCS, Inc., Plaintiff, v. The Winston-Salem Zoning Board of Adjustment, Defendant.
1998 U.S. Dist. LEXIS 11074 (July 17, 1998)

Claims

The Winston-Salem Zoning Board of Adjustment (ZBA) sought a stay pending appeal for the June 12, 1998, U.S. District Court decision that directed them to issue AT & T a special use permit.

Facts[61]

- In order for the stay pending appeal to be issued the ZBA had to demonstrate that:

1. That there would be irreparable injury if the stay was denied;
2. The public interest would be served by granting the stay.

Issue #1

Would there be irreparable harm done to the ZBA if their appeal is denied?

Holding

No. On the contrary, the Court found that AT & T would endure a great deal of harm if the original verdict were overturned.

Rationale

The Court found that the ZBA did not properly apply their zoning ordinance.

[61] Lexis-Nexis. Sept. 1998. United States District Court for the Middle District of North Carolina. AT & T Wireless PCS, Inc., Plaintiff, v. The Winston-Salem Zoning Board of Adjustment, Defendant. 17 July 1998 <http://www.lexis-nexis.com/>.

AT & T had a right to build their tower because they had met all the provisions and findings that were needed to award a special use permit.[62]

Issue #2

Would other parties be affected if the stay pending appeal were granted?

Holding

Yes. The public would be greatly affected if the ZBA were granted a stay pending appeal.

Rationale

Congress passed the Telecommunications Act of 1996 so the public would have the latest wireless technology available to them. AT & T's proposed tower met all the requirements and was needed to provide coverage in an area that did not service. Issuing the stay order would only delay AT & T's customers from having adequate service.[63]

Remedy

The Court further directed the ZBA to issue AT & T's request by July 24, 1998.

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[62]Lexis-Nexis. Sept. 1998. United States District Court for the Middle District of North Carolina. AT & T Wireless PCS, Inc., Plaintiff, v. The Winston-Salem Zoning Board of Adjustment, Defendant. 17 July 1998.

[63]Lexis-Nexis. Sept. 1998. United States District Court for the Middle District of North Carolina. AT & T Wireless PCS, Inc., Plaintiff, v. The Winston-Salem Zoning Board of Adjustment, Defendant. 17 July 1998.

United States Court of Appeals for the Fourth Circuit. AT & T Wireless PCS, Incorporated, Plaintiff-Appellee, v. The Winston-Salem Zoning Board of Adjustment, Defendant-Appellant.
1998 U.S. App. No. 98-1985 (April 5, 1999)

Claims

The Winston-Salem Zoning Board of Adjustment challenged two United States District Court decisions that overturned their ruling and enabled AT & T to receive a special use permit to erect a telecommunication tower.

Facts[64]

- On June 12, 1998, the United States District Court for the Middle District of North Carolina found that the Winston-Salem Zoning Board of Adjustment had violated the Telecommunications Act of 1996.
- The specific charges were that the denial was not backed by substantial evidence and that the Winston-Salem Zoning Board of Adjustment did not furnish AT & T a written record of the reasons their request was denied.

Issue #1

Was the Winston-Salem Zoning Board of Adjustment's rubber stamped, written denial adequate enough to satisfy the requirements of the Telecommunications Act of 1996?

[64] Lexis-Nexis. April 1999. United States Court of Appeals for the Fourth Circuit. AT & T Wireless PCS, Inc., Plaintiff, v. The Winston-Salem Zoning Board of Adjustment, Defendant. 5 April 1999 <http://www.lexis-nexis.com/>.

Holding

Yes. The Court reaffirmed the position it took during the AT & T Wireless PCS v. City Council of the City of Virginia Beach case that was heard on September 1, 1998. In this case, the Court found that rubber stamping the word "denied" on an application does constitute a written denial. Although the written denial was brief, it was a written denial nonetheless.

Rationale

The Court found that Winston-Salem Zoning Board of Adjustment meeting was taped and that a copy of it and the meeting minutes were made part of the record. The Court thought it would be ridiculous to require every municipal jurisdiction to write a detailed letter explaining the reasons for denial when there were tape recordings and meeting minutes to prove what happened.[65]

Issue #2

Was the Winston-Salem Zoning Board of Adjustment's denial of AT & T's request based on substantial evidence?

Holding

Yes. There is substantial evidence in the written record that would support denial or approval of the application. The majority of the Winston-Salem Zoning Board of

[65]Lexis-Nexis. April 1999. United States Court of Appeals for the Fourth Circuit. AT & T Wireless PCS, Inc. v. The Winston-Salem Zoning Board of Adjustment. 5 April 1999.

Adjustment members chose to deny the application because they felt the tower was not in harmony with the surrounding area.

Rationale

Although AT & T had experts testify to the towers compliance with the four findings of fact necessary to award a special use permit, there were several opponents to the tower that testified. Eight different neighborhood leaders and one mortgage banker stated and used illustrations to make an impression that the tower:

1. would have a visual impact on the surrounding residential area;
2. impact the historic Hanes House, which was immediately adjacent to the tower and;
3. lower nearby property values.[66]

Remedy

The U.S. District Court decisions were overturned and the Winston-Salem Zoning Board of Adjustment's verdict was upheld.

United States District Court for the Southern District of Alabama, Southern Division. Wendell Barnhill, et al., Plaintiffs v. City of Fairhope, et al., Defendants.
1998 U.S. Dist. LEXIS 14056 (July 17, 1998)

Claims

DigiPH claimed that the City of Fairhope Board of Adjustment (B.O.A.) violated the

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[66] Lexis-Nexis. April 1999. United States Court of Appeals for the Fourth Circuit. AT & T Wireless PCS, Inc. v. The Winston-Salem Zoning Board of Adjustment. 5 April 1999.

Telecommunications Act of 1996 when they denied their request for a special exception permit. The specific claims were that the Fairhope B.O.A. decision prohibited DigiPH from providing wireless phone service and that the decision was not based on substantial evidence.

Facts[67]

- On September 17, 1996, DigiPH purchased a Federal Communications Commission license that enabled them to provide wireless phone service in the Gulf Coast area.
- On November 12, 1997, DigiPH entered into a lease agreement with the Barnhill's so they could construct a 150' telecommunication tower.
- The Barnhill's property was zoned R-1 (low-density residential), so a special exception permit was required to erect a telecommunication tower.
- The hearing on DigiPH's application was held on February 16, 1998.
- Mr. Paul Reynolds, Operation & Project Manager for DigiPH, stated that the proposed tower was needed because there had been numerous complaints about the poor coverage on U.S. Highway 98, between Daphne and Fairhope.
- Mr. Barry Leska, Field Project Manager for DigiPH, also addressed the board. He pointed out that the surrounding land uses were commercial and mobile home parks and felt that the tower would be in harmony with the surrounding

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[67] Lexis-Nexis. Sept. 1998. United States District Court for the Southern District of Alabama, Southern Division. Wendell Barnhill, et al., Plaintiffs/Petitioners, v. City of Fairhope, et al., Defendants/Respondents. 17 July 1998 <http://www.lexis-nexis.com/>.

area. He also showed pictures and mentioned that the tower would be hidden by the existing tree line.

- Mr. Claude Puckett, Chairman of the Board of Adjustment, asked if anybody else had questions. When nobody responded, the public hearing was closed.
- A motion was made and seconded to approve the request.
- The final vote found three board members in favor, one against, and one abstention. As a result, the application failed because four votes were needed for approval.
- When Mr. Reynolds asked why the one board member voted against the application, the Chairman responded that he had his own reasons.
- The B.O.A. sent DigiPH a written denial that consisted of a check mark next to the word denied and a check mark next to the words use not compatible.
- On March 17, 1998, the plaintiffs filed their complaint.

Issue #1

Did the Fairhope B.O.A. prohibit DigiPH from providing wireless phone service?

Holding

No. The Court found that one denial could not be seen as a ban on the wireless communication industry.

Rationale

DighiPH had no proof that the Fairhope B.O.A. had made it a policy to deny

communication tower applications. The Court believed it was possible that they could have been granted approval from the B.O.A. at an alternative location.

Issue #2

Was the B.O.A. denial based on evidence that was contained in the written record?

Holding

No. The B.O.A. decision was not based on facts contained in the written record.

Rationale

The Court looked back to the BellSouth Mobility Inc. v. Gwinnett County case and went along with the conclusions that were reached in that suit. In that case, the Court found that "substantial evidence means more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". In this case, the only evidence brought in favor of denial were a few aesthetic and cable television interference concerns from nearby property owners. The Court found that no evidence was presented to show that the tower would not be in harmony with the surrounding area. On the contrary, Mr. Leska, a DigiPH representative was the only person to speak on this issue. Mr. Leska noted that the tower would be in harmony with the surrounding land uses, which were commercial and mobile homes.[68]

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[68] Lexis-Nexis. Sept. 1998. United States District Court for the Southern District of Alabama, Southern Division. Wendell Barnhill v. City of Fairhope. 17 July 1998

Remedy

The Court found that the Fairhope B.O.A. violated the Telecommunications Act of 1996 when they denied DigiPH's application. The denial was not based on substantial evidence. As a result, the Court ordered the B.O.A. to approve DigiPH's special exception request.

United States District Court for the Eastern District of Virginia, Norfolk Division. AT & T Wireless PCS, Inc., and PrimeCo Personal Communications, L.P., and Lynnhaven United Methodist Church, Plaintiffs, v. City Council of the City of Virginia Beach, Defendant.
979 F. Supp. 416; 1997 U.S. Dist. LEXIS 16293 (September 24, 1997)

Claims

Plaintiffs contend that the City Council of Virginia Beach violated the Telecommunications Act of 1996. The specific claims were that city council's actions had discriminated among wireless communication providers, prohibited personal communications services from being provided in Little Neck Peninsula, and had not been supported by substantial evidence.

Facts[69]

- AT & T and PrimeCo both purchased PCS licenses from the FCC to cover the Hampton Roads area.
- AT & T and PrimeCo entered into lease agreements with Lynnhaven United

[69]Lexis-Nexis. Sept. 1998. United States District Court for the Eastern District of Virginia, Norfolk Division. AT & T Wireless PCS, Inc., and PrimeCo Personal Communications, L.P., and Lynnhaven Methodist Church, Plaintiffs, v. City Council of the City of Virginia Beach, Defendant. 24 Sept. 1997 <http://www.lexis-nexis.com/>.

Methodist Church so they could erect two 135' communication towers.

- Before they selected the church property, AT & T and PrimeCo had met with planning staff to discuss the best possible site for the towers.
- GTE Mobile Net and 360 Communications informed AT & T and PrimeCo that they would co-locate on the towers.
- The City of Virginia Beach Zoning Ordinance states that communication tower proposals need to go through the conditional use permit process.
- On October 1, 1996, the church submitted its application for the two towers.
- The church submitted site plans, a radio frequency study, an appraisal report, and a letter from the tower manufacturer, which stated that the towers were in compliance with Virginia's Building Code.
- The planning staff recommended approval of the project with three conditions: the applicants share tower space with other carriers, use stealth antennas, and build brick equipment buildings.
- On January 8, 1997, the City Planning Commission held their hearing. Although several residents spoke against the proposal, the Planning Commission voted, 10-0, in favor of the tower.
- On March 25, 1997, the City Council heard AT & T's and PrimeCo's request.
- During the hearing, seven witnesses spoke for the towers and five people spoke against them.
- Only one councilman, William Harrison, spoke during the meeting. Mr. Williamson remarked that AT & T and PrimeCo had done a great job

investigating all the potential sites. However, the opposition had made it clear that they did not want PCS technology and that they were willing to live with their cellular service.

- After Mr. Harrison made his statements, the city council voted unanimously to deny AT & T's and PrimeCo's request.
- AT & T and PrimeCo did receive notice of the denial but it only consisted of a single word, "denied", rubber stamped on the meeting agenda.

Issue #1

Did the City Council of Virginia Beach discriminate among wireless providers?

Holding

Yes. The city council's decision had an adverse affect on personal communication providers.

Rationale

Mr. Harrison's remarks seemed to influence the council's action, for he was the only councilman to speak on the issue. He stated that the citizens had adequate cellular phone coverage in the area where the tower was proposed. The Court found that Mr. Harrison's remarks were in direct conflict with the Telecommunications Act of 1996, which was drafted to ensure competition and improve the technology that consumers had available to them.[70]

[70] Lexis-Nexis. Sept. 1998. United States District Court for the Eastern District of Virginia, Norfolk Division. AT & T Wireless PCS v. City Council of the City of Virginia Beach. 24 Sept. 1997.

Issue #2

Did the city council's action prohibit AT & T and PrimeCo from providing wireless services to their customers?

Holding

No. The City Council of Virginia Beach only denied a single application.

Rationale

The Court found that a single denial could not be viewed as a tendency to ban the entire wireless communication industry. AT & T and PrimeCo did not submit any evidence that demonstrated the City Council of Virginia Beach had a history of denying communication tower requests.

Issue #3

Did the City Council of Virginia Beach send AT & T and PrimeCo written decisions that were based on substantial evidence from the public hearing?

Holding

No. The City Council of Virginia Beach only supplied AT & T and PrimeCo with copies of the agenda with the word "denied" rubber-stamped on them.

Rationale

The Court found that a rubber stamp couldn't be seen as a written denial because it does not allow for judicial review. "Nor can this requirement be satisfied by the

production of the minutes of the hearing, or a transcript of the hearing. These documents suffer the same deficiencies as the rubber stamp. They impart no information to permit a reviewing court to ascertain the rationale behind the decision."[71]

Remedy

The Court ordered the City Council of Virginia Beach to grant Lynnhaven United Methodist Church a conditional use permit for the construction of two monopole communication towers.

United States Court of Appeals for the Fourth Circuit. AT & T Wireless PCS, Incorporated; PrimeCo Personal Communications, L.P.; Lynnhaven United Methodist Church, Plaintiffs, v. City Council of the City Council of Virginia Beach, Defendant-Appellant.
1998 U.S. App. LEXIS 21367 (September 1, 1998)

Claim

The City Council of Virginia Beach filed an appeal to challenge the decision that the U.S. District Court for the Eastern District of Virginia, at Norfolk, had rendered on September 24, 1997. The U.S. District Court decision reversed the City Council of Virginia Beach's denial of AT & T's and PrimeCo's conditional use permit application for two 135' monopole communication towers.

[71] Lexis-Nexis. Sept. 1998. United States District Court for the Eastern District of Virginia, Norfolk Division. AT & T Wireless PCS v. City Council of the City of Virginia Beach. 24 Sept. 1997.

Facts[72]

- See prior case brief to view the details that led to the appeal.
- In short, the District Court had found that the City Council of Virginia Beach had violated the Telecommunications Act of 1996 on two separate counts. The charges were that the city council had unreasonably discriminated among wireless providers and failed to supply AT & T and PrimeCo with a written denial that thoroughly explained why their conditional use permits were denied.

Issue #1

Had the City Council of Virginia Beach unreasonably discriminated against AT & T and PrimeCo?

Holding

No. The denial affected AT & T and PrimeCo, the PCS license holders, and GTE and 360° Communications, the cellular license holders, equally. GTE and 360° Communications were interested in co-locating on the proposed structures to strengthen their own coverage in Little Neck Peninsula. As a result, none of the wireless phone providers had optimum coverage in the area. Secondarily, the meeting minutes clearly show that there was strong opposition to the tower. One petition contained over seven hundred signatures of people who opposed the tower. This evidence suggests that one of the findings of fact, preserving the

[72] Lexis-Nexis. Jan. 1999. United States Court of Appeals for the Fourth Circuit. AT & T Wireless PCS, Incorporated; PrimeCo Personal Communications, L.P.; Lynnhaven United Methodist Church, Plaintiffs, v. City Council of the City Council of Virginia Beach, Defendant-Appellant. 1 Sept. 1998 <http://www.lexis-nexis.com/>.

character of the neighborhood, was in serious question. "If such behavior is unreasonable, then nearly every denial of an application such as this will violate the Act, an obviously absurd result."[73]

Rationale

The Court of Appeals believed that the District Court had reacted to the comments of one city councilman. During the public hearing, Councilman Harrison had remarked that the public was making a statement that they did not want any more towers and were willing to live with the existing cellular service. While this comment could be interpreted to back the claim of AT & T and PrimeCo, it would be foolish to do so because there were plenty of people who stated or petitioned that the tower was not in harmony with the surrounding area. The Court of Appeals also noted that this case was different from some of the other Telecommunication Act of 1996 lawsuits because the property was zoned for single-family residential dwellings.[74]

Issue #2

Had the City Council of Virginia Beach furnished AT & T and PrimeCo with a written denial that explained why their request was turned down?

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[73]Lexis-Nexis. Jan. 1999. United States Court of Appeals for the Fourth Circuit. AT & T Wireless PCS v. City Council of the City Council of Virginia Beach. 1 Sept. 1998

[74]Lexis-Nexis. Jan. 1999. United States Court of Appeals for the Fourth Circuit. AT & T Wireless PCS v. City Council of the City Council of Virginia Beach. 1 Sept. 1998

Holding

Yes. The Court of Appeals found that the two requirements should be treated separately. As a result, they had no trouble finding that the word "denied" rubber stamped on an agenda did constitute a written denial. A copy of this denial had been sent to AT & T and PrimeCo.

The Court of Appeals noted that other sections of the Telecommunications Act of 1996 used explicit language when Congress wanted an explanation for the findings that were reached. Consequently, it was determined that Congress did not intend for Section 704 of the Act to be interpreted in a fashion that would call for local government boards to write letters every time they denied a tower request.

Rationale

The Court of Appeals found that the City Council of Virginia Beach had acted correctly because there was substantial evidence in the meeting minutes that showed that the tower was not in harmony with the area.[75]

Remedy

The Court of Appeals reversed the district court's decision and ordered summary judgement in favor of the City Council of Virginia Beach.

[75]Lexis-Nexis. Jan. 1999. United States Court of Appeals for the Fourth Circuit. AT & T Wireless PCS v. City Council of the City Council of Virginia Beach. 1 Sept. 1998

United States District Court for the Northern District of Georgia, Gainesville Division. SprintCom, Inc., a Kansas corporation, and Lanier 400, a Georgia general partnership, Plaintiffs, v. City of Cumming, Georgia, et al, Defendants.

1998 U.S. Dist. LEXIS 18523 (September 21, 1998)

Claims

The plaintiffs claimed that the City of Cumming violated the Telecommunications Act of 1996 when they denied a special exception request for a 180' communication tower. The specific charges were that Mayor and City Council had not supplied SprintCom with a written denial that was backed by substantial evidence and had prohibited SprintCom from providing personal communications services to the public.

Facts[76]

- SprintCom purchased a FCC license to provide personal communications in parts of Northern Georgia.
- SprintCom entered into a lease agreement with Lanier 400 so they could provide coverage to their customers.
- The Lanier 400 property was zoned highway business "HB".
- The City of Cumming ordinance states that telecommunications towers are permitted, up to forty feet in height, in the Highway Business and Central Business Districts. In order to build a taller tower, applicants must receive a

[76] Lexis-Nexis. Feb. 1999. United States District Court for the Northern District of Georgia, Gainesville Division. SprintCom, Inc., a Kansas Corporation, and Lanier 400, a Georgia general partnership, Plaintiffs, v. City of Cumming, Georgia, et al, Defendants. 21 Sept. 1998 <http://www.lexis-nexis.com/>.

special exception permit from the Mayor and City Council to build above the height limitations.

- On February 18, 1998, SprintCom filed a special exception permit request.
- The Planning and Zoning Commission recommended denial of the request. However, they gave no reasons for recommending denial.
- The public hearing before the Mayor and City Council was scheduled for April 21, 1998.
- Public notice was placed in the paper and each adjacent landowner was notified in writing of the upcoming hearing.
- One adjacent property owner called the City Council members to voice her concern on the proposal, but nobody showed up in opposition at the public hearing.
- At the public hearing, SprintCom gave a ten-minute presentation to the Mayor and City Council. They addressed why the tower was needed and why they selected Lanier 400's property over other prospective properties. They also stated that they had been interested in placing antennas on a city water tank but had been turned down.
- The Mayor and City Council then unanimously denied SprintCom's request.
- The request was denied on the basis that the proposal was not consistent with the Cumming Comprehensive Plan. The Mayor and City Council members based this decision on the fact that a majority of the parcels in the surrounding area are not zoned highway business.

- The City of Cumming Zoning Map shows that all the adjoining parcels are zoned highway business.
- The City of Cumming Zoning Ordinance permitted radio and television studios, including broadcasting towers and satellite receiving antennas, in highway business zones. Furthermore, the ordinance stated that these uses were exempt from the forty-foot height limitation. The Court found that the City of Cumming could not differentiate between what SprintCom was proposing and what the ordinance allowed.

Issue #1

Was city council's denial of SprintCom's application based on substantial evidence?

Holding

No. City council's denial was not based on substantial evidence.

Rationale

The only reason the Mayor and City Council gave for the denial was that the proposal was not in accord with the comprehensive plan. The future land use map shows the subject and adjoining parcels are all forecasted to be zoned highway business. According to the Cumming Zoning Ordinance, broadcast towers are permitted uses in this highway business zoning district.[77]

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[77] Lexis-Nexis. Feb. 1999. United States District Court for the Northern District of Georgia, Gainesville Division. SprintCom, Inc. v. City of Cumming, Georgia. 21 Sept. 1998.

Issue #2

Did the City of Cumming prevent SprintCom from providing personal communications services to the public?

Holding

No. A single tower application being denied cannot be seen as a ban against SprintCom or the wireless phone industry.

Rationale

SprintCom did not provide the Court any evidence that the City of Cumming had a repeated history of denying tower applications.[78]

Remedy

The Court ordered the City of Cumming to issue the special exception permit. The Court found that SprintCom was in compliance with the ten findings that were needed to grant the permit.

[78]Lexis-Nexis. Feb. 1999. United States District Court for the Northern District of Georgia, Gainesville Division. SprintCom, Inc. v. City of Cumming, Georgia. 21 Sept. 1998.

Chapter IV

Data Collection – Ordinance Rewrites and Tower Success Rates in Local Jurisdictions that had their Public Hearing Decision Overturned

Seven out of the fourteen Telecommunication Act of 1996 lawsuits, filed between February 1996 and September 1998, eventually overturned the local jurisdiction's ruling. The seven local jurisdictions that had their administrative or board ruling overturned were: (1) Gwinnett County, Georgia, (2) Brevard County, Florida, (3) Jefferson County, Alabama, (4) City of Chamblee, Georgia, (5) James City County, Virginia, (6) City of Fairhope, Alabama, and (7) City of Cumming, Georgia.

Before the author began to conduct this research he believed that each jurisdiction that had one of its administrative or board decisions overturned would pass a new ordinance and/or approve a higher percentage of conditional use, special use, tall structure or special exception permits. To analyze the hypothesized increase in public hearing approvals each overturned jurisdiction's special use, conditional use, tall structure, or special exception permit approval rate was compared for two time periods. The first time period looked at the permit requests that were sought nine months prior to the lawsuit being settled (other than the one that led to the lawsuit). The second time period analyzed the permit requests that were heard in the first nine months after the lawsuit was settled.

Findings in Gwinnett County, Georgia

- On August 13, 1996, the United States District Court for the Northern District of Georgia reversed the Gwinnett County Board of Commissioners decision on BellSouth Mobility's tall structure permit application. As a result of the reversal, BellSouth Mobility was able to construct a 197' monopole communication tower.[81]
- On July 14, 1999, the author interviewed Mr. Samuel Glass, Chief Development Planner for the Gwinnett County Department of Planning and Development. Mr. Glass stated that at the time the lawsuit was filed Gwinnett County was still handling towers under their tall structure ordinance. Under this ordinance, any structure over fifty feet in height was required to obtain a tall structure permit from the Gwinnett County Commissioners.[82]
- In July 1997, Gwinnett County passed a specific telecommunication tower ordinance. Mr. Glass revealed that the passing of the ordinance had nothing to do with the outcome of the lawsuit but more to do with Gwinnett County complying with the language found in the Telecommunications Act of 1996.[83]
- After reviewing Gwinnett County's new telecommunication tower ordinance, it became apparent that they were attempting to reduce the number of towers by requiring applicants to investigate co-location on existing towers within their search ring. The ordinance also points out that the governing authority

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[81] Lexis-Nexis. Sept. 1998, United States District Court for the Northern District of Georgia, Atlanta Division. BellSouth Mobility Inc., James Dean and Lanette Dean v. Gwinnett County, Georgia.

[82] Glass, Samuel. Personal interview. 14 July 1999.

[83] Glass, Samuel. Personal interview. 14 July 1999.

will consider nine findings when determining if an applicant is entitled to a tall structure permit to erect or modify an existing communication tower. The nine findings that the tower application must address are: (1) The height and setbacks of the proposed tower; (2) The proximity to residential structures; (3) The nature of the uses on adjacent and nearby properties; (4) The surrounding topography; (5) The surrounding tree coverage and foliage; (6) The design of the tower, with particular reference to design characteristics that have the effect of reducing or eliminating visual obtrusiveness; (7) The proposed ingress and egress; (8) The availability of suitable existing towers or other structures for antenna co-location; and (9) The impact of the tower upon scenic views and visual quality on the surrounding area.[84]

NUMBER OF TALL STRUCTURE PERMIT REQUESTS, FOR COMMUNICATION TOWERS, NINE MONTHS PRIOR TO THE LAWSUIT BEING SETTLED (NOVEMBER 1995 – JULY 1996)[85]

TOTAL NUMBER OF TALL STUCTURE REQUESTS	TOTAL NUMBER OF TALL STRUCTURE PERMITS AWARDED	PERCENTAGE APPROVED
10*	10	100%

* 2 Requests were withdrawn and not counted because the applicants decided to co-locate on existing towers.

[84]Gwinnett County, Georgia. Telecommunications Tower and Antenna Ordinance. Lawrenceville:
Gwinnett County, 1997.

[85]Gwinnett County, Georgia. Tall Structure Permit Spreadsheets, 1995-1997. Lawrenceville: Gwinnett County, 1999.

NUMBER OF TALL STRUCTURE PERMIT REQUESTS, FOR COMMUNICATION TOWERS, IN THE FIRST NINE MONTHS THAT FOLLOWED THE LAWSUIT (SEPTEMBER 1996 – MAY 1997)[86]

TOTAL NUMBER OF TALL STUCTURE REQUESTS	TOTAL NUMBER OF TALL STRUCTURE PERMITS AWARDED	WINNING PERCENTAGE	DIFFERENCE IN APPROVAL PERCENTAGE
7	7	100%	0%

Findings in the Brevard County, Florida

- On June 26, 1997, the United States District Court for the Middle District of Florida reversed the decision of the Brevard County Commissioners and awarded OPM-USA-INC. a conditional use permit to erect a 330' guyed tower.[87]
- On August 4, 1999, the author interviewed Mr. Tom Meyers, Senior Planner II with Brevard County. Mr. Meyers stated the County was in the process of drafting a new telecommunications tower ordinance when OPM's application was submitted. The reason the county was working on a new ordinance was that they were growing increasingly concerned about the number of new towers that were being applied for and built. There concerns seem justified because in 1995 the planning department received one conditional use permit application for a communication tower, in 1996 that number jumped to ten.[88]

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[86]Gwinnett County, Georgia. Tall Structure Permit Spreadsheets, 1995-1997. Lawrenceville: Gwinnett County, 1999.

[87]Lexis-Nexis. Sept. 1998. United States District Court for the Middle District of Florida, Orlando Division. OPM – USA – INC., a Florida corporation, v. Board of County Commissioners of Brevard County, Florida.

[88]Meyers, Thomas. Telephone interview. 4 August 1999.

- The county passed their new tower ordinance on March 25, 1997. However, OPM's public hearing was held before the new ordinance was adopted.[89]
- Several changes were made to Brevard County's Telecommunication Ordinance. The following is a list of changes from the ordinance that encourage co-location:[90]

1. Co-locations are allowed twenty feet above the top of utility towers, regardless of the zoning district, without the issuance of a conditional use permit;
2. Co-locations are allowed on water tanks or existing buildings that are 80 feet tall or more, without a conditional use permit, in commercial, industrial, and multi-family zoning districts.
3. Co-locations on non-conforming towers are permitted without a conditional use permit hearing;
4. Existing towers can be replaced, for the purpose of adding additional antennas and thereby reducing the need for other towers;
5. New towers are subject to a five times the tower height setback from off-site residential structures and residentially zoned areas;
6. New towers are to be located at least 3,500 feet from the nearest off-site tower.

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[89]Meyers, Thomas. Telephone interview. 4 August 1999.

[90]Meyers, Thomas. "Re: Brevard County Tower Ordinance." E-mail to the author. 4 Aug. 1996.

- According to Mr. Meyers, the major impact of the lawsuit was the county began to use telecommunication consultants to verify that the applicant's reasons for not co-locating on existing towers were valid.[91]
- Since the lawsuit decision was passed, the newly used telecommunication tower consultants have been instrumental in turning two conditional use permits down. In these cases, the consulting group's presentation enabled the staff and commissioners to see that the applicants could co-locate on existing towers and structures without jeopardizing the coverage area they were trying to serve.[92]

NUMBER OF CONDITIONAL USE PERMIT REQUESTS, FOR COMMUNICATION TOWERS, NINE MONTHS PRIOR TO THE LAWSUIT BEING SETTLED (SEPTEMBER 1996 – MAY 1997)[93]

TOTAL NUMBER OF CONDITONAL USE PERMIT REQUESTS	TOTAL NUMBER OF CONDITONAL USE PERMITS AWARDED	PERCENTAGE APPROVED
5	4	80%

NUMBER OF CONDITIONAL USE PERMIT REQUESTS, FOR COMMUNICATION TOWERS, SINCE THE LAWSUIT WAS SETTLED 1997 – AUGUST 1999)[94]

TOTAL NUMBER OF CONDITIONAL USE PERMIT REQUESTS	TOTAL NUMBER OF CONDITIONAL USE PERMITS AWARDED	WINNING PERCENTAGE	DIFFERENCE IN APPROVAL PERCENTAGE
19	14	74%	-6%

[91]Meyers, Thomas. Telephone interview. 4 August 1999.

[92]Meyers, Thomas. Telephone interview. 4 August 1999.

[93]Meyers, Thomas. Telephone interview. 4 August 1999.

[94]Meyers, Thomas. Telephone interview. 4 August 1999.

Findings in Jefferson County, Alabama

- On July 31, 1997, the United States District Court for the Northern District of Alabama ruled that the Jefferson County Commission had acted improperly when they enacted a moratorium to cease action on rezoning, board of adjustment, and building permit applications. As a result of the verdict, Jefferson County was forced to act on eight pending communication tower applications.[95]
- On August 10, 1999, the author interviewed Mr. Phillip Richardson, a Planner with the Jefferson County Office of Land Development. Mr. Richardson stated that Jefferson County passed a new communication tower ordinance, on March 6, 1996, in response to the Telecommunication Act of 1996. A copy of that ordinance shows that towers were permitted by right in three commercial zones, all industrial zones, and one utility zone. A meeting with the Site Review Committee, to discuss landscaping buffers, was required if the tower site was within 1000' of a residential dwelling.[96]
- Between March 6, 1996 and November 19, 1996, the Jefferson County Land Development Department received twenty-two cellular tower applications. The great majority of these applications were for new towers.[97]

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[95] Lexis-Nexis. Sept. 1998. United States District Court for the Northern District of Alabama, Southern Division. Sprint Spectrum L.P.; Dial Call Inc., a wholly owned subsidiary of Nextel Communications, Inc., v. Jefferson County.

[96] Jefferson County, Alabama. Jefferson County Zoning Ordinance: Cellular Zoning Districts. Birmingham: Jefferson County, 1996.

[97] Lexis-Nexis. Sept. 1998. United States District Court for the Northern District of Alabama, Southern Division. Sprint Spectrum L.P.; Dial Call Inc., a wholly owned subsidiary of Nextel Communications, Inc., v. Jefferson County.

- As a result of these applications, the county passed a second 90-day moratorium on November 19, 1996. However, the moratorium only affected tower requests that involved rezoning property to a utility zoning district. Tower proposals that met the requirements of the new ordinance were not affected by the moratorium. Shortly after the second moratorium expired it became apparent that most communication providers had no intention of co-locating on existing towers.[98]
- On May 28, 1997, Jefferson County enacted a third 30-day moratorium. This moratorium immediately led to the filing of the Telecommunication Act lawsuit by Dial Call and Sprint Spectrum.[99]
- After the lawsuit was settled, Jefferson County passed a new communication tower ordinance on August 27, 1997.[100]
- The ordinance only allows towers to be located in a newly created zone, the Communication Tower District (U-2). New towers constructed in this zone must be able to accommodate two users if the tower is 80 to 159 feet in height, three users if the tower is 160 to 209 feet in height, and four users if the tower is 210 to 300 feet in height.[101]

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[98]Lexis-Nexis. Sept. 1998. United States District Court for the Northern District of Alabama, Southern Division. Sprint Spectrum L.P.; Dial Call Inc., a wholly owned subsidiary of Nextel Communications, Inc., v. Jefferson County.

[99]Lexis-Nexis. Sept. 1998. United States District Court for the Northern District of Alabama, Southern Division. Sprint Spectrum L.P.; Dial Call Inc., a wholly owned subsidiary of Nextel Communications, Inc., v. Jefferson County.

[100]Richardson, Phillip. Telephone interview. 10 August 1999.

[101]Jefferson County, Alabama. Jefferson County Zoning Ordinance: U-2 Communication Tower District. Birmingham: Jefferson County, 1997.

- A U-2 zoning district cannot be created unless:[102]

1. The proposed tower is further than 500' from the closest residence. This requirement can be waived if the home in question is owned by the lessor of the tower site;
2. The tower site is 1000 feet from a protected residential area. Protected residential areas are defined as "lots, subdivisions or otherwise designated areas planned or clearly intended for residential use, or areas currently in residential use, regardless of zoning classification or jurisdiction".[103]

- The regulations also state that towers that meet the 1000' separation can be 180' tall. Towers that exceed the 1000' separation requirement can be increased one foot for every eight feet over 1000' limit. However, no proposed tower can be taller than 300'.
- The applicant for a proposed tower must also conduct visual analysis tests and prepare co-location studies on all existing towers, tall buildings, and water tanks within two miles of the proposed site.
- The stealth tower subsection of the ordinance allows communication providers some flexibility to site new structures in areas that still have no wireless phone coverage. Under this provision, a stealth tower is permitted in all zoning districts, with a conditional use permit, if it is determined that the

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[102] Jefferson County, Alabama. Jefferson County Zoning Ordinance: U-2 Communication Tower District.

[103] Jefferson County, Alabama. Jefferson County Zoning Ordinance: U-2 Communication Tower District.

tower is visually unobtrusive. Examples of visually unobtrusive towers are light poles, bell towers, clock towers, and tree towers.

- According to Mr. Richardson, the new tower ordinance has finally made communication tower providers co-locate on existing structures and build stealth towers. "With the exception of one request for rezoning to the U-2 district, which was approved, all new tower facilities since August 27, 1997, have been stealth installations".[104]

NUMBER OF REZONING REQUESTS, FOR COMMUNICATION TOWERS, NINE MONTHS PRIOR TO THE LAWSUIT BEING SETTLED (OCTOBER 1996 – JUNE 1997)[105]

TOTAL NUMBER OF REZONING REQUESTS	TOTAL NUMBER OF REZONINGS APPROVED	PERCENTAGE APPROVED
2	2	100%

NUMBER OF REZONING REQUESTS, FOR COMMUNICATION TOWERS, IN THE FIRST NINE MONTHS THAT FOLLOWED THE LAWSUIT (AUGUST 1997 – APRIL 1998)[106]

TOTAL NUMBER OF REZONINGS	TOTAL NUMBER OF REZONINGS APPROVED	WINNING PERCENTAGE	DIFFERENCE IN APPROVAL PERCENTAGE
1	1	100%	0%

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[104] Richardson, Phillip. Telephone interview. 10 August 1999.

[105] Richardson, Phillip. Telephone interview. 10 August 1999.

[106] Richardson, Phillip. Telephone interview. 10 August 1999.

NUMBER OF TOWER CO-LOCATIONS & NEW TOWER APPROVALS
IN THE YEAR THAT PROCEEDED THE PASSAGE OF THE NEW TOWER ORDINANCE[107]

TOTAL NUMBER OF CO-LOCATIONS	TOTAL NUMBER OF NEW TOWERS CONSTRUCTED	PERCENTAGE OF APPLICATIONS THAT WERE FOR CO-LOCATION
7	27	21%

NUMBER OF TOWER CO-LOCATIONS & NEW TOWER APPROVALS IN THE YEAR THAT FOLLOWED THE PASSAGE OF THE NEW TOWER ORDINANCE[108]

TOTAL NUMBER OF CO-LOCATIONS	TOTAL NUMBER OF NEW TOWERS CONSTRUCTED	PERCENTAGE OF APPLICATIONS THAT WERE CO-LOCATIONS	DIFFERENCE IN PERCENTAGE
9	4*	69%	48%

* 3 of the new towers were stealth installations

Findings in the City of Chamblee, Georgia

- On August 28, 1997, the United States District Court for the Northern District of Georgia reversed the decisions of the Chamblee City Council and the City Manager, Ms. Kathy Brannon, and awarded AT & T Wireless a 140' monopole communication tower.[109]
- On July 14, 1999, the author interviewed Mr. Will Wiggins, Permits and Inspections Director for the City of Chamblee. Mr. Wiggins stated that the city

[107]Richardson, Phillip. Telephone interview. 10 August 1999.

[108]Richardson, Phillip. Telephone interview. 10 August 1999.

[109]Lexis-Nexis. Mar. 1999. United States District Court for the Northern District of Georgia, Atlanta Division. AT & T Wireless PCS Inc., Plaintiff, v. The City of Chamblee and Kathy Brannon, in her official capacity as City Manager.

began to make changes to their telecommunication tower ordinance after Ms. Brannon denied AT & T's application. The City continued to work on the revisions while AT & T went through the Chamblee City Council appeal process and the filing of the District Court lawsuit.[110]

- On May 20, 1997, the City of Chamblee City Council passed their new telecommunication ordinance. The main differences from the previous ordinance were the height limitations, setbacks, and visual impact standards.[111]
- The new ordinance drastically lowered the permitted tower heights in industrial, commercial, multi-family, and single-family zoning districts. For example, while the old tower ordinance allowed maximum tower heights of up to 150' in light industrial zones, the new ordinance only allows towers to be a maximum of 100'. The new ordinance also limits tower height if a proposed tower can only accommodate one user. For example, In the light industrial zoning district, towers are permitted up to 80' if only one user can use the tower and permitted up to 100' if the tower can accommodate more than one user. The ordinance also stipulates that no exceptions will be made to the height limitations unless a co-location agreement is worked out with another wireless communications provider.[112]

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[110]Wiggins, Will. Personal interview. 14 July 1999.

[111]Wiggins, Will. Personal interview. 14 July 1999.

[112]Lexis-Nexis. Mar. 1999. United States District Court for the Northern District of Georgia, Atlanta Division. AT & T Wireless PCS Inc., Plaintiff, v. The City of Chamblee and Kathy Brannon, in her official capacity as City Manager.

- While the old communication tower ordinance required the tower to be setback the height of the tower from any off site residential use, the new ordinance requires the tower to be setback at least one and one-half times the tower height from any property line.[113]
- Lastly, the new communication ordinance requires any tower that is within one hundred feet of a tree is to be designed to look like a tree. These tree towers need to be designed with bark, limbs, and foliage.[114]
- Although the new standards were approved, AT & T's tower never had to meet these standards because they filed their building permit application prior to the adoption of the new ordinance.[115]
- Mr. Wiggins revealed that an analysis of other tower cases would be impossible because there were no other cases that occurred within nine months of the lawsuit.[116]
- As of July 1999, no tower case has gone before the Chamblee City Council under the new communication tower ordinance. Mr. Wiggins informed me that other towers have been built since the ordinance's adoption, but that these towers were permitted uses under code.[117]

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[113]City of Chamblee, Georgia. Chamblee Code: Standards for Telecommunication Antennae and Towers. Chamblee: City of Chamblee, 1998.

[114]City of Chamblee, Georgia. Chamblee Code: Standards for Telecommunication Antennae and Towers.

[115]Wiggins, Will. Personal interview. 14 July 1999.

[116]Wiggins, Will. Personal interview. 14 July 1999.

Findings in James City County, Virginia

- On January 15, 1998, the United States District Court for the Eastern District of Virginia reversed the Board of Supervisors of James City County's decision on Virginia Metronet's special use permit application. As a result of the reversal, Virginia Metronet was able to construct a monopole communication tower.[118]
- On July 16, 1999, the author interviewed Paul D. Holt, III, Senior Planner with the James City County Development Department. Mr. Holt informed me that prior to the Virginia Metronet's application, James City County probably received one communication tower application every five years. However, these applications were for radio towers, television towers, and public utility towers. At the time Virginia Metronet's application was submitted, the James City County Ordinance contained no specific regulations regarding cellular towers. However, staff did follow a resolution, which was adopted by the James City Planning Commission on February 11, 1992.[119] The resolution required cellular companies to go through the special use permit process and to strongly consider: (1) Utilizing self-supporting tower designs and avoid the use of guyed towers; (2) Using red beacon lighting when required instead of strobe lighting; (3) Using the minimum amount of land possible; (4)

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[118] Lexis-Nexis. Sept. 1998. United States District Court for the Eastern District of Virginia, Newport News Division. Virginia Metronet, Inc., and Donna Grissom v. The Board of Supervisors of James City County, Virginia.

[119] Holt, Paul. Personal interview. 16 July 1999.

Investigating alternative structures prior to applying for a new tower and; (5) Using existing towers to minimize the number of towers located in James City County.[120]

- Mr. Holt admitted that the James City Development Department tried a stall tactic because Virginia Metronet's application was just one of out of the three tower applications they received that month. All three proposed towers were 185' monopole communication towers.[121]
- Due to the three applications, James City County became very concerned about the future. They realized that there was a possibility that they could receive numerous requests for towers and that their ordinance was very weak. They were especially concerned because they did not want any towers to have a visual impact on the Colonial Williamsburg area.[122]
- As a result, the county hired a consulting firm to develop an interim ordinance. Although, the interim ordinance was never officially passed it became the criterion that staff used to make their recommendation in the Virginia Metronet staff report.[123]

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[120]James City County, Virginia. Submittal of Special Use Permits for Communication Towers. Williamsburg: James City County, 1992.

[121]Holt, Paul. Personal interview. 16 July 1999.

[122]Holt, Paul. Personal interview. 16 July 1999.

[123]Holt, Paul. Personal interview. 16 July 1999.

- While the interim ordinance was being drafted two out of the three tower applications were withdrawn because the communication companies grew tired of waiting for their requests to be heard.[124]
- The interim ordinance contained four sections that outlined:[125]

1. The number of towers was to be minimized by requiring applicants to build towers that could be used by multiple users. This policy was also to be achieved by requiring applicants to provide radio frequency data that showed why co-location on existing towers would not work.
2. "The visibility of communication towers shall be minimized." This policy was achieved by requiring the use of stealth towers in residential and historical areas, using 100' buffers in cases were the tower was adjacent to residential areas, requiring the applicant to conduct a balloon test, and by setting maximum tower heights in the various zoning districts (up to 199' maximum in commercial and industrial zones).
3. "A ministerial process shall be established for some personal wireless service facilities and antenna." This policy was achieved by permitting towers by right in some commercial and industrial areas if the appropriate setback and height conditions were met.
4. "Public health and safety shall not be adversely affected." In order to meet this requirement the applicant needed to prove that their equipment would not

[124] Holt, Paul. Personal interview. 16 July 1999.

[125] Epsey, Huston & Associates, Inc. Tri-Jurisdictional Personal Wireless Service Facility Development Ordinance. Williamsburg: Epsey, Huston & Associates, Inc, 1997.

interfere with other equipment and show that it was in compliance with the Federal Communications Commission.

- Although Virginia Metronet eventually came into compliance with the interim ordinance and staff recommended approval of their request, the Board of Supervisors of James City County turned their request down. However, the District Court ruled that James City County had violated the Telecommunications Act of 1996 because they had not provided Virginia Metronet with a written record that explained why their request was turned down. The District Court found that aesthetic reasons could not be the sole reason for denial.[126]
- On May 26, 1998, after the lawsuit was settled, the Board of Commissioners of James City County passed their "Wireless Communications Facilities Standards". These new standards, for the most part, followed the guidelines that were drafted in the interim ordinance. However, there was one new provision that required towers to be at least 1,500 feet from one another in all zoning districts.[127]
- Mr. Holt informed the author that the new ordinance was a result of the three tower applications and the lawsuit. He stated that the county's current ordinance gives wireless communication companies breaks for meeting the recommended height limits and for using stealth towers in residential zones

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[126]James City County, Virginia. Submittal of Special Use Permits for Communication Towers. Williamsburg: James City County, 1992.

[127]James City County, Virginia. Wireless Communications Facilities Standards. Williamsburg: James City County, 1998.

because they realize that they cannot try to exclude towers. He stated that by keeping the towers under 200' and by the utilizing stealth technology that the county could preserve the appearance of their residential and historic areas.[128]

NUMBER OF SPECIAL USE PERMIT REQUESTS, FOR COMMUNICATION TOWERS, NINE MONTHS PRIOR TO THE LAWSUIT BEING SETTLED (APRIL 1997 – DECEMBER 1997)[129]

TOTAL NUMBER OF SPECIAL USE PERMIT REQUESTS	TOTAL NUMBER OF SPECIAL USE PERMITS AWARDED	PERCENTAGE APPROVED
0*	0	N/A

* 2 Requests were withdrawn and not counted because the applicants decided to move their proposed towers out of James City County.

NUMBER OF SPECIAL USE PERMIT REQUESTS, FOR COMMUNICATION TOWERS, IN THE FIRST NINE MONTHS THAT FOLLOWED THE LAWSUIT (FEBRUARY 1998 – OCTOBER 1998)[130]

TOTAL NUMBER OF SPECIAL USE PERMIT REQUESTS	TOTAL NUMBER OF SPECIAL USE PERMITS AWARDED	WINNING PERCENTAGE	DIFFERENCE IN APPROVAL PERCENTAGE
0	0	0%	N/A

Findings in the City of Fairhope, Alabama

- On July 17, 1998, the United States District Court for the Southern District of Alabama reversed the City of Fairhope's Board of Adjustment decision on

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[128]Holt, Paul. Personal interview. 16 July 1999.

[129]Holt, Paul. Personal interview. 16 July 1999.

[130]Holt, Paul. Personal interview. 16 July 1999.

DigiPH's special exception permit application. As a result of the reversal, DigiPH was able to construct a 150' monopole communication tower.[131]

- On July 27, 1999, the author interviewed Mr. Christopher Baker, Director of Planning and Building for the City of Fairhope. Mr. Baker stated that the City of Fairhope did not have specific regulations for communication towers before the lawsuit was filed. However, previous towers requests were going through the special exception permit process because they exceeded the underlying zoning district's height limitation. Ironically, the city had passed their first communication tower ordinance on July 26, 1999, the night before the author had called to do his research.[132]
- Mr. Baker stated that the reason that the city had waited to draft a communication tower ordinance was that the previous director of planning was not interested in making changes to the ordinance. The old director had been employed by the city for 19 years before Mr. Baker took over in February 1999. One of the first duties Mr. Baker undertook was updating the ordinance. He immediately began work on the creation of a tower ordinance because he was aware of the Telecommunications Act of 1996 lawsuit that had occurred.[133]
- The newly passed tower ordinance only allows towers to be sited in general industrial or light industrial zoning districts. The maximum permitted tower

[131] Lexis-Nexis. Sept. 1998. United States District Court for the Southern District of Alabama, Southern Division. Wendell Barnhill v. City of Fairhope. 17 July 1998.

[132] Baker, Christopher. Telephone interview. 27 July 1999.

[133] Baker, Christopher. Telephone interview. 27 July 1999.

height in these zoning districts is only 65', unless the Fairhope Board of Adjustment grants a special exception permit. In cases where a special exception permit is requested, the maximum permitted tower height is 130'.[134]

- The new ordinance also requires proposed towers to be setback the height of the tower from any property line and makes the applicants explain why they have not co-located on an existing tower or other suitable structure.[135]
- Mr. Baker stated that there had been no special exception permit requests for communication towers nine months before or nine months after the lawsuit was settled.[136]

NUMBER OF SPECIAL EXCEPTION PERMIT REQUESTS, FOR COMMUNICATION TOWERS, NINE MONTHS PRIOR TO THE LAWSUIT BEING SETTLED (OCTOBER 1997 – JUNE 1998)[137]

TOTAL NUMBER OF SPECIAL EXCEPTION REQUESTS	TOTAL NUMBER OF SPECIAL EXCEPTION PERMITS AWARDED	PERCENTAGE APPROVED
0	0	N/A

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[134]City of Fairhope, Alabama. City of Fairhope Zoning Ordinance, No. 557. Fairhope: City of Fairhope, 1999.

[135]City of Fairhope, Alabama. City of Fairhope Zoning Ordinance, No. 557.

[136]Baker, Christopher. Telephone interview. 27 July 1999.

[137]Baker, Christopher. Telephone interview. 27 July 1999.

NUMBER OF SPECIAL EXCEPTION REQUESTS, FOR COMMUNICATION TOWERS, IN THE FIRST NINE MONTHS THAT FOLLOWED THE LAWSUIT (AUGUST 1998 – APRIL 1999)[138]

TOTAL NUMBER OF SPECIAL EXCEPTION REQUESTS	TOTAL NUMBER OF SPECIAL EXCEPTION PERMITS AWARDED	WINNING PERCENTAGE	DIFFERENCE IN APPROVAL PERCENTAGE
0	0	0%	N/A

Findings in the City of Cumming, Georgia

- On September 21, 1998, the United States District Court for the Northern District of Georgia reversed the Cumming City Council's decision on SprintCom's special exception permit application. As a result of the reversal, SprintCom was able to construct a 180' monopole communication tower.[139]
- On July 14, 1999, the author interviewed Mr. John Holbrook, Chief Building Official for the City of Cumming. Mr. Holbrook revealed that SprintCom's lawsuit has had no lasting impact on the city's telecommunication tower regulations. He stated that no modifications have been made to the ordinance since the lawsuit and that there were no plans to do so. He also confirmed that there had been no other requests for towers in the nine months that proceeded or followed the lawsuit.[140]
- The current ordinance has a permitted use schedule that lists telecommunications towers as a permitted use in the Highway Business and

[138]Baker, Christopher. Telephone interview. 27 July 1999.

[139]Lexis-Nexis. Feb. 1999. United States District Court for the Northern District of Georgia, Gainesville Division. SprintCom, Inc. v. City of Cumming, Georgia. 21 Sept. 1998.

[140]Holbrook, John. Personal interview. 14 July 1999.

Central Business Districts. However, in order to build a tower that is taller than 40', applicants must receive a Special Exception Permit from the Mayor and City Council to build above the height limitations. The Cumming Code contains no special provisions regarding tower types, setbacks, visibility, or co-location.[141]

NUMBER OF SPECIAL EXCEPTION PERMIT REQUESTS, FOR COMMUNICATION TOWERS, NINE MONTHS PRIOR TO THE LAWSUIT BEING SETTLED (DECEMBER 1997 – AUGUST 1998)[142]

TOTAL NUMBER OF SPECIAL EXCEPTION REQUESTS	TOTAL NUMBER OF SPECIAL EXCEPTION PERMITS AWARDED	PERCENTAGE APPROVED
0	0	N/A

NUMBER OF SPECIAL EXCEPTION REQUESTS, FOR COMMUNICATION TOWERS, IN THE FIRST NINE MONTHS THAT FOLLOWED THE LAWSUIT (OCTOBER 1998 – JUNE 1999)[143]

TOTAL NUMBER OF SPECIAL EXCEPTION REQUESTS	TOTAL NUMBER OF SPECIAL EXCEPTION PERMITS AWARDED	WINNING PERCENTAGE	DIFFERENCE IN APPROVAL PERCENTAGE
0	0	0%	N/A

[141]City of Cumming, Georgia. Cumming Zoning Ordinance. Cumming: City of Cumming, 1991.

[142]Holbrook, John. Personal interview. 14 July 1999.

[143]Holbrook, John. Personal interview. 14 July 1999.

Chapter V

Data Analysis, Findings, and Conclusion

The findings of this study support the conclusions of the author's original two hypotheses. This study helps us understand what type of cases can be appealed, what the majority of local jurisdictions will do to their ordinances after they have lost a lawsuit, and what impact a lawsuit will have on a jurisdiction's public hearing behavior.

The first hypothesis of this study was that a substantial number of the Telecommunication Act lawsuits, filed within the southeastern United States between February 1996 and September 1998, were going to overturn the local government's decision. After reviewing all the cases, the author found that seven of the fourteen local government decisions had been overturned. While this percentage can be viewed as significant, in retrospect it really does not mean much. If the author had to do the study over again he would differentiate the cases into several different categories because the winning percentages of the different kind of appeals are much better indicators of what the outcome of future Telecommunication Act lawsuits will be. The following table shows the six different categories the fourteen lawsuits can be placed in and the percentage of cases that overturned the local-level ruling.

Lawsuit Category	Name of Case (See Chapter III for Details)	Percentage of Cases that Overturned the Local-Level Decision
1. Appeal of an Administrative Decision	A. AT & T Wireless PCS Inc., v. City of Chamblee, GA	100%
2. Appeal of a Public Hearing at the District Court Level	A. BellSouth Mobility Inc., v. Gwinnett County, GA B. OPM-USA-INC., v. Brevard County, FL C. Virginia Metronet, Inc., v. James City County, VA D. Wendell Barnhill, et al., v. City of Fairhope, AL E. SprintCom, Inc., v. City of Cumming, GA	100%
3. Appeal of a District Court Decision to a Higher Court	A. Paging Inc., v. Montgomery County, VA B. AT & T Wireless PCS, Inc., v. Winston-Salem, NC C. AT & T Wireless PCS, Inc., And Primeco Personal Comm v. Virginia Beach, VA	0%
4. Appeal of a Moratorium	A. Sprint Spectrum L.P., and Dial Call Inc., v. Jefferson County, AL B. Bell Atlantic Mobile v. Haywood County, NC	50%
5. Appeal of a New Ordinance	A. APT Tampa/Orlando, Inc. and PrimeCo Personal Communications v. Orange County, FL	0%
6. Appeal of a Variance	A. Gearon & Co., Inc., and Communication Towers Inc., v. Fulton County, GA B. AT & T Wireless Services of Florida, Inc. v. Orange County, FL	0%

Administrative Decisions

The lawsuit that challenged an administrative decision, AT & T Wireless PCS Inc., v. City of Chamblee, Georgia, does not offer much insight on what the future may hold for other telecommunication companies that challenge this type of case because it is only a single example. Other types of administrative challenges could be filed in the future that are completely different from the case that the author studied. However, the case is important because it shows that a court was unwilling to allow a local government to ignore its own regulations. The City of Chamblee's Zoning Ordinance explicitly stated that communication towers were permitted uses if the applicant met four standards. Due to the fact that AT & T was meeting the four standards they were entitled to a building permit.

Appeals of District Court Decisions to a Higher Court

The author believes that many forthcoming Telecommunication Act of 1996 lawsuits will be influenced by the verdict that was handed down in AT & T Wireless PCS, Inc.; PrimeCo. Personal Communications, L.P.; Lynnhaven United Methodist Church v. The City Council of the City of Virginia Beach. In this case, the United States District Court of Appeals determined that the lower level court had acted improperly when they overturned the city council's decision and awarded AT & T and PrimeCo conditional use permits.[144] The two counts that the United States District Court of Appeals and lower level court differed on were

[144]Lexis-Nexis. Jan. 1999. United States Court of Appeals for the Fourth Circuit. AT & T Wireless PCS v. City Council of the City Council of Virginia Beach. 1 Sept. 1998.

whether the City Council of Virginia Beach had discriminated among wireless providers and if a written decision had been supplied to the applicants.
The United States District Court of Appeals found that discrimination among wireless providers did not occur. They believed that the lower level court decision, on this issue, was based solely on the testimony of one City of Virginia Beach Councilman, who stated that the oppositions' testimony implied that the citizens were satisfied with their cellular phone coverage and did not want PCS. Although these remarks were improper, it does not mean that discrimination occurred.[145] The United States District Court of Appeals found that cellular and PCS companies were equally affected by the denial because two cellular providers had provided documentation of their intent to co-locate on the towers.[146]

The United States Court of Appeals also found that a written decision had been supplied to the applicants and that an explanation for the denial was contained in the public hearing meeting minutes.[147] The U.S. District Court of Appeals dismissed the lower level court's ruling because they had misinterpreted Congress' intent when they drafted the Telecommunications Act of 1996. The U.S. Court of Appeals firmly believed that Congress had intended the writing and

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[145] Lexis-Nexis. Jan. 1999. United States Court of Appeals for the Fourth Circuit. AT & T Wireless PCS v. City Council of the City Council of Virginia Beach. 1 Sept. 1998.

[146] Lexis-Nexis. Jan. 1999. United States Court of Appeals for the Fourth Circuit. AT & T Wireless PCS v. City Council of the City Council of Virginia Beach. 1 Sept. 1998.

[147] Lexis-Nexis. Jan. 1999. United States Court of Appeals for the Fourth Circuit. AT & T Wireless PCS v. City Council of the City Council of Virginia Beach. 1 Sept. 1998.

substantial evidence requirements in the act to be to be taken separately. When the requirements are viewed this way it is easy to say that a written denial was supplied to the applicants and that there was evidence in the meeting minutes that supported denial of the applications.[148]

The case is also important because the U.S. District Court of Appeals also indicated that public opposition could be viewed as substantial evidence. In this case, the record shows that there was significant opposition to the tower. The opposition consisted of five speakers, who presented petitions with the names of over seven hundred people against the tower proposal. The U.S. District Court of Appeals believed that such opposition had to raise the question of whether the tower was meeting the finding that the tower had to preserve the character of the surrounding area. In their ruling, the U.S. District Court of Appeals believed that ignoring such opposition would set an improper precedent because it would mean that every local level jurisdiction decision that denied a tower request could be challenged, regardless of the amount of opposition that was present at the public hearing.[149]

Appeals of Public Hearing Decisions at the District Court Level

Although communication companies won all five of the U.S. District Court case studies that challenged conditional use, special use, tall structure, and special

[148] Lexis-Nexis. Jan. 1999. United States Court of Appeals for the Fourth Circuit. AT & T Wireless PCS v. City Council of the City Council of Virginia Beach. 1 Sept. 1998.

[149] Lexis-Nexis. Jan. 1999. United States Court of Appeals for the Fourth Circuit. AT & T Wireless PCS v. City Council of the City Council of Virginia Beach. 1 Sept. 1998.

exception permits, this should not be construed to mean that this trend is going to continue to occur. The author believes that communication providers would have lost two or three of these cases if they were reheard today. The author feels this way because four out of these five cases were decided before the U.S. District Court of Appeals ruled on the case involving AT & T Wireless, PrimeCo. Personal Communications, Lynnhaven United Methodist Church, and the City Council of the City of Virginia Beach. The new precedent set by this case possibly could have led to different decisions in the cases involving Gwinnett County, Georgia, Brevard County, Florida, and James City County, Virginia. In all three of these cases there was public opposition to the tower and a finding by the U.S. District Court that the local government did not supply the tower applicant with a written reason for denial. These are two of the same issues that U.S. District Court of Appeals reviewed and found in favor of Virginia Beach.While the author questions if the U.S. District Court verdicts that were reached in three of the case studies would be upheld if they were reheard today, this in not the case for the other two cases. The author firmly believes that the U.S. District Court decisions that were reached in Fairhope, Alabama and Cumming, Georgia were correct and would not have been affected by the Virginia Beach precedent. In both of these cases there was no public opposition to the tower and no valid reasons stated in the public hearing that would back denying the requests. In the Cumming, Georgia case it was also found that the

proposed tower should have been a permitted use because towers were excluded from the height limitation in the Highway Business zoning district.[150]

Appeals of Moratoriums

The two moratorium case studies could have not been any different and it is relatively easy to see why the U.S. District Court ruled as they did. The appeal filed against Jefferson County, Alabama occurred after they imposed a third moratorium on all tower submittals and permits. The moratorium also occurred without any public notice. At the time the third moratorium was passed, the plaintiffs had eight tower submittals that were pending. In this case, the U.S. District Court required Jefferson County, Alabama to process all the pending permits and to hear all the cases that were filed before the third moratorium was announced.[151]

On the other hand, the moratorium that was passed in Haywood County, North Carolina was passed legally and the plaintiff even attended several workshops to help shape the new telecommunications tower ordinance. Shortly after attending the workshops, the plaintiffs decided they were going to file four building permits for new towers, although they were completely aware that the moratorium was still in affect. When Haywood County told the applicants that the building permits could not be processed they filed suit. Haywood County subsequently passed

[150]Lexis-Nexis. Feb. 1999. United States District Court for the Northern District of Georgia, Gainesville Division. SprintCom, Inc. v. City of Cumming, Georgia. 21 Sept. 1998.

[151]Lexis-Nexis. Sept. 1998. United States District Court for the Northern District of Alabama, Southern Division. Sprint Spectrum L.P.; Dial Call Inc., a wholly owned subsidiary of Nextel Communications, Inc., v. Jefferson County.

their new ordinance less than three weeks after the applicants filed their suit. The U.S. District Court determined that the applicants suit was ludicrous because they had no submittals pending before the moratorium was announced, had been part of the workshops, and knew that a new ordinance was about to be passed.[152]

Appeals of New Ordinances

Although the author only had one case study to analyze, it was a quite significant because of the precedent that it set. The APT Tampa/Orlando, Inc. and PrimeCo Personal Communications v. Orange County, Florida, case showed that a U.S. District Court was not willing to determine if a newly passed ordinance was unreasonable, discriminatory, or arbitrary until it had been tested by an formal application that had gone through the appropriate local jurisdiction process.[153]

Appeals of Variances

The two case studies that were analyzed indicate that U.S. District Courts are unwilling to overturn local government decisions that involve a request for variance. In both cases, the U.S. District Courts noted that the Telecommunication Act of 1996 had preserved local government authority to

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[152]Lexis-Nexis. Sept. 1998. United States District Court for the Western District of North Carolina, Asheville Division. Cellco Partnership, d/b/a/ Bell Atlantic Mobile v. Haywood County Board of Commissioners.

[153]Lexis-Nexis. Sept. 1998. United States District Court for the Middle District of Florida, Orlando Division. APT Tampa/Orlando, Inc. and PrimeCo Personal Communications v. Orange County and the Board of Commissioners.

oversee the siting, construction, and modification of existing tower sites within their jurisdictions'. The general feeling from both cases was that it would not be correct to award a telecommunication company a building permit when they had not met all the standards of the local government's ordinance.

What Impact has the Federal Telecommunications Act of 1996 had on the Ordinances and Public Hearing Winning Percentages of those Local Jurisdictions that had one of their Board Decisions Overturned?

The author's belief that a substantial number of the local jurisdictions that lost a Telecommunications Act lawsuit would pass a new tower ordinance or grant a better percentage of public hearing approvals was correct. Six out of the seven local jurisdictions passed a new ordinance that encourages co-location and makes it increasingly difficult to site a new tower. The one jurisdiction that did not follow suit was Cumming, Georgia. After conducting an interview with Cumming's Chief Building Official, the author found that the city did not pass a new ordinance because they believed that the lawsuit was a one-time phenomenon.[154] Part of the reason for their belief is that the City of Cumming is a relatively small place and that it may be possible to cover the entire city limits with one tower. To date, the City of Cumming's belief has been correct because they have not seen a tower application since the one that resulted in the lawsuit.[155]

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[154]Holbrook, John. Personal interview. 14 July 1999.

[155]Holbrook, John. Personal interview. 14 July 1999.

The one aspect of the author's hypothesis that was not correct was that telecommunication approval percentages did not increase in any of the local jurisdictions after they had lost a Telecommunication Act of 1996 lawsuit. The author believes that there are several reasons why he missed this aspect of his hypothesis:

1. The author initially and wrongly assumed that all the local jurisdictions that had a lawsuit filed against them were trying to exclude towers from their limits; and
2. The study time frame was not long enough. The author discovered that a great deal of the jurisdictions did not have another request for a communication tower in the nine months that followed the lawsuit.

What Can Telecommunication Companies Learn from this Study?

Telecommunication companies could learn a tremendous amount about their chances of winning a Telecommunications Act of 1996 lawsuit from this study. Telecommunications companies should take note of the Virginia Beach case because it was eventually heard at the U.S. District Court of Appeals and set two very important precedents. The first precedent set was that significant public opposition is a basis to deny a tower application because it can cause board members to find that a tower is not in harmony with the surrounding area. The second important precedent that came from this case was that the substantial evidence and written reasons for denial components of the act were to be viewed separately. This precedent is especially important because several earlier cases were decided when U.S. District Courts decided that these requirements should

be intertwined. As a result, several local governments were losing lawsuits because they had only sent the applicant a copy of the agenda with the word "denied" rubber stamped on it. The U.S. District Court of Appeals thought that viewing these requirements separately was ridiculous because public meetings are required to be taped and meeting minutes are to be prepared shortly there after.[156]

Telecommunications companies should also take note that U.S. District Courts have shown that they will not allow local governments to ignore their own ordinances or comprehensive plans or allow denials to stand when there is no public opposition or evidence to support the conclusions that were reached. If a telecommunications company is wrongly denied a permit they should file a suit.

After studying the Telecommunication Act of 1996, the author feels that the act is everything it was intended to be. The precedents set by case law has preserved local government police powers and allowed counties and municipalities to remain in control of tower siting as long as their policies are not unfair, arbitrary, or discriminatory. This precedent means that telecommunication companies, local jurisdictions, and citizens will have to continue to work together to develop specific tower ordinances that can best achieve the needs and desires of all the parties involved.

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[156] Lexis-Nexis. Jan. 1999. United States Court of Appeals for the Fourth Circuit. AT & T Wireless PCS v. City Council of the City Council of Virginia Beach. 1 Sept. 1998.

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Michael C. Williams, individually and in his Capacity as Director of the Gwinnett County Department of Planning and Development; and William D. Jascomb, Jr. individually and in his capacity as Director of the Development Division of the Gwinnett County Department of Planning and Development, Defendants. 13 Aug. 1996 <http://www.lexis-nexis.com/>.

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Vita

Todd K. Morgan was born and raised in Horsham, Pennsylvania, a suburb of Philadelphia. He graduated from Hatboro-Horsham Senior High School in 1987. He then enrolled at the University of Pittsburgh and received a Bachelor of Art in Political Science in 1992. In the Fall of 1993 he enrolled in the School of Planning at the University of Tennessee, Knoxville. In the Spring of 1995 he began employment with Gearon and Company, a telecommunication consulting company based out of Atlanta, Georgia. Between May 1995 and April 1999, Mr. Morgan served as a Zoning Consultant for various telecommunication companies in North and South Carolina. His daily job role was to work with radio frequency engineers, land acquisition specialists, city and county planners, and the public to find the best communication tower sites possible for all parties involved.

Mr. Morgan in currently employed as a Planner with the Boone County Planning Commission, in Burlington, Kentucky. His daily responsibilities include working with the public, approving site plans and sign permits, and preparing staff reports for Board of Adjustment and Zoning Map Amendment applications.