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Meaning of Language—Zoning Board Says It Is Entitled To Deference In Interpreting Meaning Of Term In Variance It Granted

Applicant contends board illegally and arbitrarily interpreted term

Citation: *R and R Pool and Patio, Inc. v. Zoning Bd. of Appeals of Town of Ridgefield, 129 Conn. App. 275, 2011 WL 2135677 (2011)*

CONNECTICUT (06/07/11)—This case addressed the issue of "whether a [local zoning board] is entitled to deference in its consideration of the meaning of undefined words or phrases contained in a certificate of variance."

The Background/Facts: In 1990, Richard Amatulli, a tenant of certain real property in the town (the "Property"), was granted a variance allowing wholesale and retail sales at the Property (the "Amatulli variance"). The variance limited the type of items that could be sold to: "oriental rugs, fine furniture and art ...."

Eventually, R & R Pool & Patio, Inc. ("R & R") became tenants at the Property. In December 1998, the owners of the Property, on behalf of R & R, filed with the town's planning director an appli-

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cation for site plan approval of specific products to be sold at the Property. R & R proposed to sell:

> 1. Furniture and furnishings, including customary related accessories such as cushions, umbrellas, and tableware related to furniture in stock ... 2. Spas, hot tubs and pool accessories ... 3. Billiard and gaming tables and accessories ... 4. Fireplace equipment and grills ... 5. Works of art ... 6. Christmas and seasonal holiday products.

The planning director denied the application. R & R then appealed to the town's zoning board of appeals (the "Board"). The Board considered the list of six items proposed by R & R. In doing so, the Board looked at the items permitted under the Amatulli variance and "attempted to derive a workable definition of 'fine furniture.'" The Board found no intent in the legislative history of the Amatulli variance and instead developed a definition over the course of deliberations. The Board eventually concluded that the only items permitted to be sold at the Property were: works of art; and furniture and billiard tables that were "one of a kind, handcrafted, not mass produced and capable of appreciating in value."

R & R appealed the Board's decision to the superior court. R & R claimed that "the [B]oard acted illegally, arbitrarily and in abuse of its discretion" in redefining "fine furniture" as it was used in the Amatulli variance.

The court agreed. It found the Board's definition of "fine furniture" had "no relation to the use of the premises as originally proposed and approved by the [B]oard at the time of the grant of the original variance." The court then held that the meaning of "fine furniture" as used in the Amatulli variance was "'good quality furniture,' nothing more and nothing less."

The Board appealed the court's decision. It argued that the court improperly overturned its definition of fine furniture; and substituted its interpretation of the term. The Board argued that it was "entitled to deference in its interpretation of the words and terms contained in a certificate of variance that it issued."

DECISION: Affirmed in part and reversed in part; remanded.

The Appellate Court of Connecticut held that whether a local zoning board's interpretation of undefined words or phrases contained in a certificate of zoning variance is entitled to deference depends on whether the words or phrases are ambiguous. If they are clear and unambiguous on their face, the interpretation of their meaning poses a question of law requiring only a look at the certificate and therefore according no deference to the board, said the court. However, if the undefined words or phrases are ambiguous

or reasonably susceptible to multiple interpretations, then a search of the intent of the board at the time it approved the variance is necessary. If that search yields no conclusions, the undefined term "may not be interpreted to mean whatever the zoning commission chooses it to mean; that would render it impossible for a party to discern the true meaning of the term, and, thus, to know whether compliance with the regulations is possible." Rather, the term must be construed based on its "common and ordinary meaning."

Here, the court found that the town's zoning regulations did not define "fine furniture." The court also found that the Amatulli variance did not define "fine furniture." The intent of the board in drafting the Amatulli variance did not unambiguously indicate intent as to the meaning of "fine furniture." The court further determined that the Board's interpretation of "fine furniture"—as that which is "one of a kind, hand-crafted, not mass produced, and capable of appreciating in value"—lacked any basis in the record and therefore was arbitrary and illegal. The appellate court also determined that the superior court's interpretation of the term—as meaning "good quality furniture"—was wrong. Looking to the dictionary's definition of "fine," the court concluded that "fine furniture" meant "high quality furniture."

The appellate court remanded the case to the superior court with directions for the superior court to remand the case to the Board for further proceedings consistent with the appellate court's determination as to the meaning of "fine furniture."

See also: *Spero v. Zoning Bd. of Appeals of Town of Guilford, 217 Conn. 435, 586 A.2d 590 (1991).*

See also: *Kraiza v. Planning and Zoning Com'n of Town of Hartland, 121 Conn. App. 478, 997 A.2d 583 (2010), certification granted in part, 298 Conn. 904, 3 A.3d 70 (2010).*

See also: *200 Associates, LLC v. Planning and Zoning Com'n of Town of Thompson, 271 Conn. 906, 859 A.2d 567 (2004).*

Notice—In Adopting Zoning Amendments, Town Provides Only Public Notice

Property owners argue amendments were specific, and therefore required individual notice

Citation: *Generation Realty, LLC v. Catanzaro, 2011 WL 2118773 (R.I. 2011)*

RHODE ISLAND (05/27/11)—This case addressed the issue of whether, under Rhode Island's Zoning Enabling Act of 1991 (§ 45-

24-53(c)), certain zoning amendments were "specific," requiring individual written notice to property owners, or were general, requiring only public notice. The determination of that issue dictated whether a town was required to provide only public notice of a hearing on amendments, or whether individual written notice to all owners of real property within 200 feet was necessary.

The Background/Facts: In 1999, the Town of North Providence (the "Town") adopted a zoning ordinance, Ordinance 99-127Z (the "Ordinance"), to conform to the Town's comprehensive plan. The zoning amendments effectuated by the Ordinance (the "1999 Amendments") "eliminated one commercial zoning district and created seven new zoning districts; set new dimensional regulations for all of the new zoning districts; deleted the existing table of use codes and substituted a new table in its stead; changed zoning maps to reflect the locations of the new zoning districts; and ultimately placed about 50 percent of the land area of the [T]own into a different zoning district."

Among the many properties affected by the 1999 Amendments was property (the "Property") owned by Capital City Community Centers, Inc. ("Capital City"). The Property was originally zoned as residential single family, but it was rezoned to open space by these amendments.

Eventually, Generation Realty, LLC ("Generation Realty") entered into an agreement to purchase the Property from Capital City. In April 2007, Capital City and Generation Realty (collectively, the "Owners") filed an application to amend the town zoning map and zoning ordinance to change the Property's designation from open space to residential general or multihousehold. In the midst of this process, the Owners determined that the Town "never followed necessary and property established procedures" regarding notice when adopting Ordinance 99-127Z.

The Town's planning board (the "Board") rejected the Owners' contentions and voted to deny their request for a zoning amendment.

The Owners then filed an action in superior court. Among other things, they asked the court to "declare [the Town's] actions in attempting to rezone [the Property] null and void." The Owners filed a motion for summary judgment. They asserted that no genuine issue of material fact existed and asked the court to declare that the Property was zoned residential single family and not open space. In support of the motion, the Owners argued that "rezoning the [P]roperty from residential single-family to open space constituted 'a specific change in a zoning district map' because '[f]ewer than two dozen individual properties were purportedly removed from various zoning districts and redesignated as open space lots.'" They contended that because

it was a specific change, individual written notice was required under Rhode Island's Zoning Enabling Act of 1991, § 45-24-53(c). They further contended that because the Town did not comply with this requirement, Ordinance 99-127Z and the related 1999 Amendments were invalid.

Section 45-24-53(b) mandates that "[w]here a proposed general amendment to an existing zoning ordinance includes changes in an existing zoning map," only "public notice" is necessary. However, "[w]here a proposed amendment to an existing ordinance includes a specific change in a zoning district map, but does not affect districts generally," § 45-24-53(c) additionally requires "[w]ritten notice ... to all owners of real property whose property is located in or within not less than two hundred feet of the perimeter of the area proposed for change ...."

The court agreed with the Owners. The hearing justice concluded that because the zoning changes brought by Ordinance 99-127Z were not "universal," the rezoning of the Owners' Property was specific, not general, and required individual written notice.

The Town appealed. On appeal, it argued that the Ordinance and the 1999 Amendments "[did not] target a specific parcel for change, leaving districts generally unaffected;" rather they "effected a sea change in the zoning scheme for the community at large." They maintained that the only kind of notice necessary regarding the Ordinance and the 1999 Amendments was public notice, which was made.

On appeal, the Owners maintained their argument that the zoning changes were specific, requiring individual written notice (not just public notice), because not all of the properties in the original zoning districts were affected in the same way.

DECISION: Vacated, reversed, and remanded.

The Supreme Court of Rhode Island held that the Ordinance and 1999 Amendments were "general," and therefore under § 45-24-53(b) required only public notice.

The court found that Ordinance 99-127Z, as a whole, "was a far-reaching ordinance that did not single out a specific property for revision, but rather completely overhauled the towns' zoning mosaic to conform to the comprehensive plan." The Ordinance "ultimately placed about 50 percent of the land area of the [T]own into a different zoning district." Given that "extensive nature," the court concluded that the 1999 Amendments did not include a "specific change" that "[did] not affect districts generally."

In reaching this conclusion, the court explained that for an amendment to be general, "[it] does not have to apply to every piece of property." "[G]eneral does not necessarily refer to all members of a class or category, but rather implies a majority or a prevalence," said the court. Here, the court found that the 1999 Amendments "affected a wide range of properties in [the Town] in a variety of different ways ...." Therefore, the court concluded the 1999 Amendments were not specific; they were general.

See also: *Sorenson v. Colibri Corp., 650 A.2d 125 (R.I. 1994).*

Case Note: The Owners had also contended that the Town's failure to include a proposed zoning map along with its public notice further invalidated the 1999 Amendments. The court found that argument "without merit." "The plain language of § 45-24-53(a) does not require public notice to include a map." Such a requirement is only triggered if the amendment at issue "includes a specific change ..., but does not affect districts generally."

Penalties and Fines—Town Sues Landowner For Violation Of Land Use Ordinance

Landowner contends it could not be responsible for violation that resulted from third-party actions

Citation: *Town of Levant v. Taylor, 2011 ME 64, 2011 WL 2135728 (Me. 2011)*

MAINE (05/31/11)—This case addressed the issue of whether property owners can be held responsible for land use violations resulting from actions taken on their property by a third party.

The Background/Facts: Lawrence A. Taylor and Donald C. Taylor (the "Taylors") owned a lot in the Town of Levant (the "Town"). The Taylors were negotiating sale of the lot to a third person, Timothy Linnell ("Linnell"). At some point, pending a sale of the lot to him, Linnell parked a mobile home, sitting on a trailer with tires attached, on the lot.

On December 30, 2009, the Town's code enforcement officer ("CEO") sent the Taylors a notice that the mobile home on the lot was a violation of the Town's land use ordinance. On January 21, 2010, the Town sent a letter to the Taylors demanding they cease

the violation within 15 days. Finally, on March 9, 2010, the Town filed a complaint in court against the Taylors. The complaint alleged the storage of the mobile home on the Taylors lot violated the Town's land use ordinance.

The Taylors contended that they had played no role in allowing the mobile home to be moved onto and to remain on their lot. They argued that they therefore could not be responsible for a violation of ordinance.

The court rejected the Taylors' argument. The court found that the Taylors, after having been put on notice of the land use violation, did not take any significant steps to obtain a permit or have the mobile home removed from their land. The court assessed against the Taylors a civil penalty of $2,500, plus attorney's fees, expert witness' fees, and costs.

The Taylors appealed.

DECISION: Affirmed.

The Supreme Judicial Court of Maine held that, even though it was a third-party that placed the mobile home on the Taylors' lot without first obtaining a permit, the Taylors were responsible for the land use violation.

The court explained its holding. The violation applied to the Taylors because "(1) the Ordinance authorize[d] fines against the landowner for this violation; (2) [the Taylors] had notice of the violation; (3) [the Taylors], as landowners had control over the use of their land; and (4) [the Taylors] had a reasonable opportunity to correct the violation."

See also: *Town of Boothbay v. Jenness, 2003 ME 50, 822 A.2d 1169 (Me. 2003).*

Enforcement—Landowner builds on lot declared unbuildable

Court orders demolition of structure, and landowner argues that is an inappropriate remedy

Citation: *Cornell v. Michaud, 79 Mass. App. Ct. 607, 947 N.E.2d 1138 (2011)*

MASSACHUSETTS (05/31/11)—This case addressed the issue of whether a court-ordered demolition of a structure was an "appropriate remedy" where a landowner built the structure despite notice of a nonconformity and adverse judicial action.

The Background/Facts: In 1986, the Town of Blackstone's (the "Town") zoning board of appeals (the "Board") granted a variance to Roland M. Michaud ("Roland"). The variance allowed the reconfiguration of three lots—lots 33, 47, and 48—into two buildable lots. The variance was subject to the condition that the abandoned building on historic lot 48 be removed. The building was not removed. The variance was not recorded. Nevertheless, Roland constructed and sold a house on historic lot 47. He also built a two-family home on historic lot 33. He conveyed historic lot 48 to his brother Ernest. Ernest later conveyed that lot to his nephew, Norman W. Michaud ("Norman")—the son of Roland.

In 1995, the Town's building inspector issued a permit for construction on the original lot 48. Soon after, he rescinded the permit on the ground that the abandoned building had not been removed as required by the 1986 variance. Norman applied to the Board for a special permit, which the Board denied. Eventually, the Superior Court entered final judgment in 2000 (the "2000 Superior Court judgment") that conclusively determined that historic lot 48 was not a buildable lot.

Raymond and Marcia Cornell (the "Cornells") owned land adjacent to historic lot 48. In the spring of 2005, the Cornells observed that construction of a large structure had begun on historic lot 48. After inquiring, they learned that Norman and Roland had entered an "agreement" with the then-current Town building inspector, Gerald D. Rivet ("Rivet"). Rivet, Norman, and Roland purportedly agreed that "historic lot 48 was eligible for a building permit."

Citing the 2000 Superior Court judgment, the Cornells filed a formal enforcement request with Rivet. Getting no response, the Cornells then appealed Rivet's nonaction to the Board. The Board heard the appeal and denied it. The Cornells then filed an action in Superior Court. The judge ruled that the 2000 Superior Court judgment conclusively determined that historic lot 48 was not a separate, buildable lot, and that Rivet could not issue the subject permit. The judge ordered Roland to remove any and all structures and restore historic lot 48, as nearly as possible, to its undeveloped state.

Roland appealed. Among other things, he argued that "the judge erroneously ordered [him] to restore historic lot 48 to its preconstruction condition without determining whether, in its current state, historic lot 48 could support a permissible use."

DECISION: Affirmed.

The Appeals Court of Massachusetts first held that the "agreement" between Norman, Roland, and Rivet was "void ab initio."

The court said this was because the agreement contravened the 2000 Superior Court judgment, and "[n]othing in the by-law or the zoning act [gave] Rivet the authority to enter into such an 'agreement.'" In other words, Rivet did not have the authority to abrogate a final judgment of the Superior Court by clandestine agreement with parties bound to it. Accordingly, the "agreement"—made in excess of Rivet's authority and in contravention of a binding Superior Court judgment and the bylaw—"was void from its inception."

The court also held that the judge's order of restoring historic lot 48 to the status quo before construction "was correct." In so holding, the court rejected Roland's argument that "the judge inappropriately ordered the 'extreme remedy' ... without first considering if the structure could conform to a legal use." The court acknowledged that ordinarily a court-ordered demolition would be an inappropriate remedy "[i]f a landowner c[ould] modify an incomplete structure or seek an appropriate variance or permit so as to bring the property into compliance with a zoning by-law." However, said the court, "where a landowner builds despite notice of a nonconformity and adverse judicial action, the landowner acts at his own peril and cannot protest an order to restore the land to its preconstruction state."

Here, found the court, Roland, Rivet, and the Board "all had ample notice of the tortured history of historic lot 48," including the 2000 Superior Court judgment. The court found it clear that Roland appreciated the risks of the unlawful construction and proceeded anyway. Roland therefore acted at his own peril; he could not "request an opportunity to cure the nonconformity of his use which he did not cure prior to beginning construction."

See also: *Building Inspector of Falmouth v. Haddad, 369 Mass. 452, 339 N.E.2d 892 (1976).*

See also: *Wells v. Zoning Bd. of Appeals of Billerica, 68 Mass. App. Ct. 726, 864 N.E.2d 586 (2007).*

See also: *City of Boston v. Back Bay Cultural Ass'n, Inc., 418 Mass. 175, 635 N.E.2d 1175 (1994).*

Zoning News from Around the Nation

FLORIDA

On June 2, Governor Rick Scott signed the "Community Planning Act" (HB 7207) into law. "The legislation, which has been characterized as the most sweeping change to Florida's growth management laws since 1985, does away with many state restrictions,

placing the regulatory burden on local governments. The law also shortens the evaluation period for state agencies and markedly limits their authority to raise objections and make comments." Environmental lobbies had heavily opposed the legislation, voicing concern that it would "eliminate[ ] the state's ability to act as a check to local growth." Among other things, "the legislation eliminates state requirements for school capacity, infrastructure, and park and recreation upgrades to be conducted concurrent with development." Local governments will now have the authority to maintain such requirements, if desired. "The law also repeals the requirement that all development agreements be reviewed by the state land planning agency and takes away the organization's authority to pursue civil action as a means of enforcing development orders."

Source: *The Walton Sun*; www.waltonsun.com

MARYLAND

Anne Arundel County Executive John R. Leopold reportedly "intends to block a bill that would make sweeping rezoning changes to the central and southern parts of the county." Leopold has said that "the public needs a bigger voice in rezoning talks." However, other council members have reportedly objected to Leopold's call to withdraw the proposed legislation.

Source: *Greater Annapolis Patch*; http://greaterannapolis.patch.com/

MASSACHUSETTS

State Senator Jamie Eldridge recently filed "[c]omprehensive legislation designed to overhaul the state's decades-old zoning laws." The proposed Comprehensive Land Use Reform and Partnership Act (CLURPA–S1019) has been heard by the state senate's Joint Committee on Municipalities. The bill reportedly "encourages communities to adopt or update their local master plans and provides them the tools necessary to implement zoning regulations to reach their planning goals."

Source: *Sudbury Patch*; http://sudbury.patch.com

PENNSYLVANIA

Pittsburgh City Councilwoman Theresa Smith recently introduced legislation "that not only would restrict where adult businesses can operate, but drastically change how they operate. The measure would ban any contact between dancers and patrons and

would prohibit private video-viewing booths." Smith wants to put aside the city's practice of having adult businesses apply for a conditional-use permit, and instead "wants adult businesses to operate under the 'permitted by right' rule, which means a person can create such a business only in an area zoned for it."

Source: *Pittsburg Tribune-Review*; www.pittsburghlive.com

A bill pending before the state senate would require "a municipality receiving impact fee revenue not adopt a drilling zoning ordinance more restrictive than a model zoning ordinance that would be developed by the state Public Utility Commission. Any municipality that bans drilling would not be eligible for impact fee revenue."

Source: *The Times-Tribune*; http://thetimes-tribune.com

RHODE ISLAND

The state senate is considering proposed legislation that would "create a commission with wide latitude to determine what happens to about 35 acres available for development because of the relocation of Route 195. The seven-member commission would be empowered to hire staff and an executive director for its work." The legislation would give the commission powers to, among other things, set zoning regulations.

Source: *The Providence Journal*; www.projo.com

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Notice—Local Business Challenges Public Notice of Proposed Wal-Mart

Says notice of "150,000 square foot" store failed to notify of all proposed uses

Citation: *Shakoor Supermarkets, Inc. v. Old Bridge Tp. Planning Bd., 420 N.J. Super. 193, 19 A.3d 1038 (App. Div. 2011)*

NEW JERSEY (06/13/11)—This case addressed the issue of whether: "public notice of an application for site plan approval that included the construction of 'a main retail store of 150,000 [square feet]' was legally insufficient because the application failed to identify the store as a Walmart."

The Background/Facts: The Golf Center, Inc. ("GCI") owned 53.26 acres in Old Bridge Township (the "Township"). GCI planned to develop this land. Its plan included the construction of a 150,000 square foot "main retail store." GCI applied to the Township's Planning Board (the "Board") for a preliminary and final site plan approval for this proposed development.

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In furtherance of its proposal, pursuant to New Jersey statutory law, N.J.S.A. 40; 55D-12, GCI published newspaper notice of each of four public hearings on its proposed development. Each notice included a statement that there would be a hearing on GCI's application for preliminary and final approval of: "all buildings, structures, parking areas and other site improvements related to: (a) Construction of a main retail store of 150,000 s.f."

Following the public hearings, the Board approved GCI's application.

Shakoor Supermarkets, Inc. ("Shakoor"), a local supermarket, challenged the approval. Among other things, Shakoor argued that the public notice of the hearings was legally insufficient. Shakoor said this was because GCI's notice failed to "identify the uses proposed for the buildings."

The superior court affirmed the Board's approval of GCI's application. The court found that public notice of the hearing was sufficient.

DECISION: Affirmed.

The Superior Court of New Jersey, Appellate Division, held that GCI's public notice of the hearings was legally sufficient.

In so holding, the court explained that "[f]ailure to provide proper notice deprives a municipal planning board of jurisdiction and renders null any subsequent action." For a public notice of applications before a zoning board to be "proper" or "legally sufficient," it must state "the nature of the matters to be considered," said the court. In other words, such public notice had to provide a "common sense description of the nature of the application, such that the ordinary layperson could understand its potential impact upon him or her." However, noted the court, it "need not be 'exhaustive' to satisfy the standard." Rather, to "adequately inform, the notice must give 'an accurate description of what the property will be used for under the application.'" This, further explained the court, "ensure[s] that members of the general public who may be affected by the nature and character of the proposed development are fairly apprised thereof so that they may make an informed determination as to whether to they should participate in the hearing ...."

Here, GCI's public notice of the hearings "identified the proposed use as 'a main retail store of 150,000 s.f.'" Shakoor had argued that the notice was insufficient because it failed to disclose that the 150,000-square-foot retail store was "a Wal-Mart Supercenter/Shopping Center which would itself contain multiple retail uses." The court rejected this argument. It found the notice "adequately informed laypersons that a major 'big box' store was proposed for the site and alerted them to the possible concerns such as traffic, commonly associated with those stores ...." Moreover, although the proposed store included multiple retail uses, all were permitted uses, and none of the proposed uses provided "legitimate cause for 'heightened concern' to the public, beyond those associated with a 150,000 square foot retail store."

See also: *Perlmart of Lacey, Inc. v. Lacey Tp. Planning Bd., 295 N.J. Super. 234, 684 A.2d 1005 (App. Div. 1996).*

See also: *Township of Stafford v. Stafford Tp. Zoning Bd. of Adjustment, 154 N.J. 62, 711 A.2d 282 (1998).*

Case Note: In its decision, the court gave examples of cases in which it had found the public notice was legally insufficient: It said that a notice describing a proposed use as the "creation of 3 commercial lots with a total of 42.53 acres" "provided no common sense description of the actual uses of those lots." It also said that a notice that a project included "retail/office" units was deficient because it failed to disclose that the approval sought included that for a large restaurant with a potential liquor license.

Vested Rights—Sign Companies Apply to County For Billboard Permit When Land Is Unincorporated

After land is incorporated by cities, cities argue sign companies have no vested right in billboard construction

Citation: *Fulton County v. Action Outdoor Advertising, JV, 11 Fulton County D. Rep. 1729, 2011 WL 2305974 (Ga. 2011)*

GEORGIA (06/13/11)—This case addressed the rights of certain sign companies to construct billboards in areas formerly located in unincorporated areas within a county which subsequently became incorporated cities. It addressed the issue of whether the creation of new cities could retroactively divest sign companies of their vested rights to construct signs pursuant to applications they filed at a time when the proposed billboard sites were in unincorporated areas of the county and the county had no valid sign regulations.

The Background/Facts: Action Outdoor Advertising JV, LLC, Boardworks Outdoor Advertising Company, Inc., Granite State Outdoor Advertising, Inc., KH Outdoor Advertising, Inc., and Steven Galberaith and Larry Roberts (collectively, the "Sign Companies") were companies and owners and principals of companies that leased and constructed billboards for displaying commercial and noncommercial messages. Between May 2003 and November 2006, the Sign Companies submitted complete applications to Fulton County (the "County") for permits to construct billboards at different locations within unincorporated areas of the County. The County found the signs were pro-

hibited under the County sign ordinance (the "Ordinance"), and denied the applications.

The Sign Companies then sued the County. They argued the Ordinance was unconstitutional.

While that case was pending, in a separate appeal, the Supreme Court of Georgia determined that the Ordinance was unconstitutional under the First Amendment to the United States Constitution.

Thereafter, finding there were no material issues of fact in dispute and deciding the matter on the law alone, the trial court in the Sign Companies' case then issued summary judgment in favor of the Sign Companies. The court found that since the Ordinance was invalid at the time of the Sign Companies' applications for permits, the Sign Companies "had a vested right to erect their billboards and ordered that they be allowed to erect the billboards."

Meanwhile, the unincorporated areas of the County where the Sign Companies had intended to erect billboards became incorporated into new cities (the "Cities"). The County claimed it no longer had jurisdiction to issue permits to the Sign Companies, so the Sign Companies sued the Cities. The trial court in that case agreed that the Sign Companies had a vested right to erect the billboards as of the date their applications were filed.

The Cities and the County appealed. They argued that the trial court erred by granting summary judgment to the Sign Companies and ordering them to permit construction of the signs at issue.

DECISION: Affirmed.

The Supreme Court of Georgia held that the Sign Companies had a vested right to construct the billboards at issue.

As an initial matter, the court noted that the entire County Sign Ordinance had been struck down as unconstitutional—not just the regulatory provisions applicable to billboards. As wholly void, the Ordinance was "of no force and effect from the date it was enacted." As such, it "could not be used as the basis for the denial of the [S]ign [C]ompanies' applications," explained the court. Since the County Ordinance was invalid, there was no valid restriction on the construction of billboards in the County. Therefore, the Sign Companies obtained vested rights in the issuance of the permits they sought, said the court.

In so holding, the court explained that "vested rights" are: "interests which it is proper for [the] state to recognize and protect and of which [the] individual cannot be deprived arbitrarily without justice." Thus, if an applicant submits a proper application for a permit, the applicant has a vested right to consideration of the application under the law in existence at the time the application was filed.

Here, there was no valid law governing signs and billboards at the time the Sign Companies submitted their permit applications. Therefore, under their proper applications for a permit, the Sign Companies had a vested right to construct the billboards, concluded the court.

The Cities had argued that the Sign Companies' rights did not vest because the Sign Companies did not own or have signed leasehold interests in all of the properties on which the signs were to be located. The court rejected this argument. It found the Cities failed to cite any authority for that proposition that only applicants with ownership or formal leasehold interest in the land may obtain vested rights. Rather, the court noted that Georgia law was clear that: "a party holding an option from the owner of the land, an agent of the owner, or a party standing in any contractual relationship with the owner of the land" whom "submits an application for a permit in accordance with applicable ordinances, ... is entitled to issuance of the permit." Here, the Sign Companies either owned the tract of land or had leases or informal agreements with the landowners of the tracts on which the signs at issue were to be located.

The Cities had also argued "that the subsequent creation of new cities within unincorporated Fulton County ... divested the [S]ign [C]ompanies of their vested rights." The court also rejected this argument. The court noted that the Georgia Constitution, Article I, § I, Paragraph Z, "forbids passage of retroactive laws which injuriously affect the vested rights of citizens." The creation of the new Cities, thus, "could not constitutionally and retroactively divest these companies of their vested rights to construct signs pursuant to the applications they filed in [the] County at a time when [the] County had no valid sign regulations and the [C]ities did not yet exist."

See also: *Hayes v. Howell, 251 Ga. 580, 308 S.E.2d 170 (1983).*

See also: *Recycle & Recover, Inc. v. Georgia Bd. of Natural Resources, 266 Ga. 253, 466 S.E.2d 197 (1996).*

Case Note: The Cities had also argued that the Sign Companies' vested rights were voided by Georgia Statutory law, OCGA § 36-60-26. Section 36-60-26 prohibits the issuance by a county of backdated sign permits for an area no longer within its jurisdiction due to formation of a new city or annexation. The court also rejected this argument. The court noted that statute was not enacted until "well after the time the [S]ign [C]ompanies filed their applications and it [could] not retroactively be applied to divest the [Sign] [C]ompanies of their vested rights."

Validity of Ordinance—Ordinance Prohibits Churches From Obtaining Special Use Permits in Zoning District

Church challenges ordinances as violating the Equal Terms Clause of RLUIPA

Citation: *Elijah Group, Inc. v. City of Leon Valley, Tex., 2011 WL 2295215 (5th Cir. 2011)*

The Fifth Circuit has jurisdiction over Louisiana, Mississippi, and Texas.

FIFTH CIRCUIT (TEXAS) (06/10/11)—This case addressed the issue of whether a city ordinance that prohibited churches from obtaining a special use permit to operate in a business zone in the city violated the Equal Terms Clause of the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA").

The Background/Facts: Until March 2007, the City of Leon Valley, Texas (the "City"), had maintained a zoning code that allowed churches to obtain Special Use Permits ("SUPs") to operate in business zones designated "B-2". In March 2007, the City amended its zoning code in order to "stimulat[e] the economy by creating a retail corridor" on a roadway in the City. That amendment (the "Ordinance") eliminated the right of churches to obtain SUPs in B-2 zones. Churches were effectively excluded from B-2 zones. Churches were permitted in B-3 zones. B-3 zones were designated for commercial uses with larger space requirements.

Nearly a year after the Ordinance was adopted, The Elijah Group, Inc. (the "Church") sought to purchase a property in the B-2 zone. The City denied the property owner's request to rezone the property from a B-2 to a B-3. Thereafter, the Church agreed to lease the property from the owner. Later, when the Church began to hold religious services on that B-2 property, the City obtained a temporary restraining order against such activity as violating the Ordinance.

Eventually, the Church filed suit against the City in state court. Among other things, the Church challenged the Ordinance as violative of the Equal Terms Clause of the federal RLUIPA.

The City moved the case to federal district court. That court held that the Ordinance was valid.

The Church appealed.

DECISION: Reversed, and matter remanded.

The United States Court of Appeals, Fifth Circuit, held that the Ordinance violated the Equal Terms Clause of RLUIPA.

The court explained that the Equal Terms Clause of RLUIPA provides that: "No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." The court interpreted the Clause as: "prohibiting the government from ... enacting, a facially discriminatory ordinance or ... enforcing a facially neutral ordinance in a discriminatory manner."

Here, the Church had not taken issue with enforcement of the Ordinance. It had taken issue with enactment of the Ordinance. The Church had made a facial challenge (i.e., that the ordinance was invalid on its face) to the Ordinance's treatment of "churches" less favorably than other nonretail, nonreligious institutions. The Church argued that the Ordinance should be invalidated "for differentiating between religious and nonreligious assemblies ...."

The court agreed that in analyzing the validity of a challenged ordinance, "the [Equal Terms] Clause by its nature require[d] that the religious institution in question be compared to a nonreligious counterpart." The Church needed to show more than simply that its religious use was forbidden and some other nonreligious use was permitted. It needed to show, said the court, that the Ordinance failed to treat churches and other nonreligious uses—such as private clubs—the same and on "equal terms."

Looking at the Ordinance here, the court found that its "Permitted Use Table" specifically provided that: "churches" were not allowed in B-2 zones at all; but that many nonreligious, nonretail buildings (e.g., "Club or Lodge (private)") were allowed to request SUPs and, if granted, to occupy a B-2 zone. The court agreed with the Church that, in light of the way that B-2 zones were defined, the Ordinance facially treated a church differently than a private club. The court concluded that the Ordinance was invalid because "it prohibit[ed] the Church from even applying for a SUP when, e.g., a nonreligious private club may apply for a SUP despite the obvious conclusion that the Church and a private club must be treated the same, i.e., on 'equal terms' by the [O]rdinance, given the similar non-B-2 nature of each." In other words, the court found the Ordinance invalid in violation of the Equal Terms Clause of RLUIPA because it treated the Church on terms that were less than equal to the terms on which it treated similarly situated nonreligious institutions.

See also: *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County, 450 F.3d 1295 (11th Cir. 2006).*

See also: *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253 (3d Cir. 2007).*

See also: *River of Life Kingdom Ministries v. Village of Hazel Crest, Ill., 611 F.3d 367 (7th Cir. 2010).*

See also: *Third Church of Christ, Scientist, of New York City v. City of New York, 626 F.3d 667 (2d Cir. 2010).*

Case Note: In addressing the Church's challenge, the court noted that four circuits of the U.S. Court of Appeals had "constructed different tests for applying the Clause, each with varying determinations of which nonreligious assemblies and institutions are proper comparators to the religious assembly or institution that brings the claim." The Third Circuit's test, which the district court here had applied, provides that: "a regulation will violate the Equal Terms provision [of RLUIPA] only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated as to the regulatory purpose." The Eleventh Circuit's test, which the Church asserted the district court should have applied—and which the Fifth Circuit apparently did apply here—provides that: "[w]hen alleging discriminatory application [of an ordinance], a religious plaintiff must show that 'a similarly situated nonreligious comparator received differential treatment under the challenged regulation." The Seventh Circuit provides that: "a zoning ordinance violates the Clause if it treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution that is similarly situated as to 'accepted zoning criteria.'" The court found that the Second Circuit seems to provide that: a zoning ordinance violates the Clause if it fails to treat equally a religious institution and a nonreligious "comparator that is similarly situated for all 'functional intents and purposes' of the regulation."

Agriculture and Farming Uses—County Enforces Land Use Restrictions Against Farming Operations

Farmer says such restrictions are prohibited by Right to Farm Act

Citation: *Wilson v. Palm Beach County, 2011 WL 2330077 (Fla. Dist. Ct. App. 4th Dist. 2011)*

FLORIDA (06/15/11)—This case addressed the issue of whether Florida's Right to Farm Act prohibits enforcement of county ordinances enacted prior to the Act's effective date.

The Background/Facts: Richard Wilson ("Wilson") and his two business entities, Plant Explorers, LLC ("Plant Explorers") and Excalibur Fruit Trees, LLC, own and operate a nursery on several parcels of

land located in unincorporated Palm Beach County (the "County"). Those parcels were located in an agricultural-residential zoning district. Wilson purchased one of those parcels is 2005 (the "2005 Parcel").

In 2008, Plant Explorers filed a special permit application for the 2005 Parcel. The County issued a "Special Permit" which allowed the operation of the business on the 2005 Parcel, subject to certain conditions. Those conditions required Plant Explorers to comply with specific portions of the County's Unified Land Development Code ("ULDC"). Those conditions included: set-back provisions; time prohibitions on the operation of commercial vehicles; and buffer requirements.

Apparently unhappy with the required permits and conditions, Wilson, Plant Explorers, and Excalibur Fruit Trees, LLC (hereinafter, collectively, "Wilson") filed a legal action against the County. Wilson asked the court to declare that the Special Permit conditions violated Florida's Right to Farm Act (§ 823.14(6), Florida Statutes). Section 823.14(6) of that Act provides in relevant part that: "a local government may not adopt any ordinance, regulation, rule, or policy to prohibit, restrict, regulate, or otherwise limit an activity of a bona fide farm operation on land classified as agricultural land ...."

Wilson also argued that the County lacked the authority to enforce provisions of its ULDC on farming activities. Wilson said this was because such farming activities were not "development" (which charter counties were authorized to regulate) under Florida's Local Government Comprehensive Planning and Land Development Regulation Act (See §§ 163.3164(6) and 380.04, Florida Statutes). That Act excluded the use of land for agricultural purposes from its definition of "development."

The County responded by maintaining that the Right to Farm Act restricted only new ordinances, not the enforcement of preexisting ordinances. The County also argued that restrictions on the term "development" (under Chapters 163 and 380, Florida Statutes) did not prohibit the County's ordinances. The County said its ordinances were authorized under more general grants of constitutional and statutory authority.

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the trial court issued summary judgment in favor of the County.

Wilson appealed.

DECISION: Affirmed in part, reversed in part, and remanded.

The District Court of Appeal of Florida held that Florida's Right to Farm Act did not prohibit enforcement of county ordinances enacted prior to the Act's effective date.

In reaching this conclusion, the court looked to the legislative intent and language of the Right to Farm Act. The court found that while § 823.14(6) prevented counties from "adopting" ordinances relating to agriculture, it did not address the enforcement of provisions already in place.

Here, the Right to Farm Act provisions restricting local government from adopting ordinances restricting farming activities became effective June 16, 2000. The County's ULDC was enacted in 1989. The relevant ULDC provisions existed within the ULDC prior to June 2000. Accordingly, the court determined that the County could enforce those ULDC provisions—despite the fact that they restricted farming activities—because they pre-existed the Right to Farm Act.

The court also rejected Wilson's second argument—that the County lacked the authority to enforce provisions of its ULDC on farming activities because such farming activities were not "development". Instead, the court agreed with the County. It held that even if the farming activities were not "development" as defined under Florida's Local Government Comprehensive Planning and Land Development Regulation Act, the County had authority to regulate those activities based upon constitutional home-rule powers and general authority granted to local governments.

See also: *J-II Investments, Inc. v. Leon County, 908 So. 2d 1140 (Fla. Dist. Ct. App. 1st Dist. 2005).*.

Case Note: One of the ULDC provisions that the County had sought to enforce against Plant Explorers was adopted after the enactment of the Right to Farm Act. The court found it had no way of knowing how those requirements would impact the Plant Explorers' wholesale nursery operations. Accordingly, the court concluded that a genuine issue of material fact precluded summary judgment on whether the permit restrictions violated the Act. The issue was remanded for further analysis.

Zoning News from Around the Nation

CALIFORNIA

Glendora's city council recently approved two locations within the city "to be zoned for emergency shelters and housing for the area's homeless." "[T]he new zoning codes will allow for year-round transitional housing and permanent supportive housing for homeless and formerly homeless individuals."

Source: *Glendora Patch*; http://glendora.patch.com

NEW YORK

Recently, "[t]he state Senate unanimously passed the Adirondack Community Housing Bill 62-0." This follows the bills unanimous passage in the state assembly. "If signed by Gov. Andrew Cuomo, the legislation will allow clustered development on private lands that had

previously been deemed off-limits by regional land use controls." Supporters of the bill said that it would "limit[ ] sprawl and will keep the price of new homes at a level people can afford." "The bill will allow the construction of up to four housing units on a single parcel of land in 'moderate' and 'low intensity' zoning that is located up to three miles outside an Adirondack hamlet." Previously, clustered development was typically permitted only in hamlets. Clustered housing projects would be banned within one-tenth of a mile of a shoreline.

Source: *Glen Falls Post-Star*; http://poststar.com

The town of Gaines is reportedly considering legislation which would "prohibit demonstrations within 1,000 feet of a military funeral or church service." Rochester recently passed a similar law. State Assemblyman Stephen Hawley (Republican-Batavia) has also sponsored a similar bill, which has passed the assembly and is awaiting consideration in the senate.

Source: *The Daily News*; http://thedailynewsonline.com

OHIO

Brunswick's city council is considering legislation that would prohibit "sweepstakes terminals [i.e., Internet cafes] in all zoning districts in the city."

Source: *Brunswick Sun Times*; http://blog.cleveland.com/brunswicksuntimes

TENNESSEE

A new state law (HB600) provides: "No local government shall by ordinance, resolution, or any other means impose on or make applicable to any person an anti-discrimination practice, standard, definition, or provision that shall deviate from, modify, supplement, add to, change, or vary in any manner from" state law. Essentially, the law prohibits cities, counties and school districts from having laws that prohibit discrimination based on sexual orientation or gender identity. Reportedly a lawsuit has been filed, challenging the state and federal constitutionality of the new law.

Source: *Pink Paper*; http://news.pinkpaper.com

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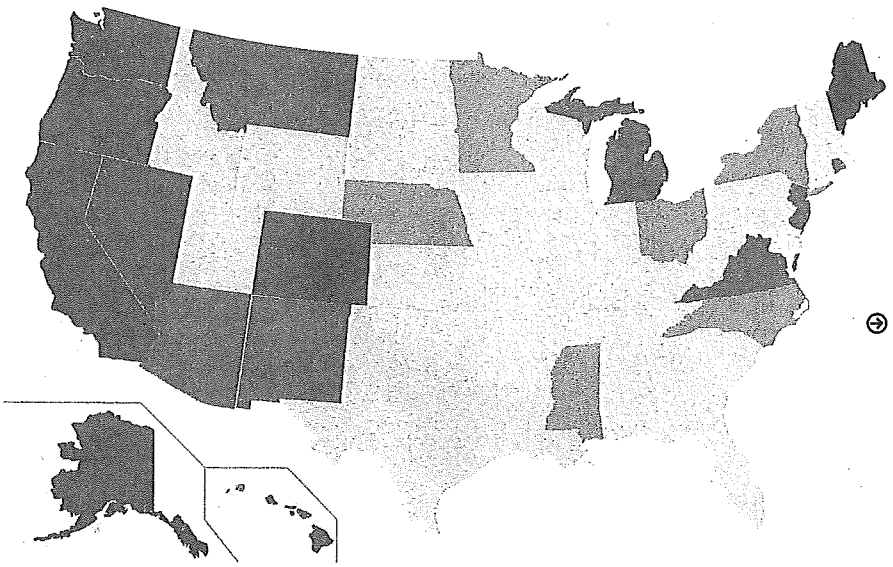
PRACTICE MEDICAL MARIJUANA

The Next Zoning Battleground: Trends and Challenges in Local Regulation of Medical Marijuana

By Deborah M. Rosenthal, AICP, and Alfred Fraijo Jr.

Fifteen states and the District of Columbia currently allow the private possession of small quantities of marijuana for medical use.



Twenty-one states and the District of Columbia have passed laws either decriminalizing the use of marijuana or sanctioning the cultivation or distribution of medical marijuana subject to local regulations. For information about specific state laws, see the National Organization for Reform of Marijuana Laws (www.norml.org).

The trend, which began with California's adoption of the Compassionate Use Act in 1996, is expected to accelerate in the future, with the majority of state laws passed in just the last six years. Last year alone, 19 states considered measures to legalize medical marijuana, although they were approved in only two states. In most states, medical marijuana possession has initially been approved by ballot measure, not statute. Medical marijuana possession, therefore, enjoys wide public support in an increasing number of jurisdictions.

State statutes decriminalizing marijuana for medical purposes typically do not govern marijuana cultivation, processing, distribution, and sale. This task is left to individual jurisdictions under the police power, specifically their zoning and business licensing authority. In response to this regulatory vacuum at the state level, local governments have responded with an almost staggering variety of ordinances and regulations over the past few years.

Local land-use approaches range from total exclusion to standard zoning and business permitting systems. To date, there is no national consensus on regulation of medical marijuana, although the need for local ordinances is readily apparent. The cautionary experiences of cities like Los Angeles, which was rapidly overwhelmed by hundreds of dispensaries after legalization, have led to a recent surge in local ordinances. For purposes of this article, the term "dispensary" is used to refer generally to medical marijuana dispensing facilities without distinction to cooperatives, collectives, or other legal entities defined by state or local law.

This article reviews the most common regulatory issues, emerging trends, and judicial challenges to regulations adopted by local government in response to state law changes permitting possession of medi-

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About the Authors

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cal marijuana. We conclude that traditional zoning and business licensing, for the most part, is adequate to address the local land-use issues raised by medical marijuana. However, some problems are unique to medical marijuana and require advance planning, careful policy consideration, and coordination with other local government agencies.

WHAT IS MEDICAL MARIJUANA?

At its simplest, medical marijuana is any form of the plant *Cannabis sativa* L., including its seeds and resin, intended for medical use by qualified patients (California Health & Safety Code, Section 11018). It may consist of the dried plant or products derived from or incorporating the plant, such as foodstuffs or medicines. All laws legalizing medical marijuana require that it be used to treat conditions listed in the statute—or otherwise determined to be covered—including, but not limited to, chronic pain and terminal illnesses (e.g., Nevada Constitution, Article 33, Section 1.a.). All state statutes mandate written documentation from a physician but cannot require a prescription, which may expose the doctor to penalty under federal law (e.g., Michigan Medical Marijuana Act, MCL 333.26422).

Virtually all state laws cap the amount of marijuana that may be possessed by a qualified patient, and most regulate the number or square footage of marijuana plants that may be grown at a single location. State laws may also limit the type of transaction (e.g., nonprofit or exchange) and the type of provider (e.g., collectives or cooperatives). Most, though not all, states have a registration system to ensure that patients qualify for possession of medical marijuana. A few states, like New Jersey and Arizona, regulate the total number of dispensaries (New Jersey Compassionate Use Medical Marijuana Act, P.L. 2009, Chapter 307 (2010) and Arizona Medical Marijuana Act, Arizona Revised Statutes, Title 36, Chapter 28.1).

Consistent with the basic legal framework established by state law, local governments are expected to regulate the cultivation, processing, distribution, delivery, dispensing, storage, exchange, and consumption of medical marijuana. Each separate activity may require a different type of regulation, or different regulatory provisions within the municipal code. Local jurisdictions should carefully review existing ordinances governing each type of activity to determine whether special provisions need to be made for medical marijuana. For instance, cities may already regulate agriculture and on-site agricultural sales, but would

Under a contract from the National Institute on Drug Abuse, the University of Mississippi Marijuana Project is the only producer of marijuana for medical and research purposes explicitly sanctioned by the federal government.

Wikimedia Commons

Many cities and counties have banned dispensaries and the consumption of medical marijuana so as not to violate the federal Controlled Substances Act, which continues to classify marijuana as a Class 1 substance.

be unlikely to have adopted standards for security fencing, setbacks, coverage, and on-site processing and sale that would be applicable to medical marijuana. Similarly, home food delivery, pharmaceutical sales, inventory storage, and alcohol use may share some objective characteristics with, but do not raise the same issues as, medical marijuana.

FEDERAL PREEMPTION

Many cities and counties have banned dispensaries and the consumption of medical marijuana so as not to violate the federal Controlled Substances Act (CSA), which continues to classify marijuana as a Class 1 substance. For example, by the end of 2010, at least 12 counties in California had banned dispensaries.

Local governments are state subdivisions authorized to exercise the state's police power rather than to enforce federal law. Local land-use regulations do not *authorize* the possession or use of medical marijuana; they merely establish local requirements for its distribution in accordance with state law. In the wake of these concerns, however, several states, including Colorado, have amended their laws and issued guidelines to permit municipalities to prohibit dispensaries within their jurisdiction (Colorado House Bill 1284 and Senate Bill 109, effective June 7, 2010).

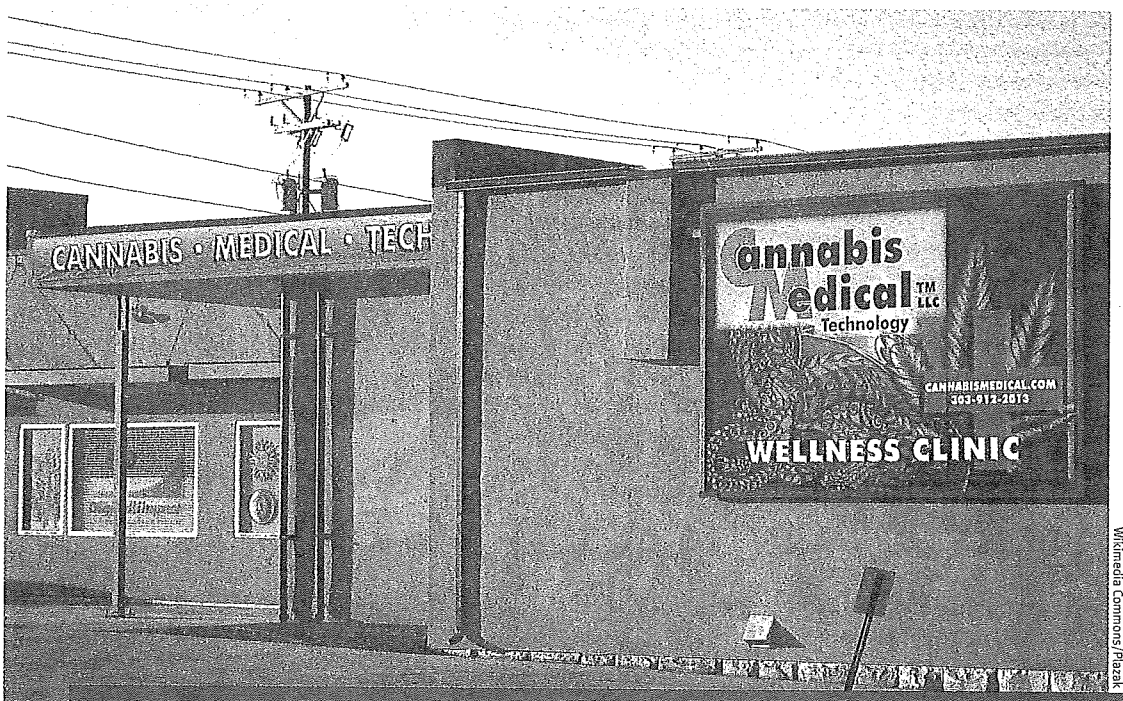
In October 2009, the U.S. Department of Justice announced that it did not intend to use scarce federal drug enforcement resources in prosecuting individuals "whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana" (U.S. Department of Justice, "Memorandum for Selected U.S. Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana," October 19, 2009). While the memorandum did not legalize marijuana possession at the federal level or provide a defense against federal prosecution, it reduced the likelihood of conflict between the CSA and state and local land-use regulations. It also clarified that the state and federal governments use different enforcement mechanisms and that local officials are not obligated to act on behalf of federal regulators. It is unclear whether the policy will have an impact on enforcement activities in states without laws permitting dispensaries, though recent suits against the department are testing the policy's reach.

Recent case law suggests that a city's ability to ban the sale or consumption of medical marijuana may be limited in states that have enacted medical marijuana laws. As noted above, several cities and counties have adopted prohibitions, some through temporary moratoria, on the sale or consumption of medical marijuana and the operation of dispensaries on grounds that the federal prohibition preempts state law. The basic argument in such cases is that local law, like state law, must yield to federal law. However, the rationale for the preemption argument has been rejected by the courts. In other cases, cities have moved to ban medical marijuana by limiting or prohibiting dispensaries through local land-use controls—an area of law in which local governments have traditionally enjoyed exclusivity. Other local governments are using nuisance abatement measures to exclude marijuana dispensaries, even if possession is beyond their reach.

The proposition that a city can prohibit the operation of a dispensary by invoking federal preemption of state law was recently rejected in California in *Qualified Patients Association v. City of Anaheim* and *County of San Diego v. San Diego NORML*. The courts found that, generally, state medical marijuana laws are not preempted by federal law because the state law merely exempts individuals who possess, cultivate, transport, or sell medical marijuana from state criminal prosecution. Accordingly, the local jurisdiction could not justify its law solely under the CSA. According to *Anaheim*, "a city may not stand in for the federal government and rely on purported federal preemption to implement federal legislative policy that differs from corresponding, express state legislation concerning medical marijuana." Conversely, the fact that individuals or a collective may elect to act in accordance with state law in a way that violates federal law does not implicate the local jurisdiction in such violation.

Wikimedia Commons/Laurie Avocado

In Los Angeles, many medical marijuana dispensaries choose to cluster along high-traffic corridors such as Ventura Boulevard.



Wikimedia Commons/Plazak

Between 2000 and 2007, medical marijuana dispensaries in Colorado were limited to five patients each. After Colorado courts lifted these restrictions, dispensaries proliferated rapidly along commercial corridors in Denver.

LOCAL PROHIBITIONS

As distinguished from federal preemption, many municipalities in states with statutes permitting medical marijuana have adopted local moratoria or prohibitions on the basis of their plenary powers to regulate local land uses and abate a nuisance. These measures have generally been upheld (e.g., *City of Claremont v. Kruse* (2000) 177 Cal.App.4th 1153). In the case of nuisance abatement, local governments may rely on existing ordinances that prohibit any use—as a nuisance per se—that is inconsistent or not specifically authorized by local regulations. In many cases, local governments have not enumerated in local codes the sale, cultivation, or distribution of marijuana as a permitted use or permitted business activity. In these jurisdictions nuisance per se, therefore, can be an effective defensive measure to close or enjoin dispensaries from operating within their limits.

Local governments have also enjoyed considerable latitude to control medical marijuana through land-use regulations even when state laws permit its consumption, cultivation, and distribution. Generally, local governments may make and enforce local land-use and business regulations that do not conflict with state statutes. Because the majority of state laws permitting medical marijuana do not mandate specific land-use requirements or business permits, such issues are not deemed exclusively a matter of state concern that preempts local governments from adopting regulations that restrict or even prohibit such activities within their limits. Further, many of the new laws narrowly permit the use of marijuana for medical purposes for patients with specific conditions, while keeping the general law criminalizing cultivation, distribution, and use as unlawful. In that sense, local governments may enjoy wider latitude regarding their regulation on grounds of public health and safety or other concerns.

Though local measures to prohibit or restrict medical marijuana cultivation, distribution, and use have been upheld by recent case law, local municipalities will be required to support their enforcement measures with policy and findings of fact that establish a direct link between the restrictions, legitimate government concerns, and local authority. Local governments may also draw regulatory distinctions among activities (e.g., cultivators and dispensaries that implicate different policy considerations). Medical marijuana cultivation for distribution may require different land-use controls or licensing compared to personal cultivation.

UNLISTED USES

There can be considerable controversy when local governments do not adopt ordinances to address changes in state laws that permit medical marijuana. Such changes in state law may create a perception among consumers, dispensaries, and other organizations that distribution, cultivation, or consumption is permitted locally as a matter of state law. Indeed, in California, a lower court judge found that state law permitting the use of medical marijuana created a "statutorily conferred right" to operate a dispensary and to obtain marijuana for medical purposes (*Medical Marijuana Collectives Litig. Americans for Safe Access v. City of Los Angeles*, Case No. BC433942, December 10, 2010). Some local governments have responded many months or years after changes in state law take effect. These jurisdictions must sometimes contend with the lack of clarity in the local permitting process that may result from the existence of dispensaries prior to enacting such local regulations.

There also may be an increase in enforcement or legal costs to local governments if dispensaries are regulated or restricted after facilities have opened and allowed to operate solely under state regulations. To illustrate, in response to a proliferation of dispensaries, Los Angeles adopted a comprehensive medical marijuana ordinance in January 2010 (effective June 2010), nearly 15 years after the statewide initiative legalizing the use marijuana for medical purposes in California.

In response to a growing number of dispensaries and prior to the enactment of a comprehensive ordinance, Los Angeles adopted an interim control ordinance, or ICO, in August 2007. The ICO permitted the operations of all dispensaries that existed prior to August 1, 2007, and that had submitted a series of documents to the city by November of the same year. The effect was a moratorium on new dispensaries in the city. However, the ICO expired by operation of state law in September 2007.

In January 2010, the city passed a comprehensive ordinance for dispensaries. Among various operating and licensing requirements, the new ordinance limited the operation of collectives to those that had registered by the November deadline. That summer, several dispensaries filed suit against the city alleging numerous constitutional and procedural claims and requested an injunction.

In December 2010, a superior court judge struck down the provisions in the law that only benefited the dispensaries with proof of registration as an unconstitutional violation of procedural due process and equal protection (*Medical Marijuana Collectives*). Because the 2007 deadline was set two months after expiration of the ICO, the judge reasoned, dispensaries that were in operation prior to the 2007 deadline, but that did not register afterward (presumably, because the expiration of the moratorium did not warrant it) were denied equal protection. "[N]o one could have anticipated that compliance with a dead statute would be necessary in order to continue as a collective three years later" (*Medical Marijuana Collectives*, p. 23). The judge also struck other provisions of the law on grounds that it violated the right to privacy (e.g., dispensaries were required to keep contact information of their members).

In contrast, Tucson, Arizona, adopted a comprehensive zoning ordinance the same month, which voters approved in a statewide referendum, permitting the cultivation, distribution, and consumption of medical marijuana. By addressing problems in advance, Tucson hopes to avoid the problem plaguing the cities that acted after the fact.

Jurisdictions that allow staff or commissions to allow uses determined to be "similar" to specifically enumerated uses may face difficult definitional problems. Medical marijuana may have characteristics similar to agriculture, home occupations, nurseries, adult uses, pharmacies, processing plants, and retail stores, depending on the circumstances and type of applications. Conditional use permits may be desired to ensure compatibility with surrounding uses but may not be available unless the zoning code authorizes them in specified districts.

[L]icensing and zoning requirements for medical marijuana will require coordination with state law to avoid conflicting requirements.

BUSINESS VERSUS ZONING REQUIREMENTS

Local jurisdictions may benefit from carefully distinguishing between the land-use issues raised by medical marijuana operations and those issues most appropriately addressed through business licensing and business permitting. For instance, operator qualifications, security patrols, inventory levels, record keeping, and other operational issues are properly the subject of annual licenses that may be monitored by a state licensing board or local agencies like the police department. On the other hand, allowable uses, fencing, coverage, parking access, hours of operation, signage, and separation of uses should be handled through local zoning regulations.

The business license and zoning requirements should be coordinated and include cross-references. For instance, a typical business license condition requires that the proposed location be properly zoned and, accordingly, that the businesses obtain clearances from planning divisions in advance of operating. The zoning ordinance may prohibit any medical marijuana facilities that are operated without a current business license. However, attempting to regulate operations directly through zoning, or to control land uses through business licenses, may make each vulnerable to legal challenge.

Many jurisdictions already have relevant experience in coordinating licensing for massage establishments and technicians with zoning requirements. As is the case with such businesses, licensing and zoning requirements for medical marijuana will require coordination with state law to avoid conflicting requirements. Many state laws allowing medical marijuana include both licensing and zoning regulations that may require different enforcement mechanisms and statutory treatment by local governments.

Local jurisdictions in states that allow medical marijuana should audit their zoning codes to ensure that they are consistent with state law and local intent. For instance, cities may add medical marijuana cultivation as a permitted or conditional use in specified districts, with limits on acreage, requirements for indoor cultivation or shielding, and processing controls.

Some jurisdictions require cultivation in residential districts to take place only in owner-occupied structures, with strict limits on the number or size of plants. Processing small amounts may be allowed in residential districts, with larger processing operations reserved to industrial or manufacturing zones. Commercial zones or districts similarly may be restricted by local regulations to specialized activities. Some jurisdictions do not allow cultivation or consumption in commercial zones, although dispensaries are allowed to operate. For example, in Colorado, state law prohibits smoking of medical marijuana on the premises of a dispensary; some jurisdictions have extended such prohibitions on consumption to within a certain radius from the dispensary. Other local governments further address consumption by prohibiting the sale of any food on-site or the sale of smoking devices and paraphernalia.

Most jurisdictions appear to prefer separating medical marijuana dispensaries from sensitive uses, like schools, churches, and each other. For instance, some municipali-

ties require a minimum 1,000-foot distance between the property lines of a site with a dispensary and the nearest residential district. New Mexico prohibits the operation of a dispensary within 300 feet of any school, church, or day care center. However, the Los Angeles experience is that dispensaries may choose to cluster together in high-traffic areas, where they can be easily accessed by potential customers. The zoning regulations should reflect the choices of the local community in how to regulate all aspects of medical marijuana.

COMPREHENSIVE PLAN CONSISTENCY

An important step for local governments addressing medical marijuana use, cultivation, and distribution will be to address the interplay between proposed zoning rules and the local comprehensive plan. As a general matter, zoning and land-use regulations are subordinate to a city or county's comprehensive plan. In some states, inconsistencies between the locally adopted plan and development regulations are vulnerable to legal challenges. This includes any regulations or guidelines that the city may adopt in connection with new land uses. Unfortunately, consistency is not the default law of the land, just a good idea. Many states don't even require a comprehensive plan.

INTERGOVERNMENTAL COOPERATION

In addition to overlapping regulations, local governments are considering intergovernmental cooperation to address the potential impacts of overlapping jurisdictions that regulate the same activity in different ways. In Michigan, for example, many of the townships have adopted ordinances that address coordination with local and state agencies with authority to inspect local businesses, including medical marijuana dispensaries. In a more expansive move, Tuolumne County and the City of Sonora in California are collaborating on regulations for dispensaries. The joint effort is designed to eliminate conflicts between the city's general plan, which listed dispensaries as an accepted use, and the county zoning code, which was silent on their operations.

PRIVACY RIGHTS

Some jurisdictions have expanded their standard business licensing standards to include more robust public reporting and background check requirements as a prerequisite to licensing dispensaries. These new regulations range from mandated background checks on applicants as well as employees and greater on-site security, lighting, and video protocols to monitor activity inside and outside the facility. Colorado requires a physical inspection of the premises prior to issuing a license. In some jurisdictions, like Fort Bragg, California, local rules mandate maintaining records of all patients and primary caretakers (Municipal Code, Sections 9.30.010–9.30.270). The chief of police also is required to conduct a detailed background investigation into the dispensary, its operator, and employees. Additionally, the ordinance provides broad discretion for denying a license. The police chief must make a determination on the good standing of the applicant, including whether he or she has engaged in any "unfair" or "deceptive" acts (although the ordinance does not define the terms).

The extensive investigation and reporting required for dispensaries are likely to be justified as necessary to ensure public safety. However, these efforts may provoke challenges on grounds that they violate legally protected privacy interests, including a legal mandate for health care providers to protect patients' medical records. The ordinance adopted in Los Angeles exemplifies this dynamic. The ordinance requires dispensaries to keep a log of all members' general contact information and mandates disclosure of the information to the police department and other departments under limited circumstances (Municipal Code, Sections 45.19.6 *et seq.* 45.19.6.6). In *Medical Marijuana Collectives*, the trial court found that patients have a "legally protected privacy interest" in the contact and medical information maintained by the dispensary, and that provisions mandating disclosure to the police violated state law. According to the court, "members of collectives have an objectively reasonable expectation of privacy" (*Medical Marijuana Collectives*, p. 26–27). The court suggested that requiring the dispensary to obtain patient consent to disclose could validate these provisions of the ordinance.

WHERE ARE WE HEADED?

We are now seeing a second wave of state statutes authorizing the use of medical marijuana. As public opinion changes and more states address this issue, officials may benefit from observing the practical impact of older initiatives. There are no common approaches or standard practices nationally or even at the state level. Rather, a balance of local interests, perceptions regarding the effects on public safety and health and, in many cases, the proliferation of unlicensed dispensaries appear to be crucial drivers influencing new legislation. Officials, planners, and lawyers in these states are also challenged by existing state statutes and court decisions that further define the reach of local land-use regulations and licensing procedures. Courts have taken some important steps to clarify the issues; we anticipate further challenges to local regulations and their relationship to legitimate public purpose and procedural due process issues, including public review, rights to a hearing, and appeal.

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IS YOUR COMMUNITY READY FOR MEDICAL MARIJUANA?

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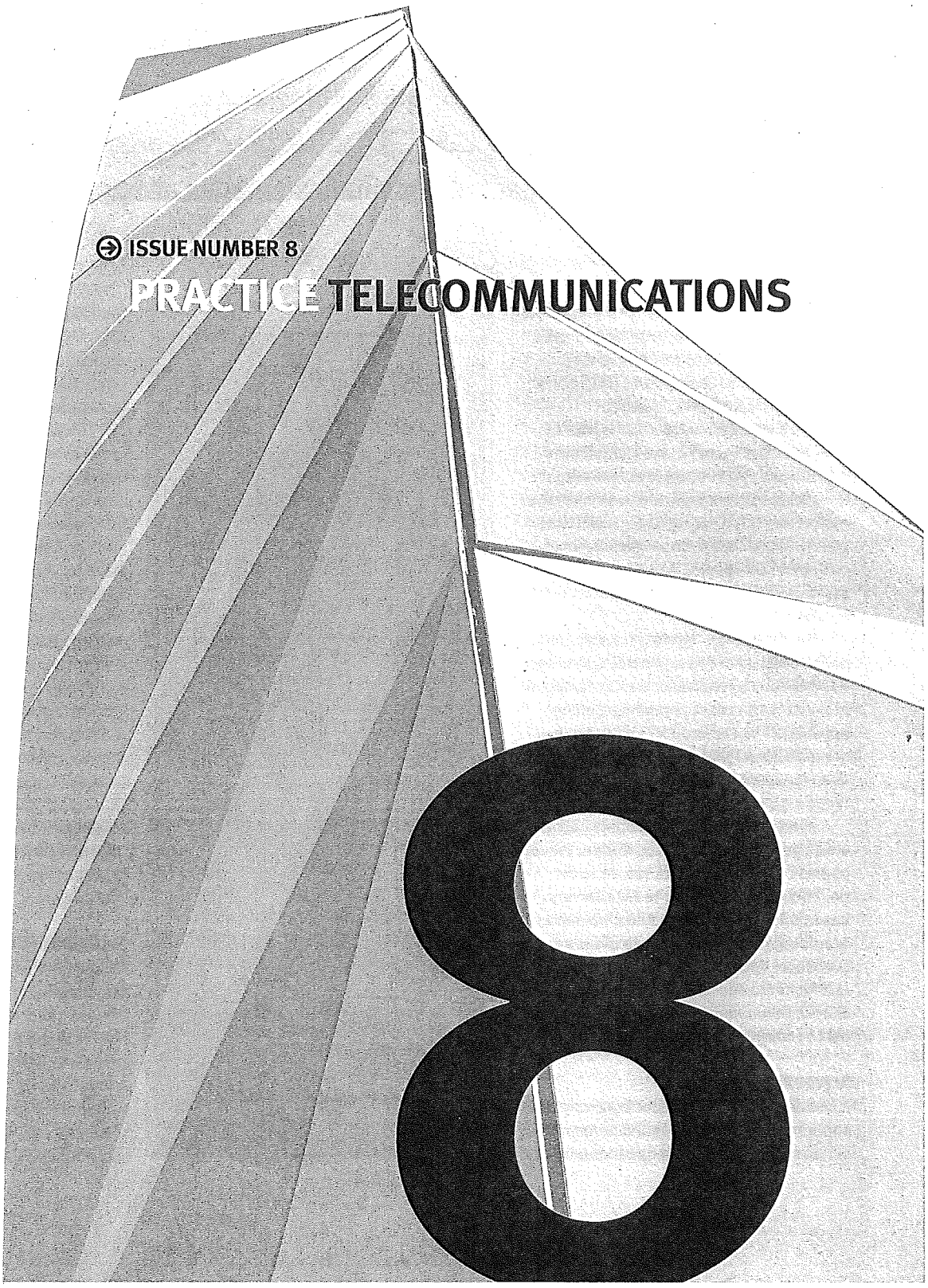

ISSUE NUMBER 8

PRACTICE TELECOMMUNICATIONS

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Federal Cell Tower Zoning: Key Points and Practical Suggestions

By John W. Pestle

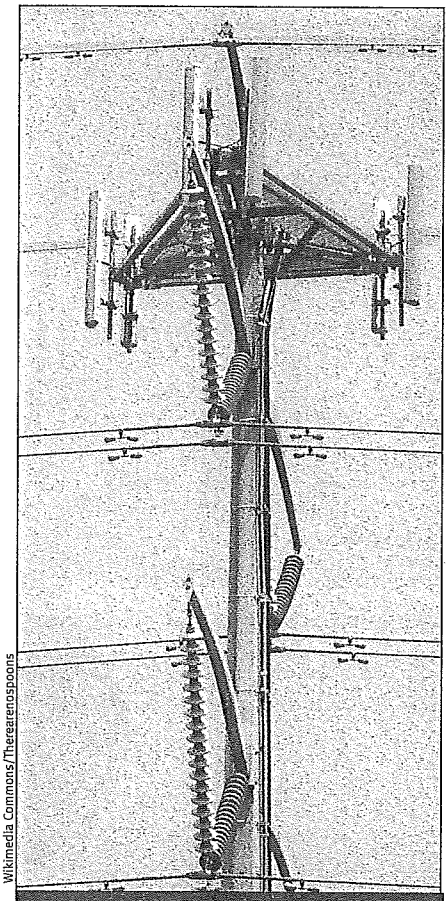
Congress first became involved with cell tower zoning with the passage of the Telecommunications Act of 1996, which added provisions entitled "Preservation of Local Zoning Authority" (47 U.S.C. § 332(c)(7)) to the principal federal telecommunications statute, the Communications Act of 1934.

This article summarizes key points regarding the Act as it has actually been interpreted and applied by the courts and Federal Communications Commission (FCC) during the 15 years since it was passed.

As interpreted by the courts, the Act does not affect many or most substantive provisions of local zoning law. However, it does impose procedural and administrative requirements that are unique to cell tower zoning. It is on these requirements where cell phone companies have been most successful in claims against local governments for violations of the Act.

The stakes are high for planners and public officials because, generally, the remedy imposed by federal courts for violations of the Act is an order approving a zoning application "as applied for" without any of the restrictions that might ordinarily have been imposed in the public interest during the zoning process.

Finally, how the Act is actually applied varies geographically due to different federal appeals courts' interpretations. In addition, how to comply with the Act can vary based on local ordinances and state laws. Accordingly, this article only provides an overview of the main points regarding the Act. Planners and local officials should consult with their municipal attorneys on how best to comply with the Act.



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Many communities encourage or require colocation of cell towers. This example shows how cellular antennas can be added to existing electrical transmission towers.

WHY MORE CELL TOWERS?

A cellular *tower* is a free-standing structure supporting one or more cellular *antennas*. Cellular antennas also can be mounted on buildings, water towers, or other structures. For convenience, the terms *cell tower* and *cellular tower* are used to refer to cell towers, cellular antennas, and associated equipment.

There were over 256,000 cell towers in the United States at the end of 2010. Installations of cell towers continue to increase at a rapid pace due to the demand for increased capacity as cell phones evolve into small mobile computers used to surf the web, receive and transmit videos, pictures, and other data, as well as carry conventional voice conversations. Web surfing, videos, pictures, and data use far more cell tower and provider network capacity than do phone calls. In addition, approximately 100,000 new towers are being added for WiMax, which uses cell phone-type antennas to provide high-speed wireless Internet access on a city or countywide basis, usually for a fee. Finally, the federal government is promoting the expansion of wireless service as one of the main ways to achieve its goal of expanding broadband service availability nationwide.

BACKGROUND ON THE ACT

At the time Congress was considering the Act, the FCC had a proceeding under way to preempt local zoning of cellular towers. The Act terminated that proceeding, and Congress did not generally preempt local zoning or turn the FCC into a federal zoning authority for cellular towers. Instead, the Act basically preserves local zoning while adding some additional federal requirements.

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Although the cell tower zoning amendments focused principally on "cell phone service," technically the Act covers "personal wireless services" and facilities used to provide personal wireless services as defined in 47 U.S.C. § 332(c)(7)(C). The terms include the antennas and facilities used to provide not just cell phone service but also "fixed wireless" (similar to microwave point-to-point) services and other similar services.

Finally, municipalities must comply with state and local zoning laws applicable to cell towers. If the state or local law is more restrictive then the Act, then the more restrictive law controls. This follows from the basic principle that the Act is an *overlay* on traditional zoning law, which is largely preserved. For example, in one case, a federal court reversed a local zoning decision because it used aesthetics to deny an application for a cell tower to be located in a public right-of-way. Aesthetics are allowed under the Act, but under the applicable *state law*, municipalities could not consider aesthetics for utility fixtures located in public rights-of-way (cell phone companies were public utilities in the state in question).

REMEDIES

The most troubling aspect of the Act relates to remedies for violations. In contrast to many state laws, the remedy that wireless providers usually request, and which courts frequently impose, is an order granting the cell tower zoning application "as applied for."

The rationale for this result is a provision that directs the courts to handle cell tower zoning cases "on an expedited basis." Cell phone companies contend this means the remedy for violations must be approval of the zoning application, not a remand with consequent delay. In many instances the courts have agreed.

Such decisions can cause well-intentioned municipal actions to have adverse effects. For example, in a 2005 case, the City of Chattanooga found that seven cell tower zoning applications did not comply with a recent zoning ordinance change. Rather than rejecting them and allowing them to be refiled, the city delayed action on the applications to allow the provider a chance to bring them into compliance with the revised ordinance. After the applications sat for a period of time, the provider sued the city, and the federal court ordered all seven applications to be approved as applied for because the city had been too slow in acting!

More recent federal decisions show some tendency to move away from the "approval order" remedy toward the more traditional remedy of a remand for proceedings in compliance with the court's order. However, as a practical matter, municipalities are well advised to be careful to comply with the Act so as to make sure they do not receive the harsh remedy described above.

On the bright side, it is clear that providers cannot get attorney fees or damages either under the Act itself or Section 1983 (Civil Rights Act) for violations. This was resolved in 2005 by the U.S. Supreme Court, supplemented by later decisions of the federal appellate courts.

PROCEDURAL RULES

As interpreted by the courts, the Act creates procedural requirements for cell tower zoning applications that often differ significantly from typical local practices. As a result, procedural challenges are one of the areas where cellular companies have been most successful in appealing local zoning decisions.

Written Decision/Separate Record

Municipalities can inadvertently violate the Act by running afoul of its "written decision/separate record" requirement. These requirements derive from a provision stating that cell tower zoning decisions "be in writing and supported by substantial evidence contained in a written record" (47 U.S.C. § 332 (c)(7)(B)(iii)). Most courts that have considered this issue have adopted a requirement that a municipality's written decision simply must provide a sufficient explanation for the court to be able to conduct a meaningful review of it.

In a significant deviation from local practice in many municipalities, some courts have required that the written zoning decision be *separate* from the written record or transcript of the local zoning proceeding. This means that local decisions may be open to challenge by providers if they are not clearly separated from the hearing or proceeding at which evidence is taken.

Until there is a clear resolution on the "separate record" issue, a practical approach is for a municipality not to make a formal decision at the zoning meeting or city council meeting where the zoning hearing occurs or an appeal is heard. Instead, following the hearing or the close of an appeal the municipality should direct counsel or staff to prepare a written order or decision along specified lines (for example, denying the application generally or approving

it with conditions) for the municipal body to consider at its *next* meeting. Then, at the next meeting, the municipal body considers the proposed decision, modifies it as necessary, and adopts it. Meeting minutes should reflect this. Proceeding in this fashion ensures that the municipality's decision complies with the written decision/separate record requirement.

Perhaps more important, using the two-step approach helps ensure that a municipality's decision is well documented and conforms with local, state, and federal law, thus providing the maximum assurance that it will be upheld on appeal. For example, in a recent California case, a municipality's carefully reasoned decision resulting from the use of the two-step approach appears to have contributed significantly to a federal court's decision to uphold the municipality's denial of several cell tower zoning applications predominantly on aesthetic grounds.

Timely Actions and FCC Shot Clocks

The Act contains a requirement that cell tower zoning decisions occur in a timely fashion, specifically "within a reasonable period of time after the request is duly filed . . . taking into account the nature and scope of such request." However, the FCC has effectively rejected this *individualized* time period approach by setting blanket time frames for action on all cell tower zoning requests through two orders that have come to be known as the "shot clock" orders.

In late 2009 the first FCC order imposed a 90-day shot clock for colocations and 150 days for new cellular towers, and in August 2010 it followed this up with an order clarifying certain points (and rejecting requests for changes). Because the orders are declaratory rulings, no "rule'" was issued. Instead, municipalities and providers have to examine the approximately 40 pages of text that comprise the two FCC orders to attempt to understand and interpret them. And the two orders are not always entirely consistent.

The FCC decided that 90 days (not 150) was reasonable for *colocations* because they often are easier to process than new towers and may involve little or no new construction. The FCC defined colocations in footnote 146 of its initial shot clock order. Because the definition is both highly detailed and adapted from an unrelated proceeding, it is unlikely to coincide exactly with the definition of colocation in local ordinances.

In general, under the shot clocks a zoning application for an additional antenna at a given location is not a colocation if it involves more than a 10 percent increase in height, more than four new equipment cabinets or one new equipment shelter, extends more than 20 feet from the tower, or if excavation is needed outside the current tower site.

Under the shot clocks municipalities must act on a cell tower zoning application within the 90/150-day time frame. If they take longer, the burden is on them to justify to a court why it was reasonable to take longer. In recognition that zoning applications can be incomplete, the orders state that the time frames do not include the time for an applicant to respond to a request for additional information. However, this extension *only* applies if the municipality notifies the applicant within 30 days of filing that the application is incomplete, which creates practical problems when the need for additional information only appears after the review is well under way.

Due to the short time periods involved, municipalities should require a provider to state in its zoning application which shot clock (90- or 150-day) it contends applies to its request. And if the provider contends that it is the 90-day shot clock, it should be required to identify the specific criteria in the FCC shot clock order it meets. By doing this, municipalities will know which time frame the provider contends is applicable and will be able to decide if the claim is accurate. More importantly, municipalities will avoid the harmful situation where the municipality believes that it has 150 days to act while the provider contends that the 90-day shot clock applies.

The FCC orders state that the shot clocks can be extended ("tolled") by mutual agreement. As a practical matter, both parties may want to extend the applicable time periods to avoid a provider having to refile because a municipality believes it needs to deny a zoning application (without prejudice) due to incompleteness, or to prevent a shot clock from expiring.

In response to the shot clocks, some municipalities have adopted detailed application forms for cell tower zoning matters to better ensure that all requisite documents and other information are provided at the outset. In addition, some municipalities are conducting a more detailed check for the presence and completeness of all relevant attachments and signatures at the filing counter *before* a cell tower zoning application will be accepted.

In seminars about the FCC shot clocks, the most frequently asked question is how the shot clocks apply when a municipality has a two-step zoning process—for example a planning commission makes an initial zoning decision and a disaffected party has the option of an internal (not court) appeal to a board of zoning appeals or city council. Municipalities frequently ask: Do the shot clocks apply just to the first step—the planning commission decision—or do they apply to the entire process?

The short answer is that the FCC has refused to address this question, although it was asked do so in its August 2010 order.

With this in mind, municipalities should carefully calendar and compute the 90- and 150-day time periods from the outset and then work backward to make sure that they act within the requisite time period after allowing for all notices, possible internal appeals, preparation of written orders, and the like.

Under the Act there are good legal grounds (not as yet ruled on by the courts or FCC) for contending that the shot clocks legally can *only* apply to a municipality's initial zoning decision (the planning commission decision in the example above). If it is not possible to complete the second step (appeal to board of zoning appeals or equivalent) of the zoning process within the appropriate time frame, then municipalities should seek a mutually agreed-upon extension from the provider.

It may help to point out to the provider that under the Act it has only 30 days from the expiration of a shot clock to file suit for exceeding the clock. In some cases it may be possible to get the provider to agree to an extension (including where only the board of zoning appeals has the authority to grant a needed variance) because the municipality will otherwise contend that the shot clock was met when the planning commission issued its decision. And by the time the board of zoning appeals rules, which is more than 30 days later, the provider will have lost its right to go to federal court, unless it agrees to an extension.

Additionally, the municipality should carefully keep track of any events that might cause the shot clocks to be exceeded. For example, if additional information is needed from the provider, the municipality should request it in writing with a very short time to respond, stating that this is due to the shot clocks and that any delay may cause a delay in the municipality's decision. Careful records such as this can provide a solid basis for either a mutually agreed-upon extension or for justifying to a court the reasonableness of a municipality taking more than 90 or 150 days to act.

Finally, some courts have specifically allowed the "written decision" by a municipality explaining the reasons for denying a zoning request to occur *after* it acts on a zoning request by denying it. In the appropriate circumstance, this may allow a municipality to comply with the shot clocks by issuing a denial within the appropriate time period and then issuing the separate written decision shortly thereafter.

Even though, as of mid-2011, the shot clock orders are currently in effect, there is serious doubt as to their validity. In part this is due to language at the start of the Act preventing any provision of the Federal Communications Act of 1934 from being used to "limit or affect" a municipality's zoning authority other than as set forth in the Act. The Act also indicates that there should be individualized time periods for each application, and the committee report accompanying the Act states that in terms of timing it is not intended to give "preferential treatment" to cell tower zoning applications compared to other zoning matters. Finally, the committee report emphasizes that the time for action should be the "usual time period under the circumstances."

A court appeal of the shot clock orders on these (and other) grounds is currently pending and is likely to be decided in late 2011. Municipalities should periodically check as to the outcome of this appeal, *City of Arlington v. FCC*, No. 10-60039 (5th Cir.).

Substantial Evidence

The Act requires that there be "substantial evidence" supporting a municipality's cell tower zoning decisions. The cases are all in agreement on this; specifically, the courts have formulated the standard that there must be "more than a scintilla but less than a preponderance" of evidence in the written record supporting a municipality's decision. The courts have emphasized that this standard means they must uphold a municipality's decision if the facts meet the preceding low standard *even if* the court would have reached a different conclusion were it free to consider the matter afresh.

In other words, the courts have stated that they cannot substitute their judgment for that of the municipality and try the zoning case anew. However, this deference only applies to factual support for substantive matters such as the impact of a cell tower on property values, the environment, or fragile environmental areas. It does not apply to claims for violations related to the radio frequency emissions or "prohibition of service" provisions of the Act.

The federal court covering mid-Atlantic Coast states has emphasized that the views of residents or laymen should be considered and may be given some weight by a municipality. It also emphasized that the "predictable barrage" of expert testimony from a cell phone provider does not necessarily trump or mandate approval of a cell tower zoning request over the objections of residents. Other courts have also allowed citizen testimony to be used as evidence to support a denial of a cell tower zoning request. However, the issue of how much weight to give to the testimony of ordinary citizens tends to be case-specific and can vary greatly depending on factors such as the number of statements and how detailed and persuasive they are in terms of their facts and reasoning.

Radio Frequency Emissions Preemption

The Act (47 U.S.C. § 332(c)(7)(B)(iv)) prevents municipalities from denying or conditioning cell tower zoning based upon the "environmental effects of radio frequency emissions" (often pejoratively termed "radiation") from cell towers, to the extent they comply with FCC emission rules (47 C.F.R. § 1.1307 *et seq.*). This provision is part of the more general federal preemption of states and municipalities from regulating matters relating to radio frequency (RF) emissions. What municipalities *may* do is enforce the FCC's emission rules, including reviewing a tower's planned compliance with the rules.

Municipalities can face emotional requests that a cellular zoning application be denied due to RF-related health concerns. The best legal advice in these circumstances is three-fold: First, state at the start of a zoning hearing that comments or claims about the adverse health effects from "cell tower radiation" will not be allowed (because federal law prohibits the municipality from considering them). Second, if a speaker attempts to raise such issues, he or she should promptly be stopped on the same grounds. Third, if attempts persist, it may be desirable to point out that allowing testimony against the tower based on RF health effects actually increases the likelihood that the cell tower will be approved. This is because the cases are clear in holding that if the court believes the real reason for denial of a zoning application was on RF-emissions grounds, it will usually order that the zoning application be granted. At a minimum, allowing such testimony gives the cell tower applicant clear grounds to appeal a denial to federal court.

Numerous cases under the Telecommunications Act hold that the allowable grounds for local zoning decisions on cellular towers include aesthetics, impact on property values, proximity to a historic district, safety, environmental impacts, and the impact of a commercial operation on a residential neighborhood.

SUBSTANTIVE ZONING RULES

Because the Act does not affect traditional local substantive zoning principles, it is generally a local decision to choose between having fewer, taller towers with more colocations or more, shorter towers with less colocation. Similarly, numerous cases under the Act hold that the allowable grounds for local zoning decisions on cellular towers include aesthetics, impact on property values, proximity to or view from a historic district or structure, safety (if the tower fell, property or persons could be hurt, especially on adjacent properties), environmental impacts (e.g., fragile areas, wetlands), and the impact of a commercial operation on a residential neighborhood.

The courts have rejected tower company complaints that local zoning requirements can increase the cost of a tower, for example, by requiring that it be camouflaged, or rejecting a single tower to be placed at the top of the scenic ridge in favor of shorter towers on either side that have a less prominent visual impact. Aesthetic objections tied to scenic vistas, proximity to historic districts, or views

from national parks are particularly likely to be upheld by the courts.

The Act prohibits "unreasonable discrimination" in cell tower zoning. The courts have interpreted this to mean that differences in the treatment of cell towers are allowed as long as there is a valid, articulated basis for the difference. For example, just because a cell tower has been allowed in *one* residential area does not mean that they must be allowed other residential areas if there are legitimate reasons for the difference (e.g., visibility, height, impact on the neighborhood or property values, etc.).

CAMOUFLAGING

Well-camouflaged cell towers are nearly invisible. Cellular companies can object due to their increased cost, but camouflaged towers are a very effective way to allow a cell tower to be placed where it is needed with little or no impact on aesthetics, historical sites and views, or property values.

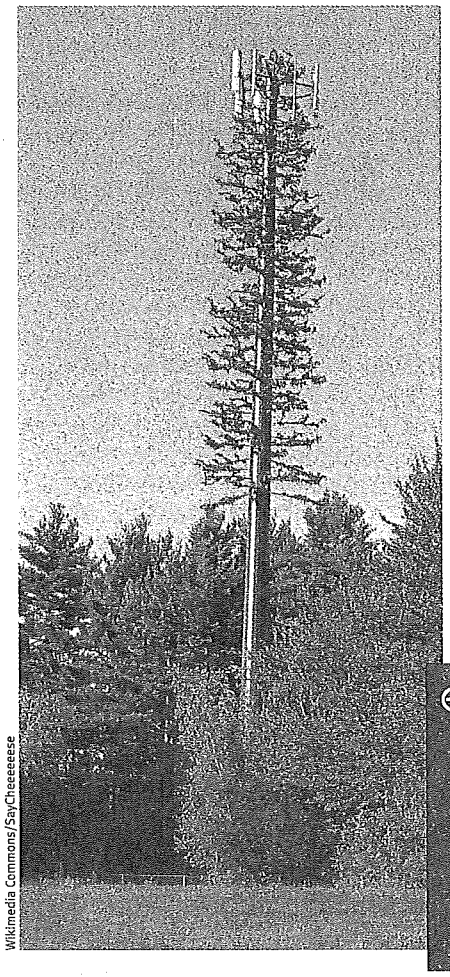
In urban settings, cell phone antennas are routinely concealed in sculptures, signs, billboards, church steeples, water tanks, crosses, and parapets of buildings. Meanwhile, in rural and suburban areas, towers are effectively concealed as trees and are nearly indistinguishable from the real thing (apart from being taller than nearby trees). In the southwest, cell towers are effectively camouflaged as large cactuses (e.g., saguaro cactuses). Many pictures of camouflaged cell towers are available at http://CellularPCS.com/gallery.

From a legal standpoint, there have been virtually no cases under the Act challenging camouflaging requirements in local zoning decisions. However, municipalities are well advised to be highly specific in any camouflaging requirements they impose and to require compliance with photo simulations, as there are examples of unsuccessful camouflaging.

GAPS IN SERVICE AND ALTERNATE SITES

The Act bars municipalities from taking zoning actions that "prohibit or have the effect of" prohibiting personal wireless services. As a practical matter this provision usually refers to claims by providers of gaps in coverage and that there are no feasible alternate sites for the tower proposed to fill the gap. Several points should be noted.

First, small gaps in coverage are expressly allowed by the FCC, and the courts have noted this. It is only "significant" gaps that typically trigger a "prohibition in service" requirement.



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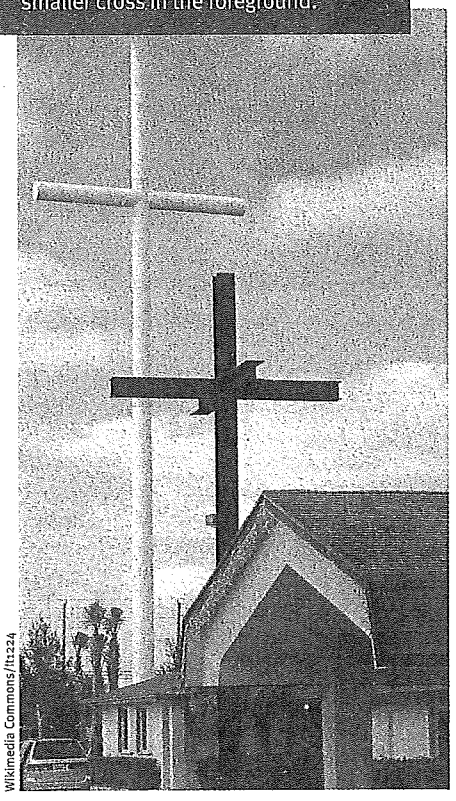

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(Left) Although taller than surrounding trees, towers camouflaged as evergreens can be a logical aesthetic compromise in rural New England. (Below) This 100-foot cross at Epiphany Lutheran Church in Lake Worth, Florida, houses a cell tower. After the new camouflaged tower was completed, the church removed the smaller cross in the foreground.

Second, there are differences between the federal appellate courts on how they apply the "prohibition of service" provision. Municipalities should consult their attorneys to make sure they are following the Act as interpreted by the federal courts in their area.

Third, and perhaps most important, gap analysis deals with radio frequency propagation and computer models that try to *predict* both whether there is a gap and the height and location of the cell tower that will fill the gap. These maps are comparable to a weather map for the day after tomorrow—predictions based upon a range of factors—and for that reason are rarely completely accurate. The computer programs used to generate the map take the topography and buildings in the area and then apply a range of "typical" factors and assumptions selected by the wireless applicant to generate a map showing how RF signals will likely propagate in the area in question. The resulting map costs relatively little to create, is sensitive to its inputs, and can be skewed in favor of the provider's zoning request.

Municipalities should require providers to set forth *all* evidence supporting a gap/prohibition of service claim so that the municipality can consider it. This will prevent providers from withholding significant evidence until a court challenge, or, if they do, will allow the municipality to seek a remand so it can consider the new evidence.

Requiring the applicant to make actual RF measurements in the field is the *only* way to accurately determine the actual size and contours of a gap and the shortest tower at a specific location that will fill it. Typically, a small antenna is suspended from a crane at a given location and height; technicians then measure the signal strength in a variety of directions and distances. They repeat the process with the antenna at different heights to determine the shortest tower height that will

fill the gap. Often this test is combined with a "balloon test," where a balloon approximating the cubic footage of the antennas is suspended at different heights to determine the visual impact of the proposed tower.

Related technical analyses are needed when the claim is that existing antennas are overloaded and a tower must be added to increase the capacity of the system in the area.

In these cases the courts typically require a showing by the provider (or rebuttal by the municipality) to the effect that there are "no feasible alternate sites" for the cell tower in question. This analysis usually involves *both* technical and economic considerations. From an engineering perspective there *rarely* is only one site for an antenna that would fill a gap. However, while a given site may be technically feasible, the provider may reject it because the cost to build or rent is too high. Municipalities are not bound to approve the "least cost" site if a reasonable alternate site (or sites) with greater cost or rent is preferable. Also, some courts give consideration to minimizing the impact or intrusion by the cell tower.

The bottom line is that in "significant gap" or "prohibition of service" cases a municipality usually needs technical assistance to knowledgeably review, comment on, and (where appropriate) challenge a provider on the issues of whether and to what extent there is a gap, its contours, the location and minimum height of a tower necessary to fill a gap, and the feasibility of alternate sites. In a number of states, municipalities can obtain this technical assistance at the provider's expense through local ordinances requiring a deposit for experts and studies at the time of application.

A qualified expert can evaluate a cellular zoning application and provide an analysis and recommendations (e.g., camouflaging suggestions) that will assist in deciding the zoning application. However, because there are cases where municipalities have lost in the courts due to assistance from unqualified experts, municipalities should obtain the names of cases where proposed experts have testified and review any opinions where a court has commented on their credentials. This will help ensure that the experts' work for the municipality will be persuasive with the provider and stand up in court.

DISTRIBUTED ANTENNA SYSTEMS

Distributed Antenna Systems (DAS) are often an attractive alternative to cell towers. Essentially, they involve a series of microcells, each with a small antenna and box mounted on a utility pole. The boxes often are smaller than other boxes or transformers on utility poles and sometimes can be put underground.

DAS is an attractive alternative for providing cell phone service, especially in residential areas, although multiple DAS antennas are required to serve the same geographic area typically served by one cell tower. Another advantage of DAS systems is that *one* set of DAS antennas can serve *all* cell phone companies licensed to serve a community. The downside is that DAS systems are sometimes more expensive to install than towers because of the need for multiple DAS sites to cover the same area as a tower, with the sites interconnected by fiber optic cables.

The cellular industry has resisted some municipal attempts to encourage or force the use of DAS. In one case, the industry mounted a major challenge and was successful in overturning (on federal preemption grounds) a local ordinance that expressed a preference for DAS. The court found that a municipality could not impose such a blanket legislative requirement; however, later decisions from the same court upheld a community's right to consider DAS on a case-by-case basis.

NOTICE OF INQUIRY

In April 2011 the FCC issued a Notice of Inquiry on "key challenges and best practices in expanding the reach and reducing the cost of broadband deployment by improving government policies for access to rights of way *and wireless facilities siting*" (emphasis added). Such notices are normally followed by rulemakings addressing issues revealed by the notice.

Among many other things, the notice asks about challenges or problems that the wireless industry claims has occurred with local zoning and with leasing land from municipalities for cell towers. In the notice, the FCC basically claims that it has the legal authority to further restrict local zoning of cell towers. Likely areas for rulemaking flowing from this notice are (a) preventing municipalities from allowing cell towers in residential areas only by variance; (b) greatly restricting or eliminating zoning approvals for colocations; and (c) putting limits on what must be included in a cell tower zoning application and the fees that may be charged.

CONCLUSION

In 1996 Congress for the first time created federal requirements for cell tower zoning. As interpreted by the courts, the Act creates some challenges for municipal compliance, in part because some of the procedural provisions are quite different from local zoning practice and in part because federal courts often order zoning applications approved when the Act is violated.

By careful attention to the matters described in this article, and by paying attention to the specific interpretations of the Act by the courts in their area, municipalities can ensure that cell tower zoning decisions comply with federal, state, and local law as well as the public interest.

"Truly Twisted Cell Tower" is a multi-carrier cell tower constructed in Albuquerque, New Mexico, by architect Dekker/Perich/Sabatini. Photograph © 2010 Kramer.Firm, Inc. Used with permission; design concept by Lisa Barton.

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ARE YOUR CELL TOWER STANDARDS IN COMPLIANCE WITH FEDERAL LAW?

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