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Supreme Court, Cell Towers, And Getting It 'In Writing'

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Joseph R. Palmore

Consumer demand for wireless communications is booming, and carriers have invested billions of dollars in necessary infrastructure to keep up. A case that will be argued at the U.S. Supreme Court on Monday will help determine whether that build-out can continue apace, or whether NIMBYism will slow it down — leading to more dropped calls and data-dead zones.

The success of the wireless revolution is widely appreciated and admired — most Americans carry a tangible piece of it in their pockets or handbags every day. But less well-known is the pro-infrastructure federal policy that helped make it possible.

Nearly 20 years ago, Congress enacted the Telecommunications Act of 1996 to encourage competition in communications services. Wireless communication for the mass market was in its infancy in 1996, but Congress nonetheless recognized its potential.

Congress also knew, however, that wireless' tremendous potential would not be realized if local zoning authorities could block or slow the construction of necessary infrastructure. The beneficiaries of such infrastructure are numerous and diffuse, and many are not even residents of the jurisdiction considering whether to give zoning approval for a necessary cell tower.

On the other hand, opponents (such as nearby landowners) can be vocal and persistent. Before enactment of the 1996 act, local governments too often ceded their local zoning authority over wireless infrastructure to those opponents, to the detriment of the broader public.

To solve that problem, the 1996 act imposed significant limitations on the zoning authority of local governments when it comes to construction of wireless facilities. For example, local authorities cannot effectively prohibit such facilities through zoning denials, unreasonably discriminate among providers, or unreasonably delay action on zoning applications for wireless facilities. And Congress provided that carriers whose zoning applications are denied or unreasonably delayed can go to court for a decision on an expedited basis.

At issue in T-Mobile South LLC v. City of Roswell, Georgia, the case that will be argued at the Supreme Court Monday, is a provision of the 1996 act that, properly interpreted, gives practical effect to all those

limitations. That provision requires that local zoning decisions on wireless facilities "be in writing and supported by substantial evidence contained in the written record." The court in T-Mobile will decide what that provision means and, by extension, whether the promise of judicial review of wireless zoning decisions will be meaningful or illusory.

The Battle in the Lower Courts Over T-Mobile's Tower

In 2010, T-Mobile found that it needed an additional cell tower in suburban Atlanta to keep up with consumer demand for its wireless service. The company applied to the city of Roswell for a permit to build the tower — disguised as a pine tree — on a vacant lot. The Roswell City Council held a public hearing on the application, where several council members spoke in opposition to it -— but for divergent reasons.

One said other carriers already had sufficient coverage in the area; another expressed aesthetic concerns; yet another voiced a worry that the proposed tower might not have sufficient emergency power for 911 services. Other council members just asked questions or stayed silent. At the end of the meeting, the council voted to deny the application.

The city then mailed T-Mobile a letter simply stating that the application had been "denied" and telling the carrier that the minutes of the meeting could be obtained from the city clerk. But the minutes had not actually been prepared at that time, and did not become available for more than three weeks. When the minutes were ultimately provided, they simply summarized the disparate comments by council members and citizens; they did not provide a reason why the council as a body had denied the application.

T-Mobile sought judicial review of the denial in federal district court, arguing that the city had failed to comply with the statutory requirement that its decision be "in writing and supported by substantial evidence." The district court agreed, holding that a decision must "contain a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons." The court ordered the city to allow T-Mobile to install its tower.

The Eleventh Circuit reversed. It held that the city had satisfied the "in writing" requirement by mailing T-Mobile a (written) letter telling the carrier that the application was denied, by making minutes available, and by having permitted T-Mobile to record the city council meeting and prepare its own transcript at its own expense.

The Supreme Court then granted T-Mobile's petition for a writ of certiorari.

Supreme Court Arguments

T-Mobile makes a persuasive case in its Supreme Court briefs that the requirement that a decision be "in writing and supported by substantial evidence" cannot be satisfied by a letter simply saying "denied," accompanied by an invitation to the carrier to sift through meeting minutes (which may not even be available) to try to piece together a collective body's reason for its action. The phrase "supported by substantial evidence" is a term of art from administrative law, and it carries with it the requirement that an agency give reasons for its actions.

It is sensible to conclude that Congress used that phrase in the 1996 act to embody the same requirement. Without such a requirement, the statute's judicial review provision would be much less

effective: if a local government is not required to say why it denied a zoning application, it will be very difficult for a reviewing court to determine whether it did so for a permissible or impermissible purpose.

For example, in this case, a city council member said during the public hearing that T-Mobile's application should be denied because other carriers already had sufficient coverage in the area. A denial on that anti-competitive basis would violate the 1996 act's prohibition on zoning denials that disfavor one carrier compared to others.

Did the city council as a whole share this view of why the application should be denied? Because the council as a whole never stated why it denied the application, we simply do not know. A busy district court judge should not be required to sift through a lengthy transcript or voluminous record to try to decipher a city's reason for its action, especially given that Congress required that judicial review in these cases be "expedited."

This is a case where the language, structure and evident purpose of the statute all point in the same direction. The court should hold that the city of Roswell failed to satisfy its obligation to provide written reasons based on substantial evidence for its denial of T-Mobile's application and, by doing so, maintain the long-standing federal policy supporting the ongoing wireless revolution.

—By Joseph R. Palmore, Morrison and Foerster LLP

Joseph Palmore is co-chairman of the Appellate and Supreme Court practice group at Morrison and Foerster and a partner in the firm's Washington, D.C., office. He is a former assistant to the solicitor general at the U.S. Department of Justice and a former deputy general counsel to the Federal Communications Commission.