

CELL TOWERS

The Federal Communications Act
vs.
Local Government Control

June 4, 2020

Presentation Outline

- I. Introduction
- II. Local Governmental Control
- III. Federal Telecommunications Act of 1996
- IV. Practice Pointers – “Dos and Don’ts”

I. Introduction

A Growing Need for Bandwidth...

- There are 312,320,000 Internet users in the United States.
- As of 2019, 90% of adults in America use the Internet.
- There are 7,000 ISPs operating in the United States (most of any country).
- In the U.S., bandwidth per Internet user only ranked 43rd in the world.
- Internet use in the U.S. (as a percentage of adult population):

Year	% of Population
2000	43%
2005	68%
2010	72%
2015	75%

...Means a Growing Need for Towers

- In 2013, only 8% of U.S. adults relied on a smartphone for Internet connectivity.
- By 2015, that number had increased to 13%.
- As of 2018, it had increased again, to 20%.

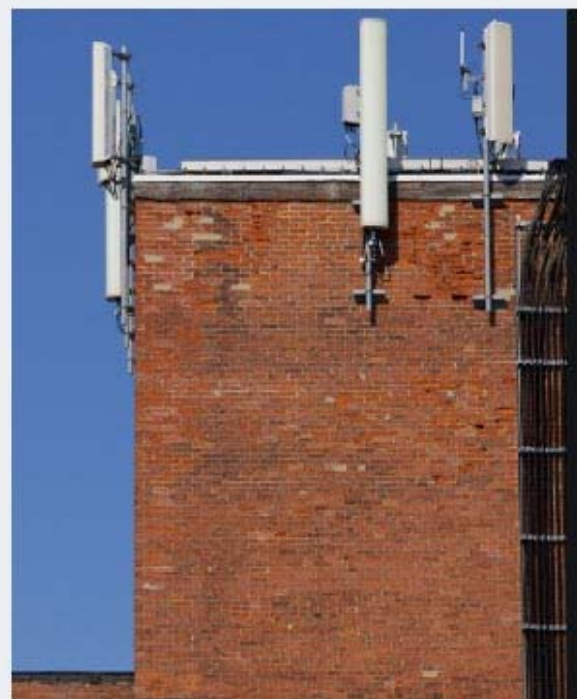
Types of Cell Sites & Towers



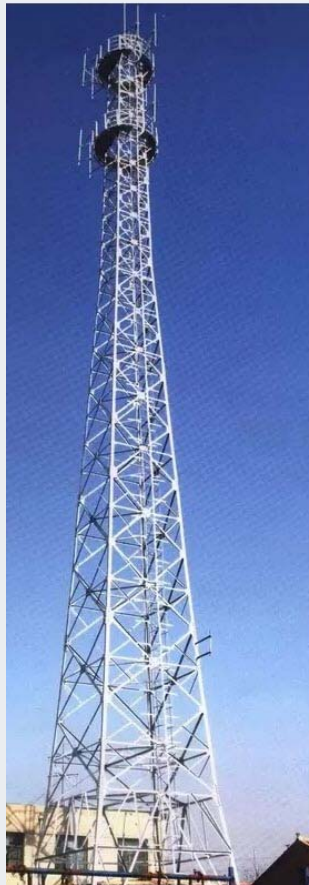
Monopole Towers



Rooftop Sites



Lattice Towers



Guyed Towers



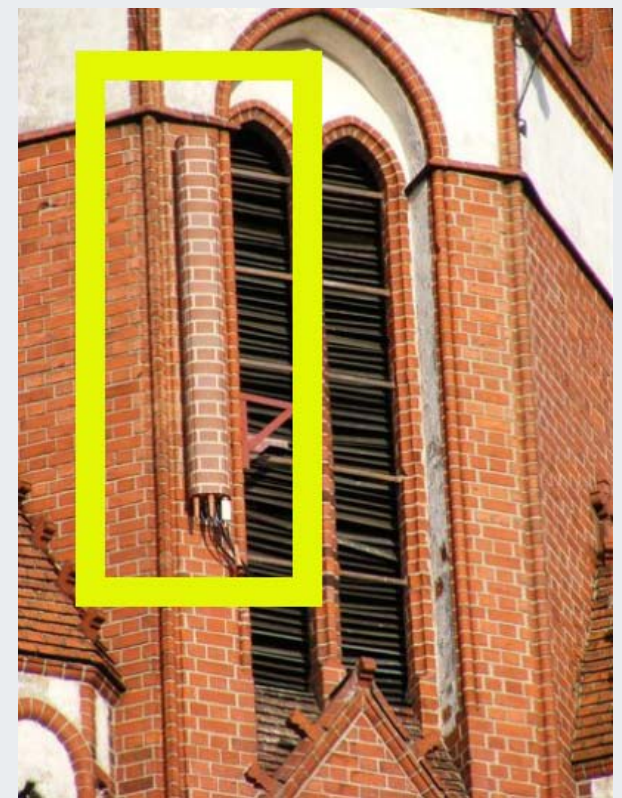
5G Sites



“Stealth” Towers



REALLY “Stealth” Site



(On a church in Sopot, Poland.)

II. Local Governmental Control

- Government as owner or landlord.
- Right-of-way management.
- **Zoning authority** (today's focus).

Zoning Authority

- Zoning – a land use planning tool
- *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926), recognized government's authority to regulate the development of real property
- Speaking broadly, zoning ordinances govern development and uses of property, the size and form of buildings, and how uses and buildings relate to their surroundings
- Idaho's Local Land Use Planning Act ("LLUPA"), codified at Idaho Code §§ 67-6501 *et seq.* (enacted in 1975)
- Before LLUPA, Idaho cities' zoning authority was derived directly from Article XII, § 2 of the Idaho Constitution

III. Federal Telecommunications Act of 1996

- Purports to preserve local zoning authority,
- Then limits local zoning authority.
- “a model of ambiguity or even self-contradiction”

- Justice Scalia, in *AT&T Corp v. Iowa Utils. Bd*, 525 U.S. 366, 397 (1999).

Federal Telecommunications Act of 1996

- Codified at 47 U.S.C. § 332(c)(7)
- Amended the federal Communications Act of 1934
- Purpose of Telecommunications Act of 1996 was “to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced information technologies and services to all Americans by opening all telecommunications markets to competition... .” (H.R. Rep. No. 104-458 (1996).)
 - Deregulation
 - Foster expansion of new technologies

Federal Telecommunications Act of 1996

Although the TCA expressly states Congress' intention to preserve traditional local zoning authority over tower siting, the TCA preempts a significant portion of that authority.

Federal Pre-emption of Zoning Authority

Section 332(c)(7)(A) of the Telecommunications Act:

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

(47 U.S.C. § 332(c)(7)(A).)

Federal Pre-emption of Zoning Authority

To accomplish its goal of removing barriers to the expansion of emerging telecom technologies, the TCA had to address land use regulations — typically almost exclusively the purview of local governments.

Federal Pre-emption of Zoning Authority

Substantive requirements of the TCA:

Zoning and building regulations cannot:

- Unreasonably discriminate between wireless service providers of functionally equivalent services;
- Prohibit, or have the effect of prohibiting, wireless services; or
- Regulate on the basis of environmental effects of FCC-compliant radio frequency emissions.

(47 U.S.C. § 332(c)(7)(B).)

Federal Pre-emption of Zoning Authority

Quick Touch on RF Emissions:

Zoning and building regulations cannot regulate based on “the environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC’s] regulations concerning such emissions.”

(47 U.S.C. § 332(c)(7)(B)(iv).)

Federal Pre-emption of Zoning Authority

Procedural requirements of the TCA:

- Local governments must act on tower siting decisions with a “reasonable period of time;” and
- Tower siting decisions must be in writing, and supported by “substantial evidence contained in a written record.”

(47 U.S.C. § 332(c)(7)(B)(ii).)

Federal Pre-emption of Zoning Authority

“The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof shall not prohibit or have the effect of prohibiting the provision of personal wireless services.”

(47 U.S.C. § 332(c)(7)(B)(i)(II).)

Federal Pre-emption of Zoning Authority

“shall not prohibit” the
provision of personal
wireless services” —

Pretty easy — no blanket prohibitions.

Federal Pre-emption of Zoning Authority

“shall not... have the effect of prohibiting the provision of personal wireless services” —

This provision is job security for lawyers with experience in planning and zoning and telecom regulation — it drives litigation.

Federal Pre-emption of Zoning Authority

Regarding the “shall not... have the effect of prohibiting the provision of personal wireless services” provision of the TCA, the primary question asked of courts is:

“To what extent has local zoning authority been preempted by the TCA?”

Federal Pre-emption of Zoning Authority

Landmark Second Circuit case, followed by most subsequent courts: *Sprint Spectrum v. Willoth*, 176 F.3d 630 (1999).

Sprint sought review of a decision upholding a denial of Sprint's application to build three towers in Ontario, New York.

- Sprint: Must construct “any and all towers” it deemed necessary, or “effective prohibition.”
- Ontario's Planning Board: Local zoning authority should have broad discretion to deny applications, provided that it does not ban *all* wireless service.

Federal Pre-emption of Zoning Authority

Second Circuit Court of Appeals:

“You’re both wrong.”

Instead, established a two-step test for determining whether denial of a land use application constituted an “effective prohibition” ---

1. Whether a significant gap in coverage exists
and
2. Whether the wireless service provider has provided sufficient evidence of the absence of alternatives to fill that significant gap.

Federal Pre-emption of Zoning Authority

FIRST PRONG OF *WILLOTH* TEST

Whether a Significant Gap in Coverage Exists

- A. The *Willoth* court established a “single provider rule” – if any wireless provider already served the locality in which a tower was proposed, no “significant gap.”
- B. In the First Circuit, however, a line of cases developed establishing a “multiple provider rule” – the “significant gap” to be filled no longer applied to any wireless service provider; instead, a provider was entitled to fill a “significant gap” in its own network.

Federal Pre-emption of Zoning Authority

SECOND PRONG OF *WILLOTH* TEST

Absence of Alternatives to Fill Significant Gap

- A. Second, Third, Sixth, and Ninth Circuits: If proposed tower site is the *least intrusive* on the values the denial sought to serve, the denial will be reversed on appeal under the TCA.
- B. First and Seventh Circuits: To reverse a denial of a tower site application, must show “that there are *no other potential solutions* to the purported problem.” (no viable alternatives)

IV. Practice Pointers

DOs:

- Comply with LLUPA requirements for public hearings, notice, appeals, etc.
- Review applications “within a reasonable time” (90 days for collocation applications, 150 days for new tower applications).
- Ensure zoning ordinance complies with the restrictions contained in the Telecommunications Act.
- Require a tower applicant to establish a “significant gap in coverage.”
- Require a tower applicant to provide detailed information on the process used to select the subject property for a tower. (Apply the “*Least Intrusive Means*” test.)
- Impose conditions of approval that address specific concerns. For example, require “stealth” installations, greater setbacks, or limit height.
- LLUPA already requires a written decision, a reasoned statement, and substantial evidence in the record – these also are crucial to surviving a federal court challenge under TCA

DON'Ts:

- Adopt a city-wide ban on towers.
- Allow testimony to devolve into impacts of RF emissions, unless the proposed tower does not meet FCC standards for RF emissions.
- Deny a tower application based on RF emissions that comply with FCC standards.
- Skimp on analysis in the written decision.

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