

PRELIMINARY FEDERAL COURT RULING: TELECOMMUNICATIONS ACT PRE-EMPTS LOCAL ZONING

A recent U.S. District Court decision granted telecommunications provider Independent Wireless One (IWO) the temporary right to install cellular phone antennas on two existing silos in the Town of Charlotte.

Following a decision by the Charlotte Board of Adjustment (ZBA) to deny its application to install the antennas, IWO, acting under the Telecommunications Act of 1996 (TCA), filed successfully in federal court for a preliminary injunction ordering the Town to issue the permits. *Independent Wireless One... v. Town of Charlotte...*, U.S. Dist. Ct. for Vermont, No. 2-02-CV-261 (Jan. 14, 2003).

The facts of the case are as follows. IWO applied for two antennae to be installed with no increase in height and no structural changes in the silos. The ZBA found the proposals met all of the applicable general and specific standards for a conditional use permit. However, it denied the permits based on Section 9.7 of its bylaws because IWO had not presented adequate “evidence of need.” The ZBA said that Section 9.7 “was intended to minimize the proliferation of telecommunications facilities once adequate coverage has been provided within the Town.” Therefore, without convincing evidence of a need for added service, the new antennae were denied.

The Town admitted that IWO had presented credible evidence of a gap in its own coverage within the town. However, the Town noted that Verizon and Cellular One already existed in town, so IWO would merely provide redundant service. In addition, Charlotte said that IWO had not explained why it could not be served by “roaming” rather than by two new antennae. The Town concluded “adequate coverage already exists” in the form of IWO’s two competitors plus the possibility of “roaming.”

The Court began its analysis by noting “The TCA was intended to provide for a procompetitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment... [of telecommunication technology] by opening all telecommunications markets to competition.” Congress wanted to create a balance between national growth of the technology and local control of siting towers. In doing this, it put specific limitations on local zoning authority. Furthermore, the Court said, the standard of review is much more rigorous when reviewing TCA disputes.

IWO argued that, without the new antennae, it would suffer irreparable harm in the forms of loss of subscribers, loss of ability to compete, loss of good will and damage to its reputation. Charlotte countered that these were merely speculative and did not show irreparable harm. Citing prior telecommunication cases, the Court agreed with IWO that “every day [its] special permit is denied is a day Plaintiff loses against major competitors in today’s quickly advancing world of telecommunications services.” It noted that IWO’s inability to offer service... restricts its ability to attract and retain customers” and that reliance on “roaming,” with its dropped calls and incremental charges, would cause reputation damage. The Court also cited decisions that held that injunctive relief is appropriate where it is especially difficult to quantify the actual loss of sales.

IWO further argued that the denial of the antennae would have the effect of prohibiting it from providing wireless service in the area, as the gap in its Charlotte service runs along heavily used areas of town. The Court noted that gaps must be

evaluated not so much by actual size as by the number of customers affected, and characterized IWO's gaps in Charlotte as "significant" for the purposes of the TCA.

Charlotte argued that if *any* wireless provider has adequate coverage in town that shows there is no need for another provider to be given a permit to operate in the area. Under that argument, since Verizon and Cellular One had coverage with no significant gap, there was no need to issue a permit to IWO. However, the Court pointed out that the long-term effect of that interpretation would mean that competition would disappear and it "might have the effect of driving the industry toward a single carrier, as users switch to carriers having the most seamless coverage." That result is counter to the intent of TCA. IWO also argued that Charlotte had unreasonably discriminated against it, in violation of the TCA. The Court agreed, noting that the Town had denied the permits based on the assumption that there was already enough cell phone service in the area. The denial had nothing to do with the cumulative effect of more antennae but was based on the decision that there was enough service provided and that competitors could be excluded.

To summarize, this is a preliminary decision in a complex case. The TCA is being applied with a bias toward rapid progress in wireless communication. Even though the subject matter is local control of development, relatively little deference is being given to towns' zoning bylaws. Town officials and attorneys should beware!

- Libby Turner, VLCT Staff Attorney

(Editor's Note: Municipalities seeking further guidance on balancing local control of telecommunications facilities with the requirements of the Telecommunications Act of 1996 should consult the VLCT Municipal Law Center for model bylaw language and other resources. In general, the TCA allows municipalities to regulate the location of telecommunications facilities within their borders, but does not allow outright prohibition of such facilities.)

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