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DECEMBER 7, 2014

Legal Update: American Tower Corporation v. City of San Diego (2014): Further Guidance From The Ninth Circuit On The Regulation Of Data Towers In California

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The Ninth Circuit recently addressed cell phone tower issues in the matter of *American Tower Corporation v. City of San Diego* (2014) 763 F.3d 1035, affirming that a local government has a wide degree of discretion to regulate towers and other telecommunication facilities. This decision is consistent with past decisions on telecommunication infrastructure, as set forth in Miller Starr Regalia's article *Local Matter or Federal Case? The Network of Cell Tower Regulation in California*, by Arthur F. Coon and Sean Marciniak.

This most recent matter arose when American Tower Corporation (ATC) asked the City of San Diego to renew conditional use permits for three telecommunication towers it owned, where the permits had expired after a 10-year period set forth in their original agreements. The City denied the owner's request to renew the permits based on concerns about the size and aesthetics of the towers, finding they did not "comply to the maximum extent feasible with the City's Land Development Code." Essentially, the City wanted the applicant to consider design alternatives that would be less "visually intrusive." ATC filed suit alleging, in part, that this denial violated the Federal Telecommunications Act ("Act").

More specifically, ATC alleged: (1) the City's denial was not supported by substantial evidence; (2) the denial constituted unreasonable discrimination among providers of functionally equivalent services, as the City itself apparently operated its own towers that could be considered eyesores; and (3) the City's strict focus on aesthetics constituted an effective prohibition on wireless services.

The substantial evidence standard. The Act mandates that a state or local government's cell phone tower decision be "supported by substantial evidence contained in a written record." 47 USC, § 332(c)(7)(B)(iii). This standard is a very deferential one, and the inquiry requires a court to make this determination in the context of state *and* local law. Here, the City's local code provided that "major telecommunication facilities must be designed to be minimally invasive through the use of architecture, landscaping architecture, and siting solutions." Whereas ATC attempted to argue that the City mistakenly evaluated its permit application under the wrong standard—i.e., a standard applying to minor telecommunication facilities—the court held these claims mischaracterized the record, and that the City used the appropriate standard. The court then found for the City, noting that ATC "consistently refused to consider modifications that involved reduction in height or redesign of the towers. Based on this record, we find that the City's decision was authorized by the relevant regulations and was supported by a 'reasonable amount' of evidence in the record, i.e., more than a scintilla but not necessarily in preponderance." 763 F.3d at 1055. A city thus has a low hurdle to overcome in defending its decisions, and an applicant cannot expect to win without solid evidentiary underpinnings.

Discrimination claim. The Act provides that the regulation of personal wireless service facilities "shall not unreasonably discriminate among providers of functionally equivalent services." 47 USC, § 332(c)(7)(B)(i)(I). Those alleging discrimination must show they have been treated differently from other providers whose facilities are "similarly situated in terms of the structure, placement or cumulative impact of the facilities in question." 763 F.3d at 1055 [citations omitted]. In this instance, the owner attempted to argue that the City treated its operations differently than it treated the City's own operation of telecommunication facilities. The court was quick to point out that American Tower Corporation and the City are not "similarly situated." "In contrast to ATC's telecommunications operations, which are entirely commercial, the City's telecommunication operations are primarily public in nature," the court said, referring to facilities that supported police, fire, and other types of public communications. The court then pointed out that, even if the two were situated similarly, a city is permitted to discriminate in a reasonable manner. Accordingly, even if the City wanted to hold the owner to a higher visual standard, the City was free to take other factors into account when authorizing its own facilities, even if they were eyesores. *Id.* at 1055-1056. In a nutshell, the court appeared to hold that a city can operate less attractive towers where those towers support instrumental emergency services, and there is no double standard if that city demands more beautiful designs from a commercial provider.

Effective prohibition claims. Finally, the Act provides that a local government cannot regulate telecommunication facilities in a way that would "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 USC, § 332(c)(7)(B)(i)(II). A city violates this provision if it prevents a party from closing a "significant gap" in the party's own service coverage.

A two-pronged analysis governs the inquiry. A complaining party must show it has a significant gap in service coverage, and the party must show that the manner in which it will fill the gap is the least intrusive on the values of the local decisionmaker. 763 F.3d at 1056 [citations omitted]. It was assumed here that a significant gap existed, and the court focused on the feasibility prong. The court noted that the City denied the permit applications because the proposed towers were not "minimally invasive," and the owner had not borne its burden to show otherwise. "ATC essentially insisted that the City accept *ATC's* conclusion that the existing facilities were the 'least intrusive means," without offering a feasibility analysis of alternative designs or sites for *the City* to reach its own conclusion," the court said. *Id.* "In effect," the court held, "ATC would make the applicant—rather than the locality—the arbiter of feasibility and intrusiveness, gutting the 'least intrusive means,' standard with predictable, applicant friendly results." *Id*.

Summary and conclusion. The Ninth Circuit did not break new ground here in interpreting the Act, though the decision is instructive where a local government is upset about the aesthetics of a proposed tower or other facility. That is, where a city is not happy with the design of a proposed tower, this decision demonstrates the utility—if not outright necessity—of providing an analysis of alternatives to a proposed tower. That said, and though this decision does not address this issue, a city conceivably could reject the determination in an applicant's feasibility study if the city mustered its own evidence because a city only needs substantial evidence to support its decision.
