Wireless Facility Siting Under the Communications Act: An Update on Judicial Decisions Applying 47 U.S.C. § 332(c)(7)

— by James R. Hobson and Matthew K. Schettenhelm —

In the Telecommunications Act of 1996,[1] Congress declined to make the Federal Telecommunications Commission (FCC) a national zoning board for hearing wireless antenna siting disputes. Instead, it imposed a federal due process framework on local adjudications, so that personal wireless services could be deployed fairly and swiftly. Congress's choice, reflected in Section 332(c)(7) of the Act,[2] left a lot of work to the courts. In this article, we examine the courts' recent application of this important section and conclude that, by and large, the courts have balanced local and federal interests well. We also examine a recent petition to the FCC that threatens to undermine Congress's choice.

Section 332(c)(7) provides that "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," with the exception of four "limitations" contained in subparagraph (7)(b), discussed in turn below. A fifth clause in the subparagraph provides relief for aggrieved persons in "any court of competent jurisdiction" and provides that a person adversely affected by the "environmental effects" clause may petition the FCC for relief.

Unreasonable Discrimination

Courts have recognized that "discrimination among providers of functionally equivalent services is allowed" provided that it is "reasonable."[3] A provider bears the burden of demonstrating unreasonable discrimination, and must show that it has been "treated differently from other providers whose facilities are similarly situated in terms of the 'structure, placement, or cumulative impact' as the facilities in question."[4] One court has noted that a provider, to prove that it is similarly situated, must engage in a "systematic comparison of the sites in question."[5]

Local governments may discriminate on "traditional bases of zoning regulation" such as "preserving the character of the neighborhood and avoiding aesthetic blight" without running afoul of the statute.[6] This follows from the legislative history of the Act, which indicates that localities should have "flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently."[7] Applying this standard, courts have permitted local governments to treat providers differently based on aesthetic considerations.[8]

In fact, relatively few courts have concluded that a local government has unreasonably discriminated under the statute.[9] In one recent case, the U.S. Court of Appeals for the Seventh Circuit upheld a district court decision finding unreasonable discrimination where an already-existing "similarly situated" tower was "both larger in diameter and significantly taller than" a proposed tower.[10] Courts have also found unreasonable discrimination when local governments have denied the placement of similar equipment on a single pole. For example, a district court found unreasonable discrimination where there was no "substantial evidence in the record of any significant visual or aesthetic difference between Plaintiff's proposed antenna array and those of other, similarly situated providers already located on the [same] tower."[11] In another case in which a provider, Nextel, sought "to collocate its antennae on an existing tower that already had antennae from three different wireless service providers," the court could "discern no plausible reason why the [zoning board] approved the VoiceStream application and, approximately two months later, voted to deny a virtually identical application from Nextel."[12]

"Prohibit or Have the Effect of Prohibiting"

The circuit courts of appeals are widely split on the interpretation of the "prohibition" language in Section 332(c)(7)(B)(i)(II). The Fourth Circuit is the least likely to find a "prohibition" or "effective prohibition": the court would generally only do so if there were a city-wide, general ban on wireless services.[13] However, several circuits have held that a local government can run afoul of the "effective prohibition" clause if it prevents a wireless provider from closing a "significant gap" in service coverage. In deciding whether there is a "significant gap," the Second and Third Circuits have adopted what has been called the "one provider" rule: no "significant gap" exists if any "one provider" offers coverage in a given area.[14] However, the First and Ninth Circuits have rejected this approach, finding, instead, that an "effective prohibition" exists if "the *provider in question* is prevented from filling a significant gap *in its own* service network."[15] Courts have held that a "significant gap" does not exist simply because there are "dead spots" in areas that otherwise have coverage.[16]

After a wireless service provider has demonstrated that a gap exists, it must then make some showing as to the intrusiveness or necessity of its plan to close the gap. The Second, Third, and Ninth Circuits require a provider to show that "the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve."[17] Alternatively, the First and Seventh Circuits require

a showing that there are "no alternative sites which would solve the problem."[18] The provider's burden "is a heavy one."[19] The Eighth Circuit recently rejected a "prohibition" claim because the provider "did not adequately investigate all feasible alternative sites, pursuing only one site with any vigor."[20]

Courts have recently dealt with the question of how to read Section 332 in light of a similar section of the Communications Act, 47 U.S.C. § 253.[21] Section 253 also outlaws local requirements that "prohibit or have the effect of prohibiting" telecommunications services.[22] Until recently, Section 253 had been invoked chiefly in franchising and right-of-way disputes involving wireline providers. But because some courts had read Section 253 to enact a very broad preemption of local legal requirements that "may" prohibit the ability to provide service, wireless providers have recently mounted challenges to local zoning ordinances under that section, as well.[23] However, a recent Ninth Circuit decision may stem that tide: in *Sprint Telephony PCS v. County of San Diego*, an *en banc* panel concluded that "a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition."[24] The court found that this interpretation "harmonizes [its] interpretations of the identical relevant text in §§ 253(a) and 332(c)(7)(B)(i)(II)."[25] Applying that standard, the court had "no difficulty" concluding that the County's zoning ordinance did not violate the statute.[26]

"In Writing"

The circuits are also deeply divided on the "in writing" requirement under Section 332(c)(7)(B)(iii). Some courts have interpreted this to require local governments to explain the reasons for their decision and to link their conclusions to specific evidence in the written record.[27] These courts have found that anything short of this "places the burden on [the] Court to wade through the record below in order to determine the decision's reasoning and assess its evidentiary support."[28] At the other extreme, the U.S. Court of Appeals for the Fourth Circuit has held that merely placing the word "DENIED" on a zoning permit application is sufficient to satisfy the plain language of the "in writing" requirement.[29] The First, Sixth, and Ninth Circuits have settled on a middle ground, requiring local governments to "issue a written denial separate from the written record" which "contain[s] a sufficient explanation of the reasons for the...denial to allow a reviewing court to evaluate the evidence in the record supporting these reasons."[30] Local governments that have used less formal procedures have run afoul of this requirement.[31]

Courts have reached different conclusions regarding whether it is sufficient for a denial to appear within the minutes of a meeting.[32] One court has concluded that a formal resolution is a sufficient "separate writing" even if it is included within the minutes.[33] In a recent decision, a district court found that "the bare-bones form that was filled out by checkmarks entered by the Board provides so little insight into the Board's final decision that no one reviewing it, including the Court, is able to glean an understanding of the Board's reasoning in response to the evidence submitted."[34] The Sixth and Eleventh Circuits have held that, for purposes of Section 332(c)(7)(B)(v), a "final action" occurs when the government issues its written decision.[35]

"Substantial Evidence"

Most courts have recognized that local governments are entitled to significant deference under the "substantial evidence" standard in Section 332(c)(7)(B)(iii).[36] As one court recently put it, "Congress intended...to allow local zoning boards to continue to do what local zoning boards traditionally do best: make reasoned decisions regarding the appropriate use of privately-owned property for the public good."[37] Courts have ruled that the "'substantial evidence' standard of Section 332 is the traditional standard employed by the courts for review of agency action."[38] The standard "does not affect or encroach upon the substantive standards to be applied under established principles of state and local law."[39] As a result, a court must "take applicable state and local regulations as [it] find[s] them and evaluate the City decision's evidentiary support (or lack thereof) relative to those regulations."[40] Every court has agreed that "substantial evidence" means "less than a preponderance, but more than a scintilla of evidence;" that is, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[41]

The burden lies with a challenger to show that a decision is not supported by substantial evidence,[42] and zoning boards are entitled to deference in interpreting their own regulations and by-laws.[43] Unlike the issue of discrimination, this analysis focuses on the specific denial in question, and is not comparative based on other towers or sites that were approved.[44] A zoning board must strive to ensure the record contains sufficient

continued on page 16



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 continued from page 15

evidence to enable it to make a responsible decision,[45] but courts generally have not required expert testimony to support a finding of substantial evidence.[46] *Post-hoc* rationales cannot serve as substantial evidence.[47] Cases concluding that a decision is not supported by substantial evidence are relatively rare.[48]

Courts have recognized that concerns about aesthetics can serve as a proper ground for the denial of a permit under the substantial evidence standard.[49] However, local complaints about aesthetics must be rooted in concrete concerns. For example, courts have held that "unsubstantiated personal opinions" expressing "[g]eneralized concerns...about the aesthetic and visual impacts on the neighborhood" are, alone, insufficient to satisfy the substantial evidence standard.[50] Courts have found, however, that zoning boards retain discretion to rely on complaints "grounded in the specifics of the case," including "aesthetic objections raised by neighbors who know the local terrain and the sightlines of their own homes."[51] As the Eleventh Circuit put it, "[a]esthetic objections coupled with evidence of an adverse impact on property values or safety concerns can constitute substantial evidence."[52]

The courts have also found substantial evidence to support a denial where a proposed tower was incompatible with the character of a neighborhood, given the use of nearby properties under local zoning schemes.[53] The U.S. Court of Appeals for the Fifth Circuit concluded that substantial evidence supported a city's conclusion that a proposed tower would not comply with the city's set-back requirements.[54] Where a community code allowed for the consideration of "community need" in evaluating conditional use permit applications, the Ninth Circuit upheld a zoning board's decision regarding the "necessity" of the use, as supported by substantial evidence, despite the fact that it "was not a model of thoroughness or rigor."[55]

Section 332 bars local regulation based on "environmental effects of radio frequency [RF] emissions." This affects the substantial evidence analysis. As one court put it, "[D]irect or indirect concerns over the health effects of RF emissions," including concerns over property values, may not serve as substantial evidence to support the denial of an application.[56] However, we know of no bar to municipalities' reasonable steps to ensure compliance with preemptive federal emissions standards. Moreover, local governments may consider other safety concerns, provided that these are adequately supported.[57]

Action Within a Reasonable Time

Under Section 332(c)(7)(B)(ii), a governmental entity must act on a request for authorization "within a reasonable period of time after the request is duly filed." Congress enacted this provision to "stop local authorities from keeping wireless providers tied up in the hearing process through invocation of state procedures, moratoria, or gimmicks."[58] One court found that a local government violated this requirement based upon "repetitive requests regarding issues previous resolved . . . and its direction that [the applicant] go before the Planning Board three times to resolve" an issue.[59]

Other Issues

The courts have addressed other issues arising out of Section 332. The U.S. Supreme Court has held that, by including a judicial remedy in Section 332(c)(7), Congress precluded resort to civil rights remedies under 42 U.S.C. § 1983.[60] The Court ruled that "[e]nforcement of § 332(c)(7) through § 1983 would distort the scheme of judicial review and limited remedies created by § 332(c)(7)(B)(v)."[61] The Ninth Circuit later held that compensatory damages "are not an appropriate remedy for violations of § 332."[62] Courts have found, instead, that a proper remedy for a violation of the statute is "injunctive relief compelling the defendant to issue the requested permit."[63] At least one court has held that Section 332(c)(7) does not confer authority on local governments that is otherwise denied by state law.[64]

Petition for Declaratory Ruling

On July 11, 2008, CTIA – The Wireless Association® (CTIA) filed a "Petition for Declaratory Ruling" with the FCC, asking that it "clarify" Section 332(c)(7) and preempt certain zoning ordinances under Section 253(a). Among other things, the Petition asks the Commission: (1) to clarify what constitutes a "failure to act" under Section 332(c)(7)(B)(v) by establishing "shot clocks" for local action;[65] (2) to "deem granted" certain applications;[66] (3) to reject the "one provider" rule discussed above;[67] and (4) to preempt under Section 253(a) any ordinance that automatically requires a wireless carrier to seek a variance.[68] Since Congress plainly did not intend for the FCC to engage in a rulemaking or adjudicatory role with respect to Section 332(c)(7),[69] and because the Petition is marked by a number of other legal errors, various local governments have asked the Commission to dismiss or deny the Petition. At this writing, FCC action on the Petition remains pending.

Conclusion

In an early decision interpreting Section 332(c)(7), a court cautioned that "the statute's balance of local autonomy subject to federal limitations does not offer a single 'cookie cutter' solution for diverse local situations, and it imposes an unusual burden on the courts."[70] From our perspective as local government advocates, the courts have discharged that burden capably thus far, and the FCC need not (and, in fact, may not) interfere with the courts' work in the future.

Notes

1. P.L. No. 104-104, 110 Stat. 56 (1996).
2. 47 U.S.C. § 332(c)(7) (West 2008).
3. MetroPCS, Inc. v. City and County of San Francisco, 400 F. 3d 715, 727 (9th Cir. 2005).
4. *Id.*
5. MetroPCS Inc. v. City and County of San Francisco, No. C 02-3442 PJH, 2006 WL 1699580 at *14 (N.D. Cal. June 16, 2006).
6. 400 F. 3d at 727.
7. H.R. Conf. Rep. No. 104-458, at 208 (1996); *see* Omnipoint Commc'ns Enter. v. Zoning Hearing Bd. of Easttown Twp., 331 F. 3d 386, 395 (2d Cir. 2003); Michael Linet, Inc. v. Vill. of Wellington, 408 F. 3d 757, 762 (11th Cir. 2005).
8. Nextel Commc'ns v. City of Cambridge, 246 F. Supp. 2d 118, 125 (D. Mass. 2003).
9. *See, e.g.*, Sprint Spectrum v. Bd. of Zoning App. of Town of Brookhaven, 244 F. Supp. 2d 108, 117 (E.D.N.Y. 2003).
10. Ogden Fire Co. No. 1 v. Upper Chichester

Twp., 504 F. 3d 370, 394 (7th Cir. 2007). 11. Nextel West v. Town of Edgewood, 479 F. Supp. 2d 1219, 1232 (D.N.M. 2006).
12. Nextel Partners, Inc. v. Town of Amherst, 251 F. Supp. 2d 1187, 1195 (W.D.N.Y. 2003).
13. AT&T Wireless, PCS, Inc. v. City Council of Virginia Beach, 155 F. 3d 423, 428-29 (4th Cir. 1998). Since *Virginia Beach*, the Fourth Circuit has qualified itself somewhat. USCOC of Virginia RSA #3, Inc. v. Montgomery County Bd. of Supervisors, 343 F. 3d 262, 268 (4th Cir. 2003).
14. Omnipoint Commc'ns v. Zoning Hearing Bd. of Easttown Twp., 331 F. 3d 386, 398 (3d Cir. 2003); Nextel West Corp. v. Unity Twp., 282 F. 3d 257, 265 (3d Cir. 2002); APT Pittsburgh Ltd. P'ship v. Penn Twp., Butler County, 196 F. 3d 469, 478-80 (3d Cir. 1999); Sprint Spectrum v. Willoth, 176 F. 3d 630, 643 (2d Cir. 1999). *See also* Cincinnati Bell v. City of Middletown, 2008 WL 1732967 at *9 (S.D. Ohio 2008), Sprint Spectrum v. Zoning Hearing Bd., 2007 WL 1101270 at *9 (E.D. Pa. 2007). However, one district court in the Second Circuit has determined that *Willoth* does not endorse the "one provider" rule. Omnipoint Commc'ns v. Vill. of Tarrytown Planning Bd., 302 F. Supp. 2d 205, 217 (S.D.N.Y. 2004).
15. MetroPCS, Inc. v. City and County of San Francisco, 400 F. 3d 715, 732 (9th Cir. 2005); Second Generation Prop., L.P. v. Town of Pelham, 313 F. 3d 620, 631-33 (1st Cir. 2002). Though the Tenth Circuit has not ruled on the question, a district court in the Circuit adopted this view. T-Mobile Central v. Unified Gov't of Wyandotte County, 528 F. Supp. 2d 1128, 1155 (D. Kan. 2007).
16. *Second Generation Prop.*, 313 F. 3d at 631; Voicestream PCS I, LLC v. City of Hillsboro, 301 F. Supp. 2d 1251, 1261 (D. Or. 2004)
17. *Penn. Twp., Butler County*, 196 F. 3d at 480; *Omnipoint*, 331 F. 3d at 398; *Unity Twp.*, 282 F. 3d at 266; *Willoth*, 176 F. 3d at 643; *MetroPCS, Inc.*, 400 F. 3d at 735; *see also* Nextel West Corp. v. Town of Edgewood, 479 F. Supp. 2d 1219, 1238 (D.N.M. 2006).
18. *Second Generation Prop.*, 313 F. 3d at 635; Voicestream Minneapolis v. St. Croix County, 342 F.3d 818, 834-35 (7th Cir. 2003). *See also*, Helcher v. Dearborn County, 500 F. Supp. 2d 1100, 1118 (S.D. Ind. 2007); USCOC of New Hampshire RSA #2, Inc. v. Town of Bow, 493 F. Supp. 2d 199, 213 (D.N.H. 2007); Cellco Partnership v. Grafton, 336 F. Supp. 2d 71, 83 (D. Mass. 2004). *Compare* MetroPCS, Inc. v. City and County of San Francisco, 400 F. 3d 715, 734 (9th Cir. 2005).
19. Amherst v. Omnipoint Commc'ns Enters., Inc., 173 F. 3d 9, 13 (1st Cir. 1999).
20. USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment of the City of Des Moines, 465 F. 3d 817, 825 (8th Cir. 2006). *See also*, *Voicestream Minneapolis*, 342 F. 3d at 835.
21. Verizon Wireless LLC v. City of Rio Rancho, 476 F. Supp. 2d 1235 (D.N.M. 2007); Sprint Telephony, PCS v. County of San Diego, 490 F. 3d 700 (9th Cir. 2007)
22. 47 U.S.C. § 253(a).
23. *Sprint Telephony, PCS*, 490 F. 3d at 712; *see also, Verizon Wireless LLC*, 476 F. Supp. 2d at 1337.
24. Nos. 05-56076, 05-56435, 2008 WL 4166657 at *5 (9th Cir. Sept. 11, 2008).
25. *Id.* at *6.
26. *Id.* at *7.
27. Omnipoint Commc'ns v. v. Planning & Zoning Comm'n, 83 F. Supp. 2d 306, 309 (D. Conn. 2000).
28. *Id.*
29. AT&T Wireless PCS, Inc. v. City Council, 155 F. 3d 423, 429 (4th Cir. 1998). *See also*, USCOC of Greater Missouri, LLC v. County of Franklin, No. 4:07CV1426 JCH, 2008 WL 2079110 at *5 (E.D. Mo. May 15, 2008); Sprint Spectrum L.P. v. County of Platte, No. 06-6049-CV-SJ-DW, 2007 WL 2994362 at *3 (W.D. Mo. Oct. 11, 2007).
30. S.W. Bell Mobile Sys., Inc. v. Todd, 244 F. 3d 51, 60 (1st Cir. 2001); New Par v. City of Saginaw, 301 F. 3d 390, 395 (6th Cir. 2002); MetroPCS, Inc. v. City and County of San Francisco, 400 F. 3d 715, 722 (9th Cir. 2005). *See also* Cincinnati Bell v. Middletown, No. 1:07-cv-022, 2008 WL 1732967 at *5 (S.D. Ohio Apr. 10, 2008).
31. *See, e.g.*, Tenn. ex. rel. Wireless Income Prop., LLC v. City of Chattanooga, 403 F. 3d 392, 398-99 (6th Cir. 2005).
32. Helcher v. Dearborn County, 500 F. Supp. 2d 1100, 1113 (S.D. Ind. 2007); USOC of Greater Iowa, Inc. v. City of Bellevue, Nebraska, 279 F. Supp. 2d 1080, 1085 (D. Neb. 2003).
33. Omnipoint Holdings, Inc. v. City of Southfield, 355 F. 3d 601, 606 (6th Cir. 2004).
34. Sprint Spectrum, LP v. City of Jeffersonville Bd. of Zoning App., No. 4:05-cv-154-SEB WGH, 2008 WL 833494 (S.D. Ind. Mar. 27, 2008).
35. *See* USCOC of Greater Mo., LLC v. Ferguson, No. 4:07-CV-1489 (JCH), 2008 WL 2065033 (E.D. Mo. May 14, 2008); *Omnipoint*, 355 F. 3d at 607.
36. USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment of the City of Des Moines, 465 F. 3d 817, 821 (8th Cir. 2006).
37. *Id.* at 822.
38. U.S. Cellular Corp. v. Bd. of Adjustment of City of Seminole, 180 Fed.Appx. 791, 794 (10th Cir. 2006).
39. *Id.*
40. MetroPCS, Inc. v. City and County of San Francisco, 400 F. 3d 715, 724 (9th Cir. 2005).
41. *Id.* at 725.
42. Michael Linet, Inc. v. Vill. of Wellington, 408 F. 3d 757, 762 (11th Cir. 2005); Amer. Tower LP v. City of Huntsville, 295 F. 3d 1203, 1207 (11th Cir. 2002); U.S. Cellular Corp. v. Wichita Falls, 364 F. 3d 250, 256 (5th Cir. 2004); Voicestream Minneapolis v. St. Croix County, 342 F. 3d 818, 830 (7th Cir. 2003).
43. Nextel Commc'ns of the Mid-Atlantic, Inc. v. Town of Brookline, 520 F. Supp. 2d 238, 250 (D. Mass. 2007); U.S. Cellular Co. v. City of Broken Arrow, 340 F. 3d 1122, 1136 (10th Cir. 2003).
44. USCOC of Virginia RSA #3 v. Montgomery County Bd. of Supervisors, 343 F. 3d 262, 270 (4th Cir. 2003).
45. Primeco Personal Commc'ns, LP v. City of Mequon, 352 F. 3d 1147, 1151 (7th Cir. 2003).
46. U.S. Cellular Corp. v. Bd. of Adjustment of City of Seminole, 180 Fed.Appx. 791, 804 (10th Cir. 2006); Omnipoint Commc'ns v. White Plains, 430 F. 3d 529, 533-34 (2d Cir. 2005); USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment of the City of Des Moines, 465 F. 3d 817, 823 (8th Cir. 2006).
47. USOC of Greater Iowa, Inc. v. City of Bellevue, Nebraska, 279 F. Supp. 2d 1080, 1087 (D. Neb. 2003).
48. *See, e.g.*, Cincinnati Bell Wireless LLC v. City of Middletown, No. 1:07-cv-022, 2008 WL 1732967 (S.D. Ohio Apr. 10, 2008); Cal. RSA No.4 v. Madera County, 332 F. Supp. 2d 1291 (E.D. Cal. 2003).
49. *Omnipoint Commc'ns*, 430 F. 3d at 533-34; Preferred Sites, LLC v. Troup County, 296 F. 3d 1210, 1219-20 (11th Cir. 2002); Michael Linet, Inc. v. Vill. of Wellington, 408 F.3d 757, 761-62 (11th Cir. 2005); Voicestream Minneapolis v. St. Croix County, 342 F. 3d 818, 830 (7th Cir. 2003). *See also* Red Sky Commc'n, LLC v. Lenexa, No. 07-2069-DJW, 2008 WL 559696 at *18 (D. Kan. Feb. 28, 2008); Omnipoint Commc'ns v. Nashua, Civil No. 07-cv-46-PB, 2008 WL 345855 at *6 (D.N.H. Feb. 06, 2008); Cellco P'ship v. Town of Grafton, Ma., 336 F. Supp.2d 71, 80 (D. Mass. 2004).
50. Omnipoint Corp. v. Zoning Hearing Bd., 20 F. Supp. 2d 875, 880 (E.D. Pa. 1998); *PrimeCo Personal Commc'ns*, 352 F. 3d at 1150; *Troup County*, 296 F. 3d at 1219-20; Cal. RSA No.4 v. Madera County, 332 F. Supp. 2d 1291, 1308 (E.D. Cal. 2003).
51. *Omnipoint Commc'ns*, 430 F. 3d at 534. *See also Voicestream Minneapolis*, 342 F. 3d at 832; Southeast Towers, LLC v. Pickens County, No. 2:06-CV-0172-RWS, 2008 WL 2064649 at *8 (N.D. Ga. May 13, 2008); Voicestream PCS I, LLC v. City of Hillsboro, 301 F. Supp. 2d 1251, 1258 (D. Or. 2004); Nextel Commc'ns v. Cambridge, 246 F. Supp. 2d 118, 123 (D. Mass. 2003); Sprint Spectrum v. Bd. of Zoning Appeals of Town of Brookhaven, 244 F. Supp. 2d 108, 114 (E.D.N.Y. 2003).
52. *Michael Linet*, 408 F. 3d at 761.
53. *Red Sky Commc'n, LLC*, 2008 WL 559696 at *18; USCOC of Va., RSA #3 v. Montgomery County Bd. of Supervisors, 343 F. 3d 262, 272 (4th Cir. 2003).
54. U.S. Cellular Corp. v. Wichita Falls, 364 F. 3d 250, 256-57 (5th Cir. 2004).
55. MetroPCS, Inc. v. City and County of San Francisco, 400 F. 3d 715, 725-26 (9th Cir. 2005).
56. AT&T Wireless Servs. of Cal. LLC v. Carlsbad, 308 F. Supp. 2d 1148, 1159 (S.D. Cal. 2003). *Compare MetroPCS, Inc.*, 400 F. 3d at 736-37. *See also New York SMSA Ltd. P'ship v. Town of Clarkstown*, 99 F. Supp.2d 381

continued on page 37

warrantless search of his house. The U.S. Court of Appeals for the Seventh Circuit disagreed. Finding it was a "close case," the court nonetheless held that, because of Lawicki's long-term and continuing residence in Ryerson's home, she had actual authority to consent to the search, and the police had acted reasonably in believing that she lived there. Although a third party generally could not consent to a warrantless search of another's home, there was an exception when the government could show, by a preponderance of evidence, that the other party "possessed common authority over, or other sufficient relationship to, the premises or effects sought to be inspected." Here, the court held there was enough of a connection between Lawicki and the house. Although Ryerson was the owner of the house, Lawicki had lived with him in the house for a "significant period" (ten months) immediately prior to the search. Lawicki had not "abandoned" the premises and remained connected the home through her co-ownership (with Ryerson) of a business on the premises (all of the company records remained in the house). In addition to actual authority, the second search (when the police found the gun) was lawful on the basis of apparent authority. Ryerson's agent—the neighbor—willingly allowed the police and Lawicki to enter, and Ryerson's note identified Lawicki as his girlfriend who lived on the premises, which suggested that she still had a right of access to the house. *U.S. v. Ryerson*, No. 07-1654, 2008 WL 4248193 (7th Cir. Sept. 18, 2008). ML

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DISTRICT OF COLUMBIA V. HELLER *continued from page 9*

Well-regulated Militias, and Criminal Street Gangs, Chapman University School of Law, Legal Studies Research Paper Series, Paper No. 08-302 (copy available at: http://ssrn.com/abstract=1245402).
33. McDonald, et al. v. City of Chicago, et al. (District docket 08-3645).
34. Robert Channick, *Morton Grove repeals 27-year-old gun ban*, CHICAGO TRIBUNE, July 28, 2008. The ordinance had previously been upheld as a valid exercise of municipal police power, with the court finding that the Second Amendment had not been incorporated into the Fourteenth Amendment and, therefore, was inapplicable to Morton Grove. Quilici v. Village of Morton Grove, 532 F. Supp. 1169 (N.D. Ill.1981), *aff'd*, Quilici v. Village of Morton Grove, 695 F. 2d 261 (7th Cir. 1982). The Supreme Court declined to hear the appeal.
35. Press Release, District of Columbia, *Mayor Fenty, Council Unveil Firearms Legislation and Regulations* (July 14, 2008).
36. Heller v. District of Columbia, District Court Docket 08-1289. See David C. Lipscomb, *Heller, others challenge semi-automatic ban*, WASHINGTON TIMES, July 29, 2008.
37. H.R. 6691, 110th Cong. § 2(5), (6), and (7) (2008).
38. H.R. 6842, 110th Cong. (2008).
39. *Id.* at § 2, 4, 7 and 10.
40. Press Release, District of Columbia, *Mayor Fenty, Council Announce New Emergency Legislation to Amend the District's Gun Law* (Sept. 15, 2008).
41. Glenn H. Reynolds & Brannon P. Denning, Heller's *Future in the Lower Courts*, 102 NW. U. L. REV. COLLOQUY 406 (July 17, 2008).
42. 128 S.Ct. 2783, 2799, 2816 (2008).
43. *Id.* at 2816-17.
44. *Id.* at 2813 (emphasis added).
45. *Id.* at 2814.
46. *Id.* at 2814-17.
47. *Id.* at 2821.
48. *Id.* at 2817 n.27.
49. *Id.* at 2821.
50. Pending 9th Cir. (07-15763); earlier appeal at 319 F. 3d 1185 (9th Cir. 2003); order denying petition for *en banc* review, 364 F. 3d 1025 (9th Cir. 2004).
51. 319 F. 3d at 1192-93. ML

WIRELESS FACILITY SITING *continued from page 17*

(S.D.N.Y. 2000); Sprint Spectrum v. Mills, 283 F. 3d 404 (2d Cir. 2002).
57. USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment of the City of Des Moines, 465 F. 3d 817, 823 (8th Cir. 2006); USCOC of N.H. RSA #2, Inc. v. City of Franklin, 413 F. Supp. 2d 21, 31 (D.N.H. 2006).
58. Masterpage Commc'ns v. Town of Olive, 418 F. Supp. 2d 66, 77 (N.D.N.Y. 2005).
59. *Id.* at 81. *But see*, USCOC of Greater Missouri, LLC v. City of Ferguson, Mo., No. 4:07-CV-1489(JCH), 2007 WL 4218978, *7 (E.D. Mo. Nov. 29, 2007).
60. Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005).
61. *Id.* at 127.
62. Kay v. Ranchos Palos Verdes, 504 F. 3d 803, 815 (9th Cir. 2007).
63. Tennessee ex rel. Wireless Income Prop., LLC v. City of Chattanooga, 403 F. 3d 392, 399 (6th Cir. 2005) (citing cases).
64. Sprint PCS Assets, LLC v. City of La Canada Flintridge, 448 F. 3d 1067, 1071 (9th Cir. 2006).
65. Petition at 17-25.
66. *Id.* at 27.
67. *Id.* at 32.
68. *Id.* at 36.
69. H.R. Report No. 104-458, at 208.
70. Amherst v. Omnipoint Commc'ns Enters., Inc., 173 F. 3d 9, 17 (1st Cir. 1999). ML