What Once Was Old is New Again: Recent Developments in Judicial Review of Land Use Regulation of Cellular Telecommunications Facilities

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I. Introduction to the Telecommunications Act of 1996

THE TELECOMMUNICATIONS ACT OF 1996 ("TCA") ENABLES, but limits, local zoning authority for wireless facilities. The TCA provides: "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."[1] However, the TCA limits the powers of local zoning authorities by providing that: (1) no regulation can unreasonably discriminate among providers or prohibit or have the effect of prohibiting the provision of personal wireless services; (2) a state or local government must act within a reasonable period of time after a request has been filed; (3) any decision of a state or local government to deny a request shall be in writing and supported by substantial evidence contained in a written record; (4) no state or local government can regulate personal wireless service facilities on the basis of environmental effects of radio frequency emissions to the extent that such facilities comply with the Federal Communication Commission's ("FCC") regulations; and (5) any person adversely affected by any final act or failure to act by a state or local government may, within thirty (30) days, commence a court action.[2]

This article will first address recent court decisions and the court's analysis of what constitutes a permit or application denial as an effective prohibition. The second section will look at different circuits' interpretation of the written requirement of the TCA leading up to the recent

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1. Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(A) (2012).
2. *Id.* § 332(c)(7)(B)(i)-(v).

Supreme Court decision that resolved the circuit split. In section three, local voting requirements are analyzed in light of TCA preemption and effective prohibition. The final section of this article introduces the new struggle courts and cities are facing in their attempts to interpret and implement the newly enacted Middle Class Tax Relief and Job Creation Act of 2012 which further limits local governmental authority over wireless facilities and the FCC order that provides additional guidance on the review of an "eligible facilities request."

II. Effective Prohibition: State or Local Government Regulation of the Placement, Construction, and Modification of Personal Wireless Service Facilities Shall Not Prohibit or Have the Effect of Prohibiting the Provision of Personal Wireless Service

"When a carrier claims an individual denial [of a permit] is an effective prohibition, virtually all circuits require courts to (1) find a 'significant gap' in coverage exists in an area and (2) consider whether alternatives to the carrier's proposed solution to that gap mean that there is no effective prohibition."[3]

Over the past year, the courts in several federal circuits faced questions about effective prohibitions relating to issues both new and old. A district court in the Third Circuit analyzed the feasibility of newer technology in Distributed Antenna Systems ("DAS").[4] The First Circuit Court of Appeals dealt with coverage gaps issues stemming from the May 2013 merger of MetroPCS and T-Mobile.[5] Finally, a district court in the Second Circuit addressed the placement of wireless communication facilities on a church listed in the New York State and National Register of Historic Places in the historic district of the Village of Southampton, New York.[6]

In *Sprint Spectrum L.P. v. Zoning Board of Adjustment of the Borough of Paramus, New Jersey*,[7] the court held that the Zoning Board of Adjustment's zoning denial constitutes an effective prohibition of wireless

3. New Cingular Wireless PCS, LLC v. City of Manchester, No. 11-cv-334, 2014 WL 799327, at *10 (D.N.H. Feb. 28, 2014) (internal quotations and citations omitted).
4. *See*, *e.g.*, Sprint Spectrum L.P. v. Zoning Bd. of Adjustment of the Borough of Paramus, N.J., Civ. No. 09-04940, 2014 WL 1883589 (D.N.J. May 12, 2014).
5. *See* Green Mountain Realty Corp. v. Leonard, 750 F.3d 30 (1st Cir. 2014).
6. *See* Metro PCS New York, L.L.C. v. Inc. Vill. of Southampton, No. 26595/12, 2013 WL 6231411 (N.Y.Sup.) (N.Y. Sup. Ct. Oct. 25, 2013).
7. *Sprint Spectrum L.P.*, Civ. No. 09-04940, 2014 WL 1883589 (D.N.J. May 12, 2014).

service.[8] The court had to decide whether Sprint "adequately considered technological alternatives to the monopole—*i.e.* the feasibility of a DAS as a less intrusive alternative."[9] "A monopole concentrates all wireless antennas onto a single tower, as the name suggests; a DAS, however, 'distributes' those antennas across utility poles and other existing structures throughout the coverage area"[10] The *Sprint Spectrum* court decided that DAS is "not a feasible alternative because it will not offer comparable wireless service when measured against the coverage that can be provided by the proposed macro facility. A DAS has significant reliability concerns associated with its deployment on utility poles, its small coverage areas per node, and its vulnerability to disruption."[11]

The First Circuit in *Green Mountain Realty Corp. v. Leonard*[12] analyzed whether the City of Milton's denial of a permit to construct a wireless cell phone tower was an effective prohibition from the context of a merger of MetroPCS and T-Mobile. The district court had determined that the merger eliminated MetroPCS's coverage gaps,[13] which was the motivating factor for the tower proposal and a key issue in the case.[14] "Specifically, the court found that MetroPCS no longer has a significant gap in its coverage because all of its customers are slated to be taken off its network and folded into T-Mobile's by the end of 2015."[15] However, the First Circuit noted that the district court "did not consider the changed circumstances from the perspective of T-Mobile US. From the record, it appears that the district court felt that once it determined MetroPCS's significant gap was no longer in play, it had no need to inquire further."[16] This error does not require reversal by itself, but the First Circuit looked at whether there was an effective prohibition of T-Mobile US from providing wireless service. "The district court found—and the parties do not contest—that there remains a significant gap in T-Mobile US's service in the [particular coverage area at issue] in spite of the merger."[17] Further, the City

8. *Id.* at *15.
9. *Id.* (internal quotations omitted).
10. *Id.* at *3.
11. *Id.* at *15.
12. *Green Mountain Realty Corp.*, 750 F.3d 30.
13. *Id.* at 37.
14. *Id.* at 38. The First Circuit has established that local zoning decisions which "prevent the closing of significant gaps in the availability of wireless services" violate the TCA. *Id.* (citing Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals, 297 F.3d 14, 19 (1st Cir. 2002)).
15. *Id.* at 39.
16. *Id.*
17. *Id.* at 40.

never challenged findings that the site is the "only feasible location on which to construct a cell phone tower to fill in T-Mobile US's significant coverage gap."[18] Thus, the First Circuit reversed the district court's grant of summary judgment for the City of Milton and remanded this case for further review.[19]

Finally, over the past year, courts have faced decisions involving the placement of wireless communication facilities on or near historical properties. In *Metro PCS New York, LLC v. Incorporated Village of Southampton*,[20] MetroPCS initially applied for a certificate of appropriateness to construct and operate a cell phone tower in a church steeple located in a historic district. After four public hearings, the application was dismissed without prejudice by the Incorporated Village of Southampton Board of Historic Preservation & Architectural Review ("Board").[21] After submitting an alternative design to the New York State Office of Parks, Recreation and Historic Preservation ("NYSHPO"), which included reducing the number and lowering the height of the antennas, it was "purportedly found by NYSHPO to have no adverse effect."[22] MetroPCS resubmitted an application to the Board that set forth the purpose or reason for the proposed alteration as "a voluntary elective alteration to the church exterior."[23] The Board found that the proposed alteration was not "appropriate" because the impact of the project as represented on the application was viewed in the "context of one large interconnected structure."[24] The Board reasoned that the impact of the application should be measured more narrowly, limiting the appropriate basis to the steeple itself because it is the "architectural centerpiece of the sanctuary."[25] The Board also expressed "significant reservations" with respect to the par-

18. *Id.*

19. In a later proceeding, the district court determined that the tower height requested was "necessary to remedy the effective prohibition of wireless service" and set a timeline to submit revised plans and receive permit approval. Green Mountain Realty Corps. v. Leonard, 2014 U.S. Dist. LEXIS 124323 (D. Mass. Aug. 29, 2014).

20. *Vill. of S. Hampton*, No. 26595/12, 2013 WL 6231411 (N.Y.Sup.) (N.Y. Sup. Ct. Oct. 25, 2013).

21. *Id.* at *1. A certificate of appropriateness should adequately describe installation of wireless antennas in church bell towers as either "reconstruction or alteration." *Id.* "The Board noted that due to the landmark status of the church building and steeple and their location within the Village's historic district, approval of the Board of a certificate of appropriateness was a condition precedent to the issuance of a building permit for the installation of the proposed facilities." *Id.* at *3.

22. *Id.* at *1.

23. *Id.* at *3.

24. *Id.*

25. *Id.* at *3.

ties' ability—both administratively and realistically—to properly restore the steeple upon termination of their lease with the Church.[26]

MetroPCS argued that "the Board's interpretation of the Village Code had the effect of prohibiting the installation of wireless communications facilities as there are no determinate circumstances in which it would permit such an installation in the Church's steeple."[27] Further, MetroPCS asserted that the Board violated the TCA by "denying the least intrusive telecommunications facility needed so as to remedy the coverage gap" because the proposed facility would be "entirely concealed within the steeple and there will be no perceptible impact to the surrounding area."[28]

In its October 2013 decision, the court found that there were two reasons "the Board's determination did not constitute an invalid prohibition against the provision of wireless services within the Village."[29] First, the Board adequately demonstrated that there would be a large aesthetic impact because "the proposed project involves the removal of historic materials that do not require replacement, contrary to federal and local guidelines for preservation, for the indeterminate period of the lease term with no assurance of their being properly preserved and then successfully restored at the end of the lease term."[30] Second, MetroPCS did not demonstrate that "the church site was more feasible than other options, instead presenting the agreement with the Church as a completed deal and dismissing alternative sites such as the Village Hall, currently containing the antennas of other wireless carriers, as probably being unfeasible."[31]

Over the past year, plaintiffs continue to challenge zoning decisions on the grounds that an application denial is an effective prohibition on wireless services. As in the past, courts have applied a fact-based approach to determine whether there is a 'significant gap' in coverage and whether there are alternative solutions to fill that gap.

26. *Id.* at *4.
27. *Id.* at *8.
28. *Id.*
29. *Id.* at *9.
30. *Id.* (internal citation omitted).
31. *Id.* (internal citation omitted).

III. Written Decision: Any Decision by a State or Local Government to Deny a Request to Place, Construct, or Modify a Personal Wireless Service Facility Shall Be In Writing and Supported by Substantial Evidence Contained in a Written Record

Leading up to a January 2015 Supreme Court decision, circuit courts grappled with the requirement that a local board decision must be in writing. A majority of Circuits to address this issue, including the First, Sixth, and Ninth Circuits,[32] have previously interpreted the TCA to require that the denial of a wireless communication facility application by a local board "(1) be separate from the written record; (2) describe the reasons for the denial; and (3) contain a sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record that supports those reasons."[33] These same courts "conclude that something more than a bare written statement of denial is necessary, because judicial review contemplated by the TCA is frustrated if a reviewing court has no means to ascertain the rationale behind the decision of a local zoning board."[34]

Over 15 years ago, the Fourth Circuit took a different approach.[35] In *AT&T Wireless PCS*, *Inc. v. City Council of Virginia Beach*, the court held "that the writing requirement was satisfied by a two-page summary of the minutes of a city council hearing . . . along with a letter describing the application and stamped with the word 'DENIED' and the date of the decision."[36] A year later, the Fourth Circuit found that "the secretary [of the city council] writing 'Denied' on the first page of AT&T's application, in the stamped form for approval or denial of this and similar requests, fulfills the 'in writing' requirement" of the TCA.[37] This past year, two more Circuits adopted this minority view first articulated by the Fourth Circuit.

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32. *See* Sw. Bell Mobile Sys., Inc. v. Todd, 244 F.3d 51, 59-60 (1st Cir. 2001); New Par. v. City of Saginaw, 301 F.3d 390, 395-96 (6th Cir. 2002); MetroPCS, Inc. v. City & Cnty., 400 F.3d 715, 722 (9th Cir. 2005).

33. Smith Commc'ns, LLC v. Washington Cnty., Ark., Civ. No. 13-5152, 2014 WL 2450067, at * 5 (W.D. Ark. June 2, 2014) (internal quotations omitted).

34. *Id.* (internal quotations and citations omitted).

35. *See* AT&T Wireless PCS, Inc. v. City Council of Va. Beach, 155 F.3d 423, 425 (4th Cir. 1998).

36. T-Mobile S., LLC. v. City of Milton, 728 F.3d 1274, 1283 (11th Cir. 2013) (discussing the Fourth Circuit's holding in *Virginia Beach*, 155 F.3d 423.).

37. AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment, 172 F.3d 307, 312 (4th Cir. 1999).

In 2013, the Eleventh Circuit Court of Appeals held that the "in writing" requirement does not require a decision be on a separate writing. In *T-Mobile South, LLC v. City of Milton, Georgia*,[38] the court stated that "[i]t seems as if it would be a simple matter to determine whether a local government's decision to deny a cell tower construction permit is 'in writing.' "[39] But "[a]s it turns out, however, those two words as they appear in the statute have been subject to some strikingly different interpretations by other courts of appeals, which are echoed in the parties' opposing positions in this case."[40] The Eleventh Circuit disagreed with T-Mobile's contention that the written requirement of the TCA "can be satisfied only if the [City's] decision is announced or reflected in a written document that contains a statement of reasons and that is separate from any hearing transcript or minutes of a meeting or hearing."[41] On the contrary, the court concluded:

> T-Mobile cannot contend that the letters, transcript, and minutes are not in writing. Each one is. Nor can it convincingly contend that when considered collectively those documents fail to adequately convey the City's decisions on the applications and the reasons for those decisions.[42]

The court noted that the statute merely requires that the denial decision "be in writing and be supported by substantial evidence in a written record."[43] As support, the Eleventh Circuit pointed to the Fourth Circuit's *Virginia Beach*[44] decision, and in differentiating it and the Fourth Circuit's holding from those Circuits that have held otherwise, the Eleventh Circuit stated:

> In interpreting what the words "in writing" mean in § 332(c)(7)(B)(iii), we are reluctant to import into those words, as some of our sister circuits have, "more pragmatic policy views" than the words themselves bring along, or to take a more "pragmatic, policy-based approach" than the plain meaning of those words taken. We are interpreting a statute, not designing one.[45]

The *City of Milton* court determined it sufficient for the grounds or reasons or explanations of denial to be given to the applicant in different written documents. When deciding whether the decision for denial

38. *City of Milton*, 728 F.3d 1274.
39. *Id.* at 1277.
40. *Id.*
41. *Id.* at 1282.
42. *Id.*
43. *Id.* at 1283.
44. *Virginia Beach*, 155 F.3d 423.
45. *City of Milton*, 728 F.3d 1274, 1284 (internal citations omitted).

is "in writing," the court held that all written documents should be "considered collectively."[46]

In an August 2014 decision, the Eighth Circuit joined the Fourth and Eleventh Circuits in their interpretation of the writing requirement of the TCA, finding that "[n]owhere does the statutory text require that the denial and the 'written record' be separate writings."[47] In *NE Colorado Cellular, Inc. v. City of North Platte, Nebraska*,[48] the Eighth Circuit agreed with the district court that the City of North Platte satisfied the "in writing" requirement because its motion for denial was recorded in the City's meeting minutes which contain not only the action taken, but also an explanation of why the application was denied.[49] The court confirmed that "the City Council passed and memorialized a formal resolution. The TCA requires no more than this."[50]

The Circuits throughout this last year have remained divided on what constitutes a "written decision" by local zoning commissions. The Eighth and Eleventh Circuits have adopted a minority view that the "in writing" requirement is satisfied even if the zoning commission's decision is not on a separate writing.

In a recent development, the Supreme Court decided *T-Mobile South, LLC v. City of Roswell*, reversing a 2013 Eleventh Circuit decision.[51] In *City of Roswell*, the city denied an application for a cellular tower and argued that its denial satisfied the "in writing" requirement, as it was "reduced in writing in numerous forms, including the denial letter, hearing minutes, and hearing transcript."[52] T-Mobile contended that the district court "adopted the correct test . . . and the City's brief, three-sentence letter notifying T-Mobile of the denial of its permit application did not suffice under that test."[53] The minutes of the meeting were not published until 26 days after the letter denying the application was sent to T-Mobile. In reversing the Eleventh Circuit, the Supreme Court resolved issues the circuits had been unable to resolve. First it confirmed that the TCA requires localities to "provide reasons when they deny applications to build cell phone towers."[54] Second, the

46. *Id.* at 1285.
47. NE Colo. Cellular, Inc. v. City of N. Platte, Neb., No. 13-3190, 2014 WL 4116809, at *6 (8th Cir. Aug. 22, 2014).
48. *Id.*
49. *Id.* at *2, *6.
50. *Id.* at *6.
51. 190 L. Ed. 2d 679 (2015).
52. 731 F.3d 1213, 1218 (11th Cir. 2013).
53. *Id.*
54. 190 L. Ed. 2d at 688.

reasons need not "appear in the same writing that conveys the locality's denial of an application[55] as long as the other writing is "issued essentially contemporaneously with the denial."[56]

IV. Voter Referendum: A City's Requirement of Voter Approval to Decide Whether to Permit Construction of a Telecommunications Antenna on City-Owned Property

Late in 2013, the Ninth Circuit addressed whether the TCA preempted a local requirement for voter approval before construction of a telecommunications antenna on city-owned park property. In *Omnipoint Communications v. City of Huntington Beach*,[57] the Ninth Circuit reversed and remanded the district court's holding that the TCA did indeed preempt the City of Huntington Beach's voter approval.[58] The Ninth Circuit considered § 332(c)(7) of the TCA and concluded that it "functions to preserve local land use authorities' legislative and adjudicative authority subject to certain substantive and procedural limitations."[59] As reasoning for its conclusion, the court noted that § 332(c)(7) "does not have a typical preemption clause that expressly preempts state law, followed by a savings provision excepting certain types of state enactments from preemption."[60] Instead, the TCA "takes the opposite approach: it begins with a savings clause, and then makes the savings clause subject to exceptions."[61]

Since the City of Huntington Beach is a charter city, under California law it retains authority to control municipal property.[62] The city amended its charter in 1990 to include an initiative, "Measure C."[63] This measure placed "certain limits on the City's ability to authorize use of city-owned property," including a requirement that any authorization be "by the affirmative votes of at least a majority of the total membership of the City Council and by the affirmative vote of at least a majority of the electors voting on such proposition at a general or special election at which such proposition is submitted."[64]

55. *Id.* at 690.
56. *Id.* at 692.
57. 738 F.3d 192 (9th Cir. 2013).
58. *Id.* at 193.
59. *Id.* at 195.
60. *Id.*
61. *Id.*
62. *Id.* at 196.
63. *See id.*; *see also* HUNTINGTON BEACH, CAL., CHARTER CODE art. VI, § 612 (2011).
64. *City of Huntington Beach*, 738 F.3d 192, 196.

The Ninth Circuit first determined that "[o]n its face, Measure C is not the sort of local land use regulation or decision that is subject to the limitations of § 332(c)(7), but rather is a voter-enacted rule that the City may not lease or sell city-owned property for certain types of construction unless authorized by a majority of the electors."[65] Specifically, the court concluded:

> Measure C simply provides a mechanism for the City, through the voters, to decide whether to allow construction on its own land. It does not regulate or impose generally applicable rules on the placement, construction, and modification of personal wireless service facilities, and so the substantive limitations imposed by [the TCA] are inapplicable.[66]

The Ninth Circuit also determined that Measure C was not "the sort of local land use decision that fulfills an adjudicatory function . . . . Rather, Measure C gives the voters an unconstrained right to approve or disapprove a proposed construction project on city-owned park lands and thus serves as a constraint on the City's plenary power to control the use of public lands."[67] Thus, the "City's adjudicative decision making in response to T-Mobile's applications was fully compliant with the TCA . . ." because "Measure C had an effect on landowner approval, not on the City's adjudicative process."[68] The Ninth Circuit noted the Second Circuit's similar conclusion when "a school district entered into a lease agreement permitting Sprint to build an antenna on the roof of a public high school, subject to specified limitations on levels of radio emissions."[69] Learning that the radio frequency emissions would exceed the limits, the school district barred the application. In upholding the school's decision, the Second Circuit noted that the TCA "does not preempt governmental actions that involve the management of its own property."[70]

These Ninth Circuit and Second Circuit decisions indicate that the provisions of the TCA do not apply to what would be considered a governmental landowner or leasing issue. Rather, such provisions pertain to the issue of a zoning authority denial of an application for a wireless telecommunications facility.

65. *Id.* at 199-200.
66. *Id.* at 200 (internal quotations and citations omitted).
67. *Id.*
68. *Id.*
69. *Id.* at 201 (discussing the holding of Sprint Spectrum L.P. v. Mills, 283 F.3d 404 (2d Cir. 2002)).
70. *Id.*

V. Middle Class Tax Relief Act and Job Creation Act: No State or Local Government May Deny, and Shall Approve, Any Eligible Facilities Request for a Modification of an Existing Wireless Tower That Does Not Substantially Change its Physical Dimensions

In February 2012, the Middle Class Tax Relief and Job Creation Act of 2012 ("TRA") was passed into federal law.[71] Section 6409 of this act provides that a "State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station."[72] On October 21, 2014, the FCC released a report and order ("FCC Order") that provides guidance and clarifications regarding the application of Section 6409.[73]

Prior to the FCC Order, the district courts in the Second and Third Circuit jurisdictions interpreted the TRA. A New York district court answered the question of whether a plaintiff could add a cause of action based on the TRA.[74] In granting the motion, the court points out that "[t]he Town no longer has authority to treat collocation and upgrades or modifications in the same manner as it does new towers."[75] "In other words, any Ordinance that requires the full panoply of [exorbitant] fees and [lengthy administrative] procedures for collocation and upgrades or modifications is now expressly preempted by Section 6409" which requires approval and prohibits denial of requests within the scope of the TRA's limitations.[76] The FCC Order further clarifies that an "eligible facilities request" must be approved with in 60 days, accounting for tolling.

A New Jersey district court, while ultimately deciding a 2013 case on lack of ripeness, analyzed whether a zoning officer had violated the TRA and the role a zoning board could play in light of the TRA's pas-

71. Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, § 6409, 126 Stat. 156 (2012).
72. *Id.* § 6409(a).
73. WT Docket No. 13-238, In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, FCC 14-153, Report and Order (Oct. 21, 2014).
74. N.Y. SMSA Ltd. P'ship v. Town of Hempstead, No. CV 10-4997, 2013 WL 1148898 (E.D.N.Y. Mar. 19, 2013).
75. *Id.* at *6.
76. *Id.*

sage.[77] In this case, the plaintiff did not seek approval from the Zoning Board of Adjustment because, according to the plaintiff, the Board had "rejected two similarly filed applications based on its 'mistaken belief that the Middle Class Tax Relief Act did not apply to those applications.' "[78] The court saw it differently, holding that the plaintiff failed to exhaust administrative remedies. In presenting its decision, the court disagreed with the plaintiff's argument that the TRA "requires state and local governments to approve 'any request for collocation of transmission equipment on an existing wireless tower.' "[79] Instead, the court puts forth that "there are certain questions that the Zoning Board of Adjustment would have to resolve before this case becomes fit for review," such as "whether the installation of the antennae would 'substantially change the physical dimensions' of the lattice tower in which Plaintiff seeks to install the antennae."[80] Further, "even if the Act preempts state and local laws, as Plaintiff argues, the Act does not prohibit local government entities from requiring the filing of applications seeking administrative approval."[81]

While judicial interpretation of the TRA is still in its infancy, these recent court decisions, coupled with the FCC Order, provide a sneak peek into the analysis courts might apply in the future.

Close to twenty years after the TCA was first enacted, much of the reignited debate concerning the TCA centers around issues that were present upon its enactment, with courts interpreting what constitutes an effective prohibition, what satisfies the "in writing" requirement, and what counts as substantial evidence. In 2013 and 2014, more than 15 years after the Fourth Circuit first asserted a minority view that the "in writing" requirement does not need to be a separate writing, the Eighth and Eleventh Circuits followed suit. The 2015 Supreme Court decision resolved this circuit dispute. The City of Huntington Beach, California used a 25 year old measure to protect its city-owned property from the placement of a wireless telecommunication facility. And, recent passage of the TRA and the FCC Order presented state and local governments with new guidance on their authority over applications for modifications to existing towers. What once was old is new again.

77. McKay Bros., LLC v. Zoning Bd. of Adjustment of Randolph, Civ. Act. No. 13-1383, 2013 WL 1621360 (D.N.J. Apr. 12, 2013).
78. *Id.* at *1.
79. *Id.* at *3.
80. *Id.*
81. *Id.*