

ZONING AND PLANNING LAW REPORT



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CELL TOWERS AND AESTHETICS: BLIGHT ON THE NEIGHBORHOOD OR SIGN OF THE TIMES?

Paul J. Weinberg

Paul Weinberg is a real estate attorney practicing in Irvine, California. Since 1979, his Orange County practice has specialized in real estate, title leasing, and real property development matters. Paul is the only non-architect member of the Laguna Beach Architectural Guild and acts as their legal counsel. He is a member of the Society of Architectural Historians and the American Institute of Architects.

There is no question that we now live in an era of steadily accelerating technological progress and advances. The ease of communication that people now enjoy is, for many, accepted almost without any thought of how and in what manner that communication is delivered. The proliferation of wireless devices to ease the daily lives of not only working men and women, but teenagers and others, is now being taken for granted by everyone using them; and a steady clamor exists for more and better devices, upgraded service and, in general, easier and greater access to each other.

With almost everyone using these devices and facilities (and they now go far beyond the simple cell telephone to Blackberry devices, personal digital assistants and even the ability to transmit photographs wirelessly), is the fact that a giant infrastructure is necessary to make all of this happen. If the necessary antennae, power sources, towers, cabling and wiring, and all the other ancillary equipment needed to transmit and receive signals do not exist, then none of the devices will work.

It is precisely this point that the proliferation of devices has accelerated; the expansion and growth of all of the infrastructure, and the corresponding looming problems for municipalities and residents alike. To use all of these devices, a system has to be in place, and to operate that system, the equipment has to be located somewhere, on someone's property, in someone's view, occluding someone's light, and, perhaps, generating a great deal of radio frequency emissions that conceivably could harm people close to it.

When these issues arise, interestingly, the Ninth Circuit Court of Appeals saw what would happen:

This case marks yet another episode in the ongoing struggle between federal regulatory power and local administrative prerogatives—the kind of political collision that our federal system seems to invite with inescapable regularity. And as most often happens in such cases, the courts are summoned to re-strike the balance of power between the national and the local.¹

The framework for deciding where, how and to what extent these facilities are built is a problem that crosses national, state, and perhaps most importantly, local lines. Municipalities want to regulate what happens within their borders; states want to provide uniformity for public utilities and their installation, and the federal government wants to encourage the growth and development of its communication infrastructure with some of these policy goals in mind. The federal government's applicable statute lays out what their goals are:

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider ... whether such actions will – (1) promote the safety of life and property; (2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands; (3) encourage competition and provide services to the largest feasible number of users; or (4) increase interservice sharing opportunities between private mobile services and other services.²

Regulation of this field at the federal level is now at the heart of the controversy. What's happening is that municipalities are refusing to allow carriers to build towers in residential and rural locations, and carriers are fighting back by filing lawsuits in federal court to try to enforce the overriding federal "public policy" considerations of competition, wide access for all, and complete coverage.

This issue came to a head in a stunning Ninth Circuit Court of Appeals decision handed down in January of 2006, *Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge*.³ The Los Angeles Times first reported on the case on January 18, 2006, in their Business Section, on its front page:

Cell phone towers may be ugly, but that's not reason enough for cities to block their construction, a federal appeals court ruled Tuesday.

In the nation's first appellate ruling on an increasingly contentious local issue, the US Ninth Circuit Court of Appeals struck down parts of a La Canada Flintridge law that had allowed the city to withhold building permits on public rights of way for purely aesthetic reasons.

Similar ordinances in cities across California and the nation have slowed efforts by wireless companies to offer better coverage and advanced services they say there are 200 million customers demand. Municipal officials counter that they have a responsibility to protect their residences from a prolifera-

tion of unsightly infrastructure.

Unlike telephone or cable lines, cell phone transmitters can't be buried underground and need to be high enough to relay signals without obstruction. And they're seemingly everywhere. By June, service providers had installed 178,025 cell sites nationwide—adding more than 15,000 a year for the last four years.⁴

At stake in the *La Canada-Flintridge* case was a municipal ordinance, passed as urgency legislation, that set forth four criteria that applicants for a public right-of-way above-ground construction permit would have to satisfy. That ordinance was called Ordinance 324 – "An Urgency Ordinance of the City Council of the City of La Canada Flintridge Adopting a Moratorium on the Issuance of Any Demolition, Grading, Utility, Excavation or Other Permits Relating to Above-Ground Structures Along City Public Rights-of-Way."

Of the four criteria most pertinent to court's inquiry were No's. 2, 3 and 4, which state as follows:

No. 2: The proposed above-ground structure is compatible with existing above-ground structures along the public right-of-way, and does not result in any over concentration of above-ground structures along the public right-of-way;

No. 3: The proposed above-ground structure preserves the existing character of the surrounding neighborhood, and minimizes public views of the above-ground structures; and

No. 4: The proposed above-ground structure does not result in a negative aesthetic impact on the public right-of-way or the surrounding neighborhood.⁵

Sprint applied for five permits shortly after the city enacted the ordinance, and the city granted two of them. Sprint withdrew one, and the city rejected the other two that caused the lawsuit.

Sprint applied for the one permit in December of 2001 along Figueroa Street, and for a second wireless telecommunications facility along Descanso Drive in July of 2002.

The Ninth Circuit picks up the procedural description here:

After a variety of appeals through the City Public Works and Traffic Commission, Sprint ended up in the City Council, which held hearings and denied Sprint's applications. As to the Figueroa Street application, the City Council based its denial on findings that: (1) the facility "will significantly damage the existing character of the neighborhood and

result in a negative aesthetic impact on the right-of-way”; (2) “[t]he proposed Project will change the character of the neighborhood and will result in a negative aesthetic impact on the public right-of-way”; (3) “[t]he antennas will negatively impact the residence’s views and the character of the neighborhood”; and (4) the antennas are “unsightly.” The City also found that the proposed facility would obstruct access to the public right-of-way, but the district court found that this ground was not supported by substantial evidence—a finding that the City does not challenge.

As for the Descanso Drive telecommunications facility installation permit, the City Council found that the proposed facility did not satisfy criteria (2), (3), and (4) of the City Moratorium. Specifically, the City Council found that: (1) the facility did not meet the second criterion because the above-ground structures would result in “over-concentration” of the structures; (2) the facility did not meet the third criterion, because the facility is “out-of-character for the neighborhood”; and (3) the facility did not meet the fourth criterion because the facility would “draw attention in a negative aesthetic manner along the street.”⁶

Before looking at the *La Canada-Flintridge* case any more closely, perhaps some perspective is in order. To fully understand what physical assets a typical application for this type of facility described and sought approval for, a similar case, *Sprint PCS Assets, LLC v. City of Palos Verdes Estates*,⁷ described, in its ruling on summary judgments brought by both parties to the matter, what the facilities in that particular application encompassed:

The Via Valmonte facility, as originally planned, consisted of a new 43.5 foot pole with two panel antennas, a pole-mounted radio frequency unit box and a ground-mounted power distribution cabinet and batter back up located across the street from the pole.⁸

Others knowledgeable about cell tower dimensions use equally daunting figures to describe the height: “Similar installations often use poles that are 140 feet in height.”⁹

The combination of ancillary equipment and a very high tower present a significant aesthetic impact. Armed with this visual understanding, the *La Canada-Flintridge* court could get an idea of the mass and bulk as well as the aesthetic impact of the proposed installations.

In the *La Canada-Flintridge* action, the lower court found that the city’s findings as to the second criterion of the ordinance were not supported by substantial evidence; and that those as to the third and fourth were sup-

ported by substantial evidence. Ruling on cross motions for summary judgment, the district court ruled against Sprint on two of its critical claims, and the parties then consented to dismissal of Sprint’s remaining claims, with the district court then entering summary judgment for the city. The appellate court went on to describe the affect of the applicable federal law, the Federal Telecommunications Act:

The Telecom Act requires that the City’s permit denials be supported by substantial evidence. Specifically, 47 U.S.C. § 332(c)(7)(B)(iii) states that “[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.”

The interpretation of “substantial evidence” in the context of the Telecom Act was the focus of extended analysis in *MetroPCS*, which held that “the substantial evidence inquiry does not require incorporation of the substantive federal standards imposed by the [Telecom Act].” Rather, courts should consider whether the denial is based on “substantial evidence in the context of applicable state and local law.” Consequently, the Telecom Act “does not affect or encroach upon the substantive standards to be applied under established principles of state and local law.” (citations omitted).¹⁰

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Editorial Director

William D. Bremer, Esq.

Contributing Editors

Patricia E. Salkin, Esq.

Lora Lucero, Esq.

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Editorial Offices: 50 Broad Street East, Rochester, NY 14694
Tel.: 585-546-5530 Fax: 585-258-3774
Customer Service: 610 Opperman Drive, Eagan, MN 55123
Tel.: 800-328-4880 Fax: 612-340-9378

At this point, Sprint injected into the fray a hoary state public utilities code statute, Public Utilities Code Section 7901, indicating that state law pre-empted the field; the Public Utilities Code Section did not contain any aesthetic limitations in it:

Telegraph or telephone corporations may construct lines of telegraphic or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutments for supporting the insulators, wires and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters ... In 1991, the California State Legislature adopted Section 7901.1(a) which reads in relevant part 'it is the intent of the legislature, consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed.'¹¹

The balance of the opinion built a logical rationale for why the state statute applied to Sprint's request and pre-empted local law:

Section 7901 gives telephone companies broad authority to construct telephone lines and other fixtures 'in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters.' By the plain text of the statute, the only substantive restriction on telephone companies is that they may not 'incommode the public use' of roads. It is possible that extremely severe aesthetic objections could conceivably incommode the use of the roads. (See, 7, the Oxford English Dictionary 806 (citation) (defining 'incommode' as 'to subject to inconvenience or discomfort; to trouble, annoy, molest, embarrass, inconvenience') An extraordinarily unattractive wireless antenna might, for example, cause such visual blight that motorists are uncomfortable using the roads. Counsel for the city posited during oral argument, that an unattractive wireless structure could cause 'discomfort'.

However, the most natural reading of Section 7901 grants broad authority to telephone companies to install necessary wires and fixtures, so long as they do not interfere with public use of the roads. The text focuses on the function of the road – its 'use,' not its enjoyment. Based solely on Section 7901, it is unlikely that local authorities could deny permits based on aesthetics without an independent justification rooted in interference with the function of the road.

Section 7901, however, has been modified by Section 7901.1. Two provisions determine the extent of local regulatory authority under Section 7901.1: First, the breadth of 'time, place, and manner' and second, the meaning of 'are accessed'.

The phrase 'time, place, and manner' seems to expand local regulatory authority beyond the 'incommode' standard in the earlier Section 7901. Despite some legislative history, of which the district court took judicial notice, that portrays Section 7901.1 is merely 'clarifying' the law, the plain text indicates that this provision expands municipal authority. (Citations). Specifically, 'incommode' refers to the disruption of the reasonable use of the road. While the authority to restrict building based on 'time, place, and manner' gives cities more authority to determine what constitutes a reasonable use of the road, this language does not seem to enhance greatly the city's regulatory latitude - - certainly not to the extent necessary to engage in aesthetic regulation. (Emphasis added.)¹²

The Los Angeles Times was the first to see the impact of this decision:

The wireless industry cheered the three-judge panel's unanimous decision, saying it would make it easier for service providers to expand their networks at a time when growth and the number of new cell phone subscribers is slowing. To win customers, cellular companies pitch better reception and new services, such as video and e-mail, which require more towers and antennas.

Cities nationwide have been rejecting tower permits based on aesthetics, prompting some providers to dress up their gear as giant trees or hide them in church steeples to pass visual muster.

The appearance of cellular transmitters varies widely. Some are little more than antennas on top of buildings. Others are massive free-standing poles topped with an array of gear ... California, the nation's biggest telecommunications market, has been particularly problematic for wireless companies, said John Walls, a spokesman for the Industry Trade Group Cellular Telecommunications and Internet Association. "We have had significant problems with getting towers along major highways in California" Wall said. "That resistance had been legally diminished by this decision"

Many states have similar utilities laws. Although the decision applies only to California law, lawyers said other courts nationwide would give it

weight when considering similar cases.

That, wireless advocates and foes agreed, would probably mean more towers.

Cingular Wireless, Verizon Wireless and Sprint are rushing to install high-speed gear in their networks. And T-Mobile USA, the fourth largest provider, committed itself last year to an aggressive plan for building its system.¹³

Now the interesting question has been raised by the *La Canada-Flintridge* court: who's in charge, state or local municipalities, in deciding aesthetic questions? This decision gives wireless companies a rather large "foot in the door" to make an argument that the state, or for that matter federal law, can regulate these decisions. The Los Angeles Times comment that other states can use this holding as persuasive authority is particularly apt: the decision was handed down by one of the largest and most powerful appellate circuits in the United States, the Ninth Circuit; and, as Times Staff Writer James Granelli pointed out, California is the nation's largest telecommunications market. For these reasons, it is hard to overstate the potential impact of this decision.

To put the effect of the decision in context though, it is necessary to see other "snapshot" examples of how the same issues are playing out across the country. In Missouri, the U.S. Dist. Court for the Eastern Dist. of Missouri issued an opinion in February of 2006, quoting the *La Canada-Flintridge* decision, but allowing the municipality the authority to make its own decision about aesthetics. That case, *Florida RSA # 8, LLC v. City of Chesterfield, MO*, 416 F.Supp.2d 725 (E.D. Mo. 2006), involved similar issues. In that case, the City of Chesterfield, MO, passed a zoning ordinance in December of 1996 that specifically took aesthetic concerns into account:

Accordingly, the city has taken into consideration the unique and diverse landscape found within this community and states that the landscape within the community is one of its most valuable assets. Protecting these valuable assets will require that the location and design of low power mobile radio service telecommunications facilities be sensitive to the setting in which they are placed.

Community and neighborhood visual concerns should be considered paramount in the consideration of and selection and sites. Visual concerns should include both those found on and off site and these concerns should be evaluated by a consideration of all the policies as set forth in this ordinance.¹⁴

The City of Chesterfield had similar aesthetic con-

cerns to *La Canada-Flintridge* that it articulated in its 1996 ordinance:

B. To encourage the location of antenna atop existing structures of buildings;

C. Minimize adverse visual impacts of communications antenna and support structures through careful design siting, landscape screening and innovated camouflaging technique;

D. Maximize the use of existing and new support structures so as to minimize the need to construct newer additional facilities;

E. Maximize and encourage the use of disguised antenna support structures as to ensure the architectural integrity of designated areas within the city and the scenic quality of protected national habitats.¹⁵

Drury Chesterfield was the owner of a parcel of land located at 355 E. Chesterfield Parkway, Chesterfield, MO. On that land was sited a hotel, the Drury Plaza Hotel, in a 'PC'-planned commercial district located near the Chesterfield Mall. The local zoning ordinance provided that property zoned as a PC district did not have in it the right to build antenna or support structures on buildings built in that district. The city then rejected US Cellular's application which, interestingly, indicated that:

US Cellular checked the box on the city's form which applies to the "installation of antenna on buildings or the construction of a tower - disguised support structure on land owned by state or federal government or local political subdivision."¹⁶

US Cellular wanted to rely on the overall planned commercial district ordinance that had listed, as permitted uses:

Stores, shops, markets, service facilities and automatic vending facilities in which goods or services of any kind are being offered for sale or hire to the general public on the premises.¹⁷

The city disagreed, indicating that placement of telecommunications equipment was regulated by its own ordinance requiring that any telecommunications equipment be included as a permitted use in any planned district.

Clearly, what was going on behind the scenes was US Cellular's wish to "inherit" the existing zoning and avoid the delay and expense of having to apply for a new or different enabling ordinance. The court saw it the same way:

Clearly, according to the plain and unambiguous meaning of the applicable zoning provisions, the director does not have the authority to grant ad-

ministrative zoning approval for new antenna in a 'PC' planned commercial district which antenna is not included as a permitted use in the enabling ordinance. While Section 1003.167.19(3)(a) states that antenna are permitted in all zoning districts, when considered in the context of the regulatory scheme applicable to communication facilities as well as Section 1003.140.4(2) which requires that an enabling ordinance for a particular PC planned commercial district included a permitted use, it is clear that this latter provision trumps any ambiguity; thus, under any and all circumstances to be permitted within a particular PC planned commercial district, an antenna must be specifically included as a permitted use in the ordinance enabling such district.¹⁸

Reading between the lines of this holding, it is clear that the *City of Chesterfield* court opined that local municipal regulatory approval would "trump" federal law as long as "substantial evidence" could be shown to buttress the conclusion of the municipal body. Interestingly, the *Metro PCS v. City and County of San Francisco* case had extensive discourse on how much evidence has to go into the record to decide what is a sufficient record:

At one interpretive extreme, some courts have required that local governments explicate the reasons for their decision and link their conclusions to specific evidence in the written record. The rationale for this approach is that anything short of this standard "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. *Omnipoint*, 83 F.Supp.2d at 309 (quoting *Smart SMR of N.Y., Inc. v. Zoning Comm'n*, 995 F.Supp. 52, 57 (D.Conn.1998)).

At the other end of the spectrum lies the Fourth Circuit, which has applied a strict textualist approach to hold that merely stamping the word "DENIED" on a zoning permit application is sufficient to meet the TCA's "in writing" requirement. *AT & T Wireless PCS, Inc. v. City Council*, 155 F.3d 423, 429 (4th Cir.1998); see also *AT & T Wireless PCS v. Winston-Salem Zoning Bd. Of Adjustment*, 172 F.3d 307, 312-13 (4th Cir.1999). According to the Fourth Circuit, the bare language of the TCA requires nothing more, and so adhering to a more stringent standard would involve "importing additional language into the statute." *AT & T Wireless*, 155 F.3d at 429.

The First and Sixth Circuits have charted a middle course, 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 those reasons." *Todd*, 244 F.3d at 60; *Saginaw*, 301 F.3d at 395-96 (adopting the *Todd* standard). This approach attempts a compromise between the demands of strict textualism and the requirements of more pragmatic policy values. The *Todd* court observed that while the statutory language of the TCA does not explicitly require detailed findings of fact or conclusions of law, and while local zoning boards are often staffed with laypersons ill-equipped to draft complex legal decisions, written decisions must be robust enough to facilitate meaningful judicial review. See *Todd*, 244 F.3d at 59-60.

In the proceeding below, the district court ultimately chose to apply the *Todd* standard and held that the Board's written denial of MetroPCS's CUP application was adequate as a decision "in writing" under this standard. 259 F.Supp.2d at 1009. The district court asserted that the *Todd* standard best "reconciles both the statutory language and Congressional intent of the 'in writing' requirement" and held that, in accordance with *Todd*, the City "has issued a written denial separate from the written record ... which summarizes the proceedings, articulates the reasons it rejected MetroPCS'[s] application, and provides sufficient information for judicial review in conjunction with the written record." *Id*¹⁹

A careful reading of this passage seems to indicate that, as long as a municipality issues sufficient written findings to justify its decision that a reviewing court can follow and that, as the *Todd* court put it, they "contain a sufficient explanation of the reasons for the denial", then federal law is not going to interfere and local law will control. What makes the *La Canada-Flintridge* case unique and, potentially, very far reaching, is that it has "inserted" an old state statute, drafted and enacted long before wireless telecommunications existed, together with its attendant problems, to take into account those problems, including the aesthetic ones.

Other portions of the country are grappling with and have already resolved these issues at the municipal level. Often times the resolution takes place during the administrative process. Examples abound: In the rural town of Niles, MI, the rejection by Milton Township's three-member zoning board of appeals of a 195-foot monopole tower in a rural area was of sufficient notoriety to be picked up both by the South Bend Tribune newspaper and a well known wireless internet magazine, *Wireless Infrastructure News Service*. T-Mobile sought the site to

provide additional coverage, and its representative, Jordan Rifkin, indicated at the hearing:

Rifkin said the Federal Communications Commission mandates that cell phone providers be able to identify where a call is coming from within 100 meters. The existing coverage T-Mobile has is less accurate. He estimated the tower would handle about 13 emergency calls a month. Up to three other carriers could be able to use the tower.

While the proposed tower would have been at least 400 feet from all property, and lines would not be lit, neighbors objected to what one resident deemed an “eye sore” on their rural landscape and express concern that property values would be reduced.

Steve Woody, Vice President of Sales and Marketing for ERS Telecom Properties, argued that T-Mobile, under the federal Telecommunications Act “has the right to have good coverage here.”

“But not at our expense”, an audience member shot back.”²⁰

The Wireless Infrastructure News Service added a number of facts in its coverage prior to the hearing:

Cell phone usage is no longer the domain of urban dwellers. Rural residents want good cell phone service, too.

“What used to be a cell phone ten years ago is now the 21st Century’s Swiss army knife” said Joe Farren, Public Affairs Director for the Cellular Telecommunications And Internet Association. “Now it’s your e-mail, it’s your web portal. Increasingly, it’s your television set, your movie and music player, your camera.

What some people seem to fail to realize is that how reliable their phone is and how fast they can tap into the internet depends on how many towers are available to send the signals. That has led to “not in my backyard” fights in places like Milton Township and even jealous rifts between neighbors when one lands a lucrative contract with a tower company and the other is passed by.

In the Milton case, Sprint Nextel decided that a cell tower ... would serve the needs of commuters traveling on the Wisconsin Highway 35 corridor and on county road 46. More people are moving into the area, which is becoming a commuter suburb of Minnesota’s Twin Cities. “We are feeling the effects of the urban sprawl”, said Jim Johnston, Polk County Land Information Director, adding that the county is likely to be included in the Twin Cities

metro statistical area in the next US Census. The controversy over some cell towers, Johnston said, symbolizes the struggle within such communities as they try to retain their rural character yet cope with the population influx.”²¹

Another example is the rural area of Cayuga Heights, NY. In December of 2005, Verizon Wireless applied to build a 120 foot cell tower near an area known as “Community Corners”. The complaints that the neighbors had about the tower now seemed to be a somewhat familiar litany:

Amid protests from residents, the Village of Cayuga Heights officials are poised to authorize the building of a 120 foot cell tower near Community Corners.

No decision has been filed yet by the Village Planning Board, which is also the Village Board of Trustees, on whether to allow Verizon Wireless to build a tower. Another carrier, Cingular Wireless, has also petitioned to place their antenna lower down on the tower, according to village mayor Walter R. Lynn.

The structure is slated for a site near Community Corners behind the Gas Light Village Apartments, according to Lynn ... Some residents of the village, particularly those with homes on Lowell Place, have been trying since September to thwart the project. Some said the views from their homes would be ruined by an obtrusive commercial tower.

“It’s going to be a large structure and very visible,” said Lowell Place resident Don Campbell, who said his house rests between 120 and 130 feet from the proposed site.

Banning together, 12 Cayuga Heights households signed a letter dated September 19th to the Village Board asking them to urge Verizon to consider other sites for the tower, such as by the State Route 13 malls, or the Cayuga Heights fire hall. They took issue with a perceived lack of justification for the height of the tower, and also, lack of a visual impact assessment... . Lynn said the Village Board has 62 days from last Monday to consider Verizon’s application to build the tower, but they may make a decision before January 19th. Because the site exists on land zoned for commercial use, the company did not have to seek zoning approval, he said. While the Board hasn’t voted formally yet, Lynn said companies such as Verizon Wireless have special rights under communications laws to place structures in places they deemed fit. If the Village

Board decided to refuse approval, “we would end up in a lawsuit,” Lynn said.

During the approval process, the Village also hired a consultant to conduct an independent assessment of Verizon’s tower application, Lynn said. The consultant concluded that Verizon had made a “justifiable case.”²²

Robert Burgdorf, a lawyer with Nixon Peabody of New York, and the attorney for Verizon on the Cayuga Heights’ application, granted an interview in mid-May of 2006 to discuss some of the factors that cell companies have to contend with in deciding where and how to install cell towers:

There is no question that aesthetics is a primary concern. If a tower is under 200 feet, we do not have FAA [Federal Aviation Administration] lighting and striping issues. It is clearly a state versus local control issue, though. In New York, the cities still have local control. Although cell towers are considered public utilities, [See, *Cellular One v. Armand Rosenberg* 82 NY 2d 364, 624 N.E. 2d 990 (1993)], case law has applied a relaxed standard for cell towers.

We find that not many of them [applications] are litigated; only in the teens. You’ve got to be able to get service to the people; it’s an essential service. The boards have to choose the least intrusive solution; they can’t say no outright. In building a network, it depends on the topography, that particular cell; we have some flexibility, but it is limited. A good phone company will work hard with a municipality.”²³

An interview with Michael Seamands of Lashly and Baer, PC, the trial attorney on the *Florida RSA # 8* case in Chesterfield, MO, reveals similar viewpoints and concerns:

In the *Chesterfield* case, aesthetics weren’t really the issue; was the antenna installed as a permitted use at all as opposed to being okay where it is? If it is a permitted use, then aesthetics are irrelevant. A tower is always going to be ugly. It has to be where you can see it to get service. It can be a question of one tower versus 50 poles. We are seeing more applications now for towers that are 100 to 140 feet rather than 180 to 220 feet as they used to be. Technology is getting a lot better. The flashing lights on top that the FAA is requiring are no longer an issue. A flag pole can also be used. It can’t hold as many antennas, though. I am seeing a pretty steady flow of litigation; some clients don’t like to sue, they find

another site. Others are more willing to test the limits. We made a settlement in the *Chesterfield* case. There is not a lot new on aesthetics – it is not a typical TCA [Telecommunications Act] issue.²⁴

Taking attorneys’ Burgdorf and Seamands comments together, one can see that other states are essentially ceding local control of these land use decisions to the municipalities with the apparent understanding and belief that the provisions of the Telecommunications Act and, in particular, 47 U.S.C.A. 332[c][7] will protect the rights of the cell companies and insure that adequate service is available to anyone who wants it.

Other somewhat rural areas such as Glasgow, DE, face the same problem. In an unintentionally unique situation, T-Mobile, when faced with a dearth of sites to erect a tower on, decided to build one disguised as a giant cross behind the sanctuary of the Good Shepherd Baptist Church in Glasgow, DE. Not surprisingly, the neighbors reacted:

“We’re all opposed,” John Howell said. “Churches should have cemeteries, not cell towers. They shouldn’t be perverted for commercial use...” “It’s not just about homeowners who don’t want this ugly eyesore or about the companies who need to make money,” Newcastle County Councilman Robert Weiner said. “It’s about all citizens who need to communicate.” Weiner drafted the county’s first cell tower ordinance in 1996, after his first successful council campaign featured a hot debate over a tower near I-95 and Talley Road in Brandywine 100. Residents were upset that there was no opportunity for public input before it was built. The law Weiner drafted, which is part of the county’s land use regulations, is fairly broad. Free standing monopoles are permitted in any zoning district, but towers in residential districts need a special use permit after a public hearing. The law does give residents some leverage; a special use permit can be denied if the board finds that a tower does not fit in with the character of the area.²⁵

Lisa Goodman, the attorney representing T-Mobile in the Glasgow, DE case, had written an article in September of 1996 in Delaware’s State Bar Journal, entitled “In Re,” where she foresaw the problem with zoning codes grappling with these issues:

At the core of every effort to develop a comprehensive land use plan is an attempt to balance the need for growth with the desire for preservation of existing land use patterns. Such plans attempt to encourage growth and carefully preplanned directions while keeping similar land uses together. Cel-

lular transmission sites, however, present a unique complication. Unlike manufacturing or intense commercial uses, which generally can be segregated from residential areas, cellular sites, if they are to provide reliable service, must be located throughout all zoning classifications. Additionally, because cellular technology is relatively new, its growth has outpaced some zoning codes, which often have not yet been amended to provide for such facilities ... In the face of community opposition, cellular providers present strong arguments for site approval. New sales and user contracts show unequivocally that demand for cellular service continues to grow. Ironically, vocal opponents of particular sites often admit that they own and use a cellular telephone. Those who must be "on call," such as doctors and emergency personnel, now rely on cellular technology. It is also used by police officers to operate computers within their squad cars; such a program is functioning out of the state policy barracks in the Penny Hill area of Wilmington, and will soon be expanding state wide. Cellular telephones are also becoming important safety phone equipment. During the stormy winter of 1995-96, cellular telephone purchases in Delaware jumped dramatically over the same period in the previous year.²⁶

So now we are back to, in a sense, where we started. The telephone companies can show a demonstrated need, and as Lisa Goodman's article points out, emergency services and other necessities of life require this service. Aesthetics advocates and local communities deeply resent the interference by larger, wealthy "outsiders" attempting to, in their opinion, foist on them ugly, offensive, "blights on the landscape" in the form of these towers and their ancillary equipment. Where is the debate going and where is it likely to end up?

In an interview on May 19, 2006, the lead attorney for the City of La Canada-Flintridge, Scott Grossberg, opined as to the significance of the *La Canada-Flintridge* case and the Ninth Circuit's holding and gave some warnings and predictions for the future:

You are going to see this issue heat up - everyone's watching this. This decision has attacked the very foundations of city government. Promoting city planning in general and aesthetics in particular are long-held traditional values. Even the *Kelo* case says so. [*Kelo v. City of New London* (2005) 125 Supreme Court 2655, 2664: "[T]he concept of the public welfare is broad and inclusive ... the values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community

should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled]

You can't decide these issues in a vacuum; it's a city-by-city determination; there are too many ramifications ... I think there is a fundamental ignorance of the word "incommode." The statutes go back before the wireless community built its infrastructure. I've got every gadget out there - society becomes very impassioned when you take away something they are dependent upon. Do I want this all along the freeways? Enough is enough. The companies need to take a community-oriented approach. My experts indicate that the companies can be more flexible. Nobody is going to give a blanket "no." The City of La Canada-Flintridge did not believe that it was provided with accurate technical information by the "acquisition agent," the people representing the carrier. There are lots of law suits being filed across the country, but they're not winning. If you walked into a Sprint store, and looked at their coverage maps, they all show coverage in all the places that the companies are seeking coverage. We're also concerned about how the wireless companies are fulfilling the public need. How do you protect the city's right to regulate the time, place and manner of where these facilities are going to be put?

A lot of this is market driven - whoever is there first makes the most money - once a tower goes up, they sell the capability to others - they are leasing out a cell tower in a sense.

The League of California Cities and other city and county groups, as well as Realtors groups, are all watching this decision carefully. The Realtors are very concerned about land values and the property rights of homeowners.²⁷

Given the gravity of the problem, it seems likely that private interests will be descending on legislative bodies in California, and probably elsewhere, to "toughen up" the laws protecting the municipalities' rights to decide for themselves where and in what manner these cell towers and ancillary equipment will be installed. This is a topic and a point that attorney Grossberg does not deny: "The integrity of self governance overrides 'free market' concerns. The laws are outdated"²⁸

The potential for this fight to be taken to the various legislatures around the country is enormous; the economic stakes are huge and the corresponding proliferation of lobbyists and special interests trying to affect this decision will be just as great. Attorney Grossberg's de-

scription of the ethical problem is telling, also, but on both sides. The City Attorney for the City and County of San Francisco, on behalf of League of California Cities, as well as the National Association of Telecommunications Officers all joined to file amicus curiae briefs to petition the La Canada-Flintridge court for a re-hearing.²⁹

Clearly, this problem is far more complicated than simply a farmer in a field who does not like to look at a cell tower all day; particularly in urban areas, small amounts of property can be greatly affected by an offensive object or series of objects that diminish or obstruct the view or cause a potential purchaser to “pass” on that property in favor of an equivalent one that does not face the same obstacles. Installation and maintenance of the towers and the equipment is essential; Lisa Goodman’s article only points out the most obvious of the reasons; allowing emergency personnel to communicate with each other and with residents in times of crises. Uploading and transmission of medical records from a hospital to a paramedic onsite at the scene of a disaster or an emergency situation; fire crews and fire equipment in remote canyons or other areas that need to communicate conditions

in the field, all of these impact these decisions as well.

What makes the *La Canada-Flintridge* case so pivotal, though, is that it is shaking the foundations of the normal relationship between local land use governments and federal policy, inserting a state layer into the mix; and, with the precedential authority of the decision upsetting that balance by giving wireless carriers a new weapon to impose their decisions on municipalities. It will be this new development in particular that will, to a great extent, govern the future of this debate and how legislatures as well as local municipalities across the country deal with it. Given the patch work of legislation and, as attorney Goodman pointed out, the archaic nature of many of the zoning laws, technology and the pace of construction of the towers may outstrip the government’s ability to react to and resolve the problem. Once a cell tower is built, and a lease is entered into, it is unlikely that it will be demolished or removed. If the legislative system cannot catch up, the issue will become moot. It is that very point that legal scholars across the country will be watching closely.

Notes

1. *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 718 (9th Cir. 2005).
2. 47 U.S.C.A. § 332.
3. *Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge*, 435 F.3d 993 (9th Cir. 2006). While the court’s opinion was amended and superseded on denial of rehearing in *Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge*, 2006 WL 1391204 (9th Cir. 2006), the superseding opinion and its concurrently-issued memorandum in *Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge*, 2006 WL 1457785 (9th Cir. 2006) make clear that the holding and rationale of the original opinion as discussed in this article remain basically unchanged.
4. “City Can’t Bar Cell Towers on Looks Only, Court Says: La Canada Flintridge’s Ban Is Rejected. Service Providers Say The Ruling Will Help Boost Coverage.” Los Angeles Times, 1/18/06, Part A; Page 1; James S. Granelli, Times Staff Writer, 2006 WLNR 6951491.
5. *La Canada-Flintridge*, 435 F.3d at 994.
6. *La Canada-Flintridge*, 435 F.3d at 995.
7. *Sprint PCS Assets, LLC v. City of Palos Verdes Estates* (US Dist. Court; Central District of CA; Southern Div.) - Case No. SA-CV-03-825.
8. *Sprint PCS Assets, LLC v. City of Palos Verdes Estates* (US Dist. Court; Central District of CA; Southern Div.) - Case No. SA-CV-03-825: Statement of Uncontroverted Facts and Conclusions of Law in Support of Summary Judgment for plaintiff on Claim 1; (page 3, lines 15-19).
9. Interview by telephone on 5/19/06 with Michael C. Seamands, Lashly & Baer, attorneys for plaintiff Florida RSA No. 8, LLC in *Florida RSA No. 8, LLC v. City of Chesterfield, Mo.*, 416 F. Supp. 2d 725 (E.D. Mo. 2006).
10. *La Canada-Flintridge*, 435 F.3d at 996.
11. *La Canada-Flintridge*, 435 F.3d at 996, 997.
12. *La Canada-Flintridge*, 435 F.3d at 997, 998.
13. “City Can’t Bar Cell Towers on Looks Only, Court Says: La Canada Flintridge’s Ban Is Rejected. Service Providers Say The Ruling Will Help Boost Coverage.” Los Angeles Times, 1/18/06, Part A; Page 1; James S. Granelli, Times Staff Writer, 2006 WLNR 6951491.
14. *City of Chesterfield*, 416 F. Supp. 2d at 727.
15. *City of Chesterfield*, 416 F. Supp. 2d at 728.
16. *City of Chesterfield*, 416 F. Supp. 2d at 730.
17. *City of Chesterfield*, 416 F. Supp. 2d at 730.
18. *City of Chesterfield*, 416 F. Supp. 2d at 736.
19. *Omni Point Communications, Inc. v. Planning and Zoning Commission* (2000) 83 F. Supp. 2d 306, 309.
20. *Southwest Bell Mobile Systems, Inv. v. Todd* (2001) 244 F. Third 51 at 60.
21. *Metro PCS, Inc.*, 400 F. 3rd at 722.
22. Cell Phone Tower Rejected; Zoning Appeals Panel Listens to Residents Opposed to Variance. Southbend Indiana Tribune, 3/15/06, Local Section, page B-8, Melissa Jackson, Tribune Staff Writer.
23. Rural Communities Try to Balance the Need for Better Services With Pastoral Charm, Wireless Infrastructure News Service, 12/23/05, http://www.wins-news.com/top_stories/2005/dec/121705-a.phb
24. Heights Set to Approve Construction of Cell Tower; The Ithaca Journal, Ithaca, NY, 12/23/05, Local Section; page 1-B; Anne Ju, Staff Writer.
25. Interview with Robert Bergdorf via telephone of 5/15/06 by author.

24. Interview with Michael C. Seamands of Lashly and Baer, via telephone on 5/19/06.
25. Cell Users Want Reception, But Not In Backyards; Note to Providers: Disguising Towers as Giant Cross Does Not Help; The News Journal, Wilmington, DE, 10/27/05; News; Page 1-A; Angie Basiouny, Staff Writer.
26. One Aspect of the Land Use Debate: Cellular Transmission Sites: Lisa B. Goodman; In Re; 9/96, Pages 19 and 20.
27. Interview with Scott Grossberg of Cihigoyenette, Grossberg & Clouse of 5/19/06 by telephone by the author.
28. Interview with Scott Grossberg of Cihigoyenette, Grossberg & Clouse of 5/19/06 by telephone by the author.
29. Rehearing was denied, *Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge*, 2006 WL 1391204 (9th Cir. 2006); see note 3, above.

RECENT CASES

Supreme Court of Hawaii concludes RLUIPA Was Not Defense in Eminent Domain Proceeding

In a matter of first impression, Hawaii's highest court considered whether the Religious Land Use and Institutionalized Persons Act of 2000 (42 U.S.C.A. §2000cc et seq. (2000)) is a defense in an eminent domain action for lease-to-fee conversions of leased-fee interests and concluded that it is not. *City and County of Honolulu v. Sherman*, 110 Haw. 39, 129 P.3d 542 (2006).

Pursuant to a city ordinance ["Residential Condominium, Cooperative Housing and Residential Planned Development Leasehold Conversion" ROH Chapter 38 (1991)], the city designated twenty-eight condominium units for conversion from leasehold to fee simple on behalf of the owner-occupant applicants (lessees). When the city later amended the designation to add six additional units owned by the church, the church opposed the condemnation and counterclaimed for violations of federal and state constitutional rights, RLUIPA, and civil rights.

The church argued that the condemnation should be analyzed under the "strict scrutiny" test because it involved fundamental rights, citing a number of first amendment cases, and that RLUIPA operated as a shield against such condemnations. The city countered that RLUIPA was inapplicable because ROH ch. 38 is not a "land use regulation." (42 U.S.C.A. § 2000cc(a)(1)). The court agreed and held that ROH ch. 38 was neither zoning nor a landmarking law, and so it did not constitute a "land use regulation" pursuant to RLUIPA; thus, the lower court did not err in ruling in the city's favor on summary judgment on this issue.

The church also argued that ROH ch. 38 applied only to residential condominium developments and, because the units owned by the church were designated as "mixed use," the city lacked authority to condemn any of the units owned by the church. The court disagreed and found that ROH ch. 38 provided no exception to the condemnation of the units owned by the church by virtue of its self-designation as a "mixed use" project. The court remanded the case to the circuit court to determine whether there was the requisite number of qualified applicants

on the date the application was filed with the city in order to proceed with the condemnation.

Conditional Use Provisions in Zoning Code Applicable To Adult Businesses Constitute Prior Restraint on First Amendment Rights, Subject To Facial Challenge

The Eighth Circuit Court of Appeals remanded a request for injunctive relief to the trial court, after concluding that the city's code amendment was a prior restraint that the applicant for an adult business permit could challenge facially. *Blue Moon Entertainment, LLC v. City of Bates City, Mo.*, 441 F.3d 561 (8th Cir. 2006).

The property owner wished to open an adult entertainment establishment, featuring dancers with "pasties" and "G-strings," on unzoned property. He applied for an occupational license, and when the city took no action, he appealed to the board of aldermen. The city informed him that he would need to get a conditional use permit and rezone the property. The zoning code was amended in 2004 and specified adult night clubs meeting certain conditions were allowed in the C-1 district with a conditional use permit; the applicant was required to show that the "proposed use will not be contrary to the public interest or injurious to nearby properties, ... and the use will not encourage or enlarge the development of blighted areas, and the use will not cause an unwanted increase in the normal law enforcement exposure of the area."

The property owner did not apply for rezoning or a conditional use permit, but went directly to district court for a temporary restraining order, arguing that the zoning code amendment violated his rights under the First and Fourteenth Amendments. The district court denied his request and concluded that his "irreparable harm" could be remedied by simply applying for a conditional use permit. Since the lower court did not address the city's argument regarding the applicant's failure to seek rezoning, nor examine whether the conditional use permitting scheme conformed to constitutional requirements, the case was remanded.

Montana Supreme Court Declares Big-Box Retail Consistent with City's Growth Plan

In Citizen Advocates For A Livable Missoula, Inc. v. City Council of City of Missoula, 2006 MT 47, 331 Mont.

269, 130 P.3d 1259 (2006), the state's highest court affirmed a district court's ruling that a rezoning to allow a "big box" style Safeway facility substantially complied with the city's growth plan.

The objectors challenged the rezoning, arguing that the proposal was inconsistent with provisions in the 2000 Joint Northside/Westside Neighborhood Plan and the 2002 Missoula County Growth Policy, which called for preservation of the residential and small business character of the district, pedestrian-friendly design, and preservation of the neighborhood's history. The court noted that it had adopted a standard in 1981 which requires zoning bodies to "substantially comply" with the master plan or growth policy in *Little v. Board of County Com'rs of Flathead County*, 193 Mont. 334, 631 P.2d 1282 (1981).

The Montana Legislature amended § 76-1-605 MCA in 2003 by adding "A growth policy is not a regulatory document and does not confer any authority to regulate that is not otherwise specifically authorized by law or regulations adopted pursuant to the law. A governing body may not withhold, deny, or impose conditions on any land use approval or other authority to act based solely on compliance with a growth policy adopted pursuant to this chapter." However, since the parties did not raise this statutory provision, the court decided to leave the issue about how the statute might impact the "substantially comply" test for another day.

South Dakota Supreme Court Instructs Trial Court on Inverse Condemnation Claim Involving Relocation of Highway Interchange

A summary judgment in favor of the state was reversed and remanded because the trial court failed to properly recognize the issues presented by the property owner and failed to thoroughly consider the applicable law. *Hall v. State ex rel. South Dakota Dept. of Transp.*, 2006 SD 24, 712 N.W.2d 22 (S.D. 2006).

Appellants owned a convenience store and filling station on land abutting I-90 in South Dakota near Exit 66. The state decided to build a new Exit 67 one mile to the east because development near Exit 66 conflicted with the "Accident Potential Zone" off the main runway of Ellsworth Air Force Base. When Exit 66 was closed, all access to I-90 from the convenience store and filling station was removed. Sales dropped sharply and the business was closed. The owners brought an inverse condemnation action against the state, and argued that their loss of reasonable and convenient access to I-90 was a compensable taking.

The trial court granted summary judgment in favor of the state, ruling that the owners "did not have a property interest in the continued flow of traffic past their business." The state's highest court noted that the South Dakota Constitution states that "private property shall not be taken for public use, or

damaged, without just compensation" and the "damage clause ... allows a property owner to seek compensation for the destruction or disturbance of ... accessibility." However, the trial court failed to consider that issue in its summary judgment decision, warranting reversal and remand.

Virginia Supreme Court Rules, As Matter of First Impression, That State and Local Government Conflict Of Interests Act (COIA) Does Not Disturb Requirements For Quorum

The Virginia Supreme Court reversed the Circuit Court and held that the town council meetings of the Town of Front Royal were a nullity, where two of the six members of the council were disqualified from acting pursuant to COIA, Code §§ 2.2-3100 et seq., and a third member recused himself, leaving less than a majority to conduct business. *Jakabcin v. Town of Front Royal*, 628 S.E.2d 319 (Va. 2006).

Wal-Mart sought approval of its application for rezoning and a special use permit. Zoning amendments require two successive public hearings where the amendment was read, followed by a vote after each reading. Prior to the public meeting in June 2003, two of the council members filed written statements of disqualification pursuant to COIA. A third councilor recused himself and did not attend the meeting. The town attorney advised the remaining three councilors that they could conduct the meeting and act on Wal-Mart's application because he believed the COIA had effectively reduced the size of the council to four, and the remaining three members constituted a quorum.

Following the first reading, the three councilors present voted in favor of the zoning amendment. The second reading was held on July 28, 2003. Five council members were present, but when the Wal-Mart rezoning application was considered, one of the two councilmen who had originally disqualified himself under COIA left the room. The second remained in order to avoid further quorum problems, but did not participate. The rezoning was approved again 3-0.

Challengers sought a declaratory judgment invalidating the town council's actions. The circuit court ruled that COIA provided a "safe harbor" provision and upheld the town council's actions. On appeal, the state's highest court granted declaratory relief, noting the strong policy reasons for requiring a quorum: "In our system of representative government, the voters must of necessity rely on their elected legislative representatives to protect their interests, to defend their freedoms, to advocate their views and to keep them informed. Elected representatives who voluntarily absent themselves from meetings of the governing body to which they have been elected cannot fully discharge those duties." The court concluded that the physical presence of a majority of the members was necessary for a valid meeting; therefore, the meetings were a nullity, and the actions taken at those meetings were void.