



TO: Mayor and Council, Kay Love and Aaron Bovos

FROM: David Davidson

DATE: March 26, 2009

RE: Laws and Ordinances related to Wireless Communication Facilities

This memo has been drafted in order to provide some clarification about the laws and ordinances regarding wireless communication facilities and the siting of such facilities within Roswell.

To begin, the Telecommunications Act prohibits state or local governments from prohibiting the provision of wireless communication services or from passing regulations that have the effect of prohibiting the provision of wireless communication services or barring market entry of service providers. 47 U.S.C.A. §§ 253, and 332(c). More specifically these sections state:

47 U.S.C.A. §§ 253

Removal of barriers to entry

(a) In general

No state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications services.

47 U.S.C. A. §§ 332(c)

(3) State preemption

(A) No State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter 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.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality

thereof-

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof *1335 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.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

Federal Courts have generally held that an ordinance that materially inhibits or limits the ability of any competitor or potential competitor to compete in the market violates the Telecommunication Act. Montgomery County Maryland v. Metromedia Fiber Network, Inc. 326 B.R. 483 (S.D.N.Y. 2005). Therefore, provided the City's ordinances do not effectively prohibit a wireless carrier from providing service within the City by limiting their ability to provide comparable service within Roswell, the City zoning regulations must be followed.

The City addresses wireless communication facilities in the City Code and in the Zoning Ordinance. Definitions promulgated in the City Code provide that:

Section 21.2.2 Definitions

- 1) **Wireless Transmission Facilities:** shall mean the buildings, cabinets, equipment and property, including but not limited to, generating and switching stations, repeaters, cables, wires, conduits, ducts, pedestals, **antennas, towers, alternative tower structures**, electronics and other appurtenances used to transmit, receive, distribute, provide or offer low-power mobile voice transmission, data transmission or other wireless communications by linking a wireless network of radio wave transmitting devices through a series of short range, contiguous cells that are part of an evolving cell grid.

- 2) Tower: means any structure that is designed and constructed primarily for the purpose of supporting one (1) or more antennas, including self-supported or monopole towers. The term includes radio and television transmission towers, microwave towers, common-carrier towers, and cellular telephone or PCS towers.
- 3) Alternative Tower Structure: means man-made trees, clock towers, bell steeples, light poles and similar alternative-design mounting structures, that ***in the opinion of council***, are compatible with the natural setting and surrounding structures, and effectively camouflage or conceal the presence of antennas or towers.

Section 21.2.5(a) of the City Code states that "towers" may be located only in I-1 and C-3 zoning districts and "alternative tower structures" are required in OCMS and any other districts, provided towers may be located on public property regardless of zoning district. The Zoning Ordinance, however, allows Communication towers and antennas in C-3, I-1 and OCMS and does not address "alternative tower structures" as defined in the City Code at all. Further "communication towers" are not defined or addressed in the Zoning ordinance except a reference in Chapter 10.12 which refers one back to the City Code for additional regulations.

Therefore, provided the company can provide a demonstrated need for the telecommunications facility (*alternative tower structure*) at the specified site an *alternative tower structure* would be allowed in any zoning district.

The Council does have the authority under the definition of *alternative tower structure* to determine whether the structure is compatible with the natural setting and surrounding structures and effectively camouflages or conceals the presence of antennas or towers. A very good example of this is the Erbesfield's property on the Southside of Holcomb Bridge approximately one block west of Norcross Street. The *alternative tower structure* is actually the trellis on top of the building. This is both compatible with the structure and camouflages the antennas. The Council further has the authority to require that any *alternative tower structures* meet all set back requirements and site requirements as defined in the City Code before being approved.