



U.S. Supreme Court holds in Favor of Cell Tower Siting Applicants

01.16.2015 | By [John J. Flynn III](#), [Benjamin Z. Rubin](#), [Gregory W. Sanders](#)

On January 14, the U.S. Supreme Court in *T-Mobile South, LLC v. City of Roswell*, held that the City of Roswell ("City") violated the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B)(iii) (the "Telecommunications Act"), when it failed to provide T-Mobile with the reasons for its denial of a permit application for a wireless telecommunications facility within a reasonable time after sending a notice of denial. The Court also found that although the City was not required to provide its written reasons for denying the siting application in a particular format, the Telecommunications Act mandated that the stated reasons provide enough detail to "enable judicial review." Thus, seemingly consistent with the interpretation of the U.S. Court of Appeals for the Ninth Circuit and a handful of other courts, the Supreme Court found that public agencies cannot merely point to the administrative proceedings to satisfy the "writing" requirement under the Telecommunications Act.

Brief Overview of the Telecommunications Act

Section 332(c)(7)(B)(iii) of the Telecommunications Act provides 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 the record." As such, courts have interpreted section 332(c)(7)(B)(iii) as imposing two requirements: "the denial must be both in writing and supported by substantial evidence." *T-Mobile Northeast LLC v. City Council of the City of Newport News, Virginia*, 674 F.3d 380, 385 n.5 (4th Cir. 2012).

As explained by the Ninth Circuit, to satisfy the "in writing" requirement, a locality must "issue a written decision separate from the written record which contains sufficient explanation of the reasons for the decision to allow a reviewing court to evaluate the evidence in the record supporting those reasons." *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 723 (2005). While a handful of appellate courts have adopted a similar interpretation (see *New Par v. City of Saginaw*, 301 F.3d 390, 395-96 (6th Cir.

2002); *Sw. Bell Mobile Sys. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001)), a number of other courts have held that the stamping of the word "denied" on a zoning application, without any statement of reasons for the decision, satisfies the "in writing" requirement. *E.g., AT&T Wireless PCS, Inc. v. City Council*, 155 F.3d 423, 429 (4th Cir. 1998).

Relevant Facts and Procedural History

In 2010, T-Mobile submitted an application to build a cell phone tower on a vacant residential property. During the hearing on the application, several City Council members expressed concerns about the tower's aesthetic compatibility and impact on the surrounding area. Subsequently, the Council voted unanimously to deny the application. Two days later, the City informed T-Mobile by letter that the application was denied and that minutes from the hearing would be made available to T-Mobile. The detailed minutes of the hearing were published and delivered 26 days later.

T-Mobile filed suit in federal court, alleging that the City Council's denial was not supported by substantial evidence in the record. The District Court agreed, concluding that the City had violated the Telecommunications Act when it failed to issue a written decision that stated the reasons for the denial. The Eleventh Circuit reversed, concluding that "to the extent that the decision must contain grounds or reasons or explanations, it is sufficient if those are contained in a different written document or documents that the applicant is given or has access to." The Eleventh Circuit found that because the denial letter stated that the application had been denied, and informed T-Mobile that it could obtain access to the minutes of the hearing, the City had met its requirements.

The Supreme Court's Reversal

As to the first issue, whether the Telecommunications Act requires government agencies to provide the basis for the denial of a cell tower siting application, the Court answered in the affirmative. The Court explained that in order to determine whether a denial is supported by substantial evidence, the Court must be able to determine the reasons for the denial of an application. And, a writing stating the reasons is not only "commonsensical" given this reality, but the statutory text and structure of the Telecommunications Act supports the imposition of such a requirement. The Court also stressed, however, that the grounds need not be elaborate or sophisticated but must be merely clear enough to enable judicial review.

As to the second issue, whether the reasons for the denial of the application must appear in the same writing that conveys the government agency's decision of denial, the Court answered in the negative. The Court did note, however, that "[a]lthough the statute does not require a locality to provide its written reasons in any particular format, and although a locality may rely on detailed meeting minutes as it did here, we agree with the Solicitor General that 'the local government may be better served by including a separate statement containing its reasons.'"

As to the issue of timing, the Court, focusing on the fact that the Telecommunications Act provides a short 30-day statute of limitations for challenging a denial, concluded that "[b]ecause an entity may not be able to make a considered decision whether to seek judicial review without knowing the reasons for the denial of its application, and because a court cannot review the denial without knowing the locality's reasons, the locality must provide or make available its written reasons at essentially the same time as it communicates its denial." The Court did not provide explicit parameters for determining what would be considered "essentially the same time."

As to the third issue, whether a failure to comply with the "writing" requirement should result in the issuance of the requested permit or approval, the Court simply punted. Thus, it is likely that public agencies will continue to argue that a harmless error standard applies to the failure to issue a timely or adequate writing.

Concurrence

While Justice Alito concurred with the majority's interpretation of the "writing" requirement under the Telecommunications Act, he wrote separately to address the merits. In his concurrence, Justice Alito focused on three administrative law principles. First, Justice Alito noted the principle that a court must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." Justice Alito explained that a succinct statement that a permit has been denied because of aesthetic incompatibility with the surrounding area should be sufficient to satisfy this principle. Second, Justice Alito noted a court must not invalidate a decision if the error was harmless. Based on the facts of this case, Justice Alito had difficulty seeing any prejudice to T-Mobile, since the entity participated in the decision-making process and transcribed the hearing. And third, Justice Alito noted the principle that a court must not remand errors to the agency except in rare cases. Applying this third principle, Justice Alito explained that the majority's decision should not be viewed to require that the cell tower be built.

Dissent

In addition to the concurrence by Justice Alito, Chief Justice Roberts, joined by Justice Ginsburg, and Justice Thomas (as to Part I only), wrote a strong dissent to the majority opinion, disagreeing with the majority's analysis.