



Department of Urban and Regional Planning • University of Wisconsin-Madison/Extension  
Old Music Hall, 925 Bascom Mall, Madison, WI 53706 (608) 262-8990 • FAX (608) 262-9307

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## Wireless Facilities Siting

by Brian W. Ohm, J.D.

Applications to site cellular telephone antenna and other facilities for personal wireless services have increased as communities in Wisconsin begin to experience the impacts of the federal Telecommunications Act of 1996. The Telecommunications Act of 1996 established new federal policy for the future of all telecommunications. That policy is to promote competition in all sectors of the telecommunications industry by breaking down legal and functional barriers. The Act seeks to promote private investment and assure that telecommunications services are available to everyone.

The intent of Congress is summed up in Section 253 of the Act which reads: "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 service."

Wireless telecommunications, which is only one part of the field of telecommunications, is a very dynamic industry. Personal wireless services (cellular telephones, pagers, personal communications services) will respond quickly to customer demands which may result from the construction of new roads and new commercial and residential development. Wireless services are also increasingly important to public safety by providing communication during emergencies resulting from natural disasters or accidents. The number of wireless customers in the United States is growing by over thirty percent annually. Nationally the number of cellular towers is expected to increase from 18,000 to over 100,000 by the year 2000. It is important that communities include telecommunications systems in their planning activities.

Under the Act, "personal wireless facilities" are transmitters, antenna structures and other types of installations used for the provision of personal wireless services. Home satellite services are not considered personal wireless services

In a recent court decision, the Wisconsin Court of Appeals held that the requirements of the Telecommunications Act of 1996 applied to a request to site a cellular tower which was filed prior to the passage of the Act. See *Westel-Milwaukee Co., Inc., v. Walworth County*, 556 N.W.2d 107 (1996).

### IMPACT ON LOCAL AUTHORITY

The Act expressly preserves state and local government powers to regulate the placement, construction, and modification of wireless towers and facilities. This provision is contrary to the interests of the cellular industry which lobbied for federal preemption of local regulatory powers. While local government has the authority to deny a request for a tower siting, there are a number of very important conditions which the Act places on local government. These limitations are outlined below:

1. **State and local governments cannot unreasonably discriminate among providers competing to deliver similar wireless services.** This prohibition is to prevent governments from favoring one competitor over another. It does not prevent localities from treating facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning ordinances, even if those facilities provide similar services.
2. **State and local governments cannot directly or indirectly prohibit the provision of wireless services.** This provision prevents such actions as categorical bans and moratoriums of unspecified duration. Local governments are still allowed to impose different aesthetic or safety restrictions in residential and commercial zones. This provision also does not mean that every locality must allow a cellular tower. The number and location of antennae needed to provide adequate personal wireless service signal coverage to a community will vary depending upon such things as topography and density

of population and buildings. A residential community that is very small geographically might be able to show that its residents will be able to receive satisfactory service from cellular towers located in a neighboring jurisdiction. Prohibiting the siting of towers in the community may not have the effect of prohibiting the provision of service to the residents. The Act requires the "provision of the service," not the siting of the facility.

3. **State and local governments must act on all wireless facility siting, construction, and modification requests within a reasonable time.** What is considered a "reasonable period of time" will depend on the nature and scope of the request. If the siting of the facility requires a zoning variance, for example, the time period for rendering a decision should be the usual period under such circumstances. The U.S. District Court for the Western District of the State of Washington recently held that a six-month moratorium on applications did not violate the Act. Communities can provide an expedited review process if they want to encourage the siting of facilities in certain areas, such as on public lands (which can be leased to the telecommunications companies), putting antennae from multiple telecommunications service providers on one tower (co-location), and/or the placement of new facilities on existing structures such as water towers.

4. **Any decision to deny a request regarding a wireless service facility must be in writing and supported by substantial evidence contained in the written record of the decision making body.** The "substantial evidence test" is the traditional standard used for judicial review of local government actions. Many local communities already do this and should be unaffected by this requirement. For communities that do not, they will need to change their procedure. It would be advisable to have a.) written applications; b.) written materials documenting the review of the application by the staff or officials; c.) written transcripts of any hearings on the application; d.) written copies of testimony presented at any hearing; e.) a written record of the decision denying the application, including references to evidence in the record that formed the basis for the denial. A recent case from the U.S. District Court for the Northern District of Georgia found that the generalized concerns of the neighbors to a proposed facility did not amount to substantial evidence supporting the community's denial of the application.

5. **State and local governments cannot regulate the siting, construction, or modification of wireless service facilities on the basis of the environmental effects of radio frequency emissions unless the facility is not in compliance with Federal Communications Commission (FCC) emission regulations.** Local communities can require that an applicant provide evidence that the tower meets FCC standards

In accordance with the Act, service providers may challenge unfavorable local land use decisions in state or federal court. Challenges concerning tower emissions, however, must be filed with the FCC.

Finally, applicants must also comply with the National Environmental Policy Act as well as other mandatory federal environmental statutes. Applicants must evaluate the location of proposed structures to determine if it is in an environmentally sensitive area. If the proposed location falls within one of the following categories, the applicant will need to prepare an environmental assessment: If the proposed facility is in an officially designated wilderness area, wildlife preserve, 100-year floodplain (as determined by the Federal Emergency Management Agency's flood insurance maps); if the location may affect threatened or endangered species under the federal Endangered Species Act, or historic districts or sites listed or eligible for listing in the National Register of Historic Places, or Indian religious sites; if the location will cause significant change in surface features, such as wetland fills, deforestation or water diversion; or the proposed use of high intensity white lights in residential neighborhoods, as defined by applicable zoning laws.

#### THE NEED FOR PLANNING & COOPERATION

In light of the requirements of the Act, local communities need to review their land use ordinances to be sure they are consistent with the provisions of the Act. Communities also need to be sure they follow appropriate record keeping procedures. More importantly, communities need to work cooperatively with other communities as well as the telecommunication companies to plan for the appropriate location of wireless services. Much of the planning work may require the use of a qualified expert in telecommunications.

By planning for these facilities in advance, communities can better explore the options which may be available for the siting of wireless facilities such as encouraging the location of sites on publicly owned land. Communities can also address aesthetic issues if they are concerned about the visual impact of personal wireless facilities. For example, communities can encourage the camouflaging of antenna structures, such as by painting the structures a certain color. Finally, to reduce the proliferation of tall towers, antennas for personal wireless services can sometimes be mounted on existing structures such as water towers, farm silos, tall buildings, church steeples, street lights, electric towers, or existing communications towers (television, radio, etc.). Telecommunications development is a national priority. Local communities need to be prepared for it. ■

Brian Ohm is an Assistant Professor and UWEX Land Use Law Specialist at the UW-Madison Department of Urban & Regional Planning