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HIGHLIGHTS

ANALYSIS: Battle Lines Drawn Between Housing Lenders and Borrowers
Richard Zahm, a Connecticut direct lender, in the first of a two-part series, draws a stark analogy between war and the ongoing struggle between entrenched Lenders and legions of angry Borrowers for the American Dream of homeownership. **Page 4**

2011: the Year of Recovery in Real Estate for Some, Disaster for Others
Brad Case of the National Association of Real Estate Investment Trusts notes that publicly traded equity real estate investment trusts posted a 27.95 percent return in 2010, but private equity funds have not yet begun to recover from the recession. **Page 23**

Cell Tower Zoning Decisions Illustrate Telecommunications Act Boundaries
A recent spate of lawsuits pitting personal cellular communications providers against local zoning boards signals that fights over cell phone tower and antenna placement shows no signs of abating. **Page 30**

INDUSTRY SPOTLIGHT: Developer Grows With China's Real Estate Sector
Feng Lun, chairman of Beijing Vantone Real Estate Co. Ltd., rose from a fledgling developer to manage one of China's largest real estate companies. Vantone has benefitted from the nation's expanding economy and adoption of Western finance techniques. **Page 26**

Church-County Mixed-Use Project Not in Violation of Establishment Clause
The U.S. Court of Appeals for the Fourth Circuit upholds the dismissal of a challenge to the constitutionality of a local government's loan to a church partnership. The loan paid for the purchase of the church's property and the construction of a new church building with a mid-rise apartment tower that will include a high percentage of affordable housing. **Page 19**

ANALYSIS: FHA Revises Its Criteria for Home Mortgage Underwriting
David F. Belkowitz of Hirschler Fleischer and **David H. Blake** of Berkadia Commercial Mortgage LLC write that at a time of strong demand for federally insured mortgages, the Federal Housing Administration has amended its underwriting standards to provide increased protection. **Page 18**

Alleged Permit Favoritism Ruled Not to Support Equal Protection Charges
The U.S. Court of Appeals for the Seventh Circuit rules that a town's alleged unfair enforcement of building permits did not constitute equal protection or due process constitutional violations because the plaintiff, an Italian restaurant, was not similarly situated to those it claimed were given preferential treatment. **Page 16**

LODGING

FORECASTS: CB Richard Ellis Econometric Advisors reports that the recovery in the U.S. hotel sector will continue in 2011 and begin to accelerate in 2012. A CBRE-EA economist tells BNA her firm has seen an "historic" increase in demand for the first three quarters of 2010, which can be traced to the "tremendously low" room rates. **Page 21**

SMALL HOTELS: David L. Kaufman, a partner at Manhattan-based A.Y. Strauss LLC, tells BNA that smaller, single-franchised hotels will be part of the general recovery in the hospitality industry, but they will have a harder time of it than larger facilities. **Page 22**

DEAL OF THE WEEK

SHOPPING CENTERS: Real estate investment trust Retail Opportunity Investments Corp. announces that it has closed on three shopping centers in California and Oregon, and $58 million of mortgages for three successful retail centers in California. **Page 17**

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Environment

Zoning

Quartet of Cellular Tower Zoning Decisions Illustrate Telecommunications Act Boundaries

A recent spate of lawsuits pitting personal cellular communications providers against local zoning boards signals that fights over cell phone tower and antenna placement shows no signs of abating. Though disputes between cell service providers and localities have been for the most part governed by the federal Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (TCA), conflicts still arise as providers try to fill coverage gaps and implement new technologies, and towns fight to preserve aesthetics.

Zoning disputes over the placement of cell towers and antennas, be they free-standing structures or add-ons to existing towers or buildings, generally focus on the guidelines required in section 704 of the TCA, which governs cell tower siting. Section 704 generally tries to strike a balance between the traditional control that localities are given over land use, and the promotion of increased wireless service to the population in general. The four recent decisions are illustrative and instructive of the frequent legal battles cell service providers and tower owners engage in with local municipalities and their zoning boards:

- *Omnipoint Communications Inc. v. Zoning Board of Adjustment of The Borough of Rutherford*, N.J. Super. App. Div., No. A-0202-09T2, 12/10/10
- *T-Mobile Northeast LLC v. City of Lawrence*, D. Mass., No. 1:09-cv-11320-NMG, 12/13/10
- *SBA Towers II v. Town of Atkinson*, D.N.H., No. 1:09-cv-00447-LM, 12/15/10
- *Vertex Development LLC v. Manatee County*, M.D. Fla., No. 8:09-cv-02645-EAK-TBM

'Substantial Evidence' Requirement a Stumbling Block. According to Timothy J. Tryniecki, a real estate partner at Armstrong Teasdale LLP, the "substantial evidence" requirement is the most heavily litigated section of the TCA, with many court decisions focusing on whether a locality's denial of a cellular tower or antennae application was supported by substantial evidence ("Cellular Tower Siting Jurisprudence under the Telecommunications Act of 1996—The First Five Years," 37 *Real Property, Probate & Trust J.* 271, 279-84 (2002)). These recently decided cases, with the exception of *Town of Aktinson*, each have at their core a debate on whether the a zoning board's decision to deny a wireless provider's application was supported by substantial evidence at the application hearing.

In *Omnipoint*, the zoning board of the Borough of Rutherford appealed an earlier reversal of its denial of cell service provider Omnipoint Communications Inc.'s application to erect eight wireless antennas on top of an existing multi-family structure. Though Omnipoint's proposal called for encasing the antennas in faux chimneys which would more readily blend in with the existing structure, the zoning board of the Borough of Rutherford denied the application because it would violate current zoning ordinances, and because Omnipoint failed to show the necessary positive criteria for a zoning variance for wireless communications facilities, in the zoning board's view.

However, a state trial court reversed that decision based on the lack of any substantial evidence supporting the zoning board's decision, a ruling an appeals court subsequently affirmed. The New Jersey appeals court noted that the only expert testimony given at trial claimed that there was a significant wireless coverage gap in the area, and could be best remedied with additional antennas placed on the subject property because it was the tallest structure in the vicinity.

The *Omnipoint* court said that for the purposes of a zoning variance application, "the positive criteria are satisfied where the carrier is licensed by the FCC and proffers credible testimony establishing that a coverage gap exists." Given that the zoning board's decision did not credit or refute the clear positive criteria presented in favor of a variance, the *Omnipoint* court said the zoning board's decision was clearly arbitrary and capricious, and must be struck down under the TCA.

A similar situation presented itself in *City of Lawrence*, where T-Mobile Northeast LLC appealed the City of Lawrence's denial of its application to install six panel-type antennas, again hidden in "stealth" chimneys, on an existing structure in a residential area. The area's zoning prohibited locating wireless facilities in residential areas unless they were located on municipality-owned buildings. Despite extensive testimony at the application hearing establishing T-Mobile's coverage gap in the area, the unsuitability of other locations in the area, and the minimal aesthetic impact the antennas would have, Lawrence denied the applications on the grounds that T-Mobile did not show adequate evidence as to why a variance should be granted.

On appeal to the U.S. District Court for the District of Massachusetts, T-Mobile argued that the city's denial of its zoning variance applications amounted to an effective prohibition of wireless services in the area in violation of the TCA. The district court agreed with T-Mobile, stating that "the Board's decision here is plainly deficient," because it merely recited the local zoning ordinance provisions, and did not explain why the evidence T-Mobile presented failed to satisfy zoning variance requirements. Indeed, the court said the zoning board's decision failed to address any specific reason why T-Mobile's zoning variance was denied, despite T-Mobile's showing that any negative impact would be de minimus.

In addition, the *City of Lawrence* court noted that in the minutes from the zoning board hearing, board members were skeptical of T-Mobile's expert's opinions regarding coverage gaps merely on the basis of the board's own non-expert, anecdotal evidence. Reiterating the city's lack of evidence in support of a denial, the

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court said such "[u]nscientific, anecdotal evidence will not suffice to controvert the plaintiff's evidence of a coverage gap." The court overturned the zoning board's ruling as a violation of the TCA's substantial evidence requirement.

TCA Calls for Expedited Remedies. Another aspect of *City of Lawrence* court's decision that bears mention is the court's issuance of a preliminary injunction directing the city to issue T-Mobile the necessary cell tower permits, instead of a remand to the city zoning board. As the court noted, "To remand the case would simply extend the litigation, contrary to the TCA's directive to the court to 'hear and decide such action[s] on an expedited basis.' "

Further illustration of why a court order was necessary in *City of Lawrence* came from an alternative remedy the city proposed. Lawrence offered to begin a public bidding process to put T-Mobile's antennas on municipally-owned buildings, in conformance with zoning regulations, a process the city estimated would take no more than two months. However, its own regional real estate manager said the process would likely take nine to 18 months.

Tryniecki mentioned the need for expedited remedies in "Cellular Tower Siting Jurisprudence," noting that while the TCA "provides no specific remedies for violation of its substantive provisions[,] [g]enerally, remedies in the TCA context require urgency . . . " Tryniecki mentions that summary judgment, writs of mandamus, declaratory judgments, injunctions, and separate civil actions for deprivation of rights are all remedies courts have used in addressing TCA violations.

A cautionary tale for why TCA violations might call for expedited remedies can be found in *Town of Atkinson*, a cell tower zoning case where the locality already lost on substantive issues in prior litigation, but footdragging in implementing the prior court's ruling led to a new round of litigation. Atkinson's zoning board's denial for building owner SBA Towers II LLC to install flush-mounted wireless antennas on its building was previously ruled a violation of the TCA's substantial evidence requirement (*SBA Towers II LLC v. Town of Atkinson*, No. 07-cv-209-JM, 2008 WL 4372805 (D.N.H. Sept. 19, 2008) (Atkinson I)). However, instead of issuing a order directing Aktinson to allow the installation of the antennas, the *Atkinson I*court directed the parties to follow a prior contract executed between the parties. That contract required SBA Towers to go back to the city and seek approval once more, which was once again rejected.

Responding to SBA Towers' motion for summary judgment, the *Town of Atkinson* court noted several deficiencies in Atkinson's response to the motion, and its denial of SBA Towers' second application. The court said Atkinson failed to respond to SBA Towers' claim that the second denial was not supported by substantial evidence. In addition, the court said the second denial did not satisfy the TCA's requirement that a decision regarding cell tower siting approval be made in writing. Though Atkinson did issue a written decision after the second denial, it was simply a transcript of the application hearing's minutes, and did not in any way explain the rationale for the city's denial. The court said, citing prior precedent, that "minutes cannot serve as a substitute for a separate written decision," under the TCA.

Evidence Key for Both Parties. Robert Foster, real estate counsel at Rackemann, Sawyer & Brewster, told BNA Jan. 5 a locality's decision to deny an application for a wireless facility must include clear reasoning for the denial in order to hold up on appeal. "There are still towns that just sort of deny these without putting a lot into their decisions, and they're still going to get reversed. That's what happened in *City of Lawrence*," said Foster. What will support a denial on appeal, said Foster, is "[i]f they have a good zoning bylaw, and they follow it. That helps and they write a fairly detailed decision."

On the service provider's side, Foster said establishing that there is a coverage gap is key to obtaining approval for a cell tower under the TCA. "When a provider says there is a coverage gap, the terms vary from federal circuit to federal circuit, [but] the general rule is they have to show they have a coverage gap, and what they are proposing is the only feasible means of filling it," said Foster. However, localities can provide some push-back on the coverage gap argument. According to Foster, service providers are "pretty good at establishing [a coverage gap], but often the town can show there is another feasible means of filling the gap; not the ideal means that the provider would like, but still will close the gap to some extent. And that kind of argument carries weight."

Establishing a coverage gap was recently made easier for service providers, thanks to a 2009 ruling from the FCC, according to Foster (FCC 09-00, November 18, 2009). There used to be a split among the circuits regarding whether a coverage gap existed for a service provider if another wireless service provider did have adequate coverage in the gap area. Pointing out a possible problem with rejecting a coverage gap where other service providers have coverage, Foster cited the 9th Circuit's reasoning that "we're trying to promote competition, and otherwise you have this weird crazy quilt of coverages that are permissible." This is no longer an issue, said Foster, because "[t]his declaratory ruling from 2009 resolved that issue, and said that a gap exists if the provider has a gap. If a town denies an application on the basis that another provider provides coverage, that will constitute effectively prohibiting the provision of personal wireless services within the meaning of the [TCA]."

Combination of Factors Cited in Appropriate Denial. A clear explanation and ample evidence in support of a denial was on display in *Manatee County*, where a cell phone tower developer challenged the denial of an application for the construction of a 150-foot cell tower in a residential golf course community. Though cell tower developer Vertex Development LLC challenged the denial as a violation of the TCA, arguing that there was a significant coverage gap in the area that could most feasibly be remedied through its proposal, the U.S. District Court for the Middle District of Florida upheld the denial. Its stated reasons included several different types of evidence showing that the cell tower was detrimental to the community at large, and that other feasible alternatives existed to facilitate adequate wireless coverage in less obtrusive means.

Unlike in *City of Lawrence* and *Omnipoint*, legitimate aesthetic concerns reigned supreme in *Manatee County* because the proposed 150-foot cell tower would dwarf the single-family homes and golf clubhouse structures

in the area, and was completely out of character for the community. Many residents complained, after witnessing multiple video and photographic mock-ups of what the tower would look like that their views would be ruined because it loomed large from all areas of the community. Several residents were also worried about the impact on the value of their homes, and mentioned that they would not have bought homes in the development if such a structure were present; a licensed realtor from the area testified that real estate prices could be expected to drop about 2 percent after the tower's construction. Finally, expert witnesses at the hearing testified that two alternative sites less intrusive to the community would provide comparable coverage to Vertex's proposal.

The *Manatee County* court had no trouble affirming the denial of Vertex's proposal, stating that "the photo simulation, residents' testimony, property value evidence, and testimony concerning alternative cell tower sites constitute substantial evidence" were adequate to support denial of Vertex's application. Indeed, the court said "only a single ground for denial of an application for a permit is required."

Aesthetics, Local Opposition Matter. What's clear from these four decisions is that courts take a locality's concerns over aesthetics seriously. *Omnipoint, City of Lawrence*, and *Town of Atkinson* all featured proposals for "stealth" wireless antennas, those that minimized their appearance through facades that matched an existing structure, and from mounting on top of an existing structure as opposed to a stand-alone tower.

Foster said striving for "stealthiness" has been an ongoing trend among cell service providers. "I think they accept those more, and they've gotten better at their 'stealthiness.' You don't see anything like those really weird tree-like things, the older ones like on the Hutchinson [River] Parkway in New York that just stand out," said Foster. "Now the brick ones look pretty good. And even the freestanding ones, they try to paint the monopoles colors that blend in with the sky, or the tree background. I think those are less noticeable than a fake tree."

Tryniecki also mentioned the importance of aesthetics to cell tower zoning decisions, stating that, "The weight of evidence on aesthetics in cellular tower placement is one of the most significant issues under the TCA." However, Tryniecki noted that "virtually no courts have [affirmed] a denial based upon aesthetics alone, 'Thus, aesthetic considerations are relevant, provided they do not amount to a de facto prohibition of personal wireless services.' " Indeed, in *Manatee County*, while opposition to the aesthetics of the proposed cell tower was strong, it was only one of several reasons supporting the application's denial.

Another factor seen in *Manatee County* denial decision was head count, that is, the amount of local citizens voicing support or opposition to a proposed variance. Tryniecki said this is the most important factor courts take into account, even more so than aesthetic concerns. The *Manatee County* court noted in its decision the large number of citizens who spoke out at the variance hearing, most of them in opposition to the cell tower.

Future of Cell Tower Siting. Foster could not identify a shift in whether localities or cell service providers are tending to win cell tower zoning disputes, but he said local opposition remains strong. "No one wants a new tower. I don't think anyone says, 'Yeah, I really need that cell [reception],' " said Foster. But he added, "Well, let's put it this way: the people driving down the road when their call drops off, they all say, 'Why isn't there coverage here?' " But the people who live along that road, they don't want to see a tower. That conflict and impulse still remains."

It's unlikely that these disputes will subside, though, as cell service providers continue striving to plug existing coverage gaps and roll out high-speed 3G, and now 4G, networks. "That's the one change I think that's happening. A lot of those [high-speed] systems require more antennas, site-to-site antennas," Foster said. "I'm on the planning board of my town in Massachusetts, and we've seen more applications for those facilities coming before us."

Foster said that, in general, "the local zoning authorities have gotten a good understanding of what is and isn't permitted under the [TCA]." Courts too have learned from handling more TCA litigation. "I think the courts have gotten pretty good at judging when it's an appropriate denial, and when it was a denial that violated the [TCA]."

Lessons of past cell tower zoning disputes have been absorbed by cell service providers and localities to some extent as well, where both parties try to accommodate the other and minimize negative impacts for all parties. Foster noted that "[o]ne of the trends that's been clear is that most localities really try to have their zoning laws promote co-location [of multiple service providers on one tower] and location on existing structures, [they] favor that over building a new tower. For the most part that's OK under the [TCA]." But Foster added, "Where that isn't OK is if there's a real coverage gap for a provider, and there's no existing structure to go on, and no co-location; then they're probably going to be able to build their tower."

Service providers too are taking similar steps to avoid costly and time consuming litigation. Foster said service providers "are able to use a lot of flat panels that don't stick out from the structures. And these providers are making an effort to co-locate or go on existing structures, because they are interested in getting these things up as fast as they can, and if they can avoid a fight over building a new tower, they will."

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