

## **Local Regulation of Tower Siting**

(from *Maine Townsman*, July 2000)

by William Plouffe, Esq., Attorney, Drummond Woodsum & MacMahon

The Federal Telecommunications Act of 1996 ("TCA") was intended by Congress to facilitate the development of wireless telecommunications facilities, including towers erected to support transmitting and receiving antennas. It is in the national interest for this technology to flourish. However, Congress was also aware that the siting of these towers is often a matter which generates local concern and controversy. Those who must live near these towers may oppose the proposed locations because of visual impacts, structural safety issues, health concerns and other reasons. Typically, these concerns are raised and pursued in the local land use permitting process.

Congress was aware of this tension between national interests and local control over land use and incorporated within the TCA language providing a balance of these interests. As the United States Court of Appeals for the First Circuit recently observed, the TCA includes "a deliberate compromise between two competing aims – to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over the siting of towers." *Town of Amherst v. Omnipoint Communications Enterprises, Inc.*, 173 F.3d 9, 13 (1st Cir. 1999).

The TCA's compromise language was recently tested in proceedings before the Town of Falmouth's Board of Zoning Appeals in a matter involving two applications to construct telecommunications towers. The Board ultimately denied both applications and the tower developers appealed to the United States District Court. In what appears to be the first case in Maine brought under the TCA, the Court upheld the authority of Falmouth to deny the tower applications. *Industrial Communications & Electronics, Inc. v. Town of Falmouth, et al.*, F.Supp.2d \_\_\_\_ (D. Me. 2000).

This article discusses the TCA's effort to balance the interests of the tower industry with the interests of local land use authorities and reviews how the TCA was applied in the Falmouth case. It then discusses some lessons from the Falmouth case.

### **TCA's Preservation of Local Zoning Authority**

A critical section of the TCA is captioned "preservation of local zoning authority" and states:

(A) Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government . . . over decisions regarding the placement, construction, and modifications of personal wireless service facilities. *47 U.S.C.A. § 332(c)(7). ["Personal wireless services" include such services as cell phones, mobile radio services and pagers. They do not include television, satellite television or AM/FM radio broadcasting services.]*

The same section, i.e., "this paragraph," of the TCA also contains "limitations" on local control and it is these "limitations" that are used by the tower industry to challenge the

decisions of local zoning authorities. However, when examined carefully, the TCA simply provides the industry specific procedural and substantive protections. It has not preempted local zoning authority. As long as local authorities do not violate those specific protections, they remain free to apply their land use ordinances, even if it results in denial of an application to build a new tower.

### **Procedural Protections**

The TCA affords certain procedural protections to applicants seeking to construct telecommunications facilities, including towers. These are:

1. Permit applications must be acted on "within a reasonable period of time" after the permit request is filed, "taking into account the nature and scope" of the request;
2. The decision on the permit request must be in writing; and
3. The decision must be supported by "substantial evidence in a written record."

### **Substantive Protections**

The TCA also affords certain substantive protections to applicants. It provides that local zoning authorities may not:

1. Unreasonably discriminate among providers of functionally equivalent services;
2. Prohibit or have the effect of prohibiting the provision of personal wireless services; and
3. Regulate on the basis of the environmental effects of radio frequency emissions to the extent that the personal wireless facilities comply with the Federal Communications Commission's regulations concerning emissions.

### **Town of Falmouth Case**

Industrial Communications & Electronics (IC&E), a Massachusetts company with operations in New England, Florida and Colorado, purchased a parcel of land in Falmouth with four existing telecommunications towers. This land is in a part of Falmouth that has a number of towers and that is zoned to permit towers as conditional uses. However, the zoning regulations, which were adopted in 1990, require that towers not exceed 200 feet in height and that they be set back from all sidelines a distance which at least equals the height of the tower, i.e., the so-called "fall zone." None of IC&E's towers exceeded 200 feet, the highest being 170 feet, but three of the four towers failed to meet the required setback. These three towers were "grand-fathered" with respect to setbacks because they pre-existed enactment of the regulations.

IC&E, which holds a license from the Federal Communications Commission to provide Specialized Mobile Radio Service ("SMRS") in Maine, filed a conditional use application with the town to build a new 200-foot tower on their land which did not meet the setback requirements. They proposed to remove the four existing towers, one of which (the 170-foot tower) had been damaged in the January 1998 ice storm. IC&E took the position that it was, in effect, repairing this ice storm damaged tower; that this fit within the "structural alteration" provision of the ordinance; and that this distinguished their application from an application to build a new tower on land which had no grandfathered towers on it. In the event that the Board of Appeals disagreed with this interpretation, IC&E also applied for a variance from the setback requirements of the ordinance.

The Board found that what IC&E proposed was the tearing down of an existing tower and the building of a new tower in a different location on the lot. This, the Board reasoned, was the same as a proposal to build a new tower. Consequently, the new tower had to meet the "fall zone" setback, which it did not. The Board also denied the requested variance, finding that IC&E failed to meet the "undue hardship" test because, among other things, IC&E knew that the property size would not accommodate a 200-foot tower due to setback requirements and because IC&E was able to use the existing towers for broadcast purposes. In fact, IC&E had tenants on the existing towers (this is called "co-location") from whom IC&E received rent. IC&E appealed this decision to the United States District Court. *[The TCA permits appeals to be brought in "any court of competent jurisdiction." IC&E could have asserted its TCA claims in state court. In fact, with respect to the substantial evidence claim brought by IC&E, the Court observed: "This seems to be a purely state law issue that belongs in state courts. Nevertheless, Congress has directed that federal courts become involved." IC&E also filed a so-called Rule 80-B appeal in the Maine Superior Court. That appeal was stayed by agreement of the parties.]*

After being denied permits for the 200-foot tower, IC&E filed applications for a 170 foot tower in a slightly different location on the lot. It did not meet the required setbacks. In addition to the arguments which IC&E had made in support of its 200-foot tower request, IC&E argued that it was entitled to a permit on the basis of being an allowable expansion of a non-conforming use. Although the tower was no higher than the damaged 170-foot tower that would be removed, the proposed tower had a larger base. (The extra strength of the proposed tower was needed to accommodate the weight of co-located antennas in addition to IC&E's own SMRS antennas.) The Board of Appeals rejected this proposal on essentially the same grounds as those given for rejecting the earlier proposal. The Board also found that it was not an allowable expansion of a non-conforming use. IC&E appealed this decision to the United States District Court. (The appeals were considered simultaneously by the Court.)

In their appeals, IC&E alleged that Falmouth violated the TCA by making decisions not based upon substantial evidence; by effectively prohibiting personal wireless services; and by unreasonably discriminating against IC&E. IC&E also claimed damages and attorneys' fees pursuant to the federal civil rights act, alleging that the town's violation of the TCA deprived them of rights secured by federal law. *42 U.S.C.A. § § 1983, 1988*. The Court analyzed each of the TCA claims separately.

The Court began by reviewing the meaning of the term "substantial evidence," as established in prior court opinions, and defined it as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Further, the Court found that the substantial evidence test gives the agency the benefit of the doubt since it does not require the degree of evidence that satisfies the court but only the degree of evidence that satisfies a reasonable factfinder.

After reviewing the extensive findings of fact and conclusions of law written by the Board in both cases, the Court found that there was substantial evidence to support the Board's conclusion that the tower proposals did not fall within the zoning ordinance's provision allowing "structural alterations" of existing towers (with conditional use approval) but, rather, constituted proposals to replace an existing tower with a new tower. The Court also found substantial evidence to support the Board's conclusion that the IC&E proposal to tear down the existing 170-foot tower meant that it would lose its grandfathered status and that, therefore, it could not be considered as a permissible expansion of a nonconforming use.

The Court then turned to the variance denial. It focused on the reasonable return and self-created hardship prongs of the four-part undue hardship test under State law. With respect to the reasonable return test, the Court, guided by Maine law, affirmed the Board's findings that the property could be used profitably by IC&E in its current condition. In fact, it was being used for the antennas of other telecommunications carriers who paid rent to IC&E.

With respect to the self-created hardship prong of the test, the Court noted that IC&E had bought the land with the four towers knowing that they could not meet IC&E's new wireless services needs and that IC&E had bought the land with presumptive knowledge of the ordinance's limitations on future development. The Court concluded that substantial evidence supported the Board's decision.

The next TCA based claim by IC&E was that Falmouth had violated one of the substantive protections afforded wireless carriers under the TCA by effectively prohibiting the provision of personal wireless services within the town. Specifically, IC&E maintained that the Ordinance did not allow modernization of existing facilities. It also pointed out that 14 of the 15 existing towers in Falmouth do not meet the fall zone requirements and cannot be replaced under the Board's interpretation of the ordinance. The Court began its analysis by commenting that a plaintiff under the TCA need not show a general ban on towers in order to succeed in a claim brought under this provision of the TCA. However, the plaintiff must meet a "heavy" burden and show "from language or circumstance not just that this application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try." Here, IC&E did not offer evidence to show that the other towers in Falmouth could not be upgraded without violating the fall zone. More importantly, the town showed that there is a substantial amount of acreage in the town which is zoned for towers as conditional uses. IC&E's response that most of this acreage is near residential areas and that the Board would never allow new towers near residential areas was unavailing since the record

showed that the town had, in the past, permitted towers near residences. The Court also noted that IC&E had not been convincing in its assertions that it had sought out other tower sites but had been unable to purchase them.

The final TCA based claim was that Falmouth had discriminated against IC&E. The Court rejected this claim:

The "discrimination" prong prohibits a municipality from purposefully denying a PWS [personal wireless services] provider similar access to that which other functionally equivalent providers have. The Act does not mandate that a provider may construct a tower that does not satisfy the municipality's zoning requirements merely because other providers have found a way to provide service to a given area.

There was no suggestion that IC&E could not get the same access to other towers through co-location that its competitors had. There also was no suggestion that Falmouth was intentionally favoring other providers over IC&E.

IC&E's claim for damages and attorney's fees was rejected because it failed to show that Falmouth had violated the TCA. *[The question of whether a municipality which has violated the TCA is liable for damages and attorneys fees under 42 U.S.C. § 1983 has been decided by several courts with different results. The only Court of Appeals decision on the issue has found that damages and fees are available to the plaintiff].*

### **Lessons from Falmouth Case**

There is no federal land use or zoning law associated with the TCA. Municipalities are allowed to apply their ordinances to tower applications just as those ordinances would be applied to other applications provided that the municipality adheres to the procedural and substantive limitations discussed above. The procedural limitations are, in general, no more onerous than what is required under Maine law.

The TCA requires a written decision on every application. This is no more than is required under State law. However, the Falmouth case demonstrates that local land use boards in TCA cases should take the time to issue detailed written decisions that fully explain the board's reasoning. The Falmouth Board issued extensive findings of fact and conclusions in each of the two cases. These served the Board well when this matter went before the Court.

Local boards should compare the evidence presented to each of the review criteria which they are applying in reviewing a tower proposal. For example, if the proposal requires a variance, go through each of the four prongs of the hardship test to determine whether the applicant has met its burden of providing proof on each criterion and then determine whether that proof is persuasive when compared to all the evidence before the Board. The Board's decision will be upheld if it is supported by "substantial evidence". This, again, is the same approach which should be used in all variance applications. However, it takes on even greater importance in TCA cases because of the extra scrutiny which a federal

court may give the decision and because of the possibility of the town's being held liable for damages under the federal civil rights statute.

Municipalities should have areas where towers are allowed as permitted or conditional uses. Those areas should be viable for tower use, i.e., the land areas should be large enough to accommodate towers and the topography should be suitable for towers. The availability of these areas should be made part of the record in tower permit proceedings.

Municipalities should not take the position that "we" already have enough of a certain type of wireless service and, so, no more towers for that type of service will be allowed. This invites a discrimination claim under the TCA.

Land use agencies and boards should ask enough questions to get an understanding of what is proposed and the technology behind it. Tower developers have often done propagation studies which show what area their signal will cover when broadcast from an antenna at a certain height; a structural study to show the "loading" on the tower with certain types of antennas and cables; and a market survey to show which areas have population centers that can serve as a customer base. Further, there are differences between digital and analog systems that require different tower features. In some cases, it may be worthwhile for the local agency to hire expert engineering assistance to help it understand the proposal.

## **Conclusion**

Three years ago, there were only a handful of court cases interpreting the TCA. Most of all of these were at the United States District Court level. Many were favorable to the tower industry. Over the past two years, there have been dozens of cases, some of them reaching the Court of Appeals level. The more recent trend seems to be more favorable to municipalities. This may be the result of the municipalities learning more about the TCA and taking more care in complying with it.

What the Falmouth case shows is that Maine towns, even after enactment of the TCA, can still control the location of towers and generally require them to meet the same standards as other types of development. This is what Congress intended.