Established 1872

Reprinted from the
Commercial Real Estate Monthly section of January 26th, 2015

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BANKER & TRADESMAN

THE REAL ESTATE, BANKING AND COMMERCIAL WEEKLY FOR MASSACHUSETTS

A PUBLICATION OF THE WARREN GROUP

GOLDEN AGE OF WIRELESS

Supreme Court Sets New Rules For Cell Tower Denials

Ruling Not All Good News For Carriers

BY ELIZABETH MASON
SPECIAL TO BANKER & TRADESMAN

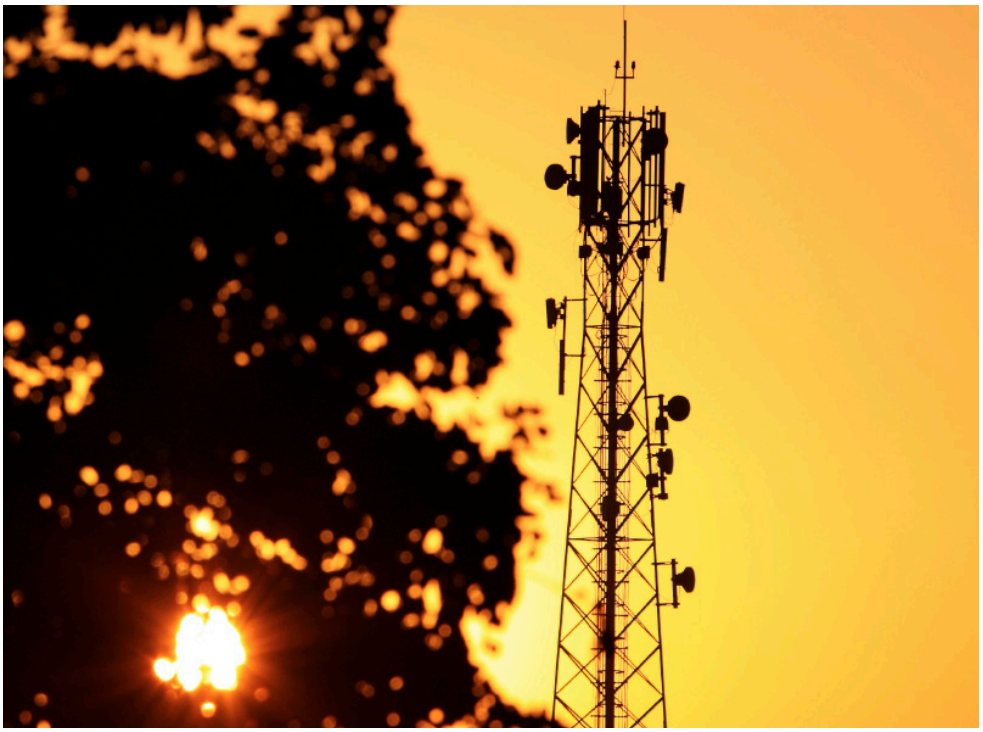
Commenters are heralding the U.S Supreme Court's recent decision in *T-Mobile South, LLC v. City of Roswell, Ga.*as a major victory for federally licensed wireless communication carriers seeking to build out their networks. The court held that when a local government denies a wireless carrier's application to construct a wireless communications facility – such as a cell phone tower – it must not only document the reasons for the denial in a "sufficiently clear" manner, but also provide those written reasons to the carrier "at essentially the same time" it issues the denial.

ELIZABETH MASON

Nonetheless, what the court took away with one hand, it arguably gave back with the other. The *T-Mobile South* decision leaves local governments with broad discretion over what form their written reasons for denial may take. Moreover, it gives such governments cover to take the full amount of time the Telecommunications Act of 1996 (TCA) and the Federal Communication Commission's so-called "shot clock" rule provide for taking final action on applications.

Some Background

In February 2010, T-Mobile South applied to build a 108-foot-tall cell phone tower in Roswell. The Roswell City Council held a public hearing to consider T-Mobile South's application. During the hearing, council members expressed concerns about the tower's impact on the area. At the end of the hearing, the council voted unanimously to deny the application. Two days after the hearing, the city informed T-Mobile South in a brief letter that its application had been denied, and that hearing minutes would be made available. Detailed minutes were issued 26 days later (four days short of the deadline for T-Mobile South to appeal the denial).



T-Mobile South filed suit, alleging that the city's denial of its application was not sup¬ported by substantial evidence in the record. (The TCA provides that any decision by a local government to deny an application to "place, construct, or modify" a wireless communication facility "shall be in writing and supported by substantial evidence contained in a written record.") The federal district court agreed with T-Mobile South, concluding that the city, by failing to issue a written decision stating its reasons for denying the application, had violated the TCA.

On appeal, however, the 11th Circuit Court of Appeals agreed with the city and reversed the district court's decision. According to the 11th Circuit, the city had satisfied the TCA because it had provided its reasons for denying T-Mobile South's application – it had just done so in a separate document from the denial letter, the hearing minutes. The Supreme Court took up the case to resolve a split among the Circuit Courts of Appeals on this issue.

Writing for the court's 6-3 majority, Justice Sonya Sotomayor held that local governments must provide reasons when they

deny a wireless carrier's application to build a cell phone tower, but do not need to include those reasons in the written denial letter. Instead, "the locality's reasons may appear in some other written record so long as the reasons are sufficiently clear and are provided or made accessible to the applicant essentially contemporaneously with the written denial letter or notice."

Impacts In Mass.

Wireless carriers are claiming victory on the grounds that it is now clear that municipalities must provide written reasons when they deny an application to build a wireless communication facility. To the extent that carriers no longer need to sift through a less-than-robust public record to discern a local government's rationale for denying an application, the decision is such a victory. Indeed, the TCA limits the grounds on which denial of an application may be based, and requiring local governments to spell out their reasons in writing ensures that a denial is for statutorily permissible reasons. (For example, at least one member of the Roswell City Council stated that he was opposed to T-Mobile South's proposed cell tower because other carriers already had sufficient coverage in the area – a basis for denial expressly proscribed by the TCA.)

However, the court's decision also gives local governments leeway to take their time in issuing final decisions. Preparing a written statement of reasons for a denial that can be issued "roughly the same day as the denial" itself will impose a burden on smaller municipalities that do not have a full-time planning department or town attorney. These municipalities – which are often in areas where carriers most need to build out their networks expeditiously – may be more likely to take the full 150 days provided under the TCA for new wireless facilities (and the full 90 days provided for modifications to already existing wireless facilities) to issue their denials with reasons. Ultimately, time will reveal the impact of the court's decision, as carriers work to deliver seamless, reliable data coverage to underserved areas, and eliminate capacity problems that interfere with consumers' ability to operate their wireless devices at times of peak usage. ■

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