JEFFERSON COUNTY, WEST VIRGINIA
Departments of Planning & Zoning
116 East Washington Street, 2nd Floor
P.O. Box 338
Charles Town, West Virginia 25414

Phone: (304) 728-3228
Email: planningdepartment@jeffersoncountywv.org **Fax: (304) 728-8126**

MEMORANDUM

TO: JEFFERSON COUNTY PLANNING COMMISSION

FROM: JENNIFER BROCKMAN, DIRECTOR OF PLANNING

DATE: SEPTEMBER 10, 2010

SUBJECT: SEPTEMBER 14, 2010 PLANNING COMMISSION MEETING

Please find attached the following documents for consideration at the September 14, 2010 Planning Commission meeting.

Documents provided:
- **September 14, 2010 agenda and map.**

1. Approval of the minutes from the August 24, 2010 meeting.
   Documents provided:
   - **August 24, 2010 draft minutes.**

2. Citizen Communications.

3. A call for postponements.

4. Request by Alpha Associates, Inc. for a variance from Section 6.3 of the Subdivision Ordinance to allow for the project file to re-open and a variance from Section 6.3 of the Subdivision Ordinance to allow for an extension of time to complete the subdivision process from 24 months, which expired June 27, 2010 to July 1, 2010. This property is located south of Beauregard Boulevard in Patrick Henry Estates at the end of Gates Way and abuts Spring Run Apartments on the west side and Patrick Henry Plaza Shopping Center to the south. This project is to consist of 13 single bedroom apartments and 24 two bedroom apartments in five separate on story garden style apartment buildings.This property is designated as Tax District:2, Map:8, Parcel: 29.1.
   Documents provided:
   - **Sloan Square Apartments Variance Application**
   - **Sloan Square Site Plan**
   - **Staff Report and Exhibits**
   - **Staff Recommended Motion**

5. Update on Old Standard Quarry Freedom of Information Act requests.
   - **FOIA request to WV Legislative Rule Making Review Committee**
   - **Information sent by Mr. Jon Amores**

- **Letter from Department of Highways**
- **Request to speak with Mr. Patel**

6. Draft request to the County Commission to consider a change in zoning for Federal Lands.
   Documents provided:
   - *Draft agenda request* (This document will be provided to you on Tuesday Night)

7. Discussion on the Draft Amendments to Article 4B, Wireless Telecommunications Facilities and review of Stakeholder Meeting.
   Documents provided:
   - **Comments from the Stakeholders meeting.**
   - **Memo from Paul Rosa regarding the FCC Shot Clock Ruling (There is further documentation regarding this item in your e-mailed packets and in the agenda packet posted on our website.)**

8. Blue Ridge Mountain Community Plan – Reminder that next meeting will be September 21, 2010 at 7 PM.

9. Reports from Legal Counsel and legal advice to the Planning Commission.

10. Director's Report.
    Documents provided:
    - **Activity Reports**
    - **Urban Tree Canopy Information**

11. County Commission Liaison Report.

12. Planning Commission Exchange.

13. President's Report.

14. Actionable Correspondence.

15. Non-Actionable Correspondence.

If you have any questions or any items are missing; please contact the office at (304) 728-3228 from 9:00 a.m. to 5:00 p.m. Thank you.

AGENDA
JEFFERSON COUNTY PLANNING COMMISSION
SEPTEMBER 14, 2010

PUBLIC MEETING PROCEDURE:

The President shall identify the matter before the Planning Commission (PC) and ask for a presentation by the applicant or the applicant's representative followed by staff's presentation and recommendation.

Once the applicant has finished speaking, the President shall ask for public comments. As a member of the public, once you are recognized by the President, please come to the podium, state your name, provide any credentials that you believe are appropriate, and make a brief presentation. If you agree with a previous speaker, you may simply say so.

The President may limit the presentation time of speakers.

Once the public comments are completed, the applicant may respond to the public comments.

PC members may ask questions at any time.

A copy of any document or exhibit used by a speaker in his or her address to the PC must be left with the PC and will become part of the official public file on the matter at hand. The applicant or a representative of the applicant may have the opportunity to view the document or material.

Once all speakers have finished, the PC will discuss and then vote on a motion to approve, disapprove, or impose conditions on the application .

Public hearings are located in the Charles Town Library meeting room at 200 East Washington Street, at the side entrance on Samuel Street at 7:00 PM

1. Approval of the minutes from the August 24, 2010 Planning Commission meeting.

2. Citizen Communications.

3. A call for postponements.

4. Request by Alpha Associates, Inc. for a variance from Section 6.3 of the Subdivision Ordinance to allow for the project file to re-open and a variance from Section 6.3 of the Subdivision Ordinance to allow for an extension of time to complete the subdivision process from 24 months, which expired June 27, 2010 to July 1, 2010. This property is located south of Beauregard Boulevard in Patrick Henry Estates at the end of Gates Way and abuts Spring Run Apartments on the west side and Patrick Henry Plaza Shopping Center to the south. This project is to consist of 13 single bedroom apartments and 24 two bedroom apartments in five separate on story garden style apartment buildings.This property is designated as Tax District:2, Map:8, Parcel: 29.1.

5. Update on Old Standard Quarry Freedom of Information Act requests.

6. Draft request to the County Commission to consider a change in zoning for Federal Lands.

7. Discussion on the Draft Amendments to Article 4B, Wireless Telecommunications Facilities and review of Stakeholder Meeting.

8. Blue Ridge Mountain Community Plan – Reminder that next meeting will be September 21, 2010 at 7 PM.

9. Reports from Legal Counsel and legal advice to PC.

10. Director's Report.

11. County Commission Liaison Report.

12. Planning Commission Exchange.

13. President's Report.

14. Actionable Correspondence.

15. Non-Actionable Correspondence.

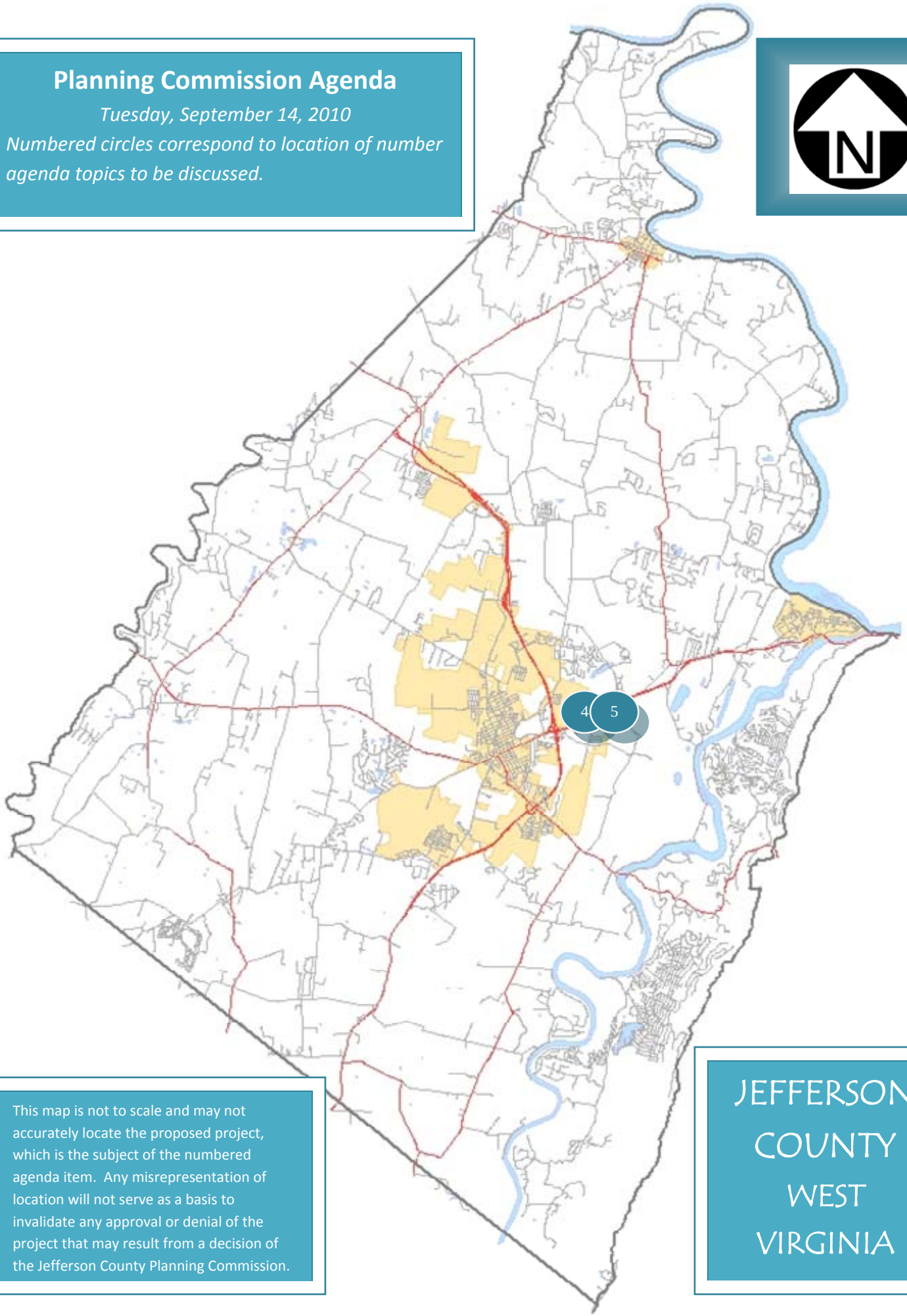
The Planning Commission welcomes written comments at any time. Our office is open Monday through Friday, 9:00 a.m. to 5:00 p.m., and is located at 116 East Washington Street, P.O. Box 338, Charles Town, WV 25414. Our phone number is (304) 728-3228; our fax number is (304) 728-8126; our email address is planningdepartment@jeffersoncountywv.org and our website is www.jeffersoncountywv.org.

Minutes and video recordings of past meetings and the Comprehensive Plan can be found on our website. The office has a file on each project as well as aerial photos of the county. Minutes and audio recordings of past meetings, Subdivision Regulations, Zoning Ordinance and the Comprehensive Plan are available for review in our office.

Planning Commission Agenda

Tuesday, September 14, 2010

Numbered circles correspond to location of number agenda topics to be discussed.



This map is not to scale and may not accurately locate the proposed project, which is the subject of the numbered agenda item. Any misrepresentation of location will not serve as a basis to invalidate any approval or denial of the project that may result from a decision of the Jefferson County Planning Commission.

JEFFERSON COUNTY WEST VIRGINIA

MINUTES
JEFFERSON COUNTY PLANNING COMMISSION
AUGUST 24, 2010

The Jefferson County Planning Commission met on Tuesday, August 24, 2010, with the following Commission members present: John Maxey, President; Thomas Trumble, Vice President; Morgan Etters, Secretary; Frances Morgan, Daniel Hayes, Arnold Dailey, Kelly Baty, and Gene Taylor. Staff members present included Jennifer Brockman, Director of Planning and Zoning; Seth Rivard, Planner; Steve Barney, Zoning Administrator; Jonathon Saunders, County Engineer; Stephen Groh, Assistant Prosecuting Attorney; and Julie Quodala, Planning and Zoning Office Manager.

Stephen Alemar was absent with notification.

Mr. Maxey called the meeting to order at 7:01 PM. The Planning Commission was provided with a letter from Mr. Stephen Alemar stating he would be resigning effective August 31, 2010.

1. **Approval of minutes for the August 5, 2010 Old Standard FOIA Request Special Meeting, the August 6, 2010 Draft Amendments to Article 4B, Wireless Telecommunications Facilities Workshop, and the August 10, 2010 Planning Commission Meeting:**
   Mr. Maxey moved to approve all three documents as written. Ms. Morgan seconded the motion. Mr. Hayes offered a friendly amendment to strike, "*Mr. Hayes stated that he would like to have a statement of deed submitted with all applications*", on page 3, section 7 of the August 10, 2010 Planning Commission Meeting. Friendly amendment was accepted and motion carried unanimously.

   Mr. Dailey and Mr. Baty entered the room at 7:05 PM.

2. **Citizens Communication:** None.

3. **A call for postponements:** None.

4. **Presentation by the Jefferson County Organization of Homeowner's Association.**
   Mr. Peter Appignani, President of the Jefferson County Organization of Homeowners Associations, Inc., introduced Mr. Neal Neilson, Vice-President; Laura Taylor, Secretary; Elliot Simon, Treasurer; Ms. Nance Briscoe, Membership Chairperson; and Suzanne Malesic, member.

   Mr. Appignani discussed the purpose of the JCOHOA and its desire to work with the Planning Commission and the County on issues such as Covenants and the coordination of the Subdivision Regulations with WV Statutes. He suggested that a case study of the Chapel View Subdivision issues be completed by a recognized institution to identify concerns and provide suggestions to correct those concerns. Ms. Syron stated that she had been in contact with Kevin Leyden of the WVU Institute for Public Affairs and that he expressed interest in working on the case study which he will confirm with Ms. Syron at a later date.

Mr. Appignani also stated that he believes that the Jefferson County Subdivision Regulations need to be coordinated with the recently revised WV State Code Chapter 36, Estates and Property; Chapter 36A, Condominiums and Unit Property; Chapter 36B, Uniform Common Interest Ownership Act; and Chapter 31E, WV Nonprofit Corporation Act.

Mr. Maxey asked that a report of the cost and feasibility of a case study be presented by staff at an upcoming meeting.

Discussion ensued regarding the processes of approving plats and what additional items need to be reviewed before approval.

Mr. Appignani offered to invite a speaker to a Planning Commission meeting to discuss covenants.

Mr. Neilson proposed that an approval from the HOA be obtained as a requirement to get a building permit.

Mr. Maxey moved to direct staff to work with Ms. Syron to contact WVU Public Affairs to find out the cost of a case study and a time schedule. There was unanimous consent. Ms. Brockman stated that an update would be given at the September 28, 2010 Planning Commission meeting.

5. **Minor Plat Change Review for Lot 26 of Canvasback Ridge Subdivision. The property is located on Bufflehead Drive, off Engle Switch Road near intersection with Bakerton Road. The purpose of the Minor Plat Change is to move the platted drainfield to allow for a proposed pool. The property is designated as Tax District: Harpers Ferry; Tax Map: 6; Tax Parcel: 7.**
   Mr. Rivard read from his staff report detailing the purpose for the plat change and explained that future Minor Plat Changes would be an administrative review.

   Mr. Peter Lorenzen, Land Surveyor, confirmed approval by the Health Department.

   Mr. Trumble moved to approve the Minor Plat Change. Mr. Baty seconded the motion which carried unanimously.

6. **Concept Plan Review for Hospice of the Panhandle (Olive Boy Farms)(File #S10-05). The property is located on the north side of WV RT 9 at the Jefferson County/Berkley County line. This project consists of the construction of a 14 bed (expandable to 21 beds) inpatient respite care facility and an office building of approximately 25,000 sqft. (expandable to 32,000 sqft.) on a 16.05 acre parcel located in Tax District: Middleway; Tax Map: 1; Tax Parcel, 1.2.**
   Ms. Margaret Cogswell, CEO of Hospice of the Panhandle, presented the details and goals of the project to the Planning Commission.

Mr. Robert Eckels, Architect representing Hospice of the Panhandle, explained the design details of the project such as building structure, stormwater management and parking.

Mr. Rivard read from his staff report and recommended approval. He commented that approvals or letters of intent had been received from the Berkeley County Water District, the Berkeley County Sewer District, the Jefferson County Historic Landmarks Commission, the Berkeley County Health Department and the Highway Department. Mr. Rivard explained that the applicants have been given the option to proceed under the newly amended Subdivision Regulations or to proceed under the Subdivision Regulations without the recent amendments due to the date of their application. Mr. Saunders stated that the Engineering Department had no objection to the project.

Mr. Maxey opened the public hearing. Ms. Jennifer Syron commented in support of the project. Mr. Maxey closed the public hearing.

Questions and discussion ensued on further details of the project. Mr. Maxey closed the public workshop.

Mr. Eckels stated he would submit a letter to the Planning Department with a decision of which process to use (the 2008 Subdivision Regulations or the 2010 Subdivision Regulations) within a few days.

Mr. Hayes moved to approve the Concept Plan without conditions. Mr. Taylor seconded the motion which passed unanimously.

7. **Follow-up from Engineering Department regarding Chapel View Subdivision.**
Mr. Saunders presented a memorandum to "call-in" the bond written by Roger Goodwin, Chief County Engineer. He stated that Mr. Goodwin had taken the memorandum before the County Commission on August 6, 2010. The document had not been approved and the issues of the subdivision were still being monitored and compaction tests were being reviewed.

Ms. Morgan and Mr. Hayes had reviewed the geotechnical report. Mr. Hayes stated that the report was typical for the area and that damages would have occurred after the road testing. Mr. Dailey asked that Engineering report back to the Planning Commission at the September 14, 2010 meeting, if possible, regarding the compaction tests.

Ms. Barbara Fuller, resident of Chapel View, attested that, after several inches of rain, the roads are in worse conditions. She requested that the Engineering Department perform a site visit to look at the roads.

8. **Update on Old Standard Quarry Freedom of Information Act requests.**

Mr. Groh stated that he received a call from Mr. John Amores, Deputy Secretary/General Counsel, who reported that there would be more documents presented to the Planning Commission. Mr. Groh asserted that those documents would be in the next packet.

Mr. Maxey called for a break at 8:22PM to allow staff to change the CD. Mr. Maxey called the meeting back to order at 8:26PM.

Mr. Groh stated that the FOIA request to the WV Legislative Rule Makin Review Committee had not been sent since there would be more information coming from Mr. Amores. He suggested waiting to see what information was included from Mr. Amores before sending the second FOIA request.

Mr. Maxey moved that the second FOIA request be sent by Friday, August 27, 2010. Mr. Dailey seconded the motion which carried unanimously.

Mr. Groh reported that there was no information on the James Gibson, et al v. The Jefferson County Planning Commission Case No. 09-C-364.

Ms. Brockman stated a letter had been drafted by the Department of Highways supporting the 340 Corridor Planning effort.

9. **Discussion and recommendation on the Draft Amendments to Article 4B, Wireless Telecommunications Facilities.**

Mr. Maxey distributed a document regarding removal bonds for cell towers detailing several states that have that bond including four counties in the state of West Virginia. Mr. Maxey moved that the removal bond policy be reinstated in the Draft Amendments to Article 4B, Wireless Telecommunications Facilities. Mr. Taylor seconded the motion which carried unanimously. Mr. Groh voiced concern that WV State Code 8A states that bonds are to be used by the governing body for the completion of infrastructure. Mr. Maxey suggested that Mr. Groh contact the attorneys for the counties listed in the document.

Mr. Barney presented a memorandum on changes to the Draft Amendments to Article 4B, Wireless Telecommunications Facilities. He reminded the Planning Commission that a Stakeholder's Meeting would be held August 31, 2010 at 4 PM. Mr. Barney discussed each of the changes in detail.

Mr. Trumble moved to direct further amendment to state that a tower must be able to support at least two additional providers instead of just one additional provider. Mr. Maxey seconded the motion which carried unanimously.

Mr. Paul Rosa, resident of Charles Town, made comment that tower antennas were not to be concealed but interwoven into the lattice work so that it is not as noticeable. He stated his support of the removal bond policy. Mr. Rosa made suggestions regarding exempting silos from fall zone requirements and allowing greater height restrictions up to 199 feet for cell

towers placed on lands owned by Jefferson County, the Jefferson County Fire and Rescue Training land, and the Jefferson County Development Authority, and up to 120 feet for cell towers placed within silos.

Mr. Maxey moved to incorporate Mr. Rosa's suggested changes into the Draft Amendments to Article 4B, Wireless Telecommunications Facilities. There was no second.

Mr. Barney presented maps to show allowed cell tower coverage provided by the Draft Amendments to Article 4B, Wireless Telecommunications Facilities. Discussion ensued on allowing cell towers in parks as a part of lands owned by Jefferson County.

Mr. Trumble moved to refrain from including in the Draft Amendments to Article 4B, Wireless Telecommunications Facilities, allowing greater height restrictions up to 199 feet for cell towers placed on lands owned by Jefferson County, the Jefferson County Fire and Rescue Training land, and the Jefferson County Development Authority. Mr. Baty seconded the motion. Mr. Hayes offered a friendly amendment to still include allowing greater height restrictions up to 199 feet for cell towers place on lands owned by Jefferson County and the Jefferson County Fire and Rescue training land but to specify that county owned land does not include county owned parks or the Jefferson County Development Authority. Mr. Trumble and Mr. Baty accepted the friendly amendment. Discussion ensued. The motion passed unanimously.

Ms. Brockman presented a letter drafted by staff to be sent to the municipalities regarding this issue. Mr. Maxey moved to accept the letter as drafted for immediate distribution. Mr. Trumble seconded the motion which carried unanimously.

10. **Blue Ridge Mountain Community Plan.**
Mr. Rivard reported on the last Citizen's Committee meeting and informed the Planning Commission that the next meeting would be held September 21, 2010 at Saint Andrew's Community Center. Ms. Brockman stated a joint meeting of the Planning Commission and County Commission would need to take place around December or January. Mr. Maxey asked Ms. Brockman to discuss with the consultants the possibility of helping the Planning Commission write a follow up grant proposal of more funds to lead the county up to an EPA Authorized Watershed Plan.

11. **Reports from Legal Counsel and legal advice to Planning Commission.** None.

12. **Director's Report.**
Ms. Brockman presented a map of Federal Lands and discussed corrections to the zoning map. She stated that almost all Federal Land in Jefferson County is zoned rural with the exception of the Federal Land along the 340 corridor which was zoned before becoming Federal Land. Discussion ensued on the next steps to be taken. Mr. Maxey asked that Ms. Brockman provide a draft agenda request form to present this issue to the County Commission.

Ms. Brockman reported that she is working with the comments that were not addressed during the Subdivision Regulation Amendments.

Ms. Brockman discussed the Urban Tree Canopy grant being done with the City of Charles Town and the City of Ranson and the progress regarding that grant.

Ms. Brockman informed the Planning Commission that there would be a Public Hearing regarding the Flowing Springs Sewer project to be held on August 26, 2010.

Mr. Maxey called for a break to allow staff to change the CD at 9:46 PM. Mr. Maxey called the meeting to order at 9:50 PM.

13. **County Commission Liaison Report.** None.

14. **Planning Commission Exchange.** Mr. Trumble suggested that the Planning Commission look at the information provided to them by Mr. Appignani of the JCOHOA, specifically pages 3 and 4 which list issues that were being undertaken.

15. **President's Report.** None.

16. **Actionable Correspondence.** None.

17. **Non-Actionable Correspondence.** None**.**

Mr. Trumble moved to adjourn at 10:01 PM. Mr. Taylor seconded the motion, which carried unanimously. A detailed transcript of the meeting may be found on CDs #__, #__ and #__ which was recorded by Julie Quodala, Office Manager. These minutes were prepared by Amy Puetz, Planning Clerk.

ALPHA
ASSOCIATES, INCORPORATED

ARCHITECTS • ENGINEERS • SURVEYORS

August 9, 2010

Jefferson County Department of Planning and Zoning
116 East Washington Street
P.O. Box 338
Charles Town, WV 25414

Attention: Jennifer M. Brockman, Director
Re: Sloan Square Apartment Site Plan – Variance Request

Dear Ms. Brockman:

On behalf of the Mr. Gerald Miller, we respectfully request that the following two variances be accepted for the Sloan Square Apartment Site Plan:

1) A variance from Section 6.3 of the Subdivision Ordinance to allow for the project file to be re-opened, as 24-months have passed since the Pre-Application Conference and a Final Plat Hearing for the subdivision has not yet been held.
2) A variance from Section 6.3 of the Subdivision Ordinance, to allow for an extension of time to complete the subdivision process from 24 months, which expired on June 27, 2010, to July 1, 2012.

Please do not hesitate to contact me if you have any questions concerning this request.

Sincerely,
ALPHA ASSOCIATES, INCORPORATED

PE

Eric H. Iser, PE
Staff Engineer

Enclosure: check #14414 $200.00

RECEIVED
AUG 09 2010
JEFFERSON COUNTY
PLANNING, ZONING AND ENGINEERING

535 WEST KING STREET • MARTINSBURG, WV 25401
PHONE: 304 • 264 • 0051 • FAX: 304 • 264 • 0707 • TOLL FREE: 877 • 264 • 0051 • email: alpha@alphaaec.com • www.alphaaec.com

JEFFERSON COUNTY PLANNING COMMISSION

V A R I A N C E R E Q U E S T

I/We request a variance from the provisions of the Jefferson County Subdivision and/or Salvage Yard Ordinance.

Property Owner(s): Gerald Miller

Address: 1 Babette Court

Baltimore, MD 21208

Phone Number: (410) 461-7382

Location of Property: Adjacent to Patrick Henry Estates at the end of Gates Way.

Lot Size: 7.52 acres

Deed Book Reference: Deed Book Number 613, Page Number 71

Tax Map Reference: District Charles Town, Map 8, Parcel 29.1

Zoning District: Residential/Light Industrial/Commercial

Section of Ordinance: 6.3

Briefly describe (in your own words) by specific reference to a sketch (in accordance with the following paragraph) of the lot the nature of your variance request.

This variance request is to reopen the project file for the Sloan Square Apartments Site Plan.

Sketch on a separate 8-1/2" x 11" sheet of paper the shape and location of the lot. Show the location of the intended construction or land use indicating building setbacks, size and height. Identify existing buildings, structures or land uses on the property. Sign and date the sketch. Please provide a vicinity map of the area.

Please note variances to the Subdivision Ordinance must comply with Article 17 of the Ordinance; and, variances from the Salvage Yard Ordinance must comply with Article 6 of the Ordinance. To justify your variance request, please address the following items:

1. The request is not contrary to the public interest. _____

See attached

2. A literal enforcement of this Ordinance will result in unnecessary hardship. _____

See Attached

3. The request is not the result of a self-imposed hardship.

See Attached

4. The spirit of this Ordinance will be observed and substantial justice done. _____

See Attached

Gerald Miller
Signature of Property Owner

_____
Signature of Property Owner

For official use only: Amount of fees paid _____

Date of meeting/public hearing _____

Official/Administrative body _____

Posting requirements _____

Advertising dates _____

Official Signature and Seal _____

Effective 6/72 Subdivision Ordinance - 8/94 Salvage Yard Ordinance

Sloan Square Apartments Site Plan
Attachment to Variance Request
August 3, 2010

Variances Requested:

1. Request is made to grant a variance from Article 8, Section 6.3, to allow for this project file to be re-opened since it was closed on June 27, 2010.

Background:

The proposed project is to construct 13 one-bedroom apartments and 24 two-bedroom apartments in four separated buildings. The C.I.S. was approved on September 29, 2008, with several contingencies. Per the Subdivision Ordinance, Article 6, Section 6.3, "If, after 24 months from the date of the Pre-Application Conference, a subdivision proposal has not been advanced through the stage of a Final Plat Hearing, the application and file for the subdivision will be automatically closed." As the Pre-Application Conference for the Sloan Square Apartments Site Plan was held on June 27, 2008, the file for the site plan was closed on June 27, 2010. Therefore, the property owner is requesting a variance to reopen this project file in order to file a variance for an extension of time as to advance the site plan to the stage of a Final Plat Hearing.

Responses to Questions:

1. *The request is not contrary to the public interest:* Reprocessing the C.I.S. could take several months and would cost the Planning Commission many hours of staff time. It is in everyone's best interest to allow this subdivision processing to proceed.

2. *A literal enforcement of this Ordinance will result in unnecessary hardship:* The literal enforcement of the Ordinance will result in thousands of dollars of cost to the engineer, the developer and the County and many months of time.

3. *The request is not the result of a self-imposed hardship:* The primary circumstance that has resulted in the delay is a lawsuit by the adjacent subdivision's homeowners association against our client. This lawsuit is to determine certain legal responsibilities concerning the roadways in the adjacent subdivision which may adversely affect our client's ability or lack thereof to continue with this project.

4. *The spirit of this Ordinance will be observed and substantial justice done:* Granting of this variance is the right and fair thing to do considering the circumstances, and is in accordance with the spirit of the Subdivision Ordinance.

JEFFERSON COUNTY PLANNING COMMISSION

VARIANCE REQUEST

I/We request a variance from the provisions of the Jefferson County Subdivision and/or Salvage Yard Ordinance.

Property Owner(s): Gerald Miller

Address: 1 Babette Court

Baltimore, MD 21208

Phone Number: (410) 461-7382

Location of Property: Adjacent to Patrick Henry Estates at the end of Gates Way.

Lot Size: 7.52 acres

Deed Book Reference: Deed Book Number 613, Page Number 71

Tax Map Reference: District Charles Town, Map 8, Parcel 29.1

Zoning District: Residential/Light Industrial/Commercial

Section of Ordinance: 6.3

Briefly describe (in your own words) by specific reference to a sketch (in accordance with the following paragraph) of the lot the nature of your variance request.

This variance request is to extend the expiration period for the Community Impact Statement from 24 months to July 1, 2012.

RECEIVED
AUG 09 2010
JEFFERSON COUNTY
PLANNING, ZONING AND ENGINEERING

Sketch on a separate 8-1/2" x 11" sheet of paper the shape and location of the lot. Show the location of the intended construction or land use indicating building setbacks, size and height. Identify existing buildings, structures or land uses on the property. Sign and date the sketch. Please provide a vicinity map of the area.

Please note variances to the Subdivision Ordinance must comply with Article 17 of the Ordinance; and, variances from the Salvage Yard Ordinance must comply with Article 6 of the Ordinance. To justify your variance request, please address the following items:

1. The request is not contrary to the public interest. _____

See Attached

2. A literal enforcement of this Ordinance will result in unnecessary hardship. _____

See Attached

3. The request is not the result of a self-imposed hardship.

See Attached

4. The spirit of this Ordinance will be observed and substantial justice done. _____

See Attached

Gerald Miller

Signature of Property Owner

_____

Signature of Property Owner

For official use only: Amount of fees paid _____

Date of meeting/public hearing _____

Official/Administrative body _____

Posting requirements _____

Advertising dates _____

Official Signature and Seal _____

Effective 6/72 Subdivision Ordinance - 8/94 Salvage Yard Ordinance

Sloan Square Apartments Site Plan
Attachment to Variance Request
August 3, 2010

Variances Requested:

1. Request is made to grant a variance from Article 8, Section 6.3, to allow for an extension of time to complete the subdivision process from June 27, 2010 to July 1, 2012.

Background:

The proposed project is to construct 13 one-bedroom apartments and 24 two-bedroom apartments in four separate buildings. The C.I.S. was approved on September 29, 2008, with several contingencies. Per the Subdivision Ordinance, Article 6, Section 6.3, "If, after 24 months from the date of the Pre-Application Conference, a subdivision proposal has not been advanced through the stage of a Final Plat Hearing, the application and file for the subdivision will be automatically closed." As the Pre-Application Conference for the Sloan Square Apartments Site Plan was held on June 27, 2008, the file for the site plan was closed on June 27, 2010. A variance request has been submitted for approval to reopen this closed file. Upon approval of the reopening of this file, the property owner is requesting a variance to allow an extension of time, until July1, 2012, in order to advance the site plan to the stage of a Final Plat Hearing.

Responses to Questions:

1. *The request is not contrary to the public interest:* Reprocessing the C.I.S. could take several months and would cost the Planning Commission many hours of staff time. It is in everyone's best interest to allow this subdivision processing to proceed.

2. *A literal enforcement of this Ordinance will result in unnecessary hardship:* The literal enforcement of the Ordinance will result in thousands of dollars of cost to the engineer, the developer and the County and many months of time.

3. *The request is not the result of a self-imposed hardship:* The primary circumstance that has resulted in the delay is a lawsuit by the adjacent subdivision's homeowners association against our client. This lawsuit is to determine certain legal responsibilities concerning the roadways in the adjacent subdivision which may adversely affect our client's ability or lack thereof to continue with this project.

4. *The spirit of this Ordinance will be observed and substantial justice done:* Granting of this variance is the right and fair thing to do considering the circumstances, and is in accordance with the spirit of the Subdivision Ordinance.

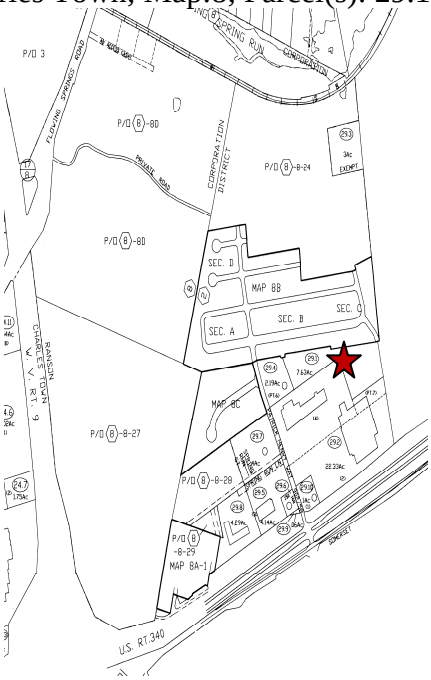
Staff Report

Item # 4

Jefferson County Planning Commission Meeting
September 14, 2010

Sloan Square Apartments Variance Request PC file #08-17

Item #4: Request by Gerald Miller for a variance to reopen the Community Impact Statement file and to extend the expiration date to July 1, 2012 for Final Plat approval of Sloan Square Apartments
(PC file #08-17). (Subdivision Ordinance, Article 6.3)

APPLICANT:	Eric H. Iser, PE, Staff Engineer, Alpha Associates, Inc.
OWNER:	Gerald Miller
DEVELOPER:	Gerald Miller
SURVEYOR/ENGINEER:	Alpha Associates, Inc.
PROPERTY LOCATION:	This property is located south of Beauregard Boulevard in Patrick Henry Estates at the end of Gates Way and abuts Spring Run Apartments on the west side and Patrick Henry Plaza Shopping Center to the south.
LEGAL DESCRIPTION:	District: Charles Town; Map:8; Parcel(s): 29.1 
ZONING DISTRICT:	2002 Zoning Map: Residential/Light Industrial/ Commercial
SURROUNDING PROPERTIES:	2002 Zoning Map North: Residential Growth South: Residential/Light Industrial/Commercial East: Residential Growth West: Residential Growth
LOT AREA:	7.52 acres
PROPOSED DENSITY:	13 single bedroom apartments and 24 two bedroom apartments in five separate one story garden style apartment buildings.

Sloan Square Variance Request

PERMIT APPROVALS:	
Health Department Permit	N/A
Department of Highways	N/A
APPROVALS:	
Conditional Use Permit	N/A
Community Impact Statement	Expired: 06/27/2010
Concept Plan	N/A
Preliminary Plat	N/A
Site Plan	N/A
Final Plat	N/A
Variance History	N/A
OTHER APPROVALS:	GIS/Addressing Approval Letter: 05/08/07

Planning & Zoning Department Recommendations

The applicant is requesting that the Sloan Square Apartment's file be reopened and a variance be granted to extend the file until July 1, 2012. The Planning Staff will not review the reopening of the file request based on the four variance criteria outlined in the 1979 Subdivision Regulations in Section 17.1but will provide the background affecting this request below. The variance request will be reviewed under the four variance criteria to extend the expiration date until July 1, 2012 to advance through Final Plat hearing. The file expired on June 27, 2010, 24 months after the Pre-Application Conference was held on June, 27 2008. In order for the variance to proceed the file needs to be reopened.

Sloan Square Apartments is a development located behind the Charles Town Plaza to the north. Direct access to the site is proposed from Beauregard Blvd., which intersects with Patrick Henry Way. Sloan Square Apartments consists of 13 one-bedroom apartments and 24 two-bedroom apartments in 4 separate buildings.

This project has proceeded through the Community Impact Statement (CIS), with conditions approved at the September 23, 2008 Planning Commission meeting, which are attached (Exhibit 1).

Early in 2010 the West Virginia State Legislature passed a bill, commonly referred to as S.B. 595, which provided automatic extensions for land development projects that had received some level of preliminary approval at the local level prior to March 1, 2010. The automatic extension written into the bill is to vest projects until July 1, 2012. Due to the nature of how the bill was drafted and passed by the State Legislature, there is some room for interpretation in applying the bill to specific projects.

Therefore, on May 18, 2010, the Director of Planning and Zoning drafted a memo stating how the department would interpret S.B 595 (Exhibit 2). Under the Director's interpretation, the approval of a CIS, prior to March 1, 2010, vested a project under the terms of S.B. 595. The applicant, Gerald Miller, came to the Planning and Zoning office and received a copy of this memo written by the Director in early June, 2010. As such, the applicant believed that his project was vest until July 1, 2012.

At the June 8, 2010 Planning Commission meeting, the Commission did not agree with the Director of Planning and Zoning's interpretation of S.B.595. The Planning Commission issued a different interpretation of S.B. 595 and passed a resolution to that effect (Exhibit 3). The Planning Commission determined that "any action short of Preliminary Plat approval be insufficient to meet the requirements intended by the legislature." A CIS is processed before a Preliminary Plat. Therefore, by Planning Commission interpretation a CIS is not a preliminary approval.

Under the Planning Commission's interpretation, the applicant was no longer vested under S.B. 595. As such the applicant's project expired on June 27, 2010. The applicant was not immediately aware of the change in interpretation made by the Planning Commission and was not able to submit a variance request in time to keep the file open. The applicant did submit an application on August 3, 2010 to request that the file be reopened and a variance be granted. For these reasons, it seems reasonable to reopen the file in order to consider the requested variance for an extension of time. The following is an analysis of how the requested variance for an extension of time until July 1, 2012 meets the evaluation criteria:

The request is not contrary to the public interest.
The request for a variance for an extension of time until July 1, 2012 to advance through the Final Plat hearing is not contrary to the public interest. In view of the fact that the applicant intends to continue the development as approved by the Planning Commission, with has conditions, no change has occurred regarding proposed development which would negatively impact public interest.

A literal enforcement of this Ordinance will result in unnecessary hardship.
A literal enforcement of the ordinance would require the applicant to start the project anew. Since the approved CIS included conditions that will have to be complied with, restarting the whole process over would result in an unnecessary hardship. If the applicant is denied an extension, they would be required to process under the new 2010 amendments to the Subdivision Regulations. The conditions that were granted with the approval of the CIS in 2008 would possibly be similar in nature under a new concept plan.

The request is not the result of a self-imposed hardship.
The applicant's progress with the development has been delayed due to a pending lawsuit with an adjacent subdivision's homeowners association. The lawsuit filed by Patrick Henry Estates against Dr. Gerald Miller, developer of Sloan Square Apartment Complex, is to determine the legal responsibility of certain roadway issues. On December 3, 2008 Richard Gay, Attorney for Gerald Miller, filed a notice to remove the case from the Jefferson County Circuit Court to the Northern District Federal Court. A final determination is yet to be made. A bench trial has been set for January 11, 2011, with discovery to be completed by September 17, 2010.

The spirit of this Ordinance will be observed and substantial justice done.
Since the variance is only for a time extension and not a variance of the site layout, the spirit of the ordinance will be observed. The purpose of variance process is to keep the public informed of existing developments that are outstanding. The public notice provided for the applicant's requested 24 months extension of the CIS is in keeping with the intent of substantial justice to keep the public inform of request related to the project.

Recommendation

Staff recommends reopening the file and granting the variance for an extension of time until July 1, 2012 to advance through the Final Plat hearing. This variance is for a time extension and not a variance to the site layout. This time extension would provide for the continuation of this development as approved by the Planning Commission.

Attachments:

- Attachment 1 – September 23, 2008 Planning Commissions Minutes (Sloan Square Apartments CIS approval with conditions)
- Attachment 2 – Director of Planning and Zoning's May 18, 2010 memo "Local Application of H.B. 595"
- Attachment 3 – Resolution by Jefferson County Planning Commission for Implementation of SB 595 Provisions

Exhibit 1

Postponed from the September 9, 2008 Planning Commission meeting. Community Impact Statement Public Hearing for the Sloan Square Apartment Complex.
Mr. Reynolds and Ms. Deming recused themselves since they were not present at the September 9, 2008 Planning Commission meeting and left the room. After discussion with Dick Klein with Alpha & Associates, Ms. Kelly modified her recommendation for denial as stated at the September 9, 2008 Planning Commission meeting and recommended acceptance of the CIS with the following conditions:

a) The subdivision roads leading to the accesses for Sloan Square (i.e. Patrick Henry Way, Beauregard Street, and Gates Way) be upgraded to meet County standards in accordance with subdivision regulations and Gates Way be widened to meet County standards;
b) The applicant either demonstrates that no setback issues will be created for the properties on both sides of Lot C-1 where the other right-of-way is proposed or seeks a variance with the Board of Zoning Appeals; and
c) The apartment complex owners' contribute their "fair share" of the costs for road maintenance of the roads in Patrick Henry Estates leading to the apartment complex.

Mr. Redman provided and discussed with the Planning Commission a statement of conditions recommended by him if the Planning Commission decides to grant CIS approval to Sloan Square Apartments. These conditions were stated as follows:

1) That perimeter landscaping be provided along Sloan Acres Lane and behind the rear yards of all lots fronting on Beauregard Boulevard.
2) That the applicant investigate providing access to Buildings #1,#2 and #3 from Patrick Henry Lane behind Kymco Realty Corp. This will require applicant negotiations with Kymco to determine feasibility.
3) That if access to Buildings #1, #2 and #3 is taken from Beauregard via Sloan Acres Lane that buffering be provided at the entrance along the road where adjacent to side property lines of parcels adjacent to the entrance off Beauregard Boulevard. This buffering may be required to include fencing if space is inadequate to accomplish buffering through planting alone.
4) That landscape planting be provided between Building #4 and PHA Associates Limited Properties.
5) That Patrick Henry Drive be improved in all areas shaded gray on the drawing submitted by the applicant titled "Patrick Henry Way Drainage Restoration."
6) That Beauregard Boulevard be constructed or reconstructed to satisfy County specifications for the entire length from its intersection with Patrick Henry Drive to Gates Way as proposed.
7) That the applicant secure a variance for construction of Gates Way within a 40' right-of-way if the County Engineering Department determines such a variance is required.
8) That the wheelchair accessible walkway between the proposed development and Kymco Corp properties (the shopping center) be constructed.
9) That a plan for landscaping of parking area be provided to include plantings

adjacent to lands owned by Dr. Nathan Swami.

Mr. Redman discussed two other conditions that he would want to include which would be as follows:

10) Investigate the feasibility and, if feasible, complete the sidewalk connecting to Charles Town Plaza along Patrick Henry Way.
11) Road maintenance cost be fully born by the owner of Sloan Square Apartments, not existing residents', moreover, each unit shall pay pro rata share for the whole community road maintenance.

Mr. Sidor asked Mr. Redman if access using Beauregard would still be his recommendation if two other options were available. Mr. Redman stated that he would not suggest using Beauregard in order to reduce the volume of traffic through the existing development. Mr. Kane moved to accept the CIS as promulgated by Mr. Redman, but excluding access through Section C Lot 1. Mr. Surkamp seconded the motion, which carried 6 for and 2 abstentions. (Mr. Reynolds and Ms. Deming)

Exhibit 2

JEFFERSON COUNTY, WEST VIRGINIA
Department of Planning & Zoning
116 East Washington Street, 2nd Floor
P.O. Box 338
Charles Town, West Virginia 25414

Email: **planningdepartment@jeffersoncountywv.org** **Phone: (304) 728-3228**
zoning@jeffersoncountywv.org **Fax: (304) 728-8126**

MEMO

TO: Planning Commission Members
FROM: Jennifer M. Brockman, AICP, Director, Planning and Zoning
DATE: May 18, 2010
RE: Local Application of HB 595

Attached is the full text of Senate Bill No. 595, sponsored by Senators McCabe and Minard, and passed March 11, 2010; (in effect from passage).

The new language in WV Code 8A-4-2(c) requires that locally adopted Subdivision and Land Development Regulations include language in the section of the regulation/ordinance that discusses "Vesting of Property Rights" that explains that "any subdivision or land development plan or plat valid under West Virginia law and outstanding as of January 1, 2010" that requires performance of an action by a certain date, shall be extended to July 1, 2012. It further includes the extension of Conditional Use Permits in these provisions.

The new language in WV Code 8A-5-12(f) contains additional language that states "Any other plan or permit associated with the subdivision or land development plan or plat shall be extended for the same time period. *Provided, That* the land development plan or plat has received at least preliminary approval by the planning commission or county commission by March 1, 2010."

In order to effectively interpret the implication of these legislative changes, both "valid and outstanding" and "preliminary approval" need to be defined. For the purpose of the Jefferson County Subdivision Regulations, "valid and outstanding" shall be interpreted to mean that at least one step in the land development or subdivision plat process has been approved and has not expired before January 1, 2010. These steps include Conditional Use Permit (CUP), Community Impact Statement (CIS), Preliminary Plat, Final Plat, Minor Plat, and/or a Major or Minor Site Plan.

"Preliminary approval" is somewhat harder to define. In Jefferson County "preliminary approval" of a plat by the planning commission occurs at the approval of the Community Impact Statement (CIS) under the 1979 Subdivision Ordinance. Under the 1979 Subdivision Ordinance, preliminary plats are approved by staff, not the planning commission. Additionally, the return of the first set of comments on a preliminary plat constitutes "approval with conditions". Because the legislation intended to differentiate between plats and plans which were "valid and outstanding" on January 1st and plats and plans which had "preliminary approval" on March 1st, the intent of the "preliminary approval" clause needs to be clarified. A discussion with the delegates that authored this amendment to the proposed SB 595 indicated that the intent of the preliminary approval clause was that a land development plan or plat should have advanced at least through the preliminary plat stage by March 1, 2010. Staff, however, believes that the

wording adopted does not clearly state this. It is also does not take into consideration staff approval of this stage of development or of the "approval with conditions" concept. All of this would need to be clarified if this interpretation was to be considered.

For this reason, the following amendment is proposed within the full context of the Subdivision Regulation Amendments that is before you on May 18, 2010:

Section 20.105 Vested Property Rights

Commentary: Section 20.105 is based on Section 8A-5-12, Vested Property Right, of the West Virginia Code, without the damages language (which applies by force of law) *(previously this was at the end of the section – recommend moving it to the beginning)*

A. **Vested Rights defined.** A vested property right is a right to undertake and complete the site development. The right is established when the Community Impact Statement (CIS, under the 1979 Subdivision Ordinance) or the Concept Plan (under these Regulations) ~~preliminary plat or site development plan and plat~~ is approved by the Planning Commission and is only applicable under the terms and conditions of the approved CIS or Concept Plan~~site development plan~~. Application of vesting to Minor Plats or Minor Site Plans shall occur after the first review comments have been returned to the applicant, at which point the application is considered "approved with conditions".

B. **Forfeiture.** Failure to abide by the terms and conditions of the approved Concept~~land development p~~ Plan and/or ~~plat~~ Community Impact Statement will result in forfeiture of the right.

C. **Vesting Period**.

1. The vesting period for an approved preliminary plat or site development plan which creates the vested property right is five years from the approval of the site development plan by the planning commission.
2. Without limiting the time when rights might otherwise vest, a landowner's rights vest in a land use or development plan and cannot be affected by a subsequent amendment to a zoning ordinance or action by the planning commission when the landowner:
   a. Obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing development of a specific project;
   b. Relies in good faith on the significant affirmative governmental act; and
   c. Incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act.

D. **Automatic Extension**.

Any subdivision or land development plan or plat, whether recorded or not yet recorded, valid under West Virginia law and outstanding as of January 1, 2010, shall remain valid until July 1, 2012, or such later date provided for by the terms of the planning commission or county commission's local ordinance or for a longer period as agreed to by the planning commission or county commission. Any other plan or permit associated with the subdivision or land development plan or plat shall also be extended for the same time period. *Provided, That* the land development plan or plat has received at least preliminary approval by the planning commission or county commission by March 1, 2010.

In addition to the proposed language noted above which should be added to the Subdivision Regulations, staff proposes that a table be developed into an informational brochure for the public and for use in response to inquiries from the development community.

Based on the requirements of the Jefferson County Zoning and Land Development Ordinance and the Jefferson County Subdivision Regulations, the provisions of Section 20.105 (D) shall be applied as follows:

IF the following approval has occurred before January 1, 2010 and has not expired, **the plan or plat will be considered "valid and outstanding"*:**	**THEN, the following due date is extended to July 1, 2012 based on SB 595:**
Conditional Use Permit	Commencement of Construction
Community Impact Statement (under 1979 Subdivision Ordinance)	Final Plat Public Hearing
Final Plat	Bonding and Recording
Major Site Plan	Bonding
Minor Plat – first review comment returned to applicant (considered approved with conditions)	Recording

*This include variances for extensions of time approved prior to January 1, 2010

Exhibit 3

Resolution
Jefferson County Planning Commission
Implementation of SB 595 Provisions

During the 2010 Legislative Session the West Virginia State Legislature adopted as Senate Bill 595 an amendment to Chapter 8A of the State Code regarding the extension of vesting rights under certain conditions. This resolution is to establish Jefferson County Planning Commission policy implementing the amendment.

Whereas the West Virginia State Legislature has modified provisions of West Virginia State Code Chapter 8A regarding vesting; and

Whereas the Jefferson County Planning Commission desires to implement the changes as required by the legislature; and

Therefore be it resolved that the Planning Commission considers the requirement under Chapter 8A as amended by Senate Bill 595 for "preliminary approval by the planning commission or county commission prior to March 1, 2010" to require approval of a preliminary plat; and

Be it Further Resolved that the Planning Commission considers any action short of Preliminary Plat approval to be insufficient to meet the requirements intended by the legislature.

A Motion Recommending Approval of a
Variance for Sloan Square Apartments
September 14, 2010

Whereas, the following facts relate to the processing of Gerald Miller's application known as Sloan Square Apartments (PC File(s) #08-17):

1. Sloan Square Apartments is proposing 13 single bedroom apartments and 24 two bedroom apartments in five separate one story garden style apartment buildings on 7.52 acres;
2. The Community Impact Statement for Sloan Square Apartments was approved on September 23, 2008.
3. Section 6.3 of the Jefferson County Subdivision Ordinance requires that a project advance through the stage of a Final Plat Hearing within 24 months of the Pre-application Conference.

Whereas, Gerald Miller has requested a variance to extend the file until July 1, 2012 to advance through the Final Plat Hearing;

Whereas, Gerald Miller has further requested reopening the file that closed on June 27, 2010;

Whereas, the following findings shall have been made in regards to the request in accordance with the provisions of Article 17, Section 17.1 of the 1979 Subdivision Ordinance:

1. The request is not contrary to the public interest;
2. A literal enforcement of this Ordinance will result in unnecessary hardship;
3. The request is not the result of a self-imposed hardship; and
4. The spirit of this Ordinance will be observed and substantial justice done.

Now therefore be it moved, that the Jefferson County Planning Commission _____ the requested variance for Gerald Miller and reopening of the file (PC File(s) #08-17) provided that the extension granted be limited to July 1, 2012.

Approved this ___ day of _____, 2010
By vote of the Jefferson County Planning Commission
By a vote of _ Yes and _ No

_____
John Maxey, Commission President

RALPH A. LORENZETTI, JR.
PROSECUTING ATTORNEY

CHARLES B. HOWARD
ASSISTANT PROSECUTING ATTORNEY

STEPHEN V. GROH
ASSISTANT PROSECUTING ATTORNEY

BRANDON C.H. SIMS
ASSISTANT PROSECUTING ATTORNEY

LAURENCE R. CROFFORD
ASSISTANT PROSECUTING ATTORNEY

HASSAN RASHEED
ASSISTANT PROSECUTING ATTORNEY

CIVIL DIVISION
(304) 728-3346
fax: (304) 728-3353

STEPHANIE F. GROVE
ASSISTANT PROSECUTING ATTORNEY

JAMES CASIMIRO III
ASSISTANT PROSECUTING ATTORNEY

OFFICE *of* THE PROSECUTING ATTORNEY
of
JEFFERSON COUNTY, WEST VIRGINIA

P. O. Box 729
110 N. George St., 3rd Floor
Charles Town, WV 25414
(304) 728-3243
fax (304) 728-3293
paoffice@jeffersoncountywv.org
www.jeffersoncountywv.org/pa

August 27, 2010

Debra Grahman, Esquire
Chief Counsel
West Virginia Legislative Rule Making Review Committee
Building1, Room MB-49
1900 Kanawha Blvd. East
Charleston, WV 25305

Dear Ms. Graham,

I write at the instruction of my client, the Jefferson County Planning Commission, to respectfully request information under the West Virginia Freedom of Information Act, West Virginia Code § 29B-1-1, *et seq.*

West Virginia Code § 5B-2-6a authorized the promulgation of legislative rules for Brownfield Economic Development Districts that are administered by the Department of Commerce. Emergency and Final Legislative Rules were adopted pursuant to said grant of authority.

With regard to any such Legislative Rules relating to WV Code §5B-2-6, my client requests that your agency provide the following:

1. All records of communications by and between your agency and any person or entity concerning any Legislative Rule (whether enacted or merely proposed) under the WV Brownfield Economic Development Act from the provisions of West Virginia Code § 5B-2-6 or leading to the adoption of rules implementing such Districts pursuant to 145 CSR 11 or elsewhere in West Virginia Rules.

2. All records of communications by and between your agency and any person or entity seeking to formulate or influence the contents or provisions of said legislative rule making.

3. All records of any kind, including without limitation, applications, summaries, exhibits, addenda, contracts, letters, emails, phone call and other communications relating to the designation or creation of said legislative rules.

This request includes all responsive records whether in electronic or hard copy form including, but not limited to, letters, emails, reports, applications, memoranda, notes and any other record that is reasonably responsive to the categories of records requested.

In addition, we are requesting all records, whether in electronic or hard copy form, including by not limited to, letters, emails, reports, applications, memoranda, or notes relating to 145 CSR 11 or to any proposed or requested rule for Brownfield Economic Development Districts.

Time is of the essence with respect to this request and, thus, as required by Section 29B-1-3(4) of the Act, the Planning Commission will expect your response within five (5) days. Should your agency deem that an entire record, or a portion of any record, is exempt from disclosure under the West Virginia Freedom of Information Act, or any other statute or regulation, please cite the specific exemption upon which you are relying in each such case and provide an index of all such records in a way that they can be clearly identified.

As a public agency the Planning Commission believes it is exempt from the provisions of Section 29B-1-3(5) that allow an agency to establish fees for the cost of making copies of records. Should you disagree we respectfully request that you so inform us of the cost associated with this request.

Please let me know if I may assist you in responding to this request. Should you have any questions you may contact me at 304 728-3243.

Thank you in advance for your cooperation and assistance.

Sincerely,

Stephen V. Groh,
Assistant Prosecuting Attorney

CC: Jefferson County Planning Commission

Kelley Goes, Secretary
Department of Commerce
State Capitol
Building 6, Room 525
Charleston, WV 25305-0311

State of West Virginia
Joe Manchin III
Governor

Telephone: (304) 558-2234
Toll Free: (800) 982-3386
Fax: (304) 558-1189
Email: Kelley.M.Goes@wv.gov
www.wvcommerce.org

August 23, 2010

Mr. Stephen V. Groh
Assistant Prosecuting Attorney
of Jefferson County, West Virginia
PO Box 729
110 N. George Street, 3rd Floor
Charles Town, West Virginia 25414

Mr. Groh,

Please find enclosed the brownfield related documents as we discussed via telephone on Monday morning, August 23.

If you have additional questions, please feel free to contact me.

Sincerely,

Jon Amores
Deputy Secretary/General Counsel

JA/jk

Enclosures

Knight, Joan E

From: Brian C. Helmick [bhelmick@spilmanlaw.com]
Sent: Monday, June 30, 2008 11:13 AM
To: Knight, Joan
Cc: Goes, Kelley
Subject: Proposed legislative rule implementing SB 88
Attachments: 2008-06-27 Proposed legislative rule implementing SB 88 Final.wpd; 2008-06-27 Proposed legislative rule implementing SB 88 Final.doc

Joan,

Please find attached the Word and and Wordperfect versions of the proposed legislative rule I discussed with you on the phone this morning. As I mentioned, you will also be receiving a package this afternoon with all relevant documents for review and filing for the comment period. Please do not hesitate to contact me if you have any questions.

Thanks,

Brian Helmick, Esq.
Spilman Thomas & Battle, PLLC
Spilman Center
300 Kanawha Boulevard, East
Post Office Box 273
Charleston, West Virginia 25321-0273

T 304.340.3826
F 304.340.3801

bhelmick@spilmanlaw.com

Knight, Joan E

From: Brian C. Helmick [bhelmick@spilmanlaw.com]
Sent: Monday, March 16, 2009 10:29 AM
To: Hooker, Todd
Cc: Knight, Joan E; Goes, Kelley M
Subject: Old Standard LLC Application Approval/Public Notice
Attachments: Draft public notice of creation of District.doc

Todd,

First, please accept my sincere thanks and gratitude on behalf of Old Standard for the Development Office's approval of the Old Standard Brownfield Economic Development District application. As we briefly discussed this morning, the Brownfield Economic Development District emergency legislative rule requires that within 14 days after the Director of the Development Office approves or rejects an application for creation of a district, a copy of the Director's order or letter approving or rejecting the application must be filed in the State Register. Emergency WVCSR 145-11-7.2. reads: "Within fourteen days after the Director established a brownfield economic development district or rejects the application for establishment of the district, a copy of the Director's letter or order shall be filed in the State Register." Because the Director's letter of March 12, 2009 does not describe the district or the economic development project, we recommend that the Development Office publish in the State Register the attached public notice followed by a copy of the letter dated March 12, 2009, establishing the district. Consequently, we believe that the following Notice and a copy of the March 12th letter both be forwarded to the West Virginia Secretary of State's office tomorrow, Tuesday, March 17, 2009 (prior to the Wednesday deadline) for publication in the State Register being published this Friday - which will permit the publication to be in compliance with the provisions of the emergency legislative rule.

Please do not hesitate to contact me or Dale Steager (contact info below) if you have any questions.

Thanks,

Brian Helmick, Esq.
Spilman Thomas & Battle, PLLC
Spilman Center
300 Kanawha Boulevard, East
Post Office Box 273
Charleston, West Virginia 25321-0273

T 304.340.3826
F 304.340.3801

bhelmick@spilmanlaw.com

Dale W Steager
Spilman Thomas & Battle,PLLC
t 304.340.1692
f 304.340.3801
dsteager@spilmanlaw.com

Brownfields
Mlewis6 WVSOS.COM

TITLE 145

PROPOSED LEGISLATIVE RULE

DEPARTMENT OF COMMERCE

DEVELOPMENT OFFICE

SERIES 11

BROWNFIELD ECONOMIC DEVELOPMENT DISTRICTS

§ 145-11-1. General.

1.1. Scope. This legislative rule ~~explains and clarifies the statute authorizing the establishment~~ of brownfield economic development districts and establishes the procedures, standards, legal documents, fees and notice applicable to an applicant for the establishment of a brownfield economic development district.

1.2. Authority. – W. Va. Code § 5B-2-6a

1.3. Filing Date. – _____

1.4. Effective Date. – _____

§ 145-11-2. Definitions.

For purposes of this rule:

2.1. "Applicant" means a person who is applying or has applied to the Director of the Development Office for establishment of a brownfield economic district.

2.2. "Application" means an application for establishment of a brownfield economic development district that is filed with the Director of the Development Office pursuant to W. Va. Code § 5B-2-6a and this rule, which provides all of the information and documentation required by this rule.

2.3. "Application fee" or "fee" means the fee provided for in section four of this rule.

2.4. "Brownfield" means a brownfield as defined in W. Va. Code § 22-22-2.

2.5. "Brownfield economic development district" means a district established by the Director of the Development Office pursuant to W. Va. Code § 5B-2-6a and in accordance with this rule.

2.6. "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

2.7. "Department of Commerce" means the Department of Commerce created in the executive branch of state government in W. Va. Code § 5F-1-2(a).

2.8. "Department of Environmental Protection" means the Department of Environmental Protection created in the executive branch of state government in W. Va. Code § 5F-1-2(a).

2.9. "Development Office" means the West Virginia Development Office created in article two, chapter five-b of the Code, which is an agency, division of office that is incorporated in and administered as part of the Department of Commerce, as provided in W. Va. Code § 5B-1-2.

2.9.1. "Designee" ~~in the phrase "or his or her designee," when used in reference to the Director of the Development Office, the Secretary of Commerce, or the Secretary of Environmental Protection,~~ means any officer or employee of ~~those agencies duly authorized by~~ Director of the Development Office, the Secretary of Commerce or the Secretary of Environmental Protection, directly, or indirectly by one or more redelegations of authority, to perform the functions mentioned or described in this rule.

2.10. "Direct jobs" means jobs located in the brownfield economic development district during the construction phase and employment in the district after the project plan is completed.

2.11. "Director" means the "Director of the West Virginia Development Office."

2.12. "Economic development plan" means written and graphic material for provision of a development that at a minimum includes the following information:

2.12.1. Name, address and phone number of property owner(s).

2.12.2. Name, address and phone number of property developer (if not the owner).

2.12.3. Name of development project, date, direction, scale.

2.12.4. Date economic development plan was prepared.

2.12.5. Name, address and phone numbers of project architect(s), engineer(s) and landscape architect(s).

2.12.6. Intended land-use/nature of development.

2.12.7. Vicinity map showing general location, surrounding property and major physical features.

2.12.8. General layout of property showing shape, approximate dimensions, and total acreage.

2.12.9. A conceptual site development plan showing alignment of building(s), what developer anticipates will be the use of the building(s) and any phases of the project, if the project will be done in phases.

2.12.10. A description of the infrastructure that will be provided by the developer.

2.13. "Full-time employee" means a permanent hourly or salary employee who is headquartered at a business location in the brownfield economic development district and who works more than eighteen hundred hours during the entire twelve-month period ending on the last day of the calendar year, whether these hours are hours worked in the district, or include hours of employer paid vacation leave or other employer paid leave. Full-time employee does not include an employee who is a part-time, seasonal or temporary employee.

2.14. "Full-time employment" means employment for at least one hundred forty hours per month at a wage not less than the prevailing state or federal minimum wage, depending on which minimum wage provision is applicable to the business.

2.15. "Indirect jobs" means jobs created in the county in which the brownfield economic district is located that did not exist in the county before completion of the project plan for the district and which are not located or based in the district.

not/pick one or say both

2.16. "Infrastructure" means broadband Internet, electric lines, natural gas or propane lines, water lines, water processing plant, fiber optic telephone lines, sewer lines, sewer disposal facilities, storm water lines, storm water disposal facilities, lighting and/or roads located within the brownfield economic development district and any upgrades to existing facilities and roads located outside the district that are necessary to deliver reliable electric, natural gas or propane, telephone, and water to businesses and residents located within the district, and to transmit and treat sewage and storm water generated in the district and the cost of improving roads located outside the district, including, but not limited to, adding turn lanes or lanes, widening lanes, adding traffic signals as may be necessary to minimize congestion to the extent due to economic development and economic activity in the district, and improve public safety. "Infrastructure" does not include customer charges for connection to a utility or charges for the utility service used or consumed by the utility customer.

2.17. "New employee" means a person hired by the developer or other employer located in the brownfield economic district to fill a position or a job in this district which previously did not exist in the developer's or other district employer's business enterprise in this State prior to the date on which the economic development project is placed in service or use in this State. A person is considered to be a "new employee" only if the person's duties in connection with the operation of the business in a brownfield economic development district are on:

2.17.1. A regular, full-time and permanent basis, or

2.17.2. A regular, part-time and permanent basis provided the person is customarily performing the duties at least twenty hours per week for at least six months during the calendar year.

2.18. "New job" means a job which did not exist in the brownfield economic development district in the business of the developer or other employer located in the district prior to the economic development project being placed in service.

2.19. "Own or control the property in the brownfield economic development district" means that the property is owned by the applicant or by a related person as defined in this rule.

2.20. "Part-time employee" means an employee who works less than twenty hours per week.

2.21. "Permanent employee" means any employee who is not a temporary or seasonal employee and who customarily performs his or her duties at least twenty hours per week for at least six months during the calendar year.

2.22. "Person" includes any natural person, corporation, partnership, or entity treated as a partnership for federal and state income tax purposes. For purposes of applying for establishment of a brownfield economic development district, "person" also includes a county, municipality, the West Virginia Economic Development Authority, a county or municipal economic development authority, and the Regional Brownfield Assistance Center established at Marshall University or West Virginia University pursuant to W. Va. Code § 18B-11-7.

2.23. "Related person" means:

23.1. A corporation, partnership, association or trust controlled by the applicant;

23.2. An individual, corporation, partnership, association or trust that is in control of the applicant;

23.3. A corporation, partnership, association or trust controlled by an individual, corporation, partnership, association or trust that is in control of the applicant; or

23.4. A member of the same controlled group as the applicant.

move up to 2.7 & renumber

23.5. ~~For purposes of this rule,~~ "control," ~~with respect to a corporation,~~ means ownership, directly or indirectly, of stock possessing fifty percent (50%) or more of the total combined voting power of all classes of the stock of the corporation entitled to vote. "Control," with respect to a trust, means ownership, directly or indirectly, of fifty percent (50%) or more of the beneficial interest in the principal or income of the trust. The ownership of stock in a corporation of a capital or profits interest in a partnership or association or of a beneficial interest in a trust is determined in accordance with the rules for constructive ownership of stock provided in section 267 (c) of the United States Internal Revenue Code of 1986, as amended, other than paragraph (3) of that section.

2.24. "Seasonal employee" means an employee who normally works on a full-time basis less than five months in a year.

do you need to define designee if you have these definitions

2.25. "Secretary of Commerce" means the chief executive officer of the Department of Commerce, or his or her designee.

2.26. "Secretary of Environmental Protection" means the chief executive officer of the Department of Environmental Protection, or his or her designee.

2.27. "Single-family housing" means a single-family dwelling unit on a separate lot that shares no common wall with any other dwelling unit.

2.28. "Significant economic development activity" means:

2.28.1 Total private real and personal property investment in an economic development project that is in excess of fifty million dollars ($50 million), not including the cost of land, through infrastructure, new construction, reconstruction, installation of fixtures and equipment of the project; and

2.28.2. Creation of additional annual payroll within the district in excess of five million dollars ($5 million).

2.29. "Site" means the contiguous land owned or controlled by the developer when the application is filed under this rule, comprising fifty (50) acres or more of which at least twenty-five percent (25%) of the site acres are subject to a voluntary remediation agreement entered into with the Secretary of Environmental Protection, as provided in W. Va. Code § 22-22-1 *et seq.*, or were subject to such an agreement and for which the developer received a certificate of completion issued by the Department of Environmental Protection as provided in W. Va. Code § 22-22-13.

2.30. "Temporary employee" means any employee who is not a permanent employee, a part-time permanent employee, a seasonal employee or a part-time seasonal employee.

2.31. "This State" ~~means the State~~ of West Virginia.

2.32. "Voluntary remediation" means a series of measures that are self-initiated by a person to identify and address potential sources of contamination of property and to establish that the property complies with applicable remediation standards that are performed pursuant to a voluntary remediation plan.

2.33. "Voluntary remediation plan" means the remediation work plan approved by the Secretary of Environmental Protection and authorized in the voluntary remediation agreement executed pursuant to W. Va. Code § 22-22-1 *et seq.*

2.34. "West Virginia Code" or "W. Va. Code" means the code of West Virginia, one thousand nine hundred thirty-one, as amended.

§ 145-11-3. Content of application.

An application for establishment of a brownfield economic development district shall, at a minimum, include the following:

3.1. The applicant's name.

3.2. The applicant's current address.

3.3. The applicant's telephone number, facsimile number and e-mail address.

3.4. The applicant's financial capabilities.? this seems a bit vague

3.5. The name of the proposed brownfield economic development district.

3.6. A general description of the site to be designated a brownfield economic development district, which shall include, at a minimum, the following:

3.6.1. A written description of the site that includes any city, county, and street addresses, and adjacent landmarks, buildings, waterways, former uses or other identifying information.

3.6.2. The deed book number and deed number of the site.

3.6.3. The County tax map references.

3.6.4. Geographic information system data to accurately delineate the voluntary remediation site.

3.6.4.1. All geographic information system location data must have a horizontal accuracy within 12.2 meters (40 feet) in accordance with the U.S. Department of Interior U.S. Geological Survey National Map Accuracy Standards.

3.6.5. Any other identifying information that will serve to clearly and concisely identify the real estate to be included in the brownfield economic district.

3.6.6. A brownfield economic development district may not include any non-contiguous location or property not owned or controlled by the applicant at the time the application is filed.

3.7. A map showing the boundaries of the brownfield economic development district and showing the proposed economic development in the district.

3.8. Documentation establishing that as of the date of the application the applicant owns or controls all of the land in the proposed brownfield economic development district.

3.9. A time line for completion of the economic development project.

3.10. A traffic study performed by a recognized traffic consultant if (a) the economic development project will directly and indirectly employ more than 200 employees who will work in the district once the economic development project is finished, or (b) if more than 200 individuals will reside in the district once the economic development project is completed, or (c) if any combination of residents and employees exceeds 200 persons in the aggregate.

3.11. A true copy of the economic development concept project plan including an estimated breakdown of project costs, which shall not include the cost to complete the voluntary remediation agreement.

3.12. Documentation of financial ability of the applicant to undertake and complete the proposed economic development project plan or an independent economic feasibility study demonstrating the feasibility of the proposed economic development project.

3.13. If the project infrastructure will tie in to a public or private utility, a letter from the utility or utilities serving the area in which the project is located certifying the following:

3.13.1. They have reviewed and approved all plans and specifications for the project's infrastructure applicable to the utility to determine that the infrastructure conforms to the utility's reasonable requirements and, when the infrastructure consists of water transmission or distribution facilities, that the infrastructure will provide for adequate fire protection for the district; and

3.13.2. If the infrastructure is built in conformance with said plans and specifications, the utility will accept the improvements following their completion.

3.14. If state or local roads adjacent to the brownfield economic development district will need to be upgraded to facilitate ingress and egress from the district, the developer shall pay for the cost of these improvements which shall be evidenced by a letter from the Division of Highways, State Department of Transportation, or the local government entity describing generally the construction work to be done, and that the developer has agreed to reimbursed the Department or local government entity for the costs of construction. If the developer will build roads that upon completion will be taken into the state or local road system, the developer shall provide a letter from the Division of Highways or local government entity certifying that if the road(s) is built to standards of the Division of Highways or the local government entity, the road(s) will be taken into the State Road System of the local road system, as the case may be.

3.15. If the utility does not currently have adequate capacity to provide reliable service customers in the brownfield economic development without significant upgrades or modifications to its treatment, storage, source of supply, or transmission facilities, the applicant must agree to pay the cost of upgrading the utility so that it has adequate capacity to provide the utility service.

3.16. A true copy of the voluntary remediation agreement with the Secretary of the Department of Environmental Protection covering some or all of the land in the proposed district.

3.17. Facts and documents demonstrating that designation of a site as a brownfield economic development district will create significant economic development, as defined in section 2 of this rule, including, but not limited to:

3.17.1. Estimated total number of jobs to be created in the brownfield economic development district.

3.17.1.1. Estimated number of construction jobs over the life of the project.

3.17.1.2. Estimated number of permanent jobs once the project is completed and all buildings are occupied.

3.17.1.3. Estimated number of temporary or seasonal jobs once the project is completed and all buildings to be occupied are occupied.

3.17.1.4. Estimated number of part-time jobs once the project is completed and all buildings are occupied.

3.18. Facts and documents demonstrating that but for designation as brownfield economic development district, the contemplated economic development project would not be possible.

3.19. Facts and documents demonstrating that the economic development project is in the best interest of the State. At a minimum, these facts and documents shall include an economic forecast of:

3.19.1. The additional amount of real and personal property taxes expected to be collected once the economic development project is completed.

3.19.2. The additional state and local taxes the completed project will generate, not including ad valorem property taxes or taxes levied on employees working in the district.

3.19.3. The amount of West Virginia personal income taxes that will be paid by employees working in the district once the project is completed, based on the payroll of the district.

3.20. Facts and documents demonstrating that applicant has attempted to work in good faith with local officials in regard to land-use issues.

3.20.1. A copy of the original land use plan submitted to the local land use officials.

3.20.2. A copy of any and all amended or revised land development plan and plat submitted to the local land use officials, with a cover document highlighting the major difference(s) between each version of the land use plan.

3.20.3. One or more documents showing that the land use plan was rejected by the land use officials. Examples of these documents include, but are not limited to, a transcript of the public meeting at which the land use plan was rejected, a letter or order signed by the chairman of the land use officials providing reasons why the land use plan was rejected, the affidavit of the applicant or the affiant's attorney stating the affiant's understand of why the land use plan was rejected.

3.21. Facts and documents demonstrating that the applicant is in compliance with the voluntary remediation agreement and that all of the requirements of W. Va. Code § 22-22-1 *et seq.*, as of the date the application for establishment of the brownfield economic development district was filed with the Development Office.

3.22. Ongoing requirement to correct errors or update information in application.

3.23. Other information, as requested by the Director of the Development Office.

§ 145-11-4. Application fee.

4.1. The application fee shall be $2,500, which amount shall be paid at the time the application is submitted

to the Development Office. In the event extraordinary costs are incurred by the Development Office as a result of processing the application, before or after deciding whether to grant or deny the application, the applicant shall reimburse the Development Office for the amount of the extraordinary costs upon receipt of the Development Office's invoice.

4.2. If the application is withdrawn by the applicant before the Development Office begins its review of the application, the application fee shall be refunded to the applicant. If the application is withdrawn after the Development Office has begun review of the application, no portion of the application fee shall be refunded to the applicant.

4.3. If during review of the application the Development Office requests additional information from the applicant that is not provided by the applicant within sixty days of being notified by facsimile transmission or certified mail of the additional information needed and thereafter the information requested is provided, the applicant shall pay a fee of $2,500 at the time the additional information is provided and the amended application shall be treated as a new application for purposes of this rule.

§ 145-11-5. Time-line for processing application.

5.1. The Development Office shall mark on the application the date it is received by the Development Office.

5.2. The Development Office shall have ninety days after it physically receives a complete application to establish a brownfield economic development district in which to grant the application, deny the application, or request additional information from the applicant. A complete application is one which provides all of the information required by section three of this rule.

5.3. If the application is granted or denied, the Director of the Development Office shall promptly notify the applicant in writing of the decision, which shall be served on the applicant by certified mail, or by facsimile transmission and first class regular mail.

5.4. If the Director requests additional information from the applicant, the request shall be made in writing and served on the applicant by certified mail, or by facsimile transmission and first class regular mail.

5.5. The applicant shall have sixty days from date of receipt of the request for additional information in which to provide the additional information.

5.6. When the additional information is provided within the applicable sixty-day period, the Director shall have thirty days after physical receipt of the additional information to act on the application or the balance of the original ninety-day period to act on the application, whichever is longer.

5.7. When the additional information is provided subsequent to the applicable sixty-day period, the additional information and the original application shall be treated as a new application, requiring payment of a new application fee, and the Director shall have ninety days from date of receipt of the new application fee in which to act on the application by granting or denying the application or requesting additional information.

§ 145-11-6. Timely filing and paying; performance when last day to act is Saturday, Sunday or legal holiday in this State.

6.1. *Delivery in person.* – If any document required by this rule to be filed with the Director of the Development Office, or any payment required to be made, within a prescribed period or on or before a prescribed

date, is delivered in person on or before such date to the Development Office at Charleston, West Virginia, during normal business hours of the Development Office, it shall be timely filed.

6.2. *Timely mailing.* – If any document required by this rule to be filed with the Director of the Development Office, or any payment required to be made within a prescribed period or on or before a prescribed date under authority of this rule, is, after such period or such date, delivered by United States mail to the Director of the Development Office, the date of the United States Postal Service postmark stamped on the cover in which such document or payment is mailed ~~shall be deemed to be~~ the date of delivery or the date of payment, as the case may be, provided the following mailing requirements are met:

6.2.1. The postmark date falls within the prescribed period or on or before the prescribed date for filing of the document or for making payment, and

6.2.2. The document or payment was, within the time prescribed in subdivision 6.2.1, deposited in the mail in the United States in an envelope or other appropriate wrapper, postage prepaid, properly addressed to Director of the Development Office or the Development Office.

6.3. *Registered and certified mailing.* – For purposes of this section, if any document or payment is sent by United States registered or certified mail, the date of registration or certification ~~shall be deemed~~ the postmark date.

6.4. *Treatment of private delivery services.*

6.4.1. Any reference in this section to the United States mail shall be treated as including a reference to any designated delivery service, and any reference in this section to a postmark by the United States Postal Service shall be treated as including a reference to any date recorded or marked as described in paragraph 6.4.2 by any designated delivery service.

6.4.2. *Designated delivery service.* – For purposes of this subsection, the term "designated delivery service" means any delivery service provided by a trade or business if such service is designated by the Secretary of the United States Treasury or the State Tax Commissioner as a delivery service for tax returns, payments and other documents filed with the Internal Revenue Service or with the State Tax Department provided the delivery service:

6.4.2.1. Is available to the general public,

6.4.2.2. Is at least as timely and reliable on a regular basis as the United States mail, and

6.4.2.3. Records electronically to its data base, kept in the regular course of its business, or marks on the cover in which any item referred to in this section is to be delivered, the date on which such item was given to such trade or business for delivery.

6.5. *Time for performance.* – When the last day to act falls on a Saturday, Sunday or legal holiday in this State, the act shall be timely if done on the next day that is not a Saturday, Sunday or legal holiday in this State.

§ 145-11-7. Public notices.

7.1. Within fourteen days after receipt of and application for establishment of a brownfield economic development district, the Director of the Development Office shall file a notice in the State Register:

TO WHOM IT MAY CONCERN

Notice is hereby given that _____ filed an application with the Director of the West Virginia Development on _____, 2008, for establishment of the _____ brownfield economic development district. The proposed district consists of _____ contiguous acres located at _____. Included in the application is a plan for economic development of the district, which is generally described as follow:

[Insert brief description of the economic development project, including phases of the project, if any, and the project's estimated cost.]

Interested persons may inspect the application during normal business hours of the West Virginia Development Office in Charleston, West Virginia, to the extent inspection is permitted under the State Freedom of Information Act, W. Va. Code § 29B-1-1 *et seq.*

7.2. Within fourteen days after the Director established a brownfield economic development district or rejects the application for establishment of the district, a copy of the Director's letter or order shall be filed in the State Register.

§ 145-11-8. Criterion for considering application.

The Director of the Development Office shall use the following criterion when determining whether to grant or deny an application for establishment of a brownfield economic development district:

8.1. Criterion for determining whether establishing a brownfield economic development district will create significant economic development, as defined in section two of this rule, in the district include, but are not limited to:

8.1.1. The cost of the economic development project, exclusive of land cost will be greater than ten million dollars.

8.1.2. The estimated number and quality of jobs to be created within the district, including, but not limited to, construction jobs and permanent employment jobs.

8.1.3. The estimated annual payroll of the jobs to be created in the district.

8.1.4. The extent to which the jobs in the district are new jobs as contrasted with the relocation of existing jobs from within this State.

8.1.5. The extent to which the economic development project will support, enhance, and diversify existing business located in the county or region in which the district is located.

8.2. Criterion for determining whether but for designation of the site as a brownfield economic development district the proposed economic development would not be possible include; but are not limited to:

8.2.1. Rejection of the applicant's land use proposal by the local officials who would otherwise need to approve the proposal.

82.2.2 The reason(s) for rejection of the applicant's proposal given by the local land use officials, if any reason(s) were provided in writing.

8.3. Criterion for determining whether the economic development project is in the best interest of the State

include but are not limited to:

8.3.1. The extent to which the new permanent jobs created will be quality jobs that pay high wages and provide good benefits.

8.3.2. The extent to which the district will stimulate and support the growth of new or existing businesses located outside the district but in the county.

8.3.3. The extent to which the district will stimulate and support the growth of new or existing businesses located outside the county but in this State.

8.3.4. The extent to which the district will compete with or compliment existing businesses in the county.

8.3.5. The extent to which the economic development project will, directly, or indirectly, improve the opportunities in the area where the district will be located for the successful establishment or expansion of other commercial or industrial businesses in the county.

8.3.6. The extent to which the economic development project will, directly, or indirectly, assist in the creation of additional employment opportunities in the area where the district will be located.

8.3.7. The extent to which the economic development project will help to diversify the local economy.

8.3.8. Other criteria:

8.3.8.1. The estimated amount of ad valorem property taxes that will be generated annually as a result of the completed project.

8.3.8.2. The estimated state and local taxes, not including ad valorem property taxes, that will be generated annually from businesses activities and employment in the district.

8.3.8.3. The estimated state and local taxes, including ad valorem property taxes, that will be generated annually from businesses activities and employment outside the district that are fairly related to business and other activities in the district.

8.4. Criterion for determining whether the applicant has attempted to work in good faith with local officials in regard to land use include but are not limited to:

8.4.1. The land use plan submitted to local officials.

8.4.2. Any revised land use plan submitted to local officials.

8.4.3. That the land use plan(s) submitted by the applicant was rejected or tabled by the local officials, or the local officials refused to consider the land use plan.

8.5. *Burden of Proof.* – The burden of proof is on the applicant for establishment of a brownfield economic development district to prove by clear and convincing evidence that establishment of the brownfield economic development district is consistent with all of the requirements of W. Va. Code § 5B-2-6a.

§ 145-11-9. Duties of applicant after district is established.

9.1. Upon completion of the economic development plan and plat for the brownfield economic development district, the applicant or any successor to the applicant shall submit the plan and plat to the Director of the Development Office for approval. If the Director finds that the plan and plat are substantially in compliance with the concept plan submitted with the application for establishment of the brownfield economic development district, the Director shall approve the plan and plat for recording by the applicant or any successor to the applicant in the office of the county clerk of the county in which the district is located.

9.2. On or before the first day of the thirty-sixth month following the month in which the brown field economic development district was established by the Director of the Development Office, the project engineer or architect retained or employed by applicant or any successor to the applicant shall certify to the Director that the economic development project remains in substantial compliance with all material provisions of the economic development project concept plan including, but not limited to, the project completion time-line, filed with the application for establishment of the brownfield economic development district and identify any area or area where material changes, if any were made. The seal of the architect or engineer shall be affixed to the certification. This certification shall be made on or before the first day of every eighteen month anniversary thereafter until the project architect or engineer retained or employed by the applicant or any successor to the applicant, certifies, under seal, that eighty percent (80%) or more of the buildings in the economic development project concept plan, based on square footage of space, has been completed. For purposes of this section "substantial compliance" means compliance with the material provisions of the economic development concept plan and the project completion timeline.

9.3. Whenever the applicant or any successor to the applicant fails to comply with the requirements of subsection 9.2 for more than thirty calendar days, the designation of the district as a brownfield economic development district shall automatically be revoked without further action by the Director of the Development Office.

9.4. Whenever the applicant or any successor to the applicant desires to materially change or deviate from the economic development concept plan or the project completion time-line submitted with the application for the brownfield economic development district, the applicant or any successor to the applicant shall apply to the Director of the Development Office for approval of the material change in or deviation from the concept plan at least thirty days before entering into any contract that by itself or in conjunction with one or more other contracts, would result in a material change in or deviation from the economic development concept plan or the project completion time-line. For purposes of this subsection "material change" means a reduction in the aggregate square footage of the buildings proposed in the economic development project concept plan by more than fifteen percent (15%), or a change in the use of a building to a use inconsistent with or a use less desirable than the use or uses described in the concept plan.

9.5. Whenever the applicant or any successor to the applicant fails to comply with the requirements of subsection 9.4, the designation of the district as a brownfield economic development district shall automatically be revoked without further action by the Director of the Development Office.

9.6. Whenever the brownfield economic development district is revoked pursuant to this section, the Director shall promptly notify the applicant or any successor to the applicant in writing of the revocation due to the action or inaction of the applicant or any successor to the applicant. The Director shall send a copy of the notice to the governing body of the local jurisdiction or jurisdictions in which the brownfield economic district was located. The Director's notice shall be served on the applicant or any successor to the applicant and on the governing body by certified mail return receipt requested, or by facsimile transmission and regular mail.

§ 145-11-10. Vested property right; termination.

10.1. When a brownfield economic development district is established as provided in W. Va. Code § 5B-2-6a and this rule, the applicant for the district and any successor to the applicant shall have a vested property right to undertake and complete the concept economic development project plan.

10.2. Failure to abide by the terms and conditions of this rule or material failure to complete the economic development project concept plan shall result in revocation of the brownfield economic development district as provided in section 9 of this rule and in forfeiture of the right established in this section.

? do you mean the property right vests or something else

10.3. The vesting period within which the economic development concept project plan must be completed is three years from the date the brownfield economic development district is established by the Director of the Development Office. This three-year period shall automatically be extended for thirty-six months each time the certification required by subsection 9.2 is filed with the Director of the Development Office and shall become permanent once eighty percent (80%) or more of the buildings in the economic development project concept plan, based on square footage of space, have been completed, unless the district is sooner terminated, as provided in this rule.

where did this come from

10.4. Revocation of the brownfield economic development district as provided in this rule or expiration of the five year vesting period prior to completion of the economic development concept plan shall not affect the portion of the economic development concept plan completed before the district is revoked or the five-year vesting period expires. Neither of these events shall affect any construction work in progress begun before the district is revoked or the five-year vesting period expires except that this grandfather rule shall not apply to any construction work in progress that is not consistent with the economic development concept plan filed with the application for creation of the brownfield economic development district or any change thereto that has been approved in writing by the Director of the Development Office.

§ 145-11-11. Orders of the Director are final.

The order of the Director of the Development Office establishing a brownfield economic development district is final when issued by the Director except as otherwise provided in this rule for termination of the district due the action or failure to act of the applicant or any successor to the applicant. – are the termination a revocation not final?

what decisions are formalized by an order?

Are any of the orders appealable?

§ 145-11-10. Vested property right; termination.

10.1. When a brownfield economic development district is established as provided in W. Va. Code § 5B-2-6a and this rule, the applicant for the district and any successor to the applicant shall have a vested property right to undertake and complete the ~~concept~~ approved elements of the economic development project plan.

10.2. Failure to abide by the terms and conditions of this rule or material failure to complete the economic development project concept plan shall result in revocation of the brownfield economic development district as provided in section 9 of this rule and in forfeiture of the ~~right~~ approved elements of the established in this section.

10.3. The vesting period within which the economic development concept project plan must be completed is three years from the date the brownfield economic development district is established by the Director of the Development Office. This three-year period shall automatically be extended for thirty-six months each time the certification required by subsection 9.2 is filed with the Director of the Development Office and shall become permanent once eighty percent (80%) or more of the buildings in the economic development project concept plan, based on square footage of space, have been completed, unless the district is sooner terminated, as provided in this rule.

10.4. Revocation of the brownfield economic development district as provided in this rule or expiration of the five year vesting period prior to completion of the economic development concept plan shall not affect the portion of the economic development concept plan completed before the district is revoked or the five-year vesting period expires. Neither of these events shall affect any construction work in progress begun before the district is revoked or the five-year vesting period expires except that this grandfather rule shall not apply to any construction work in progress that is not consistent with the economic development concept plan filed with the application for creation of the brownfield economic development district or any change thereto that has been approved in writing by the Director of the Development Office.

§ 145-11-11. Orders of the Director are final.

The order of the Director of the Development Office establishing a brownfield economic development district is final when issued by the Director except as otherwise provided in this rule for termination of the district due the action or failure to act of the applicant or any successor to the applicant.

WEST VIRGINIA LEGISLATURE
Legislative Rule-Making Review Committee

Senator Joseph Minard, Cochair
Delegate Bonnie Brown, Cochair
Debra A. Graham, Chief Counsel
Felisha N. Sutherland, Administrative Assistant

Connie A. Bowling, Associate Counsel
Rita A. Pauley, Associate Counsel
Brian Skinner, Associate Counsel
Charles Roskovensky, Associate Counsel

February 2, 2009

Kelley Goes, Cabinet Secretary/Executive Director
WV Development Office
State Capitol Complex
Building 6, Room 553
Charleston, WV 25305

RE: Brownfield Economic Development Districts, 145CSR11

Dear Ms. Goes:

Enclosed please find a copy of Rita's Abstract for the above-referenced rule. If you disagree with or have any questions regarding the abstract or suggested modifications please contact Rita at 357-7815.

Sincerely,

Felisha N. Sutherland
Administrative Assistant

Enclosure

Building 1, Room MB-49 1900 Kanawha Boulevard, East Charleston, WV 25305
Phone: (304) 347-4840 Fax: (304) 347-4901 email: felishas@mail.wvnet.edu

ANALYSIS OF PROPOSED LEGISLATIVE RULES

Agency: West Virginia Development Office

Subject: Brownfield Economic Development Districts, 145CSR11

Counsel: Rita A. Pauley

PERTINENT DATES

Filed for public comment: July 1, 2008
Public comment period ended: July 31, 2008
Filed following public comment period: August 15, 2008
Filed LRMRC: August 15, 2008
Filed as emergency: N/A

Fiscal Impact:

ABSTRACT

This rule is new. The following is a synopsis of the proposed rule.

Section 1 is the standard general section, setting forth the scope, authority, filing date and effective date of the proposed rule.

Section 2 is the definition section.

Section 3 sets forth the minimum information necessary to apply for the establishment of a brownfield economic development district. This includes things such as the applicant's contact information and financial capabilities, site description of the proposed brownfield economic district; information sufficient to clearly and concisely identify the real estate, documents establishing that the applicant owns land as of the date of the application, time line for completion of the project, a traffic study, copy of the economic development concept project plan including breakdown of project costs, certification from any utility the project will tie into that the project's applicable infrastructure is adequate and acceptable to the utility, copy of the voluntary remediation agreement with DEP, facts and documents demonstrating that the creation of a brownfield economic development district will create a significant economic development including number of jobs to be created and that the project is in the best interest of the State and that a good faith effort was made to work with local land use officials in regard to land use issues.

Section 4 establishes the application fee of $2,500. The fee is to be paid at the time the application is made. the applicant must pay any extraordinary costs that may be incurred in processing the application. If the application is withdrawn prior to processing the fee will be returned, however, once processing has begun no part of the fee will be refunded. If additional information is requested it must be received within 60 days. If the information is received after 60 days it will be considered a new application.

Section 6 establishes acceptable methods for delivery of any documents or payments to the Development Office. The date the document or payment is postmarked either by the US Postal Service or other designated delivery service is the day of delivery. If an act must be performed on a Saturday, Sunday or legal holiday it may be preformed on the next day that is not a Saturday, Sunday or legal holiday.

Section 7 specifies the content of the public notice the Development Office must publish in the State Register. The notice must be filed within 14 days of receipt of an application for establishment of a brownfield economic development district. Notice of the Director's establishment of a brownfield economic development district or rejection of an application must also be filed in the State Register within 14 days of issuance.

Section 8 sets forth the criterion for determining whether to grant or deny an application for establishment of a brownfield economic development district. There are several criteria and multiple considerations for each one. When determining if the proposed district will create significant economic development consideration will be given to whether the cost of the project, excluding the land cost, will be greater than ten million dollars; the type, number and quality of jobs to be created in the district; whether the jobs are new or relocated within the State; estimated payroll; and whether the project will support, enhance and diversify existing businesses.

When determining whether the project is in the best interest of the State consideration will be given to the extent to which the new jobs will be quality, high wage and benefit jobs; the extent to which the district will stimulate and support the growth of new or existing business in the county and the State; the extent to which the district will compete with or compliment existing business in the county; extent to which the project will improve the opportunities in the area for establishing or expanding other businesses in the county; the extent to which the project will assist in creation of other employment opportunities; and the extent to which the project will help to diversify the local economy.

The applicant bears the burden of proving by clear and convincing evidence that establishing a brownfield economic development district is consistent with all of the requirements of WVC §5B-2-6a.

Section 9 explains the applicant's requirements after a district is established. After the economic development plan and plat for the brownfield economic development district have been completed they must be submitted to the Director for approval. If the plan and plat are in substantial compliance with the concept plan submitted with the application the Director will approve the plan and plat for recording in the office of the appropriate county clerk. Within 36 months after the district was established the project engineer or architect must certify to the Director that the project remains in substantial compliance with the concept plan. This certification must be made every 18 months until the project is 80% or more completed. The designation as a brownfield economic development district will automatically be revoked for failure to comply with the reporting requirements for more than 30 days.

If an applicant or his or her successor wants to materially change or deviate from the concept plan or the completion time-line, an application for approval must be made to the Director at least 30 days before entering into any contract or combination of contracts that would result in such change. Failure to obtain the Director's prior approval will result in the automatic revocation of the district's designation.

Whenever the district designation is revoked under this section, the Director will promptly notify the applicant or any successor in writing of the revocation. A copy of the letter will also be sent to the local governing body of the local jurisdiction in which the district was located.

Section 10 Vested property rights; termination states that a vested property right to undertake and complete the concept economic development project plan is created for the applicant and any successor when the brownfield economic development district is established. Failure to abide by the terms and conditions of this rule or a material failure to complete the economic development project concept plan will result in termination of the project, loss of the district's designation and forfeiture of the property right previously created.

The vesting period to complete the economic development concept plan is 3 years. This 3 year period is extend every time the certifications required by section 9 are filed with the Director. Vesting becomes permanent after 80% or more of the buildings in the project concept plan have been completed.

Revocation of the district's designation under this rule or expiration of the vesting period before completion of the concept

plan does not effect the portion of the plan was completed. Neither event will affect any construction work in progress unless it is inconsistent with the concept plan or any approved changes to the plan.

Section 11 provides that the orders of the Director are final.

AUTHORITY

Statutory authority: W.Va. Code, §5B-2-6A(b), which provides, in pertinent part, as follows:

> **§5B-2-6a. Brownfield economic development districts; applications; fees; rules.**
> (A) May not contain single-family housing;
> (b) The development office shall propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code to implement this section and the rules shall include, but not be limited to, the application and time line process, notice provisions, additional application consideration criteria and application fees sufficient to cover the costs of the consideration of an application. The development office shall promulgate emergency rules pursuant to the provisions of section fifteen, article three, chapter twenty-nine-a of this code by the first day of October, two thousand eight, to facilitate the initial implementation of this section...

ANALYSIS

I. HAS THE AGENCY EXCEEDED THE SCOPE OF ITS STATUTORY AUTHORITY IN APPROVING THE PROPOSED LEGISLATIVE RULE?

No.

II. IS THE PROPOSED LEGISLATIVE RULE IN CONFORMITY WITH THE INTENT OF THE STATUTE WHICH THE RULE IS INTENDED TO IMPLEMENT, EXTEND, APPLY, INTERPRET OR MAKE SPECIFIC?

Yes.

III. DOES THE PROPOSED LEGISLATIVE RULE CONFLICT WITH OTHER CODE PROVISIONS OR WITH ANY OTHER RULE ADOPTED BY THE SAME OR A DIFFERENT AGENCY?

No.

IV. IS THE PROPOSED LEGISLATIVE RULE NECESSARY TO FULLY ACCOMPLISH THE OBJECTIVES OF THE STATUTE UNDER WHICH THE PROPOSED RULE WAS PROMULGATED?

Yes.

V. IS THE PROPOSED LEGISLATIVE RULE REASONABLE, ESPECIALLY AS IT AFFECTS THE CONVENIENCE OF THE GENERAL PUBLIC OR OF PERSONS AFFECTED BY IT?

Yes.

VI. CAN THE PROPOSED LEGISLATIVE RULE BE MADE LESS COMPLEX OR MORE READILY UNDERSTANDABLE BY THE GENERAL PUBLIC?

No.

VII. WAS THE PROPOSED LEGISLATIVE RULE PROMULGATED IN COMPLIANCE WITH THE REQUIREMENTS OF CHAPTER 29A, ARTICLE 3 AND WITH ANY REQUIREMENTS IMPOSED BY ANY OTHER PROVISION OF THE CODE?

Yes.

VIII. OTHER.

Counsel has suggested technical modifications.

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION
Division of Highways
1900 Kanawha Boulevard East • Building Five • Room 110
Charleston, West Virginia 25305-0430 • (304) 558-3505

Joe Manchin III
Governor

August 25, 2010

Mr. John Maxey
President
Jefferson County Planning Commission
116 East Washington Street
Post Office Box 338
Charles Town, West Virginia 25414

Dear Mr. Maxey:

Thank you for your letter, dated August 6, 2010, concerning a proposed development by Old Standard, LLC, in Jefferson County.

You have asked the Division of Highways (DOH) to make certain no approvals are given or permits issued by the DOH for the signalization of the US 340/CR 27 (Millville Road) intersection and that grade separation at that location be required. The DOH approved in May 2007 a revised Traffic Impact Study (TIS) regarding a mixed-use development that at full build-out, which was at that time expected to occur in 2011, would comprise 1.8 million square feet of usable space. The recommendations within that revised TIS were to be incorporated by the developer into the project plans pertaining to our State Highway System. To my knowledge, the DOH has not received from the developer construction plans or any request for approval to perform work within the DOH right-of-way associated with the development in question. Due to the length of time that has passed since the TIS was approved, the DOH will need to determine whether a new or revised TIS reflecting current conditions is appropriate, if the developer notifies the DOH that he wishes to proceed with the project.

Generally, the DOH addresses "large" development projects through an agreement, rather than through our encroachment permit (Form MM-109). Those "developer agreements" require the developer to obtain DOH approval of all studies and plans, prior to construction, and also address right-of-way, utility and other pertinent issues pertaining to the project. Additionally, the developer is required to obtain all other necessary permits and approvals of other governmental agencies, which I would assume would include the Jefferson County Commission, and to coordinate with the affected Metropolitan Planning Organization (MPO), where appropriate. The DOH addresses the impact of individual development projects, as they pertain to our State Highway System, as we determine to be appropriate and reasonable. As part of a TIS associated with a development project, the DOH requires developers to appropriately consider and account for other identified projects within the affected area for which pertinent data are available.

The DOH is agreeable to reviewing the results and recommendations of the study you are undertaking regarding the US 340 corridor. Our Program Planning and Administration Division coordinates with the Hagerstown/Eastern Panhandle MPO regarding transportation issues for that region, and assuming the HEP MPO will be involved with your study, DOH personnel then would be involved via that coordination process. Please note also that any enactment by the Jefferson County Commission of specific construction requirements, such as grade separation, that may result from your study and that are required of developers may exceed DOH requirements, but still would be subject to DOH approval as such construction pertains to our State Highway System.

Again, thank you for writing and sharing your concerns. Should you need additional information, please contact Mr. David E. Cramer, P. E., with our Commissioner's Office of Economic Development, at (304) 558-9211.

Sincerely,

Paul A. Mattox, Jr., P. E.
Secretary of Transportation/
Commissioner of Highways

PAM:Cc

cc: Ms. Kelley Goes, Secretary of Commerce (w/copy of submittal by County)

Julia Quodala

From: Planning Department [planningdepartment@jeffersoncountywv.org]
Sent: Friday, August 27, 2010 4:04 PM
To: yogesh.p.patel@wv.gov
Cc: jbrockman@jeffersoncountywv.org; maxey@radlib.com

Dear Mr. Patel,

It is our understanding that you will be the person who will review and issue state stormwater permits regarding proposed development on the Brownfield Economic Development Opportunity site known as the Old Standard LLC property. WV Code SB-2-6A states that projects approved under this section are exempt from WV Code 8A, but that they are required to comply with all applicable environmental regulations. As our office has not been privy to the exact specifications you use to judge a project's merits with regards to stormwater management and environmental standards, it would be helpful to know if these specifications meet the strict Chesapeake Bay standards that are up and coming. Additionally, the Jefferson County Planning Commission is interested in entering into a Memorandum of Understanding between our offices so that our roles and responsibilities are well outlined.

We respectfully request the opportunity to speak with you regarding the set of environmental standards that Old Standard LLC will be required to comply with under WV Code SB-2-6a, as they are exempt from State Code 8A, which provides for such standards. Additionally, we would like for you to explain how Old Standard LLC is meeting all of our local environmental standards, as they should still apply.

The Planning Commission is also interested in understanding how the applicant intends to address the requirement for improvements to the wastewater collection and treatment plant, as this development will be placing strain on a system that it is at capacity. Does your office review and approve these types of improvements as well?

As the questions outlined above require an in depth discussion, we request a conference call with you on Friday, September 3rd at 1:00 p.m.

Please contact us to confirm the date and time requested.

Planning Department
P.O. Box 338
116 East Washington Street
Charles Town, WV 25414
(304) 728-3228

NOTES FROM WIRELESS TELECOMMUNICATION STAKEHOLDERS MEETING: 8/31/2010

- Intent of Ordinance?
- Source of Ordinance?
- Importance of cell coverage in County.
- Timing vis-à-vis recession / increased cost - consumers
- Two-hundred foot (200') towers regarded as eyesores.
- Ensure Minor Site Plan checklist updated.
- Old Ordinance: ILP exemption under 250 sq. ft. (other jurisdictions exempt). A Site Plan should not be required for minor changes.
- 4B7 – collocation – no Site Plan required.
- Tower Site Plan – pads – additional providers can build on pads without a Site Plan.
- 4B7(3) excessively detailed.
- Federal requirements / Re: regulating technology specifics. Link to safety / maintenance. Example: 4B(3)(a,b,e,etc.).
- Flush mounting requirement cuts capacity.
- Typical: 3-4 antennas per sector (three (3) sectors).
- Flush mount on monopole yields only three (3) antennas (of possible twelve).
- Low-profile platform could be compromise.
- Limiting height limits collocation.
- Ordinance intent also to use existing structures.
- Three-mile buffer.
- Coverage outside of 199'area (e.g. Shepherdstown).
- Variance possible for 199'outside of area - clarify that Variance allowed for height.
- Telecom Act / Shot Clock = 180 days tower
  = 90 days collocation.
- NPS / coverage plan for parks mandated - e.g. Harpers Ferry public safety at rivers.
- Signage requirements / FCC dictates size, print, etc. - "Shall be in accordance with FCC".
- Flush Mount / OSHA safety hazard - can't climb tower unless shut off.
- FCC frequency-range auctions / each frequency different propagation area 1-3 miles.
- FCC allows use of unlicensed spectrum.
- FCC policy release October – universal coverage.
- FCC requires provider to provide coverage within time period.
- Concern / Re: limiting antenna size and type. Size = multiple frequencies.
- Generators – FCC mandated post Katrina.
- Rooftop Screening – required to build structures and antennas to withstand wind-load. Recommend painting, etc., instead. Requirement could reduce collocation.
- Utility Poles – installing on poles also triggers wind-load requirements. So – few antennas on wood poles. Use of poles at discretion of Utility Company – also safety issues. Most Utility Companies operate in easements which requires building access roads, etc. and Storm Water Management.
- Other jurisdictions allow swales, etc. in lieu of ponds (e.g. Maryland).
- Baltimore Company - #2 stone for drives – no Storm Water Management.
- Telecom Act / NEPA Section 106:

For new site, Federal Law requires filing with SHPO.
Towers that are less than 200', area = ½ mile.
To consider impact, look at previous techniques - Mt. Vernon stealth example.
Recommend SHPO report – thirty (30) days and six (6) months to respond.
Timing issue.

- Appalachian Trail Conservancy
  Entire trail eligible for National Historic Registry.
- Existing agreements with wireless communication umbrella organizations.
- Corridor width = one (1) mile – request overlay change.
- Trail managed with Federal government funds.
- Appalachian Trail Conservancy requests status of approval of projects within boundary.
- Work cooperatively within 1-4 miles (voluntary).
- Issue that County HLC has no set of criteria for reviewing. Goal is to minimize impact.
- Collocation does not require SHPO unless in district.
- Safety issue along river – NPS & Harpers Ferry police.
- Management Policies for the NPS - (online) #8643.
- Eligibility for National Registry elevates review.
- Incentivize collocation (e.g. Fairfax County).
- Lower height – less collocation and coverage.
- Engineer from minimum upward.
- Coverage area varies by frequency.
- Fiber or microwave needed at towers.
- Insufficient fiber.
- One smart phone = 30 – 40 cell phones in band width.
- One smart card (laptop) = 400 (+/-) cell phones.
- Balloon test incorporating transmitter test.
- Propagation Maps do not address vegetation, trees, etc.
  Shown at 140 vs. 150 ft. – no significant difference.
- Propagation maps are a small piece of what determines why location is needed.
- Concern regarding proprietary information – possible legal issue.
- Carriers do not build towers where not needed.

Comments Received on Draft Wireless Telecommunications Ordinance (Amendments to Article 4B)

#	Topic	Section	Comment	Source	Date
1	Purpose and Legislative Intent	4B.1	Add in initial paragraph Balancing the provisions of the Telecommunications Act of 1996 Remove aesthetics as the objective as it is a subjective standard	Verizon	9/6/2010
2	Purpose and Legislative Intent	4B.1(4)	Unclear what "incentives" refers to.	Shentel	8/9/2010
3	Classification of Wireless Telecommunication Facilities and Development Review Process	4B.2	"Within thirty (30) days of receiving an application for a Wireless Telecommunication Facility the Zoning Administrator shal notify the applicant in writing that its application is complete or, if additional information is needed to process the application, the applicant shall be notified in writing as to the particular information needed to complete the application. Once the additional information is reviewed and the application is found to be complete, the Zoning Administrator shall notify the applicant of that finding." (re: FCC Shot Clock Ruling)	Paul Rosa	9/2/2010
4	Classification of Wireless Telecommunication Facilities and Development Review Process	4B.2	Remove 2,3,and 4	Verizon	9/6/2010
5	Classification of Wireless Telecommunication Facilities and Development Review Process	4B.2(1)	Since Exempt Facilities is not defined in the definitions section, you may want to list it as: Exempt Facilities as defined in 4B.3 or define it in the definitions section.	NTELOS	8/27/2010
6	Classification of Wireless Telecommunication Facilities and Development Review Process	4B.2(2)	We are assuming that Microcellular is the same as the definition “Wireless Telecommunication Facility, Microcell” ; if so, we would suggest that you have the definition and any other references consistent throughout the Ordinance	NTELOS	8/27/2010
7	Classification of Wireless Telecommunication Facilities and Development Review Process	4B.2(6)	Temporary Wireless Telecommunication Facilities are not defined; need to define what a temporary facility is or can be.	NTELOS	8/27/2010
8	Exempt Facilities Allowed by Right	4B.3	Confused by the paragraph that reads Exempt Facilities are allowed by right…paragraph goes on then to talk about need for a Minor Site Plan and a public hearing. If the site is allowed by right, then no hearing should be required. Then on the following page in 4B.4 is another paragraph about Exempt Facilities	Shentel	8/9/2010
9	Exempt Facilities Allowed by Right	4B.3	Exempt Facilities Allowed by Right. Caution - excluding Television and Broadcast facilities may violate the equal treatment of carriers and favoring one over another - in the next year cable and internet companies will be providing direct voice and data product in direct competition with the traditional providers.	Verizon	9/6/2010
10	Microcellular Wireless Telecommunications Facilities.	4B.4	Very few systems are deployed across the country. Delete as exempt - the use of microcells is an industry last resort . They are extremely expensive to deploy and they are the most intrusive into a community requiring replacement of poles , electrical equipment suspended a few feet off the ground, (phone companies do not own the ground) usually directly in front of someone's house, usually in the right of way of major roads and subject to frequent problems. Utility companies do not replace poles for telecom companies	Verizon	9/6/2010
11	Microcellular Wireless Telecommunications Facilities.	4B.4	5. Add "and the National Park Service"	Paul Rosa	8/31/2010
12	Microcellular Wireless Telecommunications Facilities.	4B.4	The Proposed Ordinance also risks running afoul of Clarkson with its preference for technologies that the Proposed Ordinance deems "Microcellular." 4B.4 provides a significantly easier review process for certain technologies that can fit within the Proposed Ordinance's size definitions. Those size limits effectively dictate technologes that are out of the County's authority to mandate.	T-Mobile letter	8/31/2010
13	Microcellular Wireless Telecommunications Facilities.	4B.4(3)	By their nature, flush mounted antennas are less effective than non-flush mounted antennas, thereby requiring more infrastructure to meet the service needs of a given wireless provider.	PCIA letter	8/31/2010
14	Distributed Antenna System	4B.5	Delete Section - DAS has the same limitation and problems that the Microcell does - DAS are used in very limited areas requiring an extremely expensive network which provides little to no coverage.	Verizon	9/6/2010
15	Distributed Antenna System	4B.5	Preferences for DAS and “Microcellular Wireless Telecommunication Facilities” have been found to be preempted by federal law [see also 4B.9(J)]	PCIA letter	8/31/2010
16	Concealed Wireless Telecommunications Facilities	4B.6	Appalachian Trail is eligible for listing on National Register of Historic Places. Recommend language: "Appalachian Trail Conservancy as an approver/co-approver with Planning Commission." Add language to reflect resolution agreement, including 1-mile width.	Appalachian Trail Conservancy	8/31/2010

#	Topic	Section	Comment	Source	Date
17	Concealed Wireless Telecommunications Facilities	4B.6	• 2. placement of a facility 20 feet above requires a substantial support mechanism to meet 90 mile an hour wind load for 3 second with 1/2 inch of ice. The 2 foot limitation will decrease those wanting to utilize this provision. there are also a numbe of carriers who use metal grates rather than concrete pads for the placement of equipment on the ground. Mandating concrete pads may force more disturbances rather than less. • 3. Placement of size limitations deceases the likelihood that the provisions will be used which seems to defeat the purpose of the provision • 7. Limiting size of antennas may violate the Telecommunications act of 1996. It further increases the number of antennas. the industry is going to larger multi-frequency antennas due to structural limitations on facilities . Placing size limits will have the opposite effect of the intent of the ordinance. Issues relating to mandating rooftop screening were addressed in the definition comment. Increasing the cost of a collocation will force a carrier to alternatives of new sites rather than collocation on the rooftop • 8 delete - • 11 - Generators and their use are controlled by the FCC. the provisions in this section are contrary to those of the COW or other temporarily uses as mandated by the FCC • 12. - mandating the side and front yard setback may rule out the placement of such facilities in locations which would	Verizon	9/6/2010
18	Concealed Wireless Telecommunications Facilities	4B.6(11)	We are assuming that Testing and Maintenance in this only refers to testing and maintenance of a backup generator, because we may have to do maintenance on the facility at any hour day or night if there is an issue with the equipment.	NTELOS	8/27/2010
19	Concealed Wireless Telecommunications Facilities	4B.6(3)	Why use cubic feet, why not square footage? NTELOS uses outdoor equipment cabinets instead of shelters. One of our outdoor equipment cabinets is 68" x 56" x 38". We place these cabinets on a metal skid that sits on the ground. We typically have two (2) skids and there are two (2) cabinets on each skid. Would the metal skids have to be placed on a concrete pad? Some carriers use very large equipment shelters for their equipment.	NTELOS	8/27/2010
20	Concealed Wireless Telecommunications Facilities	4B.6(9)	NTELOS typically does not use equipment shelters, we typically use outdoor equipment cabinets that sit on a metal skid. Is there a size limit if the cabinets are concealed from view?	NTELOS	8/27/2010
21	Co-located Wireless Telecommunications Facilities	4B.7	What criteria will the Zoning Administrator use to consider the desirability of replacing, relocating, modifying or otherwise concealing the existing facility?	Shentel	8/9/2010
22	Co-located Wireless Telecommunications Facilities	4B.7	• Delete 3(a), 3(b) 3(c) 3(d) 3(e) these provisions likely violate the Telecommunications act as antennas are approved by the FCC before they can be manufactured. Dictating the equipment a carrier can use is beyond the scope of zoning and that permitted by the FCC • 3G - the FCC has certain mandates covering the use of generators on site. The provisions may contradict other provisions of the ordinance (COWS) or temporary sites for specific events. • 3h - The FCC has discouraged the use of barbed wire on the top of fences. We caution the county on the requirement of specifics for the size and type of hedge. While the provisions give the zoning Administrator the power - it takes away the power by mandating what can be approved. • 3i - The FCC mandates the size and type of signs required by all parties at a site. Recommend that the requirement is no commercial signage unless mandated by the FCC • 3j - the use of the term "any" allows for a wide subjective latitude on the part of the Zoning Administrator to impose conditions. Verizon is concerned about not being able to evaluate the true cost of a site without some understanding of "any condition" • 3k - there is permitted use of unlicensed spectrum by the FCC . the provision would deny a carrier such permitted use	Verizon	9/6/2010
23	Co-located Wireless Telecommunications Facilities	4B.7	Appalachian Trail is eligible for listing on National Register of Historic Places. Recommend language: "Appalachian Trail Conservancy as an approver/co-approver with Planning Commission." Add language to reflect resolution agreement, including 1-mile width.	Appalachian Trail Conservancy	8/31/2010
24	Co-located Wireless Telecommunications Facilities	4B.7(1)	extremely arbitrary. There is no standard under which the zoning administrator will determine if a facility will be decommissioned or otherwise modified.	PCIA letter	8/31/2010
25	Co-located Wireless Telecommunications Facilities	4B.7(1)	… wholly arbitrary. There is no standard or parameters that will govern the Zoning Administrator's consideration.	T-Mobile letter	8/31/2010

#	Topic	Section	Comment	Source	Date
26	Co-located Wireless Telecommunications Facilities	4B.7(1)	Does this mean that if the existing facility does not meet the current Ordinance requirements and we wanted to collocate on this facility that the Zoning Administrator could require that the facility be replaced, relocated or modified before we could ge approval to collocate? Do you not have a grandfather clause for existing towers? It would appear that existing towers prior to this Ordinance would be under a grandfather clause and they could be extended no more than 20' and antennas added as long as they were flush mounted. It seems excessive, unless the existing structure is structurally incapable of accommodating the additional load, to require that the tower be replaced or relocated.	NTELOS	8/27/2010
27	Co-located Wireless Telecommunications Facilities	4B.7(3)	Impermissibly provides for specific technology standards for co-located facilities.	T-Mobile letter	8/31/2010
28	Co-located Wireless Telecommunications Facilities	4B.7(3)(a)	Use of dual-band/multi band antennas --- Carriers would have difficulty sharing and working that deal and a tower company would have a difficult time in obtaining co-locators. The paragraph indications that Applications should include a narrative discussion addressing this criteria. (What is the acceptable criteria for not doing this? If a letter or statement from the carrier is needed, it is unlikely that this will ever be obtained. Carriers really are not that cooperative with each other.) Consider removal of reference to dual-band/multi band antenna.	Shentel	8/9/2010
29	Co-located Wireless Telecommunications Facilities	4B.7(3)(a)	NTELOS does not use dual-band/multi-band antennas because there are not individual ports of each carrier. If the antenna goes bad, all carriers using the same frequency are out of service. This is not in the best interest of the carriers or community, especially during emergencies and people are trying to call 911, etc. Also, every carrier uses different base station equipment/power cabinets (different manufacturers/types), capacity would be limited, and every carrier uses different azimuths, downtilts and power settings. Also, every carrier has different coverage objectives.	NTELOS	8/27/2010
30	Co-located Wireless Telecommunications Facilities	4B.7(3)(d)	Believe that restriction of mounts could in certain cases limit the ability of a carrier to effectively and efficiently moun antenna as well as maintain the antenna. The various mounting platforms are installed to be a working platform for future work on the antenna. They are installed more as a cost saving for future work.	Shentel	8/9/2010
31	Co-located Wireless Telecommunications Facilities	4B.7(3)(f)	Paragraph would be interpreted to read that even though this is a co-location on an existing tower site, that requirements could be placed on the carrier to upgrade the site with suitable vegetation. This becomes a burden on the carrier as well as the tower owner. If the site is an existing approved site, is it reasonable to impose a modification? Going back and making existing sites compliant with current and new guidelines may be burdensome for the County.	Shentel	8/9/2010
32	Co-located Wireless Telecommunications Facilities	4B.7(3)(f)	Equipment cabinets cannot be architecturally designed. We can paint them as long as it does not void the manufacturer's warranty, but I do not see how we could architecturally redesign them. Does this even apply to outdoor equipment cabinets?	NTELOS	8/27/2010
33	Co-located Wireless Telecommunications Facilities	4B.7(3)(h)	If an existing tower does not have landscaping, would a new tenant have to install landscaping under the proposed Ordinance? Will there be a list of acceptable native vegetation/trees/shrubs in the Ordinance or online readily available for review?	NTELOS	8/27/2010
34	Co-located Wireless Telecommunications Facilities	4B.7(3)(i)(iii)	What about individual emergency carrier contact information signs placed on shelters or cabinets if there are multiple carriers on an existing tower? It appears that only one sign is allowed on the fence with the tower owner's contact information. A tower may be owned by a tower company such as American Tower for example and there can be multiple carriers on the tower.	NTELOS	8/27/2010
35	Co-located Wireless Telecommunications Facilities	4B.7(3)(j)	The Zoning Administrator may require any other conditions deemed necessary or desirable to ameliorate the impact of a co located Wireless Telecommunication Facility on the adjacent properties and uses.	T-Mobile letter	8/31/2010
36	Co-located Wireless Telecommunications Facilities	4B.7(3)(j)	It appears that the Zoning Administrator has been given a great deal of responsibility and power to require other conditions. Can the Zoning Administrator's decision be appealed to the governing body if the requirement seems to be unreasonable?	NTELOS	8/27/2010
37	Co-located Wireless Telecommunications Facilities	4B.7(3)(k)	Reason that the County would need a copy of the FCC license? May be something that is just a burden for the County to maintain etc.	Shentel	8/9/2010

#	Topic	Section	Comment	Source	Date
38	Co-located Wireless Telecommunications Facilities	4B.7(3); 4B.9(H)	The preference for dual-band antennas is unnecessary, burdensome, and may violate federal law. Under the Telecommunications Act of 1996, local governments have authority over "decisions regarding the placement, construction, and modification of personal wireless service facilities." This authority does not extend to the technical or operational aspects of the provision of wireless services, which is solely regulated by the federal government. The type of antenna utilized by a given carrier and the decision whether to share facilities are clearly technical and operational. Therefore, the provisions requiring the use of dual band shared antennas and establishing preferences for the use of dual band antennas for the provision of wireless service are likely preempted.	PCIA letter	8/31/2010
39	Co-located Wireless Telecommunications Facilities	4B.7.3.h	Landscaping - Need to determine if the landscaping only applies to construction of a new facility or new installation. Shoulc not be a requirement for a carrier installing on an existing tower and within an existing compound area to be required to install any landscaping to the site	Shentel	8/9/2010
40	Temporary Wireless Telecommunication Facilities	4B.8	Is it possible for COWs to be located longer than one (1) week if required for necessary maintenance or emergency work? We have collocated on public water tanks and they have required us to remove our equipment from the tank to a COW for at least one (1) month in order for them to sand blast, paint and do maintenance on the water tank	NTELOS	8/27/2010
41	Temporary Wireless Telecommunication Facilities	4B.8	2. The provision may violate the requirements for FCC carriers to maintain their signals on temporary facilities in cases of emergency and other events as mandated. The FCC mandated after Katrina, a number of operational requirements for communications including non-emergency communications which included use of COWS and other antennas to assist in operations.	Verizon	9/6/2010
42	Wireless Telecommunication Towers	4B.9	The draft ordinance sets up a scheme whereby only applications for Wireless Telecommunications Towers require a public hearing "to allow for an analysis of demonstration of need, neighborhood compatibility, impact on cultural and historic resources, and visual mitigation." … the submittal and design requirements specific to Wireless Telecommunications Towers are much more rigorous and require far greater scrutiny than applications for installations proposing technologies and equipment falling within other classifications. Thus, the Proposed Ordinance implicitly and explicitly creates a preference system for certain technologies.	T-Mobile letter	8/31/2010
43	Wireless Telecommunication Towers	4B.9	In general, as discussed at the stakeholder meeting, there needs to be a review of the site plan process as it generally applies to towers and whether certain provisions were designed for homes and buildings rather then this type of use including SWM facilities, roads,	Verizon	9/6/2010
44	Public Hearing Required	4B.9(B)	the current draft sets up an inherent conflict between the community and the carrier. the inclusion in the ordinance that the facility is permitted means by definition that it is compatible with the neighborhood. Verizon would draw your attention to Section 106 of the Telecommunications Act and the rules and regulations which have been established for visual impact. In addition, please review the programmatic agreement signed by the FCC and the State historic Preservation Officers (SHIPO) which sets forth a number of criteria to be used to make the evaluations - creating a pamphlet for handing out to public hearing participants about the FCC and regulations may provide some safe harbor during the public hearings and provide some guidelines for approval	Verizon	9/6/2010
45	Public Hearing Required	4B.9(B)	Inconsistent with timeframe noted in 4B.2	T-Mobile letter	8/31/2010
46	Public Hearing Required	4B.9(B)	Need to make sure that definitions and criteria are clear that to co-locate on an existing tower or structure that no hearings are required and just construction drawings, structural analysis etc. If the need is for a minor site plan then the requirement exists for a public hearing the way I read the document.	Shentel	8/9/2010

#	Topic	Section	Comment	Source	Date
47	Public Hearing Required	4B.9(B)	Delete "The scope of this public hearing shall be limited to an analysis of demonstration of need, neighborhood compatibility, impact on cultural and historic resources, and visual mitigation. The Planning Commission shall review the proposed tower for compliance with the standards in this article." Add: "The scope of this public hearing shall include consideration of the submittal and design criteria set out in this ordinance, the compatibility of the tower proposal with the Comprehensive Plan, as well as any relevant information presented by any person that address the purpose and intent of this ordinance or the Comprehensive Plan. Before the Zoning Administrator may issue a Zoning Certificate for a Wireless Telecommunication Tower the Planning Commission must find, by a majority vote, that the application complies with all submittal and design criteria set out in this ordinance, as well as with the Comprehensive Plan."	Paul Rosa	8/31/2010
48	Public Hearing Required	4B.9(B)	Because cell towers typically affect the viewsheds of expansive areas, the JCHLC should be contacted for comment on each proposed tower during the preliminary stages of the permitting process.	Historic Landmarks Commission	8/31/2010
49	Retention of Consultants	4B.9(C)	Delete the retention of Consultants - it has been Verizon's experience that unless the consultant is operating full time, the "adjunct" use of a consultant typically causes more problems and provides little in the way of guidance on the matters. There are few qualified consultants who represent only governments that do not have "conflicts of interest" by representing carriers.	Verizon	9/6/2010
50	Retention of Consultants	4B.9(C)	Allows the County to retain "outside consultants or professional services" in connection with an application at the applicant's expense. An applicant should not be subject to this limitless provision and should not otherwise be responsible for any fees beyond application fees. Indeed, consultant overcharges and excessive fees were recently struck down in MetroPCS New York, LLC v. City of Mount Vernon. If additional expertise is warranted, the selection of professional services should include a comparative evaluation of consultants' skills, expertise and objectivitity, to ensure that the County secures the best possible fi for the community and its development objectives. In addition, there should be an explicit cap on the fees that the County will impose on an applicant.	T-Mobile letter	8/31/2010
51	Retention of Consultants	4B.9(C)	Add: "An application shall not be deemed complete until the applicant has posted a bond or other security satisfactory to the Zoning Administrator in accordance with the Department ofPlanning & Zoning's schedule of fees and charges to secure the cost of such consulting services. Private Business Users operating a single Wireless Telecommunication Facility at their principal place ofbusiness, and Governmental Users are exempt from this bond requirement."	Paul Rosa	8/31/2010
52	Retention of Consultants	4B.9(C)	Who pays for the cost of the consultant? Is there a “not to exceed” limit on the cost of the consultant? How does the retention of a consultant affect the review/approval time referenced in 4B.9(B)?	NTELOS	8/27/2010
53	Applicant's Burden of Proof	4B.9(D)	The Proposed Ordinance requirement that an applicant prove the need for a proposed facility is unconstitutionally vague and wholly lacking in the objective standards required for fair and consistent application. The language of this is directly contrary to the prevailing legal standards established by various federal courts pursuant to the Telecommunications Act with respect to prohibition of service. Accordingly, we believe that any criteria a municipality intends to utilize in its review of wireless applications must be set forth in the Wireless Law as proposed and subjected to public comment prior to adoption.	T-Mobile letter	8/31/2010
54	Applicant's Burden of Proof	4B.9(D)	Delete ..."no reasonable combinations of locations, techniques or technologies will obviate the need for, or mitigate the height or visual impact of" Verizon believes that mandating the techniques or technologies clearly violates the FCC provisions as that it determined by the license and provisions of 47 CFR.	Verizon	9/6/2010

#	Topic	Section	Comment	Source	Date
55	Applicant's Burden of Proof	4B.9(D)	Places an unreasonable burden on the applicant to not only demonstrate the need for the facility at the proposed height and location, but also to demonstrate that "no reasonable combination of locations, techniques, and/or technologies will obviate the need for, or mitigate the height or visual impact of, the proposed structure." Beyond demonstrating a need for the facility at the proposed height and location and complying with any other reasonable requirements of the ordinance, the *Clarkstown* decision makes it clear that an applicant may not be required to justify why it has chosen to use one technology over another, even if a different technology might have less visual impact.	T-Mobile letter	8/31/2010
56	Proof of Eligibility	4B.9(E)	Delete Proof of Eligibility - Verizon and most carriers do not build towers, tower builders do. If the intent is to prevent towers with no carriers then any applicant which is not a carrier should have a collocation application requesting the tower and its need. As noted in the stakeholders meeting, the cost of construction of a telecommunication facility often exceeds $400,000 and a carrier cost of $500,000 per site. There is no speculation going on in the industry.	Verizon	9/6/2010
57	Demonstration of Need	4B.9(F)	As noted at the stakeholders meeting, the evaluation of propagation maps are one small tool used in design. Most maps are at such small proportions that variations in height of 5 feet may not be noticeable on the visual at 1, 20,000 but at the margins which the signal strength decreases, that is quite noticeable and has s substantial impact on service and quality of service to Verizon's customers. We strongly object to the uploading of proprietary data on public websites. Verizon's licensed technology for RF modeling includes elements which are specific to Verizon and its intended business plan for utilization of its various frequencies. Such disclosure would mandate the public release of trade secrets and business plans.	Verizon	9/6/2010
58	Demonstration of Need	4B.9(F)	4B.9(F) states that "The Zoning Administrator may require the applicant to submit similar propagation maps at successively lower elevations to determine the point at which radio frequency (RF) signal propagation becomes ineffective or uneconomical." Beyond the problems with the undefined showing of "need," the provision is also problematic because a carrier should not be required to disclose its proprietary economic or financial data. The County cannot and should not be the arbiter of wireless network design or the economics of the wireless business. T-Mobile also objects to disclosing the parameters and/or variables used to create its RF propagation studies on the grounds that they are confidential.	T-Mobile letter	8/31/2010
59	Demonstration of Need	4B.9(F)	As discussed at the work session, I do believe that when initially looking for a tower site and discussing with staff etc. the information regarding the search area etc. should be treated as confidential. At the point at time that a carrier has generated propagation maps and is demonstrating the need, the information is now public. The propagation maps are part of the application and are therefore public information. The only time confidentiality comes into play from my experience is so that a competition does not unfold in a certain search area and cause a controversy among the property owners/neighbors as well as the carriers/agents working those areas. One thing to remember that each site is very costly for the carrier to develop and they are not going to propose it unless they can see a financial benefit.	Shentel	8/9/2010
60	Demonstration of Need	4B.9(F)	Engineer's affidavit; can this be a letter written from our on-staff RF Engineer or does it have to be a certified West VA RF Engineer?	NTELOS	8/27/2010
61	Balloon Test	4B.9(G)	Balloon test is costly and burdensome and should be at the discretion of the applicant. Requirement for photo simulations from 5 different locations is burdensome and vague. Publishing notice in a newspaper is costly and suggests that the proposed facility could be of interest to anyone in the County, even if they do not live anywhere near the property. Requiring process to be repeated if the proposed location moves 50 feet is burdensome.	T-Mobile letter	8/31/2010
63	Balloon Test	4B.9(G)	Replace #2 text with, "Notice of the dates and times of such tests shall be mailed to all property owners within a one-quarter mile (1320 feet radius) from the proposed location at least ten (10) days prior to such tests.	Paul Rosa	8/31/2010

#	Topic	Section	Comment	Source	Date
64	Balloon Test	4B.9(G)	It is common for the Historic Landmarks Commission to be present during balloon tests. We ask that companies allow a HLC member to accompany them during the tests, as we are familiar with the locations and viewsheds of historic resources. It would better if the county were to require this type of coordination. Also, balloon tests during the late spring to early fall are not very useful as the leaves are on trees. Balloon tests should show the affect of a tower during the months of leaf-bare, so we usually ask that balloon test be performed from Oct is-May 15. Again, it would be helpful if the county would require tests to be done during this period. The balloon test should document the visibility of the tower from any historic resource, not being limited to a particular radius from the tower itself.	Historic Landmarks Commission	8/31/2010
62	Balloon Test	4B.9(G)	1. An applicant shall conduct a balloon or crane test to simulate the maximum height of the proposed tower. Color photo simulations showing the proposed structure as it would appear viewed from the closest residential property or properties and from adjacent roadways. Photographs should be taken from appropriate locations on abutting properties, along each publicly used road from which the balloon is visible, and from significant identified structures or locations as deemed appropriate by the agent. (ie: From a intersection, from a highway, from a subdivision, from a historical area) A map shall be supplied identifying the location of each photo. Before and after photo exhibits will be presented. This provision shall not apply to collocation on existing antenna support structures. Note: Public Notice in the newspaper is fine, but mailings should be consistent with requirements for mailings by the County for all other types of CUP's. Who would mailings go to from the County regarding a conditional use permit for any other use? Should be consistent with all CUP's or Site Plans that fall under the category of requiring a hearing. Recommend the County provide a list from GIS of all property owners address that would be affected so that some sort of control is maintained and proper notification is given to the correct parties. I think that notification letters would be sent to the same property owners that the County would normally mail notice for a hearing. #4 This should not be any big issue, but for reference, a proposed location for a tower may have enough tree canopy that makes getting a balloon up impossible. Therefore the test is conducted in the general vicinity with an opening in the canopy, but may be 50 or 75 feet from the actual location. For this reason, consideration should be given to changing the distance to within 100 – 150 feet. Usually the few feet one direction or the other will not change the view for purposes of the simulations	Shentel	8/9/2010
65	Balloon Test	4B.9(G)(2)	Verizon believes that mailing notice to all residences in a subdivision or adjacent properties could be overly burdensome i.e. apartments or condo where there is high density. If the county is seeking such a notice provision, the posting of a sign at the main entrance to the community of the proposed balloon test should be sufficient to notify members of the community. Verizon has found that you will always have someone says they did not know, no matter how much effort is expended.	Verizon	9/6/2010
66	Balloon Test	4B.9(G)(3)	It seems excessive to have to advertise balloon tests in the newspaper in addition to sending out notices to adjoining/affected property owners. We have had to cancel/reschedule balloon tests multiple times due to inclement weather and the cost of advertising and re-advertising can be very expensive and time consuming.	NTELOS	8/27/2010
67	Preferred Structure and Locations Policy	4B.9(H)	delete H(1)(a) - the provisions for the use of the antennas violate the FCC rules for interference in technologies.	Verizon	9/6/2010
68	Preferred Structure and Locations Policy	4B.9(H)	Preference for County-owned properties is illogical and unlawful. County is using its legislative power to force payments to the County under leases for wireless telecommunications towers. Both federal and state courts have struck down municipal siting preferences.	T-Mobile letter	8/31/2010

#	Topic	Section	Comment	Source	Date
69	Preferred Structure and Locations Policy	4B.9(H)	Co-location Policy: 1. Many jurisdictions require that the structure be designed for at least 3 additional carriers on structures. 2. Feel that reference to dual-band/multi-band antennas is not a realistic approach and burdensome for the carriers.	Shentel	8/9/2010
70	Preferred Structure and Locations Policy	4B.9(H)	The County really has no other way to be able to state where a carrier should have a site. Various consulting firms offer a review of the County. They determine all the locations of existing facilities, towers, water tanks, silo's etc. They determine all the areas that have no structures and no service and designate these areas as Personal Communications Tower Designated Areas (PCTDA) One of those consultants is Atlantic Technology out of Ashland, VA. Here is the link to the web site. http://www.atlantic-tower.com/technology.html I realize that this would cost money, but it is a possible solution. Other jurisdictions that have this in place, allow you to apply to towers in the areas that they have identified. (FYI: Warren County, VA is one jurisdiction that has had the study completed as well as Madison and Culpeper County)	Shentel	8/9/2010
71	Preferred Structure and Locations Policy	4B.9(H)	Add: "Before an application for a monopole or lattice tower can be approved the applicant's submittal must provide justification as to why alternatives of a higher preference are not capable of serving its needs."	Paul Rosa	8/31/2010
72	Preferred Structure and Locations Policy	4B.9(H)	Preferred locations: make "Industrial-Commercial District" first preference	Paul Rosa	8/31/2010
73	Preferred Structure and Locations Policy	4B.9(H)(a)(i)	NTELOS does not use dual-band/multi-band antennas because there are not individual ports of each carrier. If the antenna goes bad, all carriers using the same frequency are out of service. This is not in the best interest of the carriers or community, especially during emergencies and people are trying to call 911, etc. Also, every carrier uses different base station equipment/power cabinets (different manufacturers/types), capacity would be limited, and every carrier uses different azimuths, downtilts and power settings. Also, every carrier has different coverage objectives.	NTELOS	8/27/2010
74	Preferred Structure and Locations Policy	4B.9(H)(a)(iii)	We are confused by what you mean "within a one-quarter mile radius of a proposed Telecommunication Tower" in this section.	NTELOS	8/27/2010
75	Preferred Structure and Locations Policy	4B.9(H)1(c)(ii)	while Verizon applauds the inclusion of county owned property as a priority and preferred location. It is a balancing act as no to "mandate" the use of said property if it does not meet the design requirements.	Verizon	9/6/2010
76	Application Requirements	4B.9(I)	Verizon noted at the stakeholder meeting that requiring the first to be at a minimum height necessary often conflicts with the requirements and needs of other collocation opportunities as by definition you are placing them lower and decreasing either their function or increasing the need for more facilities and operating contra to the intent of the ordinance. Verizon has a number of sites in which it is currently seeking modifications for increase of 10' height on towers due to the bottom spot on the tower being of no value from a coverage standpoint.	Verizon	9/6/2010
77	Application Requirements	4B.9(I)	Third paragraph starts with talking about co-location on available electric transmission tower and then goes into justificatior to build a tower. Recommend a separate paragraph that outlines the necessary justification in order to make an application for a new tower.	Shentel	8/9/2010
78	Application Requirements	4B.9(I)	Re-insert from original draft: 1. Applicants are encouraged to meet co-location requirements by using dualband/ multi-band antennas to allow sharing of antennas or antenna arrays by wireless providers using different frequency bands or by using combiners to allow sharing by users ofthe same frequency band. 2. Antennas may extend up to twenty (20) feet above the height of existing electric transmission towers if such height extensions are preferable to placement of a new Telecommunication Tower. 7. Before approving co-location of a Wireless Telecommunication Facility on a nonconforming Telecommunication Tower, the Planning Commission may consider the desirability of replacement. relocation. decommissioning, modification. or concealment of such nonconforming structure.	Paul Rosa	8/31/2010
79	Application Requirements	4B.9(I)(1)	1(a) requiring "commercially reasonable" goes into the economics" of the contractual relationships to the parties which is beyond the scope of the ordinance	Verizon	9/6/2010

#	Topic	Section	Comment	Source	Date
80	Application Requirements	4B.9(I)(1)	1(b) leased between parties do not provide for additional tenants - other than in the non-interference provisions of the lease	Verizon	9/6/2010
81	Application Requirements	4B.9(I)(1)(a)	The County does not have authority to require T-Mobile to allow other carriers to use T-Mobile's antennas and equipment. There is no explanation as to why an application for one proposed facility at one proposed location should implicate any and all other wireless facilities that an applicant may already have in the County.	T-Mobile letter	8/31/2010
82	Application Requirements	4B.9(I)(2)	I(2) delete the provision as it may violate the FCC rules for mandating locations. As noted most electric transmission lines unless metal cannot be utilized for such facilities, the electric company often only have easements, requiring extensive ground disturbance to get to a pole. Verizon would like to know whether the county has discussed the policy of collocation with Alleghany power and their policy of collocation. Verizon is aware that Allegheny power is currently in the process of a merger and is not working with carriers on collocation of facilities until after the merger.	Verizon	9/6/2010
83	Application Requirements	4B.9(I)(2)	Provision does not take into account circumstances where the electric transmission tower would not close the applicant's coverage gap even if the utility was willing to lease it and any necessary easements could be obtained. Sub3, regarding "existing or approved towers, buildings, silos or other alternative structures more than thirty (30) feet in height within a one-quarter mile radius" is similarly flawed. Accordingly, the provisions could effectively prohibit the provision of service in violation of [various court cases]. Additionally, the requirement to identify and make affirmative disclosures with respect to the surrounding structures/buildings implicated in this provision could create an overwhelming and costly burden on the applicant.	T-Mobile letter	8/31/2010
84	Application Requirements	4B.9(I)(3)	Delete 3 - the provision mandates a design at 30 feet of height. Most non-telecommunications structures cannot be adapted to utilization of antenna collocation. Unlike other structures, the FCC mandates a design to a specific wind load in the area. i.e. 90 miles an hour for 3 seconds with 1/2 inch of ice. This requirement is considerably in excess to the requirements of BOCA for construction farm buildings. The County can be assured that the difference in cost of a new facility against an existing facility with modifications is always reviewed.	Verizon	9/6/2010
85	Cultural and Historic Resources Review	4B.9(J)	The Cultural and Historic Resources Review provisions are both arbitrary and unlawful. First, the one-mile radius for the areas of potenial effect is arbitrary. Second, including all structures or properties "eligible" for listing on the National Register of Historic Places creates untenable vagueness and potential for conflict. Third, requiring applications in the Harpers Ferry Overlay District to include propagation studies and an economic analysis demonstrating why a DAS network is not viable, is contrary to the *Clarkstown* decision.	T-Mobile letter	8/31/2010
86	Cultural and Historic Resources Review	4B.9(J)	Delete j(1) and replace with the provisions of section 106 and impact on such properties. The APE for towers under 200 feet is 1/2 mile with discretion of adding site which is on the national historic register. Verizon is concerned about discrepancies developing with SHIPO and their approval against the Historic Landmarks community and their lack of standards for review of telecommunication applications as they comply with Federal Standards for visual minimization. In addition, Verizon is aware of a number of "battlefields" which do not qualify for inclusion under the American Battlefield Preservation Program. Should the County add in a historic review, it should also provide standards for that review otherwise the review is all subjective.	Verizon	9/6/2010
87	Cultural and Historic Resources Review	4B.9(J)	Appalachian Trail is eligible for listing on National Register of Historic Places. Recommend language: "Appalachian Trail Conservancy as an approver/co-approver with Planning Commission." Add language to reflect resolution agreement, including 1-mile width.	Appalachian Trail Conservancy	8/31/2010

#	Topic	Section	Comment	Source	Date
88	Cultural and Historic Resources Review	4B.9(J)	Cultural and Historic : I believe that Federal guidelines should be followed in these cases and if effects are identified, the view mitigated with the appropriate state or federal agency with input from the local jurisdiction. The feds and state have the rules and it would streamline the process to use existing guidelines and let the carrier/tower owners consultant handle. Dependent on the height of the structure, the Area of Potential Effect for historical report purposes may from ½ mile for a shorter structure to up to 1 ½ mile for a taller structure. The reports that are prepared and the process necessary to meet the requirements of the FCC are conducted by consulting firms and the reports generated are approved by the WV Department of Historic Resources'. In instances that a tower structure is proposed near a historical/or eligible historic structure, by no means automatically means that it cannot be approved. A process exists within the process and "IF" the structure is visible etc. the view can be mitigated by means of camouflage etc. Also, as part of the process, notification is made from the firm doing the study as part of the process to notify the appropriate jurisdictions and agencies within the County. They are also responsible for public notification as specified by the Federal rules Just not wanting to overburden the Zoning Administrator with requirements that are governed and controlled by the Federal requirements and procedures and policies.	Shentel	8/9/2010
89	Cultural and Historic Resources Review	4B.9(J)	Add "the Historic Landmarks Commission and"	Paul Rosa	8/31/2010
90	Cultural and Historic Resources Review	4B.9(J)	Cultural and Historic Resources Review - Again the JCHLC would recommend that not only those historic resources that are National Register listed or eligible be reviewed for impact but that "any historic site, property, district, or structure appearing on the West Virginia State Historic Preservation Office surveys, or Jefferson County Historic Landmarks Commission map and database of historic resources" be reviewed.	Historic Landmarks Commission	8/31/2010
91	Height Restrictions	4B.9(K)	b. Wireless Telecommunication Towers in the Industrial-Commercial zoning district shall not exceed 199 feet. Towers in all other zoning districts shall not exceed 100 feet, with the exception of: 1. Towers on lands owned by Jefferson County [move"(with the exception of County-owned park properties or properties owned by the Jefferson County Development Authority) or"] the Jefferson County Fire & Rescue Association in any zoning district shall not exceed 199 feet.	Paul Rosa	8/31/2010
92	Height Restrictions	4B.9(K)(1)	K(1)(a) provision as written may be inconsistent with 2 additional carrier requirements	Verizon	9/6/2010
93	Height Restrictions	4B.9(K)(1)	K(1)(b) placement of a height restriction of 100 feet without a variance provision will likely result in more structures being built rather than less. With the variation in topography in the county, the height of a tower allows the signal to travel over the right lines and cover larger areas, decreasing height will double the structure requirement to allow for the lower towers to connect to each other.	Verizon	9/6/2010
94	Height Restrictions	4B.9(K)(1)	Height Restrictions: Taller towers are necessary in outlying rural areas to insure coverage of a larger area of real estate. The industry standard is to build larger towers and then fill in with the smaller towers as needs for capacity grow which shrinks the coverage available in the area. Limiting the height of towers to 199 foot in rural areas would be acceptable, but limiting the height in these areas to 100 foot would create a proliferation of short structures in a particular area to get the same coverage. One large tower could be realistically sited to cause less visual impact than 2 or 3 shorter structures. To discourage proliferation you would want less structures and more co-locations on existing structures or a new structure rather than a number of small structures. The shorter structures will only work for 1 or possibly 2 carriers depending on location. To discourage proliferation you would want less structures and more co-locations on existing structures or a new structure rather than a number of small structures. Additionally, with the cost associated with building and maintaining a site, carriers, if forced to build and equip 3 sites (100 ft) to get the same coverage as a 199 ft structure, may opt to not cover the area at all.	Shentel	8/9/2010
95	Height Restrictions	4B.9(K)(1)(b)	Smacks of the County's improper use of its legislative power to increase the likelihood of payment to itself.	T-Mobile letter	8/31/2010

#	Topic	Section	Comment	Source	Date
96	Height Restrictions	4B.9(K)(1)(b)	The proposed height limits in zones other than Industrial - Commercial are vague and lack objective criteria. New towers should be permitted up to 199 feet. Tower heights exceeding 199 feet should be permitted by the reviewing agency if necessary to remedy a significant coverage gap. The limitation on silo height to 120 feet is illogical and unreasonable. If the silo is already taller than 120 feet, there is no logical reason it should not be available for use.	T-Mobile letter	8/31/2010
97	Fall Zone	4B.9(K)(2)	K(2) Delete - the fall zone provisions are arcane. tower built to Rev G standards exceed and take into account the need for fal zones. Location near a "residence" should be the property owner's decision. Setback from a property line will "keep" the tower on the owners property	Verizon	9/6/2010
98	Fall Zone	4B.9(K)(2)	Fall zone: Should have language that indicates how much the setback could be waived. Recommend ½ the distance of the height of the proposed structure which can be approved by the Commission. The request for the waiver must be fully justified by the applicant. The reason for this thinking is that to obtain an easement from an adjoining property owner will more than likely require additional expenses which places an undo hardship on the tower developer. As an example, placement of a tower on the property that currently has a water tank and located in a subdivision. This could in fact require 2 – 3, if not more easements. This is a situation that a setback waiver would be financially beneficial to the carriers and the proposed tower owner. This would be especially beneficial if priorities for placement of towers was added to the document as was discussed at the work session, i.e.: 1. On existing Towers or structures. 2. On County owned properties 3. On City owned properties 4. On other unincorporated property in the County	Shentel	8/9/2010
99	Fall Zone	4B.9(K)(2)	The Fall Zone requirements are unreasonable. The setback limitations should be streamlined as follows: (1) Any equipment shall meet the applicable underlyling setback requirement for the zone in which it is located. Equipment shall not include utilities, fencing, access roads and other accessory structures; and (2) Towers shall be set back from any property line a distance equal to the height of the tower, or a height less than the height of the tower if a professonal engineer certifies in writing that the tower will be designed with a fall zone less than the height of the tower.	T-Mobile letter	8/31/2010
100	Fall Zone	4B.9(K)(2)	The limitation on residential structures being within the fall zone of the subject property should be removed, as it is an issue of contract and liability between T-Mobile and the underlying property owner.	T-Mobile letter	8/31/2010
101	Visual Cross Section	4B.9(K)(3)	K(3) Delete as it likely violates the FCC rules and regulations deciding how antennas shall function and operate on a tower by their placement and impacts the deployment of the frequency by mandating the type of antennas which can be installed on a tower.	Verizon	9/6/2010
102	Visual Cross Section	4B.9(K)(3)	The "Visual Cross Section" requirements raise the same technology preference issued discussed above	T-Mobile letter	8/31/2010
103	Signage	4B.9(K)(4)	K(4) delete and replace with signage shall be consistent with that mandated by the FCC and the FAA	Verizon	9/6/2010
104	Electricity Supply	4B.9(K)(7)	k(7) Use of Generators should be in compliance with FCC guidelines and mandates for their operation and testing	Verizon	9/6/2010
105	Fencing	4B.9(K)(8)	k(8) Delete the mandate and allow the commission to determine fencing and screening as to what is appropriate on a site by site basis	Verizon	9/6/2010
106	Maintenance and Removal Bonds	4B.11	• Delete at the time of application. The appropriate time for such requirements is at the time of building permit after the tower is approved and there is something to maintain, otherwise the agreement cannot be drafted to specific conditions approved by the Commission without amending the agreement • Delete the requirement for a bond.	Verizon	9/6/2010
107	Definitions	Definitions	Want to make sure that someone does not over think the enclosure thing for outdoor cabinets and thus require some sort of sealed drawings as would be required for an actual shelter. (I ran into a situation in Warren County and had to push for an interpretation that an outdoor cabinet was NOT considered a structure.)(The reviewer was looking at black on white and could not get past the difference because the cabinet housed the same equipment as a shelter) No a big issue, just I think needs clarification	Shentel	8/9/2010
108	Definitions	Definitions	Definition of Appalachian Trail and Harpers Ferry Overlay Districts – will these maps be included in the Ordinance or available online for easy access to this information?	NTELOS	8/27/2010
109	Definitions	Definitions	Definition of Distributed Antenna Systems – Would these systems not be allowed inside buildings? This definition only refers to outside systems.	NTELOS	8/27/2010

#	Topic	Section	Comment	Source	Date
110	Definitions	Definitions	Definition of Vegetative Canopy – there is a definition, but could not find where vegetative canopy was used in the Ordinance.	NTELOS	8/27/2010
111	Definitions	Definitions	Definition of Wireless Telecommunication Facility, Concealed – We are assuming that this could be a slick stick monopole or flagpole with all antennas/cables inside the pole.	NTELOS	8/27/2010
112	Definitions	Definitions	Definitions of Microcell and Wireless Telecommunication Facility, Microcell – NTELOS' equipment cabinets are larger than 25 cubic feet.	NTELOS	8/27/2010
113	Definitions	Definitions	Antennas array should include a single antenna as some carriers use a single Omni or whip antenna	Verizon	9/6/2010
114	Definitions	Definitions	Delete antenna concealed - not sure there is an example where it is no readily discernable from the street level	Verizon	9/6/2010
115	Definitions	Definitions	Delete antenna dual band - believe that as part of the FCC compliance issues the section on antennas type will be required to be delete thus no requiring the definition	Verizon	9/6/2010
116	Definitions	Definitions	Collocation - delete in the definition the sharing of an antenna or antenna array - believe that as part of the FCC compliance issues the section on antennas type will be required to be delete thus no requiring the definition	Verizon	9/6/2010
117	Definitions	Definitions	Delete Combiner - believe that as part of the FCC compliance issues the section on antennas type will be required to be delete thus no requiring the definition	Verizon	9/6/2010
118	Definitions	Definitions	Commercial Wireless Service Provider - add to definition inclusion of the use of non-licensed frequencie	Verizon	9/6/2010
119	Definitions	Definitions	Delete Discernable -	Verizon	9/6/2010
120	Definitions	Definitions	Delete DAS - DAS systems are only practical from a highly urban area where rooftop shadowing and/or other technical limitations limitation make deployment of a system impractical. Counties that have DAS in their ordinance also provide that a showing of economic cost is sufficient to overcome any burden of proof for impractical deployment	Verizon	9/6/2010
121	Definitions	Definitions	Electric Distribution poles - remove wooden poles from definition - cannot support anything other than a micro-cell	Verizon	9/6/2010
122	Definitions	Definitions	FCC Functional Equivalent services - 47 CFR provides a much larger set of communication services. FCC is constantly expanding the use of different frequencies to meet the needs of the public demand for service	Verizon	9/6/2010
123	Definitions	Definitions	Governmental User - most Public Safety entitles also rely upon private carriers for service (us cellular, Verizon, Sprint/Nextel as an integral part of their communication network	Verizon	9/6/2010
124	Definitions	Definitions	Historic Property - the definition should reference Section 106 requirements and the APE which is what is federally mandated.	Verizon	9/6/2010
125	Definitions	Definitions	Delete Microcell - very limited use and to specify dimensions is impractical with current antenna design	Verizon	9/6/2010
126	Definitions	Definitions	Neighborhood - change from 1 mile to 1/2 mile (consistent with federal APE regulations) for areas of effect	Verizon	9/6/2010
127	Definitions	Definitions	Delete PCS - term is not used anymore -	Verizon	9/6/2010
128	Definitions	Definitions	Delete Primary Public Safety Provider - do not believe it is necessary - may accidently include DOD or other Federal users who are no licensed by the FCC due to national security for use of certain frequencies	Verizon	9/6/2010
129	Definitions	Definitions	Delete Tower Base as not relevant other than to the reviewer of the Building Permit who determines the structural base - Would suggest clarification of whether the County has adopted Rev F or Rev G for standards on tower foundations	Verizon	9/6/2010
130	Definitions	Definitions	Tower Site - fall zone requirements do not match industry realties - towers are built to withstand very high wind loads- in addition monopoles and lattice towers are design to fold in on themselves in a 1/3 area -	Verizon	9/6/2010
131	Definitions	Definitions	Utility Pole - same as electric distribution poles	Verizon	9/6/2010
132	Definitions	Definitions	Delete Visible - all facilities are visible which is not a standard that any carrier or the FCC permits	Verizon	9/6/2010
133	Definitions	Definitions	Wireless Telecommunications Facility - concealed - note that the construction of parapet walls will discourage the use of rooftops for placement of antennas. There are other way to decrease visual impact on rooftops without the extreme costs associated with the construction of new rooftops	Verizon	9/6/2010
134	Definitions	Definitions	Delete Wireless Telecommunications Tower- Speculative - few carriers build their own towers - they are built by the major tower companies Crown, ATC, SBA or the smaller tower companies	Verizon	9/6/2010

#	Topic	Section	Comment	Source	Date
135	Definitions	Definitions	we would strongly suggest that the term "Historic Resource" be used in place of the terms "historic site or historic property.' The term historic resources is already in the title of section 4B-9J. The Historic Resource definition should eliminate the term "significant" which appears twice in the current wording (what is "significant" is open to interpretation). Wording should be changed to say that "any historic site, property, district, or structure appearing on the West Virginia State Historic Preservation Office surveys or the Jefferson County Historic Landmarks Commission map and database is considered to be a historic resource."	Historic Landmarks Commission	8/31/2010
136	Formatting and Punctuation	n/a	See comments on letter.	Paul Rosa	8/31/2010

9000 Junction Drive
Annapolis Junction, MD 20701

Charles Ryan
Real Estate/Zoning
Cell: 301.526-7342
Fax: 301.512.2186

September 6, 2010

Mr. Steve Barney
Zoning Administrator
Jefferson County
124 E Washington Street
Charles town, WV 25414

Re: Verizon Wireless' written Comments on Proposed Legislation Article 4B Wireless communication Facilities

Dear Steve:

On behalf of Verizon Wireless, I wanted to thank you for providing the opportunity for the industry and specifically Verizon Wireless to attend the stakeholders meeting and to provide to you these written comments. It is our hope that our comments and those of the other carriers will be incorporated into the legislation.

We have broken our comments down by section as provided in the draft legislation. Please note that our lack of comment on a particular area should not be interpreted as support for that idea or portion of the draft, rather it is a no comment at this point in time.

Section 4B.1 Purpose and Legislative Intent

- Add in initial paragraph Balancing the provisions of the Telecommunications Act of 1996
- remove aesthetics as the objective as it is a subjective standard

Definitions

- antennas array should include a single antenna as some carriers use a single Omni or whip antenna
- delete antenna concealed - not sure there is an example where it is no readily discernable from the street level
- delete antenna dual band - believe that as part of the FCC compliance issues the section on antennas type will be required to be delete thus no requiring the definition
- collocation - delete in the definition the sharing of an antenna or antenna array - believe that as part of the FCC compliance issues the section on antennas type will be required to be delete thus no requiring the definition

- Delete Combiner - believe that as part of the FCC compliance issues the section on antennas type will be required to be delete thus no requiring the definition
- Commercial Wireless Service Provider - add to definition inclusion of the use of non-licensed frequencies
- Delete Discernable -
- Delete DAS - DAS systems are only practical from a highly urban area where rooftop shadowing and/or other technical limitations limitation make deployment of a system impractical. Counties that have DAS in their ordinance also provide that a showing of

economic cost is sufficient to overcome any burden of proof for impractical deployment

- Electric Distribution poles - remove wooden poles from definition - cannot support anything other than a micro-cell
- FCC Functional Equivalent services - 47 CFR provides a much larger set of communication services. FCC is constantly expanding the use of different frequencies to meet the needs of the public demand for service
- Governmental User - most Public Safety entitles also rely upon private carriers for service (us cellular, Verizon, Sprint/Nextel) as an integral part of their communication network
- Historic Property - the definition should reference Section 106 requirements and the APE which is what is federally mandated.
- Delete Microcell - very limited use and to specify dimensions is impractical with current antenna designs
- Neighborhood - change from 1 mile to 1/2 mile (consistent with federal APE regulations) for areas of effect
- Delete PCS - term is not used anymore -
- Delete Primary Public Safety Provider - do not believe it is necessary - may accidently include DOD or other Federal users who are no licensed by the FCC due to national security for use of certain frequencies
- Delete Tower Base as not relevant other than to the reviewer of the Building Permit who determines the structural base - Would suggest clarification of whether the County has adopted Rev F or Rev G for standards on tower foundations
- Tower Site - fall zone requirements do not match industry realties - towers are built to withstand very high wind loads- in addition monopoles and lattice towers are design to fold in on themselves in a 1/3 area -
- Utility Pole - same as electric distribution poles
- Delete Visible - all facilities are visible which is not a standard that any carrier or the FCC permits -
- Wireless Telecommunications Facility - concealed - note that the construction of parapet walls will discourage the use of rooftops for placement of antennas. There are other way to decrease visual impact on rooftops without the extreme costs associated with the construction of new rooftops
- Delete Wireless Telecommunications Tower- Speculative - few carriers build their own towers - they are built by the major tower companies Crown, ATC, SBA or the smaller tower companies

Section 4B.2 Classification of Wireless Telecommunication Facilities and Development Review Process

- remove 2,3,and 4

Section 4B.3 Exempt Facilities Allowed by Right

- Caution - excluding Television and Broadcast facilities may violate the equal treatment of carriers and favoring one over another - in the next year cable and internet companies will be providing direct voice and data product in direct competition with the traditional providers -

Section 4B.4 Microcellular Wireless Telecommunications Facilities

- Delete as exempt - the use of microcells is an industry last resort . They are extremely expensive to deploy and they are the most intrusive into a community requiring replacement of poles , electrical equipment suspended a few feet off the ground, (phone companies do not own the ground) usually directly in front of someone's house, usually in the right of way of major roads and subject to frequent problems,. Utility companies do not replace poles for telecom companies
- Very few systems are deployed across the country.

Section 4B.5 Distributed Antenna System

- Delete Section - DAS has the same limitation and problems that the Microcell does - DAS are used in very limited areas requiring an extremely expensive network which provides little to no coverage -

Section 4B.6 Concealed Wireless Telecommunications Facilities

- 2. placement of a facility 20 feet above requires a substantial support mechanism to meet 90 mile an hour wind load for 3 second with 1/2 inch of ice. The 2 foot limitation will decrease those wanting to utilize this provision. there are also a number of carriers who use metal grates rather than concrete pads for the placement of equipment on the ground. Mandating concrete pads may force more disturbances rather than less.
- 3. Placement of size limitations deceases the likelihood that the provisions will be used which seems to defeat the purpose of the provision
- 7. Limiting size of antennas may violate the Telecommunications act of 1996. It further increases the number of antennas. the industry is going to larger multi-frequency antennas due to structural limitations on facilities . Placing size limits will have the opposite effect of the intent of the ordinance. Issues relating to mandating rooftop screening were addressed in the definition comment. Increasing the cost of a collocation will force a carrier to alternatives of new sites rather than collocation on the rooftop
- 8 delete -
- 11 - Generators and their use are controlled by the FCC. the provisions in this section are contrary to those of the COW or other temporarily uses as mandated by the FCC
- 12. - mandating the side and front yard setback may rule out the placement of such facilities in locations which would otherwise be the best location and least intrusive.

Should consider a provision that indicates that an applicant can apply for a variance of any setback or provision in the ordinance

Section 4B.7 Co-located Wireless Telecommunications Facilities

- Delete 2. The city may want to encourage the use of such facilities in certain situations
- Delete 3(a), 3(b) 3(c) 3(d) 3(e) these provisions likely violate the Telecommunications act as antennas are approved by the FCC before they can be manufactured. Dictating the equipment a carrier can use is beyond the scope of zoning and that permitted by the FCC
- 3G - the FCC has certain mandates covering the use of generators on site. The provisions may contradict other provisions of the ordinance (COWS) or temporary sites for specific events.
- 3h - The FCC has discouraged the use of barbed wire on the top of fences. We caution the county on the requirement of specifics for the size and type of hedge. While the provisions give the zoning Administrator the power - it takes away the power by mandating what can be approved.
- 3i - The FCC mandates the size and type of signs required by all parties at a site. Recommend that the requirement is no commercial signage unless mandated by the FCC
- 3j - the use of the term "any" allows for a wide subjective latitude on the part of the Zoning Administrator to impose conditions. Verizon is concerned about not being able to evaluate the true cost of a site without some understanding of "any condition"
- 3k - there is permitted use of unlicensed spectrum by the FCC . the provision would deny a carrier such permitted use

Section 4B.8 Temporary Wireless Telecommunication Facilities

- 2. The provision may violate the requirements for FCC carriers to maintain their signals on temporary facilities in cases of emergency and other events as mandated. The FCC mandated after Katrina, a number of operational requirements for communications including non-emergency communications which included use of COWS and other antennas to assist in operations.

Section 4B.9 Wireless Telecommunication Towers

In general, as discussed at the stakeholder meeting, there needs to be a review of the site plan process as it generally applies to towers and whether certain provisions were designed for homes and buildings rather then this type of use including SWM facilities, roads,

- B - the current draft sets up an inherent conflict between the community and the carrier. the inclusion in the ordinance that the facility is permitted means by definition that it is compatible with the neighborhood. Verizon would draw your attention to Section 106 of the Telecommunications Act and the rules and regulations which have been established for visual impact. In addition, please review the programmatic agreement signed by the FCC and the State historic Preservation Officers (SHIPO) which sets forth a number of criteria to be used to make the evaluations - creating a pamphlet for handing out to public hearing participants about the FCC and regulations may

provide some safe harbor during the public hearings and provide some guidelines for approval

- C. Delete the retention of Consultants - it has been Verizon's experience that unless the consultant is operating full time, the "adjunct" use of a consultant typically causes more problems and provides little in the way of guidance on the matters. There are few qualified consultants who represent only governments that do not have "conflicts of interest" by representing carriers.
- d. Delete ..."no reasonable combinations of locations, techniques or technologies will obviate the need for, or mitigate the height or visual impact of" Verizon believes that mandating the techniques or technologies clearly violates the FCC provisions as that it determined by the license and provisions of 47 CFR.
- e. Delete Proof of Eligibility - Verizon and most carriers do not build towers, tower builders do. If the intent is to prevent towers with no carriers then any applicant which is not a carrier should have a collocation application requesting the tower and its need. As noted in the stakeholders meeting, the cost of construction of a telecommunication facility often exceeds $400,000 and a carrier cost of $500,000 per site. There is no speculation going on in the industry.
- f. Demonstration of Need - As noted at the stakeholders meeting, the evaluation of propagation maps are one small tool used in design. Most maps are at such small proportions that variations in height of 5 feet may not be noticeable on the visual at 1, 20,000 but at the margins which the signal strength decreases, that is quite noticeable and has s substantial impact on service and quality of service to Verizon's customers. We strongly object to the uploading of proprietary data on public websites. Verizon's licensed technology for RF modeling includes elements which are specific to Verizon and its intended business plan for utilization of its various frequencies. Such disclosure would mandate the public release of trade secrets and business plans.
- G. 2. Verizon believes that mailing notice to all residences in a subdivision or adjacent properties could b over burdensome i.e. apartments or condo where there is high density. If the county is seeking such a notice provision, the posting of a sign at the main entrance to the community of the proposed balloon test should be sufficient to notify members of the community. Verizon has found that you will always have someone says they did not know, no matter how much effort is expended.
- H. deletes H(1)(a) - the provisions for the use of the antennas violate the FCC rules for interference in technologies.
- H 1(c)(ii). while Verizon applauds the inclusion of county owned property as a priority and preferred location. It is a balancing act as not to "mandate" the use of said property if it does not meet the design requirements.
- I application requirements - Verizon noted at the stakeholder meeting that requiring the first to be at a minimum height necessary often conflicts with the requirements and needs of other collocation opportunities as by definition you are placing them lower and decreasing either their function or increasing the need for more facilities and operating contra to the intent of the ordinance. Verizon has a number of sites in which it is currently seeking modifications for increase of 10' height on towers due to the bottom spot on the tower being of no value from a coverage standpoint.
- 1(a) requiring "commercially reasonable" goes into the economics" of the contractual relationships to the parties which is beyond the scope of the ordinance

- 1(b) leased between parties do not provide for additional tenants - other than in the non-interference provisions of the lease
- I(2) delete the provision as it may violate the FCC rules for mandating locations. As noted most electric transmission lines unless metal cannot be utilized for such facilities, the electric company often only have easements, requiring extensive ground disturbance to get to a pole. Verizon would like to know whether the county has discussed the policy of collocation with Alleghany power and their policy of collocation. Verizon is aware that Allegheny power is currently in the process of a merger and is not working with carriers on collocation of facilities until after the merger.
- Delete 3 - the provision mandates a design at 30 feet of height. Most non-telecommunications structures cannot be adapted to utilization of antenna collocation. Unlike other structures, the FCC mandates a design to a specific wind load in the area. i.e. 90 miles an hour for 3 seconds with 1/2 inch of ice. This requirement is considerably in excess to the requirements of BOCA for construction farm buildings. The County can be assured that the difference in cost of a new facility against an existing facility with modifications is always reviewed.
- J. Delete j(1) and replace with the provisions of section 106 and impact on such properties. The APE for towers under 200 feet is 1/2 mile with discretion of adding site which is on the national historic register. Verizon is concerned about discrepancies developing with SHIPO and their approval against the Historic Landmarks community and their lack of standards for review of telecommunication applications as they comply with Federal Standards for visual minimization. In addition, Verizon is aware of a number of "battlefields" which do not qualify for inclusion under the American Battlefield Preservation Program. Should the County add in a historic review, it should also provide standards for that review otherwise the review is all subjective.
- K(1)(a) provision as written may be inconsistent with 2 additional carrier requirements.
- K(1)(b) placement of a height restriction of 100 feet without a variance provision will likely result in more structures being built rather than less. With the variation in topography in the county, the height of a tower allows the signal to travel over the right lines and cover larger areas, decreasing height will double the structure requirement to allow for the lower towers to connect to each other.
- K(2) Delete - the fall zone provisions are arcane. tower built to Rev G standards exceed and take into account the need for fall zones. Location near a "residence" should be the property owner's decision. Setback from a property line will "keep" the tower on the owners property
- K(3) Delete as it likely violates the FCC rules and regulations deciding how antennas shall function and operate on a tower by their placement and impacts the deployment of the frequency by mandating the type of antennas which can be installed on a tower.
- K(4) delete and replace with signage shall be consistent with that mandated by the FCC and the FAA.
- k(7) Use of Generators should be in compliance with FCC guidelines and mandates for their operation and testing
- k(8) Delete the mandate and allow the commission to determine fencing and screening as to what is appropriate on a site by site basis

Section 4B.11

- Delete at the time of application. The appropriate time for such requirements is at the time of building permit after the tower is approved and there is something to maintain, otherwise the agreement cannot be drafted to specific conditions approved by the Commission without amending the agreement
- Delete the requirement for a bond.

Verizon hopes that this detailed analysis on various provisions of the proposed ordinance are useful in the Planning commission and Planning staff's next step in the process of adoption of an ordinance.

Yours truly,

/S/

Charles J. Ryan III
Agent for Verizon Wireless

Steve Barney

From: Charles Ryan [cryan@sceeng.com]
Sent: Wednesday, September 08, 2010 12:57 PM
To: Steve Barney
Subject: RE: Draft Wireless Facilities / Cell Tower ordinance for stakeholder review
Attachments: zoning ordinance for jefferson[1].docx

Steve: Attached is soft copy of verizon comments -

From: Steve Barney [sbarney@jeffersoncountywv.org]
Sent: Monday, August 30, 2010 2:01 PM
To: Charles Ryan
Subject: RE: Draft Wireless Facilities / Cell Tower ordinance for stakeholder review

Charles,

My best guess is that there will be a few Planning Commission members – probably the chair and perhaps a few others, and it's not impossible that there could be a County Commission member or two. Most of the attendees will probably be industry reps. Paul Rosa, who one might describe as a citizen activist who addresses cell tower issues, will be there.

The full Planning Commission will review the feedback from the stakeholder meeting during the 9/14 PC meeting. They are scheduled to vote at their 9/28 meeting to recommend the ordinance to the County Commission for adoption.

Let me know if you need additional information.

Thanks,
Steve B.

From: Charles Ryan [mailto:cryan@sceeng.com]
Sent: Monday, August 30, 2010 1:38 PM
To: Steve Barney
Subject: RE: Draft Wireless Facilities / Cell Tower ordinance for stakeholder review

I will be addressing those issues -- will it be just staff or will planning commission be at the meeting

---

From: Steve Barney [sbarney@jeffersoncountywv.org]
Sent: Monday, August 30, 2010 12:29 PM
To: Charles Ryan
Subject: RE: Draft Wireless Facilities / Cell Tower ordinance for stakeholder review

Chip,
I don't think any sort of formal presentation will be necessary. I also don't believe we're going to have time for a presentation on anything other than the content of the draft ordinance, as we want to leave plenty of time for Q&A and discussion.

However, if you wanted to stand up during the Q&A and talk a bit about the context of FCC requirements, such as the timeline for buildout of awarded spectrum, that would be helpful. But the most important thing we'd like to hear from you is whether you perceive any aspects of the ordinance to be unreasonable.

Thanks,
Steve B

From: Charles Ryan [mailto:cryan@sceeng.com]
Sent: Monday, August 30, 2010 7:48 AM
To: Steve Barney
Subject: RE: Draft Wireless Facilities / Cell Tower ordinance for stakeholder review

Steve: who is attending the stakeholders meeting? commissioners, planning board, just staff? I want to make sure that I gear my presentation to the appropriate group

---

From: Steve Barney [sbarney@jeffersoncountywv.org]
Sent: Wednesday, August 25, 2010 5:31 PM
To: maxey@radlib.com; paul.rosa@frontiernet.net; Charles Ryan; LynnK@shentel.net; michael.knotwell@emp.shentel.com; pjraco_consulting@hotmail.com; jpolczynski@jeffersoncountywv.org; Andrew_Lee@nps.gov; cemanuel@appalachiantrail.org
Cc: jbrockman@jeffersoncountywv.org; 'Julie Quodala'
Subject: Draft Wireless Facilities / Cell Tower ordinance for stakeholder review

All,

Attached is the draft Wireless Facilities / Cell Tower ordinance for stakeholder review. We are currently in the process of addressing some technical issues in posting the document to the County website.

The stakeholder meeting will take place next Tuesday, August 31st.

The link to the meeting notice is:
http://www.jeffersoncountywv.org/news/60/104/Wireless-Telecommunications-Facilities-Amendment.html

Please let me know if you have any questions.

Thanks,
Steve Barney

Steve Barney
Zoning Administrator
Jefferson County Departments of Planning & Zoning
(304) 728-3195

Davis Wright Tremaine LLP

T. Scott Thompson
1919 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20006
scottthompson@dwt.com
202.973.4208 tel
202.973.4499 fax

August 31, 2010

Steve Barney
Zoning Administrator
Jefferson County Departments of Planning & Zoning
116 East Washington Street
Charles Town, WV 25414

Re: T-Mobile Comments On Draft Wireless Telecommunications Facilities Amendments

Dear Mr. Barney:

We write on behalf of our client, T-Mobile Northeast, LLC ("T-Mobile"). T-Mobile just learned of Jefferson County's proposed Wireless Telecommunications Facilities Amendment ("Proposed Ordinance") that will be discussed on August 31 at the stakeholders meeting. We appreciate this opportunity to provide written comments. We encourage the County to continue a dialog with wireless carriers and other interested industry members on these and other matters that may be raised.

As set forth in the detailed comments on specific provisions below, T-Mobile particularly wishes to bring to the County's attention three issues that are significantly problematic and likely violate federal or state law: (1) the DAS preference, including equipment size requirements or limitations; (2) review of existing permits when a co-location application is filed; and (3) the requirement to demonstrate need. T-Mobile will address each of these issues below, as well as provide comment on other provisions that require attention due to legal or practical difficulties they raise.

1. The County Cannot Effectively Impose Technology Preferences

First, a key component to the Proposed Ordinance is the enumeration in Section 4B.2 of seven classifications for Wireless Telecommunication Facilities. Several of the classifications are based on the technology used and size of the equipment that is proposed by the applicant – i.e., Microcellular Wireless Telecommunications Facilities, Distributed Antenna Systems (DAS),

Ordinance's size definitions. Those size limits effectively dictate technologies that are out of the County's authority to mandate.

2. The County Cannot Reconsider And Potentially Eliminate Existing, Approved Facilities Every Time A Collocation Application Is Filed

Section 4B.7(1) provides that "Before approving a Co-located Wireless Telecommunication Facility, the Zoning Administrator shall consider the desirability of replacing, relocating, decommissioning, modifying or otherwise concealing the existing facility." This provision is extremely problematic on multiple levels.

First, it is wholly arbitrary. There is no standard or parameters that will govern the Zoning Administrator's consideration. Second, it also subjects existing carriers to undue scrutiny for their already-approved facilities and does not take into consideration how a decision to replace, relocate, or eliminate an existing facility would affect carriers' coverage and network. Wireless networks are interrelated grids. If the County ordered the elimination of an existing facility on which T-Mobile had constructed antennas, it would have a detrimental impact on T-Mobile's entire network and in turn its ability to provide service.

Finally, the provision is unreasonable and contradictory of the Proposed Ordinance's other alleged policies. The Proposed Ordinance purports to prefer co-location, requiring that any new tower be capable of accommodating 2 other carriers and requiring the new tower applicant to make commitments regarding collocation (*see* Section 4B.9(I)(1)). Yet, this provision effectively makes every proposed co-location into a full-blown re-review of the existing facility. There is no logic to this approach, and it is unreasonable. Indeed, this provision would threaten an existing facility (and in turn those other carriers currently using it) with total elimination simply because a new carrier seeks to co-locate, which is otherwise preferred by the County. The provision creates an effective disincentive for any carrier to ever propose a co-location.

Moreover, Section 4B.7(3) impermissibly provides for specific technology standards for co-located facilities. For example, the requirement in 4B.7(3)(a) for the use of "dual-band/multi band antennas" is preempted by federal law in that the County may not dictate the type of antenna model and design that should be utilized by a carrier. *Accord Clarkstown*, 2010 WL 2598310.

Additionally, the language in 4B.7(3)(j) that "The Zoning Administrator may require any other conditions deemed necessary or desirable to ameliorate the impact of a co-located Wireless Telecommunication Facility on the adjacent properties and uses" is extremely overbroad and allows for arbitrary conditions to be placed on approvals.

3. The Required Demonstration Of "Need" For Towers

As noted above, T-Mobile objects to the process for new "Wireless Telecommunications Towers," in Section 4B.9, generally, as unduly burdensome, costly, time-consuming, and

at least five different locations" is arbitrary. Likewise, the requirement to notify surrounding property owners is both burdensome and in vague. The requirement to publish notice in the paper is costly and unnecessary to the extent that notice is required to surrounding property owners. Notice in the newspaper suggests that the proposed facility could be of interest to anyone in the County, even if they do not live anywhere near the property. Finally, requiring the whole process to be repeated if the proposed facility is amended to be moved over 50 feet (potentially in response to the first balloon test or County input) is also burdensome for all the same reasons and likely to lead to unreasonable delay.

The Proposed Ordinance's preference for County-owned properties is illogical and unlawful. There is no logical explanation for listing County-owned properties as the highest prioritized preferred location in Section 4B.9(G)(c), other than that the County is using its legislative power to force payments to the County under leases for wireless telecommunications towers. Municipal siting preferences are illegal and will subject the County to litigation from both the wireless industry and local land owners whose properties are placed at a competitive disadvantage. Potential impacts from wireless facilities are the same whether the property is owned by the County or a private landowner. Both federal and state courts have struck down municipal siting preferences. *See Sprint Spectrum L.P. v. Borough of Ringwood Zoning Bd. of Adjustment*, 386 N.J. Super.L., 2005; *Omnipoint Commc'ns Inc. v. Common Council of City of Peekskill*, 202 F. Supp. 2d 210 (S.D.N.Y. 2002); *Countryman v. Schmidt*, 673 N.Y.S.2d 521 (N.Y. Sup. Ct., Westchester Co., 2006) (which all invalidate local government efforts to requiring location on or granting special preference for wireless facilities located on municipal property).

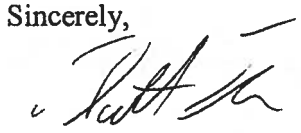
Section 4B.9(I)(1)(a) requires that applicants include with their application "A letter of intent agreeing to make all of its wireless telecommunication facilities in Jefferson County (including existing facilities) available to providers of functionally equivalent services at commercially reasonable rates." T-Mobile assumes that the intent of the provision is to show a willingness to allow co-location on a new tower, but the Proposed Ordinance defines "wireless telecommunications facilities" as all facilities, not just a support structure. The County does not have authority to require T-Mobile to allow other carriers to use T-Mobile's antennas and equipment. There is no explanation as to why an application for one proposed facility at one proposed location should implicate any and all other wireless telecommunication facilities that an applicant may already have in the County.

Section 4B.9(G)(2) requires that "If an electric transmission tower is located 25 feet below elevation and a quarter mile away," such electric transmission tower has to be used unless the applicant demonstrates that the utility is unwilling to allow attachment or easements could not be obtained. This provision does not take into account circumstances where the electric transmission tower would not close the applicant's coverage gap even if the utility was willing to lease it and any necessary easements could be obtained. Section 4B.9(G)(2), respecting "existing or approved towers, buildings, silos or other alternative structures more than 30 feet in height within a one-quarter mile radius," is similarly flawed because the specifically enumerated exceptions for co-location on such structures do not take into account the applicant's coverage objectives. Accordingly, the provisions could effectively prohibit the provision of service in

Finally, Section 4B.9(C) allows the County to retain "outside consultants or professional services" in connection with an application at the applicant's expense. An applicant should not be subject to this limitless provision and should not otherwise be responsible for any fees beyond the ordinary application fees associated with wireless telecommunication facilities. Indeed, consultant overcharges and excessive fees were recently struck down in *MetroPCS New York, LLC v. City of Mount Vernon*, 09 Civ. 8348 (SCR) (S.D.N.Y. July 22, 2010). Often, the County will not need a specialized consultant to review and report on proposed projects. Much like any other type of development, planners can look at the proposed work and evaluate it as per the local code. In many cases, industry is willing to assist staff in developing alternative designs and proposals to address staff concerns and potential impacts. If the County does determine that additional expertise is warranted, the selection of professional services should include a comparative evaluation of consultants' skills, expertise and objectivity, to ensure that the County secures the best possible fit for the community and its development objectives. In addition, there should be an explicit cap on the fees that the County will impose on an applicant.

T-Mobile thanks the County and Departments of Planning and Zoning for involving T-Mobile and other wireless industry members in this process. However, based on the foregoing, T-Mobile respectfully request that adoption of the Proposed Ordinance be postponed until it is revised such that it is a fair and balanced zoning regulation that does not violate state and federal law. Please notify the below signatory of any future public hearings regarding the proposed Wireless Law. Should you have any questions or need more information, please contact us.

Sincerely,



T. Scott Thompson

cc: John Zembruski
Jason Campbell

JEFFERSON COUNTY
HISTORIC LANDMARKS
COMMISSION

Jefferson County Planning Commission
P.O. Box 250
Charles Town, WV 25414

Aug. 31, 2010

Commissioners:

The Jefferson County Historic Landmarks Commission has reviewed the proposed changes of the Wireless Telecommunication Facilities Ordinance. As we have been involved with many cell tower reviews regarding their impacts to historic resources, the JCHLC has some additions and clarifications of language that we believe would make the ordinance work better. Our suggestions are as follows:

1. Under definitions – Historic Site/Property: we would strongly suggest that the term "**Historic Resource**" be used in place of the terms "historic site or historic property." The term historic resources is already in the title of section 4B-9J. The Historic Resource definition should eliminate the term "significant" which appears twice in the current wording (what is "significant" is open to interpretation). Wording should be changed to say that "any historic site, property, district, or structure appearing on the West Virginia State Historic Preservation Office surveys or the Jefferson County Historic Landmarks Commission map and database is considered to be a historic resource."

2. Section 4B-9B, Because cell towers typically affect the viewsheds of expansive areas, the JCHLC should be contacted for comment on each proposed tower during the preliminary stages of the permitting process.

3. Section 4B-9G, Balloon Test – It is common for the Historic Landmarks Commission to be present during balloon tests. We ask that companies allow a HLC member to accompany them during the tests, as we are familiar with the locations and viewsheds of historic resources. It would better if the county were to require this type of coordination. Also, balloon tests during the late spring to early fall are not very useful as the leaves are on trees. Balloon tests should show the affect of a tower during the months of leaf-bare, so we usually ask that balloon test be performed from Oct. 15-May 15. Again, it would be helpful if the county would require tests to be done during this period. The

JEFFERSON COUNTY
HISTORIC LANDMARKS
COMMISSION

4. balloon test should document the visibility of the tower from any historic resource, not being limited to a particular radius from the tower itself.

5. Section 4B-9J, Cultural and Historic Resources Review – Again the JCHLC would recommend that not only those historic resources that are National Register listed or eligible be reviewed for impact but that "any historic site, property, district, or structure appearing on the West Virginia State Historic Preservation Office surveys, or Jefferson County Historic Landmarks Commission map and database of historic resources" be reviewed.

Thank you for the opportunity to comment on these proposed changes.

Sincerely,

John C. Allen, Jr.
Chairman, JCHLC

wireless.org

August 31, 2010

Mr. John Maxey, President
Jefferson County Planning Commission
Post Office Box 338
Charles Town, WV 25414

Re: Wireless Telecommunication Facilities Ordinance

Dear Mr. Maxey:

I would like to offer the following comments on the August 25, 2010 draft of the Wireless Telecommunication Facilities Ordinance:

~~Strikethrough = Deleted Text~~

Underscore = Added Text

Substantive Changes

Section 4B.4 Microcellular Wireless Telecommunication Facilities (page 10)

5. For applications involving utility pole height increases in the Harpers Ferry Overlay District, the Zoning Administrator shall refer the application to the Jefferson County Historic Landmarks Commission and the National Park Service for review and comment before issuing a Zoning Certificate.

Section 4B.9 Wireless Telecommunication Towers (Page 15)

B. Public Hearing Required

In addition to the requirements for a minor site plan, a proposed Wireless Telecommunication Tower shall be reviewed at a public hearing conducted at a scheduled Planning Commission meeting. An application for such a facility shall be submitted at least 30 days prior to the scheduled Planning Commission public hearing. ~~The scope of this public hearing shall be limited to an analysis of demonstration of need, neighborhood compatibility, impact on cultural and historic resources, and visual~~

PO Box 1350
Harpers Ferry
WV 25425
phone 304.725.2990
mobile 304.839.1262
prosa@wireless.org
www.wireless.org

~~mitigation. The Planning Commission shall review the proposed tower or compliance with the standards in this article.~~ The scope of this public hearing shall include consideration of the submittal and design criteria set out in this ordinance, the compatibility of the tower proposal with the Comprehensive Plan, as well as any relevant information presented by any person that address the purpose and intent of this ordinance or the Comprehensive Plan. Before the Zoning Administrator may issue a Zoning Certificate for a Wireless Telecommunication Tower the Planning Commission must find, by a majority vote, that the application complies with all submittal and design criteria set out in this ordinance, as well as with the Comprehensive Plan.

C. Retention of Consultants (Page 15)

The Zoning Administrator may elect to retain outside consultants or professional services to review a Conditional Use Permit application for a Wireless Telecommunication Tower and to make recommendations on relevant issues including, but not limited to, verification of the applicant's due diligence, analysis of alternatives, proof of technical need, conditions of approval, and compliance with State and Federal rules and regulations at the applicant's expense. An application shall not be deemed complete until the applicant has posted a bond or other security satisfactory to the Zoning Administrator in accordance with the Department of Planning & Zoning's schedule of fees and charges to secure the cost of such consulting services. Private Business Users operating a single Wireless Telecommunication Facility at their principal place of business, and Governmental Users are exempt from this bond requirement.

G. Balloon Test (Page 16)

1. An applicant shall conduct a balloon test to simulate the ~~maximum~~ height of the proposed tower.
2. ~~Notice of the dates and times of such tests shall be mailed to all adjacent/confronting affected property owners, and all owners within adjoining subdivisions if any portion of a subdivision adjoins the proposed development site, at least ten (10) days prior to such tests.~~ Notice of the dates and times of such tests shall be mailed to all property owners within a one-quarter mile (1320 feet radius) from the proposed location at least ten (10) days prior to such tests.

H. Preferred Structures and Locations Policy (Page 17)

1.

b. Preferred Support Structures. In light of Jefferson County's agricultural and increasingly residential character, it is the policy of Jefferson County that for Wireless telecommunication Facilities located outside the Industrial-Commercial zoning district (or on lands owned by Jefferson County or the Jefferson County Fire & Rescue Association),

support structures for antennas are desired in the following descending order of preference:

i. Silos
ii. Other Alternative Structures
iii. Monopoles and Lattice Towers

Before an application for a monopole or lattice tower can be approved the applicant's submittal must provide justification as to why alternatives of a higher preference are not capable of serving its needs.

c. Preferred locations. When a new Wireless Telecommunication Tower is determined to be necessary, it is the policy of Jefferson County to encourage the use of the following facilities or locations in descending order of priority:

i. The Industrial-Commercial District
ii. County-owned properties (excluding parks and lands owned by the Jefferson County Development Authority) or properties owned by the Jefferson County Fire & Rescue Association
iii Non-residential areas screened by existing vegetation and located outside of the Industrial-Commercial District.

Comment note: Suggested change reverses the order of first two choices.

I. Application Requirements (Pages 17-19)

Re-insert from original draft:

1. Applicants are encouraged to meet co-location requirements by using dual-band/multi-band antennas to allow sharing of antennas or antenna arrays by wireless providers using different frequency bands or by using combiners to allow sharing by users of the same frequency band.

2. Antennas may extend up to twenty (20) feet above the height of existing electric transmission towers if such height extensions are preferable to placement of a new Telecommunication Tower.

7. Before approving co-location of a Wireless Telecommunication Facility on a nonconforming Telecommunication Tower, the Planning Commission may consider the desirability of replacement, relocation, decommissioning, modification, or concealment of such nonconforming structure.

J. Cultural and Historic Resources Review (Page 19)

2. An application for a Proposed Wireless Telecommunication Tower within the Harpers Ferry Overlay District shall:

a. Be referred to the Historic Landmarks Commission and the National Park Service for review and comment.

K. Design Criteria

Wireless Telecommunication Towers shall comply with the following design criteria:

1. Height Restrictions (Page 20)

b. Wireless Telecommunication Towers in the Industrial-Commercial zoning district shall not exceed 199 feet. Towers in all other zoning districts shall not exceed 100 feet, with the exception of:

1. Towers on lands owned by Jefferson County (with the exception of County-owned park properties or properties owned by the Jefferson County Development Authority) ~~and~~ or the Jefferson County Fire & Rescue Association ~~(with the exception of County-owned park properties or properties owned by the Jefferson County Development Authority)~~ in any zoning district shall not exceed 199 feet. (Page 20)

Formatting & Punctuation Changes

Section 4B.2? Definitions (Renumber other sections)

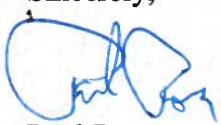
Page 4 Insert space between "FCC," and "Functionally Equivalent Services"

Page 7 Remove space between "Tower Base" and "Tower Height."

Perform a global "find and replace" search to change all references to "wireless telecommunications" to "wireless telecommunication."

I hope these suggestions will be helpful to the Planning Commission and its staff. Please do not hesitate to contact me at (304) 839-1262 should you have further questions.

Sincerely,



Paul Rosa

PCIA

Via Electronic Mail

August 30, 2010

Jennifer Brockman
Director of Planning and Zoning
P.O. Box 338
Charles Town, WV 25414

RE: **DRAFT WIRELESS FACILITY ORDINANCE**

Dear Ms. Brockman,

PCIA—The Wireless Infrastructure Association ("PCIA") writes to urge you to make significant modifications to the Draft Wireless Facility Ordinance currently under consideration by the County. We respectfully submit that the Draft in its current form will significantly inhibit the provision wireless service in the County, and may be preempted by federal law. While we would welcome the opportunity to take the time to provide extensive redlines of the ordinance, we take this opportunity merely to highlight provisions that may be preempted under federal law.

PCIA is the national trade association representing the wireless infrastructure industry. PCIA's members develop, own, manage, and operate towers, rooftop wireless sites, and other facilities for the provision of all types of wireless, telecommunications, and broadcasting services. PCIA and its members partner with communities across the nation to effect solutions for wireless infrastructure deployment that are responsive to the unique sensitivities and concerns of each community.

The citizens and businesses of Jefferson County—and the United States—increasingly rely on wireless services and devices. Wireless users rely on wireless services in every facet of their lives and businesses. Wireless services play an essential role in ensuring and maintaining public safety; approximately 50% of E911 calls are placed using wireless devices. The continued deployment of wireless infrastructure is essential to enable the wireless services on which first responders, businesses, and citizens rely.

We respect the County's interest in enacting an ordinance that requires the responsible deployment of wireless infrastructure, and it is a goal that our members similarly strive to achieve. We urge the County to work with industry stakeholders to modify the Draft to strike a balance that allows the timely deployment of wireless infrastructure while protecting the unique character of the community. As a starting point for this discussion, we take this opportunity to identify some of the problems with the Draft.

We believe that the Draft will limit and unreasonably delay the development of the wireless infrastructure that enables the services that the citizens of Jefferson County demand. We believe the Ordinance contains provisions that unreasonably burden the deployment of wireless infrastructure, and contain a preference for particular wireless technologies, which may run afoul of federal law.

- **The collocation provisions run counter to the County's interests, and are likely preempted by federal law**

The provisions of the Draft addressing collocations are overly burdensome, and will likely require the deployment of more wireless infrastructure in the County. Collocation is an efficient and effective method of deploying wireless infrastructure, and it should be encouraged. The Draft takes an important step toward encouraging collocation by permitting collocations in all zoning districts. However, the Draft

takes huge steps back by imposing extremely onerous requirements on all collocations, for instance the shared use of antennas, and requiring flush mounting. By their nature, flush mounted antennas are less effective than non-flush mounted antennas, thereby requiring more infrastructure to meet the service needs of a given wireless provider.

The Draft indicates that the use of dual band shared antennas will be encouraged and preferred. This preference is unnecessary, burdensome, and may violate federal law. Under the Telecommunications Act of 1996, local government's have authority over "decisions regarding the placement, construction, and modification of personal wireless service facilities."[1] This authority does not extend to the technical or operational aspects of the provision of wireless services, which is solely regulated by the federal government.[2] The type of antenna utilized by a given carrier and the decision whether to share facilities are clearly technical and operational. Therefore, the provisions requiring the use of dual band shared antennas and establishing preferences for the use of dual band antennas for the provision of wireless service are likely preempted.

Furthermore, the initial requirement for any collocation under the ordinance under section 4B7.1 that before approving a collocation the zoning administrator "must consider the desirability of replacing, relocating, decommissioning, modifying or otherwise concealing the existing facility" is problematic for a variety of reasons.

First, the provision does not serve the County's goal of encouraging collocation. If the County over time forces tower owners to demission or otherwise limit the usefulness of a tower, the facilities on which antennas can be collocated are reduced. Second, it is extremely arbitrary. There is no standard under which the zoning administrator will determine if a facility will be decommissioned or otherwise modified. Finally, this provision will have a significant negative impact on the provision of wireless service across the state and region. Wireless sites are chosen based on a variety of technical factors, and serve a very specific purpose within a wireless network. If a site is decommissioned, it will have a severe negative impact on the service in the County, to the detriment of its citizens.

- **Preferences for DAS and "Microcellular Wireless Telecommunication Facilities" have been found to be preempted by federal law**

As explained above, local jurisdictions have authority over decisions regarding the placement, construction, and modification of wireless facilities, but not over technical or operational aspects. Just as the preference for dual band shared antennas is likely preempted, so too are preferences for a particular type of wireless technology. A recent federal court decision struck down a local zoning provision similar to the County's, finding that "provisions setting forth 'alternate technologies' [earlier described as DAS and microcells] are also preempted because they interfere with the federal government's regulation of technical and operational aspects of wireless telecommunications technology, a field that is occupied by federal law."[3]

Given the significant impact that this Draft will have on the deployment of wireless services in Jefferson County, we respectfully urge you to work with industry stakeholders to craft a better-balanced approach. We appreciate the opportunity to provide comment in this discussion and are extremely interested in participating in future opportunities to engage in this important process.

---

[1] 47 U.S.C. § 332(c)(7)(A) (2006).
[2] N.Y. SMSA Ltd. P'ship v. Town of Clarkstown, 2010 U.S. App. LEXIS 13364, *15 (2d Cir. N.Y. June 30, 2010).
[3] *Id.*

Thank you for your time and consideration.

Best Regards,

Brian Regan
Government Affairs Counsel
PCIA—The Wireless Infrastructure Association
901 N. Washington St., Suite 600
Alexandria, VA 22314
(703) 535-7407
reganb@pcia.com

Cc: Mr. Steve Barney, Zoning Administrator

Steve Barney

From: Balser, Debbie [balserd@ntelos.com]
Sent: Friday, August 27, 2010 2:43 PM
To: 'sbarney@jeffersoncountywv.org'
Subject: FW: draft cell tower ordinance - Jefferson County WV
Attachments: Wireless Facilities Ordi. Draft NTELOS Comments 8.27.10.doc

Mr. Barney - Good afternoon. Dan Meenan, my Director, forwarded your proposed cell tower Ordinance to me this morning and asked that I review and put together some comments for you. Since your meeting is on the 31st, I have quickly reviewed and attached my comments/questions. Thank you for allowing us the opportunity to review this Ordinance. Please let me know if you have any questions.

Thank you and have a great weekend.

Debbie Balser
Site Acquisition Manager, VA West
1150 Shenandoah Village Drive
Waynesboro, VA 22980
Telephone: (540) 946-1851
Fax: (540) 932-2210

From: Meenan, Dan
Sent: Friday, August 27, 2010 8:04 AM
To: Balser, Debbie
Subject: FW: draft cell tower ordinance - Jefferson County WV

From: Steve Barney [mailto:sbarney@jeffersoncountywv.org]
Sent: Thursday, August 26, 2010 5:05 PM
To: Meenan, Dan
Subject: draft cell tower ordinance - Jefferson County WV

Mr. Meenan,

We wanted to make you aware that there are some amendments proposed to the Jefferson County cell tower regulations. A stakeholder meeting will take place next Tuesday, August 31st.

The link to the meeting notice is:
http://www.jeffersoncountywv.org/news/60/104/Wireless-Telecommunications-Facilities-Amendment.html

Attached is the draft ordinance that would revise Jefferson County's existing regulations.

Please let me know if you have any questions.

Thanks,
Steve Barney

Steve Barney
Zoning Administrator

NTELOS' COMMENTS TO JEFFERSON COUNTY
WIRELESS FACILITIES ORDINANCE DRAFT DATED 8/25/10

Definition of Appalachian Trail and Harpers Ferry Overlay Districts – will these maps be included in the Ordinance or available online for easy access to this information?

Definition of Distributed Antenna Systems – Would these systems not be allowed inside buildings? This definition only refers to outside systems.

Definition of Vegetative Canopy – there is a definition, but could not find where vegetative canopy was used in the Ordinance.

Definition of Wireless Telecommunication Facility, Concealed – We are assuming that this could be a slick stick monopole or flagpole with all antennas/cables inside the pole.

Definitions of Microcell and Wireless Telecommunication Facility, Microcell – NTELOS' equipment cabinets are larger than 25 cubic feet.

Section 4B.2(1) – Since Exempt Facilities is not defined in the definitions section, you may want to list it as: Exempt Facilities as defined in Section 4B.3 or define it in the definitions section.

Section 4B.2(2) – We are assuming that Microcellular is the same as the definition "Wireless Telecommunication Facility, Microcell" – if so, we would suggest that you have the definition and any other references consistent throughout the Ordinance – either use Microcellular or Microcell, not both – it leads to confusion.

Section 4B.2(6) – Temporary Wireless Telecommunication Facilities are not defined – need to define what a temporary facility is or can be.

Section 4B.6(3) – Why use cubic feet, why not square footage? NTELOS uses outdoor equipment cabinets instead of shelters. One of our outdoor equipment cabinets is 68" x 56" x 38". We place these cabinets on a metal skid that sits on the ground. We typically have two (2) skids and there are two (2) cabinets on each skid. Would the metal skids have to be placed on a concrete pad? Some carriers use very large equipment shelters for their equipment.

Section 4B.6(9) – NTELOS typically does not use equipment shelters, we typically use outdoor equipment cabinets that sit on a metal skid. Is there a size limit if the cabinets are concealed from view?

Section 4B.6(11) – We are assuming that Testing and Maintenance in this section only refers to testing and maintenance of a backup generator, because we may have to do maintenance on the facility at any hour day or night if there is an issue with the equipment.

Section 4B.7(1) – Does this mean that if the existing facility does not meet the current Ordinance requirements and we wanted to collocate on this facility that the Zoning Administrator could require that the facility be replaced, relocated or modified before we could get approval to collocate? Do you not have a grandfather clause for existing towers? It would appear that existing towers prior to this Ordinance would be under a grandfather clause and they could be extended no more than 20' and antennas added as long as they were flush mounted. It seems excessive, unless the existing structure is structurally incapable of accommodating the additional load, to require that the tower be replaced or relocated.

Section 4B.7(3)(a) - NTELOS does not use dual-band/multi-band antennas because there are not individual ports of each carrier. If the antenna goes bad, all carriers using the same frequency are out of service. This is not in the best interest of the carriers or community, especially during emergencies and people are trying to call 911, etc. Also, every carrier uses different base station equipment/power cabinets (different manufacturers/types), capacity would be limited, and every carrier uses different azimuths, downtilts and power settings. Also, every carrier has different coverage objectives.

Section 4B.7(3)(f) – Equipment cabinets cannot be architecturally designed. We can paint them as long as it does not void the manufacturer's warranty, but I do not see how we could architecturally redesign them. Does this section even apply to outdoor equipment cabinets?

Section 4B.7(3)(h) – If an existing tower does not have landscaping, would a new tenant have to install landscaping under the proposed Ordinance? Will there be a list of acceptable native vegetation/trees/shrubs in the Ordinance or online readily available for review?

Section 4B.7(3)(j) – It appears that the Zoning Administrator has been given a great deal of responsibility and power to require other conditions. Can the Zoning Administrator's decision be appealed to the governing body if the requirement seems to be unreasonable?

Section 4B.7(3)(i)(iii) – What about individual emergency carrier contact information signs placed on shelters or cabinets if there are multiple carriers on an existing tower? It appears that only one sign is allowed on the fence with the tower owner's contact information. A tower may be owned by a tower company such as American Tower for example and there can be multiple carriers on the tower.

Section 4B.8 – Is it possible for COWs to be located longer than one (1) week if required for necessary maintenance or emergency work? We have collocated on public water tanks and they have required us to remove our equipment from the tank to a COW for at least one (1) month in order for them to sand blast, paint and do maintenance on the water tank – what would happen in this instance?

Section 4B.9(C) – Who pays for the cost of the consultant? Is there a "not to exceed" limit on the cost of the consultant? How does the retention of a consultant affect the review/approval time referenced in Section 4B.9(B)?

Section 4B.9(F) – Engineer's affidavit – can this be a letter written from our on-staff RF Engineer or does it have to be a certified West VA RF Engineer?

Section 4B.9(G)(3) – It seems excessive to have to advertise balloon tests in the newspaper in addition to sending out notices to adjoining/affected property owners. We have had to cancel/reschedule balloon tests multiple times due to inclement weather and the cost of advertising and re-advertising can be very expensive and time consuming.

Section 4B.9(H)(a)(i) – NTELOS does not use dual-band/multi-band antennas because there are not individual ports of each carrier. If the antenna goes bad, all carriers using the same frequency are out of service. This is not in the best interest of the carriers or community, especially during emergencies and people are trying to call 911, etc. Also, every carrier uses different base station equipment/power cabinets (different manufacturers/types), capacity would be limited, and every carrier uses different azimuths, downtilts and power settings. Also, every carrier has different coverage objectives.

Section 4B.9(H)(a)(iii) – We are confused by what you mean "within a one-quarter mile radius of a proposed Telecommunication Tower" in this section.

Section 4B.9(K)(2)(a) – Can setback waivers be requested if you cannot meet the required setback? Why would you need additional easements from adjacent properties to meet the fall zone requirement if you met the 110% setback requirement? What about setbacks for utility or electric transmission poles? The majority of the time, these existing structures do not meet setback requirements – they are usually on the right-of-way with no way of meeting setback requirements.

Section 4B.9(K)(2)(b) - Can the property owner grant a waiver to the fall zone requirement if they have a dwelling on the property?

Section 4B.9(K)(8) – Could a wooden privacy fence be used to eliminate the need for landscaping?

Section 4B.11 – What would be the amount of the maintenance & removal bond? Typically, in our experience, tower owners are required to post a $25,000 removal bond for new tower construction.

Steve Barney

From: Zoning Dept [zoning@jeffersoncountywv.org]
Sent: Wednesday, September 01, 2010 11:33 AM
To: sbarney
Subject: Fw: Comments on Memo - Proposed Amendment-Wireless Telecom

-----Original Message-----
From: "Lynn Koerner" <lynnk@shentel.net>
Sent 8/9/2010 3:02:56 PM
To: zoning@jeffersoncountywv.org
Subject: Comments on Memo - Proposed Amendment-Wireless Telecom

Steve:

It was a please meeting with you Friday evening and I really felt it was a beneficial work session. Appreciate the opportunity to be able to provide some input.

I have gone through the amendment and made some notes and comments and have forwarded it to my counter part to review and comment as well. I hope to get that back to you later today or first thing in the morning. The comments are from experiences and situations/issues that have come into play in my 9 years with working the business.

I wanted to address a couple things on your memo and additional opportunities:

a. Prioritized locations – I have referenced it in my comments that will be coming, but I think they should read 1. On existing Towers or other structures 2. On County-owned property 3. On City owned property and 4. On other unincorporated property in the County. Naturally if none of the opportunities 1-3 are available in the area that a tower is proposed, then #4 becomes the priority.

   The County really has no other way to be able to state where a carrier should have a site. Various consulting firms offer a review of the County. They determine all the locations of existing facilities, towers, water tanks, silo's etc. They determine all the areas that have no structures and no service and designate these areas as Personal Communications Tower Designated Areas (PCTDA) One of those consultants is Atlantic Technology out of Ashland, VA. Here is the link to the web site. http://www.atlantic-tower.com/technology.html I realize that this would cost money, but it is a possible solution. Other jurisdictions that have this in place, allow you to apply to towers in the areas that they have identified. (FYI: Warren County, VA is one jurisdiction that has had the study completed as well as Madison and Culpeper County)

b. Landscaping - Need to determine if the landscaping only applies to construction of a new facility or new installation. Should not be a requirement for a carrier installing on an existing tower and within an existing compound area to be required to install any landscaping to the site

e. Tower height – Discussed in the other document that is coming. But, due to set back issues that are recommended at 110% of the height of the tower, recommend structure height be placed as "not to exceed 199 foot in any district. This would go along with h. To discourage proliferation you would want less structures and more co-locations on existing structures or a new structure rather than a number of small structures. The shorter structures will only work for 1 or possibly 2 carriers depending on location.

f. Demonstration of Need - As discussed at the work session, I do believe that when initially looking for a tower site and discussing with staff etc. the information regarding the search area etc. should be treated as confidential. At the point at time that a carrier has generated propagation maps and is demonstrating the need, the information is now public. The propagation maps are part of the application and are therefore public information. The only time confidentiality comes into play from my experience is so that a competition does not unfold in a certain search area and cause a controversy among the property owners/neighbors as well as the carriers/agents working those areas.

One thing to remember that each site is very costly for the carrier to develop and they are not going to propose it unless they can see a financial benefit.

Additional Means to Discourage Proliferation – sending letters out to wireless providers would not be of a benefit. The carriers each budget yearly for where they expect and have a demand for coverage and the area for build-out. The

h requirement for a carrier to use an existing structure is by far the best means to discourage proliferation. Each applicant must, as specified in f. and in the ordinance justify the site and why co-location is not possible. When an applicant comes in for a tower, they must have an agreement in place with a carrier to be able to obtain a building permit.

One other means to discourage proliferation is to make the co-location requirements strict enough and enforceable enough, but not so restrictive and cumbersome that makes a carrier say that they can build one cheaper than they can

landscape or fix up an existing site. The rules need to be in place so things are done systematically and proper, but be careful not to over engineer a simple collocation.

I will try to get the draft ordinance comments to you as soon as possible. Please let me know if you have any questions or if I can provide any additional input. I just want to make it as easy and painless as possible for ALL concerned.

Regards;

Lynn Koerner
Independent Contractor
Site Acquisition and Project Development
540-335-0030

Steve Barney

From: Zoning Dept [zoning@jeffersoncountywv.org]
Sent: Wednesday, September 01, 2010 11:32 AM
To: sbarney
Subject: Fw: Jefferson County Zoning Draft Comments(To PC again on Aug 10)

-----Original Message-----
From: "Lynn Koerner" <lynnk@shentel.net>
Sent 8/10/2010 3:59:28 PM
To: zoning@jeffersoncountywv.org
Subject: Jefferson County Zoning Draft Comments(To PC again on Aug 10)

Steve:

I was hoping to have this to you much earlier in the day, but things just got away from me. Also, I was trying to get a little more input for you from a couple of other individuals, but they have let me down.

The below comments are initial thoughts on reviewing the draft. Some of the items may be an over analysis of what is written, and then again some may be under analyzed. With that, I will just say that these are items that should at least be looked at and considered while compiling and working towards a final document.

I would be happy to discuss any item listed below or any other items in the draft document if you wish. I just want to help the jurisdiction and hopefully make the process easier on all of us.

These items are identified from the perspective of a contractor that has been working Site Acquisition issues and details in many jurisdictions for approximately 9 years. I try to take the most common sense approach to a project and so have tried to always follow the rules and read the rules with that approach.

Hope these comments are helpful and sorry for the late delivery.

Regards:
Lynn Koerner
Independent Contractor
Site Acquisition and Project Development

540-335-0030

Subject: Jefferson County Updated Draft dated August 6:

In my review of the initial Draft document, I had many concerns. The revisions on the Aug 6th document have answered some of those questions and concerns and below is what remains.

Page 1: Section4b.1 (4) – don't understand "incentives" .

Page 4: Equipment Enclosure... Want to make sure that someone does not over think the enclosure thing for outdoor cabinets and thus require some sort of sealed drawings as would be required for an actual shelter. (I ran into a situation in Warren County and had to push for an interpretation that an outdoor cabinet was NOT considered a structure.)(The reviewer was looking at black on white and could not get past the difference because the cabinet housed the same equipment as a shelter) No a big issue, just I think needs clarification

Page 8: Section 4B.3 – Confused by the paragraph that reads Exempt Facilities are allowed by right.....paragraph goes on then to talk about need for a Minor Site Plan and a public hearing. If the site is allowed by right, then no hearing should be required. Then on the following page in Section 4B.4 is another paragraph about Exempt Facilities

Page 12 : Section 4B.8

#1: What criteria will the Zoning Administrator use to consider the desirability of replacing, relocating, modifying or otherwise concealing the existing facility?

#3: a, Use of dual-band/multi band antennas --- Carriers would have difficulty sharing and working that deal and a tower company would have a difficult time in obtaining co-locators. The paragraph indications that Applications should include a narrative discussion addressing this criteria. (What is the acceptable criteria for not doing this? If a letter or statement from the carrier is needed, it is unlikely that this will ever be obtained. Carriers really are not that cooperative with each other.) Consider removal of reference to dual-band/multi band antenna.

#3: d. Believe that restriction of mounts could in certain cases limit the ability of a carrier to effectively and efficiently mount antenna as well as maintain the antenna. The various mounting platforms are installed to be a working platform for future work on the antenna. They are installed more as a cost saving for future work.

#3: f. Paragraph would be interpreted to read that even though this is a co-location on an existing tower site, that requirements could be placed on the carrier to upgrade the site with suitable vegetation. This becomes a burden on the carrier as well as the tower owner. If the site is an existing approved site, is it reasonable to impose a modification? Going back and making existing sites compliant with current and new guidelines may be burdensome for the County.

#3: k. reason that the County would need a copy of the FCC license? May be something that is just a burden for the County to maintain etc.

Page 16: 4B.10.X

Need to make sure that definitions and criteria are clear that to co-locate on an existing tower or structure that no hearings are required and just construction drawings, structural analysis etc. If the need is for a minor site plan then the requirement exists for a public hearing the way I read the document.....

Page 17: Section 4B.10.6 Balloon Test.

Recommended language;

1. An applicant shall conduct a balloon or crane test to simulate the maximum height of the proposed tower. Color photo simulations showing the proposed structure as it would appear viewed from the closest residential property or properties and from adjacent roadways. Photographs should be taken from appropriate locations on abutting properties, along each publicly used road from which the balloon is visible, and from significant identified structures or locations as deemed appropriate by the agent. (ie: From a intersection, from a highway, from a subdivision, from a historical area) A map shall be supplied identifying the location of each photo. Before and after photo exhibits will be presented. This provision shall not apply to collocation on existing antenna support structures.

Note: Public Notice in the newspaper is fine, but mailings should be consistent with requirements for mailings by the County for all other types of CUP's. Who would mailings go to from the County regarding a conditional use permit for any other use? Should be consistent with all CUP's or Site Plans that fall under the category of requiring a hearing.

Recommend the County provide a list from GIS of all property owners address that would be affected so that some sort of control is maintained and proper notification is given to the correct parties. I think that notification letters would be sent to the same property owners that the County would normally mail a notification for a hearing.

#4 This should not be any big issue, but for reference, a proposed location for a tower may have enough tree canopy that makes getting a balloon up impossible. Therefore the test is conducted in the general vicinity with an opening in the canopy, but may be 50 or 75 feet from the actual location. For this reason, consideration should be given to changing the distance to within 100 – 150 feet. Usually the few feet one direction or the other will not change the view for purposes of the simulations

Page 18: 4B.10.7 Co-location Policy

1. Many jurisdictions require that the structure be designed for at least 3 additional carriers on structures.

2. Feel that reference to dual-band/multi-band antennas is not a realistic approach and burdensome for the carriers

5. This paragraph starts with talking about co-location on available electric transmission tower and then goes into justification to build a tower. Recommend a separate paragraph that outlines the necessary justification in order to make an application for a new tower.

Page 19: Section 4B.10.9 Cultural and Historic

I believe that Federal guidelines should be followed in these cases and if effects are identified, the view mitigated with the appropriate state or federal agency with input from the local jurisdiction. The feds and state have the rules and it would streamline the process to use existing guidelines and let the carrier/tower owners consultant handle. Dependent on the height of the structure, the Area of Potential Effect for historical report purposes may from ½ mile for a shorter structure to up to 1 ½ mile for a taller structure.

The reports that are prepared and the process necessary to meet the requirements of the FCC are conducted by consulting firms and the reports generated are approved by the WV Department of Historic Resources'. In instances that a tower structure is proposed near a historical/or eligible historic structure, by no means automatically means that it cannot be approved. A process exists within the process and "IF" the structure is visible etc. the view can be mitigated by means of camouflage etc. Also, as part of the process, notification is made from the firm doing the study as part of the process to notify the appropriate jurisdictions and agencies within the County. They are also responsible for public notification as specified by the Federal rules

Just not wanting to overburden the Zoning Administrator with requirements that are governed and controlled by the Federal requirements and procedures and policies.

Page 19: Section 4.B.10.10 Design Criteria:

2. Height Restrictions

Taller towers are necessary in outlying rural areas to insure coverage of a larger area of real estate. The industry standard is to build larger towers and then fill in with the smaller towers as needs for capacity grow which shrinks the coverage available in the area. Limiting the height of towers to 199 foot in rural areas would be acceptable, but limiting the height in these areas to 100 foot would create a proliferation of short structures in a particular area to get the same coverage. One large tower could be realistically sited to cause less visual impact than 2 or 3 shorter structures.

Additionally, with the cost associated with building and maintaining a site, carriers, if forced to build and equip 3 sites (100 ft) to get the same coverage as a 199 ft structure, may opt to not cover the area at all.

Page 20: Fall Zone.

Paragraph 3 indicates that set back is of height of the tower from property lines. Last sentence should be removed. Should have language that indicates how much the setback could be waived. Recommend ½ the distance of the height of the proposed structure which can be approved by the Commission. The request for the waiver must be fully justified by the applicant. The reason for this thinking is that to obtain an easement from an adjoining property owner will more than likely require additional expenses which places an undo hardship on the tower developer. As an example, placement of a tower on the property that currently has a water tank and located in a subdivision. This could in fact require 2 – 3, if not more easements. This is a situation that a setback waiver would be financially beneficial to the carriers and the proposed tower owner. This would be especially beneficial if priorities for placement of towers was added to the document as was discussed at the work session. IE: 1. On existing Towers or structures. 2. On County owned properties 3. On City owned properties 4. On other unincorporated property in the County

Wireless Telecommunication Facilities 4B Amendment
Zoning Ordinance – Text Change Recommendation

Carlen M Emanuel, Land Protection Mgr.

Applicant: Appalachian Trail Conservancy Phone Number: 304-535-6331 x102

Article: _____ Section: 4B.10.9

Concern about provision:

Appalachian Trail is eligible for listing on National Register of Historic Places

Recommended change in language:

Appalachian Trail Conservancy included as an approver / ~~co~~ co-approver w City Commun

add language to reflect resolution agreement
reflect 1 mile width of resolution agreement

Wireless Telecommunication Facilities 4B Amendment
Zoning Ordinance – Text Change Recommendation

Carlen M Emanuel, Land Protection Mgr

Applicant: Appalachian Trail Conservancy Phone Number: 304-535-6331 x102

Article: _____ Section: 4B.5.6

Concern about provision:

Recommended change in language:

The Appalachian Trail Conservancy included as an approver / co-approver w City

add language to reflect resolution agreement

Wireless Telecommunication Facilities 4B Amendment
Zoning Ordinance – Text Change Recommendation

Carlen M. Emanuel, Land Protection Mgr

Applicant: Appalachian Trail Conservancy Phone Number: 304-535-6331 X 102

Article: _____ Section: 4B. 7.

Concern about provision:

Recommended change in language:
Appalachian Trail Conservancy included as an approver / co-approver w City
add language to reflect resolution agreement
reflect 1 mile width of resolution agreement

wireless.org

September 2, 2010

Mr. John Maxey, President
Jefferson County Planning Commission
Post Office Box 338
Charles Town, WV 25414

Re: FCC Shot Clock Ruling

Dear Mr. Maxey:

At the Planning Commission's August 31, 2010 stakeholder's meeting on the draft Wireless Telecommunication Facilities ordinance industry representatives made repeated references to a Federal Communications Commission (FCC) Declaratory Ruling[1] that

[1] November 18, 2009 Federal Communications Commission Declaratory Ruling (FCC 09-99)(WT Docket No. 08-165) (hereinafter referred to as the Declaratory Ruling) *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance* (hereinafter referred to as "the Petition").

PO Box 1350
Harpers Ferry
WV 25425
phone 304.725.2990
mobile 304.839.1262
prosa@wireless.org
www.wireless.org

imposed time constraints on local governments to act on wireless facility siting applications.

After reviewing the FCC ruling and a subsequent Order on Reconsideration,[2] I think it is fair to characterize the industry comments as saber rattling. Although Planning Commission members should be aware of these rulings, I do not believe they should be overly concerned with them.

The Declaratory Ruling defines timeframes for State and local action on wireless facilities siting requests, while also preserving the authority of States and localities to make the ultimate determination on local zoning and land use policies.[3] The Petition also raised other issues, but these are not germane to this discussion.[4]

With respect to timeframes, the Declaratory Ruling states that the FCC should define what is a presumptively "reasonable time" beyond which inaction on a siting application constitutes a "failure to act" within the meaning of Section 332(c) (7)(B)(v) of the Communications Act.[5]

The Commission concluded that the following timeframes were appropriate: (1) 90 days for the review of collocation applications, and (2) 150 days for the review of siting applications other than collocations.[6] The Commission added that "by defining the period after which personal wireless service providers have a right to seek judicial relief, we both ensure timely State and local government action and preserve incentives for providers to work cooperatively with them to address community needs."[7]

It is noteworthy that the Commission rejected the Petitioner's proposal that if a local government failed to meet a processing deadline that the application should be presumptively granted.[8] Rather, the Commission concluded that the Communications Act indicated a Congressional intent that courts should have the responsibility to fashion appropriate case-specific remedies.[9] The Commission went on to say that "the case law does not establish that an injunction granting the application is always or presumptively appropriate when a 'failure to act' occurs. To the contrary, in those cases where courts have issued such injunctions upon finding a failure to act within a reasonable period of time, they have done so only after examining all the facts in the case. While we agree that injunctions granting applications may be appropriate in many cases, the proposals in

---

[2] August 3, 2010 Federal Communications Commission Order on Reconsideration (FCC 10-144) (WT Docket 08-165).
[3] Declaratory Ruling, *supra,* Page 2, Paragraph 1.
[4] *Id,* at Page 2, Paragraph 2 states "The Petition raises three issues: the timeframes in which zoning authorities must act on siting requests for wireless towers or antenna sites, their power to restrict competitive entry by multiple providers in a given area, and their ability to impose certain procedural requirements on wireless service providers.
[5] 42 U.S.C. 332, *et seq.*
[6] Declaratory Ruling, *supra,* Page 2, Paragraph 4.
[7] *Id,* Page 15, Paragraph 38.
[8] *Id,* Page 16, Paragraph 39.
[9] *Id.*

personal wireless service siting applications and the surrounding circumstances can vary greatly. It is therefore important for courts to consider the specific facts of individual applications and adopt remedies based on those facts."[10]

In any event, the Commission went on to say that "State or local authority will have the opportunity, in any given case that comes before a court, to rebut the presumption that the established timeframes are reasonable," noting that "we have provided for further adjustments to the presumptive deadlines in order to ensure that the timeframes accommodate certain contingencies that may arise in individual cases, including where the applicant and the State or local authority agree to extend the time, where the application has already been pending for longer than the presumptive timeframe as of the date of this Declaratory Ruling, and where the application review process has been delayed by the applicant's failure to submit a complete application or to file necessary additional information in a timely manner."[11]

With respect to completeness of applications, the Commission found that "when applications are incomplete as filed, the timeframes do not include the time that applicants take to respond to State and local governments' requests for additional information," and that "reviewing authorities should be bound to notify applicants within a reasonable period of time that their applications are incomplete.[12]

The Commission added that "a review period of 30 days gives State and local governments sufficient time for reviewing applications for completeness, while protecting applicants from a last minute decision that applications should be denied as incomplete." The Commission went on to find that "the time it takes for an applicant to respond to a request for additional information will not count toward the 90 or 150 days ***only if that State or local government notifies the applicant within the first 30 days that its application is incomplete.***"[13] (emphasis added)

In a separate statement accompanying the Declaratory Ruling, Commission Chairman Julius Genachowski stated "I want to be clear that the process we establish does not dictate any substantive outcome in any particular case, or otherwise limit state and local governments' fundamental authority over local land use. It simply requires that they must reach land use decisions that involve wireless equipment in a timely fashion and be able to justify their conclusions to a federal district district court if challenged, just as Congress specified."[14] Commissioner Michael J. Copps noted that "while we establish a presumption here, nothing in this decision reduces the authority of a court of relevant jurisdiction from assessing, based on the merits of any individual case, whether a zoning review of more than 90 days for collocation applications or 150 for other tower siting applications is reasonable."[15]

---

[10] *Id.*
[11] *Id,* Page 17, Paragraph 42.
[12] *Id,* Page 21, Paragraph 52.
[13] *Id,* Page 22, Paragraph 53.
[14] Statement of Commission Chairman Julius Genachowoski accompanying Declaratory Ruling, page 2.
[15] Statement of Commissioner Michael J. Copps accompanying Declaratory Ruling, page 1.

Subsequent to the November 18, 2009 Declaratory Ruling five organizations representing local governments[16] requested that the Commission reconsider a portion of the Declaratory Ruling relating to the suspension of the 90 and 150 timeframes when an application is incomplete as filed. In its August 3, 2010 Order on Reconsideration, the Commission stated "we reaffirm our decision that the timeframes—90 days for collocations and 150 days for other wireless facility siting applications—are automatically tolled ***only when the reviewing government notifies the applicant of the incompleteness within the first 30 days after receipt.***[17] (emphasis added)

In addition, the Commission clarified that the presumptive deadlines for acting on siting applications could be extended beyond 90 or 150 days by mutual consent, and that such agreements serve to toll the commencement of the 30-day day period for filing suit.[18] The Commission added that the Declaratory Ruling "provides both that the parties may agree to extend the presumptive deadline, and that the reasonableness of delay in any case shall be considered by the court. Thus, a State or local government may seek a tolling agreement with the applicant when a delay outside the control of the State or local government occurs, either due to the applicant or to a third party. Similarly, the State or local government may request extension of the review period when it needs to ask an applicant for additional information or analysis after the 30-day period for automatically triggering tolling has passed."[19] The Commission added that "it is impractical to create in advance a comprehensive list of circumstances that would or would not merit delay. Therefore, any automatic tolling regime must necessarily balance the risks of engendering litigation and condoning excessive delay."[20]

Perhaps more emphatically, The Commission reasserted that the Declaratory Ruling "expressly states that where an application is found to be incomplete as filed during the 30-day review period, 'the timeframes do not include the time that applicants take to respond to State and local governments' requests for additional information.' ***This means that when the information is requested, the clock stops, and when the applicant provides the additional information, the clock resumes (thereby reflecting the passage of time equivalent to the time from the initial filing of the siting application to the date that the additional information was requested).***"[21]

As stated at the outset of this memorandum, I do not believe the Planning Commission should be overly concerned with the Commission's rulings. I say this because, to the best of my knowledge, there has never been a wireless facilities application in Jefferson County that has extended beyond the timelines promulgated by the FCC.

---

[16] National Association of Telecommunication Officers and Advisors (NATOA), the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American Planning Association. Order on Reconsideration, Page 3, Paragraph 7.
[17] Order on Reconsideration, Page 1, Paragraph 1.
[18] *Id,* Page 3, Paragraph 6.
[19] *Id,* Pages 6-7, Paragraph 16.
[20] *Id,* Page 7, Paragraph 18.
[21] *Id,* Page 8, Paragraph 21

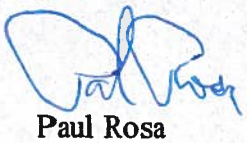
In fact, the proposed Wireless Telecommunication Facilities ordinance provides incentives for wireless providers to accelerate processing of applications. With the exception of exempt facilities, the draft ordinance describes six categories of commercial wireless facilities. Of those, five categories may be processed administratively by the Zoning Administrator without any need for public hearings before the Planning Commission.[22]

The only addition to Section 4B.2 (or perhaps in a freestanding subsection) I would recommend based upon the Commission's rulings would be a provision along the following lines:

"Within thirty (30) days of receiving an application for a Wireless Telecommunication Facility the Zoning Administrator shall notify the applicant in writing that its application is complete or, if additional information is needed to process the application, the applicant shall be notified in writing as to the particular information needed to complete the application. Once the additional information is reviewed and the application is found to be complete, the Zoning Administrator shall notify the applicant of that finding."

I hope that you and your fellow Planning Commission members find my analysis and comments to be helpful to you in developing the ordinance. Please do not hesitate to contact me should you have further questions.

Sincerely,



Paul Rosa

cc: Planning Director Jennifer Brockman
Zoning Administrator Steve Barney
Steven Groh, Esq.

[22] Draft Wireless Telecommunication Facilities Ordinance, Section 4B.2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance	)	WT Docket No. 08-165

DECLARATORY RULING

Adopted: November 18, 2009 **Released:** November 18, 2009

By the Commission: Chairman Genachowski and Commissioners Copps, McDowell, Clyburn, and Baker issuing separate statements.

TABLE OF CONTENTS

Heading Paragraph #

I. INTRODUCTION

1. This Declaratory Ruling by the Commission promotes the deployment of broadband and other wireless services by reducing delays in the construction and improvement of wireless networks. Wireless operators must generally obtain State and local zoning approvals before building wireless towers or attaching equipment to pre-existing structures. To encourage the expansion of wireless networks, Congress has required these entities to act "within a reasonable period of time" on such requests.[1] In many cases, delays in the zoning process have hindered the deployment of new wireless infrastructure.[2]

[1] 47 U.S.C. § 332(c)(7)(B)(ii).

[2] *See* para. 33, *infra.*

Accordingly, today we define timeframes for State and local action on wireless facilities siting requests, while also preserving the authority of States and localities to make the ultimate determination on local zoning and land use policies.

2. On July 11, 2008, CTIA – The Wireless Association® (CTIA) filed a petition requesting that the Commission issue a Declaratory Ruling clarifying provisions in Sections 253 and 332(c)(7) of the Communications Act of 1934, as amended (Communications Act), regarding State and local review of wireless facility siting applications (Petition).[3] The Petition raises three issues: the timeframes in which zoning authorities must act on siting requests for wireless towers or antenna sites, their power to restrict competitive entry by multiple providers in a given area, and their ability to impose certain procedural requirements on wireless service providers. In this Declaratory Ruling, we grant the Petition in part and deny it in part to ensure that both localities and service providers may have an opportunity to make their case in court, as contemplated by Section 332(c)(7) of the Act.[4]

3. Wireless services are central to the economic, civic, and social lives of over 270 million Americans.[5] Americans are now in the transition toward increasing reliance on their mobile devices for broadband services, in addition to voice services.[6] Without access to mobile wireless networks, however, consumers cannot receive voice and broadband services from providers. Providers continue to build out their networks to provide such services, and a crucial requirement for providing those services is obtaining State and local governmental approvals for constructing towers or attaching transmitting equipment to pre-existing structures. While Section 332(c)(7) of the Communications Act preserves the authority of State and local governments with respect to such approvals, Section 332(c)(7) also limits such State and local authority, thereby protecting core local and State government zoning functions while fostering infrastructure build out.

4. The first part of this Declaratory Ruling concludes that we should define what is a presumptively "reasonable time" beyond which inaction on a siting application constitutes a "failure to act." In defining this timeframe, we have taken several measures to ensure that the reasonableness of the time for action "tak[es] into account the nature and scope" of the siting request."[7] In the event a State or local government fails to act within the appropriate time period, the applicant is entitled to bring an action in court under Section 332(c)(7)(B)(v) of the Communications Act, and the court will determine whether the delay was in fact unreasonable under all the circumstances of the case. We conclude that the record supports setting the following timeframes: (1) 90 days for the review of collocation applications; and (2) 150 days for the review of siting applications other than collocations.

5. In the second part of this decision, we find, as the Petitioner urges, that it is a violation of Section 332(c)(7)(B)(i)(II) of the Communications Act for a State or local government to deny a personal

[3] In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, *Petition for Declaratory Ruling*, filed July 11, 2008 ("Petition").

[4] 47 U.S.C. § 332(c)(7).

[5] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless including Commercial Mobile Services, WT Docket No. 09-66, *Notice of Inquiry*, 24 FCC Rcd 11357, 11358 ¶ 2 (2009) ("*Mobile Wireless Competition NOI*"); *see also* Fostering Innovation and Investment in the Wireless Communications Market, GN Docket No. 09-157, A National Broadband Plan For Our Future, GN Docket No. 09-51, *Notice of Inquiry*, 24 FCC Rcd 11322 ¶ 1 (2009) ("Wireless communications is one of the most important sectors of our economy and one that touches the lives of nearly all Americans.").

[6] *Mobile Wireless Competition NOI*, 24 FCC Rcd at 11358 ¶ 2.

[7] 47 U.S.C. § 332(c)(7)(B)(ii).

wireless service facility siting application because service is available from another provider. Finally, because we have not been presented with any evidence of a specific controversy, we deny the last part of the Petitioner's request, that we find that a State or local regulation that requires a variance or waiver for every wireless facility siting violates Section 253(a) of the Communications Act.

II. BACKGROUND

6. *The Statute*. Section 332(c)(7) of the Act is titled "Preservation of Local Zoning Authority," and it addresses "the authority of a State or local government . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities."[8] Personal wireless service facilities are defined in Section 332(c)(7)(C)(ii) as "facilities for the provision of personal wireless services,"[9] and personal wireless services are defined in Section 332(c)(7)(C)(i) as "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services."[10]

7. Subsection (A) states that nothing in the Act limits such authority except as provided in Section 332(c)(7).[11] Subsection (B) identifies those limitations. Among other limitations, Clause (B)(i) states that "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[12] Clause (B)(ii) requires the State or local government to act on any request to place, construct, or modify personal wireless service facilities "within a reasonable period of time . . . taking into account the nature and scope of such request."[13] Clause (B)(v) permits a person adversely affected by any final action or failure to act by the State or local government to commence an action in court within 30 days after such final action or failure to act.[14]

8. Section 253 of the Communications Act contains provisions removing barriers to entry in the provision of telecommunications services.[15] Specifically, Section 253(a) states: "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."[16] Section 253(d) directs the Commission to preempt any State or local statute, regulation, or legal requirement that it determines, after notice and an opportunity for public comment, violates Section 253(a).[17]

9. *The Petition*. The Petition contends that the ability to deploy wireless systems depends upon the availability of sites for the construction of towers and transmitters. Before a wireless service provider can use a site for a tower or add an antenna to a tower or other structure, zoning approval is generally required at the local level, and the local zoning approval process "can be extremely time-

[8] 47 U.S.C. § 332(c)(7)(A). Section 332(c)(7) appears in Appendix B in its entirety.

[9] 47 U.S.C. § 332(c)(7)(C)(ii).

[10] 47 U.S.C. § 332(c)(7)(C)(i). "Unlicensed wireless service" is defined as "the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v))." 47 U.S.C. § 332(c)(7)(C)(iii).

[11] 47 U.S.C. § 332(c)(7)(A).

[12] 47 U.S.C. § 332(c)(7)(B)(i).

[13] 47 U.S.C. § 332(c)(7)(B)(ii).

[14] 47 U.S.C. § 332(c)(7)(B)(v). In the case of an action or failure to act that is impermissibly based on the environmental effects of radio frequency emissions pursuant to Section 332(c)(7)(B)(iv), a person adversely affected may also petition the Commission for relief. *Id*.

[15] 47 U.S.C. § 253.

[16] 47 U.S.C. § 253(a).

[17] 47 U.S.C. § 253(d).

consuming."[18] The Petition asserts that timely deployment of wireless facilities is essential to achieving the Communications Act's public interest goals.[19] According to the Petition, delays in the zoning process for wireless facility siting applications are impeding those goals.[20] The Petition asserts that Section 332(c)(7) of the Communications Act "created a framework in which states and localities could make zoning decisions 'subject to minimum federal standards – both substantive and procedural – as well as federal judicial review.'"[21] The Petition claims that those zoning authorities that do not act in a timely manner are frustrating the goals of the Communications Act.[22]

10. Accordingly, the Petition first requests that the Commission eliminate an ambiguity that CTIA contends currently exists in Section 332(c)(7)(B)(v) and clarify the time period in which a State or local zoning authority will be deemed to have failed to act on a wireless facility siting application.[23] The Petition requests that the Commission "declare that the failure to render a final decision within 45 days of a filing of a wireless siting application proposing to collocate on an existing facility constitutes a failure to act for purposes of Section 332(c)(7)(B)(v)."[24] Moreover, the Petition requests that the Commission "declare that the failure to render a final decision on any other, non-collocation wireless siting application within 75 days constitutes a failure to act for purposes of Section 332(c)(7)(B)(v)."[25] Relatedly, the Petition asks the Commission to find that, if a zoning authority fails to act within the above timeframes, the application shall be "deemed granted."[26] Alternatively, the Petition requests that the Commission establish a presumption under such circumstances that entitles an applicant to a court-ordered injunction granting the application unless the zoning authority can justify the delay.[27]

11. Second, the Petition requests that the Commission clarify that Section 332(c)(7)(B)(i)(II), which forbids State and local facility siting decisions that "prohibit or have the effect of prohibiting the provision of personal wireless services," bars zoning decisions that have the effect of preventing a specific provider from providing service to a location.[28] The Petitioner asserts that this provision prevents a local zoning authority from denying an application based on one or more carriers already serving the geographic area.[29]

12. Third, the Petition requests that the Commission preempt, under Section 253(a) of the Communications Act,[30] local ordinances and State laws that automatically require a wireless service provider to obtain a variance before siting facilities.[31]

13. On August 14, 2008, the Wireless Telecommunications Bureau (WTB) requested

[18] Petition at 4.

[19] *Id.* at 8-13. The public interest goals identified by the Petition include nationwide wireless communications services for all Americans, universal service, advanced telecommunications services, broadband deployment, spectrum build-out, and public safety and E911.

[20] *Id.* at 13.

[21] *Id.* at 18 (*citing City of Ranchos Palos Verdes v. Abrams*, 544 U.S. 113, 128 (2005) (Breyer, J., concurring)).

[22] *Id.* at 19.

[23] *Id.* at 20-23.

[24] *Id.* at 24.

[25] *Id.* at 25-26.

[26] *Id.* at 27-29.

[27] *Id.* at 29-30.

[28] *Id.* at 30-35 (*citing* 47 U.S.C. § 332(c)(7)(B)(i)(II)).

[29] *Id*. at 31-34.

[30] 47 U.S.C. § 253(a).

[31] Petition at 35-37.

comment on the Petition.[32] After a brief extension, comments were due on September 29, 2008, and replies were due on October 14, 2008.[33] Hundreds of comments and replies were filed in response to the Public Notice, including comments from wireless service providers, tower owners, local and State government entities, and airport authorities.[34]

14. Industry commenters generally support the Petition in all respects.[35] They argue that the Commission has the authority to interpret Section 332(c)(7)[36] and that the Commission's definition of the reasonable timeframes for State and local governments to process facility siting applications will promote the deployment of advanced networks, including broadband.[37] Wireless providers assert that without defined timeframes for State and local governments to process personal wireless service facility siting applications, they face undue delay in some localities.[38] They further argue that timeframes are necessary so that they know when they should seek redress from courts for State and local governments' failure to act in a timely manner.[39] They claim that the Petitioner's proposed timetables are fair and should be used to define the "reasonable period of time" for State and local governments to process facility siting applications in Section 332(c)(7)(B)(ii).[40]

15. State and local governments, as well as airport authorities, oppose the Petition. As an initial matter, they contend that Congress gave the courts, rather than the Commission, the authority to interpret Section 332(c)(7) of the Communications Act, and they cite statutory text and legislative history in support of their contention.[41] Thus, they contend that the Commission lacks the authority to determine what is a "reasonable period of time" and when a "failure to act" or a "prohibition of service" has occurred.[42] State and local government commenters further argue that both "reasonable period of time" and "failure to act" have clear meanings, and that Congress deliberately used these general terms to

[32] Wireless Telecommunications Bureau Seeks Comment On Petition For Declaratory Ruling By CTIA – The Wireless Association To Clarify Provisions Of Section 332(c)(7)(B) To Ensure Timely Siting Review And To Preempt Under Section 253 State And Local Ordinances That Classify All Wireless Siting Proposals As Requiring A Variance, WT Docket No. 08-165, *Public Notice*, 23 FCC Rcd 12198 (WTB 2008).

[33] Comments originally were due on September 15, 2008, and replies were due on September 30, 2008. Several interested parties requested additional time to submit comments and replies. While the WTB found that the requests had not established good cause for the full extensions desired, the WTB granted a short extension in order to permit interested parties additional time "to file more thorough and thoughtful comments, which should lead to a more complete and better-informed record." Wireless Telecommunications Bureau Grants Extension Of Time To File Comments On CTIA's Petition For Declaratory Ruling Regarding Wireless Facilities Siting, WT Docket No. 08-165, *Public Notice*, 23 FCC Rcd 13386 (WTB 2008).

[34] *See generally* WT Docket No. 08-165. The major commenters and the short forms by which they are cited are listed in Appendix A. Brief comments are not listed but are considered in this Declaratory Ruling.

[35] *See*, *e.g.*, Verizon Wireless Comments; AT&T Comments; Rural Cellular Association Comments; PCIA – The Wireless Infrastructure Association Comments.

[36] *See, e.g.*, Sprint Nextel Comments at 8; T-Mobile Comments at 12; MetroPCS Comments at 5-6.

[37] *See, e.g.*, MetroPCS Comments at 6-7; NextG Networks Comments at 4.

[38] *See, e.g.*, Sprint Nextel Comments at 4-5; CalWA Comments at 2-3; T-Mobile Comments at 6.

[39] *See, e.g.*, CalWA Comments at 4; Rural Cellular Association Comments at 4; T-Mobile Comments at 9-10.

[40] *See, e.g.,* Rural Cellular Association Comments at 4-5; T-Mobile Comments at 11-12; MetroPCS Comments at 7-8.

[41] *See, e.g.*, NATOA et al. Comments at 1-5 & 9-11; California Cities Comments at 18-21; Fairfax County, VA Comments at 14-15.

[42] *See, e.g.*, Fairfax County, VA Comments at 14-15; California Cities Comments at 18-20; City of Dublin, OH Comments at 2-3; Coalition for Local Zoning Authority Comments at 10-11; NATOA et al. Reply Comments at 7-9.

preserve State and local government flexibility to process applications within the typical timeframes based on the individual circumstances of each case.[43] These commenters also oppose either deeming an application granted in the event of a zoning authority's "failure to act" or establishing a presumption entitling an applicant to a court-ordered injunction granting the application.[44]

16. The Petitioner requests that the Commission apply Section 253(a) of the Communications Act to preempt local ordinances and State laws that automatically require a wireless service provider to obtain a variance before siting facilities. In addressing this request, State and local government commenters argue that Section 253(a) cannot be applied to such ordinances because under Section 332(c)(7)(A), "[n]othing in [the Communications] Act" outside of Section 332(c)(7) shall limit State or local authority over personal wireless service facilities siting decisions.[45] The EMR Policy Institute (EMRPI) filed a Comment and Cross-Petition that, *inter alia*, seeks a declaratory ruling relating to the Commission's regulations regarding exposure to radio frequency emissions.[46]

17. Since the filing of the Petition, Congress passed the American Recovery and Reinvestment Act of 2009 (Recovery Act).[47] The Recovery Act directs the Commission to create a national broadband plan by February 17, 2010, that seeks to ensure that every American has access to broadband capability and establishes clear benchmarks for meeting that goal.[48] To this end, on April 8, 2009, the Commission initiated a Notice of Inquiry (NOI) seeking comment on the best approach to developing this Plan, the interpretation of key statutory terms, and a number of specific policy goals.[49] Some commenters that filed in response to the NOI also filed their comments in the instant docket, arguing that the grant of the Petition will promote the availability of wireless broadband services.[50] The Petitioner particularly notes that the delays experienced by wireless providers for wireless service facility siting applications are frustrating the deployment of wireless broadband services to millions of Americans.[51]

III. DISCUSSION

18. Under Section 1.2 of the rules, the Commission "may . . . issue a declaratory ruling terminating a controversy or removing uncertainty."[52] The Commission has broad discretion whether to

[43] *See, e.g.*, NATOA et al. Comments at 12-14; City of Philadelphia Comments at 3-4; Florida Cities Comments at 2-4, 15-20; City of Dublin, OH Comments at 2-3; California Cities Comments at 13-16.

[44] *See, e.g.*, California Cities Comments at 17-21; NATOA et al. Comments at 15-18; SCAN NATOA Comments at 11-12.

[45] *See*, *e.g.*, NATOA et al. Comments at 7; California Cities Comments at 23-24; Fairfax County, VA Comments at 3; Michigan Municipalities Comments at 2; N.C. Assoc. of County Commissioners Comments at 1-2.

[46] *See* EMRPI Comments and Cross-Petition.

[47] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (Recovery Act).

[48] Recovery Act § 6001(k).

[49] *See generally* A National Broadband Plan for Our Future, GN Docket No. 09-51, *Notice of Inquiry*, 24 FCC Rcd 4342 (2009).

[50] *See* CTIA Comments, GN Docket No. 09-51, at 15-19 (filed June 8, 2009); PCIA and The DAS Forum Comments, GN Docket 09-51, at 5-6 (filed June 8, 2009); CTIA Reply Comments, GN Docket No. 09-51, at 13-15 (filed July 21, 2009); Google Inc. Reply Comments, GN Docket 09-51, at 40-41 (filed July 21, 2009).

[51] CTIA Comments, GN Docket No. 09-51, at 18 (filed June 8, 2009).

[52] 47 C.F.R. § 1.2.

issue such a ruling.[53]

19. Below, we address the three issues raised in CTIA's Petition. On the first issue, we conclude that we should define what constitutes a presumptively "reasonable period of time" beyond which inaction on a personal wireless service facility siting application will be deemed a "failure to act." We then determine that in the event a State or local government fails to act within the appropriate time period, the applicant is entitled to bring an action in court under Section 332(c)(7)(B)(v). At that point, the State or local government will have the opportunity to present to the court arguments to show that additional time would be reasonable, given the nature and scope of the siting application at issue. We next conclude that the record supports setting the time limits at 90 days for State and local governments to process collocation applications, and 150 days for them to process applications other than collocations. On the second issue raised by the Petition, we find that it is a violation of Section 332(c)(7)(B)(i)(II) for a State or local government to deny a personal wireless service facility siting application solely because that service is available from another provider. On the third issue, because the Petitioner has not presented us with any evidence of a specific controversy, we deny its request that we find that a State or local regulation that explicitly or effectively requires a variance or waiver for every wireless facility siting violates Section 253(a). Finally, we address other issues raised in the record, including dismissal of the EMRPI Cross-Petition.

A. Authority to Interpret Section 332(c)(7)

20. *Background*. The Petition claims that the Commission has the authority to interpret ambiguous provisions in Section 332(c)(7) of the Communications Act by means of a declaratory ruling.[54] Wireless providers support the Petition's assertion, arguing that the courts have upheld similar interpretive authority in other contexts. These commenters rely in particular on *Alliance for Community Media v. FCC*,[55] in which the Sixth Circuit upheld the Commission's establishment of a timeframe for local authorities to process cable franchise applications.[56]

21. State and local government commenters disagree, arguing that the statutory text and the legislative history evince congressional intent to deny the Commission such authority.[57] Specifically, State and local government commenters argue that in expressly preserving State and local government authority over personal wireless service facility siting decisions, subject only to the specific limitations stated in Section 332(c)(7), Congress withheld preemptive authority from the Commission.[58] Accordingly, they argue that the Commission does not have the authority to interpret Section 332(c)(7). They contend that the legislative history of Section 332(c)(7) further demonstrates this intent, as Congress indicated that "any pending rulemaking concerning the preemption of local zoning authority over the placement, construction, or modification of CM[R]S facilities should be terminated."[59] Other State and local government commenters assert that because the courts have exclusive jurisdiction over all disputes

[53] *See Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 914 (1973); Telephone Number Portability; BellSouth Corporation Petition for Declaratory Ruling and/or Waiver, CC Docket No. 95-116, *Order*, 19 FCC Rcd 6800, 6810 ¶ 20 (2004).

[54] Petition at 20-24.

[55] 529 F.3d 763 (6th Cir. 2008), *cert. denied*, 129 S.Ct. 2821 (2009) ("*Alliance for Community Media*").

[56] *See, e.g.,* Sprint Nextel Comments at 8; T-Mobile Comments at 12; MetroPCS Comments at 5-6.

[57] *See, e.g.*, NATOA et al. Comments at 1-5 & 9-11; California Cities Comments at 18-21; Fairfax County, VA Comments at 14-15.

[58] *See, e.g.*, NATOA et al. Comments at 1-5.

[59] *Id.* at 9-10 (*citing* H.R. Conf. Rep. No. 104-458, at 208) (NATOA emphasis removed). NATOA et al. argues that Congress did not mean to address only those rulemakings in play in 1996, but any future rulemakings on personal wireless service facility issues. *Id.* at 10.

arising under Section 332(c)(7) (except for those relating to RF emissions), Congress did not contemplate any role for the Commission in the State and local zoning approval process. Thus, they argue, the Commission lacks the authority to determine what constitutes a "reasonable period of time," "failure to act," or "prohibiti[on of] the provision of personal wireless services."[60]

22. In its Reply, the Petitioner disputes the claim that Congress "left in place the complete autonomy of States and localities with respect to zoning."[61] The Petitioner argues that "it is *Congress* that expressly inserted such federal concerns into the tower siting process, limiting traditional local authority, when it promulgated Section 332(c)(7)" in order to reduce delays and impediments at the State and local level.[62] Accordingly, the Petitioner argues that the Commission's interpretation of Section 332(c)(7) does not contravene that section's reservation to State and local governments of authority to review personal wireless service facility siting applications to the extent not limited by Section 332(c)(7).[63] Moreover, the Petitioner counters in its Reply that the Petition is not a challenge to a specific siting decision; thus, Section 332(c)(7)(B)(v)'s requirement that all controversies regarding siting decisions (other than those involving RF emissions) should be heard in the courts does not apply here.[64] The Petitioner also asserts that the Sixth Circuit's decision in *Alliance for Community Media v. FCC* rejected the argument that the Commission's implementation of a timeframe in the local franchising regime "improperly intruded on decisions left by Congress to the courts."[65]

23. *Discussion*. We agree with the Petitioner that the Commission has the authority to interpret Section 332(c)(7). Congress delegated to the Commission the responsibility for administering the Communications Act. Section 1 of the Act directs the Commission to "execute and enforce the provisions of this Act" in order to, *inter alia*, regulate and promote communication "by wire and radio" on a nationwide basis.[66] Moreover, Section 201(b) of the Act authorizes the Commission "to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[67] Further, Section 303(r) of the Communications Act states that "the Commission from time to time, as public convenience, interest or necessity requires shall … [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . . ."[68] Finally, Section 4(i) states that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[69] These grants of authority necessarily include Title III of the Communications Act in general, and Section 332(c)(7) in particular.

24. This finding is consistent with our decision in the *Local Franchising Order*, in which we

[60] *See, e.g.*, Fairfax County, VA Comments at 14-15; California Cities Comments at 18-20; City of Dublin, OH Comments at 2; NATOA et al. Reply Comments at 7-9; Coalition for Local Zoning Authority Comments at 10-11.

[61] CTIA Reply Comments at 12.

[62] *Id.* at 12-13 (emphasis in original).

[63] *Id.* The Petitioner also contends that it does not request that the Commission "condition or limit the scope of a zoning authority's review of a tower siting application," or that the Commission "preempt a zoning authority's review of an application." *Id.* at 2.

[64] *Id.* at 21-22.

[65] *Id.* at 22.

[66] 47 U.S.C. § 151.

[67] 47 U.S.C. § 201(b). *See also National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) ("Congress has delegated to the Commission the authority to 'execute and enforce' the Communications Act, §151, and to 'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions' of the Act, §201(b).").

[68] 47 U.S.C. § 303(r).

[69] 47 U.S.C. § 154(i).

held that the Commission has clear authority to interpret what it means for a local government to "unreasonably refuse to award" a franchise to a cable operator in Section 621(a)(1) of the Act.[70] That decision has been upheld by the U.S. Court of Appeals for the Sixth Circuit in *Alliance for Community Media v. FCC*. In that case, the court found that the Supreme Court's precedent in *AT&T Corp. v. Iowa Utilities Board*[71] controlled, and it held that the Commission "possesses clear jurisdictional authority to formulate rules and regulations interpreting the contours of section 621(a)(1)" pursuant to its authority under Section 201(b) to carry out the provisions of the Communications Act.[72] The Court held that "the statutory silence in section 621(a)(1) regarding the agency's rulemaking power does not divest the agency of its express authority to prescribe rules interpreting that provision."[73] The same holds true here. Section 332(c)(7) falls within the Act; accordingly, the Commission has the authority to interpret it.

25. We disagree with State and local government commenters that our interpreting the limitations that Congress imposed on State and local governments in Section 332(c)(7) is the same as imposing *new* limitations on State and local governments. Our interpretation of Section 332(c)(7) is not the imposition of new limitations, as it merely interprets the limits Congress already imposed on State and local governments. Moreover, the legislative history does not establish that the Commission is prohibited from interpreting the provisions of Section 332(c)(7). The Conference Report states that "[a]ny pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CM[R]S facilities should be terminated."[74] We read the legislative history as intending to preclude the Commission from maintaining a rulemaking proceeding to impose *additional* limitations on the personal wireless service facility siting process beyond those stated in Section 332(c)(7). Our actions herein will not preempt State or local governments from reviewing applications for personal wireless service facilities placement, construction, or modification. State and local governments will continue to decide the outcome of personal wireless service facility siting applications pursuant to the authority Congress reserved to them in Section 332(c)(7)(A). Under Section 332(c)(7)(B)(iii), they may deny such applications if the denial is "supported by substantial evidence contained in a written record."[75] However, State and local governments must act upon personal wireless service facility siting applications "within a reasonable period of time" as defined herein, and must not prohibit one carrier's provision of service based on the availability of service from another carrier, or applicants may commence an action in a court of competent jurisdiction pursuant to Section 337(c)(7)(B)(v).

26. Moreover, we find that Section 332(c)(7)(B)(v) does not limit our authority to interpret Section 332(c)(7). Section 332(c)(7)(B)(v) states that "[a]ny person adversely affected by any final action or failure to act by a State or local government . . . may . . . commence an action in any court of

[70] Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 5101, 5128 ¶ 54 (2007) ("*Local Franchising Order*") (interpreting Section 621(a)(1) of the Act, which prohibits local franchising authorities from "unreasonably refus[ing] to award" competitive cable franchises, and holding that if a local franchising authority fails to act on an application for a local franchise within 90 days for an applicant that already has access to rights-of-way or 6 months for all other applicants, then an interim franchise will be deemed granted until the franchising authority takes action on the application).

[71] 525 U.S. 366 (1999) (finding, *inter alia*, that the Commission has the authority to carry out provisions of the Act, including the local competition provisions added by the Telecommunications Act of 1996).

[72] 529 F.3d at 773-74.

[73] *Id.* at 774.

[74] H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. 208 (1996).

[75] 47 U.S.C. § 332(c)(7)(B)(iii).

competent jurisdiction."[76] State and local governments argue that Congress gave the courts, not the Commission, exclusive jurisdiction to interpret and enforce Section 332(c)(7). This is the same argument that we rejected in the *Local Franchising Order*. In that decision, we held that "[t]he mere existence of a judicial review provision in the Communications Act does not, by itself, strip the Commission of its otherwise undeniable rulemaking authority."[77] The Sixth Circuit agreed, holding that "the availability of a judicial remedy for unreasonable denials of competitive franchise applications does not foreclose the agency's rulemaking authority over section 621(a)(1)."[78] Accordingly, the fact that Congress provided for judicial review to remedy a violation of Section 332(c)(7) does not divest the Commission of its authority to interpret the provision or to adopt and enforce rules implementing Section 332(c)(7).

B. Time for Acting on Facility Siting Applications

27. *Background.* Section 332(c)(7)(B)(ii) of the Communications Act states that State or local governments must act on requests for personal wireless service facility sitings "within a reasonable period of time."[79] Section 332(c)(7)(B)(v) further provides that "[a]ny person adversely affected by any final action or failure to act"[80] by a State or local government on a personal wireless service facility siting application "may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction."[81] The Petition asserts that the Commission has the authority to and should define the timeframes by which State and local governments must process personal wireless service facility siting applications.[82] The Petition claims that in the absence of timeframes, it is unclear when a State or local government has failed to act under the statute. Thus, an aggrieved party wishing to challenge a State or local government's failure to act could miss the 30-day statute of limitations through no fault of its own.[83] The Petition proposes that the Commission declare that a State or local government has failed to act if it does not render a final decision on a collocation application within 45 days or on any other application within 75 days. The Petition asserts that the Commission should declare that, if a zoning authority fails to act within the prescribed timeframes, the application shall be "deemed granted."[84] In the absence of such relief, the Petition argues, the lengthy litigation process would deprive the applicant of its ability to construct within a reasonable time, as provided by the statute.[85] Alternatively, the Petition requests that the Commission establish a presumption that entitles an applicant to a court-ordered injunction granting the application, unless the local zoning authority can demonstrate that the delay was reasonable.[86]

28. State and local government commenters assert that both "reasonable period of time" and "failure to act" are clear terms and that Congress used these general terms because it wanted State and local governments to process applications in the timeframes in which land use applications are typically processed. The Act and its legislative history, they contend, establish that the courts, not the

[76] 47 U.S.C. § 332(c)(7)(B)(v).

[77] *Local Franchising Order*, 22 FCC Rcd at 5129 ¶ 56 (2007).

[78] *Alliance for Community Media*, 529 F.3d at 775 (finding that this conclusion was supported by the Supreme Court's decision in *AT&T Corp. v. Iowa Util. Bd.* upholding the Commission's authority to issue rules governing the States' resolution of interconnection arbitrations).

[79] 47 U.S.C. § 332(c)(7)(B)(ii).

[80] 47 U.S.C. § 332(c)(7)(B)(v).

[81] *Id.*

[82] Petition at 20-24.

[83] *Id.* at 20.

[84] *Id.* at 27-28.

[85] *Id.* at 28-29.

[86] *See id.* at 29-30.

Commission, should determine whether such processing is reasonable based on the individual facts in each case.[87] They argue that some applications require greater time to consider than others, and that sufficient time is needed to compile a written record as required by Section 332(c)(7)(B)(iii)[88] and to seek collaborative solutions with wireless providers and the surrounding communities impacted by the proposed wireless service facilities.[89] Finally, they assert that rigid timeframes do not account for time to amend applications that are often incomplete when submitted by wireless providers, and may provide incentive for wireless providers to submit incomplete applications and to delay correcting them until the application is "deemed granted" (as proposed by the Petitioner).[90]

29. Wireless providers argue that the Commission has the authority to define "reasonable period of time" and "failure to act," and that such definition is necessary because some State and local governments are unreasonably delaying action on their applications.[91] They further contend that without defined timeframes, it is unclear when governments have failed to act and when they may go to court for redress.[92] They claim that the Petitioner's proposed timetables are reasonable.[93]

30. State and local government commenters also urge the Commission to reject both the "deemed granted" proposal and the alternative presumption in favor of injunctive relief proposed in the Petition.[94] They argue that Congress directed applicants aggrieved by a failure to act to seek a remedy in court, and assigned to the courts the task of deciding the appropriate remedy.[95] Moreover, they assert, under the Petitioner's proposed regime, local governments would have no say over siting of facilities once an application is deemed granted, even where safety factors justify modification or rejection of the facility.[96]

31. Sprint Nextel proposes that the Commission adopt the alternative remedy in the Petition. It argues that a presumptive grant is consistent with the Commission's approach in the *Local Franchising Order*, in which the Commission did not deem a franchise application granted, but provided for an interim authorization, upon the local government's failure to act upon an application in a timely fashion.[97] The Petitioner argues in its Reply that because a State or local authority's failure to act within a reasonable time is specifically declared unlawful under the statute, an automatic grant is appropriate.[98]

32. *Discussion*. The evidence in the record demonstrates that personal wireless service providers have often faced lengthy and unreasonable delays in the consideration of their facility siting applications, and that the persistence of such delays is impeding the deployment of advanced and

---

[87] *See, e.g.*, NATOA et al. Comments at 12-14; City of Philadelphia Comments at 3-4; Florida Cities Comments at 2-4; City of Dublin, OH Comments at 2-3.

[88] 47 U.S.C. § 332(c)(7)(B)(iii) (denial of a personal wireless service facility siting application must be rendered "in writing and supported by substantial evidence contained in a written record").

[89] *See, e.g.*, California Cities Comments at 13-16; Florida Cities Comments at 15-20.

[90] *See, e.g.*, Fairfax County, VA Comments at 13; City of Bellingham, WA Comments at 1-2; Michigan Municipalities Comments at 19-20.

[91] *See, e.g.*, Sprint Nextel Comments at 4-5; CalWA Comments at 2-3; T-Mobile Comments at 6-9.

[92] *See, e.g.*, CalWA Comments at 4; Rural Cellular Association Comments at 4-5; T-Mobile Comments at 9-10.

[93] *See, e.g.,* Rural Cellular Association Comments at 6; T-Mobile Comments at 11-12; MetroPCS Comments at 7-8.

[94] *See, e.g.*, California Cities Comments at 17-21; SCAN NATOA Comments at 10-12.

[95] *See, e.g.*, Florida Cities Comments at 6; University of Michigan Comments at 3-4.

[96] *See, e.g.*, Stokes County, N.C. Comments at 2.

[97] Sprint Nextel Comments at 9-11 (*citing Local Franchising Order*, 22 FCC Rcd 5101, 5139 (2007)).

[98] CTIA Reply Comments at 26.

emergency services. To provide guidance, remove uncertainty and encourage the expeditious deployment of wireless broadband services, we therefore determine that it is in the public interest to define the time period after which an aggrieved party can seek judicial redress for a State or local government's inaction on a personal wireless service facility siting application. Specifically, we find that a "reasonable period of time" is, presumptively, 90 days to process personal wireless service facility siting applications requesting collocations, and, also presumptively, 150 days to process all other applications. Accordingly, if State or local governments do not act upon applications within those timeframes, then a "failure to act" has occurred and personal wireless service providers may seek redress in a court of competent jurisdiction within 30 days, as provided in Section 332(c)(7)(B)(v). The State or local government, however, will have the opportunity to rebut the presumption of reasonableness.[99]

33. Need for Action. Initially, we find that the record shows that unreasonable delays are occurring in a significant number of cases. The Petition states that based on data the Petitioner compiled from its members, there were then more than 3,300 pending personal wireless service facility siting applications before local jurisdictions.[100] "Of those, approximately 760 [were] pending final action for more than one year. More than 180 such applications [were] awaiting final action for *more than 3 years*."[101] Moreover, almost 350 of the 760 applications that were pending for more than one year were requests to collocate on existing towers, and 135 of those collocation applications were pending for more than three years.[102] In addition, several wireless providers supplemented the record with their individual experiences in the personal wireless service facility siting application process. For example, Sprint Nextel asserts that the typical processing times for personal wireless service facility siting applications range from 28 to 36 months in several California communities.[103] Verizon Wireless asserts that "in Northern California, 27 of 30 applications took more than 6 months, with 12 applications taking more than a year, and 6 taking more than two years to be approved"; and that "in Southern California, 25 applications took more than two years to be approved, with 52 taking more than a year, and 93 taking more than 6 months."[104] NextG Networks describes delays of 10 to 25 months for its proposals to place facilities in public rights-of-way, and states that such delay occurred even when NextG Networks merely sought to replace old equipment.[105] Moreover, two wireless providers offer evidence that the personal wireless service facility siting applications process is getting longer in several jurisdictions. For example, T-Mobile contends that in Maryland, the typical zoning process went from two months to nine months in four years and in Florida, from two months to nine months in two years.[106] Verizon Wireless notes that in

[99] We note that the operation of this presumption differs significantly from the Petitioner's alternative proposal that the Commission establish a presumption in favor of a court-ordered injunction granting the application. Under the approach we are adopting today, if a court finds that the State or local authority has failed to rebut the presumption that it failed to act within a reasonable time, the court would then review the record to determine the appropriate remedy. The State or local authority's exceeding a reasonable time for action would not, in and of itself, entitle the siting applicant to an injunction granting the application. *See* para. 39, *infra*.

[100] Petition at 15.

[101] *Id.* (emphasis in original).

[102] *Id.* The Petition claims that in "many jurisdictions" it was taking longer to obtain personal wireless service facility approvals than in prior years. *Id.*

[103] Sprint Nextel Comments at 5. Sprint Nextel also notes problems with processing in a New Jersey community. *Id.* The California Wireless Association also describes several instances of delays that ranged from 16 months to two years in California. CalWA Comments at 2-3.

[104] Verizon Wireless Comments at 6-7. T-Mobile also cites specific problems it encountered in four States. T-Mobile Comments at 7-9. Likewise, MetroPCS describes its experience with application processing delays in four jurisdictions. MetroPCS Comments at 8-12.

[105] NextG Networks Comments at 5-8.

[106] T-Mobile Comments at 6. In its comments, T-Mobile also references a collocation application submitted in LaGrange, New York, that was denied following a lengthy review process, despite the fact that the existing tower

(continued....)

the Washington, D.C. metro area, the typical processing time for new tower applications increased from six to nine months in 2003 to more than one year in 2008, and the processing of collocation applications increased from 15 to 30 days in 2003 to more than 90 days in 2008.[107]

34. This record evidence demonstrates that unreasonable delays in the personal wireless service facility siting applications process have obstructed the provision of wireless services.[108] Many wireless providers have faced lengthy and costly processing. We disagree with State and local government commenters that argue that the Petition fails to provide any credible or probative evidence that any local government is engaged in delay with respect to processing personal wireless service facility siting applications,[109] and that there is insufficient evidence on the record as a whole to justify Commission action.[110] To the contrary, given the extensive statistical evidence provided by the Petitioner and supporting commenters, and the absence of more than isolated anecdotes in rebuttal, we find that the record amply establishes the occurrence of significant instances of delay.[111]

(...continued from previous page)
was designed to accommodate multiple carriers and no height increase was required to hold the proposed installation. T-Mobile Comments at 26 (Declaration of Sabrina Bordin-Lambert). T-Mobile appealed the denial to the U.S. District Court, and the Court ruled in favor of T-Mobile and issued a permanent injunction directing the town to issue all necessary approvals to permit T-Mobile's antenna collocation within 90 days. *Omnipoint Communications, Inc. v. Town of LaGrange*, No. 08 Civ. 2201(CM)(GAY) (S.D.N.Y. Aug. 31, 2009). As support for the injunction, the Court cited the town's specific actions that resulted in a lengthy, five-year delay that ultimately prevented T-Mobile from filling an important gap in service. *Id*.

[107] Verizon Wireless Comments at 6. Moreover, both T-Mobile and Verizon Wireless provide information concerning pending applications. T-Mobile asserts that nearly one-third of its then 706 collocation applications had been pending for more than one year, and 114 of those had been pending for more than three years. T-Mobile Comments at 7. T-Mobile had 571 pending new tower applications, more than 30 percent of which had been pending for more than one year, and more than 25 of these applications had been pending for more than three years. *Id.* Verizon Wireless states that data it gathered "indicates that of the over 400 collocation requests reported as pending, over 30% of the requests [were] pending for more than six months." Verizon Wireless Comments at 6. In addition, it claims that "[o]f the over 350 non-collocation requests reported as pending, more than half of those applications [were] pending for more than 6 months, and nearly 100 of those applications [were] pending for more than one year." *Id.*

[108] We note that very late in the process, Petitioner and its supporters submitted new evidence in the form of letters and affidavits from carrier representatives that discuss specific experiences. *See Ex Parte* Letter from Christopher Guttman-McCabe, Vice President, Regulatory Affairs, CTIA -- The Wireless Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 08-165, filed November 10, 2009, Attached Letters from Michael S. Giaimo, Thomas C. Greiner, Jr., Scott P. Olson, Paul B. Albritton, and John W. Nilon, Jr., and Affidavit of Edward L. Donohue. NATOA and the Coalition for Local Zoning Authority responded that they have had no opportunity to respond to the substance of Petitioner's submissions, and suggested that the Commission should either strike CTIA's submission from the record or postpone action on the Petition until communities named in that submission have been served and given opportunity to respond. *See Ex Parte* Letter of Gerald L. Lederer, Counsel for NATOA and the Coalition for Local Zoning Authority, to Marlene Dortch, Secretary, Federal Communications Commission, WT Docket No. 08-165, filed November 10, 2009. We strongly encourage parties to submit relevant evidence as early as possible in the course of a proceeding, and preferably within the established pleading schedule, so that it may be subjected to the crucible of a response. Under the circumstances here, we do not give the record evidence contained in Petitioner's November 10 submission weight in our analysis.

[109] NATOA et al. Comments at 22; Stokes County, N.C. Comments at 1. Similarly, the County of Sonoma cites the proliferation of cell phones and towers as evidence that there is no problem and argues that the Commission should first investigate whether processing problems really exist. Sonoma Comments at 1.

[110] *See, e.g,* Coalition for Local Zoning Authority Reply Comments at 5-7; SCAN NATOA Reply Comments at 2-6; California Cities Reply Comments at 6; NATOA et al. Reply Comments at 15.

[111] The City of Philadelphia argues that the Petitioner's failure to identify and serve those local governments toward which its allegations are directed deprives those governments of a meaningful opportunity to verify or contest the
(continued....)

35. Delays in the processing of personal wireless service facility siting applications are particularly problematic as consumers await the deployment of advanced wireless communications services, including broadband services, in all geographic areas in a timely fashion.[112] Wireless providers currently are in the process of deploying broadband networks which will enable them to compete with the services offered by wireline companies.[113] For example, Clearwire is deploying a next generation broadband wireless network for the 2.5 GHz band using the Worldwide Inter-Operability for Microwave Access (WiMAX) technology.[114] Clearwire asserts that its WiMAX network will "provide a true mobile broadband experience for consumers, small businesses, medium and large enterprises, public safety organizations and educational institutions."[115] Similarly, we expect that the winners of recent spectrum auctions will need facility siting approvals in order to deploy their services to consumers.[116] At least one Advanced Wireless Service (AWS) licensee with nationwide reach already is implementing its new network in the AWS band.[117] Moreover, in the 700 MHz band, the Commission adopted stringent build out requirements precisely to ensure the rapid and widespread deployment of services over this spectrum.[118] State and local practices that unreasonably delay the siting of personal wireless service

(...continued from previous page)
Petitioner's allegations and deprives the Commission of a fair and full record. City of Philadelphia Comments at 2-3. *See also* Coalition for Local Zoning Authority Reply Comments at 5; Greater Metro Telecom. Consortium *et al.* Reply Comments at 6. We agree that an opportunity for rebuttal is an important element of process before making a finding regarding any individual community's processes. Today's decision provides such an opportunity for rebuttal by establishing presumptively reasonable timeframes that will allow the reasonableness of any particular failure to act to be litigated. The record shows that the State and local government community has had ample opportunity to respond to the aggregate evidence that supports our decision.

[112] *See* Petition at 8-10.

[113] The Petitioner has submitted a study which asserts that approximately 23.2 million U.S. residents and 42% of road miles in the U.S. do not currently have access to 3G mobile broadband services. It further estimates that approximately 16,000 new towers will need to be constructed and 55,000 existing towers will need to be augmented for both Code Division Multiple Access (CDMA) and Global System for Mobile communications (GSM) 3G broadband services to be ubiquitous to U.S. consumers. CostQuest Associates, Inc., U.S. Ubiquity Mobility Study, April 17, 2008 at 4, filed as attachment to CTIA Ex Parte, GN Docket No. 09-51, WT Docket Nos. 08-165, 08-166, 08-167, 09-66 (filed Aug. 14, 2009).

[114] *Sprint And Clearwire To Combine WiMAX Businesses, Creating A New Mobile Broadband Company*, News Release, Sprint Nextel and Clearwire Corp., May 7, 2008 ("*Sprint/Clearwire News Release*"). *See* Sprint Nextel Corp. and Clearwire Corp., Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations, WT Docket No. 08-94 and File Nos. 0003462540 et al., *Memorandum Opinion and Order*, 23 FCC Rcd 17570, 17619 ¶ 128 (2008) (approving Clearwire and Sprint Nextel's plan to combine their 2.5 GHz wireless broadband businesses into one company).

[115] *Sprint/Clearwire News Release*. Clearwire's wireless broadband service is now available in 14 markets. *Clearwire Introduces CLEAR(TM) 4G WiMax Internet Service in 10 New Markets*, Press Release, Clearwire, Sept. 1, 2009.

[116] *See* Auction of Advanced Wireless Services Licenses Closes: Winning Bidders Announced for Auction No. 66, Report No. AUC-06-66-F, *Public Notice*, 21 FCC Rcd 10521 (WTB 2006); Auction of 700 MHz Band Licenses Closes; Winning Bidders Announced for Auction 73, *Public Notice*, Report No. AUC-08-73-I (Auction 73), DA 08-595 (rel. Mar. 20, 2008).

[117] T-Mobile Comments at 2 (noting that unless it can expeditiously obtain approvals, its efforts to add high-speed services and expand coverage will be "significantly hampered").

[118] *See* Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150; Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102; Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309; Biennial Regulatory Review -- Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, WT Docket No. 03-264; Former Nextel Communications, Inc.
(continued....)

facilities threaten to undermine achievement of the goals that the Commission sought to advance in these proceedings. Moreover, they impede the promotion of advanced services and competition that Congress deemed critical in the Telecommunications Act of 1996[119] and more recently in the Recovery Act.[120]

36. In addition, the deployment of facilities without unreasonable delay is vital to promote public safety, including the availability of wireless 911, throughout the nation. The importance of wireless communications for public safety is critical, especially as consumers increasingly rely upon their personal wireless service devices as their primary method of communication. As NENA observes in its comments:

> Calls must be able to be made from as many locations as possible and dropped calls must be prevented. This is especially true for wireless 9-1-1 calls which must get through to the right Public Safety Answering Point ("PSAP") and must be as accurate as technically possible to ensure an effective response. Increased availability and reliability of commercial and public safety wireless service, along with improved 9-1-1 location accuracy, all depend on the presence of sufficient wireless towers.[121]

37. Right to Seek Relief. Given the evidence of unreasonable delays and the public interest in avoiding such delays, we conclude that the Commission should define the statutory terms "reasonable period of time" and "failure to act" in order to clarify when an adversely affected service provider may take a dilatory State or local government to court. Specifically, we find that when a State or local government does not act within a "reasonable period of time" under Section 332(c)(7)(B)(i)(II), a "failure to act" occurs within Section 332(c)(7)(B)(v). And because an "action or failure to act" is the statutory trigger for seeking judicial relief, our clarification of these terms will give personal wireless service providers certainty as to when they may seek redress for inaction on an application. We expect that this certainty will enable personal wireless service providers more vigorously to enforce the statutory mandate against unreasonable delay that impedes the deployment of services that benefit the public. At the same time, our action will provide guidance to State and local governments as to what constitutes a reasonable timeframe in which they are expected to process applications, but recognizes that certain cases may legitimately require more processing time.[122]

38. By defining the period after which personal wireless service providers have a right to seek judicial relief, we both ensure timely State and local government action and preserve incentives for providers to work cooperatively with them to address community needs. Wireless providers will have the incentive to resolve legitimate issues raised by State or local governments within the timeframes defined as reasonable, or they will incur the costs of litigation and may face additional delay if the court

---

(...continued from previous page)
Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules, WT Docket No. 06-169; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, WT Docket No. 96-86; and Declaratory Ruling on Reporting Requirement under Commission's Part 1 Anti-Collusion Rule, WT Docket No. 07-166, *Second Report and Order*, 22 FCC Rcd 15289, 15342-55 ¶¶ 141-177 (2007).

[119] Telecommunications Act of 1996, Pub.L. 104-104, Feb. 8, 1996, 110 Stat. 56, codified at 47 U.S.C. § 151 *et seq*. (1996 Act). The 1996 Act amended the Communications Act of 1934.

[120] *See supra* note 47.

[121] NENA Comments at 1-2.

[122] We recognize that there are numerous jurisdictions that are processing personal wireless service facility siting applications well within the timeframes we establish herein. We encourage these jurisdictions to continue their expeditious processing of applications for the benefit of wireless consumers.

determines that additional time was, in fact, reasonable under the circumstances. Similarly, State and local governments will have a strong incentive to resolve each application within the timeframe defined as reasonable, or they will risk issuance of an injunction granting the application. In addition, specific timeframes for State and local government deliberations will allow wireless providers to better plan and allocate resources. This is especially important as providers plan to deploy their new broadband networks.

39. We reject the Petition's proposals that we go farther and either deem an application granted when a State or local government has failed to act within a defined timeframe or adopt a presumption that the court should issue an injunction granting the application. Section 332(c)(7)(B)(v) states that when a failure to act has occurred, aggrieved parties should file with a court of competent jurisdiction within 30 days and that "[t]he court shall hear and decide such action on an expedited basis."[123] This provision indicates Congressional intent that courts should have the responsibility to fashion appropriate case-specific remedies. As the Petitioner notes, many courts have issued injunctions granting applications upon finding a violation of Section 332(c)(7)(B).[124] However, the case law does not establish that an injunction granting the application is always or presumptively appropriate when a "failure to act" occurs.[125] To the contrary, in those cases where courts have issued such injunctions upon finding a failure to act within a reasonable time, they have done so only after examining all the facts in the case.[126] While we agree that injunctions granting applications may be appropriate in many cases, the proposals in personal wireless service facility siting applications and the surrounding circumstances can vary greatly. It is therefore important for courts to consider the specific facts of individual applications and adopt remedies based on those facts.

40. We also disagree with commenters that argue that the statutory scheme precludes us from interpreting the terms "reasonable period of time" and "failure to act" by reference to specific timeframes. State and local government commenters assert that Congress used these general terms, rather than setting specific time periods in the Act, because it wanted to preserve State and local governments' discretion to process applications in the timeframes in which each government typically processes land use applications. They contend that this reading comports with the complete text of Section 332(c)(7)(B)(ii), which obligates the State or local government to act "within a reasonable period of time after the request is duly filed . . . *taking into account the nature and scope of such request*."[127] Moreover, these commenters rely upon the Conference Agreement, which states that "the time period for rendering a [personal wireless service facility siting] decision will be the usual period under such circumstances" and that "[i]t is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision[s]."[128]

---

[123] 47 U.S.C. § 332(c)(7)(B)(v).

[124] *See* Petition at 28; CTIA Reply Comments at 23-25.

[125] We note that many of the cases the Petitioner cites involved not a failure to act within a reasonable time, but a lack of substantial evidence or other violation of Section 332(c)(7)(B). *See, e.g.*, *New Par v. City of Saginaw*, 301 F.3d 390, 399-400 (6th Cir. 2002); *Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 24-25 (1st Cir. 2002); *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1222 (11th Cir. 2002).

[126] *See Tennessee ex rel. Wireless Income Props. v. Chattanooga*, 403 F.3d 392 (6th Cir. 2005); *Masterpage Communications, Inc. v. Town of Olive, NY*, 418 F.Supp.2d 66 (N.D.N.Y. 2005).

[127] 47 C.F.R. § 332(c)(7)(B)(ii) (emphasis added). *See* NATOA et al. Comments at 14-15; California Cities Comments at 5-6; Fairfax County, VA Comments at 6-7; City of Dublin, OH Comments at 3; City of Grove City, OH Comments at 3; Florida Cities Comments at 5-6; City of Burien, WA Comments at 4; Village of Alden, NY Comments at 3.

[128] H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. 208 (1996).

41. Particularly given the opportunities that we have built into the process for ensuring individualized consideration of the nature and scope of each siting request, we find these arguments unavailing. Congress did not define either "reasonable period of time" or "failure to act" in the Communications Act. As the United States Court of Appeals for the District of Columbia Circuit has held, the term "reasonable" is ambiguous and courts owe substantial deference to the interpretation that the Commission accords to ambiguous terms.[129] We similarly found in the *Local Franchising Order* that the term "unreasonably refuse to award" a local franchise authorization in Section 621(a)(1) is ambiguous and subject to our interpretation.[130] As in the local franchising context, it is not clear from the Communications Act *what* is a reasonable period of time to act on an application or *when* a failure to act occurs. As we find above, by defining timeframes in this proceeding, the Commission will lend clarity to these provisions, giving wireless providers and State and local zoning authorities greater certainty in knowing what period of time is "reasonable," and ensuring that the point at which a State or local authority "fails to act" is not left so ambiguous that it risks depriving a wireless siting applicant of its right to redress.

42. Moreover, our construction of the statutory terms "reasonable period of time" and "failure to act" takes into account, on several levels, the Section 332(c)(7)(B)(ii) requirement that the "nature and scope" of the request be considered and the legislative history's indication that Congress intended the decisional timeframe to be the "usual period" under the circumstances for resolving zoning matters. First, the timeframes we define below are based on actual practice as shown in the record. As discussed below, most statutes and government processes discussed in the record already conform to the timeframes we define. As such, the timeframes do not require State and local governments to give preferential treatment to personal wireless service providers over other types of land use applications. Second, we consider the nature and scope of the request by defining a shorter timeframe for collocation applications, consistent with record evidence that collocation applications generally are considered at a faster pace than other tower applications. Third, under the regime that we adopt today, the State or local authority will have the opportunity, in any given case that comes before a court, to rebut the presumption that the established timeframes are reasonable. Finally, we have provided for further adjustments to the presumptive deadlines in order to ensure that the timeframes accommodate certain contingencies that may arise in individual cases, including where the applicant and the State or local authority agree to extend the time, where the application has already been pending for longer than the presumptive timeframe as of the date of this Declaratory Ruling, and where the application review process has been delayed by the applicant's failure to submit a complete application or to file necessary additional information in a timely manner.[131] For all these reasons, we conclude that our clarification of the broad terms "reasonable period of time" and "failure to act" is consistent with the statutory scheme.

43. Timeframes Constituting a "Failure to Act". The Petition proposes a 45-day timeframe for collocation applications and a 75-day timeframe for all other applications.[132] The Petition asserts that because no new towers need to be constructed, collocations are the easiest applications for State and local

[129] *Capital Network System, Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994). In this case the court stated: "[b]ecause 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them." The court upheld the Commission's rejection of a competitive carrier's proposed tariff as patently unlawful because it was not "just and reasonable" under Section 201(b) of the Act. *See also National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. at 982-84 (finding that where a statute is ambiguous and the implementing agency's construction is reasonable, a federal court must accept the agency's construction of the statute, even if the agency's interpretation differs from prior judicial construction).

[130] *Local Franchising Order*, 22 FCC Rcd at 5130 ¶ 58 (2007).

[131] *See infra* paras. 49-53.

[132] Petition at 24-27. The Petition claims that over 80 percent of carriers surveyed had had "some collocations granted within one week" and new builds "granted within 2 weeks." Petition at 16.

governments to review and, therefore, should reasonably be reviewed within a shorter period.[133] The Petitioner surveyed its members and found that collocations can take as little as a single day to review, and that all members responding had received zoning approvals within 14 days.[134] With respect to new facilities or major modifications, the Petitioner's members indicated that they had received final action "in as little as one day, with hundreds of grants within 75 days."[135] Wireless providers argue that the Petitioner's proposed timeframes are reasonable,[136] and they rely upon State and local processes as evidence to support that conclusion.[137] Moreover, there is evidence from local governments that they are able to decide promptly personal wireless service facility siting applications. For example, the City of Saint Paul, Minnesota, has processed personal wireless service facility siting applications within 13 days, on average, since 2000,[138] and the City of LaGrande, Oregon, has processed applications on average in 45 days in the last ten years.[139]

44. While we recognize that many applications can and perhaps should be processed within the timeframes proposed by the Petitioner, we are concerned that these timeframes may be insufficiently flexible for general applicability. In particular, some applications may reasonably require additional time to explore collaborative solutions among the governments, wireless providers, and affected communities.[140] Also, State and local governments may sometimes need additional time to prepare a written explanation of their decisions as required by Section 332(c)(7)(B)(iii),[141] and the timeframes as proposed may not accommodate reasonable, generally applicable procedural requirements in some communities.[142] Although, as noted above, the reviewing court will have the opportunity to consider such unique circumstances in individual cases, it is important for purposes of certainty and orderly processing that the timeframes for determining when suit may be brought in fact accommodate reasonable processes in most instances.[143]

---

[133] *Id.* at 24-25.

[134] *Id.* at 25.

[135] *Id.* at 26. All members responding to the survey reported receiving approvals for new facilities within 30 days. *Id.*

[136] *See, e.g.*, MetroPCS Comments at 12; Rural Cellular Association Comments at 6; NextG Networks Comments at 9-12.

[137] Sprint Nextel Comments at 6-8 (*citing* to South Dakota Public Utility Commission's model wireless zoning ordinance and Florida and North Carolina statutes); T-Mobile Comments at 11-12 (*citing* to the processing experienced by T-Mobile in Florida, Georgia, and Texas); MetroPCS Comments at 7-8 (*citing* to the processing experienced by MetroPCS in Delaware and Pennsylvania); NextG Networks Comments at 9-14 (*citing* to North Carolina, Florida & Kentucky statutes).

[138] City of Saint Paul, Minnesota and the City's Board of Water Commissioners Comments at 10.

[139] City of LaGrande, Oregon Comments at 3.

[140] Such collaborative processes are asserted to have led to improved antenna deployments. *See, e.g.*, California Cities Comments at 13-16.

[141] Michigan Municipalities Comments at 14-19.

[142] *See, e.g.*, Fairfax County, VA Comments at 7-10; City of Dublin, OH Comments at 3-4; Florida Cities Comments at 8-9.

[143] California Cities note that the Commission previously rejected time limits for itself in a rulemaking concerning petitions filed pursuant to Section 332(c)(7)(B)(v) because they would not afford the Commission sufficient flexibility to account for particular facts in a case. California Cities Comments at 8-10 (*citing* Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*,* WT Docket No. 97-192, *Report and Order*, 15 FCC Rcd 22821, 22829-30 ¶ 20 (2000)). The timeframes that we adopt account for the flexibility that may be needed to address different fact situations, while at the same time adhering to the important public interest in certainty discussed above.

45. Based on our review of the record as a whole, we find 90 days to be a generally reasonable timeframe for processing collocation applications and 150 days to be a generally reasonable timeframe for processing applications other than collocations. Thus, a lack of a decision within these timeframes presumptively constitutes a failure to act under Section 332(c)(7)(B)(v). At least one wireless provider, U.S. Cellular, suggests that such 90-day and 150-day timeframes are sufficient for State and local governments to process applications.[144]

46. We find that collocation applications can reasonably be processed within 90 days. Collocation applications are easier to process than other types of applications as they do not implicate the effects upon the community that may result from new construction. In particular, the addition of an antenna to an existing tower or other structure is unlikely to have a significant visual impact on the community. Therefore, many jurisdictions do not require public notice or hearings for collocations.[145] For purposes of this standard, an application is a request for collocation if it does not involve a "substantial increase in the size of a tower" as defined in the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas.[146] This limitation will help to ensure that State and local governments will have a reasonable period of time to review those applications that may require more extensive consideration.

47. Several State statutes already require application processing within 90 days. California and Minnesota require both collocation and non-collocation applications to be processed within 60 days.[147] North Carolina has a time period of 45 days for processing after a 45-day review period for application completeness (for a total of 90 days),[148] and Florida's process is 45 business days after a 20-business day review period for application completeness (for a total of approximately 91 days, including weekends).[149] Moreover, the evidence submitted by local governments indicates that most already are

[144] U.S. Cellular Reply Comments at 2-3.

[145] *See, e.g.*, N.C. Gen. Stat. Ann. § 153A-349.53(a); Fla. Stat. Ann. § 365.172(12)(a)(1)(a).

[146] *See* T-Mobile Comments at 10-11. A "[s]ubstantial increase in the size of the tower" occurs if:

> (1) [t]he mounting of the proposed antenna on the tower would increase the existing height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or (2) [t]he mounting of the proposed antenna would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; or (3) [t]he mounting of the proposed antenna would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable; or (4) [t]he mounting of the proposed antenna would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site.

47 C.F.R. Part 1, App. B—Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, Definitions, Subsection C.

[147] Cal. Gov't. Code §§ 65950 & 65943 (assuming no environmental review is required; also has 30-day review period for completeness); Minn. Stat. Ann. § 15.99 (permitting an additional 60-day extension upon written notice to applicant).

[148] N.C. Gen. Stat. Ann. § 153A-349.52.

[149] Fla. Stat. Ann. § 365.172. In addition, the State of Connecticut's Connecticut Siting Council states that "most applications to approve a tower-sharing request are processed by our agency in four to six weeks." State of Connecticut's Connecticut Siting Council Sept. 24, 2008 Letter at 2.

processing collocation applications within 90 days. Of the approximately 51 localities that submitted information concerning their processing of collocation applications, only eight state that their processing is longer than 90 days. However, five of those localities indicate that their processing is within 120 days, on average. Based on these facts, we conclude that a 90-day timeframe for processing collocation applications is reasonable.

48. We further find that the record shows that a 150-day processing period for applications other than collocations is a reasonable standard that is consistent with most statutes and local processes. First, of the eight State statutes discussed in the record that cover non-collocation applications, only one State, Connecticut, contemplates a longer process.[150] Nonetheless, the process in Connecticut is only 30 days longer than the timeframe set forth here.[151] The other seven States provide for a review period of 60 to 150 days.[152] Second, of the processes described by local governments in the record, most already routinely conclude within 150 days or less. Approximately 51 localities submitted information concerning their processing of personal wireless service facility siting applications. Of those, only twelve indicate that they may take longer than 150 days. However, four of these twelve cities indicate that they generally process the applications within 180 days. Based on these facts, we conclude that a 150-day timeframe for processing applications other than collocations is reasonable. Accordingly, we do not agree that the Commission's imposition of the 90-day and 150-day timeframes will disrupt many of the processes State and local governments already have in place for personal wireless service facility siting applications.[153]

49. Related Issues. Section 332(c)(7)(B)(v) provides that an action for judicial relief must be brought "within 30 days" after a State or local government action or failure to act.[154] Thus, if a failure to act occurs 90 days (for a collocation) or 150 days (in other cases) after an application is filed, any court action must be brought by day 120 or 180 on penalty of losing the ability to sue. We conclude that a rigid application of this cutoff to cases where the parties are working cooperatively toward a consensual resolution would be contrary to both the public interest and Congressional intent. Accordingly, we clarify that a "reasonable period of time" may be extended beyond 90 or 150 days by mutual consent of the personal wireless service provider and the State or local government, and that in such instances, the commencement of the 30-day period for filing suit will be tolled.

50. To the extent existing State statutes or local ordinances set different review periods than we do here, we clarify that our interpretation of Section 332(c)(7) is independent of the operation of these

[150] *See* Conn. Gen. Stat. Ann. §§ 16-50(i) & (p) (action required within 180 days after application is filed).

[151] Moreover, the State of Connecticut, Connecticut Siting Council states that "applications to approve a new-build tower are generally reviewed and acted upon in four to five months." State of Connecticut's Connecticut Siting Council Sept. 24, 2008 Letter at 2.

[152] The State of California requires applications to be processed within 60 days, after a 30-day review period for completeness, assuming no environmental review is required. Cal. Gov't. Code §§ 65950 & 65943. The State of Florida requires applications to be processed within 90 business days, after a 20-business day review period for completeness. Fla. Stat. Ann. § 365.172. The State of Minnesota requires applications to be processed within 60 days, which can be extended an additional 60 days upon written notice to the applicant. Minn. Stat. Ann. § 15.99. The State of Oregon requires applications to be processed within 120 days, after a 30-day review period for completeness. Or. Rev. Stat. § 227.178. The Commonwealth of Virginia requires applications to be processed within 90 days, which can be extended an additional 60 days. Va. Code Ann. § 15.2-2232. The State of Washington requires applications to be processed within 120 days, after a 28-day review period for completeness. Wash. Rev. Code §§ 36.70B.080 & 36.70B.070. The State of Kentucky requires applications to be processed within 60 days. Ky. Rev. Stat. Ann. § 100.987.

[153] *See, e.g.,* California Cities Comments at 10-12; Fairfax County, VA Comments at 7-10; City of Dublin, OH Comments at 3-4; Michigan Municipalities Comments at 11-14.

[154] 47 U.S.C. § 332(c)(7)(B)(v).

statutes or ordinances. Thus, where the review period in a State statute or local ordinance is shorter than the 90-day or 150-day period, the applicant may pursue any remedies granted under the State or local regulation when the applicable State or local review period has lapsed. However, the applicant must wait until the 90-day or 150-day review period has expired to bring suit for a "failure to act" under Section 332(c)(7)(B)(v). Conversely, if the review period in the State statute or local ordinance is longer than the 90-day or 150-day review period, the applicant may bring suit under Section 332(c)(7)(B)(v) after 90 days or 150 days, subject to the 30-day limitation period on filing, and may consider pursuing any remedies granted under the State or local regulation when that applicable time limit has expired. Of course, the option is also available in these cases to toll the period under Section 332(c)(7) by mutual consent.

51. We further conclude that given the ambiguity that has prevailed until now as to when a failure to act occurs, it is reasonable to give State and local governments an additional period to review currently pending applications before an applicant may file suit. Accordingly, as a general rule, for currently pending applications we deem that a "failure to act" will occur 90 days (for collocations) or 150 days (for other applications) after the release of this Declaratory Ruling. We recognize, however, that some applications have been pending for a very long period, and that delaying resolution for an additional 90 or 150 days may impose an undue burden on the applicant. Therefore, a party whose application has been pending for the applicable timeframe that we establish herein or longer as of the release date of this Declaratory Ruling may, after providing notice to the relevant State or local government, file suit under Section 332(c)(7)(B)(v) if the State or local government fails to act within 60 days from the date of such notice. The notice provided to the State or local government shall include a copy of this Declaratory Ruling. This option does not apply to applications that have currently been pending for less than 90 or 150 days, and in these instances the State or local government will have 90 or 150 days from the release of this Declaratory Ruling before it will be considered to have failed to act. We find that this transitional regime best balances the interests of applicants in finality with the needs of State and local governments for adequate time to implement our interpretation of Section 332(c)(7).

52. Finally, certain State and local government commenters argue that the timeframes should take into account that not all applications are complete as filed and that applicants do not always file necessary additional information in a timely manner.[155] MetroPCS does not contest this argument, but it further proposes that local authorities should be required to notify applicants of incomplete applications within three business days and to inform the applicant what additional information should be submitted.[156] The Petitioner supports MetroPCS's proposal.[157] We concur that the timeframes should take into account whether applications are complete. Accordingly, we find that when applications are incomplete as filed, the timeframes do not include the time that applicants take to respond to State and local governments' requests for additional information. We also find that reviewing authorities should be bound to notify applicants within a reasonable period of time that their applications are incomplete. It is important that State and local governments obtain complete applications in a timely manner, and our finding here will provide the incentive for wireless providers to file complete applications in a timely fashion.

53. Five State statutes discussed in the record specify a period for a review of the applications for completeness. The State of Florida requires an application to be reviewed within 20

[155] *See, e.g.*, Fairfax County, VA Comments at 13; City of Bellingham, WA Comments at 1-2; Michigan Municipalities Comments at 19-20; Stokes County, N.C. Comments at 1 (complete application should be required); Florida Cities Comments at 8-9 (wireless companies should also be held to timelines for responding to requests from localities concerning siting applications).

[156] MetroPCS Comments at 12. MetroPCS also proposes that the zoning authority should be conclusively deemed to have accepted the filing as complete if it does not respond within three days.

[157] CTIA Reply Comments at 18.

business days for determining whether it is complete;[158] the State of Washington requires review within 28 days;[159] the States of California and Oregon require review within 30 days;[160] and the State of North Carolina requires review within 45 days.[161] Considering this evidence as a whole, a review period of 30 days gives State and local governments sufficient time for reviewing applications for completeness, while protecting applicants from a last minute decision that applications should be denied as incomplete. Accordingly, we conclude that the time it takes for an applicant to respond to a request for additional information will not count toward the 90 or 150 days only if that State or local government notifies the applicant within the first 30 days that its application is incomplete. We find that the total amount of time, including the review period for application completeness, is generally consistent with those States that specifically include such a review period.

C. Prohibition of Service by a Single Provider

54. *Background*. The Petitioner next asks the Commission to conclude that State or local regulation that effectively prohibits one carrier from providing service because service is available from one or more other carriers violates Section 332(c)(7)(B)(i)(II) of the Act.[162] The Petitioner contends that the Act does not define what constitutes a prohibition of service for purposes of Section 332(c)(7)(B)(i)(II).[163] The Petitioner asserts that Circuit court decisions have interpreted this provision in a number of different ways, including so as to allow the denial of an application so long as a single wireless provider serves the area, thereby creating a need for the Commission to interpret it.[164] The Petitioner argues that its position is consistent with the pro-competitive goals of the 1996 Telecommunications Act, and further, that the provision refers to personal wireless services in the plural, which cuts against a single provider interpretation.[165] Similarly, Section 332(c)(7)(B)(i)(I) bars unreasonable discrimination among providers, also suggesting a preference for multiple providers.[166] In addition to supporting the Petitioner's argument, numerous wireless providers assert that if local zoning authorities could deny siting applications whenever another carrier serves the area, competition as intended by the 1996 Act and the introduction of new technologies would be impeded, and E911 service and public safety could be impacted.[167]

55. Parties opposing the Petition argue that if, as the Petition suggests, there are local governments that deny applications solely because of coverage by another provider, the affected provider can, as courts have recognized, bring a claim of unreasonable discrimination.[168] Opponents also argue

---

[158] *See* Fla. Stat. Ann. § 365.172 (providing for a 20-business day review for application completeness, then a 45-business day period for collocation application processing and a 90-business day period for all other application processing).

[159] Wash. Rev. Code §§ 36.70B.080 & 36.70B.070 (providing for a 28-day review for application completeness, then a 120-day period for application processing).

[160] Cal. Gov't. Code §§ 65943 & 65950 (providing for a 30-day review for application completeness, then a 60-day period for application processing assuming there are no environmental issues); Or. Rev. Stat. § 227.178 (providing for a 30-day review for application completeness, then a 120-day period for application processing).

[161] N.C. Gen. Stat. Ann. § 153A-349.52 (providing for a 45-day review for application completeness, then a 45-day period for collocation application processing).

[162] Petition at 30-35.

[163] *Id*. at 30.

[164] *Id*. at 31.

[165] *Id*. at 31-32.

[166] *Id*. at 32.

[167] *See*, *e.g.*, Sprint Nextel Comments at 11-12; T-Mobile Comments at 13-14; NextG Networks Comments at 14-15.

[168] *See* NATOA et al. Comments at 20.

that the Petition fails to provide any credible or probative evidence of a prohibition on the ability of any provider to provide services.[169] Commenters also argue that granting the Petition would limit State and local authorities' ability to regulate the location of facilities.[170] One opposition commenter suggests that because the interpretation advanced in the Petition would appear to prevent localities from considering the presence of service by other carriers in evaluating an additional carrier's application for an antenna site, granting this request could have a negative impact on airports by increasing the number of potential obstructions to air navigation.[171] Finally, one commenter argues that because Section 332(c)(7)(A)[172] states that the zoning authority of a State or local government over personal wireless service facilities is only limited by the specific exceptions provided in Section 332(c)(7)(B), and because Section 332(c)(7)(B) does not say that a zoning authority cannot consider the presence of other providers, the Commission may not impose such a limitation.[173]

56. *Discussion*. We conclude that a State or local government that denies an application for personal wireless service facilities siting solely because "one or more carriers serve a given geographic market"[174] has engaged in unlawful regulation that "prohibits or ha[s] the effect of prohibiting the provision of personal wireless services," within the meaning of Section 332(c)(7)(B)(i)(II). Initially, we note that courts of appeals disagree on whether a State or local policy that denies personal wireless service facility siting applications solely because of the presence of another carrier should be treated as a siting regulation that prohibits or has the effect of prohibiting such services.[175] Thus, a controversy exists that is appropriately resolved by declaratory ruling.[176] We agree with the Petitioner that the fact that another carrier or carriers provide service to an area is an inadequate defense under a claim that a prohibition exists, and we conclude that any other interpretation of this provision would be inconsistent with the Telecommunications Act's pro-competitive purpose.

57. Section 332(c)(7)(B)(i)(II) provides, as a limitation on the statute's preservation of local zoning authority, that a State or local government regulation of personal wireless facilities "shall not

---

[169] *Id.* at 22.

[170] *See*, *e.g.*, City of Auburn, WA Comments at 3; City of SeaTac, WA Comments at 2.

[171] *See* North Carolina Department of Transportation's Division of Aviation Comments at 2.

[172] 47 U.S.C. § 332(c)(7)(A) (stating "[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.").

[173] *See* County of Albemarle, VA Comments at 8-9.

[174] Petition at 32.

[175] Some courts of appeals have found no violation of the "effect of prohibiting" clause solely because another carrier is providing service. *See APT Pittsburgh L.P. v. Penn Township Butler County of Pa.*, 196 F.3d 469, 480 (3d Cir. 1999) ("evidence that the area the new facility will serve is not already served by another provider" essential to showing violation "effect of prohibiting" clause); *AT&T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423, 428-29 (4th Cir. 1998) (concluding that the statute only applies when the State or local authority has adopted a blanket ban on wireless service facilities). Other courts of appeals have reached the opposite conclusion. *See Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d 620, 633-34 (1st Cir. 2002) (rejecting a rule that "any service equals no effective prohibition"); *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 731-33 (9th Cir. 2005) (adopting the First Circuit's analysis).

[176] *See* 47 C.F.R. § 1.2; *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.,* 125 S.Ct. at 2700 ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion"). None of the courts of appeals has held that the meaning of Section 332(c)(7)(B)(i)(II) is unambiguous. *See, e.g., Omnipoint Holdings, Inc., v. City of Cranston,* No. 08-2491 (1st Cir. November 3, 2009) ("Beyond the statute's language, the [Communications Act] provides no guidance on what constitutes an effective prohibition, so courts … have added judicial gloss").

prohibit or have the effect of prohibiting the provision of personal wireless services."[177] While we acknowledge that this provision could be interpreted in the manner endorsed by several courts – as a safeguard against a complete ban on all personal wireless service within the State or local jurisdiction, which would have no further effect if a single provider is permitted to provide its service within the jurisdiction – we conclude that under the better reading of the statute, this limitation of State/local authority applies not just to the first carrier to enter into the market, but also to all subsequent entrants.

58. We reach this conclusion for several reasons. First, our interpretation is consistent with the statutory language referring to the prohibition of "the provision of personal wireless *services*" rather than the singular term "service." As the First Circuit observed, "[a] straightforward reading is that 'services' refers to more than one carrier. Congress contemplated that there be multiple carriers competing to provide services to consumers."[178]

59. Second, an interpretation that would regard the entry of one carrier into the locality as mooting a subsequent examination of whether the locality has improperly blocked personal wireless services ignores the possibility that the first carrier may not provide service to the entire locality, and a zoning approach that subsequently prohibits or effectively prohibits additional carriers therefore may leave segments of the population unserved or underserved.[179] In the words of the First Circuit, the "fact that some carrier provides some service to some consumers does not in itself mean that the town has not effectively prohibited services to other consumers."[180] Such action on the part of the locality would contradict the clear intent of the statute.

60. Third, we find unavailing the reasons cited by the Fourth Circuit (and some other courts) to support the interpretation that the statute only limits localities from prohibiting all personal wireless services (*i.e.*, a blanket ban or "one-provider" approach). The Fourth Circuit's principal concern was that giving each carrier an individualized right under Section 332(c)(7)(B)(i)(II) to contest an adverse zoning decision as an unlawful prohibition of its service "would effectively nullify local authority by mandating approval of all (or nearly all) applications."[181] As explained below, however, our interpretation of the statute does not mandate such approval and therefore does not strip State and local authorities of their Section 332(c)(7) zoning rights. Rather, we construe the statute to bar State and local authorities from prohibiting the provision of services of individual carriers solely on the basis of the presence of another carrier in the jurisdiction; State and local authority to base zoning regulation on other grounds is left intact by this ruling.

61. Finally, our construction of the provision achieves a balance that is most consistent with the relevant goals of the Communications Act. In promoting the construction of nationwide wireless networks by multiple carriers, Congress sought ultimately to improve service quality and lower prices for consumers. Our interpretation in this Declaratory Ruling promotes these statutory objectives more effectively than the alternative, which could perpetuate significant coverage gaps within any individual

---

[177] 47 U.S.C. § 332(c)(7)(B)(i)(II).

[178] *Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d at 634.

[179] To the extent a wireless carrier has gaps in its service, a zoning restriction that bars additional carriers will cement those gaps in place and effectively prohibit any consumer from receiving service in those areas. If the gap is large enough, the people living in the gap area who tend to travel only shorter distances from home will be left without a usable service altogether. According to the First Circuit, the presence of the one carrier in the jurisdiction therefore does not end the inquiry under Section 332(c)(7)(B): "That one carrier provides some service in a geographic gap should not lead to abandonment of examination of the effect on wireless services for other carriers and their customers." *Second Generation Properties, L.P v. Town of Pelham.* 313 F.3d at 634.

[180] *Id.*

[181] *AT&T Wireless PCS v. City Council of Va. Beach*, 155 F.3d at 428.

wireless provider's service area and, in turn, diminish the service provided to their customers.[182] In addition, under the Fourth Circuit's approach, competing providers may find themselves barred from entering markets to which they would have access under our interpretation of the statute, thus depriving consumers of the competitive benefits the Act seeks to foster. As the First Circuit recently stated, the "one-provider rule" "prevents customers in an area from having a choice of reliable carriers and thus undermines the [Act's] goal to improve wireless service for customers through industry competition."[183] In sum, our rejection of this rule "actually better serves both individual consumers and the policy goals of the [Communications Act]."[184]

62. Our determination also serves the Act's goal of preserving the State and local authorities' ability to reasonably regulate the location of facilities in a manner that operates in harmony with federal policies that promote competition among wireless providers.[185] As we indicated above, nothing we do here interferes with these authorities' consideration of and action on the issues that traditionally inform local zoning regulation. Thus, where a *bona fide* local zoning concern, rather than the mere presence of other carriers, drives a zoning decision, it should be unaffected by our ruling today. The Petitioner appears to recognize this when it states that it "does not seek a ruling that zoning authorities are prohibited from favoring collocation over new facilities where collocation is appropriate."[186] Our ruling here does not create such a prohibition. To the contrary, we would observe that a decision to deny a personal wireless service facility siting application that is based on the availability of adequate collocation opportunities is not one based solely on the presence of other carriers, and so is unaffected by our interpretation of the statute in this Declaratory Ruling.

63. We disagree with the assertion that granting the petition could have a negative impact on airports by increasing the number of potential obstructions to air navigation.[187] As the Federal Aviation Administration notes, our action on this Petition does not alter or amend the Federal Aviation Administration's regulatory requirements and process.[188] Under the Commission's rules as well, parties are required to submit for Federal Aviation Administration review all antenna structures[189] that potentially can endanger air navigation, including those near airports.[190] The Commission requires antenna structures that exceed 200 feet in height above ground or which require special aeronautical study to be painted and lighted[191] and also requires antenna structures to conform to the Federal Aviation Administration's painting and lighting recommendations.[192]

64. We reject the assertion that the declaration the Petitioner seeks would violate Section

[182] *See MetroPCS, Inc. v. City and County of San Francisco,* 400 F.3d at 732 (result of "one-provider" interpretation is "a crazy patchwork quilt of intermittent coverage … [that] might have the effect of driving the industry toward a single carrier," *quoting Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d at 631).

[183] *Omnipoint Holdings, Inc., v. City of Cranston* (*citing Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d at 631, 633).

[184] *MetroPCS, Inc. v. City and County of San Francisco,* 400 F.3d at 722.

[185] *See*, *e.g.*, City of Auburn, WA Comments at 3; City of SeaTac, WA Comments at 2.

[186] CTIA Reply Comments at 29-30 (emphasis removed).

[187] *See* North Carolina Department of Transportation's Division of Aviation Comments at 2.

[188] *See* FAA Comments at 1.

[189] Section 17.2(a) of the rules defines "antenna structure" as including "the radiating and/or receive system, its supporting structures and any appurtenances mounted thereon." 47 C.F.R. § 17.2(a).

[190] *See* 47 C.F.R. § 17.7.

[191] *See* 47 C.F.R. § 17.21.

[192] *See* 47 C.F.R. § 17.23.

332(c)(7)(A).[193] Subparagraph (A) states that the authority of a State or local government over decisions regarding the placement, construction, and modification of personal wireless service facilities is limited only by the limitations imposed in subparagraph (B).[194] Because the Petition requests that the Commission clarify one of the express limitations of Section 332(c)(7)(B) – *i.e.*, whether reliance solely on the presence of other carriers effectively operates as a prohibition under Section 332(c)(7)(B)(i)(II) – we find that the Petitioner is not seeking an additional limitation beyond those enumerated in subparagraph (B).

65. In addition, opponents argue that denial of a single application is insufficient to demonstrate a violation of the "effect of prohibiting" clause.[195] Circuit courts have generally been hesitant to find that denial of a single application demonstrates such a violation, but to varying degrees, they allow for that possibility.[196] We note that the denial of an application may sometimes establish a violation of Section 332(c)(7)(B)(ii) if it demonstrates a policy that has the effect of prohibiting the provision of personal wireless services as interpreted herein. Whether the denial of a single application indicates the presence of such a policy will be dependent on the facts of the particular case.

D. Ordinances Requiring Variances

66. *Background*. In its Petition, CTIA requests that the Commission preempt, under Section 253(a) of the Act,[197] local ordinances and State laws that effectively require a wireless service provider to obtain a variance, regardless of the type and location of the proposal, before siting facilities.[198] It asks the Commission to declare that any ordinance automatically imposing such a condition is "an impermissible barrier to entry under Section 253(a)" and is therefore preempted.[199] To support such action, CTIA provides two examples of zoning limitations in a "New Hampshire community" and a "Vermont community" that it claims in effect require carriers to obtain a special variance.[200] Wireless providers that address this issue agree with the Petition, arguing that the variance process sets a high evidentiary bar which diminishes the wireless providers' prospects of gaining approval to site facilities.[201] Many other commenting parties are opposed to the Petition's request and assert, for example, that Section 332(c)(7) is

[193] *See* County of Albemarle, Virginia Comments at 8-9.

[194] 47 U.S.C. § 332(c)(7)(A).

[195] *See* NATOA et al. Comments at 19-20; Coalition for Local Zoning Authority Comments at 11.

[196] *See*, *e.g.*, *Town of Amherst, N.H. v. Omnipoint Communications Enterprises, Inc.*, 173 F.3d 9, 14 (1st Cir. 1999) ("Obviously, an individual denial is not automatically a forbidden prohibition violating the [effect of prohibiting clause]."); *APT Pittsburgh L.P. v. Penn Township Butler County of Pa.*, 196 F.3d at 478-79 ("Interpreting the [Telecommunications Act's] 'effect of prohibiting' clause to encompass every individual zoning denial simply because it has the effect of precluding a specific provider from providing wireless services, however, would give the [Act] preemptive effect well beyond what Congress intended. . . . This does not mean, however, that a provider can never establish that an individual adverse zoning decision has the 'effect' of violating [Section] 332(c)(7)(B)(i)(II)."); *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d at 731 ("it would be extremely dubious to infer a general ban from a single [] denial"). *See also* T-Mobile, USA, Inc. v. City of Anacortes, 572 F.3d 987, 994-95 (9th Cir. 2009) (finding that because the city was unable to show that there were any available and feasible alternatives to T-Mobile's proposed site, the City's denial of T-Mobile's application constituted a violation of the effect of prohibiting clause under Section 332(c)(7)(B)(i)(II)).

[197] 47 U.S.C. § 253(a).

[198] *See* Petition at 35-37.

[199] *Id*. at 37; *see also id*. at 36 ("The FCC should declare that any ordinance that automatically requires a . . . variance . . . is preempted. . . ").

[200] *See id*. at 36.

[201] *See, e.g.,* Sprint Nextel Comments at 13-14; CalWA Comments at 3; Rural Cellular Association Comments at 8; MetroPCS Comments at 13.

the exclusive authority in the Act on matters involving wireless facility siting.[202] They maintain that Section 253 does not apply to wireless facility siting disputes involving blanket variance ordinances.[203]

67. *Discussion*. We deny CTIA's request for preemption of ordinances that impose blanket variance requirements on the siting of wireless facilities. Because CTIA does not seek actual preemption of any ordinance by its Petition,[204] we decline to issue a declaratory ruling that "zoning ordinances requiring variances for all wireless siting requests are unlawful and will be struck down if challenged in the context of a Section 253 preemption action."[205] CTIA does not present us with sufficient information or evidence of a specific controversy on which to base such action or ruling,[206] and we conclude that any further consideration of blanket variance ordinances should occur within the factual context of specific cases. To the extent specific evidence is presented to the Commission that a blanket variance ordinance is an effective prohibition of service, then we will in that context consider whether to preempt the enforcement of that ordinance in accordance with the statute. We note that in denying CTIA's request, we make no interpretation of whether and how a matter involving a blanket variance ordinance for personal wireless service facility siting would be treated under Section 332(c)(7) and/or Section 253 of the Act.[207]

E. Other Issues

68. *Service Requirements*. Numerous parties argue that the Petitioner failed to follow the Commission's service requirements with respect to preemption petitions.[208] Our rules require that a party filing either a petition for declaratory ruling seeking preemption of State or local regulatory authority, or a petition for relief under Section 332(c)(7)(B)(v), must serve the original petition on any State or local government whose actions are cited as a basis for requesting preemption.[209] By its terms, the service requirement does not apply to a petition that cites examples of the practices of unidentified jurisdictions to demonstrate the need for a declaratory ruling interpreting provisions of the Communications Act.[210] Commenters' principal argument is that the Commission should require the Petitioner to identify the

[202] 47 U.S.C. § 332(c)(7).

[203] Several commenters argue that by using the sweeping phrase "nothing in this chapter," Congress made clear that it intended Section 332(c)(7) to override any other provision in the Communications Act that may be in conflict, including Section 253. They further argue that CTIA's proposal to have the Commission broadly preempt any ordinances "effectively" requiring a variance directly conflicts with Congress' preservation of local zoning authority in Section 332(c)(7). *See, e.g.*, NATOA et al. Comments at 7; California Cities Comments at 23-24; Fairfax County Comments at 3; Michigan Municipalities Comments at 2; N.C. Assoc. of County Commissioners Comments at 1-2.

[204] *See, e.g.*, CTIA Reply Comments at 33 n.124.

[205] *Id*. at 30.

[206] Although the Petition identifies two examples that Petitioner describes as problematic, it does not represent that the ordinances explicitly require variances for all applications, nor does it attempt to demonstrate with any specificity why the examples effectively require variances in all instances. *See* Petition at 36 (briefly describing ordinances of communities in Vermont and New Hampshire).

[207] 47 U.S.C. §§ 332(c)(7), 253.

[208] *See*, *e.g.*, Coalition for Local Zoning Authority Comments at 2-4; NATOA et al. Comments at 21; Greater Metro Telecom. Consortium and City of Boulder, CO Comments at 2-3.

[209] 47 C.F.R. § 1.1206(a), Note 1.

[210] We note that the Petitioner did belatedly serve the two local governments whose ordinances were described in the Petition as requiring variances; however, as discussed above, we deny Petitioner's request to preempt ordinances that require variances. *See* Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, *Opposition to Motions for Extension of Time*, at 3 n.7 (filed Aug. 26, 2008).

jurisdictions that it references anonymously, which, they assert, would then trigger the service requirement. However, nothing in the rules requires that these jurisdictions be identified. We recognize, as commenters emphasize, that in the absence of identification it has not been possible for some local governments to respond to certain factual statements in the Petition, either directly or through their associations,[211] and we take this into account in considering the weight we give to these assertions. At the same time, State and local governments have entered voluminous evidence into the record on their own behalf, including responses to several of the specific examples offered by the Petitioner. Accordingly, we conclude that the record is sufficient to address the Petitioner's claims.

69. *Radiofrequency (RF) Emissions*. Several commenters argue that we should deny CTIA's Petition in order to protect local citizens against the health hazards that these commenters attribute to RF emissions.[212] Section 332(c)(7)(B)(iv) of the Act provides that "[n]o State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions."[213] To the extent commenters argue that State and local governments require flexibility to deny personal wireless service facility siting applications or delay action on such applications based on the perceived health effects of RF emissions, this authority is denied by statute under Section 332(c)(7)(B)(iv). Accordingly, such arguments are outside the scope of this proceeding.

70. In its Comments and Cross-Petition, EMRPI contends that in light of additional data that has been compiled since 1996, the RF safety regulations that the Commission adopted at that time are no longer adequate.[214] EMRPI is asking us to revisit the Commission's previous decision that the scientific evidence did not support the establishment of guidelines to address the non-thermal effects of RF emissions.[215] This request is also outside the scope of the current proceeding, and we therefore dismiss EMRPI's Cross-Petition.

IV. CONCLUSION

71. For the reasons discussed above, we grant in part and deny in part CTIA's Petition for a Declaratory Ruling interpreting provisions of Section 332(c)(7) of the Communications Act. In particular, we find that a "reasonable period of time" for a State or local government to act on a personal wireless service facility siting application is presumptively 90 days for collocation applications and presumptively 150 days for siting applications other than collocations, and that the lack of a decision within these timeframes constitutes a "failure to act" based on which a service provider may commence an action in court under Section 332(c)(7)(B)(v). We also find that where a State or local government denies a personal wireless service facility siting application solely because that service is available from another provider, such a denial violates Section 332(c)(7)(B)(i)(II). By clarifying the statute in this manner, we recognize Congress' dual interests in promoting the rapid and ubiquitous deployment of advanced, innovative, and competitive services, and in preserving the substantial area of authority that Congress reserved to State and local governments to ensure that personal wireless service facility siting

---

[211] *See, e.g.*, City of Philadelphia Comments at 2-3 (arguing that the failure of the Petitioner to identify and serve the localities discussed in its Petition denies the Commission a complete and fair record of the facts).

[212] *See, e.g.,* Catherine Kleiber Comments; E. Stanton Maxey Comments at 1; Maria S. Sanchez Comments at 1-2; Miranda R. Taylor Comments at 1-2.

[213] 47 U.S.C. § 332(c)(7)(B)(iv).

[214] EMRPI Comments and Cross-Petition at 4.

[215] Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, ET Docket No. 93-62, *Second Memorandum Opinion and Order and Notice of Proposed Rule Making,* 12 FCC Rcd 13494, 13505 ¶ 31 (1997), *aff'd sub nom*. *Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000), *cert. denied sub nom. Citizens for the Appropriate Placement of Telecommunications Facilities v. FCC*, 531 U.S. 1070 (2001).

occurs in a manner consistent with each community's values.

V. ORDERING CLAUSES

72. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 201(b), 253(a), 303(r), and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 201(b), 253(a), 303(r), 332(c)(7), and Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, the Petition for Declaratory Ruling filed by CTIA—The Wireless Association IS GRANTED to the extent specified in this Declaratory Ruling and otherwise IS DENIED.

73. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 4(j), and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 332(c)(7), and Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, the Cross-Petition filed by the EMR Policy Institute IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

List of Participants in Proceeding

Comments

AT&T Inc. (AT&T)
Air Line Pilots Association, International
Aircraft Owners and Pilots Association
Airports Council International-North America
Alltel Communications, LLC
American Legislative Exchange Council
American Planning Association
Arthur Firstenberg
Atlantic Technology Consultants, Inc.
Aviation Council of Alabama Inc.
Aviation Department, Charles B. Wheeler Downtown Airport
B. Blake Levitt
Bartonville, Texas
Broadcast Signal Lab, LLC
Cable and Telecommunications Committee of the New Orleans City Council
California Wireless Association (CalWA)
Carole Maurer and John Dilworth
Cascade Charter Township, Michigan
Catawba County
Catherine Kleiber
Charles B. Wheeler Downtown Airport
Charleston County Planning Department, Charleston County, South Carolina
Citizens Against Government Waste
City of Airway Heights, Washington State
City of Albany, California
City of Albuquerque, New Mexico
City of Anacortes, Washington
City of Apple Valley, Dakota County Minnesota
City of Arlington, Texas
City of Auburn, Washington (City of Auburn, WA)
City of Austin, Texas
City of Bartonville, Texas
City of Bellevue, Washington
City of Bellingham, Washington (City of Bellingham, WA)
City of Bloomington Minnesota
City of Boca Raton
City of Burien, Washington (City of Burien, WA)
City of Champaign, Illinois
City of Cincinnati, Ohio
City of Columbia, South Carolina
City of Coppell, Texas
City of Dallas, Texas
City of Des Plaines, Illinois
City of Dublin, Ohio (City of Dublin, OH)
City of Dubuque

City of Evanston, Illinois
City of Farmers Branch
City of Gahanna, Ohio
City of Golf Shores
City of Grand Rapids
City of Greensboro, North Carolina
City of Grove City, Ohio (City of Grove City, OH)
City of Gulf Shores, Alabama
City of Hammond, Michigan
City of Henderson, Nevada
City of Houston, Texas
City of Huntsville, Alabama
City of Kasson, Minnesota
City of Kirkland, Washington
City of Lancaster, Texas
City of LaGrande, Oregon
City of Las Vegas, Nevada
City of Longmont, Colorado
City of Lucas, Texas
City of New Ulm, Minnesota
City of North Oaks
City of North Ridgeville, Ohio
City of Oak Park Heights
City of Philadelphia
City of Plymouth, Minnesota
City of Prior Lake, Minnesota
City of Red Wing
City of Richardson Texas
City of Rowlett Texas
City of Saint Paul, Minnesota and the City's Board of Water Commissioners
City of San Antonio, Texas
City of Scottsdale
City of SeaTac, Washington (City of SeaTac, WA)
City of Sebastopol
City of Tyler
City of Walker, Michigan
City of Wichita and Sedgwick County, Kansas
Clear Creek County, Colorado
Coalition for Local Zoning Authority City of Los Angeles, et al. (Coalition for Local Zoning Authority)
Connecticut Siting Council, State of Connecticut
County of Albemarle, Virginia
County of Frederick, Virginia
County of Goochland & Office of the County Attorney
County of Sonoma (Sonoma County, CA)
Craven County Board of Commissioners
CTIA - The Wireless Association (Petitioner)
Domagoj Vucic
Donna G. Haldane
DuPage Mayors and Managers Conference
Elizabeth Kelley
Evelyn Savarin
FCC Intergovernmental Advisory Committee

Fairfax County, VA
Federal Aviation Administration (FAA)
Florida Airports Council
Florida Department of Transportation
GMTC-RCC
George Heartwell, Mayor of City of Grand Rapids, Michigan
Glenda Cassutt
Goochland County, Virginia
Grand County, Colorado
Gray Robinson, P.A.
Greater Metro Telecommunications Consortium, et al.
Incorporated Village of Laurel Hollow
Iredell County, North Carolina
Jill Koontz
Kimberly Kitano
La Grande, Oregon
League of Minnesota Cities
League of Oregon Cities
Lee County Port Authority
Louisville Regional Airport Authority
Maria S. Sanchez
Marilyn Stollon
Marjorie Lundquist
MetroPCS Communications, Inc. (MetroPCS)
Michael C. Seamands
Michigan Municipalities and Other Concerned Communities (Michigan Municipalities)
Miranda Taylor
Miriam Dyak
Missouri State Aviation Council
National Agricultural Aviation Association
National Association of Counties (NACo)
National Association of State Aviation Officials
National Association of Telecommunications Officers and Advisors, National League of Cities, and United States Conference of Mayors (NATOA et al.)
National Emergency Number Association (NENA)
NextG Networks, Inc. (NextG Networks)
North Carolina Association of County Commissioners (N.C. Assoc. of County Commissioners)
North Carolina Chapter of the American Planning Association
North Carolina Department of Transportation's Division of Aviation
North Carolina League of Municipalities
Northwest Municipal Conference
NYC Council Member Tony Avella, Chair, Zoning and Franchises Subcommittee
Olemara Peters
Olmsted County Board of Commissioners
Palm Beach County Planning, Zoning & Building Department
PCIA—The Wireless Infrastructure Association and The DAS Forum
Piedmont Environmental Council, Citizens for Fauquier County, Shenandoah Valley Network, and Appalachian Trail Conservancy
Pima County, Arizona
Prince William County, Virginia
Robeson County, North Carolina
Rural Cellular Association

SCAN NATOA, Inc. (SCAN NATOA)
San Francisco Neighborhood Antenna-Free Union
Sandi Maurer
Sanford Airport Authority
Soledad M. de Pinillos
Sprint Nextel Corporation (Sprint Nextel)
State of Connecticut
Stokes County, North Carolina (Stokes County, N.C.)
Susan Izzo
Texas Municipal League
The Colony, Texas
The EMR Network
The EMR Policy Institute (EMRPI)
The League of California Cities, the California State Association of Counties, and the City and County of San Francisco (California Cities)
The University of Michigan (University of Michigan)
T-Mobile USA, Inc. (T-Mobile)
Town of Alton, New Hampshire
Town of Apex, North Carolina
Town of Cary, North Carolina
Town of Gilbert, Arizona
Town of Grand Lake, Colorado
Town of Matthews, North Carolina
Town of Trent Woods
United States Cellular Corporation (U.S. Cellular)
Varnum, Riddering, Schmidt & Howlett, LLP
Verizon Wireless
Victoria Jewett
Village of Bay Harbor, Town of Bay Harbor Islands, Town of Cutler Bay, City of Hollywood, City of Homestead, City of Miramar, City of Sunrise, City of Weston (Florida Cities)
Village of Alden, New York (Village of Alden, NY)
Village of Buffalo Grove
Village of East Hills, New York
Village of Hoffman Estates
Village of Morton Grove
Village of Mount Prospect, Illinois
Village of New Albany, Ohio
Village of Roslyn Estates (Nassau County, New York)
Village of Round Lake
Village of Skokie
Wake County (North Carolina) Planning Department
West Sayville Civic Association
Wichita-Sedgwick County Metropolitan Area Planning Department

Reply Comments

American Consumer Institute Center for Citizen Research
Americans for Tax Reform
Cable and Telecommunications Committee of the New Orleans City Council
California Wireless Association (CalWA)
Citizens Against Government Waste
City of Albuquerque, New Mexico

City of Cincinnati - City Planning Department
City of New York
City of Philadelphia
City of San Antonio, Texas
City of San Diego
City of Texas City
Coalition for Local Zoning Authority City of Los Angeles, et al. (Coalition for Local Zoning Authority)
County of Fairfax, Virginia (Fairfax County)
CTIA - The Wireless Association (CTIA Reply)
Greater Metro Telecommunications Consortium, et al.
The League of California Cities, the California State Association of Counties, and the City and County of San Francisco (California Cities)
Montgomery County, Maryland
National Association of Telecommunications Officers and Advisors, National League of Cities, and United States Conference of Mayors (NATOA et al.)
National Association of Towns and Townships
NextG Networks, Inc. (NextG Networks)
Ohio Township Association
PCIA—The Wireless Infrastructure Association and The DAS Forum
Rural Telecommunications Group, Inc.
SCAN NATOA, Inc. (SCAN NATOA)
United States Cellular Corporation (U.S. Cellular)
Wisconsin Towns Association
Verizon Wireless

APPENDIX B

Section 332(c) of the Communications Act of 1934

(7) **Preservation of local zoning authority**

(A) **General authority.** Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) **Limitations.**

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any 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 a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) **Definitions.** For purposes of this paragraph—

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v)).

STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI

Re: *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165.

Wireless communication—mobile—has always been central to the FCC's mission. And mobile has never had greater potential to help address vital priorities—including generating economic growth, spurring job creation, and advancing national purposes like health care, education, energy independence, and public safety. We must ensure that America leads the world in mobile.

Because mobile increasingly means broadband as well as voice, issues involving spectrum policy and wireless deployment will be important elements of our National Broadband Plan, due by February 17th, and we will hear more about that later today. But even as we work on a National Broadband Plan, we can and should move forward with concrete actions to unleash the opportunity of mobile.

To that end, in August the Commission launched inquiries into how best to promote innovation, investment, and competition in the wireless industry, as well as how to protect and empower consumers of wireless and other communications services.

In October, I outlined a Mobile Broadband Agenda that included as a key element removing obstacles to robust and ubiquitous mobile networks.

And with today's Declaratory Ruling, the Commission moves forward on that agenda and takes an important step to cut through red tape and accelerate the deployment of next-generation wireless services.

After years on the distant horizon, 4G networks are ready to move from the drawing board to the marketplace. One major provider has already launched 4G WiMAX service in select markets. Competitors have announced plans to debut LTE networks in major markets around the country beginning next year.

The real winners here will be American consumers and businesses, who will soon be able to experience mobile broadband speeds and capacities that rival what many fixed broadband customers receive at home today. These new wireless networks will change how we communicate and how we engage in commerce. And they hold the promise of improving our quality of life. To take one example offered by the American Telemedicine Association in encouraging us to take the step we take today, next generation wireless networks will allow doctors to start using mobile technology to monitor and treat chronic illnesses like heart disease and to improve doctor-patient communications.

Accelerating the deployment of these new networks is obviously a critical goal for the nation. But there is a lot of work that remains to be done before we can enjoy their benefits, and it won't be easy. We at the FCC understand the many challenges mobile operators face in turning engineering plans into actual networks of steel towers, antennas, silicon chips, and sophisticated electronics. We understand that sometimes the Commission needs to act, to establish clear rules of the road to reduce uncertainty and delay, spur investment, encourage innovation, and ensure that the benefits of advanced communications are available to all Americans.

Today's ruling is one example of creating such rules. One challenge mobile operators face is getting timely zoning approvals from state and local officials before building towers or deploying new equipment. Recognizing this problem, Congress required these entities to act on such requests "within a reasonable period of time." Yet, despite Congress's strong statement, the record before us indicates that delays have continued to persist in too many states and localities.

For example, at the time the petition was filed, of the 3,300 pending zoning applications for wireless facilities, over 760 had been pending for more than a year and 180 had been pending for more than three years. There is evidence that in certain jurisdictions the tower siting process is getting longer, even as the need for more towers and for timely decisions is growing.

Today's Declaratory Ruling will help end these unnecessary delays and speed the deployment of 4G networks, while also respecting the legitimate concerns of local authorities and preserving their control over local zoning and land use policies.

Our decision achieves this balance by defining reasonable and achievable timeframes for state and local governments to act on zoning applications—90 days for collocations and 150 days for other siting applications. I want to be clear that the process we establish does not dictate any substantive outcome in any particular case, or otherwise limit state and local governments' fundamental authority over local land use. It simply requires that they must reach land use decisions that involve wireless equipment in a timely fashion and be able to justify their conclusions to a federal district court if challenged, just as Congress specified.

I should note that we reach today's Ruling in response to a petition brought by CTIA, the wireless industry's trade association, and I would like to acknowledge CTIA's role in bringing this important issue to the Commission's attention. The decision we reach today does not grant the full relief that the industry's petition seeks—for example, the petition argued for a shorter set of deadlines, and a requirement that zoning applications be "deemed granted" as soon as the deadlines expired. I believe that the timeframes we adopt today, and the requirement that parties seek injunctive relief from a court, are more consistent with preserving State and local sovereignty and with the intent of Congress.

Nevertheless, I believe the rules we adopt today are amply sufficient to the task and will have an important effect in speeding up wireless carriers' ability to build new 4G networks—which will in turn expand and improve the range of wireless choices available to American consumers. Of course, we won't rely just on a belief that our rules are having the effects we intend. We will continue to monitor this area closely and ensure that the zoning process with respect to tower siting is operating in the way Congress intended.

I would also like to thank the many able representatives of state and local governments who have worked with my office and the Wireless Bureau to ensure that today's ruling respects the legitimate needs and prerogatives of local land use authorities.

And of course special thanks to Ruth Milkman and her hardworking staff in the Wireless Bureau for their excellent work on this item, and for striving to strike a smart and effective balance between the deployment and expansion of wireless networks and preserving state and local zoning authority.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165.

Today's action makes a further down-payment on the objectives of the National Broadband Plan to ensure that all Americans have access to Twenty-first century communications. Wireless service is clearly going to play—is already playing—a huge role in delivering broadband to rural areas—with the capability of offering connectivity where none exists today and mind-boggling new services to consumers as networks are upgraded. Building wireless broadband infrastructure—and building it expeditiously—is integral to our nation's success in too many ways to recount here this morning. Nor do we have to go beyond the obvious in pointing out how urgent it is to have tower infrastructure in place to support all this.

Building new wireless towers and attaching additional antennae to existing towers generally require—and rightly so—State and local zoning approval. State and local governments are the ones best positioned to take into account the legitimate interests of citizens in their communities in often-complex zoning decisions. Congress, in enacting Section 332 of the Communications Act, preserved this important zoning role that State and local authorities play. At the same time, in order to encourage the expansion of wireless networks nationwide, Congress directed that zoning decisions be made "within a reasonable period of time," allowing court review for failure to act within that timeframe.

In today's decision, we seek to provide greater certainty to both State and local governments, as well as to the wireless industry, as to what constitutes a reasonable period of review for collocation and other tower siting applications. Based on the record and our interpretation of the statute, we clarify the point at which an applicant may seek—should it choose to do so—court review where a State or local zoning authority has not acted. While we establish a presumption here, nothing in this decision reduces the authority of a court of relevant jurisdiction from assessing, based on the merits of any individual case, whether a zoning review of more than 90 days for collocation applications or 150 days for other tower siting applications is reasonable.

I am a great believer in our federal system of government, and have not been shy in the past about opposing Commission action that unnecessarily encroached on the authority of State and local governments. It is for that reason that I strongly dissented from the 2006 *Local Franchising Order*—which I thought went too far in usurping the authority of local franchising authorities without an adequately granular record to justify such action. Additionally, the Commission announced in that previous decision that a cable franchise application pending for more than a given timeframe was deemed granted. Nothing subtle about that approach!

We take no such actions today. Instead, we actually recognize the rights of State and local jurisdictions and also the importance of the courts. We refrain from dictating final outcomes. But we give an important boost to getting this important infrastructure building job done so that consumers may reap more of the blessings of the great potential of wireless technologies and services. That looks like a win-win-win to me. So I commend the Chairman for getting this important item to us, and I thank all my colleagues, and the Bureau, too, for their hard work and for listening to the concerns of ***all*** parties as we went about crafting today's ruling. It's fair and balanced for real and I am pleased to support it.

STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

Re: *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165.

In pursuit of helping to create more choices for consumers, I have long emphasized the importance of removing regulatory roadblocks to ease the ability of new entrants, and existing service providers, to build more delivery platforms for innovative services. For instance, I heartily supported the Commission's work to: free up the TV white spaces for unlicensed use, set shot clocks for local video franchise proceedings, and classify broadband services – no matter the platform – as unregulated Title I information services, to name just a few examples.

Today we are taking yet another positive deregulatory step: We are promoting deployment of broadband, and other emerging wireless services, by reducing the delays associated with the construction and improvement of wireless facilities. I am pleased to support this declaratory ruling, and I thank Chairman Genachowski for his leadership in this area.

Our ruling strikes an elegant balance between establishing a deregulatory national framework to clear unnecessary underbrush, while preserving state and local control over tower siting. In creating deadlines for decisions on wireless siting requests – 90 days for the review of collocation applications and 150 days for the review of other siting applications – we have both granted the industry greater certainty and provided our state and local colleagues reasonable periods for action, as well as the flexibility, to fully consider the nature and scope of a particular siting request. Put another way, our action eliminates unreasonable delay and uncertainty, the costs of which are passed on to wireless consumers, and allows our state and local colleagues the continued ability to safeguard the interests of their constituents. As we fashion a National Broadband Plan for Congress, we should continue to adopt simple initiatives to speed broadband deployment such as this one, which will help spur America's Internet economy, create jobs, and make us more competitive internationally.

On a related point, in recent months, I have heard many in the wireless industry and elsewhere call for "more spectrum." Some have suggested a critical need for many hundreds of megahertz. I fully agree that identifying additional bandwidth for long-term growth is a necessary and worthy endeavor, and I look forward to engaging in that effort. In the meantime, though, I hope that today's action – and the associated reduction in regulatory costs – will also free up capital that may be more effectively used to take better advantage of the immediate fixes already available in the marketplace. These include more robust deployment of enhanced antenna systems; improved development, testing and roll-out of creative technologies, where appropriate, such as cognitive radios; and enhanced consideration of, and more targeted consumer education on, the use of femto cells. Each of these technological options augments capacity and coverage, which are especially important for data and multimedia transmissions.

In short, the Commission's action today will save the builders of tomorrow's broadband infrastructure time and money. It is my hope that those two crucial resources will be used to squeeze more efficiency out of the airwaves while we undergo the slower process of identifying and bringing more spectrum to market. Accordingly, I eagerly anticipate learning more about the benefits that our decision today has on technological improvements and, ultimately, on consumers.

Thank you to Ruth Milkman and the talented Wireless Telecommunications Bureau staff. Also, many thanks to Austin Schlick and his team in OGC for strengthening the legal arguments underpinning this ruling. We especially appreciate the close coordination among your teams and the 8th floor offices on

this draft. Today is a win-win due in no small part to your efforts.

STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

Re: *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165.

One of the challenges we sometimes face at the Commission is harmonizing federal and local interests. Having recently arrived at the FCC from a state commission, I understand both sides of this occasionally unavoidable tension. In my experience, when these interests collide, the most appropriate path to resolution can be found in the answer to one simple question: What outcome is best for consumers?

Today's item, which explains what constitutes a "reasonable period of time" to act on a wireless facility siting application, provides a textbook example of the merits of such an approach. On the one hand, states and localities have understandably expressed concern about ceding power over zoning decisions – determinations that are clearly within their purview. On the other hand, the Commission has a strong interest in ensuring the timely rollout of robust wireless networks throughout the country, especially in light of our statutory obligation to develop a national broadband plan. By asking ourselves what is best for consumers – in this case whether a specified reasonable time period for acting on wireless facility siting applications is more advantageous than an unlimited and undefined timeframe – we are able to arrive at a decision that, in reality, makes good sense for all parties.

There is simply no reason to allow an interminable process for these applications. Consumers suffer when any governmental body – federal, state, or local – unnecessarily stands in the way of making timely determinations that have a direct impact on the quality of their lives. At the same time, consumers are harmed when arbitrary and unreasonable timeframes are imposed that speed up a process, resulting in decisions lacking appropriate due process protections or that are based on insufficient evidence.

Today's compromise preserves, as it must, state and local governments' roles as the arbiters of the merits of wireless service facility siting applications. It also, based on the record developed, provides the presumptively reasonable timeframes required to process these applications. In fact, the item merely adopts the time frames under which many responsible jurisdictions already operate in practice.

The compromise also recognizes, however, that a need has arisen for the Commission to act pursuant to its authority under the Communications Act, in order to ensure that other important Congressional and Commission goals are achieved. By giving meaning to the phrase "a reasonable period of time," we are breathing life into a provision of the Act that is essential to our mobile future. Consumers rely on all of us – federal, state, and local governments – to be responsible and responsive, and by ensuring an orderly siting application process, we are doing just that.

I would like to thank the staff of the Wireless Telecommunications Bureau and the Office of the General Counsel for their terrific work on this pro-consumer item. In developing this fine solution to a tricky problem, they have appropriately accounted for all of the legitimate interests involved, and have arrived at an answer that will benefit the provision of mobile services in the near future. I am pleased to support this item. Thank you.

STATEMENT OF
COMMISSIONER MEREDITH ATTWELL BAKER

Re: *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165.

Wireless broadband is improving the quality of lives across the country. By 2020 it is expected that most people will access the Internet with a wireless device and that most broadband networks will contain wireline and wireless components. As we are learning every day, building the infrastructure necessary to support those networks, to bring the benefits of these networks to the people who need them, any place, any time is an enormous challenge.

Our action today addresses one important aspect of network infrastructure deployment—the time it can take to build out wireless infrastructure--and will help facilitate the process of building or upgrading the towers that are necessary to support our wireless broadband. However, it is only a first step. We will need to continue to look for ways to encourage and facilitate broadband deployments in ways that are consistent with the needs and interests of the communities where they are deployed.

The item before us carefully balances several concerns in accomplishing the Commission's goal. First, the item recognizes the rights and duties of local communities to review and approve applications for zoning approvals for wireless communications facilities. At the same time, the item also appreciates the need to provide greater timeliness and certainty to the men and women who build our mobile broadband infrastructure.

Several years ago, I was involved NTIA's comprehensive effort to lower barriers for broadband innovation, which included a process for streamlining and simplifying permitting on federal lands for rights-of-way, including tower siting. It was a useful undertaking that helped spur wireless deployments in previously unserved areas. I hope our action today will be equally successful.

In general, as we seek to promote and encourage our nation's broadband infrastructure, and particularly mobile broadband, we should always seek ways to streamline the deployment process while at the same time preserving the interests of local communities. I believe the item before us is a step in the right direction.

I am especially pleased that our item today recognizes the streamlined tower citing procedures that are already in place in a number of states across the country, and hope other states will follow their lead as well.

I thank the Chairman and the Bureau leadership for bringing this item before the Commission, and am pleased to join my colleagues in lending my support.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling to Clarify	)	WT Docket No. 08-165
Provisions of Section 332(c)(7)(B) to Ensure	)	
Timely Siting Review and to Preempt Under	)	
Section 253 State and Local Ordinances that	)	
Classify All Wireless Siting Proposals as	)	
Requiring a Variance	)	
	)	

ORDER ON RECONSIDERATION

Adopted: August 3, 2010 **Released: August 4, 2010**

By the Commission:

I. INTRODUCTION

1. Last November, the Commission in a Declaratory Ruling established timeframes for State and local governments to act on wireless facility siting applications. Five organizations representing local governments requested that we reconsider a portion of that ruling relating to the suspension of these time periods when an application is incomplete as filed. Today, we reaffirm our decision that the timeframes – 90 days for collocations and 150 days for other wireless facility siting applications – are automatically tolled only when the reviewing government notifies the applicant of the incompleteness within the first 30 days after receipt. In so doing, we promote the timely deployment of innovative broadband and other wireless services while preserving the legitimate authority of State and local governments, in furtherance of the goals of our initial decision and consistent with the recommendations of the National Broadband Plan.

II. BACKGROUND

2. On July 11, 2008, CTIA–The Wireless Association® (CTIA) filed a petition requesting that the Commission issue a declaratory ruling clarifying the provisions of the Communications Act that provide for State and local review of personal wireless facility siting applications.[1] Principally, CTIA sought clarification of provisions in Section 332(c)(7) of the Communications Act that it contended were ambiguous and had been interpreted in a manner that allowed zoning authorities to impose unreasonable impediments to wireless facility siting and the provision of wireless services.

[1] In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, *Petition for Declaratory Ruling* of CTIA–The Wireless Association®, WT Docket No. 08-165, filed July 11, 2008 (CTIA Petition).

3. Section 332(c)(7) of the Communications Act generally preserves State and local authority over wireless facility siting, while also placing important limitations on that authority. Section 332(c)(7)(B)(ii) states that State or local governments must act on requests for personal wireless service facility sitings "within a reasonable period of time."[2] Section 332(c)(7)(B)(v) provides that "[a]ny person adversely affected by any final action or failure to act" by a State or local government on a personal wireless service facility siting application "may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction."[3]

4. On August 14, 2008, the Wireless Telecommunications Bureau (WTB) requested comment on the Petition.[4] Hundreds of comments and replies were filed in response to WTB's *Public Notice*, including comments from wireless service providers, tower owners, local and State government entities, and airport authorities.[5] In the Commission's *Ruling*,[6] in response to record evidence of "lengthy and unreasonable delays" involving zoning authority review of tower and antenna siting applications,[7] the Commission, among other things, clarified provisions of Section 332(c)(7) relating to the timeliness of action on these applications.[8] The Commission found that unreasonable delays in a significant number of cases had obstructed the provision of wireless services.[9] Such delays, the Commission concluded, impede advances in coverage, deployment of advanced wireless communications services, and competition that Congress has deemed critical.[10]

5. To address these findings, the Commission interpreted what constitutes a "reasonable period of time" and a "failure to act" under Section 332(c)(7) of the Communications Act. The Commission found that 90 days for processing collocation applications and 150 days for processing applications other than collocations are generally reasonable timeframes.[11] The Commission further determined that failure to meet the applicable timeframe presumptively constitutes a failure to act under Section 332(c)(7)(B)(v), enabling an applicant to pursue judicial relief within the next 30 days.[12] The Commission defined these time periods as rebuttable presumptions and acknowledged that more time may be needed in individual

[2] 47 U.S.C. § 332(c)(7)(B)(ii).

[3] 47 U.S.C. § 332(c)(7)(B)(v). *See also Ruling*, 24 FCC Rcd at 14008-10 ¶¶ 37-42.

[4] Wireless Telecommunications Bureau Seeks Comment On Petition For Declaratory Ruling By CTIA–The Wireless Association® To Clarify Provisions Of Section 332(c)(7)(B) To Ensure Timely Siting Review And To Preempt Under Section 253 State And Local Ordinances That Classify All Wireless Siting Proposals As Requiring A Variance, WT Docket No. 08-165, *Public Notice*, 23 FCC Rcd 12198 (WTB 2008) (*Public Notice*).

[5] *See generally* WT Docket No. 08-165.

[6] In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, *Declaratory Ruling*, 24 FCC Rcd 13994 (2009) (*Ruling*).

[7] *Ruling*, 24 FCC Rcd at 14004-06 ¶¶ 32-33.

[8] *See* 47 U.S.C. § 332(c)(7)(B)(ii),(v); *see also Ruling*, 24 FCC Rcd at 14010-15 ¶¶ 43-53. The Commission also found that it is a violation of Section 332(c)(7)(B)(i)(II) of the Communications Act for a State or local government to deny a personal wireless service facility siting application because service is available from another provider. *See id.* at 14015-19 ¶¶ 54-65. In addition, the Commission denied a request to find that a State or local regulation that requires a variance or waiver for every wireless facility siting violates Section 253(a) of the Communications Act. *See id.* at 14019-20 ¶¶ 66-67.

[9] *Id*. at 14005-06 ¶¶ 33-34.

[10] *Id*. at 14007-08 ¶ 35.

[11] *See Ruling*, 24 FCC Rcd at 14012 ¶ 45.

[12] *See id.*; *see also* 47 U.S.C. § 332(c)(7)(B)(v).

cases.[13] In particular, in the event an applicant pursues a judicial remedy, the Commission stated that the State or local authority has the opportunity to rebut the presumption that a delay was unreasonable.[14] Ultimately, the Commission stated, the court in each case will find whether the delay was in fact unreasonable under the circumstances of the case.[15] Thus, the Commission's *Ruling* reduces delays in the construction and improvement of wireless networks while preserving the authority of States and localities to make the ultimate determination on local zoning and land use policies.

6. The Commission also defined certain circumstances that would warrant adjustments to the presumptive deadlines, including when the applicant fails to submit a complete application or to file necessary additional information in a timely manner.[16] Specifically, the Commission stated that "when applications are incomplete as filed, the timeframes do not include the time that applicants take to respond to State and local governments' requests for additional information."[17] This automatic tolling, however, applies only if a zoning authority notifies an applicant within the first 30 days that its application is incomplete.[18] The Commission concluded that allowing for such tolling balances the need for a State or local government to have sufficient time to review an application for completeness with the interests of the applicant against a last-minute decision finding its application incomplete.[19] In addition, the Commission clarified that the presumptive deadlines for acting on siting applications could be extended beyond 90 or 150 days by mutual consent, and that such agreements serve to toll the commencement of the 30-day period for filing suit.[20]

7. On December 17, 2009, a Petition for Reconsideration or Clarification ("Petition") was filed by the National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American Planning Association ("Petitioners").[21] In their Petition:

> Petitioners seek reconsideration and clarification of the 30 day incompleteness deadline on both legal and policy grounds. First, the Commission exceeded its interpretation of its authority under Section 332(c)(7) in implementing a 30 day review for completeness deadline because the 30 day incompleteness deadline imposes additional limitations on personal wireless service facility siting

[13] *See, e.g., Ruling*, 24 FCC Rcd at 14004-05, 14010, 14011 ¶¶ 32, 42, 44.

[14] *See id*. at 14004-05 ¶ 32.

[15] *See id*. at 13995 ¶ 4.

[16] *See id*. at 14010 ¶ 42.

[17] *Id.* at 14014 ¶ 52.

[18] *Id*. at 14014-15 ¶ 53.

[19] *See id*.

[20] *See id*. at 14013 ¶ 49.

[21] In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, *Petition for Reconsideration or Clarification* of the National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American Planning Association, WT Docket No. 08-165, filed Dec. 17, 2009. Also on December 17, 2009, Petitioners filed an Emergency Motion for Stay pending Commission action on their petition. In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, *Emergency Motion for Stay* of the National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American Planning Association, WT Docket No. 08-165, filed Dec. 17, 2009. On January 29, 2010, WTB denied this Stay Request. *Order*, 25 FCC Rcd 1215 (WTB 2010).

process beyond those stated in Section 332(c)(7). Second, the ability to toll the shot clock must extend to valid reasons beyond the facial incompleteness of the application. Third, the 30 day review period does not reflect the realities of the zoning application process and will result in significant problems for local governments and applicants across the nation and could result in unnecessary litigation and/or siting delays unless modified. Fourth, the rule should be reconsidered based on input received by interested parties because the 30 day completeness rule was developed without public notice and without prior discussions with many interested parties.[22]

Petitioners further state that while they do not agree with the Commission's interpretation of its authority under Section 332 of the Act, the Petition does not challenge that interpretation.[23] The Commission issued a Public Notice on December 23, 2009, asking for comments in response to the Petition on or before January 22, 2010, and reply comments on or before February 8, 2010.[24] The Commission received a total of 21 comments, oppositions and replies in response to the Petition.[25]

8. On January 12, 2010, the City of Arlington, Texas, filed a petition for review in the United States Court of Appeals for the Fifth Circuit arguing, *inter alia*, that the Ruling generally exceeds the Commission's authority.[26] On February 19, 2010, the Commission filed a motion to hold the case in abeyance pending a decision on the Petition for Reconsideration. The City of Arlington, NATOA *et al.*, and other local government representatives opposed the motion. On March 4, 2010, the Court of Appeals granted the Commission's motion.[27]

III. DISCUSSION

A. Legal Authority to Impose a 30-Day Period for the Automatic Triggering of Tolling

9. Petitioners first contend that the Commission exceeded its own interpretation of its authority under Section 332(c)(7) of the Act.[28] In the *Ruling*, the Commission found that while Congress intended "to preclude the Commission from maintaining a rulemaking proceeding to impose additional limitations on the personal wireless service facility siting process beyond those stated in Section 332(c)(7)," the Commission retains the authority to interpret the limitations that Congress imposed in Section 332(c)(7).[29] Nevertheless, Petitioners argue, by allowing State and local governments to toll the timeframe for acting on an application only within 30 days after the application is filed, the Commission created an internal deadline for completeness of an application; and because this deadline is not contained within the

[22] Petition at 4.

[23] *See* Petition at 2.

[24] Wireless Telecommunications Bureau Seeks Comment on Petition for Reconsideration or Clarification of the Commission's Declaratory Ruling Clarifying Provisions in Section 332(c) of the Communications Act, WT Docket No. 08-165, *Public Notice*, 24 FCC Rcd 14703 (WTB 2009). Reply comments were not actually required to be filed until February 12, 2010, due to federal government snow closures.

[25] Commenters are listed in the Appendix.

[26] *City of Arlington v. FCC*, No. 10-60039 (5th Cir. filed Jan. 12, 2010).

[27] *City of Arlington v. FCC*, No. 10-60039 (5th Cir. order issued March 4, 2010).

[28] Petition at 4.

[29] *Ruling*, 24 FCC Rcd at 14002 ¶ 25. The Commission was interpreting the Conference Report on the Telecommunications Act, which provides that "[a]ny pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CM[R]S facilities should be terminated." H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. 208 (1996).

Communications Act, petitioners claim, it constitutes a "new limitation" on State and local governments in violation of the Commission's interpretation of its own authority.[30]

10. We disagree with Petitioners' argument that by defining the period within which the timeframe for acting on an application may be tolled automatically, the Commission established a new limitation on State and local governments that was not within the statute. The Commission determined that the timeframe may be tolled due to an application's incompleteness, and then specified the circumstances under which this tolling may occur, in order to define how the 90- and 150-day time periods established in the *Ruling* are to be counted in interpreting "a reasonable period of time." In other words, both the tolling provision and the conditions for its application address to what extent "a reasonable period of time" includes or excludes the time for completing an application upon notification by the State or local government. The period for tolling is an integral part of the Commission's interpretation of what constitutes a "reasonable period of time," and thus is consistent with the Commission's interpretation of its statutory authority.

11. Moreover, the Commission is under no statutory obligation to adopt any provision for automatic tolling of the presumptively reasonable time periods. Petitioners argue that the specification of a time period for automatic tolling is a "new limitation" on State and local governments, and that the absence of such a period would allow a State or local government to unilaterally toll the applicable timeframe at any point in the process. However, the Commission would have been within its discretion to define a "reasonable period of time" without allowing for any automatic tolling. The Commission included the automatic tolling provision to address concerns raised by State and local governments in their comments.[31] CTIA's Petition proposed firm timeframes and did not contemplate any circumstances under which those timeframes would be tolled.[32]

12. In addition, we note that although Petitioners assume for the purposes of their Petition that the Commission has the authority to interpret what is a "reasonable period of time," their challenge to the tolling period undercuts this assumption. Were State and local governments able unilaterally to toll the decisionmaking period at any time, the Commission's authority to define the presumptively reasonable period in which the statute requires them to act, which Petitioners assert they are not challenging here, would be rendered meaningless.

B. Policy Considerations for the 30-Day Limitation on the Automatic Triggering of Tolling

13. In addition to their legal argument against the 30-day limitation on the automatic triggering of tolling, Petitioners offer three policy arguments for modifying this limitation. First, Petitioners argue that there are legitimate reasons for tolling the applicable shot clock period that the *Ruling* does not address.[33] Petitioners note that sometimes, local governments must get approval or other information from governmental or quasi-governmental entities, such as the Federal Aviation Administration (FAA), Federal or State environmental authorities, and power utilities, before an application can be approved, and that the local government has no control over the time it takes for these entities to complete their review processes.[34] Petitioners contend that under such circumstances, the applications are not "incomplete," nor

[30] *See* Petition at 5. Government entities that commented on Petitioners' legal argument that the 30-day period exceeded the Commission's interpretation of its own authority uniformly supported Petitioners' analysis. *See, e.g.*, Los Angeles Comments at 2; San Antonio Comments at 2; Philadelphia Comments at 2; Livonia Comments at 2.

[31] *See Ruling*, 24 FCC Rcd at 14014 ¶ 52, n.155.

[32] *See generally*, CTIA Petition at 24-27.

[33] *See* Petition at 6.

[34] *See id.*; Mentor Comments at 2-3; Fairfax Reply Comments at 4.

is the local authority at fault for the delay.[35] Petitioners also argue that in some instances, the applicant's action or inaction in completing obligations related to the review process can prevent that process from being completed within the applicable time period.[36] As an example, Petitioners note that many jurisdictions require the applicant to follow publication and notice requirements before public hearings are convened on a zoning application. Petitioners state that if the applicant makes a mistake in this process, the local government has no legal power to proceed with the hearing.[37]

14. Second, Petitoners predict that the 30-day tolling period will cause various undesirable changes in the way zoning authorities process tower siting applications. They contend that when areas of concern become known after the 30-day period for tolling has passed, many State and local governments will now deny the applications because they will have insufficient time to engage in necessary follow-up exchanges and modifications.[38] In addition, because State and local governments will not want to find themselves in need of additional information after the 30-day period for tolling has lapsed, they will be forced to adhere to rigid application processes instead of the more informal zoning processes that are used for other types of applications.[39] Further, many State and local governments will seek additional information in the initial filing, even though such information would be unnecessary for most applications.[40] Petitioners also express concern that in some instances, rather than face the risk and expense of litigation, a zoning authority with limited resources may grant an application that it could not process within the 90- or 150-day timeframe due to a delay caused by the applicant or a third party, even though the State or local government would likely prevail on the merits.[41]

15. Third, Petitioners argue that due process and fairness require that the rule be reconsidered because the 30-day completeness rule was not contained in CTIA's Petition for Declaratory Ruling, and was developed without public notice and without prior discussions with interested parties.[42] Petitioners clarify in their Reply that they take no position on whether the Commission's decision to create a 30-day period for automatically triggering tolling violated the Administrative Procedure Act; rather, their concern is that the absence of a full record allegedly created unintended consequences.[43]

16. We find Petitioners' policy arguments unpersuasive. Fundamentally, the concerns Petitioners assert are addressed by the framework established in the *Ruling*. In particular, the *Ruling* provides both that the parties may agree to extend the presumptive deadline,[44] and that the reasonableness of delay in any case shall be considered by the court.[45] Thus, a State or local government may seek a tolling

[35] *See* Petition at 6.

[36] *See id*. at 7.

[37] *See id*. *See also* GMTC Comments at 3-4.

[38] *See id.* at 7-8. *See also*, *e.g*., Portland Comments at 4; Albuquerque Comments at 2; Philadelphia Comments at 4-5.

[39] *See* Petition at 8-9. *See also* Hoffmann Estates Comments at 4-5.

[40] *See* Petition at 8-9.

[41] *See* Petition at 7.

[42] *See* Petition at 10. *See also* Albuquerque Comments at 3; Fairfax Reply Comments at 2.

[43] Petitioners Reply Comments at 4.

[44] *See Ruling*, 24 FCC Rcd at 14013 ¶ 49 ("a 'reasonable period of time' may be extended beyond 90 or 150 days by mutual consent of the personal wireless service provider and the State or local government, and . . . in such instances, the commencement of the 30-day period for filing suit will be tolled").

[45] *See id*. at 14010 ¶ 42 ("the State or local authority will have the opportunity, in any given case that comes before a court, to rebut the presumption that the established timeframes are reasonable.").

agreement with the applicant when a delay outside the control of the State or local government occurs, either due to the applicant or to a third party. Similarly, the State or local government may request extension of the review period when it needs to ask an applicant for additional information or analysis after the 30-day period for automatically triggering tolling has passed. Should an applicant refuse and instead take the matter to court, the court will be able to consider whether and to what extent the particular circumstances justify a determination that "a reasonable period of time" under the statute is longer than the presumptively reasonable 90- or 150-day period. A court may conclude, for example, that a local government's request for additional information on Day 40 that the applicant did not fully answer until Day 145 was reasonable and warrants a longer "reasonable period of time" than the presumptive deadline provides. Thus, applicants "will have the incentive to resolve legitimate issues raised by State or local governments within the timeframes defined as reasonable, or they will incur the costs of litigation and may face additional delay if the court determines that additional time was, in fact, reasonable under the circumstances."[46]

17. For similar reasons, we are unpersuaded that State and local governments will find it necessary to adopt rigidly formal review processes, or to require unnecessary information as part of the application, in response to the 30-day period for automatically triggering tolling. As discussed above, the regime described in the *Ruling* incorporates flexibility to address unanticipated situations. Given this flexibility, we expect that governments and applicants alike will recognize the costs of unnecessarily formal procedures and avoid them where possible. Similarly, all parties will have incentives to avoid the uncertainty of litigation that may result from the unnecessary denial of an application.[47]

18. We recognize that defending litigation imposes costs, and that in some instances a State or local government may choose to grant an application rather than incur those costs. At the same time, an overly broad tolling regime would risk countenancing delays under circumstances where they would not be reasonable. Moreover, it is impractical to create in advance a comprehensive list of circumstances that would or would not reasonably merit delay. Therefore, any automatic tolling regime must necessarily balance the risks of engendering litigation and condoning excessive delay. In the *Ruling*, the Commission determined that in the common case of an incomplete application that is discovered within 30 days, a delay should be presumed reasonable and the review period should be automatically tolled in order to avoid unnecessary litigation. Where the delay is due to other causes or the incompleteness is identified after more than 30 days, case-by-case consideration, in the first instance by the parties, and then by the court if necessary, is more prudent. Nothing in the record on reconsideration causes us to revisit this balance.

19. With respect to Petitioners' assertion that the Commission did not seek or receive sufficient information on which to base its decision to limit the period for automatic tolling, we find that the record demonstrates otherwise, and that the *Ruling* reflects this. Various government entities raised the issue that rigid timeframes do not account for incomplete filings.[48] MetroPCS proposed a three-day review period for a State or local government to determine whether an application is complete, a proposal that CTIA supported.[49] Later, PCIA proposed a 10-day period for tolling,[50] and then a 10-business-day

[46] *Ruling*, 24 FCC Rcd at 14008-09 ¶ 38.

[47] *See id*. at 14008-09 ¶ 39.

[48] *See id*. at 14014 ¶ 52 n.155.

[49] *See id.* at 14014 ¶ 52, nn. 156-157.

[50] *See Ex Parte* Letter from Michael D. Saperstein, Jr., Esq., Public Policy Analyst, PCIA – The Wireless Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 08-165, Att. at 7 (filed Dec. 5, 2008).

period.[51] While the specific length of 30 days was not proposed in the record, the Commission reviewed state statutes that were submitted into the record in selecting that time period, concluding that 30 days "gives State and local governments sufficient time for reviewing applications for completeness, while protecting applicants from a last minute decision that applications should be denied as incomplete."[52] To the extent Petitioners are concerned that any lack of comment impeded the Commission from taking into account the ramifications of the 30-day period for tolling,[53] our review of the issues raised here addresses this concern.

C. Other Issues

20. Several commenters raise issues that are beyond the scope of the Petition. San Antonio asserts that "*all* of the *CTIA Ruling's* interpretations of Section 332(c)(7)(B)(i), (ii) and (v) exceed the Commission's authority. . ." and that the decision is "a rulemaking in disguise" that "fails to comply with the Regulatory Flexibility Act."[54] Los Angeles claims that the 90-day period for collocation applications is too short.[55] Because these matters are outside the scope of the Petition, they should have been raised through timely Petitions for Reconsideration, and not for the first time in comments on Petitioners' Petition for Reconsideration. Accordingly, we do not consider them here.

21. In Comments to the Petition, Albuquerque raises a new issue, requesting that the Commission "clarify" that the 90- or 150-day review period is reset to zero whenever a State or local government receives new material submitted to remedy a facially deficient application.[56] The *Ruling*, however, expressly states that where an application is found to be incomplete as filed during the 30-day review period, "the timeframes do not include the time that applicants take to respond to State and local governments' requests for additional information."[57] This means that when the information is requested, the clock stops, and when the applicant provides the additional information, the clock resumes (thereby reflecting the passage of time equivalent to the time from the initial filing of the siting application to the date that the additional information was requested). Because Albuquerque's request for clarification proposes – for the first time after the deadline for filing petitions for reconsideration – to alter this approach, the proposal is, in fact, an untimely request for reconsideration of this part of our decision. In any event, we are not persuaded that resuming the clock where it left off is inappropriate in this situation. The time spent determining that the application is incomplete is time spent reviewing the application, and therefore reasonably counts toward the 90 or 150 days.

22. IMLA argues that Congress's use of the term "final action" in Section 332(c)(7)(B)(v), and the absence of "final" in the requirement in Section 332(c)(7)(B)(ii) that the State or local government "shall act," create a distinction between the trigger for a lawsuit based on State or local government action and the trigger for a lawsuit based on a failure to act. IMLA contends that, accordingly, the Commission must modify the *Ruling* to expressly provide that the 90- and 150-day time periods only apply to initial zoning actions, and not to the time period from the initial decision until completion of final action on an administrative appeal.[58] In addition to arguing that IMLA's request is beyond the scope of the issues

[51] *See Ex Parte* Letter from Michael Fitch, Esq., President and CEO, PCIA – The Wireless Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 08-165, at 3-4 (filed Oct. 23, 2009).

[52] *Ruling*, 24 FCC Rcd at 14015 ¶ 53.

[53] *See* Petitioners Reply Comments at 4.

[54] San Antonio Comments at 2.

[55] Los Angeles Comments at 3.

[56] Albuquerque Comments at 2.

[57] *Ruling*, 24 FCC Rcd at 14014 ¶ 52.

[58] *See* IMLA Comments at 7-10.

raised in the Petition for Reconsideration, CTIA contends that the statutory reference to "final action" is irrelevant when there has been no action.[59] IMLA's request is outside the scope of the Petition, and we decline to render the ruling that IMLA requests. Given the many variations that are possible in local procedures and factual circumstances, it is appropriate for the court to determine whether the decisionmaking body has failed to act within the specified timeframe and whether the presumptive timeframe for action is reasonable in each case.

IV. CONCLUSION

23. We conclude that in interpreting Section 332(c)(7), the Commission has the authority to define a 30-day period after an application for wireless facility siting is filed during which a State or local government may toll the presumptive deadline for review due to the application's incompleteness, and that this 30-day period is both reasonable and supported by the record. We therefore deny the Petition.

V. ORDERING CLAUSE

24. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 303(r), 332(c)(7), and 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 332(c)(7), 405(a), and Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Reconsideration or Clarification filed by the National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American Planning Association IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[59] *See* CTIA Reply Comments at 9-10.

APPENDIX

List of Commenters

Oppositions and Comments

Charter Township of Waterford, Michigan (Waterford)
City of Albuquerque, New Mexico (Albuquerque)
City of Centerville, Minnesota, Member of the North Metro Telecommunications Commission (Centerville)
City of Livonia, Michigan (Livonia)
City of Los Angeles, California (Los Angeles)
City of Mentor, Ohio (Mentor)
City of Philadelphia, Pennsylvania (Philadelphia)
City of Portland, Oregon (Portland)
City of San Antonio, Texas (San Antonio)
CTIA – The Wireless Association (CTIA)
Greater Metro Telecommunications Consortium (GMTC)
International Municipal Lawyers Association (IMLA)
PCIA – The Wireless Infrastructure Association (PCIA)
T-Mobile USA, Inc. (T-Mobile)
Verizon Wireless
Village of Hoffman Estates, Illinois (Hoffman Estates)

Reply Comments

CTIA
Fairfax County, Virginia (Fairfax)
National Association of Telecommunications Officers and Advisors, The United States Conference of Mayors, National League of Cities, National Association of Counties, American Planning Association, and the City of Laredo, Texas (Petitioners)
PCIA

Late-Filed Reply Comment

Kiku Lani Iwata

JEFFERSON COUNTY, WEST VIRGINIA
Department of Planning & Zoning
116 East Washington Street, 2nd Floor
P.O. Box 338
Charles Town, West Virginia 25414

Email: **planningdepartment@jeffersoncountywv.org** **Phone: (304) 728-3228**
zoning@jeffersoncountywv.org **Fax: (304) 728-8126**

Director's Report
September 14, 2010
Planning Commission meeting

1) Activity Report (attached)

2) Conferences:
"Strategic Conservation Using a Green Infrastructure Approach", September 13 – 17 (Jennie);
"Growing Communities on Karst 2010 and the Great Valley Water Resources Science Forum", September 16 -17 (Steve)

3) Draft Agenda Request Form for Federal Lands rezoning

4) Urban Tree Canopy Grant

5) Status of Urban Growth Boundary discussions

Christine Chalmers

To: PLANNING DEPARTMENT
Subject: WEEKLY CALENDAR

MONDAY, AUGUST 30, 2010

10:30 am	JENNIE, SETH, STEVE – MEETING WITH JENNIFER SYRAN TO INCLUDE TOM TRUMBLE
1:30 pm	JENNIE – MEETING WITH HERB JONKERS / RE: HYLAND FARMS

TUESDAY, AUGUST 31, 2010

1:15 am – 2:45 pm	JENNIE, STEVE & JENNILEE – WEEKLY ZONING DEPT. REVIEW
4:00 pm – 6:00 pm	STAKEHOLDERS MEETING @ LIBRARY CONFERENCE ROOM

WEDNESDAY, SEPTEMBER 01, 2010

8:00 am – 9:30 am	JENNIE – MONTHLY DEPARTMENT HEAD MEETING AT HUNTER HOUSE
10:00 am	SETH – TELEPHONE CONFERENCE – SARA WITH DOWNSTREAM STRATEGIES
11:00 am	JENNIE – MEETING WITH TIM BOYDE
3:00 pm – 4:00 pm	JENNIE AND SETH – WEEKLY PLANNING DEPT. REVIEW
5:00 pm	JENNIE – "COG" MEETING @ LIBRARY CONFERENCE ROOM

THURSDAY, SEPTEMBER 02, 2010

9:00 am -	COUNTY COMMISSION MEETING
3:00 pm – 6:00 pm	JENNIE – OPEN HOUSE / FAREWELL PARTY FOR KELLY BOLES

FRIDAY, SEPTEMBER 03, 2010

11:00 am	JENNIE, SETH, STEVE – MEETING WITH KRISTIN RINGSTAFF & JASON GERHART (WHGA) RE: STASIS
1:00 pm	JENNIE, SETH & JOHN MAXIE - TELEPHONE CONFERENCE WITH YOGESH PATEL

Christine Chalmers

To: PLANNING COMMISSION
Subject: FW: WEEKLY CALENDAR

MONDAY, SEPTEMBER 06, 2010

LABOR DAY HOLIDAY – OFFICE CLOSED

TUESDAY, SEPTEMBER 07, 2010

10:00 am – 11:30 pm JENNIE, STEVE & JENNILEE – WEEKLY ZONING DEPT. REVIEW
3:00 pm STEVE & JENNILEE – APPOINTMENT WITH MYRA FIRESTONE / RE: LAKEVIEW "PROJECTS"

WEDNESDAY, SEPTEMBER 08, 2010

10:00 am STEVE, JENNIE, ROGER, JONATHAN, BECKY, MASON – PPC MEETING / RE: GREY BYRN – MERGER
11:00 am JENNIE & STEVE – MEETING WITH MAYOR JAMES ADDY / RE: HARPERS FERRY URBAN GROWTH BOUNDARY
2:00 pm STEVE & JONATHAN – PPC MEETING WITH WHGA / RE: HOTT PROPERTY

THURSDAY, SEPTEMBER 09, 2010

9:00 am - COUNTY COMMISSION MEETING

FRIDAY, SEPTEMBER 10, 2010

11:00 am JENNIE & STEVE B. – MEETING WITH PAUL RACO / RE: BRIGGS ANIMAL ADOPTION CENTER
2:00 pm JENNIE & TOM TRUMBLE – CONFERENCE CALL WITH "EPA" / RE: OLD STANDARD QUARRY

Christine Chalmers

To: PLANNING COMMISSION
Subject: FW: WEEKLY CALENDAR

MONDAY, SEPTEMBER 13, 2010

10:00 am	STEVE & MASON – SITE PLAN VISIT TO ELI SIZEMORE PROPERTY
NOON	JENNIE – NCTC CONFERENCE
3:00 pm	STEVE – MEETING WITH PETER PENTONY, ESQ. / RE: GAYE SNYDER
7:00 pm	JENNIE – FARMLAND PRESERVATION BOARD MEETING

TUESDAY, SEPTEMBER 14, 2010

ALL DAY	JENNIE – NCTC CONFERENCE
7:00 pm	PLANNING COMMISSION MEETING

WEDNESDAY, SEPTEMBER 15, 2010

ALL DAY	JENNIE – NCTC CONFERENCE
10:30 am -	JENNIE – MEETING: HAGERSTOWN TECH. ADVISORY COMMITTEE / EASTERN PANHANDLE METRO PLANNING ORG.
2:00 pm	JENNIE – ISC MEETING

THURSDAY, SEPTEMBER 16, 2010

9:00 am -	COUNTY COMMISSION MEETING
ALL DAY	JENNIE – NCTC CONFERENCE
ALL DAY	STEVE – KARST CONFERENCE
3:00 pm -	BOARD OF ZONING APPEALS MEETING

FRIDAY, SEPTEMBER 17, 2010

ALL DAY	JENNIE – NCTC CONFERENCE
ALL DAY	STEVE – KARST CONFERENCE

Commission Office Use Only

Date on Agenda:

Appt Time or New Business:

AGENDA REQUEST FORM

Name: **Jennifer Brockman**

Department or Entity: **Planning and Zoning**

Estimation of amount of time needed for appointment: **10 minutes**

Date Requested – 1st Choice: **September 30, 2010?**

Date Requested – 2nd Choice:

If a specific date is needed, please provide reason for specific date:

Subject: **Request to Initiate Rezoning of certain Federal Lands**

Please provide the County Commission with a description of your request or presentation, including any background information:

WV Code 8A-7-9 provides two mechanisms to initiate amendments to zoning ordinances. One mechanism permits the planning commission to petition the County Commission to amend a previously adopted zoning ordinance. The other is for the County Commission to initiate the amendment to the zoning ordinance, which requires the County Commission to obtain a recommendation from the Planning Commission on conformance with the Comprehensive Plan.

The Planning Commission is interested in having the County Commission initiate a zoning map amendment for any federal land in Jefferson County that is not zoned rural. The Planning Commission has researched this and determined that this situation only exists in the 340 corridor. Land recently acquired by the National Park Service and by the Customs and Border Patrol consists of a number of different zoning districts. The Planning Commission has initiated discussion with both of these entities and they have indicated that would not object to having their zoning classification changed.

For this reason, the Planning Commission is requesting that the County Commission initiate this zoning map amendment process enabling the Planning Commission to evaluate request in light of the Comprehensive Plan, hold a public hearing, and provide a recommendation to the County Commission.

Recommended motion (Please type out the wording of the motion that you would like the Commission to approve):

I move that the Planning Commission research, hold a hearing, make a recommendation related the rezoning of certain federal lands along 340 from their current zoning to rural zoning.

Attachments:

JEFFERSON COUNTY, WEST VIRGINIA
Department of Planning & Zoning
116 East Washington Street, 2nd Floor
P.O. Box 338
Charles Town, West Virginia 25414

Email: **planningdepartment@jeffersoncountywv.org**
zoning@jeffersoncountywv.org
Phone: (304) 728-3228
Fax: (304) 728-8126

August 26, 2010

Mr. Robert L. Hannah
WV Division of Forestry
P.O Box 40
Farmington, WV 26571

Dear Bob:

Attached is a complete application for the 2010 Chesapeake Bay Community Grant for an Urban Tree Canopy Project for Jefferson County, West Virginia. This project is a collaborative effort between the Cities of Ranson and Charles Town and Jefferson County. Supporting documents showing the Cities' support of the grant application are also attached.

Please feel free to contact me if you have any questions.

Sincerely,

Jennifer M. Brockman, AICP
Director, Planning and Zoning

CHESAPEAKE BAY COMMUNITY GRANTS 2010
PROPOSAL TO
WEST VIRGINIA DIVISION OF FORESTRY
BY
JEFFERSON COUNTY

AUGUST 2010

Jefferson County Department of Planning and Zoning
116 East Washington Street
Charles Town, West Virginia 25414
304-728-3228
Contact: Jennifer M. Brockman, AICP, Director
jbrockman@jeffersoncountywv.org

FEI #___55-6000333_____

Project time frame: October 2010 till May 31, 2011.

No portion of this grant will be used for "administrative costs"; "staff salaries"; or, purchase of land or "equipment".

Grant funds will be used for:
Purchase of trees, site preparation & planting, and related supplies including: mulch; stakes & ties (when necessary); watering bags, hoses & tanks.
Urban tree canopy inventory assessment and study for the purpose of developing a long term management plan and setting Urban Tree Canopy goals for Jefferson County and the municipalities within the County; Bolivar, Charles Town, Harpers Ferry, Ranson, and Shepherdstown.

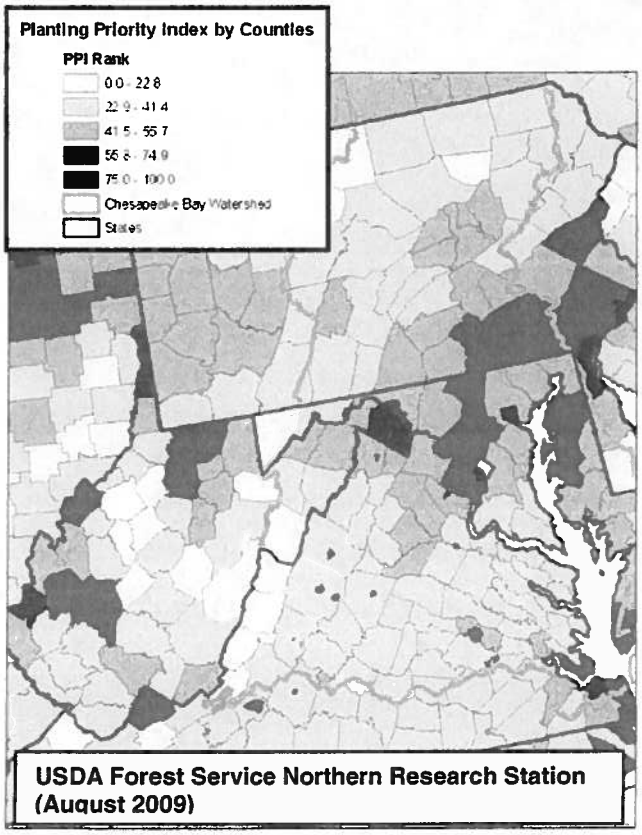
Matching funds will come from: Staff salaries & volunteer hours; use of municipal equipment; pro-bono professional time, work, & equipment; site preparation; and delivery of trees. All matching expenses, volunteer & pro-bono contributions will be directly related to the implementation of this grant. No Federal dollars will be used as match. All funds, grant and matching, will be expended by May 31, 2011.

This application is submitted on behalf of the cities of Ranson and Charles Town and Jefferson County by the Jefferson County Commission.

Lyn Widmyer, President
Jefferson County Commission

INTRODUCTION

In 2009, Jefferson County, with the assistance of the WV Potomac Tributary Strategy Implementation Team (WV Trib Team), began an Urban Tree Canopy (UTC) assessment project. The County in its effort to foster wider acceptance of voluntary best management practices (BMPs) for urban tree conservation and plantings, first needed a UTC assessment to determine the extent and location of canopy. Preserving and extending the tree canopy will reduce excessive storm water runoff. Jefferson's efforts will help WV meet the state's commitment to the Chesapeake Bay Program (CBP) goal to have "at least 5 local jurisdictions ... in each state ... complete an assessment of urban forests, adopt a local goal to increase urban tree canopy and encourage measures to attain the established goal."



USDA Forest Service Northern Research Station (August 2009)

Jefferson County utilized existing Light Detection and Ranging (USGS, 2005) and Color Infrared data (NAIP, 2007) to complete a high resolution UTC assessment (<1 meter resolution, U. Vermont 2009). County planners, in coordination with planners in Bolivar, Charlestown, Harpers Ferry, Ranson, and Shepherdstown are currently developing UTC goals utilizing Chesapeake Bay Program and USDA Forest Service guidelines.

Coincidentally, at the same time Jefferson County was conducting a tree canopy assessment, the USDA Forest Service published its first National Planting Priority Index. Jefferson and Berkeley Counties (WV) rank above 75% national and are among the highest priority counties in the Chesapeake Bay watershed (map inset).

This grant proposal addresses the need for additional funds to support tree plantings and complete the drafting of UTC Goals for the County and municipalities.

BACKGROUND

Tree canopy is the layer of leaves, branches, and stems of trees that cover the ground when viewed from above. "Urban", as defined by the U.S. Census Bureau, is any census block with a population of 500 person per square mile, or the entirety of any incorporated municipality with a single census block meeting that criteria. Urban Tree Canopy (UTC), therefore, is the study of the tree canopy in and around populated areas. Expanding the UTC provides many benefits to communities, including improving water quality, reducing stormwater runoff, saving energy,

lowering city temperatures, reducing air pollution, enhancing property values, providing wildlife habitat, facilitating social and educational opportunities, and providing aesthetic benefits.

Municipal leaders and public officials in Jefferson County are keenly aware of, and engaged in, efforts to reduce stormwater runoff for the sake of protecting local watersheds and the larger Chesapeake Bay watershed. Trees intercept rain water and have the potential to reduce stormwater runoff by up to >75% under their canopy. Establishing a UTC goal is a crucial component of Jefferson County's effort to redcue runoff and improve its green infrastructure.

A Jefferson County UTC assessment was completed by the University of Vermont's (UVM) Spatial Analysis Laboratory in January 2010, under contract to Jefferson County. This county wide study, the largest of its kind in the U.S., utilizes the U.S. Forest service's premier UTC assessment protocol. By combining LiDAR and high resolution color infrared imaging the UVM assessment is more than 95% accurate, approximately 20% more accurate than assessments that use only color infrared. The results are under review and being edited by the Jefferson County Office Planning and Zoning. Results of the UTC assessment have been presented to the Jefferson County "Round Table", an informal assemble of elected officials and leaders; and to the various planning and public officials and interested public.

The analysis of Jefferson County, based on high resolution aerial imagery sufficient to enumerate single trees, revealed a tree canopy (TC) of about 134,000 acres (termed Existing TC) that corresponds to 38% of all land within the county. The UVM assessment also found that 59% (79,000 acres) of the county that was without trees could theoretically be improved with tree canopy (termed Possible TC). Possible TC includes non-canopy vegetation (e.g., grass/shrubs), bare earth, and certain paved surfaces (e.g., driveways, sidewalks) that, under the right circumstances, could be modified to increase tree cover. Because much of Jefferson County is devoted to agriculture, the county's Existing TC generally occurs in scattered patches. The largest, most contiguous patches occur east of the Shenandoah River in the Blue Ridge Mountain area. Note that agricultural land-cover types were not specifically mapped as part of this project but are included in the Grass/Shrubs land-cover category. (See attachment for full report.)

TECHNICAL PROPOSAL

The overall goal of this UTC Goal Setting and tree planting project is to preserve, protect, and enhance the tree canopy within Jefferson County in order to reduce excess stormwater runoff, mitigate the impact of impervious surfaces, and protect local waters and the Chesapeake Bay.

County and municipal planners, with public input, and technical support from the WV Potomac Tributary Team (including Herb Peddicord, WV DOF Chesapeake Bay Forester; and Frank Rodgers, ISA Certified Arborist with Cacapon Institute) will build off the UTC assessment completed in 2010 to develop a comprehensive UTC Goal to expand tree canopy in the county. A post-graduate intern will be contracted to facilitate the UTC Goal setting project and oversee the implementation of tree plantings under this grant.

The UTC assessment delineates the percentage of tree canopy, amount of impervious, and amount of area open to possible tree canopy. While the UTC assessment maps in high resolution where there is, and is not, tree canopy, it does not specifically identify or recommend where additional trees can be planted. The specific site recommendations and planting specifications will be developed under this grant for the fall 2010 and spring 2011 planting seasons. Additionally, these short-term planting plans will be developed as part of a long-term UTC Goal.

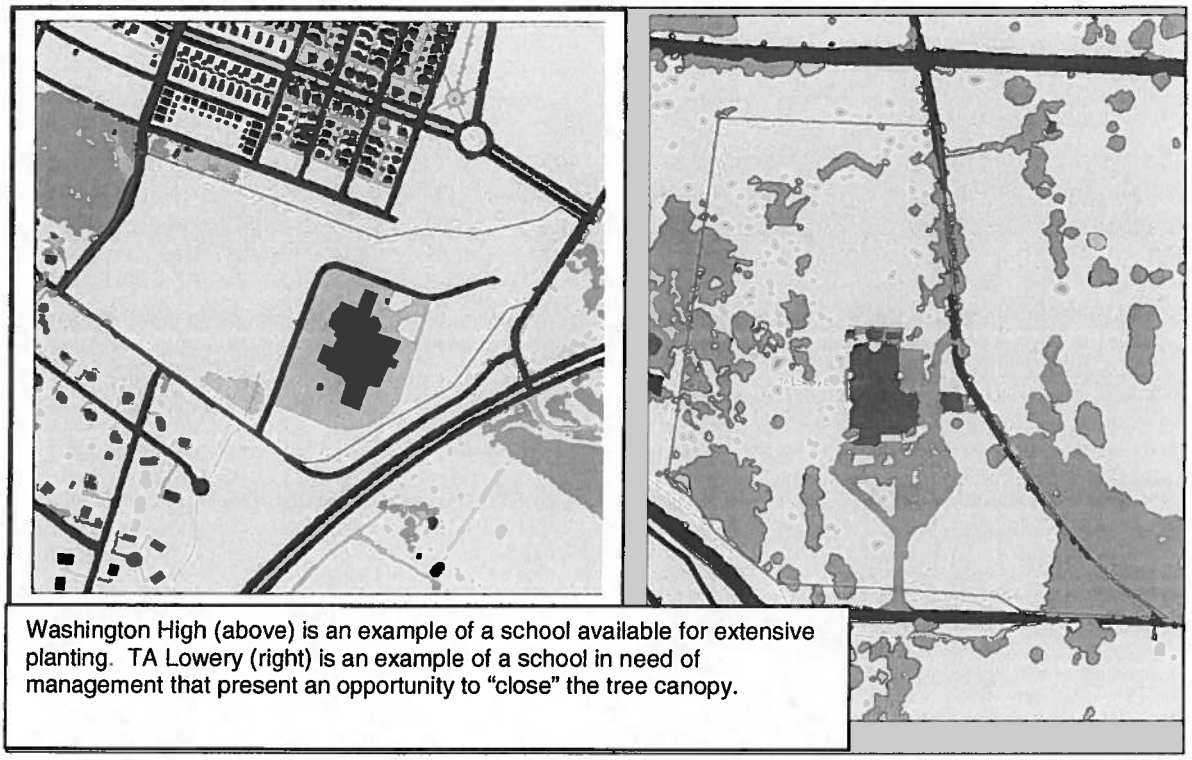
County and municipal planers, working with the WV Trib Team, will develop specific planting plans for the spring of 2011. In addition to planning planting to maximize the environmental benefits of trees, all plantings will also be developed for the purpose of outreach and public education on the value of trees. Public planting under this grant will include an educational component to encourage private citizens to "reforest" their own properties and/or plant shade trees.

The specific planting plans to be developed will include these foundations:

- Planting of approximately 100 "large" trees, i.e. hardwood shade trees such as Maple, Oak, Sycamore, etc.
- Planting of approximately 50 "small" trees where "large" trees are inappropriate, i.e. Red Bud, Hawthorn, Cherry, etc. (priority will be to plant "large" trees that have the greater environmental benefit).

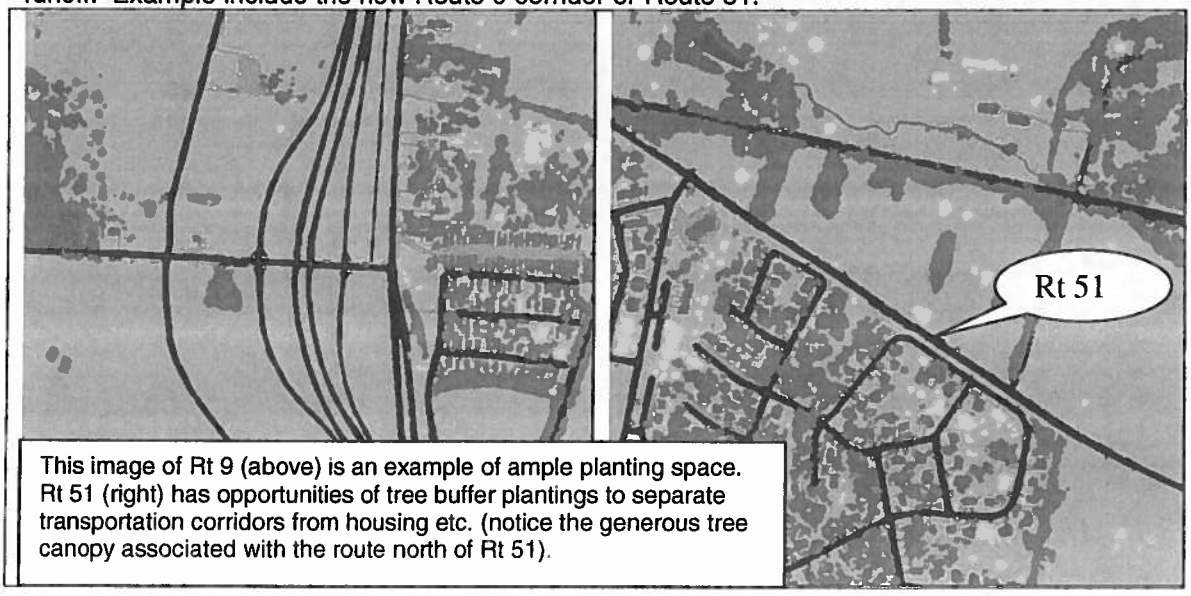
No less than five (5) sites will be identified for plantings of multiple trees. The low number of multi-tree plantings will facilitate high-impact, highly-visible, and more easily maintained "tree groves". These sites will be chosen, based on the UTC assessment, for their lack of adequate tree canopy in relation to their potential for planting and for maximum stormwater runoff mitigation. In addition to multi-tree plantings, no less than ten (10) single-tree plantings will be conducted for the purpose of public outreach and education. Tree planting sites will include public school grounds, transportation corridors, and public parks.

Public school grounds that have been identified with an insufficient tree canopy. Schools offer a unique opportunity for public education through involvement of the students and parents. The ecological benefits of cleaner air and cooler ambient temperatures will benefit the youth attending selected schools. Possibilities include the new Washington High School or existing Wildwood Middle School.



Washington High (above) is an example of a school available for extensive planting. TA Lowery (right) is an example of a school in need of management that present an opportunity to "close" the tree canopy.

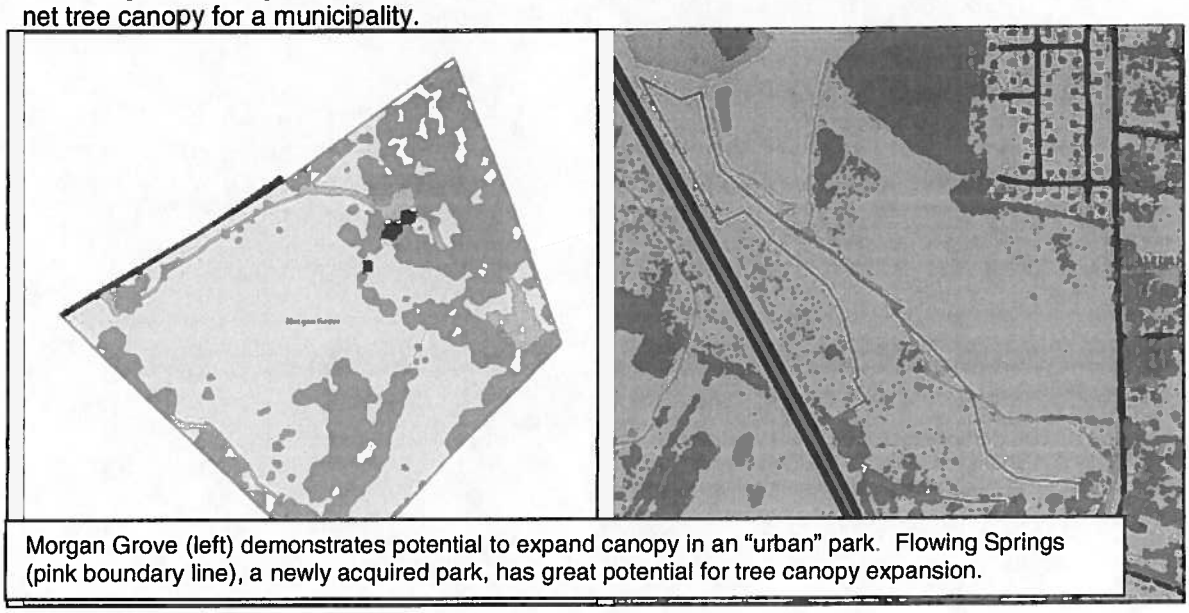
Road right-of-ways that offer potential for tree plantings that do not interfere with public safety or highway operations. Road ROW plantings are highly visible and demonstrate the benefit of cost saving from reduced mowing, the aesthetic value of trees, and their ability to reduce stormwater runoff. Example include the new Route 9 corridor or Route 51.



This image of Rt 9 (above) is an example of ample planting space. Rt 51 (right) has opportunities of tree buffer plantings to separate transportation corridors from housing etc. (notice the generous tree canopy associated with the route north of Rt 51).

Public parks that have aging and/or insufficient tree canopy. Park plantings, in addition to providing the environmental benefits of shade and cooler ambient temperature, offer an opportunity to demonstrate proper planting techniques to the general public and disseminate

information on the benefits of trees to encourage citizens to plant trees on private property. Example include the new Evitt's Run and Flowing Springs and the historic parks of Morgan's Grove. While parks typically have more tree canopy and open green space than other "urban" areas might, focusing on maximizing the extent of the tree canopy in parks helps to increase the net tree canopy for a municipality.



Morgan Grove (left) demonstrates potential to expand canopy in an "urban" park. Flowing Springs (pink boundary line), a newly acquired park, has great potential for tree canopy expansion.

REQUIREMENTS

All planting stock will meet ANSI Z60.1-1986 standards. The number of trees and species will vary; but, preference will be for "large" hardwood trees. All trees will be 1.5" to 1.75" caliper (>3' conifers) at the time of planting. Trees will be planted in accordance with best practices as outline in the Planting Specification in Appendix 2 of the Chesapeake Bay Community Grants 2010 RFP (signed copy of specification to be attached). Specific sites, chosen from the above mentioned public areas, will be chosen based on suitability of the soil for planting (lack of compaction, appropriate moisture content, pH, etc.)

Whenever possible, existing volunteer organization will be recruited to organize and carry out the planting and maintenance plans (e.g. tree commissions, watershed organizations, parks-friends groups, etc.)

Specific plans, as they are developed, will be approved by the WV DOF Chesapeake Bay Forester and WV DOF Urban & Community Forestry Program.

COST PROPOSAL WORKSHEET

I. EXPENDITURE OF GRANT FUNDS

A. *COST OF MATERIALS*

Description	Material Provider	Quantity	Unit Price	Total Price
Hardwood native tree stock (1.5-1.75" Oak, Maple, etc.)	Nursery	~75	$75-$100	$8,000
Conifer native tree stock (>3' Pine, Spruce, etc.)	Nursery	~25	$50-$75	$2,000
"Small" native tree stock (1.5" Red Bud, Hawthorn, etc.)	Nursery	~50	$30-$75	$2,750
Mulch (delivered)	Nursery	4 cu.yd.	$50	$200
Stakes & ties	Wholesale	~50 pair	$10	$500
Watering bags	Wholesale	~50	$20	$1,000
Tank, pickup truck mount	Wholesale	1	$400	$400
Hoses, 3/4" x 50'	Wholesale	5	$30	$150
		Total Cost of Materials		$15,000

B. *COST OF PROFESSIONAL/CONTRACTUAL SERVICES*

Description	Service Provider	Quantity	Unit Price	Total Price
Contract for post-graduate Project leader to draft UTC Goals And plan specific planting under This Chesapeake Bay Grant	Shepherd U.	8 months	$5,000	$5,000
		Total Cost of Contractual Services		$5,000$

C. *ADDITIONAL COSTS*

Description	Service Provider	Quantity	Unit Price	Total Price
NONE				
			Total Additional Costs	$0
			Total Amount of Grant Requested	**$20,000**

II. EXPENDITURE OF MATCHING FUNDS

A. *CASH MATCH*

Description	Service/Material Provider	Quantity	Unit Price	Total Price
Contract for post-graduate Project leader to draft UTC Goals And plan specific planting under This Chesapeake Bay Grant (Shared by County & municipalities Under MOU)	Shepherd U.	8 months	$5,000	$5,000
			Total Cash Contribution	$5,000

B. *IN-KIND MATCH (Paid Labor and Equipment Provided by Applicant)*

Description of Work/Equipment	Cost/Hour	Hours	Total Cost
Pick up & delivery of trees	$10/tree		$1,500
Public works facilitation of tree Plantings (Miss utility markings, permits, etc.)	$100 per planting		$1,500
Office space, computer for Project manager (College Intern)	$50/ 8 months		$400
Supervision of intern (Shared by County & municipalities Under MOU)	$50/hour	8 hours x 8 months	$3,200
		Total In-Kind Match	$6,600

C. VOLUNTEER AND DONATION MATCH (Donated Labor and Equipment)

Description of Work/Equipment	Value/Hour	Hours	Total Value
Volunteers planning specific plantings	$100/planting	15 plantings	$1,500
Volunteers planting trees	$15	2 hour x150 trees	$4,500
Follow up watering (by May 2011)	$15	3 volunteers X 4 hours x 15 sites	$2,700
Total Value of Volunteer & Donation Match $			$8,700

Total Applicant Match $20,300

Appendix 2

Chesapeake Bay Community Grant
Tree Planting Specifications

This section must be returned with any application for tree planting.

I. Stock Specifications

All trees planted must meet the following specifications and need to be inspected prior to planting.

A. *Main Trunk* - Trees will have a single trunk with the lower 3 feet clear of branches (unless previously approved) and be at least 1 ½" in caliper.

B. *Health* - Trees will be healthy, vigorous and well-grown, showing evidence of proper root and shoot pruning. Trees will be free from significant mechanical injury to the trunk, root ball and branches. Trees will also be free of any insect or disease problems.

C. *Form* - Trees will have been properly pruned to removed narrow branch angles, included bark, broken and crossing branches. Trees will have been pruned to establish a central trunk and to eliminate co-dominate branching. Previous pruning should not include excessive heading or topping cuts (rounding-over) to reduce the overall height of the tree.

D. *Root Ball* - All root balls will only be covered in rottable burlap and tied with rottable rope. Root balls will have a flattened top with good root flare. Broken or damaged roots more than 1/4" in diameter should be pruned with a clean cut.

E. *Substitutions* - Substitutions may only be made with express consent from the Community representative.

F. *Stock Inspections* - The municipal representative reserves the right to inspect trees prior to planting and to reject any trees not meeting the specifications described herein.

II. Planting Specifications

All planting activities must be approved by the municipal representative responsible for implementing the grant.

A. *Planting Location* - All planting sites will be identified and marked by the municipal representative and indicated to the Contractor. Express permission from the municipal representative is required to change any planting location. All trees will be centered between curb and sidewalk unless otherwise specified. Contractor will be responsible for notifying any appropriate utility authority prior to digging and be responsible for any damage to utilities.

B. *Temporary Storage* - Root balls, of trees not immediately planted after delivery, must be adequately protected by mulching and watering until

planting occurs. Contractor assumes all risk and expense of temporary storage.

C. ***Planting Holes*** - Planting holes may be dug by hand, backhoe, tree spade or other approved equipment. An auger is not considered approved equipment. The top diameter of the planting hole shall be two times that of root ball. The bottom of the hole shall be flat and deep enough to have the tree at its original planting depth or slightly higher. Holes should be dug on day tree is planted.

D. ***Planting Depth*** - Trees will be planted at the same depth they were growing in the nursery or up to two inches higher than that level. The root collar must be at or slightly above ground line. Contractor will be required to replant any trees, at their expense, that are planted too deeply.

E. ***Wire Baskets & Burlap*** - Wire baskets should be completely removed when possible or at a minimum removed from the top half of the root ball. Contractor will be required to replant any tree, at their expense, when a portion of the wire basket can be found from minor excavation. All burlap and twine will be removed from the upper half of the root ball and any remaining burlap must be untreated.

F. ***Backfilling*** - Planting is only allowed when soil is not frozen and temperatures are above 30 degrees. Backfilling shall occur with quality topsoil. Soil will be adequately tamped as to eliminate air pockets during backfilling. All trees will be planted as straight as possible.

G. ***Surplus Excavation*** - Any surplus soil will be removed and disposed of by the Contractor. Surplus soil shall not be mounded around trunk above ground level.

H. ***Staking and Guying*** - Only trees prone to leaning or in areas exposed to high wind should be staked and guyed. If staking is necessary for support, two stakes on opposite sides on the trunk shall be used with a wide, belt-like, tie material to hold the tree upright. Wire in a garden hose or any other rigid material shall not be used to guy trees. All trunk wrap, twine and other material shall be removed at the time planting.

I. ***Mulching*** - All trees will be mulched at the time of planting with wood or bark chips. Mulch shall be 2" to 3" deep and at least 18" in diameter or cover the entire planting hole. Mulch should not be in direct contact with the trunk and a mulch-free area on 2"around the trunk should be maintained.

J. ***Watering*** - Trees will be thoroughly watered to settle backfill when half of backfill is in place and again after all backfill is placed.

K. ***Fertilization*** - Trees shall not be fertilized at the time of planting, unless previously specified.

L. ***Pruning*** - All dead, broken, or damaged branches, and sprouts should be removed at the time of planting. All pruning will be with a clean cut outside the branch collar. Excessive pruning and heading (rounding-over) is not

acceptable. Only individuals knowledgeable of proper pruning techniques shall prune trees.

Acceptance of the Tree Planting Specifications

These specifications will be followed for all trees planted with funds provided by this Chesapeake Bay Community Grant for Jefferson County WV

The undersigned Contractor agrees to provide and/or plant trees to meet all requirements in the above Tree Planting Specifications. Any exceptions must be approved in writing by the appropriate municipal official. My signature indicates that I have read and understand all specifications.

Company Name: _____

Contractor Signature: _____

Date: _____

Municipal Representative: Lyn Widmyer/JMS

Title: President, Jefferson County Commission

Date: 8/27/10

Appendix 3

MAINTENANCE PLAN

This section must be returned with any application for tree planting.

Newly planted trees require special attention to maintenance practices during the first three growing seasons following planting. All trees shall receive at least the following maintenance practices for a three-year period:

1. **WATERING:** Ample soil moisture shall be maintained following planting. A thorough watering each five to seven days, depending on drainage and precipitation, is usually adequate during the growing season. A thorough watering allows moisture to reach the deepest roots. **How will watering be accomplished and who will be responsible?**
   Volunteers, assisted by municipal crews, will water the trees as needed during the growing season utilizing the 'gator bags', hoses, and tanks provided by this grant.

2. **FERTILIZATION:** Trees shall not be fertilized at the time of planting. Fertilizer can kill young roots very rapidly. If fertilizer is not applied wisely, in may not benefit the tree at all and may even adversely affect the tree. Soil conditions, especially pH and organic matter content, vary greatly making the proper use and selection of fertilizer a complex process. Any fertilization should be based on a soil test. Soil Conservation Districts can provide tests and advice on application rates, timing, and fertilizer selection. **Under what circumstances (if any) will trees be fertilized and who will be responsible?**
   There are no plans to fertilize the trees planting on public lands.

3. **MULCHING:** Mulching provides trees with a stable root environment that is cooler and contains more moisture than surrounding soil. Mulch can also prevent mechanical damage by keeping lawn mowers and weed whips away from the thin bark. Trees must be mulched at the time of planting and every consecutive spring. Mulch should only be **two** to **three** inches deep (do not mound) and cover the entire root system. Mulch should not contact the trunk; a mulch-free area of one to two inches around the trunk should be maintained. **How will trees be mulched and who will be responsible for re-mulching each year?**
   Trees will be mulched at the time of planting taking care to cover a wide area, not apply mulch too deep, and to protect the root collar from damage. Future mulching will be completed by volunteer with assistance from municipal crews for the purpose of protecting trees from 'weed-whacking' and maintain soil moisture.

4. **PRUNING:** Excessive pruning at the time of planting should be avoided. During the first two years, only dead, broken, or injured branches, and sprouts shall be removed. Trees will never be topped or rounded-over. Pruning during the third year can begin to improve structure and encourage sturdy crotch development. Structural pruning advice is available through the Urban Forestry Coordinator.

Describe pruning methods, both short and long term, and who will be responsible?
Pruning at the time of planting will be limited to dead, broken, or injured branches. Long term pruning to improve structure, ensure public safety, and enhance public acceptance will be done in accordance with WV DOF recommendations.

5. **STAKING AND GUYING:** Often it is not necessary to stake and guy quality nursery stock that has been properly planted. Studies have shown that trees will establish more quickly and develop stronger trunks and root systems if not staked at the time of planting. If staking is necessary for support, two stakes used in conjunction with a wide flexible tie material will hold the tree upright, provide flexibility, and minimize injury to the trunk. Do not use wire in a garden hose or any other in-flexible, narrow material. All guy and support material must be removed after the first growing season. **Will trees be staked and guyed? What material will be used and who will be responsible for the removal?**
Trees will not be staked except where high winds or heavy pedestrian traffic threatens the tree's structure or root stability.

6. **PROVIDE ADDITIONAL MAINTENANCE INFORMATION:**
Ranson currently has a Tree Commission prepared to help maintain trees planted within their jurisdiction. Jefferson County and Charles Town will pursue public-private partnerships to maintain individual trees and pursue the protection and enhancement of urban tree canopy.

Community or Organization: Jefferson County

Signature: Lyn Widmyer /JHB
Lyn Widmyer

Title: President, Jefferson County Commission

Date: 8/27/10

City of Charles Town

101 East Washington Street, P.O. Box 14, Charles Town, WV 25414
Phone: (304) 725-2311 ♦ Fax: (304) 725-1014 ♦ Web: www.charlestownwv.us

RESOLUTION 2010-19

Urban Tree Canopy Grant Application

Whereas, in 2009, Jefferson County, with the assistance of the WV Potomac Tributary Strategy Implementation Team began an Urban Tree Canopy (UTC) assessment project, and

Whereas, UTC provides many benefits to communities, including improving water quality, saving energy, lowering city temperatures, reducing air pollution, enhancing property values, providing wildlife habitat, facilitating social and educational opportunities, and providing aesthetic benefits, and

Whereas, the purpose of the County's assessment is to foster wider acceptance of voluntary best management practices for urban tree conservation and plantings, to reduce excessive storm water runoff, and address the CBP goal to have "at least 5 local jurisdictions … in each state to complete an assessment of urban forests, adopt a local goal to increase urban tree canopy and encourage measures to attain the established goal", and

Whereas, a 50/50 matching grant is available through the 2010 Chesapeake Bay Community Grants which can fund a variety of projects that focus on protecting and enhancing the health of the Potomac Tributary Watershed, and

Whereas, the City of Charles Town agrees to contribute no more than $3,000.00 toward a matching total of $10,000.00, and

NOW, THEREFORE, BE IT RESOLVED, that the City of Charles Town supports the joint UTC grant application led by the Jefferson County, City of Ranson and City of Charles Town planning staff.

Signed and approved this 16th day of August, 2010.

Peggy A. Smith
Mayor

ATTEST:

Joe Cosentini
City Clerk

CITY COUNCIL MEETING
TUESDAY, JULY 20, 2010

AGENDA ITEM I - CALL TO ORDER:

Mayor Hamill called this meeting to order at 7:00 p.m.

AGENDA ITEM II - MEMBERS PRESENT:

Mayor Hamill reported all Council Members present City Recorder Tony Braithwaite, Keith "Duke" Pierson, Donnie Haines, Dave Cheshire, and Debbie McClure, with the exception of Scott Coulter. Also, present were City Manager David Mills, City Attorney Andrew Blake, Chief William Roper, City Clerk Stacey Dodson, Finance Director Chris Bontoft, Planning Director Sarah Kleckner, Public Works Director Michael Martin, and Public Works Supervisor Bill Silveous.

AGENDA ITEM III - APPROVAL OF THE MINUTES:

Minutes of the July 6th, 2010, Council Meeting was presented for approval. Motion by Council Member Haines to dispense with the reading of the minutes, seconded by Council Member McClure. No discussion. Motion passed unanimously.

Motion by Council Member Pierson that the minutes be approved as submitted, seconded by Council Member Cheshire. No discussion. Motion passed unanimously.

AGENDA ITEM IV - CITIZEN'S PRESENTATIONS/PETITIONS:

1. None

AGENDA ITEM V - COUNCIL/COMMITTEE ANNOUNCEMENTS:

1. None

AGENDA ITEM VI- CITY MANAGER/STAFF REPORTS:

1. Police Chief's Report

   a. Police Chief Roper referred to his written report.

1. City Manager's Report

   a. City Manager Mills presented to Council an Annexation Report for Jefferson Crossing II (WVA 340 Limited Partnership LLC), which included an update about the area to be annexed; description of the petition; compatibility with comprehensive plan; and the overall fiscal impact.
   b. City Manager Mills provided a copy of the Notice of Intent to Demolish and Notice of Invitation to Bid for the Fiddler property located at 125 E. Park Avenue in Ranson, which was published July 17th, 2010.
   c. City Manager Mills requested all Council Members to complete the Potomac Headwaters RC&D Information Survey and return to City Clerk, upon completion.
   d. City Manager Mills continued with his report by informing Council that the Public Works Department had identified several street deficiencies namely, Third Avenue, N. Preston Street, and East end of 12th Avenue near Forrest Street with a total street project cost in the amount of $14,564.00; and

recommended that said deficiencies be addressed through normal funds.

e. Next, City Manager Mills informed Council that at the last Council meeting, a Member asked if a boarding house similar to the one located at the intersection of Mildred Street and 3rd Avenue could be built in our Residential 6 (R-6) zoning district. After conferring with City Attorney Andy Blake and Planning Director Sarah Klecker to investigate the matter, it was concluded that a boarding house is a permitted by-right use in this district. The process to build a new structure or convert an existing building is virtually the same, as both would be required to file a site plan with the Ranson Planning Commission. A site plan should address parking, staffing, loading zones, and buffers between adjacent properties. A public hearing on the plan for a rooming or boarding house is not required, as it is an approved use that must follow the standards already stated in the City's ordinance. However, kindergartens, daycare centers, government facilities, nursing homes, dance schools, and apartments are considered "Special Exceptions" and as such, must hold a public hearing in front the Board of Zoning Adjustment (BZA). If the BZA finds that the use is compatible with the neighborhood, then a site plan is prepared and approved in the same fashion as a boarding house. It must be noted that under Federal law, group homes for the developmentally disabled are always permitted in residential districts.

f. City Manager Mills continued to report that the City of Ranson had been invited to collaborate with the City of Charles Town and Jefferson County to prepare an application for funding through the Division of Forestry's 2010 Chesapeake Bay Community Grants Program. The maximum grant request is for $10,000 and requires a 50/50 match. The match may be met with in-kind expenses such as personnel services/fringe benefits, volunteer hours, equipment use, and donations of cash and supplies. Applications are due August 27th. Approved projects will begin in October and conclude by May 2011. Funding priority will be given to municipalities with a Tree City USA and organizations with a primary focus on water quality within the Potomac Tributary Watershed. The grant can be used to fund innovative projects that meet certain goals.

g. City Manager Mills stated that on March 9, 2010, FEMA conducted a community assistance visit within the City of Ranson to discuss Ranson's floodplain management program and its participation in the National Flood Insurance Program (NFIP). He further stated that Ranson had been a participant in the (NFIP) since 1979. NFIP was created by the U.S. Congress in 1968 through the National Flood Insurance Act of 1968. The program enables property owners in participating communities to purchase protection from the government against losses from flooding. After the March 9, 2010, community assistance visit, it was concluded that during the floodplain tour, several potential violations and minor deficiencies were identified in the City's administrative and enforcement procedures. City Manager Mills informed Council that corrective actions were being taken by staff by developing a program to ensure complete compliance with the requirements for floodplain management. Staff was directed to notify the twelve affected property owners about the situation, offer to perform a free inspection to verify the problem, and prepare a corrective action work plan for each of the properties. As all of the deficient properties were built or improved at least 15 years ago, there is not a contractor to go back to for corrective action, and the City does not have

A Report on the Jefferson County's Existing and Possible Tree Canopy

Why is Tree Canopy Important?

Tree canopy (TC) is the layer of leaves, branches, and stems of trees that cover the ground when viewed from above. Tree Canopy provides many benefits to communities, including improving water quality, saving energy, lowering city temperatures, reducing air pollution, enhancing property values, providing wildlife habitat, facilitating social and educational opportunities, and providing aesthetic benefits. Establishing a TC goal is crucial for those communities seeking to improve their green infrastructure. A TC assessment that estimates the amount of tree canopy currently present (Existing TC), along with the amount of tree canopy that could theoretically be established (Possible TC), is the first step in the TC goal-setting process.

How Much Tree Canopy Does Jefferson Co. Have?

An analysis of Jefferson County, West Virginia's tree canopy (TC) based on high resolution aerial imagery found that about 134,000 acres of the county is covered by tree canopy (termed Existing TC). This corresponds to 38% of all land within the county (Figure 1). However, 59% (79,000 acres) of the county could theoretically be improved to support tree canopy (termed Possible TC). Possible TC includes non-canopy vegetation (e.g., grass/shrubs), bare earth, and certain paved surfaces (e.g., driveways, sidewalks) that, under the right circumstances, could be modified to increase tree cover. Because much of Jefferson County is devoted to agriculture, the county's Existing TC generally occurs in scattered patches. The largest, most contiguous patches occur east of the Shenandoah River in the Blue Ridge Mountain area. Note that agricultural land-cover types were not specifically mapped as part of this project but are included in the Grass/Shrubs land-cover category.

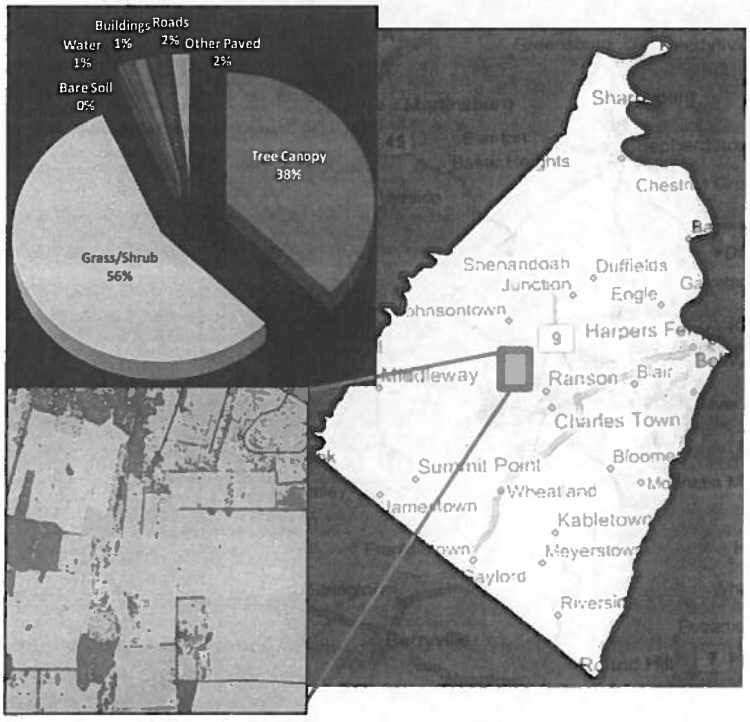


Figure 1: Sample land cover dataset for a portion of the county and overall land cover summaries for the entire county.

Project Background

The analysis of Jefferson County's Tree Canopy (TC) was carried out in collaboration with the Jefferson County Commission, Cacapon Institute, and the USDA Forest Service. The analysis was performed by the Spatial Analysis Laboratory (SAL) of the University of Vermont's Rubenstein School of the Environment and Natural Resources, in consultation with the USDA Forest Service's Northern Research Station.

The goal of the project was to apply the USDA Forest Service's tree canopy assessment protocols to the Jefferson County. This analysis is primarily based on year 2007 aerial imagery provided by the USDA.

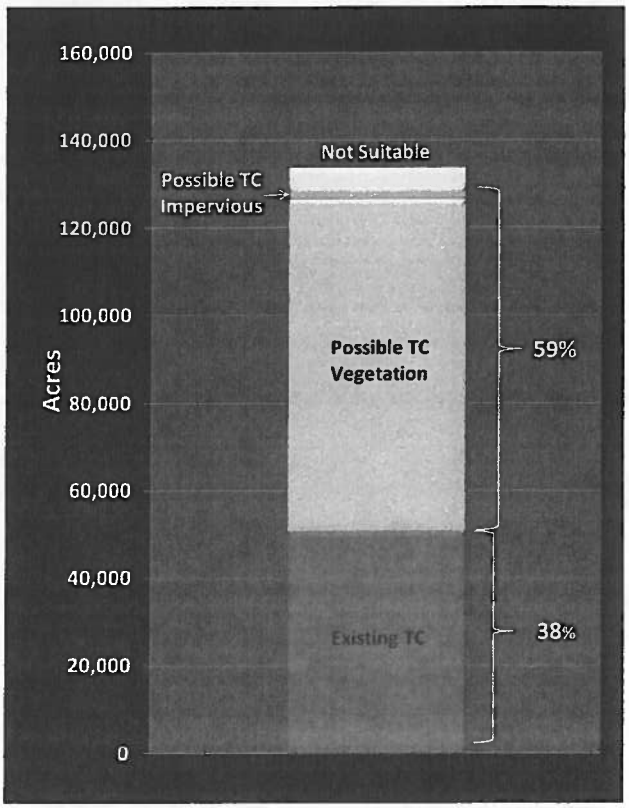


Figure 2: TC metrics for Jefferson County based on % of land area covered by each TC type.

Key Terms

TC: Tree Canopy (TC) is the layer of leaves, branches, and stems of trees that cover the ground when viewed from above.

Land Cover: Physical features on the earth mapped from aerial or satellite imagery, such as trees, grass, water, and impervious surfaces.

Existing TC: The amount of Tree Canopy present when viewed from above using aerial or satellite imagery.

Impervious Possible TC: Asphalt or concrete surfaces, excluding roads and buildings, that are theoretically available for the establishment of tree canopy.

Vegetated Possible TC: Grass or shrub area that is theoretically available for the establishment of tree canopy.

Mapping Jefferson County's Trees

Prior to this study, the only available estimates of tree canopy for Jefferson County were from the 2001 National Land Cover Dataset (NLCD 2001). While NLCD 2001 is valuable for analyzing land cover at the state-wide level, it is derived from relatively coarse, 30-meter resolution satellite imagery (Figure 3a). Using high-resolution (1 meter) aerial imagery acquired in the summer of 2007 (Figure 3b), in combination with advanced automated processing techniques, land cover for the city was mapped with such detail that single trees were detected (Figure 3c). NLCD 2001 estimated the County to have only 30% tree canopy, compared to the more precise estimate of 38%.

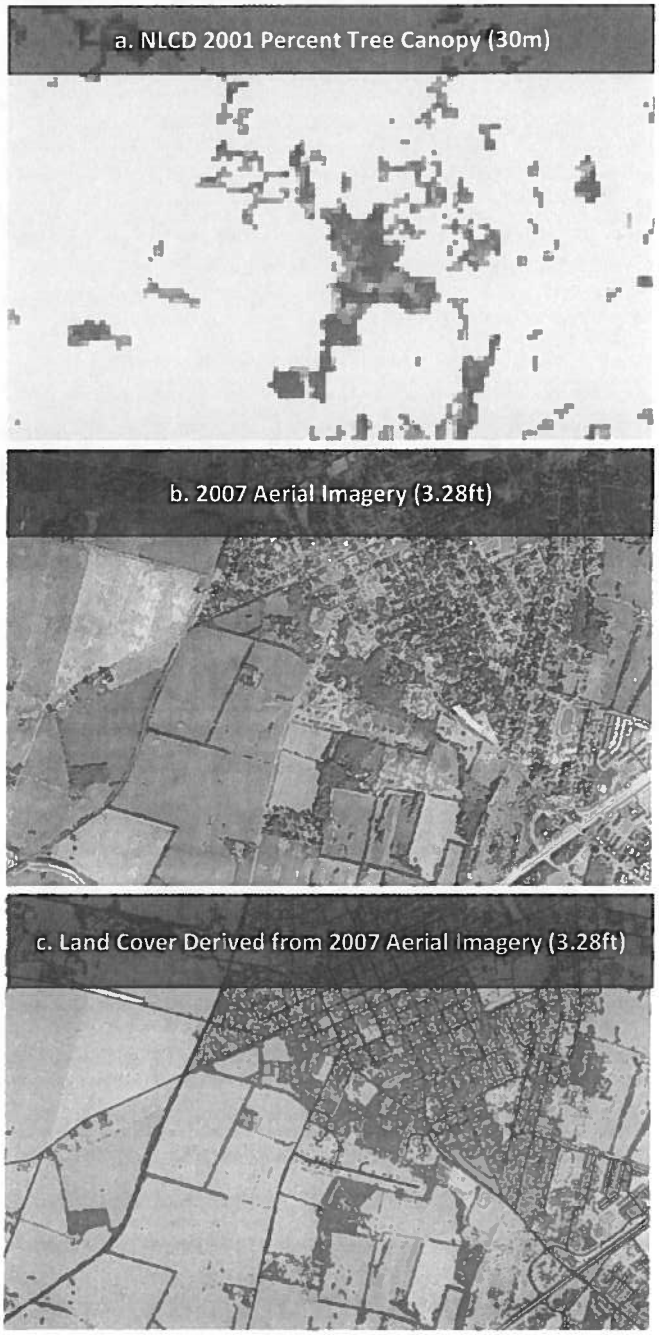


Figure 3a, 3b, 3c: Comparison of NLCD 2001 to high-resolution land cover.

Zoning Summary

Following computation of Existing and Possible TC, the TC metrics were summarized for each category in the County's zoning layer. (Figure 4). For each zoning category, the absolute area of Existing and Possible TC was computed along with the percent of Existing TC and Possible TC (TC area/area of the zoning category).

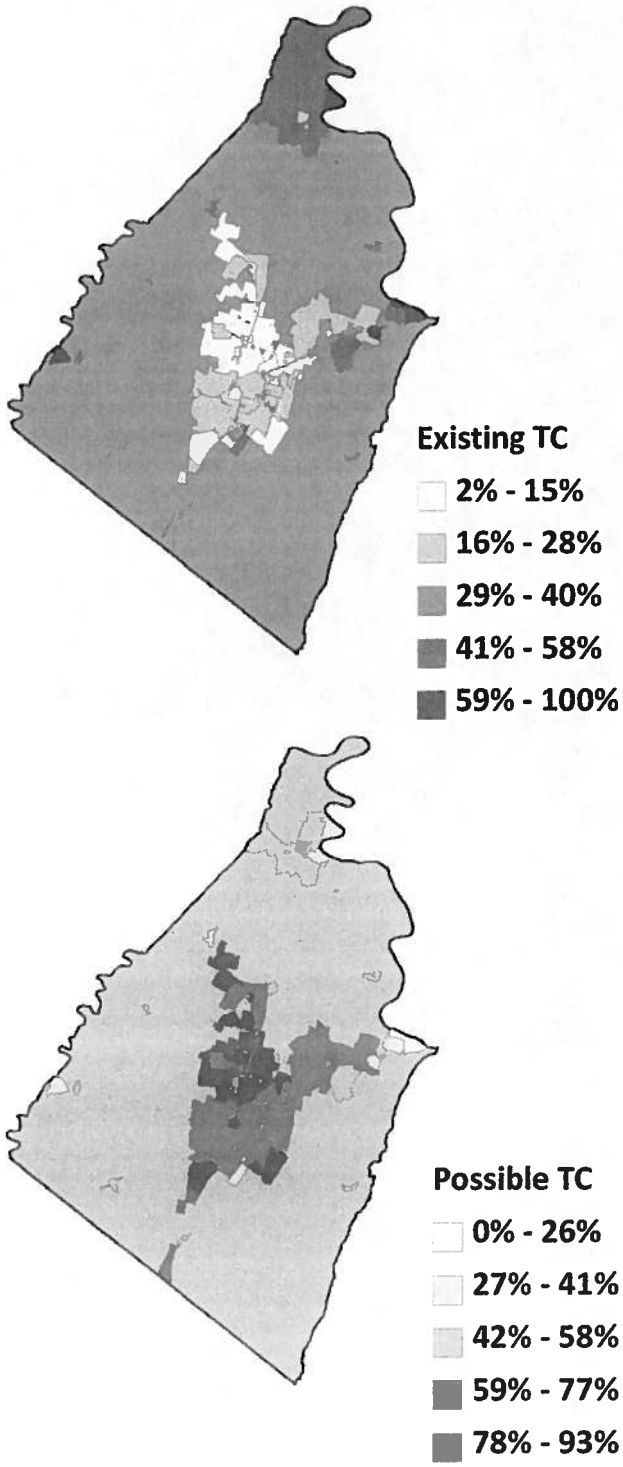


Figure 4: Zoning-based TC metrics. TC metrics are generated at the zoning level, allowing each zoning category to be evaluated according to its Existing TC and Possible TC.

Zoning Districts

An analysis of Existing and Possible TC by zoning district was conducted using the most recent zoning layer for the County. As indicated in Figure 5 the largest zoning category by overall area, amount of tree canopy, and room to plant trees is "Rural." Table 1 presents, for each zoning district, the TC metrics computed as a percentage of all land in the County (% Land), as a percent of land area by the amount of land in the specified zoning district (% Category), and as a percent of the area for TC type (% TC Type). For example, land designated as "Rural" has the most Existing TC in raw acreage, with 33% of all land in Jefferson County consisting of tree canopy in "Rural." "Rural" and "Village" zoned land has the highest percentage of tree canopy relative to its land area at 41%. Areas zoned as "Rural" also encompasses 88% of Existing TC by TC Type.

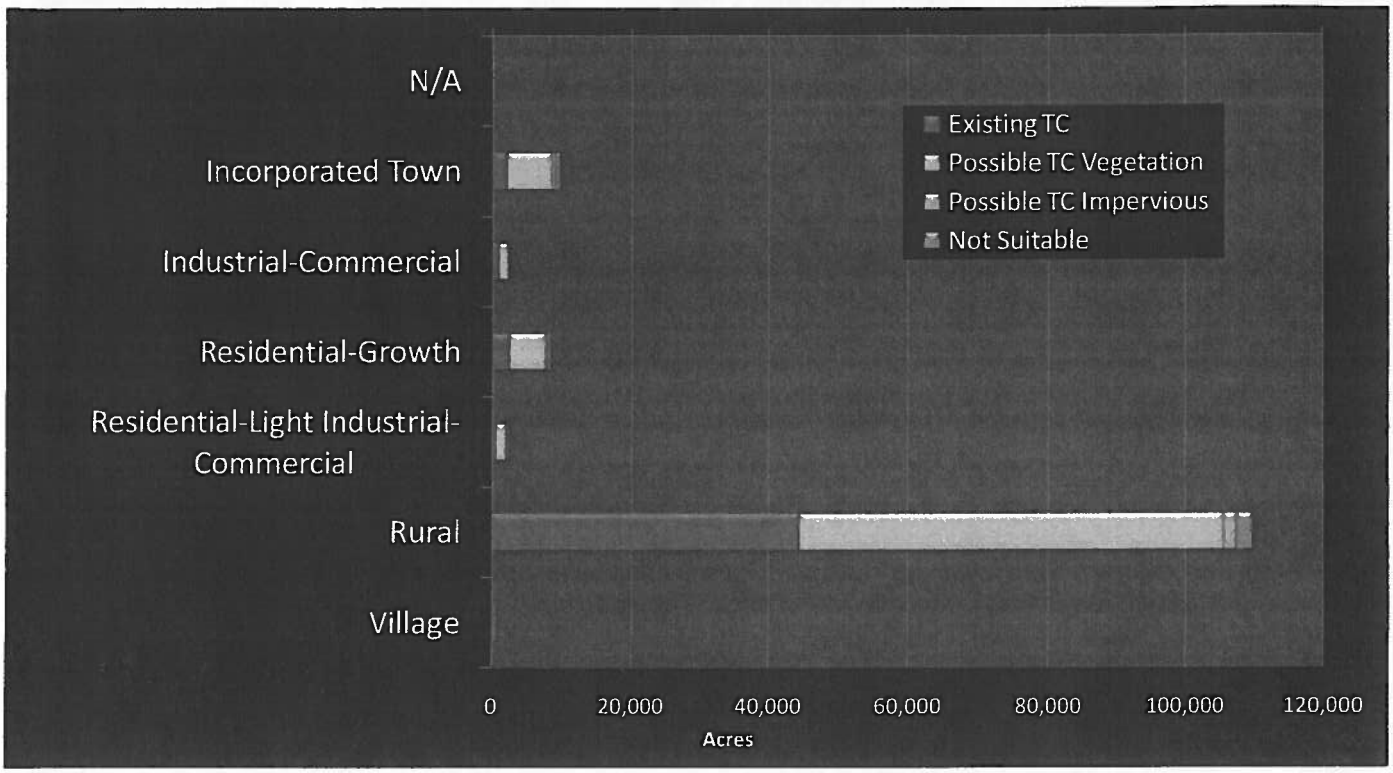


Figure 5: TC metrics summarized by zoning district

Zoning District	Existing TC			Possible TC Vegetation			Possible TC Impervious		
	% Land	% Category	% TC Type	% Land	% Category	% TC Type	% Land	% Category	% TC Type
N/A	0%	27%	0%	0%	57%	0%	0%	5%	0%
Incorporated Town	1%	21%	4%	5%	66%	8%	0%	4%	1%
Industrial-Commercial	1%	34%	2%	1%	54%	2%	0%	6%	0%
Residential-Growth	2%	29%	5%	4%	61%	7%	0%	4%	0%
Residential-Light Industrial-Commercial	0%	18%	1%	1%	63%	2%	0%	9%	0%
Rural	33%	41%	88%	46%	56%	81%	1%	2%	3%
Village	0%	41%	1%	0%	38%	0%	0%	7%	0%

$$\%\ \text{Land} = \frac{\text{Area of TC type for specified District}}{\text{Area of all land}}$$

$$\%\ \text{Category} = \frac{\text{Area of TC type for specified District}}{\text{Area of all land for specified District}}$$

$$\%\ \text{TC Type} = \frac{\text{Area of TC type for specified District}}{\text{Area of all TC type}}$$

The % Land Area value of 33% indicates that 33% of Jefferson County's land area is covered by tree canopy in the Rural category.

The % Category value of 41% indicates that 41% of land in the Rural category is covered by tree canopy.

The % TC Type value of 88% indicates that 88% of all "Existing TC" is classified in the Rural category.

Table 1: TC metrics were summarized by zoning district. For each zoning district TC metrics were computed as a percent of all land in the County (% Land), as a percent of land area by zoning district (% Category) and as a percent of the area for TC type (% TC Type).

Municipalities

Existing TC and Possible TC were summarized by the five municipalities within Jefferson County Figure 6). Ranson is the largest municipality and has the most acreage of Existing TC and Possible TC compared to the other municipalities (Figure 7). Harpers Ferry had the highest percentage of Existing TC by land area while Ranson had the highest percentage of Possible TC by land area.

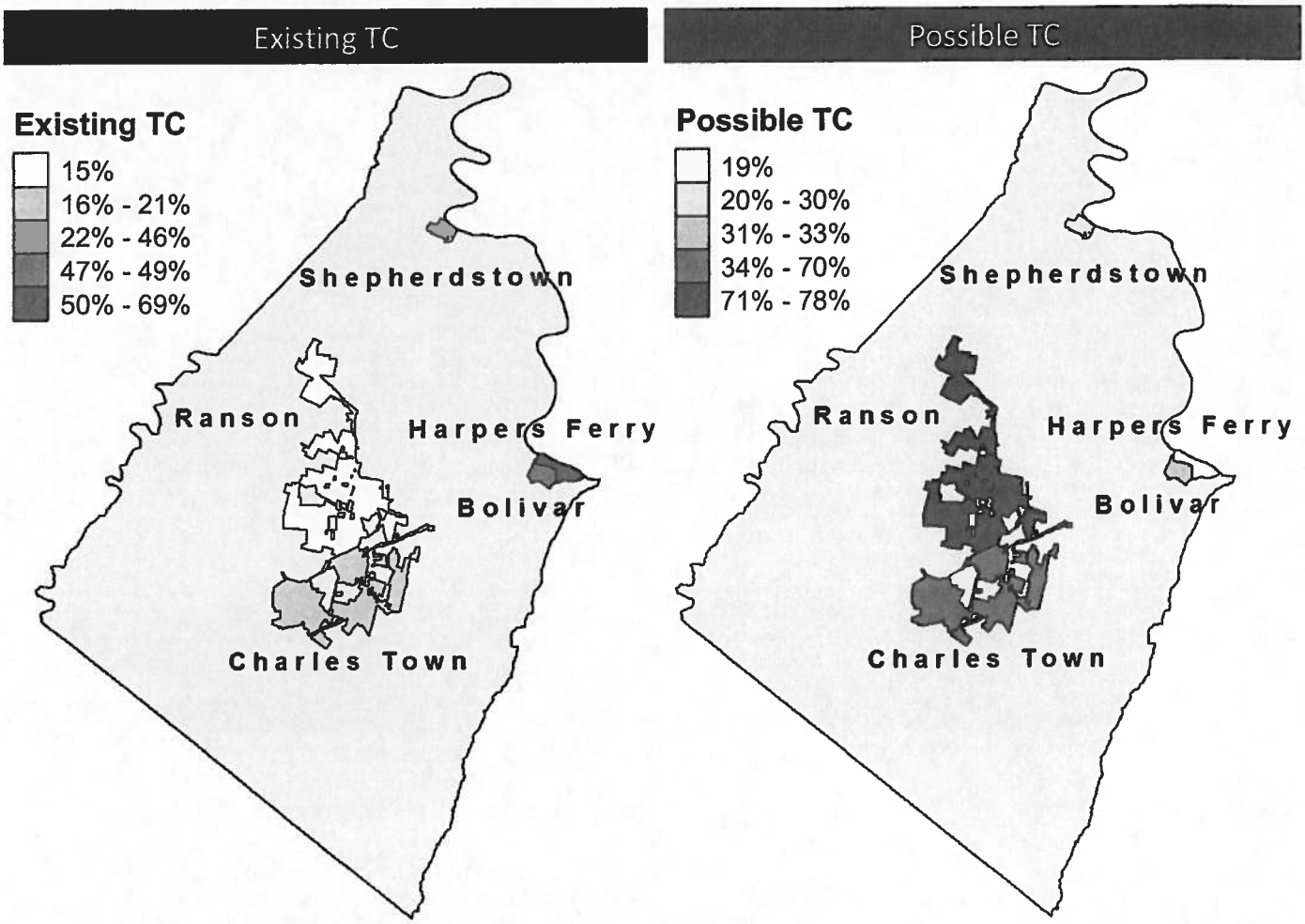


Figure 6. Existing TC (left) and Possible TC (right) as a percentage of land area by municipal boundaries.

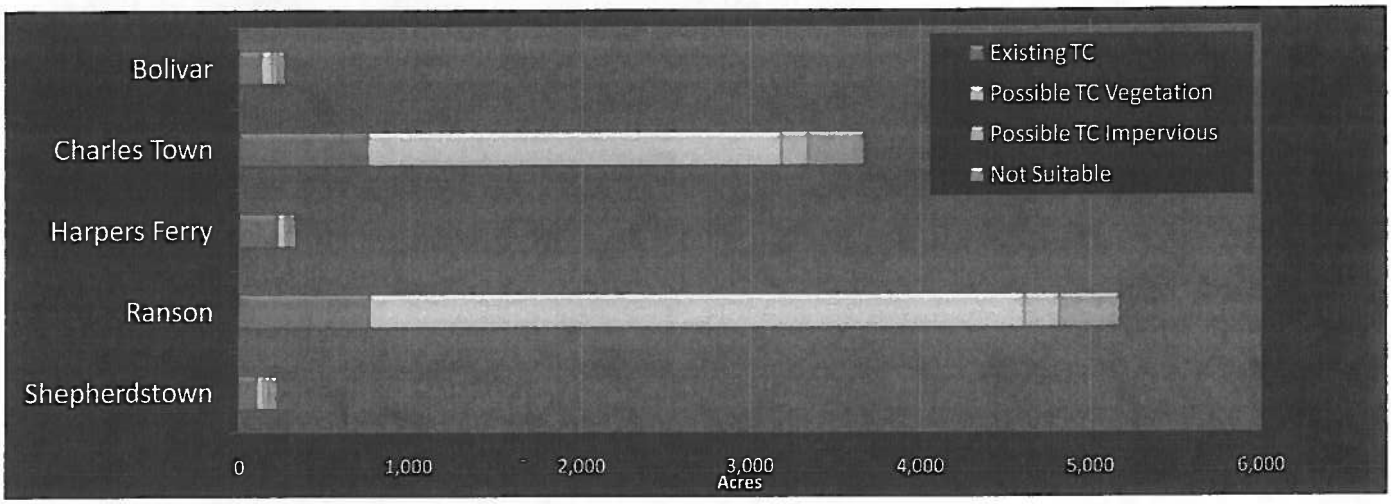


Figure 7: Distribution of existing and possible tree canopy by municipality in Jefferson County.

Urban Growth Centers

Existing TC and Possible TC were summarized by the four Urban Growth Centers within Jefferson County (Figure 8). Charles Town occupies the largest area and has the most Existing TC and Possible TC in raw acreage compared to the other Urban Growth Centers. Bolivar occupies the least amount of area but has the highest percentage of Existing TC by land area when compared to other Urban Growth Centers. Charles Town has the highest percentage of Possible TC compared to the other Urban Growth Centers.

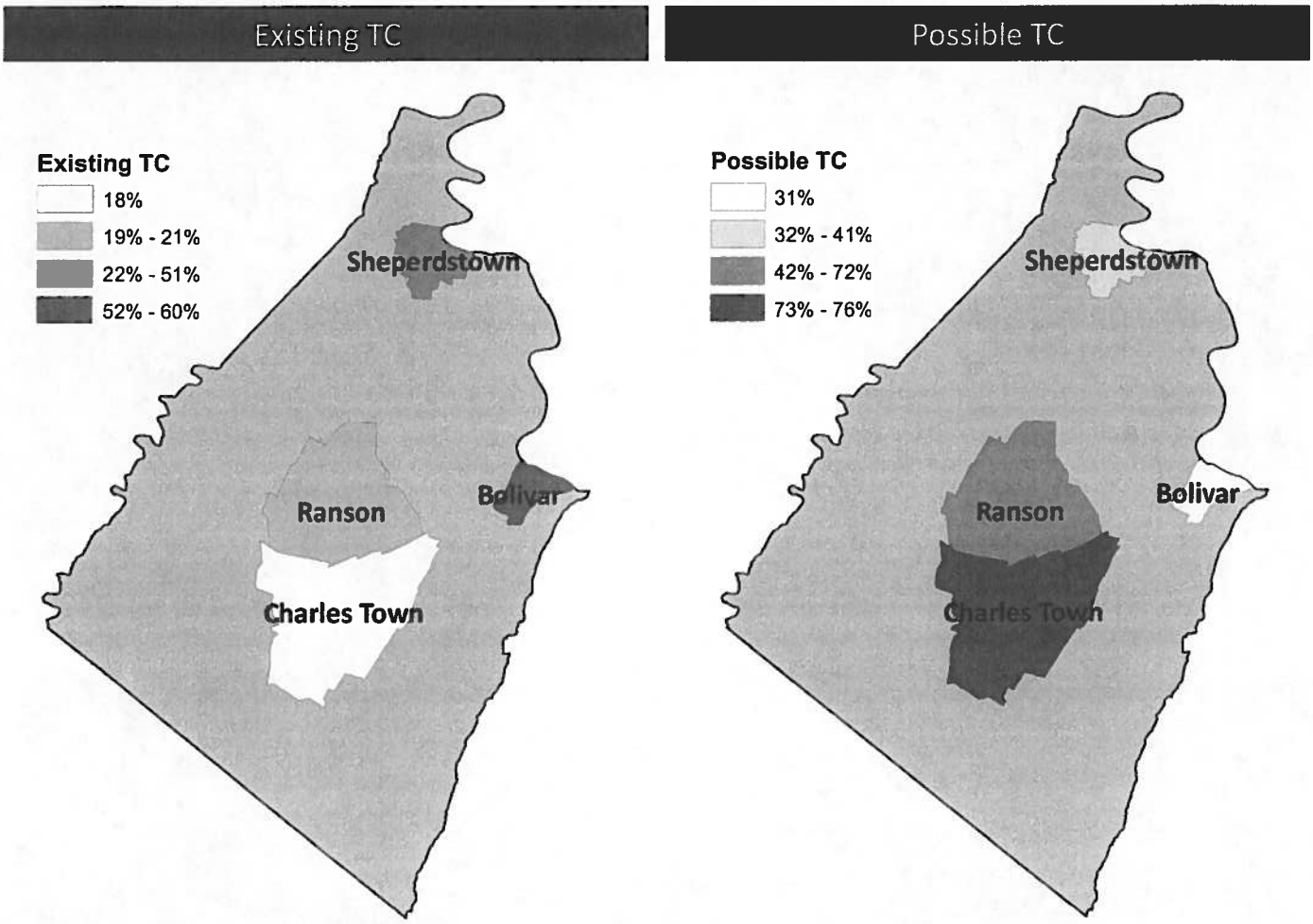


Figure 8. Existing TC (left) and Possible TC (right) as a percentage of land area by Urban Growth Centers.

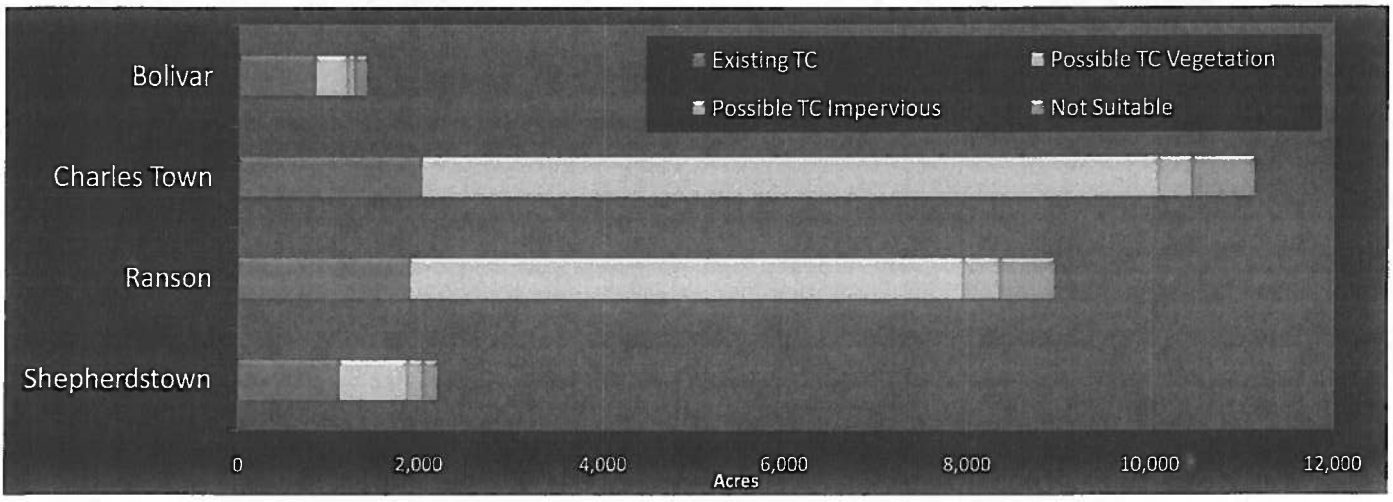


Figure 9: Distribution of Existing TC and Possible TC by Urban Growth Center

Slope Classes

High-resolution topographic data was used to generate slope maps for the county. In the old slopes classes, slopes ranging from 0-9.9% had largest overall area and greatest amount of Existing and Possible UTC. This range of slope values also had the highest percentage of Existing and Possible TC by % land area. In the new slope classes, the slopes ranging from 0-14.9% covered the largest area of the County area and had the greatest area of Existing and Possible TC and highest percentage of land area covered by both TC metrics. The steepest class for the old classes (>35%) and the new slope classes (>50%) had less than 1% of both Esiting and Possible TC.

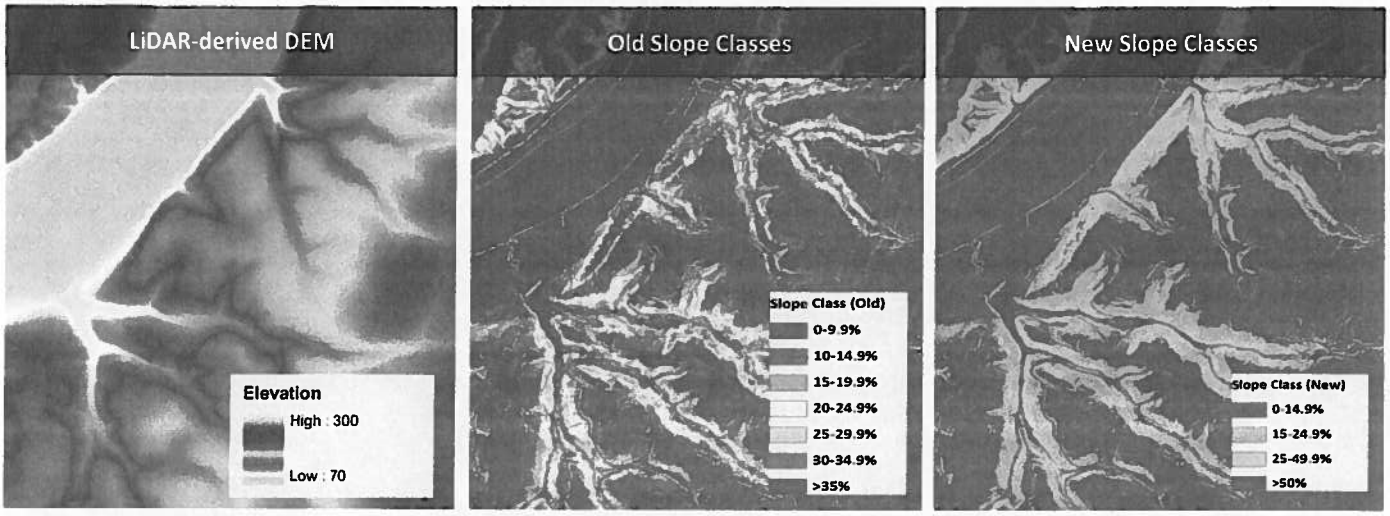


Figure 9: High-resolution slope maps were generated from a LiDAR-derived DEM left). The slope map is displayed according to old slope classes (center) and new slope classes (right).

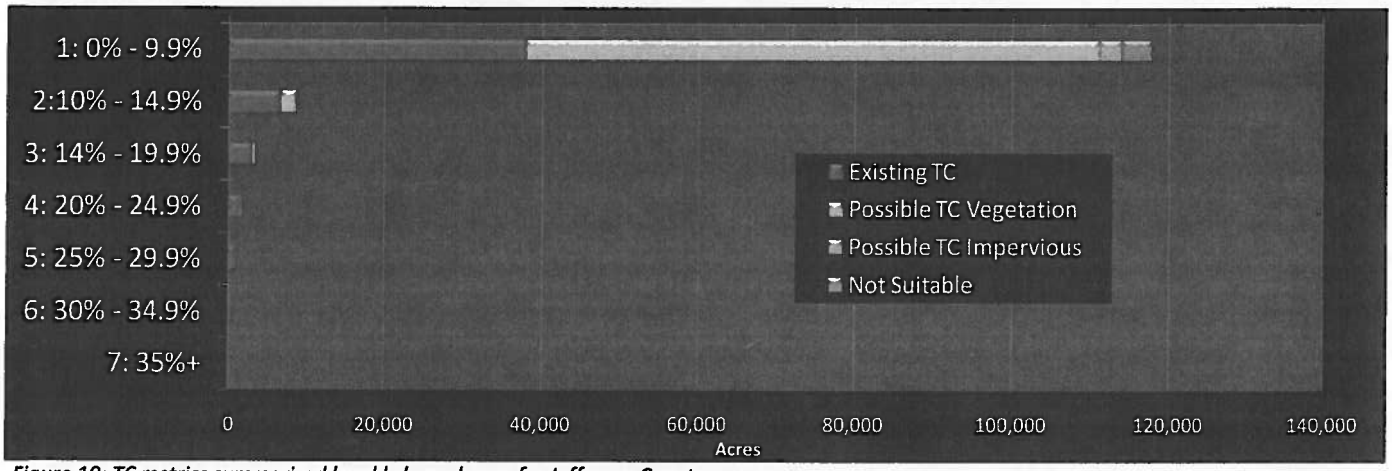


Figure 10: TC metrics summarized by old slope classes for Jefferson County.

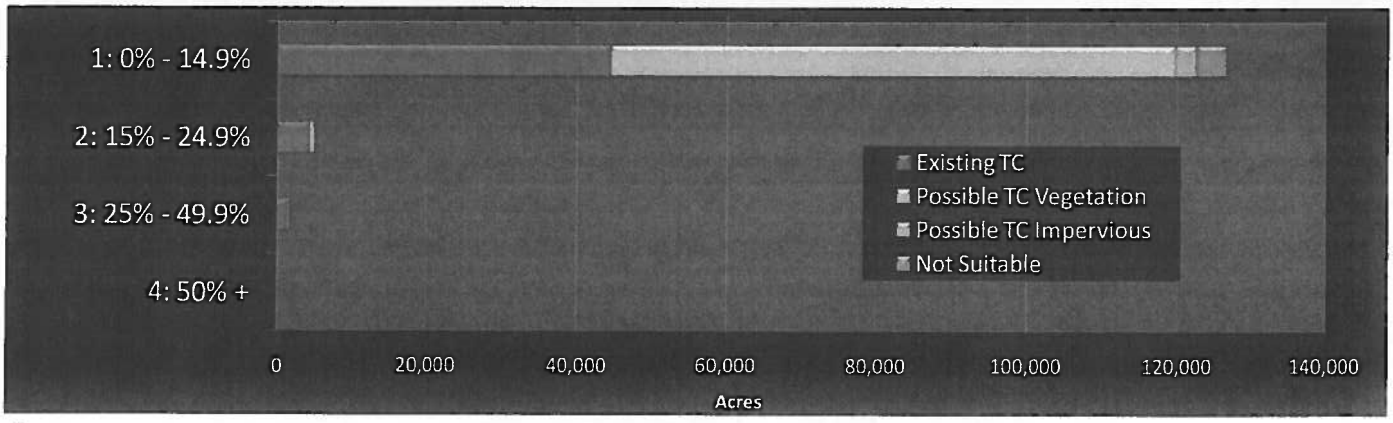


Figure 11: TC metrics summarized by new slope classes for Jefferson County.

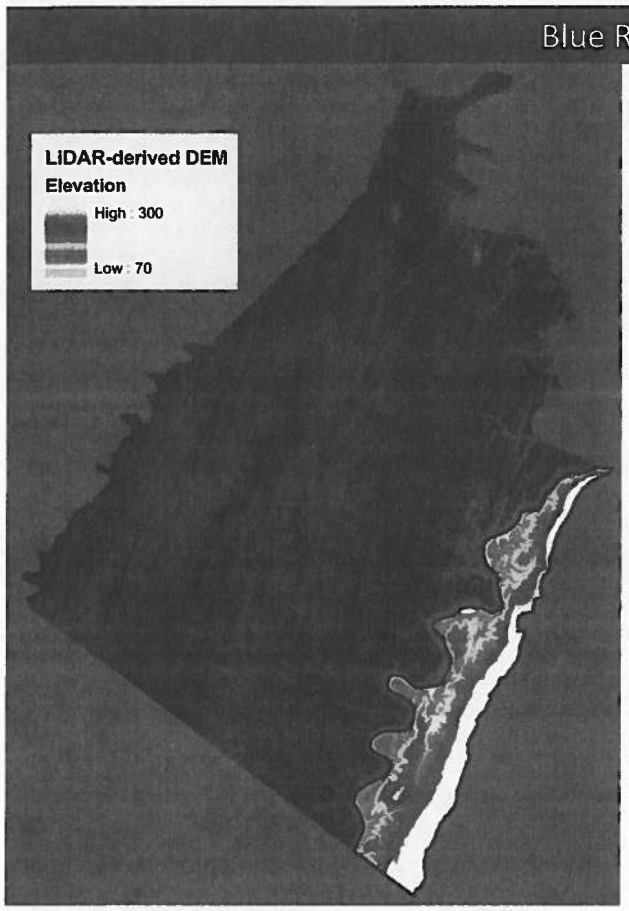


Figure 13. LiDAR-derived digital elevation model (DEM) showing topography for the Blue Ridge Mountain Area.

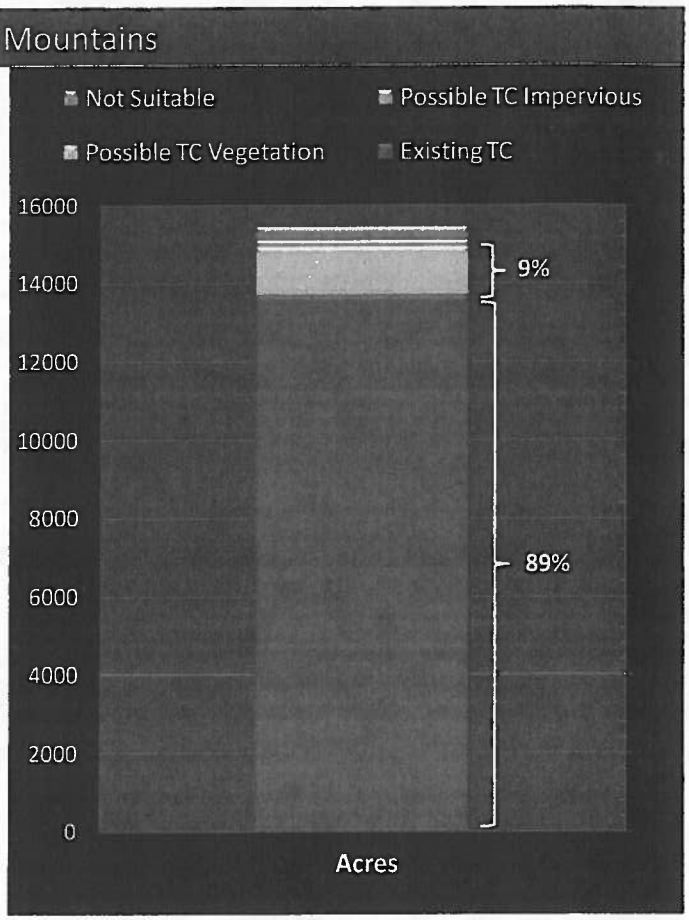


Figure 14: TC metrics for the Blue Ridge Mountain Area show that the area is primarily covered by tree canopy.

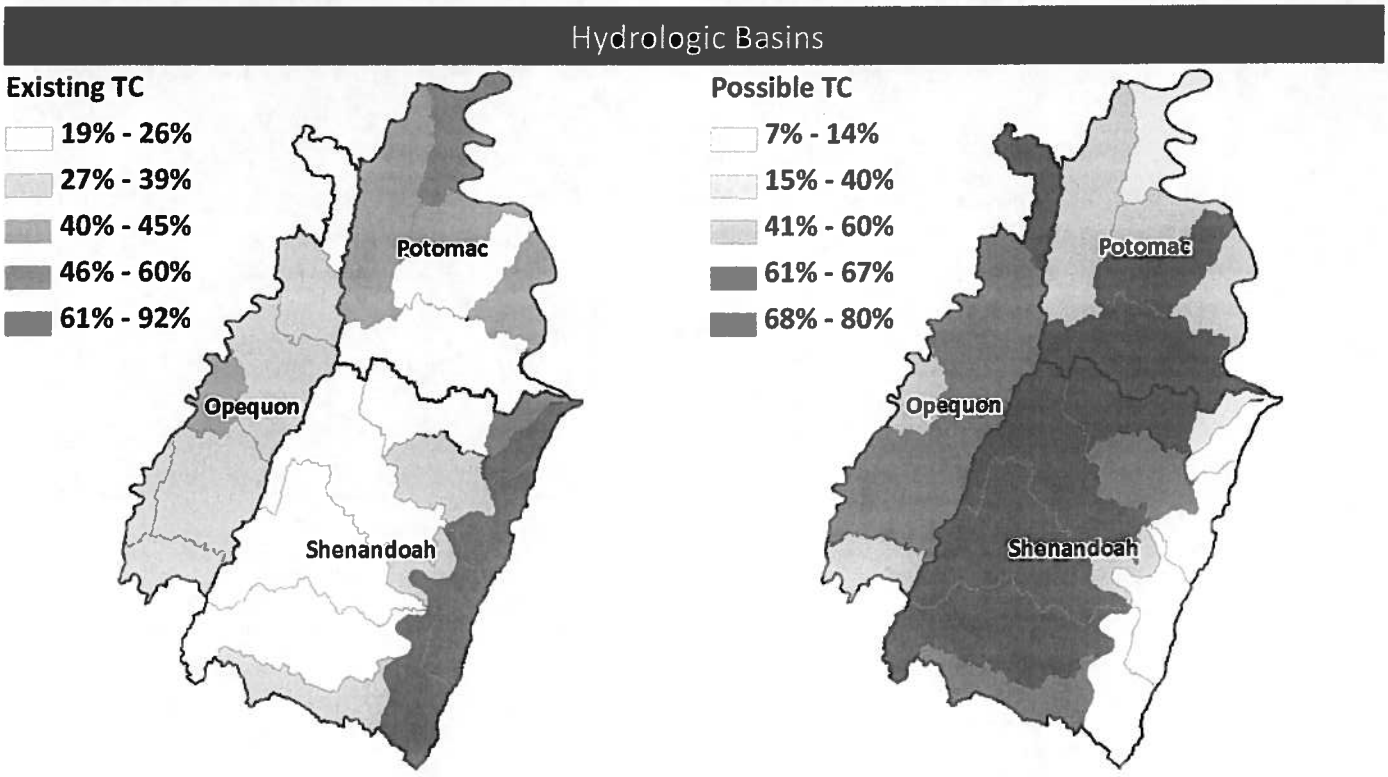


Figure 15: Existing TC and Possible TC were summarized by hydrologic basins and corresponding subwatersheds for Jefferson County.

Conclusions and Recommendations

- Jefferson County's Tree Canopy is a vital county asset that reduces stormwater runoff, improves air quality, reduces the county's carbon footprint, enhances quality of life, contributes to savings on energy bills, and serves as habitat for wildlife.
- Jefferson County should consider establishing a TC goal. Such a goal should not be limited to increasing the county's overall tree canopy; it should also focus on increasing tree canopy in those zoning districts or municipalities that have the least Existing TC and highest Possible TC.
- Zoning-level summaries can be used for targeting tree planting and preservation efforts within different regions of the County.
- "Rural" areas had the highest percentage of Existing and Possible TC for the County. Policies and management strategies should be developed to preserve and promote tree canopy within this zoning district.
- Residential, industrial and commercial zoning districts are covered by 2% or less Existing tree canopy. Regulations or incentive programs should be implemented to encourage establishing more tree canopy in these areas.
- Of particular focus for TC improvement should be municipalities or urban growth centers within the county that have large contiguous impervious surfaces. These areas contribute high amounts of runoff, which degrades water quality. The establishment of tree canopy in these municipalities will help reduce runoff during periods of peak overland flow.
- Policies should be implemented that encourage tree plating as part of development within the urban growth centers.
- Tree canopy should be preserved or established in steeper slope areas. Establishing tree canopy and other vegetation on steep slopes can reduce soil erosion and landslide risks.
- With Existing TC and Possible TC summarized at the watershed and basin level and integrated with the County's GIS database, individual watersheds or basins can be examined and targeted for TC improvement.. Research (Goetz et al., 2003) indicates that watersheds with 37% tree canopy results in a "fair" stream health rating, and 45% tree canopy results in a stream health rating of "good."

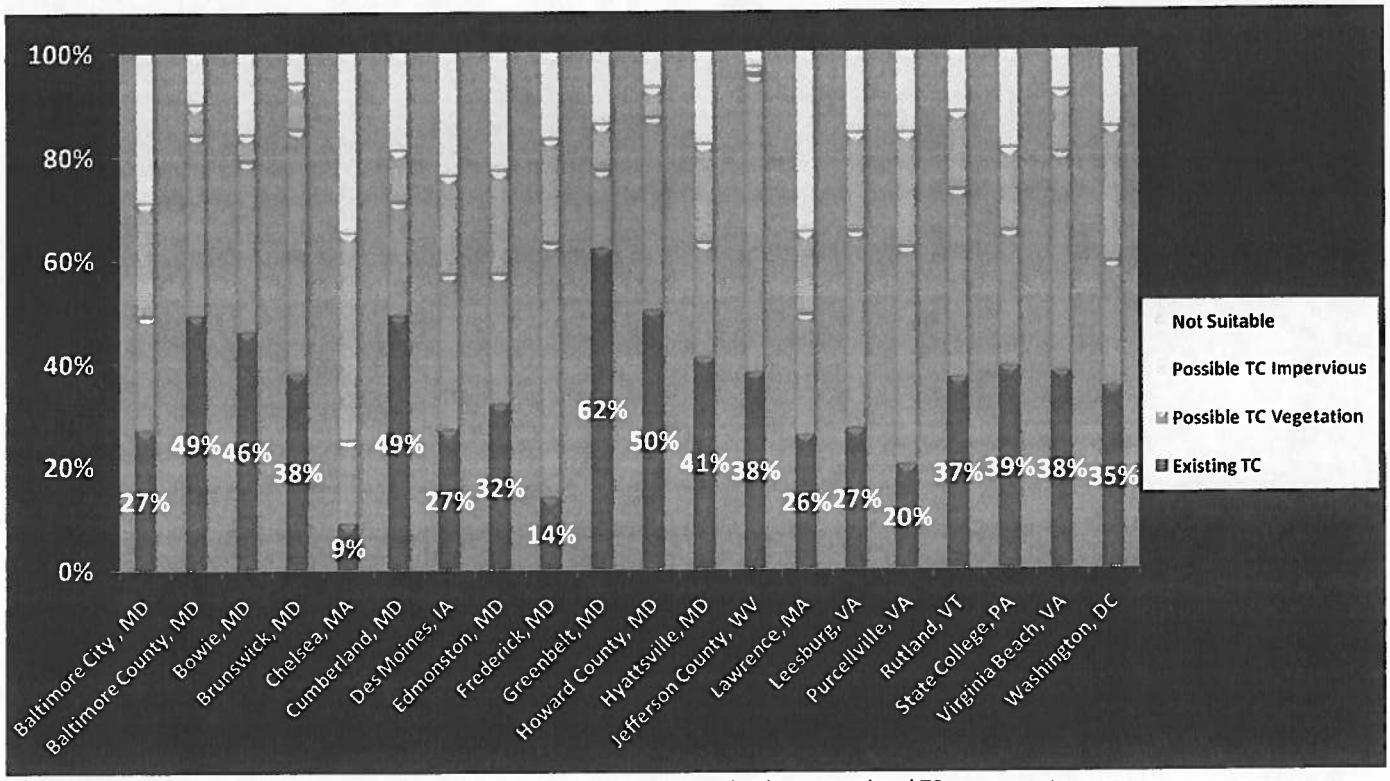


Figure 16: Comparison of TC Metrics with other selected counties and cities that have completed TC assessments.

Prepared by:

Jarlath O'Neil-Dunne & Keith Pelletier
Spatial Analysis Laboratory
Rubenstein School of the Environment & Natural Resources
University of Vermont
joneildu@uvm.edu
802.656.3324

Additional Information

Funding for the project was provided by the Jefferson County Commission. More information on the tree canopy assessment can be found at the following web site:

http://nrs.fs.fed.us/urban/TC/