To: Board of Supervisors
Glenn Russell
Dave Ward
Dennis Marshall

From: Cindy Feinberg
Sarah Wilson
Don Miller
Joanne Shefflin

In preparation for the Board of Supervisors briefing on Telecommunications Program and Current Projects, we would like to respond to Regulatory Framework on both the Federal and County levels. Attached for your review are four recent lawsuits from the United States Court of Appeals for the Ninth Circuit. In all four of these cases, the court has ruled in favor of the City over the Telecommunications Company.

Please be aware that according to the Telecommunications Act of 1996 (TCA) under Limitations General Authority under the same section that is referenced in the Board Letter,
(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 modifications of personal wireless service facilities.

The key under limitations is that a State or local government cannot discriminate among providers. Any decision made by a local government to deny a permit for any reason simply needs to be made in writing and be supported by substantial evidence. The attached cases have been won by the local government supporting their arguments in writing with sufficient evidence. Furthermore, "the substantial evidence inquiry does not require incorporation of the substantive federal standards imposed by the TCA, but instead requires a determination whether the zoning decision at issue is supported by substantial evidence in the context of applicable *state and local law*."(Metro PCS, Inc. v. San Francisco). In fact, "the California Constitution gives the City the authority to regulate local aesthetics, and neither PUC $7901 nor PUC $7901.1 divests it of that authority." (Sprint PCS Assets v. Palos Verdes) . An example of this provision is seen the case of Sprint v. County of San Diego where the court supported that "City ordinance has the right to consider open-ended concepts such as community character and aesthetics.

Next, we need to answer the question, is there anything in our zoning regulation that allows the City of Santa Barbara to contest the proposed Next G nodes? First, we must consider that "most courts have held that discrimination based on 'traditional bases of zoning regulation' such as 'preserving the character of the neighborhood and avoiding aesthetic blight' are reasonable and thus permissible. AT&T Wireless, 155 F.3d at 427. Our answer is under section 35.444.010, page 4-51, section c.(3) "proposed facilities shall be assessed as potential collocation facilities or sites to promote facility and site sharing so as to minimize the overall visual impact. ….Criteria used to determine suitability for collocation include visibility of the existing site, potential for exacerbating the visual impact of the existing site, ...". In Montecito, we strive to preserve our rural character and do not want to add any more eye sores to the community such as more telecommunications antennas. In fact, the community has been pushing to put all power lines underground and hence any existing pole is already an aesthetic blight to our community and we do not want to exacerbate the problem by adding anything that will add to an undesirable visual impact on our community.

The second issue we must address is if the local government has the right to deny any telecommunications permits based on necessity of the service. The court case of Metro PCS v. San Francisco has set a precedent that a local government may deny a permit if the telecommunications provider cannot prove a significant gap in service coverage.. "The test employed by the Second and Third Circuits holds that a significant gap in service exists only if no provider is able to serve the gap area in question." This inquiry involves a two-pronged analysis (1) the showing of a significant gap in service coverage and (2) some inquiry into the feasibility of alternative facilities or site locations." Metro PCS, Inc. v. San Francisco. Our community would like to know if this issue has been addressed by the Development Review Division. We have reviewed ten of the eleven antenna permit applications and did not see any information detailing a significant gap in coverage.

We would like you to address all of these issues at the Board of Supervisors meeting on Tuesday, October 20th.

Thank you for attention to this significant community issue.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SPRINT PCS ASSETS, L.L.C., a Delaware limited liability company, wholly-owned by Sprint Telephony PCS, LP, a Delaware limited partnership,

Plaintiff-Appellee,

v.

CITY OF PALOS VERDES ESTATES, a California municipality; CITY COUNCIL OF THE CITY OF PALOS VERDES ESTATES, its governing body; JOSEPH SHERWOOD, in his official capacity as Mayor Pro Tem of the City of Palos Verdes Estates; JOHN FLOOD, in his official capacity as Councilmember of the City of Palos Verdes Estates; ROSEMARY HUMPHREY, in her official capacity as Councilmember of the City of Palos Verdes Estates; DWIGHT ABBOTT, in his official capacity as Councilmember of the City of Palos Verdes Estates; JAMES F. GOODHART, in his official capacity as Councilmember of the City of Palos Verdes Estates,

Defendants-Appellants.

No. 05-56106

D.C. No. CV-03-00825-AHS

OPINION

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding

14535

Argued and Submitted
July 6, 2009—Pasadena, California

Filed October 14, 2009

Before: Barry G. Silverman, Kim McLane Wardlaw, and Jay S. Bybee, Circuit Judges.

Opinion by Judge Wardlaw

COUNSEL

Scott J. Grossberg, Richard R. Clouse, Amy R. von Kelsch-Berk, and Angelica A. Arias of Cihigoyenetche, Grossberg & Clouse, Ranco Cucamonga, California, and Daniel P. Barer of Pollak, Vida & Fisher, Los Angeles, California, for the appellants.

John J. Flynn III, Gregory W. Sanders, and Michael W. Shonafelt of Nossaman, Guthner, Knox & Elliott, LLP, Irvine, California, for the appellee.

OPINION

WARDLAW, Circuit Judge:

The City of Palos Verdes Estates ("City") appeals the grant of summary judgment in favor of Sprint PCS Assets, L.L.C. ("Sprint"). We must decide whether the district court erred in concluding that the City violated the Telecommunications Act of 1996 ("TCA"), Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in various sections of U.S.C. titles 15, 18, and 47), when it denied Sprint permission to construct two wireless telecommunications facilities in the City's public rights-of-way. Specifically, we must decide (1) whether the City's denial is supported by substantial evidence, as required by 47 U.S.C. § 332(c)(7)(B)(iii), and (2) whether the City's denial constitutes a prohibition on the provision of wireless service in violation of 47 U.S.C. §§ 253(a) and 332(c)(7)(B)(i)(II). Because the City's denial is supported by substantial evidence, and because disputed issues of material fact preclude a finding that the decision amounted to a prohibition on the provision of wireless service, we reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

The City is a planned community, about a quarter of which consists of public rights-of-way that were designed not only to serve the City's transportation needs, but also to contribute to its aesthetic appeal. In 2002 and 2003, Sprint applied for permits to construct wireless telecommunications facilities ("WCF") in the City's public rights-of-way. The City granted eight permit applications but denied two others, which are at issue in this appeal. One of the proposed WCFs would be constructed on Via Azalea, a narrow residential street, and the other would be constructed on Via Valmonte, one of the four main entrances to the City. Sprint acknowledged that it already served four thousand customers in the City with its existing network but stated that the proposed WCFs were nonetheless needed to replace its existing infrastructure.

A City ordinance ("Ordinance") provides that WCF permit applications may be denied for "adverse aesthetic impacts arising from the proposed time, place, and manner of use of the public property." Palos Verdes Estates, Cal., Ordinances ch. 18.55.040(B)(1). Under the Ordinance, the City's Public Works Director ("Director") denied Sprint's WCF permit applications, concluding that the proposed WCFs were not in keeping with the City's aesthetics. The City Planning Commission affirmed the Director's decision in a unanimous vote.

Sprint appealed to the City Council ("Council"), which received into evidence a written staff report that detailed the potential aesthetic impact of the proposed WCFs and summarized the results of a "drive test," which confirmed that cellular service from Sprint was already available in relevant locations in the City. The Council also heard public comments and a presentation from Sprint's representatives. The Council issued a resolution affirming the denial of Sprint's permit applications. It concluded that a WCF on Via Azalea would disrupt the residential ambiance of the neighborhood and that a WCF on Via Valmonte would detract from the natural beauty that was valued at that main entrance to the City.

Denied permits by the Director, the Commission, and the Council, Sprint took its case to federal court, seeking a declaration that the City's decision violated various provisions of the TCA. The district court concluded that the City's decision was not supported by substantial evidence and thus violated 47 U.S.C. § 332(c)(7)(B)(iii). This determination was premised on a legal conclusion that California law prohibits the City from basing its decision on aesthetic considerations. The district court also concluded that the City violated 47 U.S.C. §§ 253 and 332(c)(7)(B)(i)(II) by unlawfully prohibiting the provision of telecommunications service, finding that the City had prevented Sprint from closing a significant gap in its coverage. The City timely appeals.

II. JURISDICTION AND STANDARD OF REVIEW

The district court exercised jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291. "We review summary judgment de novo." *Nelson v. City of Davis*, 571 F.3d 924, 927 (9th Cir. 2009) (citation omitted). Summary judgment is appropriate only if the pleadings, the discovery, disclosure materials on file, and affidavits show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). All justifiable factual inferences must be drawn in the City's favor, and we must reverse the grant of summary judgment if any rational trier of fact could resolve a material factual issue in the City's favor. *See Nelson*, 571 F.3d at 927.

III. DISCUSSION

The tension between technological advancement and community aesthetics is nothing new. In an 1889 book that would become a classic in city planning literature, Vienna's Camillo Sitte lamented:

> [T]here still remains the question as to whether it is really necessary to purchase these [technological] advantages at the tremendous price of abandoning all artistic beauty in the layout of cities. The innate conflict between the picturesque and the practical cannot be eliminated merely by talking about it; it will always be present as something intrinsic to the very nature of things.

Camillo Sitte, City Planning According to Artistic Principles 110 (Rudolph Wittkower ed., Random House 1965) (1889).

The TCA attempts to reconcile this "innate conflict." On the one hand, the statute is intended to "encourage the rapid deployment of new telecommunications technologies." Pub.

L. No. 104-104, 110 Stat. 56. On the other hand, it seeks "to preserve the authority of State and local governments over zoning and land use matters." *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 992 (9th Cir. 2009) (citation omitted). The TCA seeks a balance by placing certain limitations on localities' control over the construction and modification of WCFs. *See* 47 U.S.C. §§ 253(a), 332(c)(7)(B). This appeal involves a challenge to the district court's conclusion that the City exceeded those limitations.

A. Section 332(c)(7)(B)(iii)

[1] One of the limitations that the TCA places upon local governments is that "[a]ny decision . . . 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." 47 U.S.C. § 332(c)(7)(B)(iii). As we have explained, "The upshot is simple: this Court may not overturn the [City's] decision on 'substantial evidence' grounds if that decision is authorized by applicable local regulations and supported by a reasonable amount of evidence." *MetroPCS, Inc. v. City & County of S.F.*, 400 F.3d 715, 725 (9th Cir. 2005).[1] Thus, we must determine (1) whether the City's decision was authorized by local law and, if it was, (2) whether it was supported by a reasonable amount of evidence. Both requirements are satisfied here.

1. The City's decision was authorized by local law.

"[W]e must take applicable state and local regulations as we find them and evaluate the City decision's evidentiary

[1]The district court did not have the benefit of our decision in *MetroPCS* when it issued its order granting Sprint summary judgment on its claims under 47 U.S.C. §§ 253 and 332(c)(7)(B)(iii). Indeed, there has been considerable development in this area of the law since the district court resolved Sprint's motion. *See, e.g., Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008); *City of Anacortes*, 572 F.3d at 987.

support (or lack thereof) relative to those regulations." *MetroPCS*, 400 F.3d at 724. As noted above, the Ordinance authorizes the denial of WCF permit applications on aesthetic grounds. Also relevant for our purposes is the California Public Utilities Code ("PUC"), which provides telecommunications companies with a right to construct WCFs "in such manner and at such points as not to incommode the public use of the road or highway," Cal. Pub. Util. Code § 7901, and states that "municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed." *Id*. § 7901.1. The district court erred in concluding that the City's consideration of aesthetics was invalid under the PUC.[2] The California Constitution gives the City the authority to regulate local aesthetics, and neither PUC § 7901 nor PUC § 7901.1 divests it of that authority.

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[2]During the pendency of this appeal, pursuant to Cal. R. Ct. 8.548(a), we requested that the California Supreme Court decide whether PUC §§ 7901 and 7901.1 permit public entities to regulate the placement of telephone equipment in public rights-of-way on aesthetic grounds. The California Supreme Court denied our request, concluding that a decision on that issue may not be determinative in these federal proceedings. Accordingly, the task now before us is to predict how the California Supreme Court would resolve the issue. *See Giles v. Gen. Motors Acceptance Corp*., 494 F.3d 865, 872 (9th Cir. 2007). We may look to the state's intermediate appellate courts for guidance. *Id.* While the question of whether California's municipalities have the power to consider aesthetics in deciding whether to grant WCF permit applications has been addressed by us and the California Courts of Appeals, it has not been resolved in a published opinion on which we may rely. *See Sprint PCS Assets, L.L.C. v. City of La Cañada Flintridge*, 182 Fed. Appx. 688, 690-91 (9th Cir. 2006) (city may not consider aesthetics); *Sprint Telephony PCS v. County of San Diego*, 44 Cal. Rptr. 3d 754, 764-66 (Cal. Ct. App. 2006) (city may consider aesthetics) *superseded by* 143 P.3d 654 (Cal. 2006); *see also* 9th Cir. R. 36-3 (unpublished dispositions are not precedent); Cal. R. Ct. 8.1115 (no citation or reliance on unpublished opinions).

i. California's Constitution

[2] The California Constitution authorizes local governments to "make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal. Const. art. XI, § 7. California's Supreme Court has explained that a " 'city's police power under this provision can be applied only within its own territory and is subject to displacement by general state law but otherwise is as broad as the police power exercisable by the Legislature itself.' " *Fisher v. City of Berkeley*, 693 P.2d 261, 271 (Cal. 1984) (quoting *Birkenfeld v. City of Berkeley*, 550 P.2d 1001, 1009 (Cal. 1976)); *see also Conn. Indem. Co. v. Super. Ct. of San Joaquin County*, 3 P.3d 868, 872 (Cal. 2000) (state constitution provides city with "general authority to exercise broad police powers"). There is no question that the City's authority to regulate aesthetics is contained within this broad constitutional grant of power. *See Landgate, Inc. v. Cal. Coastal Comm'n*, 953 P.2d 1188, 1198 (Cal. 1998) (aesthetic preservation is "unquestionably [a] legitimate government purpose[ ]"); *Ehrlich v. City of Culver City*, 911 P.2d 429, 450 (Cal. 1996) ("[A]esthetic conditions have long been held to be valid exercises of the city's traditional police power.").

Thus, the threshold issue is not, as Sprint argues and the district court apparently believed, whether the PUC authorizes the City to consider aesthetics in deciding whether to grant a WCF permit application, but is instead whether the PUC divests the City of its constitutional power to do so.[3] There-

[3]Sprint urges us to approach the question differently, relying on language from *Western Union Tel. Co. v. Hopkins*, 116 P. 557 (Cal. 1911), that

> [i]t is universally recognized that the state in its sovereign capacity has the original right to control all public streets and highways, and that except in so far as that control is relinquished to municipalities by the state, either by provision of the state consti-

fore, the question actually before us is whether the City's consideration of aesthetics is "in conflict with general laws." Cal. Const. art. XI, § 7. "A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by . . . legislative implication." *Action Apartment Ass'n, Inc. v. City of Santa Monica*, 163 P.3d 89, 96 (Cal. 2007) (citation and quotation omitted). "Local legislation is contradictory to general law when it is inimical thereto." *Id.* (citation and quotation omitted). Absent a specific legislative indication to the contrary, we presume that there is no conflict where the local government regulates an area over which it has traditionally exercised control. *See id.* Sprint has the burden of demonstrating that a conflict exists. *See id*. We conclude that neither PUC § 7901 nor PUC § 7901.1 conflicts with the City's default power to deny a WCF permit application for aesthetic reasons.

ii. PUC § 7901

[3] The City's consideration of aesthetics in denying Sprint's WCF permit applications comports with PUC § 7901,

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tution or by legislative act not inconsistent with the Constitution, it remains with the state legislature.

Id. at 562. The defect in Sprint's argument is that it contemplates a relinquishment of state sovereignty through statute only, thus turning a blind eye to the constitutional grant of power contained in Cal. Const. art. XI, § 7. Our observation that the City possesses constitutionally based police powers over aesthetics is entirely consistent with the *Hopkins* court's recognition that the utility companies' right to construct telegraph facilities remained subject to "the lawful exercise by the city of such rights in regard to such use as it has under the police power." *Hopkins*, 116 P. at 563; *see also id.* at 562 (city retains power to do "such things in regard to the streets and the use thereof as were justified in the legitimate exercise of the police power"); *see also Pac. Tel. & Tel. Co. v. City & County of S.F.*, 336 P.2d 514, 519 (Cal. 1959) (telephone franchise is a matter of state concern but city still controls the particular location and manner in which public utility facilities are constructed in the streets). The *Hopkins* court refrained from articulating the scope of the city's police powers because, unlike in this appeal, that was "a question in no way involved in [the] case." *Hopkins*, 116 P. at 562-63.

which provides telecommunications companies with a right to construct WCFs "in such manner and at such points as not to incommode the public use of the road or highway." Cal. Pub. Util. Code § 7901. To "incommode" the public use is to "subject [it] to inconvenience or discomfort; to trouble, annoy, molest, embarrass, inconvenience" or "[t]o affect with inconvenience, to hinder, impede, obstruct (an action, etc.)." 7 The Oxford English Dictionary 806 (2d ed. 1989); *see also* Webster's New Collegiate Dictionary 610 (9th ed. 1983) ("To give inconvenience or distress to."). The experience of traveling along a picturesque street is different from the experience of traveling through the shadows of a WCF, and we see nothing exceptional in the City's determination that the former is less discomforting, less troubling, less annoying, and less distressing than the latter. After all, travel is often as much about the journey as it is about the destination.

The absence of a conflict between the City's consideration of aesthetics and PUC § 7901 becomes even more apparent when one recognizes that the "public use" of the rights-of-way is not limited to travel. It is a widely accepted principle of urban planning that streets may be employed to serve important social, expressive, and aesthetic functions. *See* Ray Gindroz, *City Life and New Urbanism*, 29 Fordham Urb. L.J. 1419, 1428 (2002) ("A primary task of all urban architecture and landscape design is the physical definition of streets and public spaces as places of shared use."); Kevin Lynch, The Image of the City 4 (1960) ("A vivid and integrated physical setting, capable of producing a sharp image, plays a social role as well. It can furnish the raw material for the symbols and collective memories of group communication."); Camillo Sitte, City Planning According to Artistic Principles 111-12 (Rudolph Wittkower ed., Random House 1965) (1889) ("One must keep in mind that city planning in particular must allow full and complete participation to art, because it is this type of artistic endeavor, above all, that affects formatively every day and every hour of the great mass of the population . . . ."). As Congress and the California Legislature have recognized,

the "public use" of the roads might also encompass recreational functions. *See, e.g.*, Cal. Pub. Util. Code § 320 (burying of power lines along scenic highways); 23 U.S.C. § 131(a) (regulation of billboards near highways necessary "to promote . . . recreational value of public travel . . . and to preserve natural beauty").

These urban planning principles are applied in the City, where the public rights-of-way are the visual fabric from which neighborhoods are made. For example, the City's staff report explains that Via Valmonte, which is adorned with an historic stone wall and borders a park, is "cherished for its rural character, and valued for its natural, unspoiled appearance, rich with native vegetation." Meanwhile, Via Azalea is described as "an attractive streetscape" that creates a residential ambiance. That the "public use" of these rights-of-way encompasses more than just transit is perhaps most apparent from residents' letters to the Director, which explained that they "moved to Palos Verdes for its [a]esthetics" and that they "count on this city to protect [its] unique beauty with the abundance of trees, the absence of sidewalks, even the lack of street lighting."

[4] Thus, there is no conflict between the City's consideration of aesthetics in deciding to deny a WCF permit application and PUC § 7901's statement that telecommunications companies may construct WCFs that do not incommode the public use of the rights-of-way.

iii. PUC § 7901.1

[5] Nor does the City's consideration of aesthetics conflict with PUC § 7901.1's statement that "municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed." Cal. Pub. Util. Code § 7901.1. That provision was added to the PUC in 1995 to "bolster the cities' abilities with regard to construction management and to send a message to

telephone corporations that cities have authority to manage their construction, without jeopardizing the telephone corporations' statewide franchise." S. Comm. on Energy, Utilities, and Commerce, Analysis of S.B. 621, Reg. Sess., at 5728 (Cal. 1995); *see also id*. ("[I]ntent of this bill is to provide the cities with some control over their streets.").[4] If the preexisting language of PUC § 7901 did not divest cities of the authority to consider aesthetics in denying WCF construction permits, then, a fortiori, neither does the langauge of PUC § 7901.1, which only "bolsters" cities' control.

[6] Aesthetic regulations are "time, place, and manner" regulations,[5] and the California Legislature's use of the phrase "are accessed" in PUC § 7901.1 does not change that conclusion in this context. Sprint argues that the "time, place and manner" in which the rights-of-way "are accessed" can refer only to when, where, and how telecommunications service providers gain entry to the public rights-of-way. We do not disagree. However, a company can "access" a city's rights-of-way in both aesthetically benign and aesthetically offensive ways. It is certainly within a city's authority to permit the former and not the latter.[6]

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[4]We cite the legislative history only to put the statute in its historical context; we do not rely upon it to discern the statute's meaning.

[5]In the First Amendment context, California courts have recognized that governments' aesthetic-based regulations fall within the rubric of "time, place, and manner" regulations. *See, e.g.*, *Showing Animals Respect & Kindness v. City of W. Hollywood*, 83 Cal. Rptr. 3d 134, 141 (Ct. App. 2008) (ordinance with declared purpose of improving city aesthetics was valid time, place, and manner regulation); *Union of Needletrades, AFL-CIO v. Super. Ct. of L.A. County*, 65 Cal. Rptr. 2d 838, 850-51 (Ct. App. 1997) (requirement that leaflets comport with mall's general aesthetics constituted valid time, place, and manner regulation). We see no principled basis on which to distinguish aesthetic "time, place, and manner" regulations in the First Amendment context from aesthetic "time, place, and manner" regulations in the context of PUC § 7901.1.

[6]Our conclusion that the language of PUC § 7901.1 does not conflict with the City's consideration of aesthetics in denying WCF permit appli-

[7] Our interpretation of California law is consistent with the outcome in *City of Anacortes*, in which we rejected a § 332(c)(7)(B)(iii) challenge to a city's denial of a WCF permit application that was based on many of the same aesthetic considerations at issue here. *City of Anacortes*, 572 F.3d at 994-95. There, the city determined that the proposed WCF would have "a commercial appearance and would detract from the residential character and appearance of the surrounding neighborhood"; that it "would not be compatible with the character and appearance of the existing development"; and that it would "negatively impact the views" of residents. *Id.* at 989-90. We noted that the city ordinance governing permit applications required the city to consider such factors as the height of the tower and its proximity to residential structures, the nature of uses of nearby properties, the surrounding topography, and the surrounding tree coverage and foliage. *Id*. at 994. We stated that "[w]e, and other courts, have held that these are legitimate concerns for a locality." *Id.* (citing *T-Mobile Cent., LLC v. United Gov't of Wyandotte County, Kan. City*, 546 F.3d 1299, 1312 (10th Cir. 2008); *Cellular*

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cations is supported by the California Legislature's use of materially identical language in the California Coastal Act, which provides that:

> The public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case including, but not limited to . . . [t]he need to provide for the management of access areas so as to protect . . . the aesthetic values of the area by providing for the collection of litter.

Cal. Pub. Res. Code § 30214(a)(4). If Sprint's narrow interpretation of PUC § 7901.1 were correct, it would follow that, in the California Coastal Act, the Legislature explicitly stated that the need to regulate the time, place, and manner of access depends on the need to protect aesthetic values, but that, in PUC § 7901.1, the Legislature meant to say that control over the time, place, and manner of access excluded control over aesthetics. We see no reason to ascribe this inconsistency to the California Legislature, however.

Tel. Co. v. Town of Oyster Bay, 166 F.3d 490, 494 (2d Cir. 1999)). What was implicit in our decision in *City of Anacortes* we make explicit now: California law does not prohibit local governments from taking into account aesthetic considerations in deciding whether to permit the development of WCFs within their jurisdictions.

Sprint warns that this conclusion will allow municipalities to run roughshod over WCF permit applications simply by invoking aesthetic concerns. However, our decision in no way relieves municipalities of the constraints imposed upon them by the TCA. A city that invokes aesthetics as a basis for a WCF permit denial is required to produce substantial evidence to support its decision, and, even if it makes that showing, its decision is nevertheless invalid if it operates as a prohibition on the provision of wireless service in violation of 47 U.S.C. § 332(c)(7)(B)(i)(II). Nor does our decision constitute a judgment on the merits of the City's decision in this case. Our function is not to determine whether the City's denial of Sprint's permit applications was a proper weighing of all the benefits (e.g., economic opportunities, improved service, public safety) and costs (e.g., the ability of residents to enjoy their community) of the proposal, but is instead to determine whether the City violated any provision of the TCA in so doing.

2. The City's decision was supported by such relevant evidence that a reasonable mind might accept as adequate.

[8] "[W]hile the term 'substantial evidence' is not statutorily defined in the Act, the legislative history of the TCA explicitly states, and courts have accordingly held, that this language is meant to trigger 'the traditional standard used for judicial review of agency decisions.' " *MetroPCS*, 400 F.3d at 723 (quoting H.R. Conf. Rep. No. 104-458, at 208 (1996)). A municipality's decision that is valid under local law will be upheld under the TCA's "substantial evidence" requirement

where it is supported by " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id*. at 725 (quoting *Town of Oyster Bay*, 166 F.3d at 494).

[9] The City's finding that the proposed WCFs would adversely affect its aesthetic makeup easily satisfies this standard. The Council reviewed propagation maps and mock-ups of the proposed WCFs and a report that detailed the aesthetic values at stake. It had the benefit of public comments and an oral presentation from Sprint's personnel. From the entirety of the evidence, one could reasonably determine, as the City did, that the Via Azalea WCF would detract from the residential character of the neighborhood and that the Via Valmonte WCF would not be in keeping with the appearance of that main entrance to the City. Consequently, we find that the City's decision was supported by substantial evidence, and we reverse the district court.

B. Section 332(c)(7)(B)(i)(II)

[10] The TCA provides that a locality's denial of a WCF permit application "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). "[A] locality can run afoul of the TCA's 'effective prohibition' clause if it prevents a wireless provider from closing a 'significant gap' in service coverage." *MetroPCS*, 400 F.3d at 731.[7] The "effective prohibition" inquiry "involves a two-pronged analysis requiring (1) the showing of a 'significant gap' in service coverage and (2) some inquiry into the feasibility of alternative facilities or site locations."[8] *Id*. at 731. Because we conclude that Sprint has

[7]We focus on the "effective prohibition" clause because the City has not adopted a "general ban" on wireless services. *See MetroPCS*, 400 F.3d at 731. To the contrary, the City's ordinance contemplates the construction of WCFs, and the City has repeatedly granted permits for WCF construction in the past.

[8]We have adopted the "multiple provider rule," which focuses the "significant gap" inquiry on the issue of whether a particular provider is pre-

not shown the existence of a significant gap as a matter of law, we do not reach the second element of the analysis.

The district court's legal conclusion that Sprint established the existence of a "significant gap" rests on two purportedly undisputed facts: (1) "[w]ithout either facility, [Sprint's] network will contain significant gaps in coverage" and (2) existing wireless coverage in the City was "based on obsolete facilities needing replacement." These factual findings were insufficient to support summary judgment because they were disputed in the record below.

1. Significance of the Gap

" '[S]ignificant gap' determinations are extremely fact-specific inquiries that defy any bright-line legal rule." *Id.* at 733. Yet Sprint and the district court take a bare-bones approach to this inquiry. The district court simply declared, as a matter of fact and fiat, that there was "a significant gap" in Sprint's coverage in the City. Sprint defends this factual finding on appeal, arguing that its presentation of radio frequency propagation maps was sufficient to establish a "significant gap" in coverage. We disagree.

Sprint's documentation stated that the proposed WCFs would provide "good coverage" for .2 to .4 miles in various directions. However, it remains far from clear whether these estimates were relative to the coverage available from existing WCFs or to the coverage that would be available if there were no WCFs at all (i.e., if the existing WCFs were removed). In any event, that there was a "gap" in coverage is certainly not sufficient to establish that there was a "significant gap" in coverage. *See id.* at 733 n.10 ("[T]he relevant service gap

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vented from filling a significant gap in its own service coverage; the availability of wireless service from other providers in the area is irrelevant for purposes of this analysis. *MetroPCS*, 400 F.3d at 733.

must be truly 'significant . . . .' "); *id.* at 733 ("The TCA does not guarantee wireless service providers coverage free of small 'dead spots . . . .' ").

[11] The district court found that there was a "gap" in Sprint's coverage but failed to analyze its legal significance. District courts have considered a wide range of context-specific factors in assessing the significance of alleged gaps. *See, e.g., Cellular Tel. Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus*, 197 F.3d 64, 70 n.2 (3d Cir. 1999) (whether gap affected significant commuter highway or railway); *Powertel/Atlanta, Inc. v. City of Clarkston*, No. 1:05-CV-3068, 2007 WL 2258720, at *6 (N.D. Ga. Aug. 3, 2007) (assessing the "nature and character of that area or the number of potential users in that area who may be affected by the alleged lack of service"); *Voice Stream PCS I, LLC v. City of Hillsboro*, 301 F. Supp. 2d 1251, 1261 (D. Or. 2004) (whether facilities were needed to improve weak signals or to fill a complete void in coverage); *Nextel Partners, Inc. v. Town of Amherst*, 251 F. Supp. 2d 1187, 1196 (W.D.N.Y. 2003) (gap covers well traveled roads on which customers lack roaming capabilities); *Am. Cellular Network Co., LLC v. Upper Dublin Twp.*, 203 F. Supp. 2d 383, 390-91 (E.D. Pa. 2002) (considering "drive tests"); *Sprint Spectrum, L.P. v. Town of Ogunquit*, 175 F. Supp. 2d 77, 90 (D. Me. 2001) (whether gap affects commercial district); *APT Minneapolis, Inc. v. Stillwater Twp.*, No. 00-2500, 2001 WL 1640069, at *2-3 (D. Minn. June 22, 2001) (whether gap poses public safety risk). Here, the district court said nothing about the gap from which it could have determined its relative significance (i.e., whether preventing its closure was tantamount to a prohibition on telecommunications service), nor did Sprint's counsel offer any support for a conclusion that the gap was significant.[9]

[9]During oral argument, Sprint's counsel was unable to explain satisfactorily on what basis the district court found that the gap was significant. He acknowledged that there was a dispute as to the significance of the gap in Sprint's coverage within the City, and he even conceded that he had seen nothing in the record that led him to believe that the matter was uncontested.

2. Obsolescence of Existing WCF Network

We need not decide whether the TCA's anti-prohibition language even covers situations, like that presented here, in which a telecommunications service provider seeks to replace existing WCFs, as contrasted with the more typical situation in which the provider seeks to construct new WCFs. It is sufficient to note that the record does not establish the obsolescence of the old facilities as a matter of uncontested fact. Sprint's representatives not only failed to explain why the existing facilities were no longer usable, but they actually undermined that position by pointing out that those facilities were currently serving some four thousand residents and acknowledging at the public hearing that Sprint service was generally available in the City. Residents' comments at the public hearing and the drive test results contained in the staff report submitted to the Council further illustrate that Sprint's existing network was, at the very least, functional. Consequently, we reverse the grant of summary judgment in Sprint's favor on its § 332(c)(7)(B)(i)(II) "effective prohibition" claim.

C. Section 253

The district court also concluded that the City's ordinance was "preempted by the Supremacy Clause, insofar as it conflicts with section 253(a) of the Telecom Act." However, due to intervening changes in the law, this Supremacy Clause claim is no longer viable. *See Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (en banc) (overruling *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), and holding that "a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition" (citation omitted)); *see also City of Anacortes*, 572 F.3d at 993. Moreover, we need not decide whether § 253 contemplates "as applied" challenges. Insofar as Sprint seeks to advance an "as applied" challenge under § 253, we conclude,

for the reasons set forth above, that Sprint has not demonstrated a prohibition on the provision of wireless service as a matter of law. *See Sprint Telephony*, 543 F.3d at 579 ("We need not decide whether Sprint's suit falls under § 253 or § 332. As we now hold, the legal standard is the same under either.").

IV. CONCLUSION

[12] Because the City's decision to deny Sprint's application for a permit to construct two new WCFs was supported by substantial evidence and because disputed issues of material fact preclude a finding that the decision constituted a prohibition on the provision of wireless service, we **REVERSE and REMAND.**

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

METROPCS, INC., a Delaware Corporation, *Plaintiff-Appellant-Cross-Appellee,* v. THE CITY AND COUNTY OF SAN FRANCISCO and THE BOARD OF SUPERVISORS OF THE CITY OF SAN FRANCISCO, *Defendants-Appellees-Cross-Appellants.*	Nos. 03-16759 03-16760 D.C. No. CV-02-3442 PJH OPINION

Appeals from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding

Argued and Submitted
October 4, 2004—San Francisco, California

Filed March 7, 2005

Before: Richard D. Cudahy,* Susan P. Graber and
Raymond C. Fisher, Circuit Judges.

Opinion by Judge Cudahy;
Partial Concurrence and Partial Dissent by Judge Graber

*The Honorable Richard D. Cudahy, United States Circuit Judge for the Seventh Circuit, sitting by designation.

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OPINION

CUDAHY, Circuit Judge:

MetroPCS brought the instant action in the District Court for the Northern District of California, alleging that a decision by the San Francisco Board of Supervisors denying MetroPCS permission to construct a wireless telecommunications antenna atop a city parking garage violated several provisions of the Telecommunications Act of 1996 (TCA). Specifically, MetroPCS alleged that the Board's decision (1) was not "in writing" as required by the TCA, (2) was not supported by substantial evidence, (3) constituted unreasonable discrimination among providers of functionally equivalent wireless services, (4) prohibited or had the effect of prohibiting the provision of wireless services and (5) was improperly based on environmental concerns about radio frequency (RF) emissions.

Both parties moved for summary judgment, and the district court granted the City's motion for summary judgment as to all claims except the prohibition claim, ruling that material questions of fact remained as to whether the Board's decision had the effect of prohibiting the provision of personal wireless services. Both parties now appeal the ruling below, and we affirm in part and reverse in part the district court's decision.

I. *BACKGROUND*

This case marks yet another episode in the ongoing struggle between federal regulatory power and local administrative prerogatives — the kind of political collision that our federal system seems to invite with inescapable regularity. And as most often happens in such cases, the courts are summoned to re-strike the balance of power between the national and the local. More specifically, we are called upon to interpret several provisions of the TCA, an exegetical effort having implications for Federal Communications Commission (FCC)

licensing authority, wireless telecommunications companies and municipal zoning authorities alike. The stakes of the current dispute are especially high since this case involves several important questions of law that have not yet been authoritatively addressed by this Circuit.

The basic facts of this case are not in dispute. MetroPCS is a provider of wireless telecommunications services. It is licensed by the FCC to construct and operate radio transmitting and receiving facilities in San Francisco, Oakland and San Jose, California (the Bay Area). On January 15, 2002, MetroPCS submitted to the City of San Francisco's Planning Department an application for a Conditional Use Permit (CUP) to install six panel antennas on an existing light pole located on the roof of a parking garage at 5200 Geary Boulevard (the Geary site). The proposed facility was to consist of (1) six panel antennas mounted 53 feet above the sidewalk grade on an existing light pole on the roof of a 42-foot-high parking garage, and (2) equipment cabinets mounted on an existing wall on the garage roof. Each antenna was to be five feet long and painted to match the garage. The proposed installation was designed to improve MetroPCS's wireless service coverage in the Richmond District, where the Geary site is located. MetroPCS chose the Geary site after evaluating the technical feasibility of several sites in the area and considering community objections to alternative site locations.

Under the San Francisco Planning Code, the Geary site is located within an "NC-3" or "Moderate Scale Neighborhood Commercial District." In an NC-3 zoning district, a wireless facility (such as a panel antenna) is considered a public use that requires a CUP from the City Planning Commission. Because the Geary site is located on top of a commercial structure in an NC-3 zoning district, it is classified as a Location Preference 4 under the City's Wireless Telecommunications Facilities Siting Guidelines — it is neither a high-priority site nor a "disfavored" site. On April 18, 2002, the San Francisco Planning Commission held a public hearing to

consider MetroPCS's application for a CUP at the Geary site. At the close of the hearing, the Planning Commission voted to grant MetroPCS's application. The Planning Commission later adopted written findings and drafted a written decision. These findings included a determination that the proposed MetroPCS antenna facility is necessary to MetroPCS's service coverage in the Richmond District and "both necessary and desirable" for the community.

On May 20, 2002, Richmond District resident Robert Blum filed an appeal of the Planning Commission's decision with the City Board of Supervisors (the Board). Mr. Blum was joined by some 80 local property owners, representing almost 60% of the land area within 300 feet of the Geary site, who signed petitions in support of the appeal. Hundreds of other San Francisco residents also signed a petition opposing construction of the MetroPCS facility at the Geary site. Consistent with applicable local zoning procedures, the Board of Supervisors held a public hearing to consider the appeal on June 17, 2002. At the hearing, a number of community members (including Mr. Blum and his son) voiced disapproval of MetroPCS's CUP application. Local residents asserted, *inter alia*, that the antenna facility was not necessary for MetroPCS or the community since the Richmond District already enjoys excellent wireless service, that the facility would create a visual blight detrimental to the neighborhood character and that the facility would produce harmful RF emissions hazardous to public health.

Representatives of MetroPCS — including company managers and technical staff — appeared before the Board to speak in favor of the proposed facility, claiming that the antenna installation is necessary for MetroPCS's service coverage of the Richmond District and that it is an unobtrusive facility that will not constitute a visual or industrial blight on the neighborhood. At the conclusion of the hearing, the Board of Supervisors unanimously voted to overturn the decision of the Planning Commission and to deny MetroPCS the CUP.

The Board's findings were later formally adopted in a five-page written decision disseminated on June 24, 2002.

In articulating the bases for its decision, the Board's written opinion formally found that (1) the proposed facility is not necessary to MetroPCS's ability to service the Richmond District around the Geary site, (2) the facility is not necessary for the community, since there is already adequate wireless service in the neighborhood around the Geary site, (3) the proposed facility would constitute a "visual and industrial blight" and would be detrimental to the character of the neighborhood and (4) the proposed antenna facility is not in conformity with and would not further the policies of the City's General Plan. The Board's decision asserted that its denial of the CUP application did not reflect unreasonable discrimination against MetroPCS, did not limit or prohibit access to wireless services and did not limit or prohibit the filling of a significant gap in MetroPCS's service coverage. The Board also maintained that the proposed facility was not the least intrusive way to provide wireless services in the Richmond District.

On July 17, 2002, MetroPCS filed a complaint in the District Court for the Northern District of California claiming that, in denying its application for a CUP, the City (via the Board) had violated several provisions of § 332(c)(7) of the TCA. Both MetroPCS and the City moved for summary judgment on all claims, and on April 25, 2003, the district court issued a decision granting in part and denying in part the City's motion for summary judgment, and denying in part MetroPCS's motion for summary judgment. *MetroPCS, Inc. v. City & County of San Francisco*, 259 F. Supp. 2d 1004 (N.D. Cal. 2003).

Specifically, the district court held that (1) the Board's written denial of MetroPCS's CUP application constituted a decision "in writing" as required by § 332(c)(7) of the TCA, (2) the Board's decision was supported by "substantial evidence," (3) the Board did not unreasonably discriminate

among providers of functionally equivalent services and (4) the Board's decision was not impermissibly based on concerns over RF emissions. The City was granted summary judgment with respect to its claims on each of these issues. *Id.* However, the district court also held that significant questions of material fact existed as to whether the Board's denial of MetroPCS's CUP application prohibited or had the effect of prohibiting the provision of wireless services in violation of § 332(c)(7) of the TCA. *Id*. at 1012-15. Accordingly, the district court denied both parties' motions for summary judgment as to this issue. *Id.* at 1015. Both parties were granted leave to appeal the district court's ruling to this Court, and both parties now seek summary judgment on all claims.

II. *JURISDICTION AND STANDARD OF REVIEW*

Since the district court granted both parties' motions to certify its order for appeal, we now have jurisdiction pursuant to 28 U.S.C. § 1292(b). We review motions for summary judgment *de novo*. *See Suzuki Motor Corp. v. Consumers Union of United States, Inc.*, 330 F.3d 1127, 1131 (9th Cir.), *cert. denied*, 124 S. Ct. 468 (2003); *King Jewelry, Inc. v. Fed. Express Corp*., 316 F.3d 961, 963 (9th Cir. 2003). Summary judgment should be granted when "there is no genuine issue as to any material fact" such that "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Suzuki Motor Corp.*, 330 F.3d at 1131.

To prevail on a summary judgment motion, the moving party carries the initial burden of demonstrating to the court that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has carried that burden, it then shifts to the nonmoving party, who must present evidence that there is indeed a genuine issue for trial. *See id.* at 323-24. All disputed issues of fact are to be resolved in favor of the nonmoving party. *Anderson*, 477 U.S. at 255.

III. *DISCUSSION*

MetroPCS advances claims under several sections of the TCA, none of which has been authoritatively construed by this circuit.[1] We address each of these claims in turn.

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[1]The relevant provisions of the TCA read as follows:

> (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
>
> . . . .
>
> (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 [Federal Communications] Commission's regulations concerning such emissions.

47 U.S.C. § 332(c)(7).

A. *Decision "In Writing"*

[1] Under the Telecommunications Act, "[a]ny decision by a State or local government . . . to deny a request to place, construct, or modify personal wireless service facilities shall be in writing." 47 U.S.C. § 332(c)(7)(B)(iii). In the proceedings below, the district court ruled that the Board's decision was adequately "in writing" under the TCA and granted the City's motion for summary judgment on this issue. 259 F. Supp. 2d at 1009. MetroPCS now appeals this ruling and moves for summary judgment.

The TCA's simple directive that all local zoning decisions adverse to wireless service providers be "in writing" seems clear enough, and the City's five-page written decision overturning the grant of MetroPCS's CUP certainly qualifies as "in writing" under any colloquial or common-sense understanding of that term. (*See* Board Decision, ER 12, Exh. 5.) However, while the plain meaning of the TCA's text supports the district court's ruling, the circuits are split in their interpretations of the "in writing" requirement, and this Circuit has yet to take an authoritative position on the issue. *See New Par v. City of Saginaw*, 301 F.3d 390, 395 (6th Cir. 2002) (noting the split and outlining the various interpretations); *S.W. Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 59 (1st Cir. 2001) (giving a summary of the different interpretations).

At one interpretive extreme, some courts have required that local governments explicate the reasons for their decision and link their conclusions to specific evidence in the written record. *See, e.g., Omnipoint Communications, Inc. v. Planning & Zoning Comm'n*, 83 F. Supp. 2d 306, 309 (D. Conn. 2000) ("A local zoning authority must issue a decision in writing setting forth the reasons for the decision and linking its conclusions to evidence in the record.") (citations omitted); *Cellco P'ship v. Town Plan & Zoning Comm'n*, 3 F. Supp. 2d 178, 184 (D. Conn. 1998) (similar standard); *Ill. RSA No. 3, Inc. v. County of Peoria*, 963 F. Supp. 732, 743 (C.D. Ill.

1997) (same). The rationale for this approach is that anything short of this standard " 'places the burden on [the] Court to wade through the record below' " in order to determine the decision's reasoning and assess its evidentiary support. *Omnipoint*, 83 F. Supp. 2d at 309 (quoting *Smart SMR of N.Y., Inc. v. Zoning Comm'n*, 995 F. Supp. 52, 57 (D. Conn. 1998)).

At the other end of the spectrum lies the Fourth Circuit, which has applied a strict textualist approach to hold that merely stamping the word "DENIED" on a zoning permit application is sufficient to meet the TCA's "in writing" requirement. *AT & T Wireless PCS, Inc. v. City Council*, 155 F.3d 423, 429 (4th Cir. 1998); *see also AT & T Wireless PCS v. Winston-Salem Zoning Bd. Of Adjustment*, 172 F.3d 307, 312-13 (4th Cir. 1999). According to the Fourth Circuit, the bare language of the TCA requires nothing more, and so adhering to a more stringent standard would involve "importing additional language into the statute." *AT & T Wireless*, 155 F.3d at 429.

[2] The First and Sixth Circuits have charted a middle course, requiring local governments to "issue a written denial separate from the written record" which "contain[s] a sufficient explanation of the reasons for the . . . denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons." *Todd*, 244 F.3d at 60; *Saginaw*, 301 F.3d at 395-96 (adopting the *Todd* standard). This approach attempts a compromise between the demands of strict textualism and the requirements of more pragmatic policy values. The *Todd* court observed that while the statutory language of the TCA does not explicitly require detailed findings of fact or conclusions of law, and while local zoning boards are often staffed with laypersons ill-equipped to draft complex legal decisions, written decisions must be robust enough to facilitate meaningful judicial review. *See Todd*, 244 F.3d at 59-60.

In the proceeding below, the district court ultimately chose to apply the *Todd* standard and held that the Board's written

denial of MetroPCS's CUP application was adequate as a decision "in writing" under this standard. 259 F. Supp. 2d at 1009. The district court asserted that the *Todd* standard best "reconciles both the statutory language and Congressional intent of the 'in writing' requirement" and held that, in accordance with *Todd*, the City "has issued a written denial separate from the written record . . . which summarizes the proceedings, articulates the reasons it rejected MetroPCS'[s] application, and provides sufficient information for judicial review in conjunction with the written record." *Id*.

We agree with the district court that the *Todd* standard ultimately strikes the most reasonable balance between the text of the Act and the practical demands of meaningful judicial review. While the bare language of the Act may not require more than the briefest written disposition, it also does not compel a strictly minimalist construction, and the purposes of the "in writing" requirement would be ill-served by allowing local zoning authorities to issue the kind of opaque, unelaborated ruling approved by the Fourth Circuit in *AT & T Wireless v. City Council*. Indeed such a minimalist approach is in direct tension with the Act's requirement — discussed more fully in the next section — that all local zoning decisions be supported by substantial evidence contained in a written record. 47 U.S.C. § 332(c)(7)(B)(iii). If such an evidentiary review is to be undertaken at all, courts must at least be able to ascertain the basis of the zoning decision at issue; only then can they accurately assess the evidentiary support it finds in the written record. Therefore, the zoning decision must be sufficiently elaborated to permit this assessment.

[3] Similarly, the text of the TCA does not compel the more demanding standard outlined in *Omnipoint*, 83 F. Supp. 2d at 309, and we find persuasive the *Todd* court's observation that such a standard might place an unduly heavy burden on lay zoning boards. As a general matter, we see no reason to insist upon a standard more exacting than is required to facilitate meaningful judicial review. We therefore adopt the *Todd* stan-

dard and hold that the TCA requires local zoning authorities to issue a written decision separate from the written record which contains sufficient explanation of the reasons for the decision to allow a reviewing court to evaluate the evidence in the record supporting those reasons.

[4] As to the merits of the case at bar, we are persuaded that the district court did not err in granting the City's motion for summary judgment as to this claim under the *Todd* standard. As the district court correctly noted, the Board of Supervisors issued a five-page written decision, separate from the record, which summarized the facts of the dispute, recounted the proceedings it conducted, articulated its reasons for overturning the Commission's grant of the CUP and explained the evidentiary basis for its ruling. Whatever else might be said about the decision or its reasoning, it does contain sufficient explanation to enable judicial evaluation of the evidentiary support for its rationale. In fact MetroPCS itself devotes many pages of its brief to discussing and critiquing the decision's reasoning and evidentiary support.[2]

[5] In light of all these considerations, we affirm the district court's ruling that the Board's decision was properly "in writing" under § 332(c)(7)(B)(iii) of the TCA.

[2]Incidentally, we believe that the Board's decision would arguably pass muster under any of the aforementioned legal standards. It easily passes the Fourth Circuit's test, under which merely stamping the application "DENIED" is sufficient. *AT & T Wireless*, 155 F.3d at 429. And with regard to the more stringent test outlined in *Omnipoint* and its ilk, the Board's decision "[sets] forth the reasons for the decision" and does at least a passable job of "linking its conclusions to evidence in the record." *Omnipoint*, 83 F. Supp. 2d at 309. While the Board's decision is phrased in somewhat general terms, it does make reference to "the record," recounts the testimony offered during its hearing on the issue, articulates its findings and discusses its objections to many of the specific findings of the Planning Commission. Thus although the decision does not offer formal findings of fact and conclusions of law as a full-blown judicial decision might, it is not clear that the *Omnipoint* standard demands such rigor.

B. *Substantial Evidence*

[6] In addition to requiring that all local zoning decisions be "in writing," the TCA also mandates that these decisions be "supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). In the proceedings below, the district court granted the City's motion for summary judgment on this issue, ruling that the Board's determination that the proposed facility is not necessary for the community was supported by substantial evidence. 259 F. Supp. 2d at 1011.

In stark contrast to virtually every other aspect of this case, there appears to be universal agreement among the circuits as to the substantive content of this requirement. While the term "substantial evidence" is not statutorily defined in the Act, the legislative history of the TCA explicitly states, and courts have accordingly held, that this language is meant to trigger "the traditional standard used for judicial review of agency decisions." H.R. Conf. Rep. No. 104-458, at 208 (1996); *see also Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999) (holding that "substantial evidence" implies this traditional standard); *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1218 (11th Cir. 2002) (same).

[7] However, the substantial evidence inquiry does not require incorporation of the substantive federal standards imposed by the TCA, but instead requires a determination whether the zoning decision at issue is supported by substantial evidence in the context of applicable *state and local law*. As our sister circuits have recognized, the TCA "does not affect or encroach upon the *substantive* standards to be applied under established principles of state and local law." *Oyster Bay*, 166 F.3d at 494 (internal quotation marks omitted) (emphasis added). " 'Substantial evidence' review under the TCA does not create a substantive federal limitation upon local land use regulatory power . . . ." *Todd*, 244 F.3d at 58 (citations omitted); *see also Voicestream Minneapolis, Inc. v.*

St. Croix County, 342 F.3d 818, 830 (7th Cir. 2003) (same rule) (citing *Todd*). In other words, we must take applicable state and local regulations as we find them and evaluate the City decision's evidentiary support (or lack thereof) relative to those regulations. If the decision fails that test it, of course, is invalid even before the application of the TCA's federal standards.

This approach serves several purposes. First, it enables us to avoid unnecessarily reaching the federal questions of whether a zoning decision violates the substantive provisions of the TCA. If a zoning board's decision, reached under its own rules, is not supported by substantial evidence, then we need not consider the application of the anti-prohibition or anti-discrimination prongs of the statute. Second, local regulations standing alone may offer little insight into whether they violate the substantive requirements of the TCA. Zoning rules — such as those that allow local authorities to reject an application based on "necessity" — may not suggest on their face that they will lead to discrimination between providers or have the effect of prohibiting wireless services. Thus, in most cases, only when a locality applies the regulation to a particular permit application and reaches a decision — which it supports with substantial evidence — can a court determine whether the TCA has been violated.

The dissent disagrees with this approach, arguing that any zoning regulation — or application of such a regulation — based on considerations of community "necessity" by its terms discriminates against new providers, cannot be squared with the TCA's anti-discrimination provision, 47 U.S.C. § 332(c)(7)(B)(i)(II), and is therefore, *ipso facto*, not supported by substantial evidence. Yet such an interpretation may thwart congressional intent concerning the independence accorded local zoning authorities under the TCA. As the dissent recognizes, the only direct *substantive* restriction the Act places on local zoning authorities is the proscription of decisions based on concerns over radio frequency emissions con-

tained in § 332(c)(7)(B)(iv). (*See* discussion of this provision, *infra* in Section III-F.) Had Congress desired to proscribe zoning decisions based on community necessity — or, for that matter, any other disfavored rationale — we are confident that it could have done so. Yet as the foregoing legal precedents and legislative history demonstrate, Congress instead intended that the traditional substantive prerogatives of local zoning authorities not be disturbed.

Perhaps more fundamentally, the dissent's conflation of the TCA's substantive anti-discrimination provision, 47 U.S.C. § 332(c)(7)(B)(i)(II), with its procedural "substantial evidence" requirement threatens to render the "substantial evidence" provision superfluous. Rather than review a zoning decision for basic evidentiary support, the dissent would require, as a threshold matter, that we review the decision for discriminatory *rationale*. But regardless of the rationale employed, zoning decisions must still satisfy the TCA's anti-discrimination provision, *id*., which prohibits *actual* discrimination. If similarly situated providers are not treated differently *in fact*, there is little reason to obviate a zoning decision based purely on an impermissible "necessity" rationale.

[8] Having thus delimited the scope of our substantial evidence inquiry, we may now turn to the merits of the question before us. The most authoritative and oft-cited elaboration of the TCA's substantial evidence standard comes from the Second Circuit in *Oyster Bay*, where the court explained that "substantial evidence" implies "less than a preponderance, but more than a scintilla of evidence. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " 166 F.3d at 494 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). This formulation has been adopted by every circuit that has had occasion to consider the issue. *See, e.g., St. Croix County*, 342 F.3d at 830 (7th Cir. 2003); *United States Cellular Tel. of Greater Tulsa, L.L.C. v. City of Broken Arrow*, 340 F.3d 1122, 1133 (10th Cir. 2003); *Troup County*, 296 F.3d at 1218

(11th Cir.); *Second Generation Props., L.P. v. Town of Pelham*, 313 F.3d 620, 627-28 (1st Cir. 2002); *360º Communications Co. of Charlottesville v. Bd. of Supervisors*, 211 F.3d 79, 83 (4th Cir. 2000).

Review under this standard is essentially "deferential," such that courts may "neither engage in [their] own fact-finding nor supplant the Town Board's reasonable determinations." *Oyster Bay*, 166 F.3d at 494. In applying this standard to the facts of a given case, the written record must be viewed in its entirety, including all evidence supporting both parties, and "local and state zoning laws govern the weight to be given the evidence." *Id*. As mentioned earlier, these baseline rules are solidly established, and the parties here do not dispute them.

The upshot is simple: this Court may not overturn the Board's decision on "substantial evidence" grounds if that decision is authorized by applicable local regulations and supported by a reasonable amount of evidence (i.e., more than a "scintilla" but not necessarily a preponderance). In the proceeding below, the district court correctly identified the prevailing legal standard discussed above, 259 F. Supp. 2d at 1009, and granted the City's motion for summary judgment on this issue, ruling that the City's determination that the Richmond District community did not need the MetroPCS antenna was (1) authorized by local zoning regulations and (2) supported by substantial evidence, *id*. at 1010-11. This ruling was legally correct.

[9] First, the San Francisco Planning Code explicitly authorizes the consideration of community need in evaluating conditional use permit applications. San Francisco Planning Code § 303(c)(1) (directing the City Planning Commission to consider whether "the proposed use . . . is *necessary or desirable for, and compatible with, the neighborhood or the community*") (emphasis added). Thus, the necessity-based portion of the Board's decision was clearly authorized by local zoning

regulations. Even MetroPCS acknowledges this much. Accordingly, the only remaining issue concerns whether the Board's "necessity" conclusion was supported by substantial evidence.[3] A perusal of the record demonstrates that it was.

The Board's inquiry into this issue was not a model of thoroughness or rigor,[4] but the record does clearly establish that the Richmond District is amply served by at least five other major wireless service providers and thus did not "need" the proposed Geary facility. One of MetroPCS's own representatives testified before the Board that "every carrier in San Francisco has coverage along Geary [Boulevard]," and reiterated that "every carrier has an antenna in this neighborhood." Another MetroPCS representative testified that "we've got Verizon, Sprint, AT & T, Singular [sic], Nextel, all in the very same vicinity [of the Geary site]," adding later that Sprint and Verizon "have great coverage. They have an excellent foothold in the [Geary] area." Indeed MetroPCS argued before the Board that it needed a facility at the Geary site *precisely* because it had to compete with other providers who had coverage in the area.

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[3]MetroPCS cites *Nextel Communications of Mid-Atlantic, Inc. v. Town of Wayland*, 231 F. Supp. 2d 396, 406-07 (D. Mass. 2002), for the proposition that local zoning regulations are not protected to the extent that they violate the TCA. This assertion reflects a misreading of *Wayland*. The passage cited by MetroPCS actually speaks to the anti-prohibition prong of the TCA. While the TCA is apparently agnostic as to the substantive content of local zoning ordinances, zoning *decisions* may be invalidated if they unreasonably discriminate among providers or prohibit the provision of wireless services. *See* discussion of the prohibition and discrimination issues, *infra*.

[4]Particularly alarming is the general lack of reference to the City Planning Commission's decision to *grant* MetroPCS the CUP initially. At the least, one certainly wonders why the Planning Commission concluded, contrary to the Board's decision, that the MetroPCS site *was* "necessary and desirable" for the community. Unfortunately the Board did not shed any light on this issue, and, since at least one of its findings is supported by substantial evidence, the TCA provides no basis for remedying such procedural shortcomings. As discussed above, congressional intent to preserve local zoning authority — however constituted — is clear.

These statements by MetroPCS were buttressed by testimony and numerous written petitions from local residents, including Robert Blum (the resident actually challenging the CUP grant), reporting that the Richmond District already enjoyed excellent wireless coverage. The record also contains a site map showing the locations of SprintPCS facilities in the Richmond District, including one antenna installation just 0.2 miles from the proposed Geary site. Taken in its totality, this evidence, including unequivocal statements by MetroPCS itself, constitutes at least a showing that "a reasonable mind might accept" as adequate. The "substantial evidence" provision of the TCA requires nothing more.

[10] In briefing this issue, both parties spend considerable time discussing the evidence supporting the Board's findings on neighborhood character and the aesthetic impact of the proposed facility. MetroPCS in particular spends considerable time arguing that residents' aesthetic concerns are speculative or unsubstantiated. This may be true. Yet, since the Board's finding on community necessity was authorized by local regulations and supported by substantial evidence, it is unnecessary to consider the evidence supporting other potential grounds for the City's decision. *See e.g., Oyster Bay*, 166 F.3d at 495 (stating that the court must "determine whether the Board possessed substantial evidence on one or both of [its permissible] grounds" for a zoning permit denial). The district court was correct in taking this analytical approach as well, relegating these ancillary concerns to a footnote. 259 F. Supp. 2d at 1011 n.6.

[11] As the district court below identified the correct prevailing legal standard and applied it properly, we affirm the district court's ruling that the Board's decision was supported by "substantial evidence" as required by the TCA.

C. *Discrimination Claim*

[12] In addition to its more concrete procedural requirements, the TCA also mandates that "[t]he 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*." 47 U.S.C. § 332(c)(7)(B)(i)(I) (emphasis added). As the bulk of the cases on this issue have recognized, by using this language "the Act explicitly contemplates that some discrimination 'among providers of functionally equivalent services' is allowed. Any discrimination need only be reasonable." *AT & T Wireless*, 155 F.3d at 427; *see also Omnipoint Communications Enters., L.P. v. Zoning Hearing Bd.*, 331 F.3d 386, 395 (3d Cir.) (citing *AT & T Wireless*, 155 F.3d at 427), *cert. denied*, 124 S. Ct. 1070 (2003); *Nextel W. Corp. v. Unity Township*, 282 F.3d 257, 267 (3d Cir. 2002) (same); *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 638 (2d Cir. 1999) (same).

More specifically, most courts have held that discrimination based on "traditional bases of zoning regulation" such as "preserving the character of the neighborhood and avoiding aesthetic blight" are reasonable and thus permissible. *AT & T Wireless*, 155 F.3d at 427; *see also Willoth*, 176 F.3d at 639 (same) (citing *AT & T Wireless*). Aside from reflecting the plain meaning of the TCA's text, this interpretation is also supported by the Act's legislative history. The House Conference Report on the TCA explained the Act's nondiscrimination clause as follows:

> The conferees also intend that the phrase "unreasonably discriminate among providers of functionally equivalent services" will *provide localities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services*. For example, the conferees do not intend that if a State or local government grants a permit in a commercial district, it must also

> grant a permit for a competitor's 50-foot tower in a residential district.

H.R. Conf. Rep. No. 104-458, at 208 (1996) (emphasis added).[5]

In keeping with these baseline principles, almost all federal courts considering such cases have ruled that providers alleging unreasonable discrimination must show that they have been treated differently from other providers whose facilities are "*similarly situated*" in terms of the "*structure, placement or cumulative impact*" as the facilities in question. *APT Pittsburgh Ltd. P'ship v. Penn Township Butler County*, 196 F.3d 469, 480 n.8 (3d Cir. 1999) (internal quotation marks omitted) (emphasis added); *Willoth*, 176 F.3d at 643 ("[I]t is not unreasonably discriminatory to deny a subsequent application for a cell site that is substantially more intrusive than existing cell sites by virtue of its structure, placement or cumulative impact."); *see also Omnipoint*, 331 F.3d at 395 ("Permitting the erection of a communications tower in a business district does not compel the [zoning board] to permit a similar tower at a later date in a residential district."); *Unity Township*, 282 F.3d at 267 (discrimination claim " 'require[s] a showing that the other provider is similarly situated' ") (quoting *Penn Township*, 196 F.3d at 480 n.8). In fact, the sole district court case from the Ninth Circuit on this issue holds that a mere increase in the number of wireless antennas in a given area over time can justify differential treatment of providers. *Airtouch Cellular v. City of El Cajon*, 83 F. Supp. 2d 1158, 1166 (S.D. Cal. 2000).

[5]Indeed one of the primary purposes of section 332(c)(7) is to protect the legitimate traditional zoning prerogatives of local governments. This section of the Act is actually entitled "Preservation of local zoning authority" and states as its baseline principle that, "[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A).

In ruling that the City's decision here did not unreasonably discriminate against MetroPCS, the district court employed a somewhat confusing and contradictory analysis. The court first stated that, in order to prevail, MetroPCS must demonstrate that the City treated it differently from one of its competitors for a "functionally *identical* request." 259 F. Supp. 2d at 1012 (emphasis added). The district court cites *Sprint Spectrum*, 244 F. Supp. 2d at 117, for this proposition, though the court's formulation appears to reflect a misreading of that case. The court in *Sprint Spectrum* actually applied the broader legal principle that "a local board may reasonably consider the location of the cell tower when deciding . . . whether to approve the application for construction." *Id*.

Later in its opinion, the district court stated that MetroPCS must demonstrate that "other providers have been permitted to build *similar* structures on *similar* sites while it has been denied." 259 F. Supp. 2d at 1012 (emphasis added). As discussed above, given that the wireless providers in question provide "functionally equivalent services" (which is undisputed in this case), "similarly situated" is the prevailing legal standard on the discrimination issue. The district court then proceeded to find that the facilities of other service providers in the Richmond District are "differently situated from MetroPCS because they have sought to place their antenna structures at different locations within the district." *Id*. Thus while it is not clear whether the decision below ultimately turned on the prevailing "similarly situated" analysis (similar structures on similar sites) or the district court's own "functionally identical request" standard, it appears that the court would have ruled for the City under either test. This ruling was error.

First, the district court frames the relevant legal inquiry too narrowly. For the policy reasons discussed above, the "similarly situated" standard seems to strike an appropriate balance between Congress's twin goals of promoting robust competition and preserving local zoning authority. The district court's

formulation of the discrimination inquiry, under which localities may deny use permits any time the relevant antenna structures are at "different locations," *id.*, appears unduly narrow. Unless competing providers seek to place virtually identical antennas at the very same location or on the same specific structure, no wireless service provider could ever carry its burden to show discrimination under this test. Such a standard would give localities far too much leeway in rejecting functionally *similar* requests by competing providers and would thwart the competition that the TCA sought to facilitate.

[13] As for the district court's final determination that the City did not, as a matter of law, unreasonably discriminate against MetroPCS, this too was error. The factual record is equivocal on the discrimination issue. While the Board's decision appears to have been authorized by the City Planning Code, it is not entirely clear whether the proposed MetroPCS site is "similarly situated" to other approved facilities in the Richmond District. The record shows that there is a competing SprintPCS wireless facility, also on Geary Boulevard, just two blocks (~0.2 miles) from the rejected MetroPCS site. MetroPCS also alleges that, shortly after it denied MetroPCS's application for a CUP at the Geary site, the Board approved the installation of a Cingular Wireless facility on a rooftop in the same neighborhood. These facts at least suggest a real possibility of discrimination between *similar* sites.

While the Board maintains that the other existing wireless facilities in the Richmond District were approved because they were placed at a more ideal location, *see* 259 F. Supp. 2d at 1012, the record contains no systematic comparison of the sites in question. Similarly, while the record also contains photo simulations of the proposed MetroPCS site, (ER 31 Exh. 1), there are no similar photographs of competing facilities in the area. In short, while it is undisputed that there are other wireless facilities in the same neighborhood, there appears to have been no detailed inquiry into the similarity of these existing facilities to the proposed MetroPCS facility in

terms of "structure, placement or cumulative impact." *See again Penn Township*, 196 F.3d at 480 n.8 (internal quotation marks omitted).

[14] Given the foregoing, MetroPCS has presented sufficient evidence to create an issue of fact as to the discrimination claim. Since there is no conclusive evidence as to how MetroPCS's proposed facility compares to the existing sites of its competitors in terms of "structure, placement or cumulative impact," substantial questions of fact remain as to whether the Board of Supervisors unreasonably discriminated against MetroPCS, and thus neither party is entitled to judgment as a matter of law.[6] We accordingly reverse the district court's grant of summary judgment in favor of the City on

[6]In its brief, MetroPCS asserts that the City's community necessity rationale "constitutes unreasonable discrimination against new providers and is antithetical to the pro-competitive goals of Section 332(c)(7)(B)." In support of this argument, MetroPCS relies on *Western PCS II Corp. v. Extraterritorial Zoning Authority*, 957 F. Supp. 1230, 1237-38 (D.N.M. 1997), and *Sprint Spectrum, L.P v. Town of Easton*, 982 F. Supp. 47, 51 (D. Mass. 1997), both of which ruled that local governments may not deny wireless providers permission to construct facilities merely because they believe that existing wireless service is adequate. However, as the district court notes in its opinion below, 259 F. Supp. 2d at 1012 n.8, both of these decisions turned on the local government's disregard of relevant evidence and improper application of relevant zoning laws. And while the City does little to directly address MetroPCS's broader argument that necessity-based zoning decisions are inherently discriminatory against new market entrants, such an argument is of limited persuasiveness.

As discussed above, the Act specifically preserves traditionally local zoning authority over siting decisions, and it has been consistently held that the TCA does not intrude upon the substantive content of local zoning rules. *Oyster Bay*, 166 F.3d at 494. In other words, far from prohibiting zoning decisions based on redundancy or community "necessity," the TCA itself appears to be totally agnostic on this issue. Moreover, a purely aesthetic determination that a certain neighborhood is blighted with too many wireless antennas — which is specifically permitted in the prevailing case law and anticipated in the legislative history of the TCA — may similarly disadvantage new market entrants who wish to add new facilities in the neighborhood.

this issue and remand the case for further proceedings to determine whether the proposed MetroPCS facility was similarly situated to competing facilities approved by the City and, if so, whether the City discriminated against MetroPCS with respect to the proposed and the competing facilities.

D. *Prohibition Claim*

[15] Section 332 of the TCA provides that "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or any instrumentality thereof — (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). MetroPCS alleges that, in denying its application for a CUP, the City has violated this provision by both imposing a "general ban" on new service providers in the Richmond District and effectively prohibiting the provision of wireless services by preventing MetroPCS from filling a "significant gap" in its coverage.

In the proceedings below, the district court held that the City's decision did not amount to a "general ban" on wireless services, but that material questions of fact remain as to

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As for the case at bar, the claim of discrimination against new providers also rings a bit hollow coming from MetroPCS, since the record shows that it has been allowed to construct some 30 sites in the city of San Francisco, including 18 facilities under discretionary CUPs. While this does not necessarily establish that MetroPCS has been allowed to realize seamless coverage in the city, it certainly does refute any claim of discrimination against new providers *as such*.

More to the point, Congress has already considered the competing interests of local zoning authorities and wireless providers (both new and old), and has constructed a statutory scheme to accommodate *both*. As will be discussed more fully below, while the TCA is agnostic as to the substantive *content* of local regulations, localities are nonetheless constrained by section 332(c)(7)(B)(i)(I) and (II) of the TCA, which preclude them from unreasonably discriminating against competing providers or (effectively) prohibiting the provision of wireless services. *See* discussion *infra* at Section III, Part E.

whether the denial of MetroPCS's CUP application perpetuates a "significant gap" in MetroPCS's coverage. 259 F. Supp. 2d at 1015. We find the district court's reasoning persuasive, and we affirm all aspects of its holding as to this claim.

1. General Ban

A city-wide general ban on wireless services would certainly constitute an impermissible prohibition of wireless services under the TCA. In fact, this is the only circumstance under which the Fourth Circuit will find an impermissible prohibition under the statute. *See AT & T Wireless*, 155 F.3d at 428 (holding that only "blanket prohibitions" and "general bans or policies" affecting *all* wireless providers count as effective prohibition of wireless services under the TCA). Under this rule, which is based on a strict plain meaning analysis, individual zoning decisions or persistent coverage gaps can never constitute a prohibition under the statute — courts must ask only whether local governments have (effectively) banned wireless services *altogether*. *Id*. The City asks us to adopt the Fourth Circuit's interpretation as well, noting that the House Conference Committee's Report on the TCA seems to anticipate a narrow, bare-bones approach: "It is the intent of this section that bans or policies that have the effect of banning personal wireless services or facilities not be allowed and that decisions be made on a case-by-case basis." H.R. Conf. Rep. No. 104-458, at 208 (1996).

However, for a variety of reasons, we decline to adopt the Fourth Circuit rule on this point. The language of the TCA, while sparse, does not dictate such a narrow interpretation even under a plain meaning approach. As the First Circuit has observed, given the current structure of the wireless services market, "[t]he 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." *Second Generation Prop*s., 313 F.3d at 634. Additionally the Fourth Circuit's interpretation, by permitting all but the most restric-

tive local zoning policies, could actually thwart Congress's twin goals of encouraging competition in the wireless services industry and facilitating efficient use of bandwidth. The touchstone of our prohibition analysis is therefore not limited to blanket bans or general policies prohibiting wireless services. The TCA framework requires a more discriminating inquiry. (*See* our discussion of the "Significant Gap" analysis, *infra*.)

Turning briefly to the merits, the record offers no support for MetroPCS's assertion that the City has imposed a "general ban" on wireless services, against new providers or anyone else. Aside from the fact that it would be extremely dubious to infer a general ban from a single CUP denial, the record reveals that the City has been receptive to wireless providers in general and MetroPCS in particular. It is undisputed that the City has authorized the installation of some 2,000 antennas at about 450 sites around the city, including 30 MetroPCS sites. This undercuts any assertion that the City has placed a general ban on new market entrants. The district court made virtually identical observations in its own finding that no general ban exists, 259 F. Supp. 2d at 1013, and we uphold this ruling as entirely correct.

2. Service Gap

Several circuits have held that, even in the absence of a "general ban" on wireless services, a locality can run afoul of the TCA's "effective prohibition" clause if it prevents a wireless provider from closing a "significant gap" in service coverage. This inquiry generally involves a two-pronged analysis requiring (1) the showing of a "significant gap" in service coverage and (2) some inquiry into the feasibility of alternative facilities or site locations. Currently there is a clear circuit split as to what constitutes a "significant gap" in coverage, and the Ninth Circuit has yet to rule on the issue.[7]

[7]The high stakes involved for both wireless service providers and local governments are reflected in the fact that most of the Amicus briefs filed in this case focus on this issue.

(a) Definition of "Significant Gap"

The test employed by the Second and Third Circuits holds that a "significant gap" in service exists only if *no provider* is able to serve the "gap" area in question. *See Omnipoint*, 331 F.3d at 398; *Unity Township*, 282 F.3d at 265; *Penn Township*, 196 F.3d at 478-80; *Willoth*, 176 F.3d at 643. One district court in the Ninth Circuit has also adopted this test. *El Cajon*, 83 F. Supp. 2d at 1167. This test is sometimes referred to as the "one provider" rule since, if any single provider offers coverage in a given area, localities may preclude other providers from entering the area (as long as the preclusion is a valid, nondiscriminatory zoning decision that satisfies the other provisions of the TCA).

This rule has been touted as proceeding from the consumer's perspective rather than the individual service provider's perspective, which the Third Circuit argues is more in keeping with the regulatory goals of the TCA — as long as *some* provider offers service in the area, consumers will be adequately served and the TCA's goal of establishing nationwide wireless service will be achieved. *See Omnipoint*, 331 F.3d at 397-98; *Unity Township*, 282 F.3d at 265. Under this view, the TCA protects only the individual user's ability to receive service from one provider or another; it does not protect each service provider's ability to maintain full coverage within a given market. *Omnipoint*, 331 F.3d at 397-98; *Unity Township*, 282 F.3d at 265; *cf. Willoth*, 176 F.3d at 641-43.

[16] The First Circuit has recently rejected the "one provider" approach and held that a local regulation creates a "significant gap" in service (and thus effectively prohibits wireless services) if the *provider in question* is prevented from filling a significant gap *in its own* service network. *See Second Generation Props.*, 313 F.3d at 631-33. This approach formally takes the perspective of the individual service provider in assessing coverage gaps, but, as the *Second Generation Properties* court persuasively explains, this approach actually bet-

ter serves both individual consumers and the policy goals of the TCA.[8] The *Second Generation Properties* court notes that the TCA "aims to secure lower prices and better service for consumers by opening all telecommunications markets to competition." *Id*. at 631 (citing H.R. Conf. Rep. No. 104-458, at 113 (1996)). The court then warns against the dysfunctional implications of the Second and Third Circuits' "one provider rule":

> A flat "any service equals no effective prohibition" rule would say that a town could refuse permits to build the towers necessary to solve any number of different coverage problems . . . . Such a rule would be highly problematic because it does not further the interests of the individual consumer. To use an example from this case, it is of little comfort to the customer who uses AT & T Wireless (or Voicestream, Verizon, Sprint, or Nextel) who cannot get service along the significant geographic gap which may exist along Route 128 that a Cingular Wireless customer does get some service in that gap . . . . *The result [of such a rule] would be a crazy patchwork quilt of intermittent coverage. That quilt might have the effect of driving the industry toward a single carrier*. When Congress enacted legislation to promote the construction of a nationwide cellular network, such a consequence was not, we think, the intended result.

Id. at 633 (footnote omitted). In short, the First Circuit's multiple provider rule better facilitates the robust competition

[8]It should be noted that there is a difference between the interests of local residents — who may prefer fewer providers to limit the number of antennas in the area — and those of wireless service subscribers who may be frustrated that their particular provider cannot offer coverage in a given neighborhood. Both of these may be categorized as the "consumer perspective," though they lead to different results. Our use of the term "consumer" in the discussion here refers to wireless service subscribers.

which Congress sought to encourage with the TCA, and it better accommodates the current state of the wireless services market. The district court also found these arguments persuasive, since it formally adopted the First Circuit rule in its decision below. 259 F. Supp. 2d at 1013-14.

For its part, MetroPCS does not object to the district court's adoption of the First Circuit "multiple provider rule" (in fact MetroPCS and its Amici argue strenuously in favor of the First Circuit's approach), though it argues that the City's zoning "criteria," which allow for CUP denials based on findings that a given facility is "not necessary" for the community, are "impossible for any non-incumbent carrier to meet" and thus constitute an effective prohibition of wireless services. Once again, the large number of permits already granted by the City — to providers new and old — belies this assertion.

Additionally, we emphasize that MetroPCS's concerns regarding zoning decisions based on "necessity" can be accommodated by the First Circuit's version of the significant gap test. Under this rule, zoning decisions explicitly based on redundancy of service are not per se invalid, but they are subject to the crucial limitations that (1) they cannot discriminate between similarly situated facilities and (2) they cannot result in a significant gap in service for the *provider in question*. As will be discussed shortly, the First Circuit's interpretation also fully meets the preemption and supremacy arguments advanced by MetroPCS.[9]

[17] Having considered both the avowed policy goals of the TCA and the practical implications of the various constructional options, we elect to follow the district court's lead and formally adopt the First Circuit's rule that a significant gap in service (and thus an effective prohibition of service) exists whenever a provider is prevented from filling a significant

[9]*See* discussion of MetroPCS's supremacy and preemption arguments, *infra* at Section III, Part E.

gap in *its own* service coverage. With the correct legal standard thus clarified, we now turn to the merits of MetroPCS's prohibition claim.

In applying the First Circuit's provider-focused notion of "significant gap," the district court denied both parties summary judgment, holding that significant questions of fact still exist as to whether the Board's decision actually perpetuates a significant gap in MetroPCS's coverage. This conclusion is amply supported by the existing record and, therefore, we affirm the district court's ruling on this issue. Both parties confidently assert that the current record unequivocally supports their respective positions. But to the contrary, the record is replete with contradictory allegations as to MetroPCS's need for the Geary site. *Compare* Statements of Suki McCoy, SER at 223-36 (stating that MetroPCS has adequate coverage in the Richmond District); Statements of Martin Signithaler, SER at 134-36 (stating that the Geary site would not improve MetroPCS's effective coverage); MetroPCS Marketing Materials, SER 225, 234 (advertising that MetroPCS has full coverage around the Geary site), *with* Statements of MetroPCS Technological Expert, SER at 200-02 (stating that MetroPCS coverage is not adequate without the Geary site); Declaration of Lisa Nahmanson, ER 32 (stating that MetroPCS coverage is insufficient without the Geary site); Testimony of Deborah Stein, SER 191-200(same); Declaration of John Schwartz, ER 49 (challenging basis of City's contention that existing MetroPCS service is adequate).

In urging us to grant it summary judgment on this issue, the City cites a bevy of cases that, collectively, are meant to demonstrate that "[t]he TCA does not assure every wireless carrier a right to seamless coverage in every area it serves," and that the inability to cover a "a few blocks in a large city" is, as a matter of law, not a "significant gap." While we recognize that the TCA does not guarantee wireless service providers coverage free of small "dead spots,"[10] the existing case law

[10]The district court correctly notes that the relevant service gap must be truly "significant" and "not merely individual 'dead spots' within a greater

amply demonstrates that "significant gap" determinations are extremely fact-specific inquiries that defy any bright-line legal rule. Moreover, the City's assertion as to the size of MetroPCS's alleged service gap merely assumes the very fact in issue here — the existence and geographic proportions of a gap in MetroPCS's coverage.

[18] Given the conflicting contents of the record, there is simply no basis for granting either party summary judgment on this issue. We affirm the district court's ruling to that effect.

(b) Least Intrusive Means

[19] Under all existing versions of the "significant gap" test, once a wireless service provider has demonstrated that the requisite significant gap in coverage exists, it must then make some showing as to the intrusiveness or necessity of its proposed means of closing that gap. Here again, the circuits are split as to the required showing.

The Second and Third Circuits require the provider to show that "the manner in which it proposes to fill the significant gap in service is the *least intrusive on the values that the denial sought to serve*." *Penn Township*, 196 F.3d at 480 (emphasis added); *see also Omnipoint*, 331 F.3d at 398; *Unity Township*, 282 F.3d at 266; *Willoth*, 176 F.3d at 643. The First and Seventh Circuits, by contrast, require a showing that there are "no alternative sites which would solve the problem." *Second Generation Props.*, 313 F.3d at 635; *see also St. Croix County*, 342 F.3d at 834-35 (adopting the First Circuit

service area." 259 F. Supp. 2d at 1014. Courts applying both versions of the "significant gap" test appear to agree on this proposition. *See e.g.*, *Second Generation Props.*, 313 F.3d at 631; *360° Communications Co.*, 211 F.3d at 87; *Willoth*, 176 F.3d at 643-44.

test and requiring providers to demonstrate that there are no "viable alternatives") (citing *Second Generation Properties*).[11]

After concluding that material issues of fact remain as to the presence (or absence) of a significant gap in MetroPCS's coverage, the district court attempted to reconcile competing interpretations of the intrusiveness inquiry by creating its own "fact-based test that requires the provider to demonstrate that its proposed solution is the *most acceptable option* for the community in question." 259 F. Supp. 2d at 1015 (emphasis added).

Since there is no controlling legal authority on the issue, our choice of rule must ultimately come down to policy considerations. The district court's "most acceptable option" rubric seems a hopelessly subjective standard, and one wonders how a proposed site could ever be proven "the most acceptable" if a zoning proposal with respect to it had already been denied by local authorities. On the other hand, the First and Seventh Circuit requirement that a provider demonstrate that its proposed facility is the only viable option seems too exacting. As the case at bar demonstrates, there may be several viable means of closing a major service gap, (*see* MetroPCS Alternative Site Analysis, SER 26-35), and in such a situation, this "only viable option" rule would either preclude the construction of any facility (since no single site is the "only viable" alternative) or require providers to endure

[11]The district court also notes that, in the Fourth Circuit, " '[a] community could rationally reject the least intrusive proposal in favor of a more intrusive proposal that provides better service or that better promotes commercial goals of the community.' " 259 F. Supp. 2d at 1014 (quoting *360° Communications Co.*, 211 F.3d at 87). This rule is inapposite to the case at bar since the Fourth Circuit, as discussed above, does not recognize either version of the "significant gap" test. Instead, it holds that the TCA prohibits only general or "blanket" bans on wireless services. Under such a rule, denials of individual siting requests can never run afoul of the TCA, and so the relative intrusiveness of different siting proposals is irrelevant.

repeated denials by local authorities until only one feasible alternative remained. This seems a poor use of time and resources for both providers and local governments alike.

[20] The Second and Third Circuit "least intrusive" standard, by contrast, allows for a meaningful comparison of alternative sites before the siting application process is needlessly repeated. It also gives providers an incentive to choose the least intrusive site in their first siting applications, and it promises to ultimately identify the best solution for the community, not merely the last one remaining after a series of application denials.

[21] For these reasons, we now adopt the "least intrusive means" standard and instruct the district court to apply this rule as necessary in its consideration of the prohibition issue on remand.

E. *Preemption Claim*

One additional note is in order that bears, albeit indirectly, on MetroPCS's discrimination and prohibition claims. MetroPCS vigorously asserts, as separate claims independent of the specific provisions of the TCA, that the Board's denial of its CUP based on an appraisal of community "necessity" violates the FCC's exclusive licensing authority over wireless providers and is preempted by the TCA's statutory scheme.

In support of this claim MetroPCS points out that the FCC has identified "an immediate need for cellular service" and has established the goal of "providing for up to two cellular systems per market." *In the Matter of An Inquiry Into the Use of Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, Memorandum Opinion and Order on Reconsideration, 89 F.C.C.2d 58, at ¶ 82 (1982). The FCC further sought to preclude state regulation of the number of service providers in a given market: "[W]e have already determined 'need' on a nationwide basis and have preempted

the states from denying state certification based on the number of existing carriers in the market or the capacity of existing carriers to handle the demand for mobile services." *Id*. Congress similarly has declared that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service," 47 U.S.C. § 332(c)(3)(A), and that the TCA is "not intended to limit or affect the Commission's general authority over radio telecommunications, including the authority to regulate the construction, modification and operation of radio facilities," H.R. Conf. Rep. No. 104-458, at 209 (1996). For its part, the City does little to address these arguments directly.

Yet while MetroPCS does convincingly demonstrate that the FCC has exclusive authority to issue licenses and regulate the wireless services market — a point which appears to be undisputed between the parties — the TCA itself fully accommodates these preemption concerns in its anti-discrimination and anti-prohibition provisions. The TCA's statutory scheme ensures that the bandwidth usage and competitive market dynamics sought by Congress and the FCC will be realized, while at the same time allowing cities to prevent certain areas from being overburdened by a proliferation of wireless facilities. MetroPCS's vigorous *per se* arguments against necessity-based zoning decisions misconstrue the delicate regulatory balance struck by the Act.

First of all, a zoning decision to prohibit construction of a wireless facility at a specific location — whether based on necessity or not — does not implicate the FCC's ability to regulate the number of wireless providers in a given market. Federal supremacy and the FCC's exclusive power to regulate wireless markets are fully vindicated in the TCA's anti-discrimination and anti-prohibition provisions, especially under the First Circuit's "multiple provider" interpretation of the "prohibition" clause. As discussed above, whatever a locality's judgment as to the need for a facility at a given site, such a determination may not effectively prohibit service or

reflect favoritism for one provider over another. This protects, at a macro-level, the competitive markets that the FCC has sought to construct. Put differently, if a single siting denial does not create significant gaps in provider coverage and reflects no unreasonable discrimination among providers, market dynamics and FCC authority are not threatened in the first place.

Essentially, the TCA represents a congressional judgment that local zoning decisions harmless to the FCC's greater regulatory scheme — and only those proven to be harmless — should be allowed to stand. As discussed earlier, the TCA "does not affect or encroach upon the *substantive* standards to be applied under established principles of state and local law," *Oyster Bay*, 166 F.3d at 494 (internal quotation marks omitted) (emphasis added), and it "does not create a substantive federal limitation upon local land use regulatory power," *Todd*, 244 F.3d at 58; *see also St. Croix County*, 342 F.3d at 830 (same rule) (quoting *Todd*). MetroPCS's preemption and supremacy claims are thus misdirected. *See, e.g., El Cajon*, 83 F. Supp. 2d at 1168-69 (rejecting a federal preemption claim in a § 332(c)(7) case). The fate of MetroPCS's real concerns in this area — that localities may be able to reject all siting proposals that they feel are unnecessary — is determined by our construction of the TCA's prohibition provision. As discussed earlier, the First Circuit's multiple-provider approach best preserves market competition and addresses these supremacy and preemption concerns as well.

F. *Environmental Concerns*

[22] The last claim in this case is easily resolved. The TCA provides that localities may not base zoning decisions on concerns over radio frequency emissions if the proposed wireless facility complies with FCC emissions requirements:

> 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 [FCC]'s regulations concerning such emissions.

47 U.S.C. § 332(c)(7)(B)(iv). There is no dispute that MetroPCS's proposed facility for the Geary site complies with the relevant FCC regulations. The only issue is whether the City's decision was impermissibly based on concerns over RF emissions.

MetroPCS argues that the Board did base its decision on environmental considerations. In support of this claim it notes that "opponents of MetroPCS's application made boisterous presentations before the Board regarding RF emissions, accompanied by argument, badges and t-shirts complaining about RF emissions." MetroPCS also claims that "the Board's denial motion expressly states that it was based on 'all of the public comments made in support of and opposed to the appeal.' " Finally, MetroPCS notes that the Board's decision stated the proposed facility would "not promote the health, safety and welfare of the city."

These observations are of little relevance to the issue here. As the district court correctly points out, the party actually challenging the MetroPCS CUP application before the Board (Mr. Blum) took pains to clarify that his appeal was *not* based on environmental concerns. Additionally, the Board's formal decision against MetroPCS did *not* state that it was "based on" all public comments made in support of and opposed to the appeal. MetroPCS's quotation on this point is misleading. The Board merely stated that it "*reviewed and considered*" all such comments, which is exactly what a local zoning board is supposed to do at a public hearing. (Emphasis added.)

[23] Most crucially, the Board's written decision does not once mention RF emissions as a motivation for denying

MetroPCS's CUP application. Broadly stating (presumably as a recitation of the City's Policy Principles) that the proposed facility "will not promote" public health, safety and welfare is not remotely equivalent to basing a zoning decision on a fear of RF emissions. Given the foregoing, the one case cited by MetroPCS on this issue (*Telespectrum, Inc. v. Pub. Serv. Comm'n*, 227 F.3d 414 (6th Cir. 2000)), which involved a straightforward application of the TCA's RF provision, is inapposite. The district court was correct in granting the City summary judgment as to this claim, and we affirm that ruling.

IV. *CONCLUSION*

For the foregoing reasons, we AFFIRM the district court's ruling that the Board's decision was properly "in writing," supported by substantial evidence and not impermissibly based on concerns over radio frequency emissions under the TCA. We also AFFIRM the district court's ruling that material questions of fact remain as to whether the Board's decision effectively prohibited the provision of personal wireless services under the TCA. Finally, we REVERSE the district court's determination that the Board's decision did not, as a matter of law, unreasonably discriminate among providers of functionally equivalent services within the meaning of the TCA, and we REMAND this case for further proceedings consistent with this opinion.

GRABER, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that genuine issues of material fact remain with respect to whether the Board of Supervisors' (Board) denial of MetroPCS's application for a Conditional Use Permit (CUP) to construct wireless facilities violated the anti-discrimination and anti-prohibition provisions of the Telecommunications Act of 1996 (TCA), 47 U.S.C. §§ 151-

615. I write separately because the Board's determination that the proposed facilities are unnecessary, premised on the fact that at least one other service provider serves the same area, is irreconcilable with the anti-discrimination provision of the TCA, 47 U.S.C. § 332(c)(7)(B)(i)(II). In view of that inconsistency, the Board's "necessity" finding cannot support its denial of MetroPCS's request even if substantial evidence supports that finding. I respectfully dissent from the majority's conclusion to the contrary.

According to the majority, a reviewing court's analysis of the reasons given by a zoning authority for denying a request to construct wireless facilities begins and ends with determining whether those reasons are authorized by local regulations and supported by evidence. Relying on the Second Circuit's decision in *Cellular Telephone Co. v. Town of Oyster Bay*, the majority concludes that "the TCA 'does not affect or encroach upon the *substantive* standards to be applied under established principles of state and local law.' " Maj. op. at 2722 (emphasis in majority opinion) (quoting *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999)). That is, the reasons stated by a zoning authority in denying a request for wireless facilities are irrelevant under the majority's analysis. Accordingly, the majority concludes that the Board was entitled to reject MetroPCS's application for a CUP solely because "[n]othing in the record suggests that the area proximate to 5200 Geary Boulevard is not already served by at least one other wireless service provider." *See* Maj. op. at 2732-33 n.6 (finding no error in the Board's "necessity" rationale because "the TCA is agnostic as to the substantive *content* of local regulations").

The majority overstates the extent of the TCA's indifference to the substantive content of local regulations when those regulations are applied to zoning decisions regarding the "placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(B)(i). *Oyster Bay* tempered its statement regarding the TCA's neutrality by

observing that at least one provision of the TCA places a substantive limitation on the permissible bases to support a zoning authority's denial of a request for the construction of wireless facilities: "We note . . . that [47 U.S.C.] § 332(c)(7)(B)(iv)[1] bars denials based on environmental effects of rfes [radio frequency emissions,] if the applicant facility would comply with FCC standards . . . ." *Oyster Bay*, 166 F.3d at 494 n.2. Although health and safety are undeniably a proper subject for local regulation, the TCA " 'prevents the denial of a permit *on the sole basis* that the facility would cause negative environmental effects.' " *Id.* at 495 (quoting *Iowa Wireless Servs., L.P. v. City of Moline*, 29 F. Supp. 2d 915, 923 (C.D. Ill. 1998).

Similarly, "the anti-discrimination and anti-prohibition provisions of the TCA, [47 U.S.C. § 332(c)(7)(B)(i)(I), (II),] involve federal limitations on state authority." *S.W. Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 58 (1st Cir. 2001) (internal quotation marks omitted). Unlike the TCA's provision relating to radio frequency emissions, the anti-discrimination and anti-prohibition provisions do not expressly prohibit the consideration of specific grounds in zoning decisions regarding the construction of wireless facilities. Nonetheless, those provisions do limit the ways in which a state or local government may apply its zoning regulations to a request for the placement of wireless facilities. As *Todd* observed, a local zoning authority is "subject to several substantive and procedural limitations that 'subject [local governments] to an outer limit' upon their ability to regulate personal wireless services land use issues." *Id.* at 57 (alteration in orig-

[1]47 U.S.C. § 332(c)(7)(B)(iv) provides:

> 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.

inal) (quoting *Town of Amherst v. Omnipoint Communications Enters., Inc.*, 173 F.3d 9, 15 (1st Cir. 1999)); *see also APT Pittsburgh Ltd. P'ship v. Penn Township Butler County of Pennsylvania*, 196 F.3d 469, 473 (3d Cir. 1999) (noting that the TCA "places several substantive and procedural limits upon [local zoning] authority when it is exercised in relation to personal wireless service facilities").

For example, the Board could not deny MetroPCS's application solely on the ground that the availability of wireless services in the Geary neighborhood may lead to increased wireless telephone usage among automobile drivers in that neighborhood, with a commensurate increase in traffic accidents. Traffic safety is certainly a legitimate zoning concern, and the Board could easily produce substantial evidence to support a correlation between wireless telephone usage among drivers and traffic accidents. Nonetheless, the Board's rationale for its decision would be entirely inconsistent with the TCA's anti-prohibition provision, as carefully and correctly interpreted by the majority, because the Board would be seeking to *preserve* a significant coverage gap. Accordingly, a denial of permission to construct wireless facilities for that reason alone should not survive judicial scrutiny.

The Board's necessity rationale presents the same problem. Whatever its consistency with local zoning ordinances,[2] the denial of MetroPCS's request on the ground that the Geary neighborhood is already served by at least one other wireless service provider is irreconcilable with § 332(c)(7)(B)(i)(II)'s prohibition of zoning decisions that "unreasonably discriminate among providers of functionally equivalent services." As explained in the House Conference Report, the chief purpose of the TCA is to "open[ ] all telecommunications markets to competition." H.R. Conf. Rep. No. 104-458, at 1 (1996). The

[2]Pursuant to San Francisco Planning Code § 303(c)(1), the Board may consider whether a proposed development "is necessary or desirable for, and compatible with, the neighborhood or community."

TCA's anti-discrimination provision furthers that purpose by ensuring "that a State or local government does not in making a decision regarding the placement, construction and modification of facilities of personal wireless services described in this section *unreasonably favor* one competitor over another." *Id.* at 208 (emphasis added).

Here, the Board's necessity determination results in precisely the type of unreasonable discrimination that the TCA seeks to prevent. It protects existing service providers against potential competitors and effectively bars all new market entrants from the area in question. Because the Board's necessity determination is inherently and unreasonably discriminatory, it cannot serve as a valid, legally relevant basis for rejecting MetroPCS's application for a CUP.

The majority misunderstands my point when it claims that I argue "that any zoning regulation—or application of such a regulation—based on considerations of community 'necessity' by its terms discriminates against new providers." Maj. op. at 2723. Instead, I argue much more simply, and much more narrowly, that a local agency's fact-finding about "necessity" must respect the statutorily required definition of what "necessity" is.

Neither the majority nor the district court looked further than the Board's "necessity" rationale in holding that substantial evidence supported the Board's decision as a whole. Because "[a] significant number of community members that opposed the installation indicated that they had adequate wireless services [from other providers] in their district," the district court concluded that it "need not reach the question of whether there is substantial evidence supporting the Board's determination that MetroPCS's installation would cause visual blight, or that MetroPCS did not need the antennas for its own service." *MetroPCS, Inc. v. City & County of San Francisco*, 259 F. Supp. 2d 1024, 1010-11 & n.6 (N.D. Cal 2003). For the reasons discussed above, I disagree with the

majority that the Board's decision can rest on that ground alone, even if that ground is supported by substantial evidence. Accordingly, on remand, I would instruct the district court to consider whether substantial evidence supports the legally relevant and permissible reasons that the Board gave for denying MetroPCS's request to construct wireless facilities.

In all other respects, I concur in the majority's opinion.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

T-MOBILE USA INC., a Delaware corporation; et al., *Plaintiffs-Appellees,* v. CITY OF ANACORTES, a Washington municipal corporation, *Defendant-Appellant.*	No. 08-35493 D.C. No. 2:07-cv-01644-RAJ OPINION

Appeal from the United States District Court
for the Western District of Washington
Richard A. Jones, District Judge, Presiding

Argued and Submitted
June 1, 2009—Seattle, Washington

Filed July 20, 2009

Before: William C. Canby, Jr., David R. Thompson and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Callahan

COUNSEL

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T. Scott Thompson (argued) of Davis Wright Tremaine, LLP of Washington, D.C., and Linda Atkins of Bellevue, Washington, for the plaintiffs-appellees.

OPINION

CALLAHAN, Circuit Judge:

The City of Anacortes (the "City") appeals the district court's determination that the City's denial of an application by T-Mobile USA, Inc. ("T-Mobile") to erect a 116-foot monopole antenna at a particular location violates a provision of the Telecommunications Act of 1996, 47 U.S.C.

§ 332(c)(7)(B). The district court found that T-Mobile's proposal was the least intrusive means to close a significant gap in its wireless service in the City, and that the City's denial was not supported by substantial evidence. We determine that, although the district court did not have the benefit of our opinion in *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) (en banc) ("*Sprint II*"), and therefore failed to recognize that the City's denial of the application was supported by substantial evidence, the district court nevertheless properly concluded that the City's denial of the application violated § 332(c)(7)(B) because the City failed to rebut T-Mobile's showing that the denial of the application amounted to an effective prohibition of wireless services.

I.

T-Mobile offers digital wireless voice, messaging and data services. It provides its services through a cellular radio telephone network which is comprised of thousands of cell antenna sites, switching facilities and other network elements. The federal government assigns radio frequency ("RF") channels to each wireless carrier and the RF channels are assigned to the cell sites to enable wireless communications. The district court noted: "[t]he limited number of RF channels must be reused at different cell sites, creating potential interference between sites. To minimize such interference, all sites transmit at very low power, resulting in limited coverage from each site. The location of antenna sites is determined by terrain, structure blockage, call volume, and antenna height."

In September 2006, in order to close a "service gap" and to expand its coverage in the City, T-Mobile applied for a permit to construct an additional wireless telecommunications facility ("WCF") at a particular site: 2201 "H" Avenue, which is owned by the United Methodist Church (sometimes referred to as the "Church site"). The permit application analyzed eighteen site alternatives and proposed the construction of a 116-foot monopole with three antennas at the top.

The Anacortes Municipal Code ("AMC") regulates the permitting approval process. T-Mobile's application was for a "special use permit" ("SUP").[1] The AMC also provides that installation of a tower or antenna without a permit is a misdemeanor.

The City Planning Commission eventually denied the application, and T-Mobile appealed to the City Council. The City Council held a hearing on the matter and following the meeting, voted to deny the application. On September 19, 2007, the City Council entered written findings of fact and conclusions of law denying the application.

On the basis of the testimony of witnesses and other evidence before the City Planning Commission and City Council, the City's written findings and conclusions explained that:

> The proposed wireless communications facility would have a commercial appearance and would detract from the residential character and appearance of the surrounding neighborhood. The proposed wireless communications facility would not be compatible with the character and appearance of the

[1]The AMC sets forth eight factors the City must consider when deciding whether to grant a SUP:

1. the height of the proposed tower,
2. the proximity of the tower to residential structures and district boundaries,
3. the nature of uses on adjacent and nearby properties,
4. the surrounding topography,
5. the surrounding tree coverage and foliage,
6. the design of the tower (with emphasis on features that reduce or eliminate visual obtrusiveness),
7. proposed ingress and egress, and
8. the availability of alternatives not requiring a tower.

> existing development in the vicinity of 2201 "H" Avenue, which is predominantly single-family residences. The proposed wireless communications facility would negatively impact the views from single-family residences in the vicinity of the proposed site.

The City further stated that the predominant land use in the vicinity of the proposed site was residential and that the "existing vegetation would not completely screen the proposed tower and the tower would be taller than the existing trees."

The City also concluded that "T-Mobile has not established that its proposal to locate a wireless communications facility tower at the 2201 'H' Avenue site is the 'least intrusive' on the values that the denial of the application seeks to serve." It determined:

> At least four alternative single sites are potentially acceptable to provide coverage as required by T-Mobile, and at least two two-site alternatives would work from an RF coverage perspective. These alternative sites are either on commercially or industrially zoned property, or would provide a site for [a] proposed wireless communications facility that is not in such close proximity to residences. T-Mobile also offers an in-home service technology that provides another alternative for "in-structure" cellular telephone service. If T-Mobile constructed a wireless communications facility at one or more of the alternate single sites or two-site alternatives, a significant gap in T-Mobile's service coverage would no longer exist, even though that coverage would not be identical to that provided by a tower at the 2201 "H" Avenue site.

II.

On October 10, 2007, T-Mobile filed a complaint for declaratory and injunctive relief in the District Court for the

Western District of Washington, alleging violations of sections 253 and 332 of the Telecommunications Act ("TCA"), 47 U.S.C. §§ 253 and 332(c)(7)(B). The parties filed cross-motions for summary judgment, and at a hearing held on April 25, 2008, agreed that no material facts were in dispute that might prevent the court from ruling on the respective motions.

On May 6, 2008, the district court granted T-Mobile summary judgment on its claim that the AMC, as it related to T-Mobile's wireless communications facility, was preempted by 47 U.S.C. § 253. The district court based its ruling on the Ninth Circuit's opinion in *Sprint Telephony PCS, L.P. v. County of San Diego*, 490 F.3d 700 (9th Cir. 2007) ("*Sprint I*").[2] The district court ordered the City to issue a permit allowing T-Mobile to construct the monopole. It also noted that in light of its resolution of the § 253 preemption issue, it did not need to address the parties' arguments concerning § 332(c)(7).

Shortly after the district court's order, we agreed to rehear *Sprint I* en banc. The City then asked the district court to reconsider its order and to grant a stay of enforcement pending the resolution of the en banc proceedings in *Sprint I*. T-Mobile opposed the City's requests and also asked the district court to rule on its claims under § 332.

On July 18, 2008, the district court denied the City's requests for relief and ruled in favor of T-Mobile on its request for relief under § 332. The district court held:

[2]The district court reasoned:

> The county ordinance challenged in *Sprint* [*I*] contains similar provisions to the AMC provisions challenged in this case. Both add voluminous submission requirements to a multi-layer permitting process, both contain criminal penalties for non-compliance, and both include subjective aesthetic and design requirements that vest significant discretion in the decision-making body.

> T-Mobile has shown that its proposal was the "least intrusive" means to close the significant gap, based on its good-faith effort to identify less-intrusive alternatives. The City's conclusion to the contrary was not supported by substantial evidence. Because the City prevented T-Mobile from closing a significant service gap through the "least intrusive" means available, the City's decision has the effect of prohibiting wireless service in violation of Section 332(c)(7).

On September 11, 2008, we issued our en banc opinion in *Sprint II*. The en banc panel disagreed with *Sprint I* and with the court's prior opinion in *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), and joined "the Eighth Circuit in holding that 'a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.' " 543 F.3d at 578 (quoting *Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 532 (8th Cir. 2007)).

The parties then stipulated that *Sprint II* was controlling as to T-Mobile's claim under § 253, and agreed that the portion of the appeal concerning § 253 could be remanded to the district court to allow T-Mobile to withdraw its claim under § 253. We issued an order effectuating the parties' stipulation. Thus, only the district court's grant of relief to T-Mobile pursuant to 47 U.S.C. § 332 remains pending before us.

III.

Resolution of this appeal requires some appreciation of the purposes behind the Telecommunications Act of 1996, Pub. L. No 104-104, 110 Stat. 56, (codified as amend in scattered sections of U.S.C., Tabs 15, 18, 47), and our efforts to discern and effectuate those purposes. When enacting the TCA, Congress expressed two sometimes contradictory purposes. First, it expressed its intent "to promote competition and reduce

regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." 110 Stat. at 56. In *Sprint II*, we noted that Congress chose to "end the States' longstanding practice of granting and maintaining local exchange monopolies" and that it did so by enacting 47 U.S.C. § 253.[3] 543 F.3d at 576 (internal punctuation and citations omitted).

[3]Section 253 reads, in relevant part:

(a) In general

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.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers

Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

Second, Congress was determined "to preserve the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement." *Sprint II*, 543 F.3d at 576 (internal punctuation and citations omitted). This legislative purpose was reflected in the enactment of 47 U.S.C. § 332(c)(7).[4]

[4]Subsection 332(c)(7) reads:

(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 facili-

"Section 332(c)(7)(A) preserves the authority of local governments over zoning decisions regarding the placement and construction of wireless service facilities, subject to enumerated limitations in § 332(c)(7)(B). One such limitation is that local regulations "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." *Sprint II*, 543 F.3d at 576.

In *MetroPCS, Inc. v. City of San Francisco*, 400 F.3d 715 (9th Cir. 2005), we considered the requirement in § 332(c) that a local zoning decision be "supported by substantial evidence." *Id.* at 723-26 (discussing 47 U.S.C. § 332(c)(7)(B)(iii)). We noted that although the term "substantial evidence" was not defined in the TCA, there appeared to be "universal agreement among the circuits as to the substantive content of this requirement" — "this language is meant to trigger 'the traditional standard used for judicial review of agency decisions.' " *Id*. at 723 (internal citation omitted). Furthermore, "the substantial evidence inquiry does not require incorporation of the substantive federal standards imposed by the TCA, but instead requires a determination whether the zoning decision at issue is supported by substantial evidence in the context of applicable *state and local law*." *Id*. at 723-24. "In other words, we must take applicable state and local regulations as we find them and evaluate the City

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ties 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.

(emphasis added).

decision's evidentiary support (or lack thereof) relative to those regulations. If the decision fails that test it, of course, is invalid even before the application of the TCA's federal standards." *Id*. at 724. We commented that this approach "enables us to avoid unnecessarily reaching the federal questions of whether a zoning decision violates the substantive provisions of the TCA," and noted that "in most cases, only when a locality applies the regulation to a particular permit application and reaches a decision — which it supports with substantial evidence — can a court determine whether the TCA has been violated." *Id.*

Sprint II concerned a facial challenge to a local zoning ordinance under § 253 of the TCA. 543 F.3d at 574. The en banc court generally agreed with the standards set forth in *MetroPCS*, and in doing so moved away from the more "procedural" standard we had endorsed in *Sprint I* and *Auburn*.[5] It overruled *Auburn* and joined "the Eighth Circuit in holding that 'a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.' " *Sprint II*, 543 F.3d at 578 (quoting *Level 3 Commc'ns*, 477 F.3d at 532).

The en banc court noted that its approach to § 253 was "buttressed" by our interpretation of § 332(c). *Id.* It explained that in "*MetroPCS*, to construe § 332(c)(7)(B)(i)(II), we focused on the *actual* effects of the city's ordinance, not on what effects the ordinance *might possibly* allow." *Id.* The en banc court concluded:

> Our holding today therefore harmonizes our interpretations of the identical relevant text in §§ 253(a) and

[5]In *Auburn*, we held that the municipal regulations at issue "were preempted because they imposed procedural requirements, charged fees, authorized civil and criminal penalties, and — 'the ultimate cudgel'— reserved discretion to the city to grant, deny, or revoke the telecommunications franchises." 543 F.3d at 577 (internal citation omitted).

> 332(c)(7)(B)(i)(II). **Under both**, **a plaintiff must establish** either an outright prohibition or **an effective prohibition on the provision of telecommunications services**; a plaintiff 's showing that a locality could *potentially* prohibit the provision of telecommunications services is insufficient.

Id. at 579 (footnote omitted) (emphasis added).

Although *Sprint II* concerned a facial challenge to a local ordinance pursuant to § 253, its statements as to what a plaintiff service provider had to show provide guidance for our resolution of this as-applied challenge to the City's denial of a permit pursuant to § 332. For instance, we noted:

> A certain level of discretion is involved in evaluating any application for a zoning permit. It is certainly true that a zoning board *could* exercise its discretion to effectively prohibit the provision of wireless services, but it is equally true (and more likely) that a zoning board would exercise its discretion only to balance the competing goals of an ordinance — the provision of wireless services and other valid public goals such as safety and aesthetics.

543 F.3d at 580. We also noted that the plaintiff had "not identified a single requirement that effectively prohibits it from providing wireless services," commenting that "[o]n the face of the Ordinance, requiring a certain amount of camouflage, modest setbacks, and maintenance of the facility are reasonable and responsible conditions for the construction of wireless facilities, not an effective prohibition."[6] *Id*.

[6]We also gave several examples of what restrictions could be facially challenged.

> If an ordinance required, for instance, that all facilities be underground and the plaintiff introduced evidence that, to operate,

IV.

With the benefit of our en banc opinion in *Sprint II*, we review the district court's order holding that the City's denial of the permit violates § 332(c). We review the district court's grant of summary judgment *de novo*. *MetroPCS*, 400 F.3d at 720. Moreover, as suggested in *MetroPCS*, we first consider whether the City's denial under the AMC is supported by substantial evidence. *Id*. at 724. Determining that the denial is supported by substantial evidence under the applicable local laws, we then consider whether the denial violates § 332(c). We conclude that because the City failed to adequately rebut T-Mobile's prima facie showing that no other location was available and feasible, the district court properly found that the denial of the permit constituted an effective prohibition of coverage.

A. The City's denial of the application was supported by substantial evidence.

[1] The AMC provides that when considering a special use permit, the City may consider a number of factors including the height of the proposed tower, the proximity of the tower to residential structures, the nature of uses on adjacent and nearby properties, the surrounding topography, and the surrounding tree coverage and foliage.[7] We, and other courts, have held that these are legitimate concerns for a locality.

> wireless facilities must be above ground, the ordinance would effectively prohibit it from providing services. Or, if an ordinance mandated that no wireless facilities be located within one mile of a road, a plaintiff could show that, because of the number and location of roads, the rule constituted an effective prohibition.

543 F.3d at 580.

[7]The AMC also provides for consideration of "the availability of alternatives not requiring a tower." The record does not indicate that any such alternatives existed.

Sprint II, 543 F.3d at 580 (stating that the zoning board may consider "other valid public goals such as safety and aesthetics"); *see also T-Mobile Cent., LLC v. Unified Gov't of Wyandotte County, Kan.*, 546 F.3d 1299, 1312 (10th Cir. 2008) (noting that "aesthetics can be a valid ground for local zoning decisions"); *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999) (recognizing that "aesthetic concerns can be a valid basis for zoning decisions"); *Voice Stream PCS I, LLC v. City of Hillsboro*, 301 F. Supp. 2d 1251, 1255 (D. Or. 2004).[8]

[2] There was substantial evidence concerning these factors. A number of residents claimed that the monopole would have a detrimental impact on the surrounding residential property, that the pole would not be completely screened, and that it would interfere with residents' views of the Cascade Mountains and other scenic views. This evidence is "more than a scintilla of evidence," and accordingly the district court should have deferred to the City's determination that the evidence was adequate to support its denial of the application under the AMC. *See MetroPCS*, 400 F.3d at 725 (stating that "this Court may not overturn the Board's decision on 'substantial evidence' grounds if that decision is authorized by applicable local regulations and supported by a reasonable amount of evidence").

B. The City did not rebut T-Mobile's showing that the

[8]In *Voice Stream*, the district court observed:

> [u]nder the TCA, the board is entitled to make an aesthetic judgment as long as the judgment is "grounded in the specifics of the case," and does not evince merely an aesthetic opposition to cellphone towers in general. . . . Accordingly, when the evidence specifically focuses on the adverse visual impact of the tower at the *particular location at issue* more than a mere scintilla of evidence generally will exist.

301 F. Supp. 2d at 1258 (internal citations omitted).

denial of the application constituted an effective prohibition of services.

1. *Under the least intrusive means standard, the provider has the burden of showing the lack of available and technologically feasible alternatives.*

[3] In *MetroPCS*, we recognized that a locality could violate the TCA's effective prohibition clause if it prevented a wireless provider from closing a "significant gap" in service coverage. 400 F.3d at 731. Such a claim generally "involves a two-pronged analysis requiring (1) the showing of a "significant gap" in service coverage and (2) some inquiry into the feasibility of alternative facilities or site locations." *Id*. Here, the City concedes that there is a "significant gap" in T-Mobile's services in Anacortes.[9] Once the provider has demonstrated the requisite gap, the issue becomes what showing a provider must make in support of its proposed means of closing the gap. *Id.* at 734.

[4] In *MetroPCS*, we adopted the "least intrusive means" standard used by the Second and Third Circuit. 400 F.3d at 734 (citing *ATP Pittsburgh, L.P. v. Penn Twp.*, 196 F.3d 469, 480 (3d Cir. 1999); *Omnipoint Commc'ns Enters., L.P. v. Zoning Hearing Bd. of Easttown Twp.*, 331 F.3d 386, 398 (3d Cir. 2003); *Nextel West Corp. v. Unity Twp.*, 282 F.3d 257, 266 (3d Cir. 2002); and *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 642 (2d Cir. 1999)). This standard requires that the provider "show that the manner in which it proposes to fill the significant gap in services is the *least intrusive on the values that the denial sought to serve*." *MetroPCS*, 400 F.3d at 734 (internal quotation marks and citation omitted). We noted that this standard:

[9]In *MetroPCS*, we "formally adopt[ed] the First Circuit's rule that a significant gap in service (and thus an effective prohibition of service) exists whenever a provider is prevented from filling a significant gap in *its own* service coverage." 400 F.3d at 733.

> allows for a meaningful comparison of alternative sites before the siting application process is needlessly repeated. It also gives providers an incentive to choose the least intrusive site in their first siting applications, and it promises to ultimately identify the best solution for the community, not merely the last one remaining after a series of application denials.

Id. at 734-35. Our opinion in *MetroPCS* concluded by instructing the district court to apply the "least intrusive means" standard "in its consideration of the prohibition issue on remand." *Id*.

Here, T-Mobile, cognizant of the "least intrusive means" standard, submitted a detailed permit application that included an analysis of eighteen alternative sites. The City nonetheless denied the permit, concluding that the Church site was not the least intrusive means of closing the gap.

[5] Where, as here, there is more than a scintilla of evidence to support a locality's disapproval of a particular site for a WCF, a court's determination of whether the denial violates the TCA turns on an evaluation of the availability and technological feasibility of the alternatives. We read *MetroPCS* and *Sprint II* as holding that the provider has the burden of showing the lack of available and technologically feasible alternatives.[10] *See Sprint II*, 543 F.3d at 579; *MetroPCS*, 400 F.3d at 734.

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[10]The Third Circuit appears to agree. It noted:

> the provider applicant must also show that the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve. This will require a showing that a good faith effort has been made to identify and evaluate less intrusive alternatives, e.g., that the provider has considered less sensitive sites, alternative system designs, alternative tower designs, placement of antennae on existing structures, etc.

Penn Twp., 196 F.3d at 480.

2. *The City failed to rebut T-Mobile's showing of a lack of available and feasible alternative sites.*

[6] In determining whether T-Mobile met its burden of demonstrating that the Church site was the "least intrusive means," we examine the City's stated ground for concluding otherwise. The City's findings and conclusions stated:

> At least four alternative single sites are potentially acceptable to provide coverage as required by T-Mobile, and at least two two-site alternatives would work from an RF coverage perspective. These alternative sites are either on commercially or industrially zoned property, or would provide a site for proposed wireless communications facility that is not in such close proximity to residences. T-Mobile also offers an in-home service technology that provides another alternative for "in-structure" cellular telephoneservice. If T-Mobile constructed a wireless communications facility at one or more of the alternate single sites or two-site alternatives, a significant gap in T-Mobile's service coverage would no longer exist, even though that coverage would not be identical to that provided by a tower at the 2201 "H" Avenue site.

Initially, we agree with the district court that T-Mobile's in-home service technology (HotSpot@Home) is not relevant to a determination of the least intrusive means. This service is not a global system for mobile communications ("GSM"), must be separately purchased by individual customers, requires a broadband Internet connection, and only works within the homes of subscribing customers. Accordingly, the availability of HotSpot@Home has no effect on the significant gap in T-Mobile's cell phone coverage of Anacortes, which it offers in competition with other cell phone service providers.

We next consider the adequacy and technological feasibility of the six alternatives advanced by the City. The City's consultant noted four single antenna alternatives: (1) Anacortes Middle School, (2) Anacortes Police Headquarters, (3) Washington National Guard Building, and (4) Island View Elementary School. However, the consultant noted that these alternatives "are all lower in ground elevation, would require at least the same antenna height and would have somewhat lower signal levels in the resident areas that are at the northern and western portions of T-Mobile's coverage area of interest." The consultant also found two two-site combinations that "could work from an RF coverage perspective . . . a combination of the city water tank at the end of 29th St . . . with either the Whitney Elementary School (12th St & M Ave) or the Guemes Island communications tower." He noted that use of the Guemes Island communications tower "would have the advantage of improving T-Mobile's coverage along Oakes Avenue and the San Juan Islands ferry docking." However, he also commented that a "two-site solution may not be feasible because it would require two sites be constructed instead of one, which would raise both the impact of the WCF's on the community as well as the construction and operational costs that T-Mobile would have to bear."[11] The consultant concluded that "T-Mobile has chosen the best possible location . . . to improve the radio coverage of their PCS GSM network and that few, if any, viable alternative locations exist for T-Mobile in vicinity of their proposed location."

T-Mobile did not rest on the consultant's equivocal report, but presented the City with evidence showing that most, if not all, of the possible alternative sites were not available. T-Mobile told the Planning Commission that the Police Chief had said that an antenna adjacent to the police headquarters

[11]The consultant further noted that "[e]ach site would have to have a sufficiently large coverage footprint to generate enough traffic to pay back the wireless carrier's investment in the site as well as to defray the ongoing expenses to operate the site."

would never be approved "due to the proximity to the hospital across the street and the flight patterns of emergency helicopters," and because a tall antenna "would meet with great resistence due to the views from the west looking east and the lack of trees in the area to screen a taller pole." T-Mobile also asserts that because the National Guard site is next to the police station, these concerns preclude the placement of an antenna there.

Moreover, it is questionable whether any public school site was available. T-Mobile's first choice for the location of a WCF was Anacortes High School. It entered into negotiations with the school district, but the school district declined its proposal. The City argues, however, that during the application process, the school district indicated that it would consider allowing T-Mobile's facility at the high school, and that T-Mobile improperly declined to pursue this option asserting that it came too late in the process. T-Mobile responds that because the school district had multiple grounds for declining its initial offer, further negotiations with the school district were not likely to be fruitful.

Finally, T-Mobile asserts that the two-site combinations are not feasible because "there is no evidence on the record indicating that T-Mobile would have access to or be approved to use the 'Guemes Island' site." It further asserts that Guemes Island "is within the jurisdiction of Skagit County, and the City has no jurisdiction to determine whether a facility there would be permitted."

[7] The issue then is whether the City's claim that school sites and Guemes Island are available is sufficient to allow it to decline T-Mobile's proposal. We approach this issue by applying the standard set forth in *Sprint II*. We must determine whether T-Mobile has shown "an effective prohibition on the provision of telecommunications services," or only that the denial of its application "could *potentially* prohibit the provision of telecommunications services." *Sprint II*, 543 F.3d

at 579. Furthermore, the determination should be made in a manner that allows "for a meaningful comparison of alternative sites before the siting application is needlessly repeated," and "gives providers an incentive to choose the least intrusive site in their first siting applications." *MetroPCS*, 400 F.3d at 735.

[8] As we have previously indicated, the provider has the burden of showing that the denial of its proposal will effectively prohibit the provision of services. *Sprint II*, 543 F.3d at 579. A provider makes a prima facie showing of effective prohibition by submitting a comprehensive application, which includes consideration of alternatives, showing that the proposed WCF is the least intrusive means of filing a significant gap. A locality is not compelled to accept the provider's representations. However, when a locality rejects a prima facie showing, it must show that there are some potentially available and technologically feasible alternatives. The provider should then have an opportunity to dispute the availability and feasibility of the alternatives favored by the locality.

[9] Here, the City has failed to show that there are any available alternatives. The possibility of locating a WCF at the high school or any other public school in Anacortes is too speculative to be considered a viable alternative. In declining to entertain T-Mobile's proposal to locate the WCF at the high school, the school district cited three reasons: "upsetting our neighbors, allowing T-Mobile total 24/7 access to our high school site, [and] committing the property to this particular 'long term' project." It is by no means clear that an increase in compensation by T-Mobile would overcome any of these concerns. In light of the opposition to the Church site, and T-Mobile's experience in other localities,[12] no school site

[12]T-Mobile presented testimony to the Planning Commission that it had approached thousands of school boards about locating WCFs on their properties, and that where there is opposition in the community to the construction of a WCF, such opposition is likely to be intensified if the proposed location of the WCF is on school property.

appeared to be sufficiently available to support the denial of T-Mobile's Church site application in favor of forcing T-Mobile to pursue a new application with the school district in order to close the significant gap in its coverage.

[10] The alternative of the combination of the city water tank and the Guemes Island communication tower presents a closer question. The City offered to allow T-Mobile access to the water tank free of charge, and T-Mobile did not really deny that it could use the Guemes Island communications tower.[13] Accordingly, unlike the other alternatives, this combination may have been viable. However, in light of the environmental impact and additional costs identified by the City's own consultant as being inherent in the two-site combination, as well as the City's failure to present any evidence concerning the availability of the Guemes Island communications tower, we do not think that the possible viability of this combination defeats T-Mobile's showing that the Church site is the least intrusive means of closing its significant gap.[14] We conclude that T-Mobile made a prima facie showing that placing its WCF on the Church site was the least intrusive means of closing its significant gap in service coverage and that the City's denial of the application without showing the existence of some potentially available and technically feasible alternative constituted an effective prohibition of service, which the district court properly enjoined.

Because we conclude that the City failed to show that there were any available alternative sites, we need not determine whether the proposed alternative sites would have provided

[13]The fact that the communications tower is not within the City of Anacortes does not appear to be relevant to the question of whether the site is available.

[14]Because of our determination that the City failed to show that the Guemes Island communications tower was available, we need not consider T-Mobile's claim that the two-site combination would not close the significant gap in its service.

sufficient coverage to close the gap in T-Mobile's coverage. We would address this issue in the same manner as we addressed the availability of alternative sites. The provider's application would have to show how the proposed site would close the gap, supported by data showing the coverage afforded by other sites. The locality could then investigate and determine whether the provider's representations were sound and persuasive. The provider would then have an opportunity to reply to the locality's challenges.

Indeed, this is how T-Mobile and the City proceeded in this case. T-Mobile supported its application with considerable data showing the coverage of the Church site and the other alternatives. The City responded by questioning some of T-Mobile's data and arguing that T-Mobile's propagation maps did not delineate the coverages offered by the alternatives when combined with T-Mobile's existing WCFs. The resolution of this disagreement over the adequacy of the propagation maps and the potential coverage of alternative sites is not necessary because we have determined that the City failed to show that any alternative sites were available.

[11] In sum, applying our statement in *Sprint II* that a plaintiff must establish "an effective prohibition on the provision of telecommunications services," 543 F.3d at 579, we conclude that T-Mobile's application made a prima facie showing of effective prohibition, and that the City in denying the application failed to show that there were any potentially available and feasible alternatives to the Church site. Accordingly, the City's denial of T-Mobile's application violates 47 U.S.C. § 332(c)(7)(B)(i)(II).

V.

The TCA requires that courts, when reviewing a locality's denial of an application to a wireless communications facility, balance local concerns over the specific locations of such facilities with the national purpose of providing telecommuni-

cation services to all consumers. Following the procedure we set out in *MetroPCS*, 400 F.3d at 724, we first considered whether there was substantial evidence to support the City's denial of the special use permit under the applicable state and local laws. Because we concluded that there was substantial evidence to support the denial under the AMC, we then considered whether the denial violates 47 U.S.C. § 332(c)(7)(B)(i)(II) by prohibiting or having the effect of prohibiting the provision of personal wireless services. *See Sprint II*, 543 F.3d at 579. T-Mobile made a prima facie showing that its proposed location was the least intrusive means to close the admitted significant gap in coverage by including in its application an analysis of eighteen alternative sites. Although the City was not required to accept the provider's representations, in order to avoid violating § 332(c)(7)(B), the City was required to show the existence of some potentially available and technologically feasible alternative to the proposed location. Because the City has failed to do so, the district court's grant of summary judgment in favor of T-Mobile is **AFFIRMED.**

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SPRINT TELEPHONY PCS, L.P., a Delaware limited partnership,
Plaintiff-Appellant/ Cross-Appellee,

and

PACIFIC BELL WIRELESS LLC, a Nevada limited liability company, dba Cingular Wireless,
Plaintiff,

v.

COUNTY OF SAN DIEGO, a division of the State of California; GREG COX, in his capacity as a supervisor of the County of San Diego; DIANNE JACOB, in her capacity as a supervisor of the County of San Diego; PAM SLATER, in her capacity as a supervisor of the County of San Diego; RON ROBERTS, in his capacity as a supervisor of the County of San Diego; BILL HORN, in his capacity as a supervisor of the County of San Diego,
Defendants-Appellees/ Cross-Appellants.

Nos. 05-56076
05-56435

D.C. No.
CV-03-1398-BTM

OPINION

Appeals from the United States District Court
for the Southern District of California
Barry Ted Moskowitz, District Judge, Presiding

Argued and Submitted
June 24, 2008—Pasadena, California

Filed September 11, 2008

Before: Alex Kozinski, Chief Judge, and
Andrew J. Kleinfeld, Michael Daly Hawkins,
A. Wallace Tashima, Sidney R. Thomas, Barry G. Silverman,
Susan P. Graber, Ronald M. Gould, Marsha S. Berzon,
Richard C. Tallman, and Jay S. Bybee, Circuit Judges.

Opinion by Judge Graber;
Concurrence by Judge Gould

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OPINION

GRABER, Circuit Judge:

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in U.S.C. Titles 15, 18 & 47) ("the Act"), precludes state and local governments from enacting ordinances that prohibit or have the effect of prohibiting the provision of telecommunications services, including wireless services. In 2003, Defendant County of San Diego enacted its Wireless Telecommunications Facilities ordinance. San Diego County Ordinance No. 9549, § 1 (codified as San Diego County Zoning Ord. §§ 6980-6991, 7352 ("the Ordi-

nance")). The Ordinance imposes restrictions and permit requirements on the construction and location of wireless telecommunications facilities. Plaintiff Sprint Telephony PCS alleges that, on its face, the Ordinance prohibits or has the effect of prohibiting the provision of wireless telecommunications services, in violation of the Act. The district court permanently enjoined the County from enforcing the Ordinance, and a three-judge panel of this court affirmed. *Sprint Telephony PCS, L.P. v. County of San Diego*, 490 F.3d 700 (9th Cir. 2007). We granted rehearing en banc, 527 F.3d 791 (9th Cir. 2008), and we now reverse.

FACTUAL AND PROCEDURAL HISTORY

The County of San Diego enacted the Ordinance "to establish comprehensive guidelines for the placement, design and processing of wireless telecommunications facilities in all zones within the County of San Diego." San Diego County Ordinance No. 9549, § 1. The Ordinance categorizes applications for wireless telecommunications facilities into four tiers, depending primarily on the visibility and location of the proposed facility. San Diego County Zoning Ordinance § 6985. For example, an application for a low-visibility structure in an industrial zone generally must meet lesser requirements than an application for a large tower in a residential zone. *Id.*

Regardless of tier, the Ordinance imposes substantive and procedural requirements on applications for wireless facilities. For example, non-camouflaged poles are prohibited in residential and rural zones; certain height and setback restrictions apply in residential zones; and no more than three facilities are allowed on any site, unless "a finding is made that co-location of more facilities is consistent with community character." *Id.* An applicant is required to identify the proposed facility's geographic service area, to submit a "visual impact analysis," and to describe various technical attributes such as height, maintenance requirements, and acoustical information, although some exceptions apply. *Id.* § 6984. The proposed

facility must be located within specified "preferred zones" or "preferred locations," unless those locations are "not technologically or legally feasible" or "a finding is made that the proposed site is preferable due to aesthetic and community character compatibility." *Id.* § 6986. The proposed facility also must meet many design requirements, primarily related to aesthetics. *Id.* § 6987. The applicant also must perform regular maintenance of the facility, including graffiti removal and proper landscaping. *Id.* § 6988.

General zoning requirements also apply. For example, hearings are conducted before a permit is granted, *id.* § 7356, and on appeal, if requested, *id.* § 7366(h). Before a permit is granted, the zoning board must find:

> That the location, size, design, and operating characteristics of the proposed use will be compatible with adjacent uses, residents, buildings, or structures, with consideration given to:
>
> 1. Harmony in scale, bulk, coverage and density;
>
> 2. The availability of public facilities, services and utilities;
>
> 3. The harmful effect, if any, upon desirable neighborhood character;
>
> 4. The generation of traffic and the capacity and physical character of surrounding streets;
>
> 5. The suitability of the site for the type and intensity of use or development which is proposed; and to
>
> 6. Any other relevant impact of the proposed use[.]

Id. § 7358(a). The decision-maker retains discretionary authority to deny a use permit application or to grant the application conditionally. *Id.* § 7362.

Soon after the County enacted the Ordinance, Sprint brought this action, alleging that the Ordinance violates 47 U.S.C. § 253(a)[1] because, on its face, it prohibits or has the effect of prohibiting Sprint's ability to provide wireless telecommunications services. Sprint sought injunctive and declaratory relief under the Supremacy Clause and 28 U.S.C. § 1331, and damages and attorney fees under 42 U.S.C. § 1983. The County argued that § 253(a) did not apply to the Ordinance, because 47 U.S.C. § 332(c)(7) exclusively governs wireless regulations, and that, in any event, the Ordinance is not an effective prohibition on the provision of wireless services. The County also argued that damages and attorney fees are unavailable because Congress did not create a private right of action enforceable under 42 U.S.C. § 1983.

The district court first held that facial challenges to a local government's wireless regulations could be brought under either § 253(a) or § 332(c)(7), because neither is exclusive. The district court next held, relying on our decision in *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), that the Ordinance violated § 253(a). The district court therefore permanently enjoined the County from enforcing the Ordinance against Sprint. Finally, the district court held that a claim under 42 U.S.C. § 1983 for a violation of § 253(a) was not cognizable and granted summary judgment to the County on that claim. The parties cross-appealed. A three-judge panel of this court affirmed, and we granted rehearing en banc.

[1]In its complaint, Sprint also alleged that the Ordinance violated another subsection of 47 U.S.C. § 253. The district court dismissed that cause of action for failure to prosecute, and Sprint does not challenge that dismissal on appeal.

STANDARDS OF REVIEW

We review for abuse of discretion the district court's grant of a permanent injunction, but review its underlying determinations "by the standard that applies to that determination." *Ting v. AT&T*, 319 F.3d 1126, 1134-35 (9th Cir. 2003).

DISCUSSION

Sprint argues that, on its face, the Ordinance prohibits or has the effect of prohibiting the provision of wireless telecommunications services, in violation of the Act. As a threshold issue, the parties dispute *which* provision of the Act—47 U.S.C. § 253(a) or 47 U.S.C. § 332(c)(7)(B)(i)(II)—applies to this case.

A. *The Effective Prohibition Clauses of 47 U.S.C. § 253(a) and 47 U.S.C. § 332(c)(7)(B)(i)(II)*

When Congress passed the Act, it expressed its intent "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." 110 Stat. at 56; *see also Ting*, 319 F.3d at 1143 ("[T]he purpose of the . . . Act is to 'provide for a pro-competitive, deregulatory national policy framework . . . by opening all telecommunications markets to competition.' " (quoting H.R. Rep. No. 104-458, at 113 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124, 124)). The Act "represents a dramatic shift in the nature of telecommunications regulation." *Cablevision of Boston, Inc. v. Pub. Improvement Comm'n*, 184 F.3d 88, 97 (1st Cir. 1999); *see also Ting*, 319 F.3d at 1143 (characterizing the Act as a "dramatic break with the past"). Congress chose to "end[ ] the States' longstanding practice of granting and maintaining local exchange monopolies." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 405 (1999) (Thomas, J., concurring in part, dissenting in part).

[1] Congress did so by enacting 47 U.S.C. § 253, a new statutory section that preempts state and local regulations that maintain the monopoly status of a telecommunications service provider. *See Cablevision of Boston*, 184 F.3d at 98 ("Congress apparently feared that some states and municipalities might prefer to maintain the monopoly status of certain providers . . . . Section 253(a) takes that choice away from them. . . ."). 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."

The Act also contained new provisions applicable only to *wireless* telecommunications service providers. The House originally proposed legislation requiring the Federal Communications Commission ("FCC") to regulate directly the placement of wireless telecommunications facilities. *See* H.R. Rep. No. 104-204(I), § 107, at 94 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 61. But the House and Senate conferees decided instead to "preserve[ ] the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement." H.R. Rep. No. 104-458, § 704, at 207-08 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124, 222.

[2] Accordingly, at the same time, Congress also enacted 47 U.S.C. § 332(c)(7). Section 332(c)(7)(A) preserves the authority of local governments over zoning decisions regarding the placement and construction of wireless service facilities, subject to enumerated limitations in § 332(c)(7)(B). One such limitation is that local regulations "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." *Id.* § 332(c)(7)(B)(i)(II).

We have interpreted § 332(c)(7)(B)(i)(II) in accordance with its text. In *MetroPCS, Inc. v. City of San Francisco*, 400 F.3d 715, 730-31 (9th Cir. 2005), we held that a locality runs

afoul of that provision if (1) it imposes a "city-wide general ban on wireless services" or (2) it actually imposes restrictions that amount to an effective prohibition.

[3] Our interpretation of § 253(a), however, has not hewn as closely to its nearly identical text. Again, § 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." In *Auburn*, we became one of the first federal circuit courts to interpret that provision. We surveyed district court decisions and adopted their broad interpretation of its preemptive effect. *Auburn*, 260 F.3d at 1175-76. In the course of doing so, we quoted § 253(a) somewhat inaccurately, inserting an ellipsis in the text of § 253(a). *Id.* at 1175. We held that "[s]ection 253(a) preempts 'regulations that not only "prohibit" outright the ability of any entity to provide telecommunications services, but also those that "may . . . have the effect of prohibiting" the provision of such services.' " *Id.* (quoting *Bell Atl.-Md., Inc. v. Prince George's County*, 49 F. Supp. 2d 805, 814 (D. Md. 1999), *vacated and remanded on other grounds*, 212 F.3d 863 (4th Cir. 2000)); *see also Qwest Commc'ns Inc. v. City of Berkeley*, 433 F.3d 1253, 1258 (9th Cir. 2006) (invalidating the locality's regulations because they "may have the effect of prohibiting telecommunications companies from providing services"); *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1241 (9th Cir. 2004) (emphasizing that "regulations that *may* have the effect of prohibiting the provision of telecommunications services are preempted [by § 253(a)]"). It followed from that truncated version of the statute that, if a local regulation merely "create[s] a substantial . . . barrier" to the provision of services or "allows a city to bar" provision of services, *Auburn*, 260 F.3d at 1176, then § 253(a) preempts the regulation. Applying that broad standard, we held that the municipal regulations at issue in *Auburn* were preempted because they imposed procedural requirements, charged fees, authorized civil and criminal penalties, and—"the ultimate cudgel"—reserved discretion to the

city to grant, deny, or revoke the telecommunications franchises. *Id.*

Our expansive reading of the preemptive effect of § 253(a) has had far-reaching consequences. The *Auburn* standard has led us to invalidate several local regulations. *See Berkeley*, 433 F.3d at 1258 (holding that Berkeley's regulations were preempted by § 253(a)); *Portland*, 385 F.3d at 1239-42 (reversing the district court's holding that Portland's regulations survived preemption and remanding for additional analysis). Three of our sister circuits also have followed our broad interpretation of § 253(a), albeit with little discussion. *See P.R. Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) (citing *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1269 (10th Cir. 2004)); *Santa Fe*, 380 F.3d at 1270 (quoting *Auburn*, 260 F.3d at 1176); *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002). Applying our *Auburn* standard, federal district courts have invalidated local regulations in tens of cases across this nation's towns and cities. *See, e.g., NextG Networks of Cal., Inc. v. County of Los Angeles*, 522 F. Supp. 2d 1240, 1253 (C.D. Cal. 2007); *TC Sys., Inc. v. Town of Colonie*, 263 F. Supp. 2d 471, 481-84 (N.D.N.Y. 2003); *XO Mo., Inc. v. City of Maryland Heights*, 256 F. Supp. 2d 987, 996-98 (E.D. Mo. 2003).

But the tension between the *Auburn* standard and the full text of § 253(a) has not gone unnoticed. *See City of Portland v. Elec. Lightwave, Inc.*, 452 F. Supp. 2d 1049, 1059 (D. Or. 2005) ("The Ninth Circuit's interpretation of the scope of section 253(a) appears to depart from the plain meaning of the statute . . . ."); *Qwest Corp. v. City of Portland*, 200 F. Supp. 2d 1250, 1255 (D. Or. 2002) (construing the *Auburn* standard as dictum because reading § 253(a) as preempting regulations that *may* have the effect of prohibiting telecommunications services "simply misreads the plain wording of the statute"), *rev'd by Portland*, 385 F.3d at 1241 ("Like it or not, both we and the district court are bound by our prior ruling [in *Auburn*]."); *see also Newpath Networks LLC v. City of Irvine*,

No. SACV-06-550, 2008 WL 2199689, at *4 (C.D. Cal. Mar. 10, 2008) (noting that "the Court is sympathetic to Irvine's argument that judicial decisions in this area have not been particularly instructive in telling municipalities how they may regulate in accordance with the . . . Act"). Recently, the Eighth Circuit rejected the *Auburn* standard and held that, to demonstrate preemption, a plaintiff "must show actual or effective prohibition, rather than the mere possibility of prohibition." *Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 532-33 (8th Cir. 2007); *see also AT&T Commc'ns of Pac. Nw., Inc. v. City of Eugene*, 35 P.3d 1029, 1047-48 (Or. Ct. App. 2001) (implicitly rejecting the *Auburn* standard).

[4] We find persuasive the Eighth Circuit's and district courts' critique of *Auburn*. Section 253(a) provides that "[n]o State or local statute or regulation . . . may prohibit or have the effect of prohibiting. . . provi[sion of] . . . telecommunications service." In context, it is clear that Congress' use of the word "may" works in tandem with the negative modifier "[n]o" to convey the meaning that "state and local regulations shall not prohibit or have the effect of prohibiting telecommunications service." Our previous interpretation of the word "may" as meaning "might possibly" is incorrect. We therefore overrule *Auburn* and join the Eighth Circuit in holding that "a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition." *Level 3 Commc'ns*, 477 F.3d at 532.

Although our conclusion rests on the unambiguous text of § 253(a), we note that our interpretation is consistent with the FCC's. *See In re Cal. Payphone Ass'n*, 12 F.C.C.R. 14191, 14209 (1997) (holding that, to be preempted by § 253(a), a regulation "would have to actually prohibit or effectively prohibit" the provision of services); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (holding that the two-step *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), analysis applies to

FCC rulings). Were the statute ambiguous, we would defer to the FCC under *Chevron*, as its interpretation is certainly reasonable. 467 U.S. at 843. Our narrow interpretation of the preemptive effect of § 253(a) also is consistent with the presumption that "express preemption statutory provisions should be given a narrow interpretation." *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 496 (9th Cir. 2005).

Our present interpretation of § 253(a) is buttressed by our interpretation of the same relevant text in § 332(c)(7)(B)(i)(II) —"prohibit or have the effect of prohibiting." In *MetroPCS*, to construe § 332(c)(7)(B)(i)(II), we focused on the *actual* effects of the city's ordinance, not on what effects the ordinance *might possibly* allow. 400 F.3d at 732-34. Indeed, we rejected the plaintiff's argument that, because the city's zoning ordinance granted discretion to the city to reject an application based on vague standards such as "necessity," the ordinance necessarily constituted an effective prohibition. *Id.* at 724, 732. Consequently, our interpretation of the "effective prohibition" clause of § 332(c)(7)(B)(i)(II) differed markedly from *Auburn*'s interpretation of the same relevant text in § 253(a). *Compare MetroPCS*, 400 F.3d at 731-35 (analyzing, under § 332(c)(7)(B)(i)(II), whether the city's ordinance and decision *actually* have the effect of prohibiting the provision of wireless services), *with Portland*, 385 F.3d at 1241 ("[R]egulations that *may* have the effect of prohibiting the provision of telecommunications services are preempted [by § 253(a)]."); *compare also MetroPCS*, 400 F.3d at 732 (rejecting the argument that "the City's zoning 'criteria,' which allow for [permit] denials based on findings that a given facility is 'not necessary' for the community, are 'impossible for any non-incumbent carrier to meet' and thus constitute an effective prohibition of wireless services"), *with Auburn*, 260 F.3d at 1176 (holding that the city's ordinance is an effective prohibition under § 253(a), in large part because the "city reserves discretion to grant, deny, or revoke the [telecommunications] franchises").

When Congress uses the same text in the same statute, we presume that it intended the same meaning. *See N. Sports, Inc. v. Knupfer (In re Wind N' Wave)*, 509 F.3d 938, 945 (9th Cir. 2007) (applying the presumption); *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) ("We must presume that words used more than once in the same statute have the same meaning."); *see also Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality opinion) ("[W]e begin with the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."); *id.* at 261 (O'Connor, J., concurring in the judgment) (stating that the presumption should apply in the absence of "strong evidence" to the contrary). We see nothing suggesting that Congress intended a different meaning of the text "prohibit or have the effect of prohibiting" in the two statutory provisions, enacted at the same time, in the same statute.

[5] Our holding today therefore harmonizes our interpretations of the identical relevant text in §§ 253(a) and 332(c)(7)(B)(i)(II).[2] Under both, a plaintiff must establish either an outright prohibition or an effective prohibition on the provision of telecommunications services; a plaintiff's showing that a locality could *potentially* prohibit the provision of telecommunications services is insufficient.

Because Sprint's suit hinges on the statutory text that we interpreted above—"prohibit or have the effect of prohibiting"—we need not decide whether Sprint's suit falls under § 253 or § 332. As we now hold, the legal standard is the same under either.

[2]We make no comment on what differences, if any, exist between the two statutory sections in other contexts.

B. *The Effective Prohibition Standard Applied to the County of San Diego's Ordinance*

[6] Having established the proper legal standard, we turn to Sprint's facial challenge to the Ordinance. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).[3]

The Ordinance plainly is not an outright ban on wireless facilities. We thus consider whether the Ordinance effectively prohibits the provision of wireless facilities. We have no difficulty concluding that it does not.

The Ordinance imposes a layer of requirements for wireless facilities in addition to the zoning requirements for other structures. On the face of the Ordinance, none of the requirements, individually or in combination, prohibits the construction of sufficient facilities to provide wireless services to the County of San Diego.

[7] Most of Sprint's arguments focus on the discretion reserved to the zoning board. For instance, Sprint complains that the zoning board must consider a number of "malleable and open-ended concepts" such as community character and

[3]The Supreme Court and this court have called into question the continuing validity of the *Salerno* rule in the context of First Amendment challenges. *See, e.g., Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 (2008); *Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 971-72 (9th Cir. 2003). In cases involving federal preemption of a local statute, however, the rule applies with full force. *See Hotel & Motel Ass'n*, 344 F.3d at 971 ("To bring a successful facial challenge outside the context of the First Amendment, 'the challenger must establish that no set of circumstances exists under which the [statute] would be valid.' " (alteration in original) (quoting *Salerno*, 481 U.S. at 745)); *see also Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995) (unanimous opinion) (applying *Salerno* to a federal preemption facial challenge to a state statute).

aesthetics; it may deny or modify applications for "any other relevant impact of the proposed use"; and it may impose almost any condition that it deems appropriate. A certain level of discretion is involved in evaluating any application for a zoning permit. It is certainly true that a zoning board *could* exercise its discretion to effectively prohibit the provision of wireless services, but it is equally true (and more likely) that a zoning board would exercise its discretion only to balance the competing goals of an ordinance—the provision of wireless services and other valid public goals such as safety and aesthetics. In any event, Sprint cannot meet its high burden of proving that "no set of circumstances exists under which the [Ordinance] would be valid," *Salerno*, 481 U.S. at 745, simply because the zoning board exercises some discretion.

[8] The same reasoning applies to Sprint's complaint that the Ordinance imposes detailed application requirements and requires public hearings. Although a zoning board could conceivably use these procedural requirements to stall applications and thus effectively prohibit the provision of wireless services, the zoning board equally could use these tools to evaluate fully and promptly the merits of an application. Sprint has pointed to no requirement that, on its face, demonstrates that Sprint is effectively prohibited from providing wireless services. For example, the Ordinance does not impose an excessively long waiting period that would amount to an effective prohibition. Moreover, if a telecommunications provider believes that the zoning board is in fact using its procedural rules to delay unreasonably an application, or its discretionary authority to deny an application unjustifiably, the Act provides an expedited judicial review process in federal or state court. *See* 47 U.S.C. § 332(c)(7)(B)(ii) & (v).

[9] We are equally unpersuaded by Sprint's challenges to the substantive requirements of the Ordinance. Sprint has not identified a single requirement that effectively prohibits it from providing wireless services. On the face of the Ordinance, requiring a certain amount of camouflage, modest set-

backs, and maintenance of the facility are reasonable and responsible conditions for the construction of wireless facilities, not an effective prohibition.

That is not to say, of course, that a plaintiff could never succeed in a facial challenge. If an ordinance required, for instance, that all facilities be underground and the plaintiff introduced evidence that, to operate, wireless facilities must be above ground, the ordinance would effectively prohibit it from providing services. Or, if an ordinance mandated that no wireless facilities be located within one mile of a road, a plaintiff could show that, because of the number and location of roads, the rule constituted an effective prohibition. We have held previously that rules effecting a "significant gap" in service coverage could amount to an effective prohibition, *MetroPCS*, 400 F.3d at 731-35, and we have no reason to question that holding today.

[10] In conclusion, the Ordinance does not effectively prohibit Sprint from providing wireless services. Therefore, the Act does not preempt the County's wireless telecommunications ordinance.

C. *Section 1983 claim*

[11] We adopt the reasoning and conclusion of the three-judge panel that 42 U.S.C. § 1983 claims cannot be brought for violations of 47 U.S.C. § 253. *Sprint Telephony*, 490 F.3d at 716-18; *accord Santa Fe*, 380 F.3d at 1266-67; *see also Kay v. City of Rancho Palos Verdes*, 504 F.3d 803, 812-15 (9th Cir. 2007) (holding that § 1983 claims cannot be brought for violations of 47 U.S.C. § 332).

AFFIRMED with respect to the § 1983 claim; otherwise REVERSED. Costs on appeal awarded to Defendants - Appellees/Cross-Appellants.

GOULD, Circuit Judge, concurring:

I concur in full in Judge Graber's majority opinion, holding that Section 253(a) preempts any state or local law that actually or effectively prohibits provision of telecommunication services. I write separately to add my view that normally local governments will have the ability to enforce reasonable zoning ordinances that might affect where and how a cellular tower is located, but that will not effectively prohibit cellular telephone service. Zoning ordinances, in my view, will be preempted only if they would substantially interfere with the ability of the carrier to provide such services. Cases of a preempted zoning ordinance will doubtless be few and far between, and the record in this case shows that telecommunication services here were not effectively barred by the zoning ordinance.