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MEMORANDUM

TO: Interested Municipal Officials and Attorneys

FROM: Tim Lay, Katie Mapes, and Jessica Bell

DATE: February 10, 2015

SUBJECT: Supreme Court Issues Decision in *T-Mobile South, LLC v. City of Roswell*

On January 14, 2015, the Supreme Court issued its decision in *T-Mobile South, LLC v. City of Roswell*.[1] Although not an outright win for the City of Roswell (and many local governments may need to revise their practices accordingly), the Court ultimately dealt a far bigger blow to T-Mobile and its industry *amici*.

BACKGROUND

This case arose from the City's 2010 denial of T-Mobile's application to construct a cell tower. Following its public hearing to consider the application, the City sent T-Mobile a short letter notifying it of the denial and providing instructions for obtaining written minutes from that hearing. T-Mobile filed suit challenging the City's decision in district court, and that court held that the City failed to satisfy the "in writing" requirement of 47 U.S.C. § 332(c)(7)(B)(iii), which states that:

> 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.

After finding that the City failed to comply with the "in writing" requirement, the district court imposed the draconian remedy of granting an injunction requiring the City to grant T-Mobile's application. Both this harsh remedy, as well as the court's excessive focus on

[1] Available at http://www.supremecourt.gov/opinions/14pdf/13-975_8n6a.pdf. Oral argument recording and all briefs are available at http://www.scotusblog.com/case-files/cases/t-mobile-south-llc-v-city-of-roswell/.

the "in writing" language (as opposed to the substantial evidence requirement or other substantive requirements of Section 332(c)(7)), marked this case as unusual.

The City appealed to the Eleventh Circuit, which reversed and remanded. *T-Mobile South, LLC v. City of Roswell*, 731 F.3d 1213 (11th Cir. 2013). Citing its earlier decision in *T-Mobile South, LLC v. City of Milton*, 728 F.3d 1274 (11th Cir. 2013), the court found that the collection of documents available to T-Mobile—the City Council meeting minutes, the transcript of the meeting, and the denial letter—satisfied the "in writing" requirement. At that point, the case would have been sent back to the district court to consider T-Mobile's merits challenges.

T-Mobile sought *certiorari*, which the Court granted, and arguments were held in November 2014. Industry *amici* were heavily stacked on T-Mobile's side; on the City's side, Spiegel attorneys Tim Lay, Katie Mapes, and Jessica Bell, through the State and Local Legal Center, filed an *amicus* brief on behalf of the National League of Cities, the National Association of Counties, the U.S. Conference of Mayors, the International Municipal Lawyers Association, the International City/County Management Association, and the American Planning Association. The Solicitor General filed an *amicus* brief in support of neither party.

THE COURT'S DECISION

In a 6-3 split,[2] the Court reversed the Eleventh Circuit and held that, to enable judicial review, a locality must provide reasons for denying a wireless siting application, but that these reasons may be contained in a document separate from the written denial. Thus, all members of the Court disagreed with T-Mobile's argument that the reasons for a locality's decision must be set forth in the document denying a wireless provider's application (thus resolving a circuit split in favor of the City). The Court found that if the reasons for a locality's decision are not contained in a decision denying the application but are instead supplied by an accompanying document (or collection of documents), such as council meeting minutes, that document must be "essentially contemporaneously" available with the denial letter.

This "contemporaneous" requirement was the position urged by the Solicitor General as *amicus curiae*, although it had no bearing on the facts of this case. That is, T-Mobile did not allege that the City's minutes, which were available 26 days after the written denial and 4 days before the expiration of T-Mobile's time to seek judicial review under Section 332(c)(7), frustrated its efforts to seek judicial review. Yet the Court's rationale is that a locality should not "stymie or burden the judicial review contemplated

[2] Justice Sotomayor authored the majority opinion, joined by Justices Kennedy, Breyer, Alito, and Kagan. Justice Alito filed a concurring opinion. Chief Justice Roberts filed a dissenting opinion in which Justice Ginsburg joined, and Justice Thomas joined as to one part. Justice Thomas also filed a separate dissenting opinion.

by the statute by delaying the release of its reasons for a substantial time after it conveys its written denial."

As Chief Justice Roberts pointed out in his dissent (joined by Justices Ginsburg and Thomas)—and as *amici* argued in support of the City—a reviewing court does not need contemporaneous reasons in order to carry out substantial evidence review, and that issue was not even raised in the courts below. Further, the dissent noted the lack of harm to providers: "cell service providers are not Mom and Pop operations. As this case illustrates, they participate extensively in the local government proceedings, and do not have to make last-second, uninformed decisions on whether to seek review." The dissent authored by Chief Justice Roberts (and joined in relevant part by Justice Ginsburg) would have found that Section 332(c)(7) requires nothing more than "a written document that communicates the town's denial" and would thus have affirmed the Eleventh Circuit's decision to remand to the district court for consideration on the merits.

Justice Thomas shared the Chief Justice's "concern about the Court's eagerness to reach beyond the bounds of the present dispute" in creating the "contemporaneously available" requirement. Justice Thomas would afford municipalities "at least as much respect as a federal agency" in this case, and criticized the Court majority's treatment of municipalities as "conscripts in 'the national bureaucratic army.'"

NEXT STEPS FOR THE CITY OF ROSWELL

The Court remanded the case to the Eleventh Circuit for further proceedings consistent with its opinion. Collectively, the Court's opinions leave the City room to argue on remand that its failure to comply with the new "contemporaneously available" requirement was harmless error, and therefore the case should be remanded to the district court to consider T-Mobile's additional arguments. (That, of course, was what the Eleventh Circuit had ordered in the first place.)

In fact, the majority opinion leaves open this possibility, stating, "We do not consider questions regarding the applicability of principles of harmless error or questions of remedy, and leave those for the Eleventh Circuit to address on remand." And Justice Alito wrote a separate concurrence in which he first emphasized that there was no "opinion-writing requirement" in Section 332(c)(7), and then went on to stress the availability of the harmless error doctrine to the City on remand. He wrote "I have trouble believing that T-Mobile South, LLC—which actively participated in the decisionmaking process, including going so far as to transcribe the public hearing—was prejudiced by the city of Roswell's delay in providing a copy of the minutes." He concluded by emphasizing that nothing in the Court's opinion should be taken to mean that "when a locality has erred, the inevitable remedy is that a tower must be built."

Chief Justice Roberts's dissent, obviously critical of the Court's decision, stated: "Today's decision is nonetheless a bad break for Roswell. Or maybe not." "T-Mobile

somehow managed to make the tough call to seek review of the denial of an application it had spent months and many thousands of dollars to obtain, based on a hearing it had attended." And judicial review had not been "stymied" here.

NEXT STEPS FOR ALL LOCAL GOVERNMENTS

In light of the Court's holding that denials under Section 332(c)(7) must include reasons, local governments that include these reasons in separate documents—usually, council meeting minutes or transcripts—are strongly advised to wait to issue the denial letter until the accompanying documents are ready so that they are all issued together. The 30-day period in which the provider may seek judicial review begins to run from the issuance of the denial letter, and the Court held that the reasons need to be available around the same time as this 30-day period begins to run. The local government must still issue the denial within the limits of the FCC's shot clock (90 days for collocations and 150 days for other siting applications).

The Court agreed with the Solicitor General's suggestion that "the local government may be better served by including a separate statement containing its reasons." The Court believes that by issuing "a short statement providing its reasons, the locality can likely avoid prolonging the litigation … while the parties argue about exactly what the sometimes voluminous record means." According to the Court, this would also avoid the risk that a reviewing court could not determine the locality's reasons or mistakenly ascribe to the locality a rationale that did not actually motivate the decision. This is good advice. At the same time, however, we doubt whether a locality's issuance of such a written decision setting forth reasons would actually prevent a wireless provider from alleging that a local government acted for impermissible reasons or would otherwise reduce litigation expense. A written decision setting forth reasons could, however, strengthen a locality's ability to defend against those allegations.

CONCLUSION

Although not a clean win for the City of Roswell, it may well turn out that the Court's holding will merely add a step—harmless error analysis in the Eleventh Circuit—but not change the ultimate outcome of any subsequent Eleventh Circuit remand to the district court for a merits determination on T-Mobile's application. For local governments generally, the Court definitively determined just how much can be required of local governments that deny wireless siting applications by rejecting T-Mobile's (and industry *amici*'s) argument to require a written denial separate from the written record—a requirement that some circuits had imposed.

The "contemporaneously available" requirement was not an issue on the facts of *Roswell,* but it is now law, and local governments should be aware of it and alter their practices accordingly. One hopes that compliance with the requirement will not require substantial additional effort or expense, and that the post-*Roswell* world will be relatively

easy for local governments to adapt to. As the Chief Justice observed in dissent, "At the end of the day, the impact on cities and towns across the Nation should be small, although the new unwritten ['contemporaneously available'] requirement could be a trap for the unwary hamlet or two." As the dissent noted, and we agree, the majority decision is not a "sky is falling" one for local governments.

Wireless providers, on the other hand, may not like the new normal. With local governments delaying written decisions until the reasons are prepared—either in a separate written decision or in meeting minutes/transcripts—the likely result is that a wireless provider will now have to wait longer after a council vote denying its application before it can go to court. The written denial—not a vote at a meeting—constitutes the "final action" on which judicial review is available. For many wireless siting applications, *Roswell* may ultimately serve to (1) prompt localities to provide more thorough reasoning for their denials, and (2) require wireless providers to cool their litigation heels while the locality is doing so.

Please contact us if you have any questions or would like to discuss the Supreme Court's decision.