

**Analysis of *ExteNet Sys. v. Village of Flower Hill* by Attorney Robert Berg, Legal Advisor
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In a [landmark legal decision](#), federal district court judge Frederic Block held on July 29, 2022 that the Village of Flower Hill, NY, acted within its powers under the Telecommunications Act of 1996 when it denied the application of ExteNet, Inc. ("ExteNet"), a telecommunications company working for Verizon Wireless, to install 18 "small cell" 4G wireless antennas on public rights-of-way in the Village. The case is *ExteNet Sys. v. Village of Flower Hill*, No. 19-CV-5588-FB-VMS, pending in the United States District Court for the Eastern District of New York.

In 2016, Verizon had identified the area around Flower Hill as having deficient 4G LTE service, and asked ExteNet to design and install a network of 66 small wireless facilities to improve coverage, 18 of which would be located within Flower Hill. In May 2017, ExteNet applied for a permit for one small cell facility, and the Village imposed a moratorium on such applications while it considered an ordinance regulating them. That ordinance was enacted in 2019, by which time ExeNet had applied for 18 such permits. Following meetings with Village officials, revised applications from ExteNet, multiple public hearings and a public forum, the Village Board voted to deny ExteNet's applications, and approved a written statement of findings prepared by the Village Attorney explaining the reasons. The reasons for the Board's denial were: (1) the significant adverse aesthetic and property value impacts of the 18 nodes permeating the tiny village; (2) no gap in wireless coverage for Verizon and no need to justify the significant adverse impacts; and (3) ExteNet's abject refusal to submit an actual fixed plan for each of the 18 wireless nodes and poles, instead offering multiple different plans with different pole/node locations and configurations, abject refusal to provide onsite photo simulations for each of the proposed nodes, and refusal to comply with the public notice provisions of the village code.

ExteNet sued the Village in federal court under the Telecommunications Act of 1996 ("TCA"), claiming that the Village's ordinance regulating small cell facilities constitutes an effective prohibition on personal wireless services, was discriminatory, and was not supported by substantial evidence -- all in violation of the TCA. Additionally, ExteNet alleged that the denial violated New York's Transportation Corporations Law.

In rejecting ExteNet's arguments, the District Court made several very notable findings based on well-established, controlling Second Circuit law. First, Judge Block noted that the TCA "is not a model of clarity. In part, this is because it 'strikes a balance between two competing aims - to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers.'" Relying on *Omnipoint Communications, Inc. v. City of White Plains*, 430 F.3d 529, 534 (2nd Cir. 2005). Judge Block then pointed out that the Second Circuit

holds that this balance can be found by requiring local governments to "allow service providers to fill gaps in the ability of wireless telephones to have access to land-lines." Relying on *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 643 (2nd Cir. 1999). That's all the TCA requires of a local government -- the local government only must allow a service provider to provide wireless telephone service which can connect to landlines. Nothing more!

This is the key takeaway of this important decision. Why? Because in 2018, the Federal Communications Commission ("FCC") issued a ruling that purports to expand the scope of the TCA to include wireless services beyond providing access to a telephone network. In that ruling, *In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 F.C.C.R. 9088, 9104-05 (2018), the FCC "clarif[ie]d that an effective prohibition occurs where a state or local legal requirement materially inhibits a provider's ability to engage in any of a variety of activities related to its provision of a covered service. This test is met not only when filling a coverage gap but also when densifying a wireless network, introducing new services, or otherwise improving service capabilities."

Judge Block held that the FCC's 2018 ruling exceeds the scope of the TCA which only covers providing wireless telephone service access to landlines. Judge Block noted: "Improved capacity and speed are desirable (and no doubt, profitable) goals in the age of smartphones, but they are not protected by the Act," relying again on *Willoth*.

Judge Block then examined the Village Board's decision denying ExteNet's application to determine whether it was supported by substantial evidence, as required under the TCA. Judge Block found that substantial evidence showed that Verizon's wireless customers throughout the Village can make a wireless telephone call, even though the signal strength might not be especially high; consequently, there is no gap in coverage justifying ExteNet's application. Having found a single reason supported by substantial evidence for the Board's denial of the application, the Court found no need to evaluate the Board's other reasons, citing *T-Mobile Ne, LLC v. Town of Islip*, 893 F.Supp.2d 338, 355 (E.D.N.Y. 2012) ("If the Court finds that even one reason given for the denial is supported by substantial evidence, the decision of the local zoning body cannot be disturbed.").

Keep in mind the following caveat and a few additional positive points about this important legal decision:

Judge Block is a federal district judge within the Second Circuit. His decision relies on favorable Second Circuit decisions which he, as a district court judge, is obligated to follow. Other circuits either have not addressed this specific issue or may be more favorably inclined towards the FCC's 2018 broad interpretation of the reach of the TCA. Judge Block's decision does not bind



any other federal court. However, Judge Block is a very well-respected, seasoned jurist who is applying thoughtful Second Circuit precedent. We believe Judge Block's decision will be persuasive to other courts, and we recommend that the decision be disseminated broadly to interested parties.

Further, the other reasons provided by the Village Board for denying the application -- aesthetics, property devaluation, and ExteNet's refusal to provide actual fixed plans and photo simulations for each of the proposed nodes and refusal to comply with the Village Code notice provisions, if supported by substantial evidence, in our view, would also support denial of the applications under the case law.

[A copy of the judge's decision can be found here.](#)

Legal inquiries about the Flower Hill decision can be sent to the Environmental Health Trust's legal advisor, Robert Berg, at robertbergesq@aol.com.