

LAST WORDS ON RECENT DEVELOPMENTS

“CAN YOU HEAR ME NOW?”: “SUBSTANTIAL EVIDENCE” UNDER THE TELECOMMUNICATIONS ACT OF 1996—A CLOSER LOOK AT *LINET* v. *WELLINGTON*

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I. INTRODUCTORY REMARKS

At the outset, the Author begs your indulgence if the style of this Article seems a bit too informal for this context. The intent is to have a “conversation” with the reader that focuses on the case at hand, to wit, *Michael Linet, Inc. v. Village of Wellington (Linet)*,¹ and then discusses more broadly its practical implications.

The Author’s firm represented Michael Linet, Inc. in this case. When invited to compose a “Last Word,” the Author was tempted to write about everything that was wrong with *Linet*.² It

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1. 408 F.3d 757 (11th Cir. 2005).

2. Let there be no mistake, the Author contends *Linet* missed the mark on a number of points, both legally and factually. There is a significant disconnect between the evidence that actually appears in the record and the “evidence” as described in *Linet*. The Author leaves room for the possibility that he may attach more significance to those differences than is warranted. In those instances where *Linet* describes “evidence” in a fashion different from what evidence actually appears in the record, those differences will be identified. The reader is urged to make his or her own determinations as to whether there is any “disconnect” and if so, the significance of any differences between what the record actually

would likely be much more productive, however, to discuss only the most significant issue implicated by the decision: “What constitutes ‘substantial evidence’ sufficient, under the Telecommunications Act of 1996 (the TCA),³ to deny a permit to construct a personal wireless services (a/k/a telecommunications tower or cell tower) facility?”

II. THE TELECOMMUNICATIONS ACT OF 1996

Ten years after the enactment of the TCA, courts interpreting its application to certain issues implicated by it have become somewhat more uniform in their decisions.⁴ On some issues though, especially what constitutes substantial evidence, courts have not been as consistent.⁵

One of the great ironies of our time is that, despite the enormous popularity of cellular phones and other devices that rely upon wireless services, there has been ferocious opposition to the installation of the required infrastructure.⁶ At land use hearings, when a wireless-services provider or a tower operator seeks approval for a new tower, it is not uncommon to see one witness after another testify in opposition to the facility with one or more cell phones attached to his or her belt.

The TCA was adopted, in part, to address local opposition and procedural impediments to the installation of the required infrastructure.⁷ Discussing the intended operation of the TCA, the First Circuit Court of Appeals stated:

reflects and what *Linnet* indicates the record reflects.

3. Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

4. Robert B. Foster & Mitchell A. Carrel, *Disguised as a Tree: Judicial Review of Land Use Decisions on Cellular Telecommunications Facilities under the Telecommunications Act of 1996*, 38 Urb. Law. 657, 657 (2006) (discussing the requirement of a written decision).

5. *Id.* at 657–658.

6. See generally Eve Leberson, *Opposition Fails to Halt Cell Tower*, St. Pete. Times, North of Tampa, Zoning 1 (Nov. 12, 2000) (stating that local residents fervently opposed the erection of a cell tower, complaining that the tower would lower property values); Eric Stirgus, *Residents Call for Denial of 350-Foot Tower*, St. Pete. Times, Largo Times 1 (Nov. 29, 2000) (stating that neighbors of a proposed tower circulated petitions demanding that the county deny a company's request for a cell tower).

7. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005).

[The TCA] works like a scale that [] attempts to balance two objects of competing weight: on one arm sits the need to accelerate the deployment of telecommunications technology, while on the other arm rests the desire to preserve state and local control over zoning matters.⁸

Insofar as is most relevant to this discussion, the TCA provides 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

* * *

(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.⁹

8. *ATC Realty, L.L.C. v. Town of Kingston*, 303 F.3d 91, 94 (1st Cir. 2002); see generally *U.S. Cellular Corp. v. City of Wichita Falls*, 364 F.3d 250, 253 (5th Cir. 2004) (examining the congressional intent relevant to this "balancing"). The court in *Wichita Falls* stated:

The Telecommunications Act of 1996 balances two competing concerns. On one hand, Congress found that "siting and zoning decisions by non-federal units of government[] have created an inconsistent and, at times, conflicting patchwork of requirements" for companies seeking to build wireless communications facilities. On the other hand, Congress "recognized that there are legitimate State and local concerns involved in regulating the siting of such facilities." Congress reconciled these conflicting interests by explicitly preserving the zoning authority of local governments, but imposing substantive and procedural limits on the exercise of that authority.

Id. (citations omitted).

9. 47 U.S.C § 332(c)(7)(A), (c)(7)(B)(iii) (2000).

The TCA does not, however, expressly answer the question, “What does there have to be substantial evidence of?” The TCA places limits on local government’s ability to regulate wireless facilities, but it does not “federalize telecommunications land use law.”¹⁰ This Author suggests that it is local land use law that determines what substantial evidence is required. The following discussion from the Fifth Circuit Court of Appeals is instructive on this point:

In the context of the Telecommunications Act, the substantial evidence standard limits the *types of reasons* that a zoning authority may use to justify its decision. First, “generalized concerns” about aesthetics or property values do not constitute substantial evidence.

Second, because the Telecommunications Act “is centrally directed at whether the local zoning authority’s decision is consistent with the applicable zoning requirements,” courts have consistently required that the challenged decision accord with applicable *local zoning law*.¹¹

Before analyzing *Linnet*, a discussion of how substantial evidence is defined or perhaps should be defined, is necessary. It is not enough to identify those factors that require substantial evidence. One must also consider what quality of evidence is required. This issue becomes particularly vexing against the backdrop of the TCA’s intended purpose to place limits on the exercise of local zoning authority.¹²

Linnet, consistent with other courts considering TCA claims, defines substantial evidence as “more than a mere scintilla but less than a preponderance.”¹³ Under Florida law, a land use decision must be supported by substantial competent evidence.¹⁴ The Florida definition of substantial competent evidence and the federal definition of substantial evidence are similar.¹⁵ In Florida,

10. *S.W. Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 57 (1st Cir. 2001).

11. *U.S. Cellular Corp.*, 364 F.3d at 256 (emphasis added and citations omitted).

12. Foster & Carrel, *supra* n. 4, at 658.

13. *Michael Linet, Inc.*, 408 F.3d at 762.

14. *Miami-Dade Co. v. Omnipoint Holdings, Inc.*, 863 So. 2d 375, 377 (Fla. 3d Dist. App. 2003).

15. *Compare id.* at 377 (“such relevant evidence as a reasonable mind would accept as adequate to support a conclusion”) with *U.S. Cellular Corp.*, 364 F.3d at 255 (“such rea-

however, lay opinion testimony, where technical expertise is required, does not constitute substantial competent evidence.¹⁶ Accordingly, in Florida, to the extent that the federal definition of substantial evidence requires less than the substantial competent evidence that Florida zoning law requires, the upholding of a denial based on evidence that is not competent, would expand rather than diminish local authority to deny a permit.

III. THE FACTS OF LINET

Linet originated with an application seeking conditional use approval to construct and maintain a wireless telecommunications facility on property within the Village of Wellington. The application was made pursuant to the Village of Wellington's Unified Land Development Code.¹⁷ The facility was designed as a flagpole, 120 feet tall. All of the telecommunications antennas would have been housed within the flagpole and therefore not visible from the outside. The facility qualified as a "stealth facility" under the Unified Land Development Code.¹⁸

The facility was to be located on a golf course property, more than 600 feet from the nearest residential property line. At the request of the Village's Planning, Zoning & Adjustment Board, the location was changed slightly so that in one direction, the tower would have been slightly less than 600 feet from the nearest residential property line. Nevertheless, it was undisputed that the application, but for the minor location change requested by the Village, was in complete compliance with the Village's Unified Land Development Code. The Village's Planning, Zoning & Adjustment Board and the Village's professional staff recommended the application's approval.

sonable evidence that a reasonable mind would accept to support a conclusion").

16. *Omnipoint Holdings, Inc.*, 863 So. 2d at 377.

17. Village of Wellington Unified Land Dev. Code (Fla.) § 6.4(D)(22)(e) (2002).

18. *Id.* at § 6.4(D)(22)(b). The Village of Wellington Unified Land Development Code defines a stealth facility as "any wireless communications tower or facility that is designed to incorporate into and be compatible with existing or proposed uses of the site. Examples of stealth facilities include, but are not limited to: architecturally screened roof-mounted antennas, antennas integrated into architectural elements, and wireless communications towers designed to look like light poles, power poles, trees, flag poles, clocks, steeples or bell towers and of the same height and the same nature emulated." *Id.*

The application was heard by the Village Council.¹⁹ At the hearing, residents testified both in favor of and in opposition to the application. At the conclusion of the first hearing, the matter was deferred so that Linet could investigate alternative sites for the facility.²⁰ Ultimately, the Village Council denied the application, declining to take any testimony regarding alternative sites.

Linet brought suit in federal district court to challenge the denial. Linet's challenge was based, among other grounds, on an assertion that the denial was not supported by substantial evidence. On competing motions for summary judgment, the district court upheld the denial. Linet then appealed to the Eleventh Circuit Court of Appeals, again raising a number of issues, including the lack of substantial evidence. The appellate court affirmed. At this juncture, a closer examination of the *Linet* evidence is warranted.²¹

IV. THE EVIDENCE AND THE RECORD

The court's substantial evidence analysis was relatively brief. The court identified the following evidence as the substantial evidence supporting the application's denial:

- (1) The residents' primary concern, voiced at the June 2003 meeting, was the impact the pole would have on the value of their property.²²
- (2) Residents testified that they would not have purchased their homes if the pole was present and a local realtor

19. There were actually two hearings before the Village Council, but the Council only received evidence at the first hearing.

20. The Author feels it worthy of note (although it appears that the court did not) that the Mayor of Wellington, Thomas M. Wenham, closed the first hearing with these words:

I want everybody to understand what has just happened here so you can go away somewhat happy. You did not get the pole in your backyard this evening. . . . All we're doing is postponing it, so you haven't got the tower in your backyard at this point in time.

Mayor Thomas M. Wenham, Wellington Village Council Reg. Meeting Transcr. 167:12–167:16, 168:12–168:14 (June 24, 2003) (copy of transcript on file with *Stetson Law Review*).

21. Linet's appeal was based on a number of grounds. The focus of this Article is solely on the substantial evidence ground.

22. *Michael Linet, Inc.*, 408 F.3d at 760.

testified [that] the pole would adversely impact home resale values.²³

- (3) Other ancillary concerns included the impact the pole might have on nearby non-commercial air traffic and the pole's proximity to a middle school.²⁴
- (4) Linet's expert testimony contradicting the adverse property value impact concerns was provided by a telecommunications executive who placed a tower in a different part of the community and a realtor who based his knowledge on condominium sales in a different county.²⁵
- (5) The residents were worried about the impact of this tower on the golf course within their community, not a different tower, different location, or different community.²⁶

With due respect to the court, a review of the hearing transcript reveals that the court was simply mistaken about the testimony.

The court appears to have given great weight to the testimony of a realtor who testified in opposition to the application. That is certainly the court's prerogative, but what the realtor actually said, in context, is as follows:

Will a cell tower affect resale prices? For sure it will affect the ability of the homeowner to sell the house in a shorter period of time and at a maximum price he or she should ask.

We cannot guess the perceived reactions of a buyer when they see the tower, whether they will be rejecting the locations that the realtor presents *or not*.²⁷

Assuming *arguendo* that this witness was qualified to testify as to property values, the witness simply did not opine that the flag-pole would impact property values. At best, the witness testified

23. *Id.*

24. *Id.*

25. *Id.* at 762.

26. *Id.*

27. Marvin Hass, Wellington Village Council Reg. Meeting Transcr. 31:21–32:4 (June 24, 2003) (emphasis added).

that the installation would impact the *time* it might take to sell a property for some assumed maximum “asking price.” The witness further testified that it would be impossible to “guess” the reaction of a potential buyer.²⁸ This testimony falls woefully short of this witness opining that the flagpole installation would, in fact, impact property values.

The court’s comment on the evidence Linet submitted on property value again demonstrates that the court misconstrued the record. In *Linet*, the court stated:

Linet’s expert testimony contradicting the adverse property value impact concerns was provided by a telecommunications executive who placed a tower in a different part of the community and a realtor who based his knowledge on condominium sales in a different county.²⁹

The court summarily dismissed Linet’s expert testimony on property value.

The “realtor” was actually an appraiser.³⁰ He was a principal in a real estate appraisal firm, had been engaged in the appraisal industry for twenty-five years (as of the time of the hearing), held the MAI³¹ designation with the Appraisal Institute, was qualified as an expert witness in several counties in Florida, and was an adjunct professor.³² The study he testified about was not done in a different county.³³ It was done in Boca Raton, Florida, which is in the same county as the Village of Wellington, to wit, Palm Beach County.³⁴ The study also involved an installation on a golf course.³⁵ In his expert opinion, the installation would have had no adverse impact.³⁶

28. *Id.* at 32:1–32:4.

29. *Michael Linet, Inc.*, 408 F.3d at 762.

30. Dan Ravco, Wellington Village Council Reg. Meeting Transcr. 141:16–141:19 (June 24, 2003).

31. MAI stands for “Member, Appraisal Institute.” The Appraisal Institute “currently confers the MAI membership designation on those who are experienced in the valuation of commercial, industrial, residential and other types of properties.” Appraisal Inst., *Some Commonly Asked Questions about Real Estate Appraisers and Appraisals* 1 (2005) (available at http://www.appraisalinstitute.org/resources/downloads/brochures/FAQs_Web.pdf).

32. *Id.* at 141:16–141:25.

33. *Id.* at 142:6–142:17.

34. *Id.*

35. *Id.* at 142:11–142:17.

36. *Id.* at 145:6–145:10.

It is unclear whom the court was referring to by its reference to a “telecommunications executive.”³⁷ No telecommunications executive testified on the issue of value. Two witnesses, both with first-hand experience with telecommunications facilities and their impact on the surrounding area, did testify. One was the owner of property in Wellington where another telecommunication flagpole is located.³⁸ He testified that the Mayor of Wellington and members of the Wellington Village Council actually approached him and solicited him to allow a telecommunications facility to be relocated from city-owned property to his property.³⁹ This witness identified no adverse impact.⁴⁰

Presumably, the court was referring to the testimony of a witness identified as the “executive director” of a nearby property where a tower was located.⁴¹ She testified as follows:

And I am actually here kind of as an experienced witness. We at [the riding center] also have a cell phone tower and went through some very similar hearings through the county.

Our experience with the cell phone tower really has been nothing but positive. It does bring a great income for a non-profit organization which is of great benefit to our community. But since going into this, there was great misperception in my area of Loxahatchee that this was going to be certainly an eyesore to our community. And many of you have visited our property . . . and it is not the first thing that you see when you drive in our driveway, and it's not the first thing that most people recognize. In fact, many people don't even realize that it's there. It is placed in the middle of our property. And I feel that from looking at what the golf and country club is going to do, they have moved their tower to pretty much a central part of their property also, so it really isn't bordering really close with some of the neighbors. It does meet all the setback rules.

37. *Michael Linet, Inc.*, 408 F.3d at 762.

38. Glen Straub, Wellington Village Council Reg. Meeting Transcr. 79:17–80:12 (June 24, 2003).

39. *Id.* at 80:1–80:12.

40. *Id.* at 80:13–80:15.

41. Ruth Minnor, Wellington Village Council Reg. Meeting Transcr. 90:18–90:21 (June 24, 2003).

We really have had no adverse affect on surrounding property values.⁴²

The court's mislabeling of this witness as a "telecommunications executive" may simply be a scrivener's error.⁴³ The mistake in nomenclature, however, cannot simply be glossed over. A reader could easily surmise that the court's use of this label gives an indication that the witness was biased in some fashion towards the telecommunications industry.

Regarding the proximity of the proposed facility to a school, the witness actually said:

I respectfully ask what precedent installation of this cellular telecommunications tower *so close* to the Landings Middle School in a residential neighborhood would set for the rest of Wellington.⁴⁴

The witness did not testify, *nor does the record otherwise demonstrate*, the distance between the proposed facility and the referenced school.⁴⁵ A reader cannot tell what this witness meant by the term "so close," any more than a litigant (or counsel) seeking guidance from the court's decision can tell what the court meant by "unnecessarily."⁴⁶ The referenced testimony is only evidence that this one witness, without quantifying the distance, felt the installation was "so close" to a school.

As to the nearby airport, it is unclear whether the court considered the "concerns" regarding the impact the flagpole "might have" to be substantial evidence.⁴⁷ Since the court took the time to include the reference to the concerns, one can reasonably assume it did. That being the case, a close examination of the testimony is in order. Presumably, the court refers to the following testimony:

42. *Id.* at 90:22-92:1.

43. *Michael Linet, Inc.*, 408 F.3d at 762.

44. Richard Goldberg, Wellington Village Council Reg. Meeting Transcr. 57:6-57:10 (June 24, 2003) (emphasis added).

45. *Id.*

46. *Michael Linet, Inc.*, 408 F.3d at 762 ("the proposed site was unnecessarily close to a local middle school").

47. *Id.* at 760 (identifying that "other ancillary concerns included the impact the pole might have on nearby non-commercial air traffic").

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The proposed radio tower would be less than a mile or so from our runway. I agree that it would not be in the normal landing approach path of our runway, but it *could be* in the one- or two-mile radius of the pattern area that surrounds our airfield.

* * *

At the very least, the proposed tower . . . *could be* a serious distraction for pilots using the [Aero] Club. And in times of bad weather and low clouds or in the event of a mechanical failure, it *could be* a collision hazard.⁴⁸

This witness did not identify herself as a pilot, although she indicated others in her family fly.⁴⁹ Assuming this witness had any qualifications in the subject, accepting her “could be” testimony as substantial evidence not only eviscerates the TCA, it reduces the standard for substantial evidence to speculation and conjecture. “Could be” testimony does not supply even a scintilla of evidence and certainly does not meet the standard of substantial evidence.⁵⁰

Further, since the decision did not mention it, it is unclear whether the court overlooked or dismissed the testimony of Linet’s aviation expert. This expert performed an extensive study and opined that the proposed flagpole would not interfere with the operations of the private airport.⁵¹ The expert unequivocally concluded that the proposed flagpole did not present an aviation hazard.⁵² If this testimony was overlooked, it should not have been. The Author submits that the expert’s testimony was a much better candidate for substantial evidence than the “could be” testimony identified above.

48. Julia Sergeant, Wellington Village Council Reg. Meeting Transcr. 42:3–42:8, 42:13–42:18 (June 24, 2003) (emphasis added).

49. *Id.* at 41:22–41:24.

50. *Supra* nn. 13–16 and accompanying text (explaining the “standard of substantial evidence” and its relationship to a “scintilla of evidence”).

51. Clyde Pittman, Wellington Village Council Reg. Meeting Transcr. 98:21–109:20 (June 24, 2003).

52. *Id.* at 100:21–101:2.

V. THE SUBSTANTIAL EVIDENCE ANALYSIS

To be clear, the record was replete with complaints about the appearance of the proposed flagpole facility.⁵³ However, “[a] blanket aesthetic objection does not constitute substantial evidence under [the TCA].”⁵⁴ Rather, as the court recognized, “[a]esthetic objections coupled with evidence of an adverse impact on property values or safety concerns, can constitute substantial evidence.”⁵⁵ What is troublesome about *Linnet* is that, apparently based on the authority of *American Tower, LP v. City of Huntsville*,⁵⁶ the court indicates a willingness to accept as substantial evidence a statement by any resident, regardless of qualifications, that the visual impact of a telecommunications facility will necessarily erode property values.⁵⁷ However, upon close scrutiny of *American Tower*, it becomes apparent that the case cannot stand for that proposition on a circuit-wide basis.

Linnet suggests that *American Tower* speaks definitively to the issue of lay testimony versus expert testimony on property values. The *Linnet* court indicates that *American Tower* holds as follows:

[T]estimony by residents and [a] realtor on negative impact on property values along with safety concerns because of proximity to a school constituted substantial evidence sufficient to reject [a] construction application.⁵⁸

Respectfully, it is not clear that *American Tower* is definitive on the lay testimony as substantial evidence issue, at least outside Alabama. The relevant portion of *American Tower* reads:

53. See e.g. Charles Hogarty, Wellington Village Council Reg. Meeting Transcr. 49:17 (June 24, 2003) (“the tower is a monstrosity and an eyesore”); Norman Slasser, Wellington Village Council Reg. Meeting Transcr. 51:5–51:8 (June 24, 2003) (“The proposed cell tower is totally incompatible with the overall look of our community and will stick out like a sore thumb.”).

54. *Michael Linet, Inc.*, 408 F.3d at 761.

55. *Id.*

56. 295 F.3d 1203 (11th Cir. 2002).

57. See *Michael Linet, Inc.*, 408 F.3d at 761 (referring to the analysis from *American Tower* based upon residents’ objections that a cell site will “detract from the aesthetic appeal of the community”). Furthermore, the court stated that, “aesthetic objections coupled with evidence of an adverse impact on property values . . . can constitute substantial evidence.” *Id.*

58. *Id.* at 761–762.

The [Board of Zoning Adjustments (the BZA)] heard testimony from several residents on the negative aesthetic and value impact of the proposed tower. For example, the BZA heard testimony from a local resident who testified that she was a *realtor* and *investor* in real estate. She said that, *in her 16-year experience as a realtor*, once the proposed tower was known in the residential neighborhood, it had made it harder to sell houses in the neighborhood[,] devaluating the property and hurting the neighborhood. To be more specific about this tower, she also testified that she *had already lost potential buyers for her own property in the area because of the proposed tower*.⁵⁹

The *American Tower* court, apparently explaining *why* it was willing to accept this type of evidence as competent evidence, stated: “We accept *these* statements as competent evidence of the tower’s impact on property values.”⁶⁰ It is unclear whether by “these statements,” the court intended to refer only to the realtor’s testimony, or to both the realtor’s *and* the residents’ testimony. If the latter, the decision gives no indication as to how the nonrealtor residents were qualified to give competent testimony on the topic, other than the cited section of the Alabama Evidence Code.

The citation to the Alabama Code⁶¹ suggests that the court did *not* intend to adopt, on a circuit-wide basis, a rule that the testimony of nonexpert, lay witnesses, concerning the impact of a proposed tower on real estate values, is substantial evidence. The cited section of the Alabama Code reads:

Direct testimony as to the market value is in the nature of opinion evidence; *one need not be an expert* or dealer in the article, but may testify as to value if he has had an opportunity for forming a correct opinion.⁶²

The Florida Evidence Code has no corresponding provision that would enable a lay witness to opine about the future impact of a proposed tower on surrounding land values. Florida law permits a

59. 295 F.3d at 1208 (emphasis added).

60. *Id.* at 1208 n. 7 (emphasis added).

61. Ala. Code. § 12–21–114 (West 2006).

62. *Id.* (emphasis added).

witness, who is not testifying as an expert, to testify in the form of an opinion.⁶³ This is only allowed, however, if the opinion does not require special knowledge, skill, experience, or training.⁶⁴ This discussion begs the question, “What is the viability of this portion of the *American Tower* case in jurisdictions which do not have evidentiary code provisions similar to the Alabama Code?” This Author suggests that, if the Alabama Code section was in fact the basis upon which the *American Tower* court was willing to accept the testimony as substantial evidence, then *American Tower* is of limited applicability.

An equally troubling aspect of *Linnet*'s substantial evidence analysis is the court's failure to cite, much less analyze, what land use criteria were relevant to the application. The court fails to cite even one provision of the Village's Unified Land Development Code. The court's analysis essentially treats the TCA as if *it was* the applicable land use ordinance in the Village of Wellington. This is as puzzling as it is troubling because, in *American Tower* and in *Preferred Sites, L.L.C. v. Troup County*,⁶⁵ both cited in *Linnet*, the reviewing courts spent considerable time analyzing the applicable local land use ordinances under which the cell tower applicants in those cases sought their approval.⁶⁶ It appears that the substantial evidence determination in both *American Tower* and *Preferred Sites* was made with reference to, and in the context of, the local ordinances at issue.

Under current law, a substantial evidence analysis must start by examining applicable land use ordinances.⁶⁷ It seems

63. Fla. Stat. § 90.701 (2006).

64. *Id.* The Author does not mean to imply that the rules of evidence are enforced or are even applicable at quasi-judicial hearings for land use applications. But in applying the *American Tower* decision, it is significant that the court cited to the referenced Alabama Code as a basis for its conclusion that the statements of the *American Tower* residents were competent evidence as to the tower's impact on property values. For a good discussion of “substantial competent evidence” in the context of a quasi-judicial land use hearing, see Mark P. Barnebey & Bonnie Twardosky Polk, *Quasi-Judicial Land Use Hearings: Does Your Evidence Pass Muster?* 69 Fla. B.J. 42 (March 1995).

65. 296 F.3d 1210 (11th Cir. 2002).

66. *See id.* at 1213 (analyzing applicable local land use ordinances specifying the requirements for a proposed tower); *Am. Tower*, 295 F.3d at 1208 n. 6 (referring to a local zoning ordinance when determining whether the board of zoning officials was authorized to consider a proposed tower's negative aesthetic impact).

67. *U.S. Cellular Corp.*, 364 F.3d at 256 (stating that “because the Telecommunications Act is centrally directed at whether the local zoning authority's decision is consistent

relatively clear that when performing a substantial evidence analysis, the reviewing court must first look to the local applicable land use law to determine what criteria are at issue.⁶⁸ The court must then determine whether the evidence presented at the hearing provides substantial evidence of those criteria.⁶⁹ Testimony on a topic which is not a criterion under the applicable local land use law is irrelevant and incapable of constituting substantial evidence to support a denial.

Of course, one must leave room for the possibility that, had the court included the Village’s Unified Land Development Code in its analysis, the outcome may well have been the same. However, given the court’s failure to discuss the code and given what appear to be inaccurate recitations of what is actually contained in the record,⁷⁰ the precedential value of *Linnet* in regard to its substantial evidence analysis is limited, if not non-existent.

VI. CONCLUSION

So where does all of this leave the local government practitioner? To answer that question, it may be helpful to recount the limitations the TCA places on local governments, with the goal of facilitating the deployment of wireless services. The limitations are procedural and substantive. They include the requirement

with the applicable zoning requirements.’ . . . courts have consistently required that the challenged decision accord with applicable local zoning law” (citing *Omnipoint Commun. MB Operations v. Lincoln*, 107 F. Supp. 2d 108, 115 (D. Mass. 2000))). More recently, the Ninth Circuit Court of Appeals has articulated the required analysis as follows:

[T]he 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.” “Substantial evidence’ review under the TCA does not create a substantive federal limitation upon local land use regulatory power. . . .” In other words, we must take applicable state and local regulations as we find them and evaluate the [local] 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.

MetroPCS, Inc. v. City & Co. of San Francisco, 400 F.3d 715, 723–724 (9th Cir. 2005) (emphasis in original, citations omitted).

68. *MetroPCS, Inc.*, 400 F.3d at 724.

69. *Id.*

70. *Supra* pt. IV (referring to what the Author believes to be the court’s inaccurate statements regarding the trial record).

that a denial be supported by substantial evidence in a written record, together with the requirement that a denial may not result in a prohibition of the provision of personal wireless services or unreasonable discrimination among the providers of those services.⁷¹

Regarding the definition of substantial evidence, courts appear to accept the federal definition uniformly without regard to the quantity or quality of proof required under the applicable state or local land use law.⁷² The quality of evidence required to meet this federal definition, however, is less clear. The point along the continuum from “blanket aesthetic objections” to competent fact-based testimony of “negative impact on property values along with safety concerns” where one reaches the milestone of substantial evidence, seems incapable of precise definition.

If *Linet* has, as the Author suggests, interpreted the substantial evidence standard under the TCA as lower than Florida’s substantial competent evidence standard, then *Linet*’s interpretation actually expands, rather than limits, the power of a local government to deny a permit. Under *Linet* a federal court can uphold a denial that was based on unqualified (lay) testimony. Under Florida land use law, the substantial *competent* evidence standard would cause the same denial to be overturned. Thus, the *Linet* evidentiary standard makes it easier rather than more difficult for local governments to deny telecommunication tower permits, defeating the TCA’s original intent.⁷³

71. 47 U.S.C. § 332(c)(7)(B)(iii), (c)(7)(B)(i)(I).

72. *Am. Tower*, 295 F.3d at 1207–1208 (referring to the TCA’s “substantial evidence” standard when reviewing the determination that a local zoning board’s decision was not supported by substantial evidence).

73. Some courts have indicated a willingness to give a certain amount of latitude to neighbors objecting to a proposed telecommunications facility. For example, much like *David and Goliath*, the Fourth Circuit has observed as follows:

[The tower applicants] correctly point out that both the Planning Department and Planning Commission recommended approval. In addition, [applicants] of course had numerous experts touting both the necessity and the minimal impact of towers at the [c]hurch. Such evidence surely would have justified a reasonable legislator in voting to approve the application, and may even amount to a preponderance of the evidence in favor of the application, but the repeated and widespread opposition of a majority of the citizens of Virginia Beach who voiced their views—at the Planning Commission hearing, through petitions, through letters, and at the City Council meetings—amounts to far more than a “mere scintilla” of evidence to persuade a reasonable mind to oppose the application. Indeed, we should wonder at a legislator who ignored such opposition. In all cases of this sort, those seeking to build will

Simply stated, assuming that impact on property values and safety concerns are relevant criteria under the applicable land use regulation at issue, no amount of opposition testimony on those topics should be considered sufficient evidence to support the denial of a telecommunications facility, unless that testimony is given by a witness with proper credentials and who has completed the proper analysis. On matters that require specialized knowledge and training, the rule should be the same for applicants seeking permission to build telecommunications facilities as for those who oppose those facilities. The following discussion from the United States District Court for the Northern District of Illinois is instructive on this issue:

[U]nsupported constituent testimony opposing cellular tower location[s] generally will not satisfy the substantial evidence test. We qualify this conclusion because it is conceivable that a cellular service provider could produce no evidence in support of its application, in which case even unsupported equivocal remarks could satisfactorily support a special use denial. But, in general, service providers attend zoning hearings well-armed with extensive evidence justifying their efforts to secure special use permits. Additionally, that evidence tends to be in the form of expert reports and testimony that their special use satisfies the local land-use regulations.

come armed with exhibits, experts, and evaluations. [Applicants], by urging us to hold that such a predictable barrage mandates that local governments approve applications, effectively demand that we interpret the Act so as always to thwart average, nonexpert citizens; that is, to thwart democracy. The district court dismissed citizen opposition as "generalized concerns." Congress, in refusing to abolish local authority over zoning of personal wireless services, categorically rejected the scornful approach.

AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach, 155 F.3d 423, 431 (4th Cir. 1998) (citations and footnotes omitted). One can perhaps understand a court's recognition that sometimes (and the Author can tell you from experience this is certainly not true in every case) objectors may not have the same resources available as the applicant seeking to construct a wireless telecommunications facility. However, when that effort to "level the playing field" rises to the level of dismissing or discounting expert testimony propounded by an applicant while accepting as substantial evidence testimony from witnesses lacking the credentials to give the testimony, the courts have effectively eviscerated the limitation the substantial evidence requirement was intended to place on local governments. The Author submits that it is neither scornful nor undemocratic to require objectors to produce expert testimony as to those components of any objection that require expert testimony including the impact of a proposed telecommunications facility on future land values.

In the face of such evidence, something more is required than mere constituent opposition to a tower.

* * *

We suspect that [the Fourth Circuit] is entirely correct that legislators will find the opinions of angry constituents compelling. But validating this reasoning would nullify Congress' goals of reducing regulation, rapidly deploying new telecommunications technologies, and providing nationwide cellular services; it would allow a small number of constituents to defeat the placement of telecommunications towers in locations necessary to accomplish these congressional goals. We cannot believe Congress intended this result when it reserved authority to local governments over the construction and placement of cellular towers.⁷⁴

Clearly, what the "something more" is has a significant impact on the balance that the TCA is meant to achieve.

To use the balancing analogy, the Author submits that *Linnet* presents a compelling case for taking a closer look at what sort of evidence should be placed on the substantial evidence scale. For example, objections that a particular installation is "too tall" should not be allowed on the scale unless the discrete issue of height is a relevant criterion under the applicable land use ordinance. Furthermore, testimony that a proposed facility is too tall and will therefore decrease property values should not be allowed on the scale unless it is placed there by one with the training and expertise to opine as to that conclusion.

The more the substantial evidence limitation is diluted, the more significant the "prohibition" or "effective prohibition" and "unreasonable discrimination" components of the TCA become.⁷⁵

74. *Primeco Personal Commun., LP v. Village of Fox Lake*, 26 F. Supp. 2d 1052, 1063 (N.D. Ill. 1998). The court's acknowledgement that the Fourth Circuit is correct in "find[ing] the opinions of angry constituents compelling," is likely a reference to *AT&T Wireless*, 155 F.3d at 430.

75. The TCA provides in part:

(7) Preservation of local zoning authority.

* * *

While a full discussion of those limitations is beyond the scope of this Article, if the substantial evidence limitation is not meaningfully applied, then the denial of a permit to construct a telecommunications facility can only be overturned when: (1) the denial of that facility prohibits or has the effect of prohibiting the provision of personal wireless services, or (2) when the denial unreasonably discriminates against providers. Because courts are not in agreement as to the quantum of proof necessary to establish when either the “prohibition” or “discrimination” limitations have been violated, proper analysis of the substantial evidence requirement is essential. Otherwise, the “TCA scales” will have tipped decidedly against Congress’ goal of accelerating the deployment of telecommunications technology.

(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.