No. 29177 -- *American Tower Corporation v. Common Council of the City of Beckley*

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OF WEST VIRGINIA

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Starcher, J. dissenting:

The cell phone is an amazing device, but people have the right to control where the towers go.

The majority opinion's statutory reading or reasoning is simply not persuasive. The controlling statute (*W.Va.Code*, 8-24-55(3)) requires that a BZA *shall* decide special exceptions ". . . upon which the [BZA] *is required to act under the* [local] *ordinance.*"

However, the Beckley ordinance does *not* require the Beckley BZA to decide special exceptions. Rather, the Beckley ordinance requires the *city council* to decide special exceptions. Thus, the statutory requirement is simply inapplicable to the Beckley BZA's review of special exceptions.

Also, the Beckley Council's position, that the statute permits a city council to reserve special exception decisions to itself, is supported by all of the decisional authority in this state and elsewhere. The majority opinion does not cite any cases that adopt its view. The holding in the majority opinion would invalidate the special exception procedures in Charleston, Lewisburg, and other cities. The West Virginia Municipal League has filed an extensive *amicus curiae* brief on behalf of the Beckley Council's position. Moreover, what are the implications of this Court invalidating as illegal the procedures that have been relied upon in a number of cities, for years, to address special exceptions? The opinion does

not address these concerns, either. In summary, there is a more than reasonable construction of the statute that favors the Beckley position. That is the construction that we should adopt, rather than strike down the democratic expression of the citizens of Beckley.

I hope that the Legislature clarifies the statute and restores to the citizenry their right to have their say. I join Justice McGraw in dissenting.