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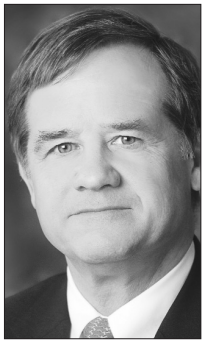
Environmental LAW

It's time to tweak local laws on cell tower siting

While cellphones are now ubiquitous, controversy over the siting of facilities which enable their use has not ceased. Federal law expressly preserves the right of municipalities to regulate the siting of facilities, but this right is subject to express limitations.

Recent developments have clarified two of these limitations; namely, time periods within which municipalities must act on facility applications and the kinds of modifications to facilities which must be approved. Municipalities should review their telecommunications local laws and make revisions to accommodate these developments as appropriate.



By ROBERT B. KOEGEL
Daily Record Columnist

Under section 704 of the Telecommunications Act of 1996 (TCA), 47 USC § 332(c)(7), State and local governments may regulate the "placement, construction and modification" of personal wireless service policies. However, this regulation may not "unreasonably discriminate" among providers of functionally equivalent services, "prohibit or have the effect of prohibiting" the provision of wireless services, or consider the "environmental effects" of radio frequency emissions to the extent that the facilities comply with federal regulations.

Moreover, state and local governments must act on any application to place, conduct or modify wireless service facilities "within a reasonable period of time" after the application is duly filed, taking into account the nature and scope of the application, and any decision on the application must be in writing and supported by "substantial evidence" contained in a written record.

All of these limitations have been the subject of extensive, nationwide litigation, the discussion of which is well beyond the scope of this article. Instead, this article will focus on what constitutes a "reasonable period of time" to act on an application and what kinds of "modifications" must be approved.

Until recently, courts determined the reasonable time standard on a case-by-case basis. For example, where a provider sued a town after it required the preparation of a SEQRA environmental impact statement nearly one year after the provider submitted its application, the Second Circuit found that the "reasonable period of time" standard had not been violated, because the town had made "steady progress" on the application and was trying to make an informed decision under SEQRA, *New York SMSA Ltd. P'ship v. Town of Riverhead*, 45 Fed. Appx. 24 (2d Cir. 2002).

However, in 2009, the Federal Communications Commission interpreted the meaning of the reasonable time provision in a declaratory ruling commonly known as the Shot Clock Order, 24 FCC Rcd. 13994 (2009).

Under the Shot Clock Order, there is a rebuttable presumption that the "reasonable period of time" language in the TCA means 90 days for a collocation application and 150 days for all other applications. These time periods do not include the time it takes for an applicant to respond to a request for additional information, but only if the state or local government notifies the applicant within the first 30 days that its application is incomplete. These time limitations can also be extended by mutual consent.

In 2012, the Fifth Circuit held that the Shot Clock Order is entitled to judicial deference as a permissible construction of an ambiguous statute, in a decision later approved by the Supreme Court, *City of Arlington, Tex. v. FCC*, 668 F.3d 229 (5th Cir. 2009), aff'd, 133 S. Ct. 185 (2013). And, in 2013, one New York federal district court did the same, *Crown Castle NG East, Inc. v. Town of Greenburgh*, 2013 U.S.Dist. LEXIS 93699 (SDNY

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While there is no requirement that municipalities incorporate the presumptive Shot Clock Order time periods directly into their local laws, it would be wise to at least acknowledge them for purposes of notice to all concerned. More importantly, given the relatively short, fixed time periods involved, municipalities should amend their local laws as necessary to insure that all relevant information will be required to be submitted for a complete application.

This information will include proof concerning the need for the facility in terms of filling a significant gap in service in the wireless network, and alternative means of proceeding, such as by alternative sites, collocation, alternative designs and alternative technologies. And, of course, municipalities will want to be aware of the 30-day period to declare an application incomplete, as necessary.

With respect to the modification of facilities, section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 (TRA), 47 U.S.C. § 1455(a), provides that, notwithstanding section 704 of the TCA, a state or local government may not deny, "and shall approve," any "eligible facilities request" for a modification of an existing tower or base station that does not "substantially change" the physical dimensions of such tower or base station.

The term "eligible facilities request" means any request for a modification of an existing tower or base station that involves collocation of new transmission equipment or removal or replacement of existing transmission equipment.

Apparently, no federal court has yet determined what kind of modification does not "substantially change" a tower or base station. However, one New York federal district court recently granted a motion to amend a provider's complaint to annul a town's local telecommunications ordinance so as to add a claim under TRA §6409(a), *New York SMSA Ltd. P'ship v. Town of Hempstead*, 2013 U.S.Dist. LEXIS 37833 (EDNY 2013).

Furthermore, the FCC has issued a public notice interpreting this section of the TRA. FCC Public Notice DA 12-2047 (Jan. 25). According to the notice, a state or local government may require an application for a modification covered under the TRA, even though the application must be approved, if the approval is "administrative." The notice also opines that the approval should be made within 90 days.

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