MISSOURI MUNICIPAL ATTORNEYS ASSOCIATION

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NEW DEVELOPMENTS IN WIRELESS COMMUNICATIONS FACILITIES SITING AND LEASES

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I. <u>OVERVIEW OF TELECOMMUNICATIONS ACT OF 1996</u>. 47 U.S.C. § 332(c)(7) of federal Telecommunications Act of 1996 (the "TCA") provides limitations on the ability of local government to regulate placement, construction, and modification of "personal wireless service facilities," i.e.: cell towers, but "specifically preserved the authority of local zoning boards 'over decisions regarding the placement, construction, and modification of personal wireless service facilities,' *47 U.S.C. § 332(c)(7)(A)*." *USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment of the City of Des Moines*, 465 F.3d 817, 820 (8th Cir. 2006).

A. <u>Procedural Requirements of TCA</u> – Decisions on the placement, construction, and modification of personal wireless service facilities must satisfy the following:

1. *Decision "in writing" – § 332(c)(7)(B)(iii)*

a. *Sprint Spectrum, L.P. v. Platte County*, 578 F.3d 727, 731 (8th Cir. 2009). To satisfy the TCA's "in writing" requirement, decisions by local zoning boards must:

i. be <u>separate</u> from the written record;

ii. describe the reasons for the denial; and

iii. contain a sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record that supports those reasons.

b. *USCOC of Greater Missouri, LLC v. City of Ferguson*, 583 F.3d 1035, 1041-42 (8th Cir. 2009). Issuance of the local government's written decision, not the local government's vote to deny an application, is the "final action" that starts the 30-day limitations period for providers to sue under the TCA.

2. *Supported by "substantial evidence" in a written record* – § 332(c)(7)(B)(iii)

a. The TCA's "substantial evidence" requirement is directed at whether the local zoning authority's decision is consistent with the applicable local zoning requirements.

i. <u>*Compliance with Zoning Code*</u> – Failure to conform to local zoning regulations is, alone, held to be sufficient evidence to support a denial of a permit for a wireless service facility.

- *Florida RSA #8 LLC d/b/a U.S. Cellular v. City of Chesterfield*, 416 F.Supp.2d 725, 739 (E.D.Mo. 2006) (Denial of administrative permit supported by substantial evidence where administrative permit was not permissible under City's zoning ordinance);
- *USCOC of Va. RSA #3 v. Montgomery County*, 343 F.3d 262, 271 (4th Cir. 2003) ("[T]he proposed tower's inconsistency with local zoning requirements is sufficient to establish substantial evidence for the denial of the permit.");

ii. <u>*Aesthetics*</u> – Aesthetic concerns can be a valid basis on which to deny a wireless facility application.

- *Sprint Spectrum, L.P. v. Platte County*, 578 F.3d 727, 733 (8th Cir. 2009) Aesthetic judgment must be "grounded in the specifics of the case" and not based on "generalized aesthetic concerns…that are applicable to any tower, regardless of location."

3. *Decision within a "reasonable period of time"* – § 332(c)(7)(B)(ii)

a. Under TCA, decisions on the placement, construction, and modification of personal wireless service facilities must be done in a "reasonable period of time."

b. See discussion of FCC Shot Clock Rule below. *Provisions of Section 332(c)(7)(B)…, FCC 09-99, Declaratory Ruling (November 18, 2009)* (Order defining "reasonable period of time.")

B. Substantive Requirements of TCA – Local government regulation of personal wireless service facilities cannot:

1. *Unreasonably discriminate among providers of functionally equivalent services* – § 332(c)(7)(B)(i)(I)

a. *USCOC of Greater Missouri, LLC v. Village of Marlborough*, 618 F.Supp.2d 1055 (E.D.Mo. 2009). In order to succeed on a claim of unreasonable discrimination under the TCA, wireless providers "must show that [the local government] discriminated among providers of functionally equivalent services and that these providers were treated unequally."

i. "There is no unreasonable discrimination under the TCA where there is no evidence that a local zoning board treated another competitor differently." *Id.*, 618 F.Supp.2d at 1065. In *Village of Marlborough*, unreasonable discrimination claim was dismissed where "there [was] no allegation that the Village actually treated another telecommunications provider differently from [the plaintiff wireless provider]." *Id.* at 1064.

2. *Prohibit or have the effect of prohibiting provision of personal wireless services* – § 332(c)(7)(B)(i)(II)

a. A "Significant Gap" in wireless coverage must be shown. There is a circuit split on what constitutes a "Significant Gap"

i. 1st and 9th Circuit

- Gap only need be in one providers' available service. See e.g., *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 732-33 (9th Cir. 2005)

ii. 2nd and 3rd Circuit

- Gap must be in *all* available wireless service. *APT Pittsburgh Ltd. P'ship v. Penn Twp.*, 196 F.3d 469, 480 (3rd Cir. 1999)

b. "As Applied" Effective Prohibition claims – *See USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment of the City of Des Moines*, 465 F.3d 817, 820 (8th Cir. 2006).

i. Claim of effective prohibition based on a specific decision of a zoning board requires a showing that a wireless provider:

- adequately investigated "all feasible alternative sites,"
- gave "serious consideration" to other locations,
- proposed site "was the only location for a cellular tower that would remedy [the provider's] coverage issue."
  - Complaint must contain allegations showing that the provider's proposed site is the "only viable location." (In *Village of Marlborough*, prohibition of service claim dismissed where complaint failed to allege proposed site was only viable location and alleged facts showing that sites other than proposed site would remedy provider's coverage needs.)

c. "Facial" challenges to regulations alleging Effective Prohibition – *USCOC of Greater Missouri, LLC v. Village of Marlborough*, 618 F.Supp.2d 1055, 1062 (E.D. Mo. 2009). Providers must show either:

i. The impossibility of obtaining a permit through the applicable local ordinances; or

ii. That no alternative site exists that the provider could use to fill a gap in service.

3. *Regulate "on the basis of the environmental effects of radio frequency emissions." – § 332(c)(7)(B)(iv)*

a. Federal RF Safety Standards totally preempt conflicting attempts to regulate RF emissions.

b. Prohibition against regulating RF emission does not apply where local government is seeking to control RF emissions as landlord, and not as regulator. *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404 (2nd Cir. 2002).

C. Remedy for Violations of TCA

1. *Remand* – *See USCOC of Greater Missouri, LLC v. County of Franklin*, 575 F.Supp.2d 1096, 1102-03 (E.D. Mo. 2008) (Remand back to zoning board was appropriate remedy where zoning board failed to comply with "in writing" requirements of TCA).

2. *Injunction* – *But see Sprint Spectrum L.P. v. County of St. Charles*, 2005 WL 1661496, 2005 U.S. Dist. LEXIS 43590 (E.D.Mo. July 6, 2005); (Injunction granted to allow the wireless provider to construct its tower in the manner it applied for upon violations of TCA's "in writing" and "substantial evidence" requirements.)

II. FCC'S SHOT CLOCK RULE - *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)…*, FCC 09-99, Declaratory Ruling (November 18, 2009) –

Under TCA, 47 U.S.C. 322(c)(7)(B), decisions on the placement, construction, and

modification of personal wireless service facilities must be done in a "reasonable period of time."

A. <u>Effect on Procedure</u>

1. The FCC Shot Clock Rule states that a "reasonable period of time" for a local government is presumptively:
    a. **Ninety (90) days** to process personal wireless service facility siting applications requesting co-locations (**antennas on existing towers/structures**)
    b. **One-hundred fifty (150) days** to process all other applications (**new towers/structures**)
2. A failure to make a "final action" (a final *written* decision) within those timeframes constitutes a rebuttable presumption of a "failure to act" authorizing a challenge in federal court.
    a. However, failure to act on an application within the timeframes "would not, in and of itself, entitle the siting applicant to an injunction granting the application."
3. Applicants and the state or local authority **can agree to extend** the above timeframes.
4. The 90 day or 150-day time limits **do not start to run until the applicant files a complete application**.
    a. State and local governments **must inform an applicant that their application is incomplete within thirty (30) days** of receiving an incomplete application.
5. New restriction on permissible reasons for denials:
    a. "A State or local government that denies an application for personal wireless service facilities siting **solely** because 'one or more carriers serve a given geographic market' has engaged in unlawful regulation that 'prohibits or ha[s] the effect of prohibiting the provision of personal wireless services….'" (emphasis added).

B. <u>*City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012)</u>

1. ***Rule upheld*** – Opinion upheld FCC Shot Clock Rule as an appropriate exercise of FCC's authority.
2. **Operation of presumption –** Opinion points out that Shot Clock Rule merely creates a <u>presumption</u> that a City that does not make a final action within the Shot Clock time-limits failed to act within reasonable amount of time.
    a. "If the party against whom the presumption operates produces evidence challenging the presumed fact, the presumption simply disappears from the case."
    b. "[T]he ultimate burden of persuasion remains with the wireless facilities provider to demonstrate that the government unreasonably delayed action on an application."

c. "[T]he wireless provider would likely be entitled to relief if it showed a state or local government's failure to comply with the time frames and the state or local government failed to introduce evidence demonstrating that its delay was reasonable despite its failure to comply."

d. "If the state or local government introduced evidence demonstrating that its delay was reasonable, a court would need to weigh that evidence against the length of the government's delay—as well as any other evidence of unreasonable delay that the wireless provider might submit—and determine whether the state or local government's actions were unreasonable under the circumstances."

3. ***Practical implications of presumption*** – If your City cannot render a "final action" within the FCC Shot Clock Rule's time limits, make sure the City's record contains documentation showing the reasons for delay and showing that the delay was reasonable in the circumstance.

C. Action Plan to Deal with FCC Shot Clock Rule

1. Review City's wireless facility siting ordinance and current practices to ensure that it is adequately protected against new challenges based on this FCC Shot Clock Rule.

a. Possibly incorporate new time limits expressly into existing codes and practices.

b. Implement procedures regarding what constitutes a "complete application," the timing of review, procedures for extensions, and clear standards for decisions that reduce the risk of legal action and increase the likelihood that local decisions regarding your community will be upheld.

i. See CVR's Model Wireless Communication Facilities Code, for provisions addressing FCC Shot Clock Rule. http://www.municipalfirm.com/documents/CVRModelWirelessCommunicationsFacilitiesCode2012.pdf.

2. Notify and educate officials and staff who are responsible for processing and/or making decisions on wireless facility applications of the TCA obligations, the FCC Shot Clock Rule, and court interpretations of the procedural requirements of the TCA.

III. NEW FEDERAL STATUTE PROHIBITING DENIAL OF CERTAIN COLLOCATION REQUESTS

– As part of the *Middle Class Tax Relief and Job Creation Act of 2012 (H.R. 3630)* a new federal statute was approved on Feb. 22, 2012 that impacts state and local governments' authority to deny certain applications related to siting of wireless communications facilities (cell towers).

A. ***The Statute*** – Section 6409(a) of the Act (47 U.S.C. 1455(a)(1)-(2)) provides:

§ 1455. Wireless facilities deployment

(a) Facility modifications.

(1) *In general*. Notwithstanding section 704 [47 U.S.C. § 332] of the Telecommunications Act of 1996 (Public Law 104-104) or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.

(2) *Eligible facilities request*. For purposes of this subsection, the term "eligible facilities request" means any request for modification of an existing wireless tower or base station that involves--

(A) collocation of new transmission equipment;

(B) removal of transmission equipment; or

(C) replacement of transmission equipment.

B. <u>Undefined Terms</u>. – What do they mean?

1. *"Notwithstanding … any other provision of law"* –

a. Building/Safety Code?

b. Zoning Code?

Note: Nothing in § 1455 strips Cities of their right to review applications and issue the necessary zoning permits/approvals.

2. *"Substantially change the physical dimensions of such tower or base station"*

a. From FCC Presentation on May 2, 2012

- FCC previously defined "substantial increase in size" in the Nationwide Collocation Agreement, 47 C.F.R. Part 1, App. B
  - NCA excludes most collocations that do not involve a substantial increase in size from National Historic Preservation Act Section 106 review
  - FCC also used to define what it is a collocation for purposes of shot clock
- May be useful as guidance in applying Section 6409

b. "National Collocation Agreement" = *Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*

i. Between FCC, the National Conference of State Historic Preservation Officers and the Advisory Council on Historic Preservation (Jan. 5, 2005)

ii. Defines "*Substantial increase in the size of the tower*'':

(1) *Height* – Greater of **10% of existing height** *or* **height of additional array plus 20ft**; or

(2) *Equipment* - Installation of more than the **standard number** of new

equipment cabinets for the technology involved, **not to exceed four**, or more than **one new equipment shelter**; or

(3) *Width* – Greater of **20ft protruding from edge of tower** *or* **width of tower** at attachment height; or

(4) *Site* - Excavation outside the current tower site (boundaries of the tower's lease or fee area plus related access or utility easements.

iii. National Collocation Agreement is only <u>one way</u> of determining whether an application constitutes *"Substantially change the physical dimensions of such tower or base station"*; and greatly favors the wireless industry.

c. Strategies for limiting what constitutes a substantially change the physical dimensions of such tower or base station.

i. Ordinance – define "substantially change the physical dimensions…"

ii. Policy/Discretionary Decision-making

- If your City denies an applications that the wireless company could claim is protected by §1455, make sure the City's record and written decision clearly lay out the reasons why the application falls outside the provisions of the Act.

IV. MODEL WIRELESS COMMUNICATIONS FACILITIES CODE

A. **<u>Reducing the Impact While Increasing Opportunities For Wireless Facilities</u>** – The Model Code seeks to reduce wireless facilities impacts by requiring and encouraging co-location of new antennas on existing structures, requiring necessary, new support structures to provide opportunities for co-location to minimize the need for construction of future towers, and by requiring new support structures and antennas to be disguised and otherwise blend in to the surrounding environment, all through the following regulations:

1. ***Shared-use requirements*** – Regulations designed to encourage (and require where possible) co-location of antennas to minimize the number of wireless communications support structures within the City.

a. Wireless facilities owners are required to agree to make their structures available for future co-location of other wireless provider's antennas.

b. New towers (over 60 feet) must be constructed to provide room for future co-location.

c. The application process is used to collect information about wireless facilities in the City and alerts other wireless providers of potential opportunities for co-location of antennas.

d. Other wireless providers must be given notice of new tower requests

e. New antennas must co-locate on existing towers within 1 mile, unless not feasible.

2. ***Design requirements*** – Regulations for new wireless facilities designed to minimize the impacts of wireless facilities on the public:

   a. Compliance with other applicable Building Codes, Safety Standards, and Zoning Codes.

   b. Compliance with other Regulatory agency requirements (FAA, FCC, etc.).

   c. Security, Lighting, and Advertising regulations.

   d. Design Requirements – Regulations emphasize disguising and blending-in of a wireless facility into its surrounding environment.

      i. Color

      ii. Ground equipment must be disguised or installed underground

      iii. Height limitations

      iv. No exposed antennas – i.e., "crow's nests"

      v. Type of tower – Monopole design is required for new support structures; No lattice towers or guy-wires.

      vi. Fencing and landscaping

      vii. Setbacks – 100% of tower height from residential used property lines; 50% of tower height from all other property lines

B. **<u>Encouraging Placements of Wireless Facilities that Benefit the Public at Large</u> –** The Model Code encourages benefits of wireless facilities to the public generally instead of a small number of private interests, because the impacts of wireless facilities are sustained by the public at large. The Model Code encourages this through a three-level permitting system:

Goals of Three-Level System Permitting System

- Encourage location of wireless facilities on publicly-owned property before locations on private property so taxpayers benefit from overall aesthetic harm suffered to community as a whole.
- Promote opportunities for expedited approvals of new facilities that serve the community where new exposed towers or towers benefiting only a few are avoided.
- Reduce the likelihood of private windfalls (from lease rates) that might disproportionately cause harm to community or nearby neighbors.

1. ***Uses permitted as of right –*** Uses that would have minimal negative impact on the surrounding environment or that extends benefits to public at large:

   a. City-owned land (lease can dictate appropriate conditions to protect public)

   b. Use of existing towers (co-location).

   c. Concealed antennae on any existing structure.

   d. High-voltage towers.

2. ***Permitted with administrative review*** – No CUP or hearing, but subject to administrative conditions and Site Plans (approval by administrative official):

   a. Disguised towers (disguised within the context of the surrounding environment);

   b. One-time replacement of a tower (complying replacement towers no more than 20 feet higher)

   c. Utility/telephone poles (no greater than 40 feet in residential zones).

   d. Temporary towers (less than 45 days).

3. ***Permitted by conditional use permit*** – Requires hearing and substantial evidence; Applies to all other towers or uses subject to the following minimum requirements:

   a. Uses permitted by right or by administrative permit shown to be not feasible.

   b. Publicly-owned land must be used if available.

   c. No tower over 150 feet without third-party expert proof of need.

   d. Must minimize visibility of tower, and minimize number of towers.

   e. New towers must generally be a monopole design.

   f. Towers must meet design, location, and other requirements of the Code.

V. TOWER LEASES

A. Opportunities for Public Property Wireless Locations

1. Water tanks
2. Athletic fields/parks
3. Flagpole locations
4. Public buildings
5. Private development partnering

B. Opportunities to Increase Revenue

1. Lease assignments
2. Expansions of equipment or site
3. Lease term extensions
4. Sale of leases/easements

C. New Lease Negotiation Issues

1. Revenue (timing, rate of increase, collocations; in-kind)
2. Indemnification – Cities are unauthorized to execute contracts that contain hold harmless or indemnification provisions that protect other parties at the expense of the City.

a. Mo. Atty. Gen. Op. 138-87 (Webster, Dec. 18, 1987) – Governmental entities may not enter into a hold harmless clause in a contract because to do so would be an unauthorized waiver of sovereign immunity. [Public library at issue in opinion]

3. Lease language revisions - conformity payments

4. Regulation of RF (see above)

5. Length of terms

6. Termination rights – both sides

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