MICHIGAN STATE UNIVERSITY | Extension

Land Use Series

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Limits and parameters on local and state regulation of wireless communication

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"Thirty seven million acres is all the Michigan we will ever have."

Former Governor William G. Milliken

At the start of 2013, significant new restrictions were placed on local governmenal authority to regulate the expansion and location of wireless service facilities, in addition the restrictions on local regulation already in place.

Such limits on local authority exist in the Federal Telecommunications Act of 1996[1] (FTA) and new limitations were added in at the start of 2013. Many missed new restrictions were added to the FTA because some of the broadband and wireless legislation was buried in the Middle Class Tax Relief and Job Creation Act of 2012 (more commonly known as the federal sequestration budget cuts act [sequestration act]) – in Title VI, subtitle D, section 6409.[2] Also, the Michigan Zoning Enabling Act was amended by PA 143 of 2012 to add a section 514[3] on wireless communications, which also limits local government regulation of such facilities. The state law requires most applications to be handled as permitted uses, but in some cases may be special uses – with a cap on application fees, deadlines for actions, and other matters.

This paper will review each (1) the Federal Telecommunication Act, (2) the Sequestration Act, and (3) the Michigan statutory amendment.

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[1] Pub. LA. No. 104-104, 110 Stat. 56 (1996); 47 U.S.C.151

[2] Title VI–*Public Safety Communications and Electromagnetic Spectrum Auctions*; Subtitle D *Spectrum Auction Authority*; Section 6409 *Wireless Facilities Deployment*.

[3] PA 143 of 2012 amended the MZEA by adding MCL 125.3514, effective May 24, 2012.

Federal Telecommunications Act

Summary of the FTA in general

Local and state governments cannot discriminate between different businesses that provide similar types of wireless, broadband, and other such service. Further the ultimate effect of local and state regulation cannot result in prohibiting the ability of a business, or businesses, to provide personal wireless services to an area.

Local governments and states can still regulate the placement, construction, and modification[4] of personal wireless services, but with certain restrictions. Those restrictions on state and local governments are categorized into three substantive and two procedural categories according to Robert B. Foster.[5]

Substantive restrictions are:

1. Cannot unreasonably discriminate between different provider companies.[6] ("Reasonable" discrimination would be based on if facilities "create[d] different visual, aesthetic, or safety concerns."[7] But further restriction in Michigan may exist because aesthetics cannot be a primary purpose of regulation.[8])
2. "[T]he regulation of the placement, construction, and modification of personal wireless service facilities . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[9] (See discussion on *T-Mobile Central v. West Bloomfield Charter Township* at page 3, below.)
3. Regulations cannot be based on "environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC]'s regulations. . . ."[10] (See discussion on radio frequency emissions on page 8, below.)

Procedural requirements are:

1. Applications must be acted on within certain deadlines and decisions shall "be in writing and supported by substantial evidence contained in a written record"[11] as well as following requirements of local and state law. (See MSU Extension's *Land Use Series* "How to take Minutes For Administrative Decisions"May 4, 2006 at lu.msue.msu.edu; the FTA deadlines for action, page 6, below; and the section on Michigan Law, page 11, below.)
2. Anyone harmed by a decision to deny a wireless facility permit can bring the issue to court, and the court must hear and rule on the case in an expedited manner.[12] (Note the provision is for a cause of action for denial of a permit, not for granting a permit.[13])

More recently added are federal law provisions which require a state or local government to allow expansion of existing wireless facilities (see discussion on the Sequestration Act, page 8, below.)

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[4] 47 U.S.C. § 332(c)(7)(A) (2006).

[5] Foster, Robert B.; "Like a Martian Machine: Recent Developments in Land Use Regulation of Cellular Telecommunications Facilities under the Telecommunications Act of 1996"; Urban Lawyer; Summer 2011; Vol. 43, Issue 3; p.789-799. 43 Urb. Law. 789 2010-2011.

[6] 47 U.S.C. § 332(c)(7)(B)(i)(I) (2006).

[7] *MetroPCS N.Y., LLC v. City of Mount Vernon* 739 F. Supp. 2d 409 (S.D.N.Y. 2010) at 417 (quoting *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 643 (2d Cir. 1999).

[8] *Wolverine Sign Works v. City of Bloomfield Hills*, 279 Mich 205, 271 NW 823 (1937) (Counterpoint: *Gannett Outdoor Co. v. City of Troy*, 156 Mich App 126, 136, 409 NW2d 719, 723 (1986)).

[9] 47 U.S.C. § 332(c)(7)(B)(i) (2006).

[10] 47 U.S.C. § 332(c)(7)(B)(iv) (2006).

[11] 47 U.S.C. §§ 332(c)(7)(B)(ii)-(iii).

[12] 47 U.S.C. § 332(c)(7)(B)(v).

[13] Foster, Robert B.; "Like a Martian Machine: Recent Developments in Land Use Regulation of Cellular Telecommunications Facilities under the Telecommunications Act of 1996"; *Urban Lawyer*; Summer 2011; Vol. 43, Issue 3; at p.797-798. 43 Urb. Law. 789 2010-2011.

Placement of wireless facilities

The FTA gives courts authority to review zoning denial of wireless facilities and towers.[14] Over time courts have tried to balance "local control" and the public need for wireless facilities providing full (geographic) and adequate (volume) coverage.

However the issues about locating wireless facilities have been subject to the most litigation when it is a denial of wireless facility and if it has the ultimate effect of prohibiting wireless service coverage in an area. The first complication of court cases deals with what "coverage" means. For example does the denial result in no cell phone or wireless Internet coverage at all, or is it denying coverage for one particular carrier (e.g., AT&T, Verizon, T-Mobile, or another)?

An important United States Sixth Circuit Court case on this subject is *T-Mobile Central v. West Bloomfield Charter Township* .[15] Plaintiff-T-Mobile Central, LLC sued defendant-Bloomfield Charter Township after the township denied its application to put up a cell tower to address a gap in coverage. The application was to replace a 50-foot pole with a 90-foot pole, which would accommodate collocation by others, and it was to be disguised to look like a pine tree with antennas fashioned as branches. But it was not being located within one of two overlay zones where wireless facilities are permitted by right. On December 17, 2008, T-Mobile applied for a special use permit. Areas to the north, east, and west of the proposed location are residential subdivisions and there is a daycare to the south. Opposition was voiced at the planning commission public hearing and again when the permit came before the township board of trustees. The planning commission recommended and the township board followed the recommendation to denied the permit.

T-Mobile Central, LLC sued arguing the denial violated the FTA, 47 U.S.C. § 332 *et seq.* – specifically § 332(c)(7)(B)(i)(II). The focus of the challenge was "substantial evidence of *what*?" In other words, if there is a denial of an application to build a wireless facility, what must the substantial evidence in the record show[16] in order to avoid a violation of the federal code? The U.S. District court ruled in favor of T-Mobile Central, LLC.

The township appealed and the United States Circuit Court adopted the *MetroPCS, Inc. v. City & County of San*

A small tower and antenna, using a wood utility pole.

[14] Foster, Robert B.; "Like a Martian Machine: Recent Developments in Land Use Regulation of Cellular Telecommunications Facilities under the Telecommunications Act of 1996"; *Urban Lawyer*; Summer 2011; Vol. 43, Issue 3; p.789-799. 43 Urb. Law. 789 2010-2011.

[15] U.S. Court of Appeals Sixth Circuit (691 F.3d 794; 2012 U.S. App. LEXIS 17534, August 21, 2012). See also (Source: State Bar of Michigan e-Journal Number: 52498, September 19, 2012) Full Text Opinion: http://www.michbar.org/opinions/us_appeals/2012/082112/52498.pdf. Thus summary is from *Selected Planning and Zoning decisions*: 2013 May 14, 2013 Page 3-4 and *6th Circuit provides good overview of the state of cell tower regulation in the federal courts on its way to its own decision* by Gary Taylor, August 27, 2012: http://blogs.extension.iastate.edu/planningBLUZ/2012/08/27/6th-circuit-provides-good-overview-of-the-state-of-cell-tower-regulation-in-the-federal-courts-on-its-way-to-its-own-decison

[16] 47 U.S.C. § 332(c)(7)(B)(iii) provides: "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."

Francisco (9th Cir.)[17] standard and held that the denial of a single application can constitute a violation of the FTA (47 USC § 332 *et seq.*) § 332(c)(7)(B)(i)(II). That section of the FTA provides that

> [t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

So the question was does the denial of a single application from T-Mobile constitute an effective prohibition? This was a question of first impression in the *Bloomfield* case. The Circuit Court looked to other federal circuit courts for guidance. The Fourth Circuit has held that only a general, blanket ban on the construction of all new wireless facilities would constitute an impermissible prohibition of wireless services; however, the large majority of circuit courts have rejected this approach. The 6th Circuit Court rejected it as well, stating that such a reading makes the "effective prohibition" language meaningless if it can only be triggered by an actual ban.

The two-part test (from the Ninth Circuit) adopted in this case is that there must be:

1. a showing of a 'significant gap' in service coverage and
2. some inquiry into the feasibility of alternative facilities or site locations.

The Circuit Court also rejected the township's other arguments that its denial of plaintiff's application was supported by substantial evidence. Rather, the court found the record was simply an expression of NIMBYism[18] or lay opinion contradicted by expert opinion.[19]

First, it held that its aesthetics objections were not based on substantial evidence, noting that general concerns from a few residents that the tower would be ugly or that a resident would not want it in his backyard are not sufficient. It also found that the township's height objections were not based on substantial evidence, noting that there was no evidence in the record to support its position that a 70-foot tower would have been suitable to satisfy the zoning ordinance's requirement that two wireless providers, engaged in reasonable communication, could be collocated at this particular site.

Second, the court concluded that township's sufficient need objections were not supported by substantial evidence, noting that, based on the terms of the township's own zoning ordinance, plaintiff introduced "voluminous amounts of evidence to support its position that there was a sufficient need for the tower."

Third, the court also rejected the township's argument that plaintiff failed to establish a significant coverage gap.

Instead, the court agreed with plaintiff-T-Mobile Central, LLC that the relevant evidence showed that the gap was "significant" because the "gap area includes both a major commuter highway and fully developed residential areas." The court found that both of these assertions were amply supported by plaintiff's engineer's affidavit. Finally, as to whether there were other feasible locations for plaintiff's tower, the court found that plaintiff

> made numerous good-faith efforts to identify and investigate alternative sites that may have been less intrusive on the "values that the denial sought to serve,"

but that none were feasible, and defendant-township offered no other alternatives.

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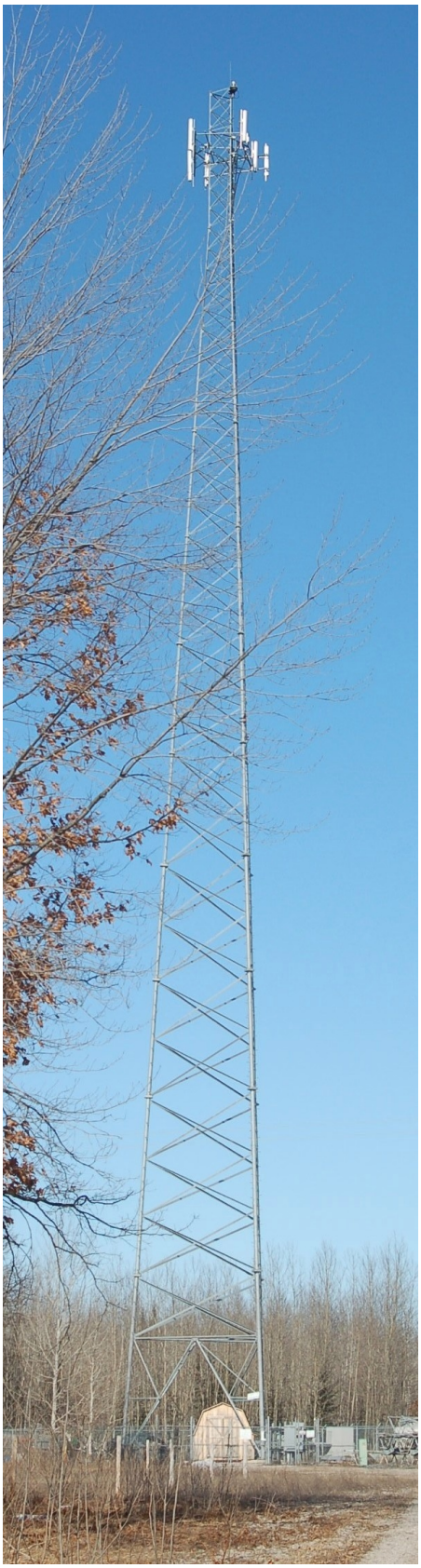
[17] 259 F. Supp. 2d 1004, 2003 U.S. Dist. LEXIS 7319 (N.D. Cal., 2003)

[18] NIMBY is an tongue-in cheek acronym for "Not In My Back Yard" to express a community's desire to not allow a new land use near them.

[19] Taylor, Gary; *6th Circuit provides good overview of the state of cell tower regulation in the federal courts on its way to its own decision*; August 27, 2012: http://blogs.extension.iastate.edu/planningBLUZ/2012/08/27/6th-circuit-provides-good-overview-of-the-state-of-cell-tower-regulation-in-the-federal-courts-on-its-way-to-its-own-decison



A lattice tower with cell phone antennas.

Thus, the United States Sixth Circuit Court upheld the district court, ruling in favor of T-Mobile Central, LLC.

The important part of this case for zoning in Michigan is the two-part test. The following is a summary written by Associate Professor Gary Taylor *esq.* of Iowa State University.[20]

There must be:

1. a showing of a 'significant gap' in service coverage and
2. some inquiry into the feasibility of alternative facilities or site locations.

> As for the first part of this test – whether the "significant gap" in service focuses on the coverage of the applicant provider (T-Mobile in this case) or whether service by any other provider (Verizon, AT&T, Sprint, etc.) is sufficient – the 6th Circuit again found a split among federal circuit courts. The 2nd, 3rd and 4th Circuits have held that no "significant gap" exists if any "one provider" is able to serve the gap area in question. On the other hand, the 1st and 9th Circuits have rejected the "one provider" rule and adopted a standard that considers whether "a provider is prevented from filling a significant gap in its own service coverage. In 2009, the FCC issued a Declaratory Ruling that effectively supported the approach of the First and Ninth Circuits. The 6th Circuit chose to follow the FCC's lead. Finding that T-Mobile's position that it suffered a significant gap in coverage to be well-supported by documentary evidence and testimony from RF engineers, it concluded that the denial of T-Mobile's application "prevented [T-Mobile] from filling a significant gap in its own service coverage."

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[20] Taylor, Gary; *6th Circuit provides good overview of the state of cell tower regulation in the federal courts on its way to its own decision*; August 27, 2012: http://blogs.extension.iastate.edu/planningBLUZ/2012/08/27/6th-circuit-provides-good-overview-of-the-state-of-cell-tower-regulation-in-the-federal-courts-on-its-way-to-its-own-decison

As for the second part of the test (alternative facilities) The 2nd, 3rd and 9th Circuits require the provider to show that "the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve." The 1st and 7th Circuits, by contrast, require a showing that there are "no alternative sites which would solve the problem." The 6th Circuit chose to fall in line with the 2nd, 3rd and 9th "It is considerably more flexible than the 'no viable alternatives' standard, as [under the other standard] a carrier could endlessly have to search for different, marginally better alternatives. Indeed, in this case the Township would have had T-Mobile search for alternatives indefinitely." The Court found that T-Mobile satisfied its burden under the "least intrusive" standard, having investigated a number of other specific options but determining they would have been "significantly more intrusive to the values of the community."

Deadlines for action

When an application is received for a permit to place, construct, or modify wireless service antennas, towers, equipment and accessory facilities the action on the application must be "within a reasonable period of time"[21] according to the FTA. This leaves the question of what is a "reasonable period of time." The Federal Communications Commission (FCC) administrative ruling[22] provides the following interpretation:

- A delay can happen if the application is incomplete– but must notify the applicant within 30 days of receiving the application that the application is incomplete.
- Must act on the application within 90 days of receiving a complete application when it is an application for a co-location of an antenna on an existing structure.
- Must act on the application within 150 days of receiving a complete application when it is an application for a new facility.

If a local or state government does not act within these time lines the applicant can bring action against the government under federal law. This ruling on deadlines has become known as the "shot-clock ruling."

On May 20, 2013 the United States Supreme Court upheld the FCC's shot clock ruling for local decisions on cell tower permits. A summary of that case is provided in Iowa State University Associate Professor Gary Taylor *Esq.*'s blog.[23]

City of Arlington, Texas v. Federal Communications Commission
(U.S. Supreme Court, May 20, 2013)

[The] U.S. Supreme Court issued its opinion, which effectively validates the FCC's shot clock declaratory ruling. A summary of the Court's opinion:

The Federal Telecommunications Act (FTA) requires state or local governments to act on siting applications for wireless facilities "within a reasonable period of time after the request is duly filed." Relying on its broad authority to implement the FTA, the Federal Communications Commission (FCC) issued a Declaratory Ruling (the shot clock) concluding that the phrase "reasonable period of time" is presumptively (but rebuttably) 90 days to process an application to place a new antenna on an existing tower and 150 days to process all other applications. The cities of Arlington and San Antonio, Texas, argued that the Commission lacked authority to interpret the language "within a reasonable period of time" because

[21] 47 U.S.C. 332; §332.(c)(7)(B)(ii).

[22] Federal Communications Commission; WT Docket No. 08-165; Declaratory Ruling; Nov. 18, 2009.

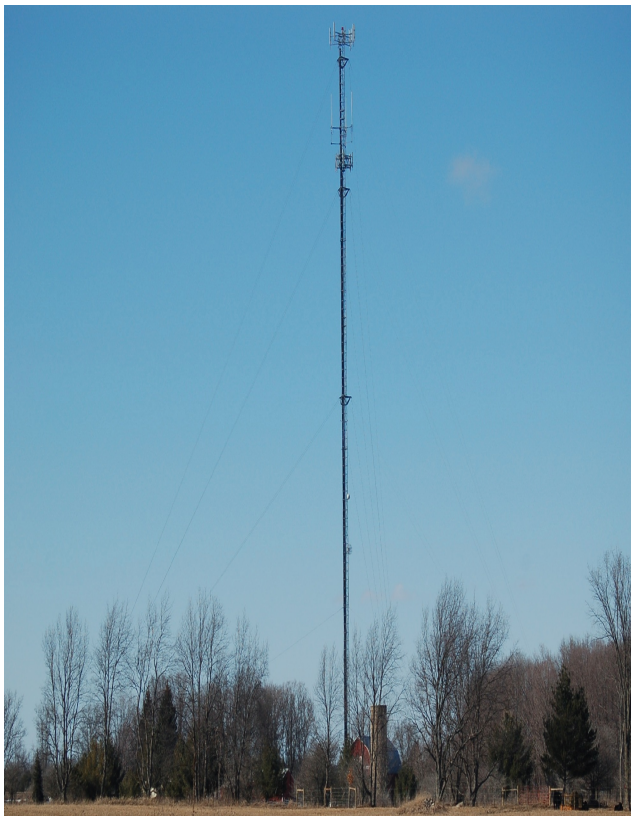
[23] http://blogs.extension.iastate.edu/planningBLUZ. Taylor is an Associate Professor and Community and Regional Planning Extension Specialist with Iowa State University Extension.

doing so amounted to determining the jurisdictional limits of its own authority – a task exclusively within the province of Congress. The Fifth Circuit Court of Appeals applied precedent from the case of Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837, to that question. Finding the statute ambiguous, it upheld as a permissible construction of the statute the FCC's view that the FTA's broad grant of regulatory authority empowered it to adopt the Declaratory Ruling.

In a 6-3 decision, the U.S. Supreme Court affirmed the Fifth Circuit. Writing for the majority, Justice Scalia found no distinction between an agency's "jurisdictional" and "nonjurisdictional" interpretations. When a court reviews an agency's interpretation of a statute it administers, the question is always, simply, whether the agency has stayed within the bounds of its statutory authority. The "jurisdictional-nonjurisdictional" line is meaningful in the judicial context because Congress has the power to tell the courts what classes of cases they may decide—that is, to define their jurisdiction—but not to prescribe how they decide those cases. For agencies charged with administering congressional statutes, however, both their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is beyond their authority and can be struck down by a court. Under Chevron, a reviewing court must first ask whether Congress has directly spoken to the precise question at issue; if so, the court must give effect to Congress' unambiguously expressed intent. If, however the statute is silent or ambiguous, the court must defer to the administering agency's construction of the statute so long as it is permissible. Because the question is always whether the agency has gone beyond what Congress has permitted it to do, there is no principled basis for carving out an arbitrary subset of "jurisdictional" questions from the Chevron framework.

The Court rejected Arlington's contention that Chevron deference is not appropriate here because the FCC asserted jurisdiction over matters of traditional state and local concern. The case does not implicate any notion of federalism: The statute explicitly supplants state authority, so the question is simply whether a federal agency or federal courts will draw the lines to which the States must hew.

A general conferral of rulemaking authority validates rules for all the matters the agency is charged with administering. In this case, the preconditions to deference under Chevron are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act



A guy-wired tower with several collocated antennas.

through rulemaking and adjudication, and the agency's interpretation of "reasonable period of time" at issue was promulgated in the exercise of that authority.

[brackets added]

Radio frequency emissions

The FTA also prohibits state and local government from regulating, or prohibiting wireless service facilities on the basis of "environmental effects of radio frequency emissions," if those facilities comply with the FCC's regulations on emissions.[24]

In short the FTA assumes their existing regulations protect the public health, and that conclusion must be treated as a "given." One attorney[25] advises members of the public may express concerns about health effects at a planning commission or zoning board of appeals public hearing, and that is okay. But the administrative body (planning commission or zoning board of appeals) cannot use those health concerns as part of the record to turn down an application. In other words, the health concerns expressed at a public hearing should not be included in the administrative body's findings of fact.

The FTA preempts even considering such health effects claims, because regulation to cover those concerns is already done at the federal level.

Property values

Another concern often surrounding placement of wireless facilities, towers and antennas focuses on property values of nearby land. For a case to be made that there is an adverse impact on property values there must be expert testimony on the record (at the public hearing). It is best to have that expert be a qualified land appraiser who provides expert testimony reporting on his or her study and findings for that specific site and surrounding land. A mortgage banker's expert testimony about that specific site and surrounding land may also be adequate.[26]

The bottom line is claims about property value loss must be based on real data prepared by experienced professionals in that field. Also, the data must be based on research on that specific site – not general studies or reports. Since at least 1996 courts have been consistent in the requirement that one needs substantial evidence by a competent expert using real, local, data.[27]

Sequestration Act changes

The changes to the FTA from amendments in the Sequestration Act are considered major. The purpose of that section of the Sequestration Act was to minimize the amount of time and approvals for co-location on existing wireless facilities and towers as a means to improve high-speed internet as an economic development goal.

As a follow up to the Sequestration Act changes the FCC published a *Guidance* in January 2013.[28] Section 6409 of the Act and the *Guidance* require:

According to the Sequestration Act:

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.[29]

[italics added]

The term "eligible facilities request" means any request for modification of an existing wireless tower or base station that

[24] 7 U.S.C. 332; §332.(c)(7)(B)(iv)

[25] Donna J. Pugh; FOLEY & LARDNER LLP, Chicago office, presenting at the APA national conference, April 15, 2013.

[26] Donna J. Pugh; FOLEY & LARDNER LLP, Chicago office, presenting at the APA national conference, April 15, 2013.

[27] Donna J. Pugh; FOLEY & LARDNER LLP, Chicago office, presenting at the APA national conference, April 15, 2013.

[28] FCC Public Notice DA 12-2047 "Wireless Telecommunications Bureau Offers Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012"; January 25, 2013.

[29] Section 6409.(a)(1).

involves—

(A) collocation of new transmission equipment;
(B) removal of transmission equipment; or
(C) replacement of transmission equipment."[30]

So to determine if it is an *eligible facilities request* a state or local government must determine if it includes any of the following. If it does, it is an *eligible facilities request*:

- Wireless tower[31] or base station[32]
- Collocation[33] of new transmission equipment
- Removal of transmission equipment
- Replacement of transmission equipment
- A *substantial change* to the physical dimensions of the wireless tower or base station.

The phrase "*shall approve*" leaves open the question as to whether approval is done by a zoning permit for a permitted use (use by right), or if it can be for a zoning special use permit. The FCC 2013 Guidance suggests the approval is without conditions or standards. The Wireless Telecommunications Bureau of the FCC *2013 Guidance* are non-binding on local government or future FCC actions. But there is belief that the FCC could issue formal rules which end up saying much the same thing as the *Guidance*.

"*Substantial change*" is not defined in the act. But the FCC *Guidance*[34] recommends applying a previously adopted definition of the same term, found in the *Nationwide Collocation Agreement*[35] That definition of "substantial increase" reads:

C. "Substantial increase in the size of the tower" means:
   1) The mounting of the proposed antenna on the tower would increase the existing height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or
   2) The mounting of the proposed antenna would involve the installation of more than the standard number of new equipment cabinets for the

[30] Section 6409.(a)(2); *Nationwide Programmatic Agreement for Collocation of Wireless Antennas* (2001), (see 47 C.F.R,. Part 1, Appendix B); and *Wireless Telecommunications Bureau's "Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012*, January 25, 2013 (D.A. 12-2047).

[31] TOWER means any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities (*Nationwide Programmatic Agreement for Collocation of Wireless Antennas* (2001), (see 47 C.F.R,. Part 1, Appendix B))

[32] BASE STATION means radio transceivers, antennas, coaxial cable, a regular and backup power supply, and other associated electronics . . . We believe it is reasonable to interpret a 'base station' to include a structure that currently supports or houses an antenna, transceiver, or other associated equipment that constitutes part of a base station . . . (*Wireless Telecommunications Bureau's "Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012*, January 25, 2013 (D.A. 12-2047) CITING Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, WT Docket No. 10-133, Annual Report and Analysis of Competitive market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Fifteenth Report, 26 FCC Rcd. 9664, 9481, para. 308 (2011)).

[33] COLLOCATION means the mounting or installation of antennas on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes. (*Nationwide Programmatic Agreement for Collocation of Wireless Antennas* (2001), (see 47 C.F.R,. Part 1, Appendix B))

[34] *Wireless Telecommunications Bureau's "Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012*, January 25, 2013 (D.A. 12-2047).

[35] *Nationwide Programmatic Agreement for Collocation of Wireless Antennas* (2001), (see 47 C.F.R,. Part 1, Appendix B). http://wireless.fcc.gov/releases/da010691a.pdf

technology involved, not to exceed four, or more than one new equipment shelter; or

3) The mounting of the proposed antenna would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable; or

4) The mounting of the proposed antenna would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site.

In other words "substantial change" to the physical dimension of a wireless tower or base station (where local jurisdiction may still apply) has the meanings above and some with outstanding questions:

- An increase in height of more than 10% or 20 feet, whichever is greater. But at what point in time does one measure the existing height? Is it whatever the height is when an application is filed? Is it whatever the height was on the effective date of the Sequester Act? Is it a one-time measurement for all additions cumulatively? The concern is that the following scenario might happen: applicant "A" shows up and adds 10 feet (10%) to a 100 foot tower, then at a later date applicant "B" shows up and adds 11 feet (10%) to the now 110 foot tower, and so on.
- When increasing the height of the tower, in communities that fixed a maximum height to avoid the federal aviation required flashing lights, to a new height where flashing lights must be added outside of the meaning of "substantial change?".
- New cabinets which are more than the standard number of new equipment cabinets, but not more than four or more than one new structure. What is the standard number?
- Placement of a new antenna, including adding an appurtenance to the body of the tower extends out the side of the tower more than 20 feet, or more than the width of the tower structure (at the level of the appurtenance), whichever is greater. An exception is the antenna mounting may extend out more distance if necessary to shelter the antenna from weather or to connect the antenna to the tower cable.
- New excavation is outside the tower site. Is that the tower land leased or owned or the entire parcel?

Michigan statute

In 2012 the Michigan legislature amended the Michigan Zoning Enabling Act to add a section 514.[36]

Permitted use

That section declares that wireless communications equipment is a permitted use of property, not subject to special use permit approval if the following requirements are met:

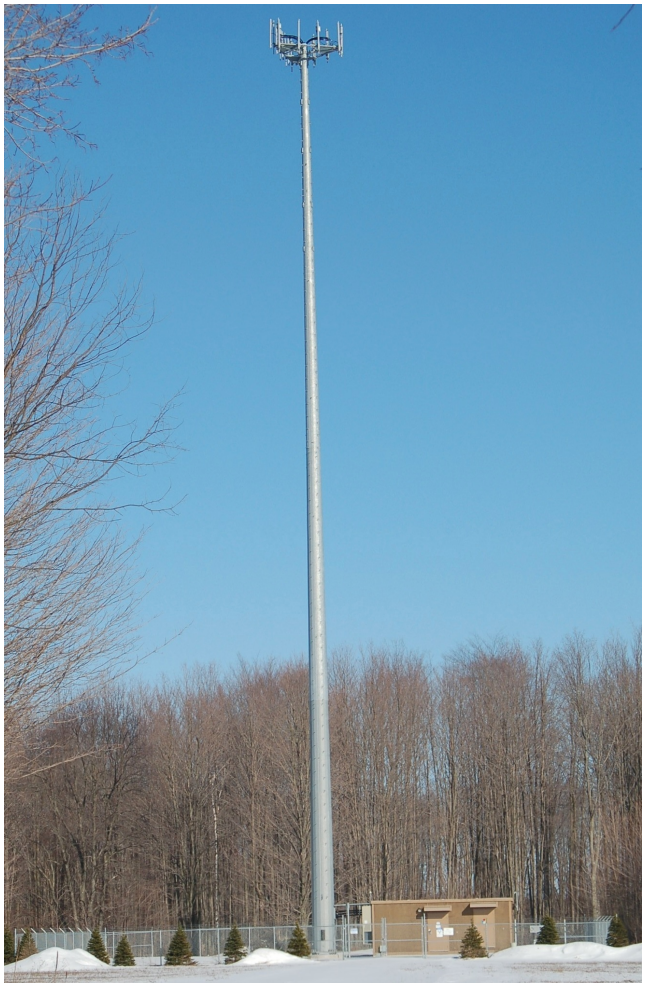
(a) The wireless communications equipment will be collocated on an existing wireless communications support structure or in an existing equipment compound.

(b) The existing wireless communications support structure or existing equipment compound is in

[36] PA 143 of 2012 amended the MZEA by adding MCL 125.3514, effective May 24, 2012.

compliance with the local unit of government's zoning ordinance or was approved by the appropriate zoning body or official for the local unit of government.

(c) The proposed collocation will not do any of the following:
  (i) Increase the overall height of the wireless communications support structure by more than 20 feet or 10% of its original height, whichever is greater.
  (ii) Increase the width of the wireless communications support structure by more than the minimum necessary to permit collocation.
  (iii) Increase the area of the existing equipment compound to greater than 2,500 square feet.
(d) The proposed collocation complies with the terms and conditions of any previous final approval of the wireless communications support structure or equipment compound by the appropriate zoning body or official of the local unit of government.



Monopole tower design.

The same questions raised above (page 10) might also be issues here. But with state law local government can provide clarity – or answers – by providing the additional detail and explanation in the local zoning ordinance. (That use of a local ordinance for clarification may not be as easy to do from a jurisdiction standpoint, or as straight forward with questions coming from federal law.)

Special land use type 1

If wireless communications equipment is collocated ((a), above), and the structure is already in compliance with zoning ((b), above), but increases the height of the structure more than 20 feet or 10% (whichever is greater) ((c)(i), above), increases width more than necessary ((c)(ii), above), and increases the existing compound area over 2,500 square feet ((c)(iii), above), and does not comply with previous approval ((d), above) the application may be handled as a special use permit.

But if it is handled as special use permit (the local unit of government can still choose to treat the application as a permitted use[37]), the application shall include a site plan[38], map of the property, etc., and other information specifically required by the zoning ordinance.[39] A special use permit shall be considered complete if the local unit of government (zoning administrator) has not ruled otherwise within 14 business days of the application being received.[40] The fee for the special

[37] MCL 125.3514(9).

[38] MCL 125.3501.

[39] MCL 125.3502(1) and 125.3504.

[40] MCL 125.3514(4).

use permit shall not be more than the actual cost to process the application, or $1,000, whichever is less.[41] Action (approve, deny, approve with conditions) of a special use permit for wireless communications shall be taken within 60 days of a complete application. If action has not taken place within 60 days the special use permit shall be considered approved as submitted.[42] Any action that included conditions of approval can only have conditions that directly relate to the existing zoning ordinance, other local ordinances, and applicable state and federal laws.[43]

Special land use type 2

If wireless communications equipment is not being collocated ((a), above) on an existing structure the application may be handled as a special use permit.

But if it is handled as special use permit (the local unit of government can still choose to treat the application as a permitted use[44]), the application shall include a site plan[45], map of the property, etc., and other information specifically required by the zoning ordinance.[46] A special use permit shall be considered complete if the local unit of government (zoning administrator) has not ruled otherwise within 14 business days of the application being received.[47] The fee for the special use permit shall not be more than the actual cost to process the application, or $1,000, whichever is less.[48] Action (approve, deny, approve with conditions) of a special use permit for wireless communications shall be taken within 90 days of a complete application. If action has not taken place within 90 days the special use permit shall be considered approved as submitted.[49] Any action that included conditions of approval can only have conditions that directly relate to the existing zoning ordinance, other local ordinances, and applicable state and federal laws.[50]

Definitions

In the MZEA the following terms have specific meanings:[51]

> COLLOCATE means to place or install wireless communications equipment on an existing wireless communications support structure or in an existing equipment compound. "Collocation" has a corresponding meaning.
>
> EQUIPMENT COMPOUND means an area surrounding or adjacent to the base of a wireless communications support structure and within which wireless communications equipment is located.
>
> WIRELESS COMMUNICATIONS EQUIPMENT means the set of equipment and network components used in the provision of wireless communications services, including, but not limited to, antennas, transmitters, receivers, base stations, equipment shelters, cabinets, emergency generators, power supply cables, and coaxial and fiber optic cables, but excluding wireless communications support structures.
>
> WIRELESS COMMUNICATIONS SUPPORT STRUCTURE means a structure that is designed to support, or is capable of supporting, wireless communications equipment, including a monopole, self-supporting lattice tower, guyed tower, water tower, utility pole, or building.

[41] MCL 125.3514(5).

[42] MCL 125.3514(6).

[43] MCL 125.3514(7).

[44] MCL 125.3514(9).

[45] MCL 125.3501.

[46] MCL 125.3502(1) and 125.3504.

[47] MCL 125.3514(4).

[48] MCL 125.3514(5).

[49] MCL 125.3514(6).

[50] MCL 125.3514(7).

[51] Quoting MCL 125.3514(10).

Federal code versus state statute

Keep in mind, the FTA speaks to regulation by both local and state government. That means, in part, when the state statute and federal code contravene each other, the federal code supercedes. But when the state statute and federal code have different requirements, which do not contravene each other, than the stricter of the two should be followed.

Some, not all, examples of this are:

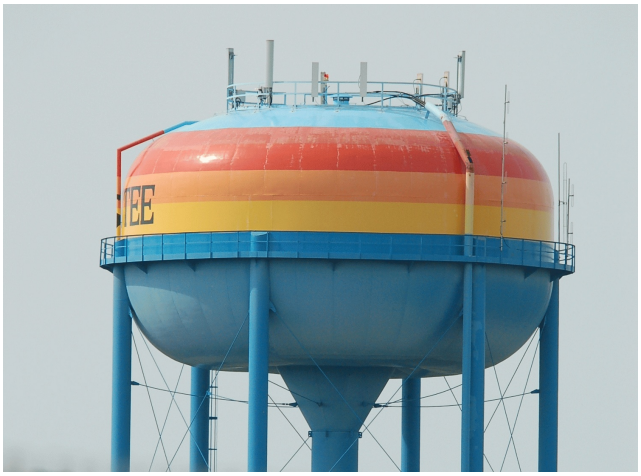
Federal code requires 90 and 150 day deadlines for review of different types of wireless communication applications. State statute requires 60 or 90 day deadlines for special use permit applications. So the shorter periods would be the deadlines Michigan zoning authorities must follow.

Concerning collocation of a new antenna on an existing structure that does not substantially change the structure's physical dimensions: State statute requires most collocation applications be handled as a permitted use, or use by right zoning request. The Sequestration Act requires that such application requests shall be approved. In this case both the state and federal requirements must be followed.

Both federal and state law appear to have a 10% or 20 foot aspect to increases in height for collocation. Both raise questions (page 10) on how this might be applied. While lack of clarity in Michigan law can be dealt with by providing greater clarity in the local zoning ordinance, interpretation of federal code may need to rely on the *Guidance* documents from the FCC, its agencies or subdivisions.

Finally, note the definition of collocation found in Michigan statute is different than the definition currently in use by the federal government.[52] But those referenced in this paper are *Guidance* documents –guidelines– that are federal statements which are non-binding on local government or future FCC actions.

Enlarging the site, or pad is "not substantially changing"[53] if new excavation is outside the tower site – the tower land leased or owned under federal code. State statute threshold is an increase of the area of the existing equipment compound to greater than 2,500 square feet. The more restrictive of the two would be followed, but there may be instances where these two contravene each other, in which case the federal requirements prevail.



Using a water tank for collocation of antennas.

It is unlikely the above calls attention to all possible issues between federal and Michigan requirements. There could be others not highlighted here.

Advice

Review your existing zoning ordinance and other police power ordinances, if any, to make sure your local regulations are not contravening these federal and state laws. Consult with a municipal attorney who is experienced in municipal, planning and zoning law when changing local ordinances or reviewing a wireless communication permit application.

Resources

Brian S. Grossman, Prince Lobel Tye LLP, 100 Cambridge Street, Suite 2200, Boston Mass.; "Middle Class Tax Relief

[52] *Nationwide Programmatic Agreement for Collocation of Wireless Antennas* (2001), (see 47 C.F.R,. Part 1, Appendix B)

[53] *Wireless Telecommunications Bureau's "Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012*, January 25, 2013 (D.A. 12-2047).

and Job Creation Act of 2012 - What is it and what does it have to do with wireless communications?" American Planning Association Conference Presentation April 15, 2013.

Donna J. Pugh, Foley & Lardner LLP, 321 North Clark Street, Suite 2800, Chicago, Ill; American Planning Association Conference Presentation April 15, 2013.

Gary Taylor *Esq.*, Associate Professor, Community and Regional Planning Extension Specialist, Extension. Education, Iowa State University

William A. Worth, Prince Lobel Tye LLP, 100 Cambridge Street, Suite 2200, Boston Mass.; "Broadband and Wireless Delivery: The FCC Shot-Clock Rule"; American Planning Association Conference Presentation April 15, 2013.

Mark A. Wyckoff, FAICP, Director, Planning and Zoning Center at MSU and Senior Associate Director, Land Policy Institute; Overview of Proposed and Recently Enacted [Michigan] Legislation, Michigan Citizen Planner Advanced Academy, June 13, 2013.

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