Coates' Canons Blog: Can We Top Off Our Tower?

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Article: https://canons.sog.unc.edu/can-we-top-off-our-tower/

This entry was posted on March 18, 2013 and is filed under Land Use & Code Enforcement

Update: Provisions substantially similar to the federal provisions discussed in this post were incorporated into state statutes in 2013. S.L. 2013-185. See the update at the end of this post for details.

Cell tower construction is a hot zoning topic. The proliferation of smart phones and tablet devices is substantially increasing the demand for wireless data transmission. Everyone wants good cell phone reception and high quality access for their mobile devices. But no one wants to look at a cell tower out their back door. This demand for more and higher quality wireless coverage, combined with widespread concern about the aesthetic impact of telecommunication towers, has sparked a considerable amount of legislation and litigation, not to mention many heated zoning hearings.

The latest wrinkle in reconciling these competing public interests is a little-noticed provision tucked into 2012 federal legislation extending payroll tax cuts and unemployment benefits. This law, along with recently released FCC guidance, affects an issue that increasingly arises with cell towers. Suppose there is an existing, permitted cell tower that was built to the maximum height and size allowed by local zoning regulations. The tower owner now has an opportunity to lease space to a provider who wants to collocate a new antennae array on this tower, but there is not enough space on the tower for an additional antennae array.

If the tower owner applies for a permit modification to add height and new antennae to the tower, this new legislation dictates whether the local government has to approve it. Can the tower owner top off the tower? Under the new law, in many instances the answer is yes, the local government will have to approve the modification.

Previous Federal Provisions

Federal law preemption of local zoning of telecommunication towers is not a new issue. There is a strong national interest in having an effective wireless network. Although some advocates recommended regulation of tower location and construction exclusively by the federal government, congress recognized that the means of providing wireless service could have significant impact on important community interests. So a compromise was reached that allowed some local land use regulation of telecommunication towers, but with restrictions to protect national interests.

The Telecommunications Act of 1996 allows local regulation of the location of personal wireless services but provides for limited preemption of local ordinances in specified situations. 47 U.S.C. § 332(c)(7)(B) (2010). This law limits local regulation of cell towers as follows:

1. Local regulations based on the environmental health effects of radio frequency emissions are prohibited.
2. Local governments are required to act on permit applications for wireless telecommunication facilities within a reasonable time. The Federal Communications Commission (FCC) subsequently issued an order setting out "presumptively reasonable" times of 90 days to review a collocation application and 150 days to review an application for a new tower. 24 FCC Rcd 13994 (2009). See this **blog post** by Rich Ducker regarding this "shot clock" regulation and related state statutes.
3. Denials of applications for wireless telecommunication facilities must be supported by substantial evidence in the hearing record.
4. Local regulations may not unreasonably discriminate among providers of functionally equivalent wireless telecommunication facilities. Regulations may not set a preference for one type of wireless technology over another, may not favor publicly owned facilities over privately owned ones, or favor an initial provider of services over subsequent competitors.
5. Local regulations may not prohibit or have the effect of prohibiting the provision of personal wireless services. Prohibition includes not only a general ban on all towers in a jurisdiction, but also policies that will result in all possible sites in a given area being rejected.
6. Denials of applications for wireless telecommunication facilities must be in writing.

Previous State Legislation

In 2007 the General Assembly added state statutory restrictions on local government regulation of cell towers. G.S. 160A-400.50 to -400.53 and 153A-349.50 to -349.53 allow local land use regulation of wireless telecommunication facilities, but add several limits on this authority:

1. A local land use regulation may not require information on an applicant's "business decisions," specifically including information about customer demand or quality of service. A local government is allowed to consider whether an existing or previously approved structure can reasonably be used to provide service, whether residential, historic, and designated scenic areas can be served from outside those areas, and whether the proposed tower height is necessary to provide the applicant's designated service.
2. Streamlined processing must be provided for qualified collocation applications. Decisions on these applications must be made within 45 days of receipt of a completed application. Decisions on all other applications must be made within a reasonable time consistent with other land use applications. Collocations entitled to this streamlined process include those that meet a set of specified conditions, including no increase in the height or width of the supporting tower, no increase in ground space for the facility, and any new equipment meeting the weight limits for the structure. The new federal provisions noted below will supersede some of these limits.
3. Local governments are prohibited from requiring that wireless facilities be located on city- or county-owned towers or facilities. They are allowed to provide expedited processing for applications for wireless facilities proposed to be located on city- or county-owned property.
4. Local governments are allowed to charge an application fee that includes fees for consultants to assist in review of permit applications. These fees must be fixed in advance of the application and may not exceed the usual and customary costs of services provided.
5. Local governments may add a condition to zoning approvals for new towers that prevents building permits for the tower being issued until the applicant provides documentation identifying parties intending to locate facilities on the tower. It also may require that permitted facilities be constructed within a reasonable time, provided that time is not less than twenty-four months.

New Legislation and Guidance

When Congress adopted the Middle Class Tax Relief and Job Creation Act of 2012 (Pub. L. 112-96) last February, most attention rightfully focused on its provisions extending payroll tax cuts, unemployment benefits, and other provisions addressing economic recovery. The law also included a number of other special provisions, including a section on wireless telecommunication that addressed spectrum management, facilities on federal lands, and public emergency technology.

Tucked into these special provisions was Section 6409(a), which broadens the federal preemption of local cell tower

regulations. This new law provides that state or local governments "shall approve" any eligible request to modify an existing wireless tower or base station that does not "substantially change" the tower or base station. Eligible requests include collocation of new transmission equipment and replacement of existing equipment.

This mandate raises the obvious question of just what constitutes a "substantial change" that must be approved. On January 25, 2013 the FCC provided notice that it interprets the new law using the same standards for defining a "substantial modification" that were previously set in the context of reviewing collocation agreements and facilities in historic districts. Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, § I.C, 47 C.F.R. Part 1, App. B.

The new **FCC guidance** (not yet proposed as a formal rule) provides that it is not a substantial change if: (1) the height of the tower is not increased by more than 10%; (2) the addition will not extend more than 20 feet from the tower; (3) it will add no more than one equipment shelter or four equipment cabinets; and (4) it will not involve excavation outside the tower site or existing utility and access easements. Proposed modifications to existing towers that fall within these guidelines must be approved by local governments.

The FCC guidance goes on to address several other questions raised by the new legislation. It interprets the law as applying to both telecommunication towers and to other structures that support or house an antennae and to include emerging technologies such as distributed antenna systems and small cells. It does not affect collocations on structures other than wireless towers or base stations. It concludes that a local government may require an application for administrative approval, but that such applications must be approved within 90 days.

So, can a tower owner top off an existing tower that is already at the maximum height allowed by the zoning ordinance in order to install additional antennae?

Yes, provided the addition does not increase the tower height by more than 10%, protrude more than 20 feet from the tower, and involves only relatively modest ground work within the tower site. The 2012 federal legislation says eligible modifications must be approved "notwithstanding . . . any other provision of law," thus overriding any applicable maximum height limit in a local zoning ordinance. An application can be required to verify that a proposed modification falls within these limits, but a qualifying, complete application must be approved in 90 days or less according to the FCC's interpretation of the law.

There may be some exceptions to these limits, but the law and guidance leave some important questions unaddressed. Presumably applicants will need to document that they have legal authority to use or modify the tower from the tower owner before they can seek mandatory approval. Presumably a proposed tower modification that adds less than 10% to the height of a tower could be denied if the additional equipment would violate weight limits for the tower, fall zone buffer setbacks, or other safety requirements. But the law is not entirely clear about this and these presumptions may not be valid.

Local zoning ordinances should be updated to reflect the preempted modifications as permitted uses, not subject to special or conditional use permit reviews or variance procedures. Standards for new towers may also need to be reviewed in light of the possibility of future modification requests that must now be approved. A potential for a future 10% increase in height or an additional 20 feet protrusion can be particularly significant where "stealth" design is involved, so this may well need to be factored into standards for review of proposals for new towers.

Update: In 2013 the N.C. General Assembly amended state law to add provisions similar to the federal legislation described in this post. S.L. 2013-185 amends state law to require expedited review of collocations and minor modifications of existing towers. Minor modifications — include adding not more than 10% to the height or one additional antenna array, adding not more than 20 feet in width, or not more than 2,500 sq. ft. to the existing ground equipment compound — must be approved. The law also caps application fees for collocation reviews at $1,000.

Links

- canons.sog.unc.edu/can-we-top-off-our-tower/cell-tower/
- canons.sog.unc.edu/?p=1668
- www.fcc.gov/document/local-review-collocation-applications-interpretive-guidance