Coates' Canons Blog: Wireless Telecommunications Facilities: Can North Carolina Communities Avoid Shot-Clock Violations?

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UPDATE September 2013: Click here for an update on federal law as of March 2013. New North Carolina legislation adopted during the summer of 2013 makes conforming changes to North Carolina law with respect to recent federal legislation and Federal Communications Commission rulings and adds features that are peculiar to this state. *See* S.L. 2013 – 185.

About two months ago the Federal Communications Commission (FCC) adopted a declaratory ruling concerning local government review of siting decisions for wireless telecommunication facilities. Among other things, the agency used its rule-making authority to set express time limits within which local governments must act on facilities siting applications (resulting in the analogy of the wireless industry's trade association to a basketball game "shot clock" for zoning authorities). North Carolina local governments may breathe somewhat easier because the November 18, 2009, ruling is in most instances, but not all instances, less demanding than the North Carolina General Statutes are in comparable situations. It is unlikely that North Carolina local governments complying with state law will be guilty of a "shot-clock" violation under federal law. Here's why.

The federal Telecommunications Act of 1996, passed by Congress to speed the country's transition into the wireless age, assigned to the FCC broad powers to make declaratory rulings clarifying and elaborating provisions in the legislation. Supporters of the Telecommunications Act sought to ensure that local zoning practices would not unnecessarily hinder the expansion of wireless networks. The FCC declaratory ruling of November 18, 2009, responding to a petition of the Cellular Telecommunications Industry Association (CTIA), demonstrates that the FCC can rule on matters that directly affect the zoning practices of local governments throughout the country.

Section 332(c)(7)(B)(ii) of the Act requires the State or local government to act on any request to place, construct, or modify personal wireless service facilities "within a reasonable period of time . . . . taking into account the nature and scope of such request." Section 332(c)(7)(B)(v) permits a person adversely affected by "any final action or failure to act" by government to commence an action in court within 30 days after such "final action or failure to act." The trade association claimed that unreasonable delays were occurring in a significant number of instances, citing data indicating, among other things, that some 180 applications before local governments throughout the country had awaited final zoning action for periods of greater than three years. In addition, petitioners requested the FCC to eliminate the ambiguity under the federal statutes about when a local government could be deemed to have "failed to act." CTIA requested a determination that the failure to render a final decision within 45 days of a filing for an application for facilities involving collocation was a "failure to act" and within 75 days of a filing with respect to applications for site facilities that did not involve collocation. In response to this proposal the FCC set decision-making deadlines for local governments of 90 days for collocation applications and 150 days for other applications.

Various State and local government commentators argued that the "shot-clock" periods should take into account that not all applications are complete as filed and that applicants do not always file necessary additional information in a timely manner. Industry representatives countered by pointing out that reviewing authorities should be bound to notify applicants within a reasonable period of time that their applications were incomplete. In response to these arguments the FCC ruled that the time it takes for an applicant to respond to a request for additional information will not count toward the 90 or 150 days, but only if the governmental agency notifies the applicant within the first 30 days that its application is incomplete.

In this regard the provisions in the North Carolina Statutes governing review of wireless facility applications provide a useful comparison. G.S. 160A-400.52(d) (cities) and G.S. 153A-349.52(d) (counties) declare that a collocation application must "be deemed complete unless the local government provides notice in writing to the applicant within 45 days of

submission or within some other mutually agreed upon timeframe. The notice shall identify the deficiencies in the application which, if cured, would make the application complete. The application shall be deemed complete on resubmission if the additional materials cure the deficiencies identified." In addition the local government must "issue a written decision approving or denying an application within 45 days" with respect to qualifying collocation applications and within a "reasonable period of time consistent with the issuance of other land-use permits" with respect to other wireless facility applications. Both periods are measured from the time the application is deemed complete.

How do North Carolina "shot-clock" standards compare then with the new FCC standards? North Carolina standards are generally not inconsistent with federal law (and are thus not preempted), with two possible exceptions. The first exception might involve a proposal for a new tower with antennae. Under the FCC ruling the governmental agency has 150 days to provide a decision; under North Carolina law the "reasonable period" within which the government must act depends upon the speed with which other land-use permit applications are typically handled. To avoid an inconsistency with federal law in such an instance North Carolina's "reasonable period" must be interpreted not to exceed 150 days.

The second possible exception might involve a proposal for a facility to be collocated. Under federal law the local decision must be rendered within 90 days, and under North Carolina law within 45 days. However, federal law and North Carolina law treat differently the period of time that passes before the application is deemed complete. Under federal law the 30-day period for notifying the applicant that the application is incomplete counts toward the 90-day period; so, too, can the period the applicant takes to cure deficiencies if the applicant is not notified within 30 days of the filing. In either circumstance the shot-clock deadline for rendering a decision continues to tick. Under North Carolina law the 45 days that the government has to notify the applicant of any application deficiencies is entirely separate and apart from the 45-day period that begins when the application is deemed complete. Suppose that a city fails to inform the applicant of significant deficiencies in the application until the 40th day after application filing and the applicant fails to satisfy the requirement for a complete application until the 80th day. Under the federal law the agency would have "failed to act" if it did not render a decision within ten more days. Under North Carolina law the agency would have a full 45 days to make a decision. This quandary illustrates the importance of North Carolina local governments complying with the more demanding federal law by notifying the applicant within 30 days of filing if the application is incomplete.

The declaratory ruling of the FCC also addressed the issue of proposed wireless service in an area already served. Section 332(c)(7)(B)(i)(II) forbids a local government from engaging in regulation that "prohibits or ha(s) the effect of prohibiting the provision of personal wireless services." Federal courts of appeal have disagreed about whether denying an application solely because of the presence of an existing carrier has the effect of prohibiting service. In this regard the Fourth Circuit Court of Appeals (which serves North Carolina) has held in the seminal case of AT&T Wireless PCS, Inc. v. City Council of Va. Beach, 155 F.3d 423 (4th Cir. 1998) that the statutory provision above applies only when the State or local authority has adopted a blanket ban on wireless service facilities. However, the FCC adopted a different view by ruling that the fact that service is already provided to an area is an inadequate reason to justify rejecting the proposal of a carrier wishing to enter the area. One of the Act's purposes is to promote competition among carriers, and denying the application of an individual carrier solely because of the presence of another carrier can have the "effect of prohibiting service." However, local governments may still base their decision on other relevant planning and zoning considerations.

Finally, the November 18, 2009, declaratory ruling entertained a proposal to preempt the local practice of requiring a wireless service provider to obtain a zoning variance, regardless of the type and location of the proposal, if siting is to be allowed. However, the FCC declined to rule on this matter because the petitioner (CTIA) failed to provide sufficient information about specific examples of the practice to justify a full analysis of it.

It has been only two and a half years since the North Carolina General Assembly adopted relatively comprehensive legislation governing the siting of wireless facilities. The Federal Communication Commission declaratory ruling of November 18, 2009, adds extra dimensions to the regulatory and legal framework that now exists. Local governments will want to update their knowledge and review their practices to stay abreast of this rapidly expanding and changing field. And remember, somewhere a shot clock may be ticking.

Links

- canons.sog.unc.edu/?p=7046&print=1
- www.ncga.state.nc.us/Sessions/2013/Bills/House/PDF/H664v6.pdf

- hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-99A1.pdf
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-400.52.html
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