

Cell Tower Zoning and Placement: Navigating Recent FCC Changes

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I. INTRODUCTION

Recent developments place new restrictions and requirements on local government land use and zoning authority over wireless facilities and may require many localities to modify their procedures, and potentially local ordinances. This paper discusses recent activity at both the Federal Communications Commission (“FCC” or “Commission”) and the Supreme Court affecting local government rights and obligations concerning wireless facility siting.

II. SECTION 332(c)(7) OF THE COMMUNICATIONS ACT: LIMITED FEDERAL PREEMPTION OF LOCAL LAND USE CONTROL OVER WIRELESS SITING

Section 704(a) of the Telecommunications Act of 1996 (“TCA”) added Section 332(c)(7) to the Communications Act of 1934, as amended.¹ Section 332(c)(7) provides for limited preemption of state and local zoning authority in the siting of personal wireless service facilities. As part of an overall goal of promoting competition and encouraging rapid deployment of new wireless telecommunications technologies, Section 332(c)(7) aimed to reduce what were perceived to be local zoning impediments to the installation of facilities for wireless communications.² The provision “prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement.”³ The provision “is a deliberate compromise between two competing aims—to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers.”⁴

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, § 704(a), 110 Stat. 56 (1996) (codified at 47 U.S.C. § 332(c)(7)). Section 332(c)(7) was the first provision of the federal Communications Act to explicitly address local land use and zoning authority over wireless facilities.

² See *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005).

³ H.R. Rep. No. 104-458, at 207-08 (1996), as reprinted in 1996 U.S.C.C.A.N. 222 (“Conference Report”).

⁴ *Town of Amherst v. Omnipoint Commc’ns Enters., Inc.*, 173 F.3d 9, 13 & n.3 (1st Cir. 1999) (discussing initial House version of provision that would have charged the FCC with “developing a uniform national policy for the deployment of wireless communication towers” that was rejected in favor of a bill that “rejected such a blanket preemption of local land use authority”).

The provisions of Section 332(c)(7)(B) set limits on the general principle of the preservation of local authority established in Section 332(c)(7)(A).⁵ The statute disallows unreasonable discrimination “among providers of functionally equivalent services”⁶ and local government actions that “prohibit or have the effect of prohibiting the provision of personal wireless services.”⁷ State or local governments may not regulate wireless facilities on the basis of the environmental effects of radio frequency emissions to the extent that a facility complies with FCC regulations on such emissions.⁸ State or local governments are also required to act on “any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time.”⁹ The statute requires denials to be in writing and supported by substantial evidence¹⁰ and provides for expedited judicial review.¹¹

A) FCC’s 2009 *Shot Clock Order*

For more than a decade after its 1996 enactment, interpretation and application of Section 332(c)(7) was the province of the courts, just as Congress envisioned by including a specific court remedy in Section 332(c)(7)(B)(v). In 2008, however, CTIA – The Wireless Association filed a petition requesting the Commission to address, among other things, what constitutes a

⁵ See *Omnipoint Commc’ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 196 (9th Cir. 2013) (concluding that the preemptive scope of Section 332(c)(7) is that “(1) it preempts local land use authorities’ regulations if they violate the requirements of § 332(c)(7)(B)(i) and (iv); and (2) it preempts local land use authorities’ adjudicative decisions if the procedures for making such decisions do not meet the minimum requirements of § 332(c)(7)(B)(ii) and (iii).”).

⁶ 47 U.S.C. § 332(c)(7)(B)(i)(I). See *AT&T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423, 426-28 (4th Cir. 1998) (finding no unreasonable discrimination).

⁷ 47 U.S.C. § 332(c)(7)(B)(i)(II). See *New Cingular Wireless PCS, LLC v. Fairfax Cnty. Bd. Of Supervisors*, 674 F.3d 270, 275-77 (4th Cir. 2012) (discussing what constitutes a prohibition under Section 332(c)(7)(B)(i)(II)); *APT Pittsburgh Ltd. P’ship v. Penn Twp. Butler Cty.*, 196 F.3d 469, 480 (3d Cir. 1999).

⁸ 47 U.S.C. § 332(c)(7)(B)(iv). But see *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 420-21 (2d Cir. 2002) (upholding governmental entity’s lease provision addressing radiofrequency emissions).

⁹ 47 U.S.C. § 332(c)(7)(B)(ii). See Section II(B), *infra*.

¹⁰ 47 U.S.C. § 332(c)(7)(B)(iii). See Conference Report at 208 (“The phrase ‘substantial evidence contained in a written record’ is the traditional standard used for judicial review of agency actions.”). See also *MetroPCS, Inc. v. City & Cty. of S.F.*, 400 F.3d 715, 721-23 (9th Cir. 2005) (discussing how different Courts of Appeal have interpreted the “in writing” requirement); *Sw. Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 58-59 (1st Cir. 2001) (describing substantial evidence standard).

¹¹ 47 U.S.C. § 332(c)(7)(B)(v). See Conference Report at 209 (noting that the party making the appeal may choose to seek judicial review in the appropriate Federal district court or a State court of competent jurisdiction). The Commission has solicited comment on appropriate remedies. Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, WT Docket No. 13-238, *Notice of Proposed Rulemaking*, FCC 13-122 (rel. Sept. 26, 2013), 28 FCC Rcd. 14,238, ¶ 162 (2013), 78 Fed. Reg. 73,144 (2013) (“*NPRM*”).

“reasonable period of time” for the purpose of Section 332(c)(7)(B)(ii).¹² In response to the petition, the Commission defined what constitutes a “presumptively ‘reasonable period of time’ beyond which inaction on a personal wireless service facility siting application will be deemed a ‘failure to act’” as 90 days for collocation applications, and 150 days for applications other than collocations.¹³ These timeframes take into account whether applications are complete, and the local government must notify the applicant within 30 days if it finds an application to be incomplete.¹⁴

Several cities sought review of the *Shot Clock Order*.¹⁵ The Fifth Circuit gave the Commission deference with respect to its exercise of authority to implement Section 332(c)(7).¹⁶ The Fifth Circuit then rejected the cities’ argument that the FCC’s timeframes improperly place the burden on a state or local government, creating a “presumption *for* preemption,” finding instead that this was not the effect of the presumptively reasonable time periods.¹⁷ The court explained that a presumption in a civil proceeding operates according to a “bursting-bubble” theory of presumption, and “the *only* effect of a presumption is to shift the burden of producing evidence with regard to the presumed fact.”¹⁸ Applying this theory to the *Shot Clock Order*, the court stated:

True, the 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. But, if the state or local government introduced

¹² Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, Declaratory Ruling, 24 FCC Red. 13,994, ¶ 2 (2009) (“*Shot Clock Order*”), *recon. denied*, 25 FCC Red. 11,157, *aff’d sub nom.*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff’d*, 133 S. Ct. 1863 (2013).

¹³ *Shot Clock Order* ¶ 19. The Commission found that defining timeframes would lend clarity to Section 332(c)(7) and “ensur[e] that the point at which a State or local authority ‘fails to act’ is not left so ambiguous that it risks depriving a wireless siting applicant of its right to redress.” *Id.* ¶ 41.

¹⁴ *Id.* ¶ 53.

¹⁵ *City of Arlington*, 668 F.3d at 236, *aff’d*, 133 S. Ct. at 1873 (considering whether “a court should apply *Chevron* to review an agency’s determination of its own jurisdiction”).

¹⁶ *City of Arlington*, 668 F.3d at 254.

¹⁷ *Id.* at 256 (internal quotation marks omitted).

¹⁸ *Id.* (internal quotations marks and citations omitted).

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.¹⁹

The state or local government must produce evidence challenging the presumed reasonableness of the FCC's "shot clock" period in a particular case, and then the presumption disappears, leaving the reviewing court to judge competing evidence.

The Supreme Court granted certiorari to review the Fifth Circuit's decision but affirmed the Fifth Circuit on *Chevron* grounds.²⁰

B) Revisiting 332(c)(7) Five Years After the *Shot Clock Order*: The FCC's 2014 *Wireless Siting Order*

On October 21, 2014, the Commission released a Report and Order in its wireless siting rulemaking proceeding.²¹ This rulemaking addressed, among other things, the operation of Section 332(c)(7), five years after the FCC's *Shot Clock Order*. The Commission clarified several aspects of Section 332(c)(7), including: municipal property siting preferences, determinations that applications are complete, local moratoria, application of the *Shot Clock Order* to distributed antenna systems ("DAS") and small cell deployments, the definition of collocation, and remedies.

1. Preferences for Deployments on Municipal Property

The Commission found that municipal property preferences are not *per se* discriminatory or otherwise a violation of Section 332(c)(7).²² Any such violation would need to be argued on a case-by-case basis.²³

¹⁹ *Id.* at 257.

²⁰ *City of Arlington*, 133 S. Ct. at 1873.

²¹ *In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-258, *Report and Order*, FCC 14-153 (rel. Oct. 21, 2014), 29 FCC Rcd. 12,865, 80 Fed. Reg. 1238 (2015), http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1021/FCC-14-153A1.pdf, ("*Wireless Siting Order*"), *petit. for review denied sub nom. Montgomery Cty. v. FCC*, 811 F.3d 121 (4th Cir. 2015).

²² *Id.* ¶ 280.

²³ *Id.*

2. Application Completeness

The Commission provided some guidance as to how local governments should handle incomplete wireless siting applications. The *Shot Clock Order*'s presumptively reasonable timeframe begins to run when the application is first submitted, not when it is deemed complete.²⁴ To toll the shot clock, any request by a locality for additional information must specify the city code provision, ordinance, application instruction, or otherwise publicly-stated procedures that require the information to be submitted.²⁵ Once an applicant submits additional information, the shot clock begins to run again; the reviewing authority has 10 days to notify the applicant that the additional submission did not complete the application.²⁶ Any subsequent determination by a locality that an application remains incomplete may be based only on the applicant's failure to supply the information that the locality requested within the first 30 days.²⁷

3. Local Moratoria

The Commission clarified that the presumptively reasonable timeframes of the *Shot Clock Order* run regardless of any applicable local moratorium on wireless siting applications.²⁸ Thus, local moratoria on siting applications to, for example, update applicable zoning regulations, do not stop the shot clock.

4. Application to DAS and Small Cell Deployments

The Commission found that the *Shot Clock Order*'s timeframes apply to DAS and small cell applications.²⁹ The Commission noted that some jurisdictions did not apply the shot clocks to these deployments and wanted to clarify this issue. If a deployment requires new poles,

²⁴ *Id.* ¶ 258.

²⁵ *Id.* ¶ 260. The *Shot Clock Order* required such requests to be made within 30 days.

²⁶ *Id.* ¶ 259.

²⁷ *Id.*

²⁸ *Id.* ¶ 265.

²⁹ *Id.* ¶ 270 (“to the extent DAS or small-cell facilities, including third-party facilities such as neutral host DAS deployments, are or will be used for the provision of personal wireless services, their siting applications are subject to the same presumptively reasonable timeframes that apply to applications related to other personal wireless service facilities”).

however, that will be subject to the 150-day shot clock for new construction (not the 90-day collocation shot clock).³⁰

5. Definition of Collocation

The Commission declined to make any changes or clarifications to the *Shot Clock Order*'s standard for determining what is a "collocation" subject to the 90-day shot clock.³¹ The Commission also noted that some collocation applications that are covered by Section 332(c)(7) are not "eligible facilities requests" for the purposes of Section 6409(a) (discussed below), and there is a rationale for preserving distinct standards for the two provisions.³²

6. Remedies

The Commission declined to adopt a "deemed granted" remedy for state or local government failures to act within the Section 332(c)(7) shot clocks.³³ However, the Commission did observe that absent some compelling need for additional time to review the application, it would be appropriate for a reviewing court to treat a locality's failure to comply with the presumptively reasonable shot clock as a "significant factor[]" weighing in favor of such [injunctive] relief."³⁴

III. SECTION 6409(a) OF THE SPECTRUM ACT: A SHORT PROVISION WITH SIGNIFICANT CONSEQUENCES

The Spectrum Act was enacted as part of the Middle Class Tax Relief and Job Creation Act of 2012. The Spectrum Act was generally intended to "advance wireless broadband service" for public safety and commercial purposes and provided for the creation of a broadband communications network (known as "FirstNet") for first responders, as recommended by the 9/11 Commission.³⁵ Section 6409(a) of the Spectrum Act provides, in pertinent part, that Section 332(c)(7) notwithstanding, "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

³⁰ *Id.* ¶ 272.

³¹ *Id.* ¶ 276.

³² *Id.* ¶ 277.

³³ *Id.* ¶ 284.

³⁴ *Id.*

³⁵ H.R. Rep. No. 112-399, at 136 (2012), *as reprinted in* 2012 U.S.C.C.A.N. 186, 220.

station that does not substantially change the physical dimensions of such tower or base station.”³⁶

While Section 6409(a) has been in effect since its enactment in 2012, the language’s ambiguity has led to different interpretations by industry and local governments about what it means. What is an “eligible facilities request”? What is a “substantial change to the physical dimensions of a tower or base station”? What is an “existing tower or base station”? By ordering local government to “approve” Section 6409(a) applications, is Section 6409(a) even constitutional? In September 2013, the Commission opened a rulemaking proceeding to, among other things, establish “rules clarifying the requirements of Section 6409(a) to ensure that the benefits of a streamlined review process for collocations and other minor facility modifications are not unnecessarily delayed.”³⁷

In its October 2014 *Wireless Siting Order*, the Commission defined various terms in Section 6409(a), clarified Section 6409(a) application procedures, and decided whether Section 6409(a) applies to local governments as property owners and possible remedies.³⁸

A) What Structures are Covered

By defining key terms in Section 6409(a), the Commission carved out the scope of covered “eligible facilities requests.” The Commission generally interpreted terms in Section 6409(a) broadly.

Transmission equipment means “any equipment that facilitates transmission for any Commission-licensed or authorized wireless communication service, including, but not limited to, radio transceivers, antennas and other relevant equipment associated with and necessary to their operation, including coaxial or fiber-optic cable, and regular and backup power supply.”³⁹

Tower includes “any structure built for the sole or primary purpose of supporting any Commission-licensed or authorized antennas and their associated facilities.”⁴⁰ **Base station** is

³⁶ 47 U.S.C. § 1455(a).

³⁷ *NPRM* ¶ 95.

³⁸ Last December, the FCC’s *Wireless Siting Order* was upheld on appeal by the Fourth Circuit. *Montgomery Cty. v. FCC*, *supra*.

³⁹ *Wireless Siting Order* ¶ 160.

⁴⁰ *Id.* ¶ 166.

“the equipment and non-tower supporting structure at a fixed location that enable Commission-licensed or authorized wireless communications between user equipment and a communications network” and includes any equipment associated with wireless communications service.⁴¹ An *existing* base station is a structure supporting or housing, at the time of the application, an antenna, transceiver, or other associated equipment that constitutes part of a “base station,” even if the particular structure was not built for the sole or primary purpose of providing such support.⁴² This definition should preserve state and local authority to review the *first* base station deployment that would bring any non-tower support structure (such as a building, utility or light pole, or water tower) within the scope of Section 6409(a).⁴³

Collocation means “the mounting or installation of transmission equipment on an eligible support structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes.”⁴⁴ **Eligible support structure** means any structure that is a “tower” or “base station.”⁴⁵ However, the definition of “collocation” does *not* “require local governments to approve deployments on anything that could house or support a component of a base station” but which does not currently do so.⁴⁶ **Eligible facilities request** includes “hardening through structural enhancement where such hardening is necessary for a covered collocation, replacement, or removal of transmission equipment, but does not include replacement of the underlying structure.”⁴⁷ It also includes any “modification of an existing wireless tower or base station that involves’ collocation, removal, or replacement of transmission equipment.”⁴⁸

⁴¹ *Id.* ¶ 167.

⁴² *Id.* ¶ 168.

⁴³ *Id.* ¶ 174.

⁴⁴ *Id.* ¶ 178.

⁴⁵ *Id.*

⁴⁶ *Id.* ¶ 179.

⁴⁷ *Id.* ¶ 180.

⁴⁸ *Id.* Note, “replacement” only refers to the replacement of transmission equipment, not the replacement of an existing wireless tower or the support structure on which base station equipment is located. *Id.* ¶ 181.

B) What It Means to “Substantially Change the Physical Dimensions” of an Existing Wireless Tower or Base Station

Although many local government commenters argued that what constitutes a “substantial change in the physical dimensions” of an existing tower or base station should be a relative concept based on surrounding context, the Commission decided that “substantial change” should be primarily an objective, quantifiable concept.

A modification *substantially changes the physical dimensions* of a tower or base station (and thus falls outside of Section 6409(a)) if it meets any of the following:⁴⁹

1. For towers outside of public rights-of-way (“ROW”), it increases the 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 20 feet, whichever is greater;
2. For towers in the ROW and all base stations, it increases the height of the tower or base station by more than 10% or 10 feet, whichever is greater;
3. For towers outside the ROW, it protrudes from the edge 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;
4. For towers in the ROW and all base stations, it protrudes from the edge of the structure more than 6 feet;
5. It involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets;
6. It entails any excavation or deployment outside of the current site of the tower or base station;⁵⁰
7. It would defeat the existing concealment/camouflage elements of the tower or base station; or
8. It does not comply with conditions associated with the locality’s prior zoning approval of construction or modification of the tower or base station, unless the non-compliance is due to an increase in height, increase in width, addition of cabinets, or new excavation that does not exceed the corresponding “substantial change” thresholds.⁵¹

⁴⁹ *Id.* ¶ 188.

⁵⁰ For towers outside the ROW, “site” is 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. *Id.* ¶ 198. For other towers and all base stations, the “site” is further restricted to that area in proximity to the structure and to other transmission equipment already deployed on the ground. *Id.*

⁵¹ *Id.* ¶ 187. Note, this is informed by, but has some differences from, the Collocation Agreement’s definition of “substantial increase in size.” *Id.* ¶¶ 190-93.

In addition, “modifications of an existing tower or base station that occur after the passage of the Spectrum Act will not change the [pre-Spectrum Act] baseline for purposes of measuring substantial change.”⁵² Where the deployments will be separated horizontally (e.g., on a rooftop), changes in height should be measured from the original support structure.⁵³

C) Deadlines, Land Use Application Review, and the “Deemed Granted” Remedy

The Commission also adopted rules in the *Wireless Siting Order* to structure local governments’ review of applications for Section 6409(a) projects. It is important that local governments become familiar with these procedures so as to preserve the limited review processes that they are permitted to retain under Section 6409(a).

Local review must be finished within 60 days, including any review to determine whether an application is complete.⁵⁴ The only exceptions are where (a) there is mutual agreement to an extension of time, or (b) the locality informs the applicant within 30 days of the submission that the application is incomplete.⁵⁵

If the locality determines that Section 6409(a) does not apply to a particular siting application, then the presumptively reasonable timeframe under the Section 332(c)(7) *Shot Clock Order* will begin to run from the issuance of the locality’s decision that the application is not covered by Section 6409(a).⁵⁶ In cases where both provisions apply, Section 6409(a) governs.⁵⁷

When informing a Section 6409(a) applicant that its application is incomplete, a local government may only require the applicant to provide documentation that is “reasonably related to determining whether the request meets the requirements of [Section 6409(a)].”⁵⁸ The Commission added, however, that when seeking further information on an incomplete

⁵² *Id.* ¶ 197.

⁵³ *Id.* ¶ 188.

⁵⁴ *Id.* ¶ 215. The timeline continues to run regardless of any local moratoria. *Id.* ¶ 219.

⁵⁵ *Id.* ¶ 217.

⁵⁶ *Id.* ¶ 220.

⁵⁷ *Id.*

⁵⁸ *Id.* ¶ 214.

application, a locality cannot require the wireless provider to furnish the locality with documentation proving the need for the proposed modification.⁵⁹

A Section 6409(a) request will be “deemed granted” if not approved within the 60-day period, accounting for any tolling.⁶⁰ The deemed grant will not become effective, however, until the applicant notifies the locality that the application has been deemed granted.⁶¹ A local government may challenge an applicant’s written notification of a deemed grant in court.⁶²

In approving a Section 6409(a) request, a local government may require the applicant to comply with “generally applicable building, structural, electrical, and safety codes or with other laws codifying objective standards reasonably related to health and safety.”⁶³ Additionally, because of how the Commission defined “substantially change the physical dimensions,” a local government may impose existing camouflage requirements on a Section 6409(a) request.

The Commission concluded that Section 6409(a) only applies to state and local governments acting in their role as land use regulators and *not* in their proprietary capacities.⁶⁴ The Commission declined to elaborate on the application of this principle to particular circumstances under Section 6409(a), noting that the Section 332(c)(7) case law can provide guidance.⁶⁵ However, there is an open question around applications for collocations in the ROW because of the status of the ROW and the Commission’s Section 6409(a) definitions for collocations in the ROW.

⁵⁹ *Id.*

⁶⁰ *Id.* ¶ 216. Unlike the case with the Section 332(c)(7) shot clocks, a municipality may not rebut a claim of failure to act under Section 6409(a) by demonstrating that a longer review period was reasonable.

⁶¹ *Id.* ¶ 226.

⁶² *Id.* ¶ 231.

⁶³ *Id.* ¶ 202.

⁶⁴ *Id.* ¶ 239.

⁶⁵ *Id.* ¶ 240; *see, e.g., Sprint Spectrum L.P.*, 283 F.3d at 421 (Section 332(c)(7) does not apply to siting of wireless facilities on municipal property where government entity acts in a proprietary capacity).

IV. DENYING A WIRELESS APPLICATION UNDER SECTION 332(c)(7): WHAT LOCALITIES CAN AND CANNOT DO

A) Section 332(c)(7) Restrictions

1. Substantive Limitations

Section 332(c)(7)(B) places restrictions on the evidence on which a local government may rely in denying an application and the practical effects that a denial is permitted to have. Local governments may not regulate wireless facilities on the basis of environmental effects of radio frequency (“RF”) emissions, so long as the facilities comply with FCC regulations concerning RF emissions.⁶⁶

Additionally, a local government’s regulation of the placement, construction, and modification of wireless facilities may not unreasonably discriminate among providers of functionally equivalent services.⁶⁷ Distinctions based on traditional zoning principles, such as aesthetic impact⁶⁸ or different zoning requirements in business districts and residential districts,⁶⁹ have been found acceptable. When an applicant is similarly situated to other, prior applicants and seeks approval for a structure that is as (if not less) intrusive as these prior towers in placement and impact, a denial may be unreasonably discriminatory.⁷⁰

Wireless siting decisions also may not prohibit or have the effect of prohibiting the provision of personal wireless services.⁷¹ A prohibition can be in the form of a general ban on new service providers or the denial of an application that will result in a significant gap in the

⁶⁶ 47 U.S.C. § 332(c)(7)(B)(iv). The FCC, however, has recognized the need to balance a local government’s interest in ensuring that facilities will comply with Commission rules on RF emissions with this prohibition. Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934, WT Docket No. 97-192, *Report and Order* at 8-9, FCC 00-408 (rel. Nov. 17, 2010), 15 FCC Rcd. 22,821 (2000), https://apps.fcc.gov/edocs_public/attachmatch/FCC-00-408A1.pdf; see also *New York SMSA Ltd. P’ship v. Town of Clarkstown*, 603 F. Supp. 2d 715 (S.D.N.Y. 2009), *aff’d*, 612 F.3d 97 (2d Cir. 2010).

⁶⁷ 47 U.S.C. § 332(c)(7)(B)(i)(I).

⁶⁸ *T-Mobile Ne. LLC v. Fairfax Cty. Bd. of Supervisors*, 672 F.3d 259 (4th Cir. 2012).

⁶⁹ *Omnipoint Commc’ns Enters. v. Zoning Hearing Bd. of Easttown Twp.*, 331 F.3d 386 (3d Cir. 2003), *cert. denied*, 540 U.S. 1108 (2004).

⁷⁰ *Global Tower, LLC v. Hamilton Twp.*, 897 F. Supp. 2d 237 (M.D. Pa. 2012).

⁷¹ 47 U.S.C. § 332(c)(7)(B)(i)(II).

applying provider’s coverage.⁷² The latter inquiry involves a two-pronged analysis: (1) the showing of a “significant gap” in service coverage, and (2) whether the proposal to fill this gap is the least intrusive means of doing so.⁷³ Some circuits require a showing that the manner in which an applicant proposes to fill the significant gap is “least intrusive on the values that the denial sought to serve.”⁷⁴ Other circuits require a showing that there are no alternative sites that would fill the gap.⁷⁵

2. Procedural Requirements

A local government’s denial of a request to place, construct, or modify personal wireless service facilities must be “in writing and supported by substantial evidence contained in a written record.”⁷⁶ The “substantial evidence” requirement is “more than a scintilla” but “less than a preponderance”—the same as the substantial evidence standard for review of administrative agency decisions.⁷⁷ The “in writing” requirement was interpreted by a recent Supreme Court decision and is discussed in detail in Section IV(B), *infra*. It essentially requires the inclusion of reasons along with the written denial—either as a single document or as a collection of contemporaneously available documents.

3. Non-Application to Municipal Property

Preemption doctrines generally apply only to state regulation and not when a state owns and manages property.⁷⁸ Accordingly, courts have generally ruled that Section 332(c)(7) does not apply to local government actions or decisions relating to the siting of wireless facilities on municipal property. A related issue is whether ordinances or practices that incentivize wireless

⁷² *MetroPCS, Inc.*, 400 F.3d at 730.

⁷³ *Id.* at 733-34.

⁷⁴ *APT Pittsburgh Ltd. P’ship*, 196 F.3d at 480; *see also MetroPCS, Inc.*, 400 F.3d at 735; *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630 (2d Cir. 1999).

⁷⁵ *Second Generation Props., L.P. v. Town of Pelham*, 313 F.3d 620 (1st Cir. 2002); *VoiceStream Minneapolis, Inc. v. St. Croix Cnty.*, 342 F.3d 818 (7th Cir. 2003).

⁷⁶ 47 U.S.C. § 332(c)(7)(B)(iii).

⁷⁷ *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999); *see also Am. Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1053 (9th Cir. 2014).

⁷⁸ *See Bldg. & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 226-27 (1993) (“When a State owns and manages property ... it must interact with private participants in the marketplace. In doing so, the State is not subject to pre-emption by the [federal statute], because pre-emption doctrines apply only to state regulation.”).

facility siting on municipal property (as opposed to neighboring private property) in some way run afoul of Section 332(c)(7).

The Ninth Circuit recently addressed the application of Section 332(c)(7) to municipal property. In this case, T-Mobile and the City of Huntington Beach entered into lease agreements for the siting of wireless facilities in City parks.⁷⁹ The City Council then determined that notwithstanding T-Mobile's lease agreement with the City and valid land use and building permits, T-Mobile also had to obtain voter approval under a city charter measure that gave voters authority over construction on public lands.⁸⁰ T-Mobile sought relief in federal court, arguing that Section 332(c)(7) barred the application of the voter approval measure to the proposed project; the district court found that the measure, as applied to T-Mobile's wireless siting application, ran afoul of Section 332(c)(7), and remanded to the City, at which point the City followed Section 332(c)(7) procedures to revoke the permits.⁸¹

On appeal, the Ninth Circuit reversed. It determined that the city charter measure at issue "is not the sort of local land use regulation or decision that is subject to the limitations of § 332(c)(7), but rather is a voter-enacted rule that the City may not lease or sell city-owned property for certain types of construction unless authorized by a majority of the electors."⁸² Because the charter provision "simply provides a mechanism for the City, through the voters, to decide whether to allow construction on its own land,"⁸³ it is not a form of local zoning or land use regulation to which Section 332(c)(7)(B) applies. The court held: "By its terms, the TCA applies only to local zoning and land use decisions and does not address a municipality's property rights as a landowner."⁸⁴ As a rule dealing with the City's management of its own property, the measure was therefore outside the scope of Section 332(c)(7) preemption.

The Second Circuit has similarly found that Section 332(c)(7) does not limit proprietary actions of a municipality and concluded that Congress intended Section 332(c)(7)'s preemption

⁷⁹ *Omnipoint Commc'ns, Inc.*, 738 F.3d at 198.

⁸⁰ *Id.* at 196, 198.

⁸¹ *Id.* at 198-99.

⁸² *Id.* at 199-200.

⁸³ *Id.* at 200.

⁸⁴ *Id.* at 201.

to be narrow and its preservation of local governmental authority to be broad.⁸⁵ Examining the language of the statute, the court observed that the preservation of local governmental “authority” in Section 332(c)(7)(A) refers to “decisions,” whereas the limitations on local authority in Section 332(c)(7)(B) language refer to “regulation.”⁸⁶ These contrasting terms highlight that the limitations of Section 332(c)(7)(B) apply to a different, and more limited, set of local government actions than what is covered, and preserved, in Section 332(c)(7)(A). The court also noted that a municipality or an instrumentality thereof—in this case a school district—has “the same right in its proprietary capacity as [a private] property owner to refuse to lease” its property, and Section 332(c)(7) does not preempt a governmental body’s right to refuse to lease its property.⁸⁷ Further, a public entity, just like a private party, is permitted to decline to lease its property except subject to agreed-upon conditions, and the party seeking a lease may look for other eligible sites if it does not accept those conditions.⁸⁸

B) *T-Mobile South, LLC v. City of Roswell*

On January 14, 2015, the Supreme Court issued its decision in *T-Mobile South, LLC v. City of Roswell*.⁸⁹ This case has important implications for the procedures that local governments must follow in denying a wireless siting application under Section 332(c)(7).

1. Background

This case arose from the City’s 2010 denial of T-Mobile’s application to construct a cell tower. Following a public hearing to consider the application, the City sent T-Mobile a short letter notifying it of the denial and providing instructions for obtaining the written minutes of that hearing. T-Mobile filed suit challenging the City’s decision in district court, and that court held that the City failed to satisfy the “in writing” requirement of 47 U.S.C. § 332(c)(7)(B)(iii). After finding that the City failed to comply with the “in writing” requirement, the district court

⁸⁵ *Sprint Spectrum L.P.*, 283 F.3d at 420.

⁸⁶ *Id.*

⁸⁷ *Id.* at 421. *Accord Omnipoint Commc’ns Enters., L.P. v. Twp. of Nether Providence*, 232 F. Supp. 2d 430, 435 (E.D. Pa. 2002) (“[T]he Township had no duty under the TCA to negotiate or ultimately to lease portions of municipal property to Omnipoint for the purpose of installing an antenna.”).

⁸⁸ *Sprint Spectrum L.P.*, 283 F.3d at 421 (“We see no indication that Congress meant the TCA to apply any different set of principles to a telecommunications company’s negotiated agreement with a public property owner.”).

⁸⁹ *T-Mobile S., LLC*, 135 S. Ct. 808 (2015). Oral argument recording and all briefs are available at <http://www.scotusblog.com/case-files/cases/t-mobile-south-llc-v-city-of-roswell/>.

imposed the draconian remedy of granting an injunction requiring the City to grant T-Mobile's application. Both this harsh remedy, as well as the court's excessive focus on the "in writing" language (as opposed to the substantial evidence requirement or other substantive requirements of Section 332(c)(7)), marked this case as unusual.

The City appealed to the Eleventh Circuit, which reversed and remanded.⁹⁰ Citing its earlier decision in *T-Mobile South, LLC v. City of Milton*, 728 F.3d 1274 (11th Cir. 2013), the court found that the collection of documents available to T-Mobile—the City Council meeting minutes, the transcript of the meeting, and the denial letter—satisfied the "in writing" requirement. The Eleventh Circuit sent the case back to the district court to consider T-Mobile's merits challenges.

T-Mobile sought *certiorari* on the "in writing" requirement issue, which the Court granted. Arguments were held in November 2014.

2. The Court's Decision

In a 6-3 split,⁹¹ the Court reversed the Eleventh Circuit and held that, to enable meaningful judicial review, a locality must provide reasons for denying a wireless siting application, but that these reasons may be contained in a document separate from the written denial. Thus, all members of the Court disagreed with T-Mobile's argument that the reasons for a locality's decision must be set forth in the document denying a wireless provider's application (thus resolving a circuit split in favor of the City). The Court also held, however, that if the reasons for a locality's decision are not contained in a decision denying the application but are instead supplied by an accompanying document (or collection of documents), such as council meeting minutes, that document must be "essentially contemporaneously" available with the denial letter.

This "contemporaneous" requirement was the position urged by the Solicitor General as *amicus curiae*, although it had no bearing on the facts of this case. That is, T-Mobile did not allege that the City's minutes, which were available 26 days after the written denial and 4 days

⁹⁰ *T-Mobile S., LLC v. City of Roswell*, 731 F.3d 1213 (11th Cir. 2013).

⁹¹ Justice Sotomayor authored the majority opinion, joined by Justices Scalia, Kennedy, Breyer, Alito, and Kagan. Justice Alito filed a concurring opinion. Chief Justice Roberts filed a dissenting opinion in which Justice Ginsburg joined, and Justice Thomas joined as to one part. Justice Thomas also filed a separate dissenting opinion.

before the expiration of T-Mobile's time to seek judicial review under Section 332(c)(7), frustrated its efforts to seek judicial review.

As Chief Justice Roberts pointed out in his dissent (joined by Justices Ginsburg and Thomas)—and as local government *amici* argued in support of the City—a reviewing court does not need contemporaneous reasons in order to carry out substantial evidence review, and that issue was not even raised in the courts below. Further, the dissent noted the lack of harm to providers: “cell service providers are not Mom and Pop operations. As this case illustrates, they participate extensively in the local government proceedings, and do not have to make last-second, uninformed decisions on whether to seek review.”⁹² The Chief Justice (joined in relevant part by Justice Ginsburg) would have found that Section 332(c)(7) requires nothing more than “a written document that communicates the town’s denial” and would thus have affirmed the Eleventh Circuit’s decision to remand to the district court for consideration on the merits.⁹³

Justice Thomas wrote a separate dissent. He shared the Chief Justice’s “concern about the Court’s eagerness to reach beyond the bounds of the present dispute” in creating the “contemporaneously available” requirement.⁹⁴ Justice Thomas would afford municipalities “at least as much respect as a federal agency” in this case, and criticized the Court majority’s treatment of municipalities as “conscripts in ‘the national bureaucratic army.’”⁹⁵

The Court remanded the case to the Eleventh Circuit for further proceedings consistent with its opinion. Collectively, the Court’s opinions left the City room to argue on remand that its failure to comply with the newly-minted “contemporaneously available” requirement was harmless error, and that therefore the case should be remanded to the district court to consider only T-Mobile’s merits arguments. (That, of course, was what the Eleventh Circuit had ordered in the first place.)

The Supreme Court majority opinion stated, “We do not consider questions regarding the applicability of principles of harmless error or questions of remedy, and leave those for the

⁹² *T-Mobile S., LLC*, 135 S. Ct. at 820 (Roberts, C.J., dissenting).

⁹³ *Id.* at 821 (Roberts, C.J., dissenting).

⁹⁴ *Id.* at 823 (Thomas, J., dissenting).

⁹⁵ *Id.* at 824 (Thomas, J., dissenting).

Eleventh Circuit to address on remand.”⁹⁶ And Justice Alito wrote a separate concurrence in which he first emphasized that there was no “opinion-writing requirement” in Section 332(c)(7), and then went on to stress the availability of the harmless error doctrine to the City on remand.⁹⁷ He wrote: “I have trouble believing that T-Mobile South, LLC—which actively participated in the decisionmaking process, including going so far as to transcribe the public hearing—was prejudiced by the city of Roswell’s delay in providing a copy of the minutes.”⁹⁸ He concluded by emphasizing that nothing in the Court’s opinion should be taken to mean that “when a locality has erred, the inevitable remedy is that a tower must be built.”⁹⁹

On remand, the Eleventh Circuit remanded to the district court to consider the “harmless error” question, whether the City had otherwise violated Section 332(c)(7), and what the appropriate remedy was (if any violation was not harmless).¹⁰⁰

3. Summary

The “contemporaneously available” requirement was not an issue on the facts of *Roswell*, but it is now law, and local governments should be aware of it and alter their practices accordingly. One hopes that compliance with the requirement will not require substantial additional effort or expense, and that the post-*Roswell* world will be relatively easy for local governments to adapt to. As the Chief Justice observed in dissent, “At the end of the day, the impact on cities and towns across the Nation should be small, although the new unwritten [‘contemporaneously available’] requirement could be a trap for the unwary hamlet or two.”¹⁰¹

Wireless providers, on the other hand, may not like the new normal. With local governments delaying written decisions until the reasons are prepared—either in a separate written decision or in meeting minutes/transcripts—the likely result is that a wireless provider will now have to wait longer after a council vote denying its application before it can go to court. The written denial—not a vote at a meeting—constitutes the “final action” on which judicial

⁹⁶ *Id.* at 819.

⁹⁷ *Id.* (Alito, J., concurring).

⁹⁸ *Id.* (Alito, J., concurring).

⁹⁹ *Id.* (Alito, J., concurring).

¹⁰⁰ *T-Mobile S., LLC v. City of Roswell*, No. 12-12250-BB (11th Cir. Mar. 2, 2015).

¹⁰¹ *T-Mobile S., LLC*, 135 S. Ct. at 823 (Roberts, C.J., dissenting).

review is available. For many wireless siting applications, *Roswell* may ultimately serve to (1) prompt localities to provide more thorough reasoning for their denials, and (2) require wireless providers to cool their litigation heels while the locality is doing so.

V. REVISING LOCAL LAND USE/ZONING CODES TO BE CONSISTENT WITH THE FCC'S WIRELESS SITING ORDER AND RECENT COURT RULINGS

The new Section 6409(a) rules went into effect on April 8, 2015, after a transition period, while the other rules adopted in the *Wireless Siting Order* went into effect on February 8, 2015.

If they have not done so already, local governments should revisit their procedures for reviewing applications for siting wireless facilities and consider whether revisions are needed in light of the *Wireless Siting Order* and the *Roswell* decision. For example, the *Wireless Siting Order* specifies time periods for review and procedures for requesting additional information to complete applications to which local governments must adhere, or risk losing the ability to fully consider applications. Because the time period for review of Section 6409(a) eligible facilities requests begins once the application is submitted, local governments are advised to have a process for prompt intake and evaluation of whether an application is, in fact, for an eligible facilities request so as to maximize the allowed review period. This may include adopting requirements to ensure that the applicant provides the information that the local government needs to determine whether a project qualifies as a Section 6409(a) eligible facilities request in a streamlined fashion to allow for efficient review by appropriate staff.

Additionally, because local governments lose substantial control over eligible facilities requests, the initial approval of a new tower is the local government's primary opportunity to impose conditions and preserve land use authority. Local governments would be well-served by reviewing their wireless siting procedures and amending their codes for new facilities and towers, as needed, to ensure that initial approvals are subject to appropriate review.

In light of the Court's holding in *Roswell* that denials under Section 332(c)(7) must include reasons, local governments that include these reasons in separate documents—usually, council meeting minutes or transcripts—are strongly advised to wait to issue the denial letter until the accompanying documents are ready so that they are all issued together. The 30-day period in which the provider may seek judicial review begins to run from the issuance of the denial letter, and the Court held that the reasons need to be available around the same time as this

30-day period begins to run. The local government must still issue the denial within the limits of the FCC's *Shot Clock Order* (90 days for collocations and 150 days for other siting applications).

The *Roswell* Court agreed with the Solicitor General's suggestion that "the local government may be better served by including a separate statement containing its reasons."¹⁰² The Court believed that by issuing "a short statement providing its reasons, the locality can likely avoid prolonging the litigation . . . while the parties argue about exactly what the sometimes voluminous record means."¹⁰³ According to the Court, this would also avoid the risk that a reviewing court could not determine the locality's reasons or mistakenly ascribe to the locality a rationale that did not actually motivate the decision.

Although this is probably good advice, it is doubtful whether a locality's issuance of such a written decision setting forth reasons would actually prevent a wireless provider from alleging that a local government acted for impermissible reasons or would otherwise reduce litigation expense. A written decision setting forth reasons could, however, strengthen a locality's ability to defend against those allegations.

VI. ENVIRONMENTAL AND HISTORIC PRESERVATION REVIEW

A) Local Level: What Local Governments and States Can Do

To the extent that state and local laws require evaluation of a proposed facility's environmental and historic preservation impacts and such evaluation can be completed within the prescribed time limits of the *Shot Clock Order* and the *Wireless Siting Order*, those laws are not preempted by Section 332(c)(7). States and localities should be able to enforce such laws with respect to proposed wireless facilities and may deny projects where substantial evidence indicates that adverse environmental or preservation impacts would occur. However, these kinds of state and local laws may be preempted, or at least limited, where Section 6409(a) is applicable. The *Wireless Siting Order* states that "States and localities may require a covered request to comply with generally applicable building, structural, electrical, and safety codes or with other laws codifying objective standards reasonably related to health and safety, and that

¹⁰² *T-Mobile S., LLC*, 135 S. Ct. at 816.

¹⁰³ *Id.*

they may condition approval on such compliance.”¹⁰⁴ The Order thus would appear to permit State and local enforcement of environmental law related to health and safety with respect to Section 6409(a) facilities requests. Whether the Order would permit enforcement of state or local historic preservation laws with respect to Section 6409(a) requests, however, is far from clear.

Even if state and local environmental and historic preservation laws are preempted or inapplicable, federal environmental and historic preservation laws will apply,¹⁰⁵ including the National Environmental Policy Act (“NEPA”)¹⁰⁶ and the National Historic Preservation Act (“NHPA”).¹⁰⁷ Both laws provide opportunities for the general public and state and local governments to participate in the compliance processes. Because state and local governments’ ability to condition zoning approval on a developer’s agreement to undertake desired mitigation associated with a particular project may be constrained by federal law, participating in federal environmental and historic preservation review provides those governments with a means to encourage certain types of mitigation they may not otherwise have the ability to require. Additionally, states and localities may be able to protect wilderness areas, wildlife, or historic properties by seeking federal recognition and protections that may require heightened consideration under NEPA or NHPA.

B) FCC Obligations Under Federal Law

Before the FCC can approve or register communications and broadcast towers and other wireless facilities pursuant to its statutory authority, it must comply with federal laws, including NEPA and NHPA, that mandate consideration of the environmental and historic preservation impacts resulting from licensing, registration and subsequent construction of those facilities. The FCC’s NEPA and NHPA compliance obligations are separate from, and in addition to, approval from state or local land use/zoning authorities for the proposed siting of wireless facilities.

¹⁰⁴ *Wireless Siting Order* ¶ 202.

¹⁰⁵ *Id.* ¶ 203.

¹⁰⁶ 42 U.S.C. §§ 4321-4347.

¹⁰⁷ 54 U.S.C. §§ 300101-307108.

1. Overview of NEPA and the FCC's NEPA Process

NEPA requires federal agencies to identify and evaluate the environmental effects of proposed “major Federal actions significantly affecting the quality of the human environment”¹⁰⁸ Compliance with NEPA is procedural in nature; NEPA does not require federal agencies to avoid or mitigate environmental effects of their actions but to analyze significant environmental consequences resulting from major federal actions and to make this analysis available to the public. A “major Federal action” includes projects licensed by federal agencies,¹⁰⁹ which the FCC has determined includes any application approved by the FCC that results in the construction of communications facilities.¹¹⁰

NEPA regulations direct federal agencies to classify an action's environmental effects as one of three types of actions and require the agency to conduct a different level of analysis for each type:¹¹¹ (1) actions that normally have a significant environmental impact require the production of “Environmental Impact Statement” (“EIS”);¹¹² (2) actions that ordinarily may have a significant environmental impact require the production of an “Environmental Assessment” (“EA”);¹¹³ and (3) actions that *do not* individually or cumulatively have a

¹⁰⁸ 42 U.S.C. § 4332(2)(C).

¹⁰⁹ 40 C.F.R. § 1508.18(a).

¹¹⁰ Approving ASR applications and both site-specific and geographic-area spectrum licensing applications trigger NEPA environmental review. *NPRM* ¶ 21.

¹¹¹ *See* 40 C.F.R. § 1507.3(b)(2).

¹¹² 47 C.F.R. § 1.1305. An EIS is a detailed statement produced by the responsible federal agency considering:

- (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(C).

¹¹³ 47 C.F.R. § 1.1307. An EA is less detailed than an EIS and is produced to determine whether an EIS is required. An EA “provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact” and includes “brief discussions of the need for the proposal, of alternatives . . . of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.” 40 C.F.R. § 1508.9.

significant effect on the human environment do not require analysis, unless “extraordinary circumstances” apply.¹¹⁴

FCC regulations provide that most actions associated with the construction of communications and broadcast facilities are categorical exclusions – *i.e.*, actions that do not have a significant effect on the environment, except under specific “extraordinary circumstances.”¹¹⁵ Therefore, FCC registration and licensing approvals do not require evaluation of environmental impacts associated with construction of licensed facilities, unless an extraordinary circumstance is present. If an extraordinary circumstance is present, however, the licensee must produce an EA that the FCC then uses to determine if the proposed construction will have a significant environmental impact. The FCC has determined that the following are extraordinary circumstances that require the production of an EA:

- Proposed facility is to be located in an officially designated wilderness area or wildlife preserve.¹¹⁶
- Proposed facility may impact threatened or endangered species or designated critical habitats or adversely impact proposed endangered or threatened species or proposed critical habitats, as determined under the Endangered Species Act of 1973.
- Proposed facility may affect historic districts or properties, or Indian religious sites.
- Proposed facility is to be located in a flood plain.
- Proposed facility will involve significant change in surface features (*e.g.*, wetland fill, deforestation, or water diversion).
- Proposed facility will include high intensity white lights in residential neighborhoods.¹¹⁷
- Proposed facility would involve radiofrequency exposure in excess of FCC guidelines.¹¹⁸
- Proposed facility is over 450 feet tall.¹¹⁹

¹¹⁴ See 47 C.F.R. §§ 1.1307, 1.1306.

¹¹⁵ See 47 C.F.R. § 1.1306; *see also* 40 C.F.R. § 1508.4.

¹¹⁶ Typically, if a project is located in a designated wilderness area or wildlife preserve, the project will occur on federal land managed by another federal agency. In that case, the FCC defers to the land-managing federal agency to complete the NEPA process.

¹¹⁷ 47 C.F.R. § 1.1307(a).

¹¹⁸ *Id.* § 1.1307(b).

¹¹⁹ *Id.* § 1.1307(d), (Note to P(d)).

- FCC determines that the proposed facility is may have a significant environmental impact.¹²⁰

Applications to collocate an antenna or wire or cable are generally not required to produce an EA, even if an extraordinary circumstance is present. Collocations of this sort do not require an EA unless the installation may affect historic properties or result in human exposure to radiofrequency in excess of FCC guidelines.¹²¹

The FCC’s antenna structure registration (“ASR”) process is required for towers over 200 feet tall or in a Federal Aviation Administration (“FAA”)–defined aircraft glide slope. The ASR process entails a 30-day local and national notice and comment period, during which the public can raise environmental concerns and request environmental review.¹²² If an EA is triggered and produced, another 30-day notice and comment period follows submission of the EA to the FCC. For radio service authorization applications (*i.e.*, tower construction) that are accompanied by an EA, a 30-day notice and comment period follows submission of the EA to the FCC.

In addition to NEPA, applicants must also consider whether a proposed project complies with the Federal Endangered Species Act,¹²³ the Migratory Bird Treaty of 1918,¹²⁴ Section 404 of the Clean Water Act,¹²⁵ and the Bald and Golden Eagle Protection Act.¹²⁶ Compliance with these laws is generally integrated with the FCC’s NEPA compliance process.

2. Overview of the NHPA and the FCC’s NHPA Process

Section 106 of NHPA requires federal agencies to consider the effects of federal “undertakings” on historic properties eligible or included on the National Register of Historic Places (“National Register”).¹²⁷ As is the case with NEPA, compliance with NHPA is procedural in nature; NHPA does not require federal agencies to avoid or mitigate adverse effects to historic properties but instead requires agencies only to analyze impacts to such

¹²⁰ *Id.* § 1.1307(c), (d).

¹²¹ *Id.* § 1.1306.

¹²² *Wireless Siting Order* ¶ 14.

¹²³ 16 U.S.C. §§ 1531-1544.

¹²⁴ 16 U.S.C. §§ 703-712.

¹²⁵ 33 U.S.C. § 1344.

¹²⁶ 16 U.S.C. §§ 668-668d.

¹²⁷ 54 U.S.C. § 306108.

properties through consultation with the affected State Historic Preservation Officer(s) (“SHPO”) or Tribal Historic Preservation Officer(s) (“THPO”), the Advisory Council on Historic Preservation (“ACHP”), and the public. NHPA defines an undertaking to include projects “requiring a federal permit, license, or approval.”¹²⁸ The FCC considers its approval of applications resulting in the construction of communications facilities to be “undertakings” under NHPA.

The FCC has incorporated its Section 106 review obligations into its environmental rules.¹²⁹ Therefore, if a project may affect historic properties listed or eligible for listing on the National Register, the project applicant must produce and submit an EA. The FCC will engage in consultation if a licensee or applicant determines that the project will have an adverse effect on a historic property or when a conflict (typically with a SHPO, THPO, ACHP, or the public) arises about whether an adverse effect will occur.

To comply with Section 106, licensees and applicants must follow the procedures established by the ACHP’s rules or such procedures as modified by one of two FCC-specific programmatic agreements: the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (“Collocation Agreement”) or the Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process (“NPA”).¹³⁰

The Collocation Agreement sets forth the historic preservation review process for collocations on existing towers, buildings, and other non-tower structures.¹³¹ The Collocation Agreement exempts most collocations of wireless and broadcast antennas and associated equipment from the standard historic preservation review process and clarifies under what circumstances a collocation is not exempt from the process. Collocations on existing towers are not exempt from historic preservation review if: (1) the collocation will result in “substantial

¹²⁸ *Id.* § 300320.

¹²⁹ *See* 47 C.F.R. § 1.1307(a)(4). Like with NEPA, the FCC is responsible for compliance with NHPA. The FCC, however, has delegated to FCC licensees and applicants some of the necessary steps to comply with NHPA.

¹³⁰ *See* 47 C.F.R. § 1.1307(a)(4). A programmatic agreement establishes specific procedures for a particular program or project type as agreed to by a federal agency, the ACHP, a relevant SHPO/THPO, or, if nationwide in effect, the National Conference of State Historic Preservation Officers (“NCSHPO”). 36 C.F.R. § 800.14(b).

¹³¹ 47 C.F.R. pt. 1, app. B.

increase in the size of the tower”;¹³² (2) the tower is subject to a pending environmental review proceeding or complaint is pending regarding the tower; (3) either the licensee or tower owner has notice that the FCC has received a notification supported by substantial evidence that the tower has an adverse effect on one or more historic properties; (4) the FCC has determined that a tower built prior to March 16, 2001 has an adverse effect on a historic property and such effect has not been resolved or mitigated; or (5) the tower was constructed after March 16, 2001, and has not undergone environmental or historic preservation review.¹³³ On the other hand, collocations on existing buildings or structures do not trigger Section 106 review, unless: (1) the building or structure is more than 45 years old; (2) the building or structure is inside the boundary of a historic district or within 250 feet outside the boundary of a historic district, and the antenna is visible from the ground level anywhere within the historic district; (3) the building or structure is a designated National Historic Landmark or listed in or eligible for listing in the National Register; or (4) either the licensee or tower owner has notice that the FCC has received a notification supported by substantial evidence that the tower has an adverse effect on one or more historic properties.¹³⁴

The NPA sets forth historic preservation review procedures specific to FCC-approved projects, as well as additional exclusions from standard Section 106 review.¹³⁵ To complete a Section 106 review, licensees and applicants must apply the NPA’s standards and procedures for (1) determining whether the proposed project will affect “Historic Properties,” including “[a]ny prehistoric or historic district, site, building, structure, or object included in, or eligible for

¹³² “Substantial increase in the size of the tower” occurs under any of the following: (1) the increase of the existing height of the tower by more than 10 percent or the height of one additional antenna array with separation from the nearest existing antenna not to exceed 20 feet, whichever is greater; (2) more than 4 new equipment cabinets or more than one new equipment shelter will be added; (3) the width of the tower will be increased by adding an appurtenance that is more than 20 feet or more than the width of the tower at the level of the appurtenance, whichever is greater; (4) excavation will occur outside the current tower site. The Collocation Agreement provides some exceptions to size limits defined in the first and third categories. *Id.* I.

¹³³ *Id.* III., IV.

¹³⁴ *Id.* V.

¹³⁵ 47 C.F.R. pt. 1, app. C. Exclusions under the NPA include: tower enhancements that do not involve collocation and do not constitute a “substantial increase in size” as defined in the Collocation Agreement; certain replacement towers that do not involve a “substantial increase in size”; certain temporary towers as defined under the NPA; certain facilities under 200 feet in height located in industrial parks, commercial malls, or shopping centers; certain facilities in designated communications or utility rights-of-way; and facilities in locations previously designated by the SHPO or THPO as having limited potential to affect historic properties. *Id.* III.

inclusion in, the National Register,” and (2) preparing a “Submission Packet” that documents the historic review process and findings.¹³⁶ If the Submission Packet indicates that either (1) no Historic Properties will be affected, or (2) the project will not adversely affect Historic Properties and the SHPO/THPO concurs with either finding, the Section 106 review process is complete.¹³⁷ If, on the other hand, the Submission Packet indicates that the project will have an adverse effect on Historic Properties, the licensee or applicant is required to submit to the SHPO/THPO, FCC, and the ACHP a mitigation plan to avoid or reduce the adverse effect(s).¹³⁸ The licensee or applicant, SHPO/THPO, and other potential consulting parties (including local governments) will then negotiate a “Memorandum of Agreement” regarding mitigation and submit it to the FCC.¹³⁹ Procedures for managing disagreements between the consulting parties are included in the NPA.¹⁴⁰

3. New FCC Rules for Streamlined NEPA and NHPA Review

In the *Wireless Siting Order*, the FCC adopted new regulations designed to streamline NEPA and NHPA compliance for DAS and small cell technologies.¹⁴¹ These regulations establish new categorical exclusions under NEPA and exemptions under NHPA.

The Order established the following new categorical exclusions under NEPA:

- The NEPA exclusion applicable to “antenna,” as used in the Commission’s existing Note 1 categorical exclusion (the “mounting of antenna(s) on existing buildings and antenna towers”), encompasses all on-site equipment associated with the antenna, including transceivers, cables, wiring, converters, power supplies, equipment cabinets and shelters, and other comparable equipment.¹⁴² Leaks or spills resulting from generator maintenance are not federal actions subject to NEPA.¹⁴³

¹³⁶ *Id.* II.A.9, 13.

¹³⁷ *Id.* VII.B, C.

¹³⁸ *Id.* VII.D.

¹³⁹ *Id.* VII.D.4.

¹⁴⁰ *Id.* VII.B, C, D.

¹⁴¹ *Wireless Siting Order* ¶ 1.

¹⁴² *Id.* ¶ 41.

¹⁴³ *Id.* ¶ 43. The Order does not explain how the Commission’s construction of Section 6409(a), which provides that generally applicable public safety and health requirements apply to Section 6409(a) applications, squares with this statement.

- The NEPA exclusion for mounting antennas “on” existing buildings applies to installations in the interior of existing buildings.¹⁴⁴
- The NEPA exclusion for collocations on towers and buildings applies to collocations on other structures, including utility poles, light poles, road signs, and water towers.¹⁴⁵
- An entirely new exclusion for certain wireless facilities deployed in above-ground utility and communications ROWs.¹⁴⁶ This exclusion includes deployments on new or replacement poles if: (1) the facility is located in a ROW designated by a federal, state, local, or tribal government for communications towers, above-ground utility transmission or distribution lines, or any associated structures and equipment; (2) the ROW is in active use for such designated purposes; and (3) the facility will not constitute a substantial increase in size over existing support structures that are located in the ROW within the vicinity of the proposed construction.¹⁴⁷

The Order established the following new exemptions under NHPA:

- A new exclusion from NHPA review for collocations on existing utility structures, including utility poles and electric transmission towers.¹⁴⁸ This exclusion only applies where the deployment meets specified size limitations and involves no new ground disturbance.¹⁴⁹ It also only applies to collocations on utility structures where historic preservation review is currently required under existing rules solely because the structures are more than 45 years old.¹⁵⁰
- A new exclusion for collocations on buildings and other non-tower structures.¹⁵¹ To qualify for this exclusion, several conditions must be met, including: (1) there must be an existing antenna on the building or structure; (2) one of several criteria to mitigate antenna visibility must be satisfied; (3) the new antenna must comply with all zoning conditions and historic preservation conditions applicable to existing antennas in the same vicinity that directly mitigate or prevent adverse visual effects, such as camouflage requirements; and (4) the deployment must involve no new ground disturbance.¹⁵²

¹⁴⁴ *Id.* ¶ 48.

¹⁴⁵ *Id.* ¶ 52.

¹⁴⁶ *Id.* ¶ 60 (incorporated into FCC rules as Note 4 to Section 1.1306).

¹⁴⁷ *Id.* ¶ 61.

¹⁴⁸ *Id.* ¶ 90.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* If a wireless deployment would trigger historic preservation review for other reasons—such as being within the boundary of a historic district or within 250 feet of the boundary of a historic district—this exclusion would not apply. *Id.*

¹⁵¹ *Id.* ¶ 97.

¹⁵² *Id.* Like the new exclusion for collocations on existing utility structures, this new targeted exclusion applies only to collocations where historic preservation review would otherwise be required under existing rules solely because the structures are more than 45 years old. *Id.*

- The NHPA exemption applicable to collocations under the NPA and the Collocation Agreement applies to collocations *inside* of buildings as well as those *on* buildings.¹⁵³

On May 12, 2016, the FCC’s Wireless Bureau released a Public Notice seeking comment on proposed amendments to the Collocation Agreement to facilitate DAS, small cell and “5G” wireless deployment.¹⁵⁴ In general terms, the FCC is proposing new exclusions from NHPA review for (1) small cell facility locations on properties more than 45 years of age that are not historic properties or in historic districts; (2) “minimally visible deployments” of small cell facilities in historic districts or on historic properties; and (3) certain “visible small wireless antennas and associated equipment deployments” in historic districts or on historic properties. Comments on the proposed amendments to the Collocation Agreement were due on June 13, 2016.

VII. CONCLUSION

Federal law limitations notwithstanding, local governments retain an important role to play in wireless facility siting. Recent developments, however, may require local governments to refine and revise their procedures to ensure that they can effectively exercise the authority that federal law still leaves them.

¹⁵³ *Id.* ¶ 105.

¹⁵⁴ *Wireless Telecommunications Bureau Seeks Comment on Proposed Amended Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, Public Notice, DA 16-519 (FCC Wireless Telecomm. Bureau rel. May 12, 2016).

VIII. APPENDIX

A) Text of Section 332(c)(7)

Sec. 332. Mobile Services.¹⁵⁵

...

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) 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.

¹⁵⁵ Telecommunications Act § 332(c)(7).

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph—

(i) the term “personal wireless services” means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term “personal wireless service facilities” means facilities for the provision of personal wireless services; and

(iii) the term “unlicensed wireless service” means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

B) Text of Section 6409(a)

Sec. 6409. Wireless Facilities Deployment.¹⁵⁶

(a) Facility modifications. —

(1) In General — Notwithstanding section 704 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

¹⁵⁶ Middle Class Tax Relief and Job Creation Act § 6409(a).

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.

(3) Applicability of Environmental Laws — Nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969.