

**Revising Local Tower Zoning Regulations to Comply with New FCC Rules**

Jessica Bell  
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**Overview**

- ◆ New FCC rules
  - Implementing the Spectrum Act
  - Clarifying Section 332(c)(7)
  - Streamlining NHPA & NEPA review for DAS and small cell
- ◆ *T-Mobile South, LLC v. City of Roswell*
- ◆ Best practices

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**FCC Rulemaking**

***In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies***

- ◆ *NPRM*: FCC 13-122, Sept. 26, 2013, WT Docket No. 13-238, 28 FCC Rcd. 14,238, 78 Fed. Reg. 234 (Dec. 5, 2013).
- ◆ *Order*: FCC 14-153, Oct. 21, 2014, WT Docket No. 13-238, 29 FCC Rcd. 12,842, 80 Fed. Reg. 1238 (Jan. 8, 2015).

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### The Spectrum Act § 6409(a)

“[A] State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.”

47 U.S.C. § 1455(a)

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### Definitions

- ◆ Transmission equipment
- ◆ Tower
- ◆ Base station
- ◆ Existing
- ◆ Collocation
- ◆ Eligible support structure
- ◆ Eligible facilities request
- ◆ Substantially change the physical dimensions

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### Substantial Change in Physical Dimensions

<b>Towers outside the ROW:</b> 10% or the height of one additional antenna array (≤ 20 ft separation from nearest existing antenna) – whichever is greater 20 ft or more than the width of the tower at the level of the appurtenance – whichever is greater	<b>Towers in the ROW and all base stations:</b> 10% or 10 ft – whichever is greater 6 ft
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**Substantial Change in Physical Dimensions**

- ◆ Installation of more than standard number of equipment cabinets (but no more than 4)
- ◆ Excavation or deployment beyond the current site
- ◆ Defeats the existing camouflage elements
- ◆ Does not comply with conditions associated with the prior zoning approval of construction or modification (unless non-compliance is due to an otherwise permitted expansion)

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**6409(a) Application Review Process**

- ◆ 60 days for local review
- ◆ Deemed granted if not approved within 60 days (accounting for any tolling)
- ◆ Can require documentation “reasonably related to determining whether the request meets the requirements” of 6409(a)
- ◆ Can require compliance with “generally applicable building, structural, electrical, and safety codes or with other laws codifying objective standards reasonably related to health and safety”
- ◆ Does not apply to local governments acting in their proprietary capacities

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**Section 332(c)(7)**

- ◆ Telecommunications Act of 1996
- ◆ Limited preemption of state and local authority
- ◆ 2009 *Shot Clock Order*: statutory requirement to act within “reasonable period of time”
  - 90 days for collocations
  - 150 days for all other applications

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**“Clarifications”**

- ◆ Shot clock runs regardless of local moratoria
- ◆ Shot clocks apply to DAS and small cell applications (note, a deployment requiring new poles is subject to the 150-day clock)
- ◆ Municipal property preferences not *per se* discriminatory
- ◆ Application review process

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**332(c)(7) Application Review Process**

- ◆ Shot clock begins upon submission of application (not when it is deemed complete)
- ◆ In the case of an incomplete application:
  - Request for more info within 30 days will toll the shot clock *if* a publicly-stated procedure requires that info
  - Once applicant submits additional info, shot clock begins to run again
  - Reviewing authority has 10 days to notify applicant that application remains incomplete—must be related to info previously requested
- ◆ NO deemed granted remedy...but failure to comply with shot clock can be a “significant factor” in favor of injunctive relief

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**National Environmental Policy Act**

- ◆ Expand categorical exclusion for “antenna” to include all on-site equipment associated with the antenna
- ◆ Expand exclusion for mounting antennas “on” existing buildings to installations in the interior of existing buildings
- ◆ Expand exclusion for collocations on towers and buildings to include other man-made structures
- ◆ New exclusion for certain facilities in above-ground utility and communications ROW

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**National Historic Preservation Act**

- ◆ New exclusion for collocations on existing utility structures (size limitations, no new ground disturbance) where NHPA is triggered because the structure is over 45 years old
- ◆ New exclusion for collocations on buildings and other non-tower structures in certain cases

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**T-Mobile South, LLC v. Roswell: Background**

- ◆ "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." Section 332(c)(7)(B)(iii).
- ◆ Circuit split: simple denial versus decision with reasons
- ◆ Roswell's notice to T-Mobile: "Please be advised the City of Roswell Mayor and City Council denied the request from T-Mobile for a 108' mono-pine alternative tower structure during their April 12, 2010 hearing. The minutes from the aforementioned hearing may be obtained from the city clerk. Please contact Sue Creel or Betsy Branch at [phone number]. If you have any additional questions, please contact me at [phone number]."

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**T-Mobile South, LLC v. Roswell: The Decision**

- ◆ Locality must provide reasons for denial
- ◆ *But* those reasons can be in a document separate from the written denial
- ◆ *But* any other document must be "essentially contemporaneously" available with the denial letter
- ◆ 135 S.Ct. 808 (2015)

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### 6409(a) Best Practices

- ◆ Have procedures to identify 6409(a) “eligible facilities requests” very quickly as they come in
- ◆ Have clear application requirements
- ◆ Streamline process for review, including process for requesting more information
- ◆ Remember that generally applicable health and safety requirements can be imposed, *even on an application deemed granted*

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### 332(c)(7) Best Practices

- ◆ Review application requirements for all facilities (collocations and new structures)
- ◆ Ensure that application requirements are clear and that review for completeness is thorough
- ◆ Consider imposing conditions on modifications and new construction that would carry over to subsequent “eligible facilities requests”
- ◆ Consider what the addition of an “eligible facilities request” would look like when reviewing applications for new structures
- ◆ Include reasons for denials

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### A Recent Warning from Commissioner O’Rielly

“The FCC also needs to review its wireless buildout rules and policies, as well as other technical requirements, to ensure that they encourage, rather than hinder, network expansion. That is the policy side of the Commission’s activities, which I am working hard to make happen. Part of this will require cooperation by the local governments. The simple fact is that wireless providers are going to need to install thousands of new facilities to provide service. I get the fact that not everyone likes the [aesthetics] of towers but they are a necessity for wireless broadband. For those local governments that stall or try to block tower siting, know that you will see the Commission step in with appropriate authority to push things forward.”

*Remarks of FCC Commissioner Michael O’Rielly at Rep. Dave Brat (R-VA) Town Hall, 9/23/15*

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Questions?

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