New York Law Journal
Real Estate Trends
WWW.NYLJ.COM
An ALM Publication
VOLUME 265—NO. 100
WEDNESDAY, MAY 26, 2021

ZONING AND LAND USE PLANNING

Local Govt's React to FCC's 'Small Cell' Rules

By **Anthony S. Guardino**

Mobile wireless services function by receiving and transmitting information between devices over radio waves through a network of antennae and similar equipment. Each collection of communications equipment operating over a given area is commonly known as a "cell." In legacy networks (for example, 3G and 4G), telecommunications providers generally use macro cell sites to provide coverage over wide areas.

The newest generation of cellular wireless technology is known as "5G," for fifth generation. It is seen as transformational because it provides increased bandwidth, allows more devices to be connected at the same time, and is so fast that connected devices receive near instantaneous responses from servers.

5G leverages 4G macro cell sites but also relies on "small cells" with coverage areas of hundreds of feet. Because the coverage area is small, an effective 5G network requires placement of a large number of cell sites in close proximity to each other. A small cell typically consists of a single small antenna and related accessory equipment placed on existing utility poles or street lights within public rights of way.

These small cells have become subject to a wide variety of regulations by local governments unhappy with the proliferation of cell towers and other 5G transmission facilities. In response, the Federal Communications Commission (FCC) has promulgated a series of orders relating to the installation and management of small cell facilities, including the manner in which local governments may regulate them.

Two of the FCC orders issued in 2018 were challenged in court but for the most part were upheld by the U.S. Court of Appeals for the Ninth Circuit in *City of Portland v. Federal Communications Commission*, 969 F.3d 1020 (9th Cir. 2020). While a petition for certiorari in that case is pending before the U.S. Supreme Court (*see* https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-1354.html), a growing number of municipalities already have begun the process of amending their local ordinances in an effort to regulate small cells to the extent authorized by the FCC's orders.

After describing the essential provisions of the orders of particular interest to zoning and land use officials, this column will review the Ninth Circuit's decision and briefly discuss how one Long Island municipality has amended provisions of its village code to address small cells.

The FCC's Rules

In 2018, the FCC issued its "Moratoria Order," 33 FCC Rcd. 7705, 7775-91 (2018), and its "Small Cell Order," 33 FCC Rcd. 9088 (2018).

In the Moratoria Order, the FCC focused both on "express moratoria," which are written legal requirements that prevent or suspend the processing of permits and applications necessary for deploying wireless facilities, and "de facto moratoria," which effectively prevent or suspend such processing but are not codified.

These moratoria, the FCC decided, "prohibit or have the effect of prohibiting" the deployment of facilities necessary to provide telecommunications service within the meaning of Section 253 of the Communications Act of 1934 (the Act). The FCC also decided that moratoria that are time-limited can violate Section 253 because some localities impose "temporary" moratoria without

ANTHONY S. GUARDINO *is a partner with the Farrell Fritz, P.C. in the firm's Long Island office. He practices in the areas of land use, zoning, and environmental law. He serves as counsel to Village of Huntington Bay, which recently adopted a local law governing small cell sites.*

definite end dates or continually extend them.

The Small Cell Order addresses when other state or local actions "prohibit or have the effect of prohibiting" the provision of wireless service and the timeframes within which state and local governments must act on small cell applications. It states that:

- The appropriate standard to examine a state or local action is whether it "materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment";
- State and local fees associated with the deployment of wireless infrastructure comply with the "materially limits or inhibits" standard if they are non-discriminatory and reasonably approximate the state or locality's reasonable costs; and
- Aesthetic requirements comply with the "materially limits or inhibits" standard if they are reasonable, non-discriminatory, and "objective and published in advance." To demonstrate this, the FCC ruled, aesthetic requirements must not burden small wireless facilities more than similar infrastructure deployments, and must "incorporate clearly-defined and ascertainable standards, applied in a principled manner."

Regarding fees, the FCC identified a "safe harbor" of presumptively valid fees, including a $500 "upfront" application fee for up to five small wireless facilities or a $1,000 non-recurring fee for a new utility pole, and $270 per small wireless facility per year for all recurring fees.

In addition, the Small Cell Order separately set forth "shot clocks" (or time limits) governing review of applications for wireless facilities. The FCC set a time limit of 60 days for attachment of a small wireless facility to an existing structure and 90 days for a new structure. The FCC explained that in situations where a jurisdiction misses a shot clock deadline, the applicant should, in most cases, be able to obtain expedited relief in court under Section 332(c)(7) of the Act, which directs courts to decide suits brought by any adversely affected person on an "expedited basis."

> Many municipalities have laws that regulate telecommunications facilities, but most apply only to antenna towers and other macro cell sites—not small cells. As service providers seek to rapidly deploy the small cells needed to support their 5G networks, local governments are reacting by adopting new laws to regulate small cells.

According to the Small Cell Order, in such cases, applicants should have a relatively low hurdle to clear in establishing a right to expedited judicial relief, given that missing the shot clock would amount to a presumptive violation of Section 332(c)(7).

The Ninth Circuit's Decision

Numerous local governments challenged the FCC's orders and the limits the orders imposed on their authority to regulate telecommunications providers.

The arguments against the Moratoria Order included that it was overly broad because it preempted even benign seasonal restrictions on construction, such as freeze-and-frost laws, that it was an invalid application of Section 253, and that it was self-contradictory in its definitions. The Ninth Circuit found no merit in any of these contentions.

It pointed out that the FCC explained that municipal ordinances "of general applicability" would qualify as de facto moratoria only where the delay caused by the ordinances "continues for an unreasonably long or indefinite amount of time such that providers are discouraged from filing applications." Therefore, the Ninth Circuit continued, municipal regulations on construction are not preempted if they "simply entail some delay in deployment."

The circuit court also rejected the argument that Section 253 preempts only laws that specifically target the provision of telecommunications services while the Moratoria Order

preempts laws of general applicability, finding that Section 253(a) "is not so limited" and looks to "both the language and impact of local regulations."

The Ninth Circuit then found nothing inconsistent or unexplained in the FCC's separate definitions of express and de facto moratoria and upheld its decision to permit emergency bans on 5G deployment where the regulations are competitively neutral and intended to remedy an ongoing public safety concern.

The local governments also challenged the Small Cell Order on various grounds.

First, they objected to the fee limitations, asserting that there was no rational connection between whether a particular fee is higher than a local government's costs, and whether that fee is prohibiting service.

The Ninth Circuit found that the FCC did not base its fee structure on a determination that there was a relationship between a particular jurisdiction's fees and prohibition of services but, rather,

that above-cost fees, in the aggregate, were having a prohibitive effect on a national basis. Moreover, the circuit court found, the FCC's key factual finding—that high fees were inhibiting deployment both within and outside the jurisdictions charging high fees—was supported in the record.

The Ninth Circuit then decided that the FCC's approach to fees is consistent with the language and intent of Section 253(c) and "is reasonably explained." It also ruled that the presumptively permissible fee levels "are not arbitrary and capricious."

Similarly, the circuit court upheld the FCC's decision to shorten the shot clock time, reasoning that if an applicant for a permit seeks an injunction to force a faster decision, local officials can show that additional time is necessary under the circumstances. It also upheld the FCC's decision to expand shot clocks beyond zoning applications to all applications for deployment of wireless services, finding that the FCC had reasonably decided that limiting shot clocks to zoning permits could lead states and localities to "delay their consideration of other permits (e.g., building, electric, road closure or other permits) to thwart the proposed deployment."

The Ninth Circuit upheld the Small Cell Order with the exception of one provision dealing with the authority of local governments in the area of aesthetic regulations. It ruled that to the extent that provision requires small cell facilities to be treated in the same manner as other types of communications services, the regulation is contrary to the congressional directive that allows different regulatory treatment among types of providers, so long as that treatment does not "unreasonably discriminate among providers of functionally equivalent services." It also held that the requirement that all aesthetic criteria must be "objective" lacks a reasoned explanation and had to be vacated.

Need for New Local Laws

Many municipalities have laws that regulate telecommunications facilities, but most apply only to antenna towers and other macro cell sites—not small cells. As service providers seek to rapidly deploy the small cells needed to support their 5G networks, local governments are reacting by adopting new laws to regulate small cells.

To date, few communities have amended their local codes to establish a framework for small cell regulation, but this undoubtedly will be changing in the near term.

By way of example, the Village of Huntington Bay, in Long Island's Suffolk County, adopted a local law governing the permitting, development, siting, installation, design, operation, and maintenance of wireless telecommunications facilities in the village's public rights-of-way. *See* https://ecode360.com/33309797.

In many respects, the 17 detailed sections of the 26-page law, which allows the village to regulate small cell sites in its right-of-ways, can be seen as a response to the growth of 5G technology in a way that is guided by the FCC's orders.

After beginning with a section on legislative intent (including that the new law is "not intended to prohibit or have the effect of prohibiting the provision of adequate communications systems"), the village law continues with a series of definitions (from "accessory equipment" to "wireless telecommunications services").

It then explains, among other things, the permits required for wireless telecommunications facilities or modifications to existing wireless telecommunications facilities; the contents of an application for the required special permit; the review procedure; and the requirement that wireless telecommunications facilities located within a public right-of-way be designed and maintained so as to minimize visual, noise, and other impacts on the surrounding community. *See, also,* Town of Huntington local law regarding wireless telecommunications facilities, *available at* https://www.ecode360.com/HU0566/laws/LF1331987.pdf.

Conclusion

The latest FCC orders governing small cell sites, as upheld by the Ninth Circuit, are the federal rules with which local governments now must comply. To date, few communities have amended their local codes to establish a framework for small cell regulation, but this undoubtedly will be changing in the near term. 5G is coming, and small cell sites will become widespread.