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FCC Cell Tower Zoning Preemption Proceeding

by

John W. Pestle*

prepared for

IMLA

September 2008

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* John W. Pestle represents municipalities across the country on cable, telecommunications and utility-related matters, from large cities such as Detroit to small communities. He is a past Chair of both the Municipal Lawyers Section of the State Bar of Michigan and Legal Section of the American Public Power Association. He received a special award of merit from the Michigan Municipal League in 2006 for his work for municipalities on cable and right of way matters and received the "Member of the Year" award from the National Association of Telecommunications Officers and Advisors in 1996 for his representation of municipalities on the Federal Telecommunications Act of 1996. Mr. Pestle is a graduate of Harvard College, Yale Graduate School, and the University of Michigan Law School.

Introduction

- Cell phone companies have petitioned FCC for ruling to effectively preempt much local zoning of cell towers
  - Apparently on fast track for completion before January 20, commissioners change
  - Could set precedent for preemption of zoning, code enforcement, for radio station, TV towers
- Prior FCC attempts at zoning preemption rejected by Congress, FCC
  - Broadcast (radio, TV) towers
  - Cell towers
- Congress in 1996 preserved local zoning of cell towers, rejected pending FCC zoning preemption proceeding
  - 47 U.S.C. § 332(c)(7), titled "Preservation of Local Zoning Authority"

Timing

- Current proceeding prompted by June *Alliance for Community Media* decision on cable franchising
  - Upholding FCC authority to issue time frames for municipal action on cable franchise applications
- Petition is an attempt to obtain a similar ruling on cell tower zoning before FCC Commissioners change with change in administrations
- Short times to respond
  - Comments due Sept 29, Replies Oct 14
  - This is two week extension from original due dates

Cellular Industry Petition - 4 Requests

- 75 day "shot clock" for "final action" by municipalities on zoning applications for new cellular towers, antennas
  - If deadline not met, approval automatically deemed granted
- 45 day "shot clock" for final action on applications to collocate antennas on existing towers, structures
  - If deadline not met, approval automatically deemed granted
- Preempt zoning ordinances where variances are required for cell towers
  - If variance required for a cell tower, cell companies will likely argue local approval is preempted, not needed

Cellular Industry Petition - 4 Requests (cont.)

- Prevent municipalities from considering whether other cell companies provide service in the area in question in determining whether there is a "gap" in coverage warranting a new tower
  - Effectively reverse Third Circuit and similar decisions on this point

Analysis - Concerns

- Congress in 1996 refused to preempt local zoning of cell towers, instead preserved it, with mainly procedural additions. 47 U.S.C. § 332(c)(7).
  - Ever since, cellular industry has tried to overcome this refusal
  - Initially by industry attempting restrictive interpretations (rejected by courts) of Section 332(c)(7)
  - Recently by claiming zoning is preempted by the "no barrier to entry" provisions of 47 U.S.C. § 253
    - Some success in Ninth Circuit, in case currently in en banc rehearing
  - Current petition is the latest attempt
- Zoning, and balancing of competing concerns, is inherently local
  - Each application is unique, has its own issues, timing
  - FCC cannot be "national zoning board" for cell towers
  - Or impose "one size fits all" deadlines, rules

Analysis – Concerns (cont.)

- No "crisis" or barriers in cell tower zoning warranting action
  - As shown by the over 214,000 cell towers in place
- Proposed deadlines ignore Federal, state and local zoning procedures, realities
  - State notice, hearing requirements
  - Appeals as of right from planning/zoning commission to Board of Zoning Appeals
  - Federal cases requiring written decision, separate from the record, with adequate explanation of reasoning
  - Incomplete applications, slow responses by cell companies to questions
  - Are particularly troublesome for contentious cases (such as cell towers in residential areas) which require the most time to resolve

Analysis – Concerns (cont.)

- Proposals encourage providers to “run out the clock” with bad applications, delays
  - Deficient, incomplete applications
  - Slow responses to requests for information
  - Appeals by provider to Board of Zoning Appeals
- Proposals encourage non-conforming towers
  - Application for 101' tower (where only 100' towers allowed)
  - So provider can claim "variance" and thus preemption of need for any local zoning approval

Legal Objections

- Violates Constitutional cases on Federalism
  - "Blurs lines of political accountability"
- Violates "preservation of local zoning authority" provisions of 1996 Act and Committee Report
  - Which state "no preferential treatment" for cell tower zoning
  - Time to act is "reasonable time", "usual period of time" for zoning decisions
- Violates 1996 Congressional directive for FCC to terminate zoning preemption rulemaking
- Unduly tries to expand Section 253
- Violates normal procedures for resolving conflicts between Circuits

What Municipalities Should Do

- File comments at FCC
- Write U.S. Representatives, Senators, asking them to oppose cellular industry Petition
- See www.varnumlaw.com/serviceGroups/cableTV/cellularwireless for
  - Sample letters
  - Information on filing comments

****For Use by Municipalities in States other than Michigan****

[for Michigan version, see our web page at http://www.varnumlaw.com/serviceGroups/cableTV/cellularwireless/]

****Send this letter to your US Senators and Representative****

****Fax or email copies—Security screening delays mailed letters****

****Send copies to municipal groups as indicated so they can follow up****

****And send copies to any of your states Senators or Reps who are on the House or Senate Commerce Committees - - see http://energycommerce.house.gov/membios/110fullmship.shtml and http://commerce.senate.gov/public/index.cfm?FuseAction=About.Members ****

The Honorable _____ [your senior US Senator] fax 202-___-____
Senate Office Building
Washington, DC 20510

The Honorable _____ [your junior US Senator] fax 202-___-____
Senate Office Building
Washington, DC 20510

The Honorable _____ [your U.S. Representative] fax 202-___-____
House Office Building
Washington, DC 20515

via mail and facsimile

Dear Senator _____, Senator _____, and Representative_____:

Please help stop the current Federal Communications Commission proceeding to effectively preempt local zoning of cellular towers. There is no need for Federal intervention here. The FCC's proposed action directly violates the Telecommunications Act Congress passed in 1996 which preserves local zoning of cell towers (and directed the FCC to dismiss proceedings that would have restricted local zoning of cell towers). Please stop this proceeding in the current budget process by telling the FCC that no funds can be spent on it. And contact the FCC to register your strong opposition to this proceeding, telling them to take no action regarding it.

Please do these things quickly, as the FCC has asked for comments in September, and appears to be trying to act on this before the change in administrations.

There is no "crisis" or problem with cell tower zoning. The several hundred thousand

cell towers already in place, with new ones being added every day, show this.

Despite this, the FCC recently started a proceeding (at the request of the cellular industry) to preempt local cell tower zoning, known as WT Docket 08-165. In it, the FCC proposes among other things to implement 45 and 75 day "shot clocks" for municipalities to act on local zoning approval for cell towers, with such applications "automatically deemed granted" if the deadlines are not met. But in 1996 Congress said that the time for municipalities to act on cellular zoning requests are the "generally applicable time frames for zoning decisions", taking into account the "nature and scope of each request", and without giving "preferential treatment" to the cellular industry.

The proposal ignores local zoning procedures, such as the need to notify area residents, scheduling and notice requirements for municipal meetings, the fact that zoning bodies don't meet daily or weekly, and people's ability to appeal decisions from (for example) a zoning commission to a board of zoning appeals or to a city council. In fact, the FCC's deadlines provide incentives for cell companies to delay and appeal zoning matters within a municipality so as to ensure that a deadline is not met.

The proposal also ignores the wide variation in 35,000 municipalities nationwide, and the fact that each cell tower zoning application is unique. Complex or contentious applications may take more than 75 days to resolve. This is particularly the case for cell towers in residential areas where it takes time to conduct the engineering studies necessary to see whether there truly is a "gap" in service that needs to be filled, how tall a tower must be to fill the gap, what alternative solutions are available, and (if a tower in fact is needed) whether it needs to be camouflaged in a sign or as a tree to preserve the character of the neighborhood.

Zoning is - - and always has been - - a matter of uniquely local concern. The FCC cannot be the "local zoning board" for cell towers nationwide. Congress recognized this when in 1996 you preserved local zoning of cell towers and told the FCC to get out of the cell tower zoning business. The FCC proposal ignores this Congressional direction, so please cut off funding for this FCC proceeding, and tell the FCC not to adopt these proposals.

Sincerely,

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