2021 Cell Tower Zoning Update

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for

International Municipal Lawyers Association

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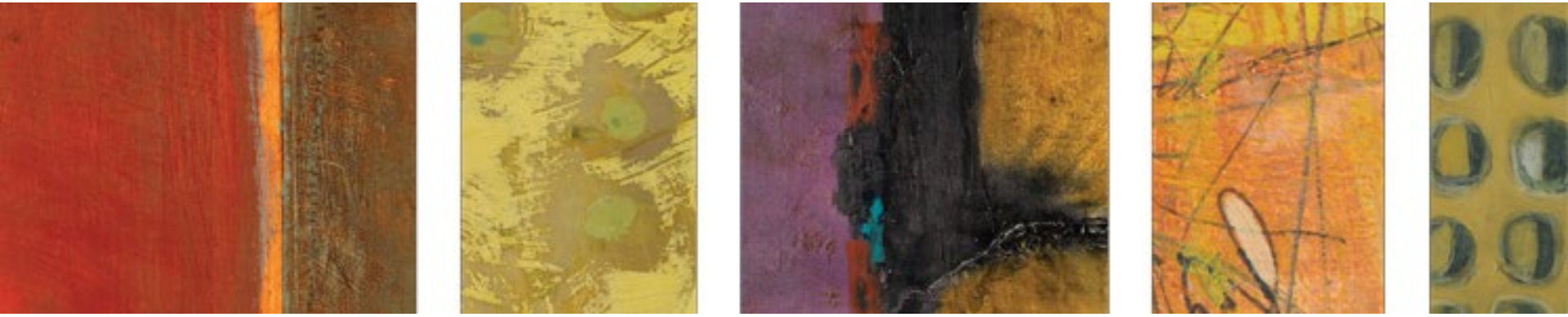

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Varnum Law Firm

- One of Michigan's largest law firms - - 133 years old
- Corporate firm with significant communications, municipal and utility practice
- For 25 years:
  - Representing property owners on cell tower leases
  - Representing municipalities on cell tower zoning
  - Representing clients on sale of over 100 cell leases
- Offers model cell tower and antenna leases, drafted from property owners' perspective at www.varnumlaw.com/lease
- Cell tower blog (www.varnumlaw.com/pestle-publications ***and scroll to bottom of page***) with many posts on selling leases, likely sales prices, timing, terms, etc.

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John Pestle

- Over 30 years' experience in communications, utility and energy law
- Actively involved on 1996 Telecom Act, 47 USC §§253, 332
- Chair of Varnum's Telecommunications Practice Group
- Graduate of Harvard College, Yale Graduate School and the University of Michigan Law School
- Admitted in Arizona and Michigan
- Past Chair of Municipal Lawyers Section of Michigan Bar and Legal Section of American Public Power Association
- Held FCC license to work on radio, TV, ship radar transmitters
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Outline of Presentation

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Part I - - Introduction

5G Cell Service

- 5G - - Overhyped and under delivered:
  - High speed/high frequency version could be next generation of cell service – But very expensive to deploy (billions), so is being rolled out very slowly - - A few dense urban areas first, later to some suburbs, not at all to most rural areas.
    - But only around ½ of 1% of the U.S. has it!
  - Many publicized 5G rollouts are low frequency/low speed version - - Basically are current cell towers with low frequency 4G radios swapped for 5G radios on same frequency - - no real speed increase
  - Used as tactic to scare property owners into unfavorable terms
- Current cell towers will continue, either converted to low speed 5G or to fill in gaps inherent in high speed 5G

Background - - Federal Cell Laws

- Long and continuing series of industry efforts to preempt local cell tower zoning. Many prior attempts:
  1. 1995 FCC Rulemaking to preempt local zoning, stopped by . .
  2. 1996 Act, 47 U.S.C. § 332(c)(7)
  3. Aggressive industry positions in initial cases under §332(c)(7), largely rejected by courts
  4. San Diego case challenging all local cell tower zoning under 47 USC § 253, rejected by courts 543 F.3d 571
  5. Shot clock orders in 2009 and 2010
  6. Various proposed Federal bills, ca. 2011-2012
  7. FCC 2011 Notice of Inquiry on Public Rights of Way and Wireless Siting
  8. 2012 Middle Class Tax Relief Act adds Section 6409(a) requiring approval of many tower changes

Background (cont'd)

9. 2014 Order implementing Section 6409(a) exempts many changes to antennas, facilities from local zoning
10. Change to pro-industry Trump FCC after 2016 election
11. March 22, 2018 FCC Second Report and Order exempting small wireless facilities from Federal Environmental and Historic Preservation laws
12. July 19, 2018 FCC Broadband Development Advisory Committee's model code for telecommunications, small cell deployment, right of way usage
13. August 2, 2018 FCC Third Report and Order that moratoria (express or de facto) on small cell, other wireless and wireline facilities violate 47 U.S.C. § 253
14. Proposed legislation, e.g. Senate Bill 3317 of 2017-2018 Congress, similar to item 11 and Order

Background (cont'd)

15. 2018 5G/Small Cell Order requiring approval of small cells in rights of way to aid 5G rollout
16. Industry push to get additional favorable FCC rulings prior to potential change to Biden FCC
17. June, 2020 FCC Order "clarifying"/expanding local zoning exemption of 2014 Order
18. November, 2020 FCC Order further expanding exemption to areas outside leased area

Result

- Generally five sets of Federal laws and orders applicable to cell tower and communications tower zoning, etc.
  1. 47 U.S.C. § 332(c)(7), added in 1996 (cell antennas and towers)
  2. Shot clock orders from 2009 and 2010 (same)
     - Now codified in Rules adopted by 5G Order
  3. Public Law 112-96 § 6409(a) and 2014 Order and later orders interpreting same (all communications towers)
  4. August 2, 2018 FCC Moratoria Order (all telecommunications services)
  5. September 26, 2018 5G Order (small cells; all cells)

Result (cont'd)

- Federal communications law now generally divides communications towers into several classes - - with shot clocks varying from 60 to 150 days:
  1. New cell towers that are not small cells - - Mainly 47 USC § 332(c)(7) - - 150 day shot clock
  2. Cell antennas on existing structures that are not small cells - - 90 day shot clock
  3. Small cells - - 5G Order - - 60/90 day shot clock
  4. Communications tower modifications
     a. If "insubstantial" - - Public Law 112-69, § 6409(a) and FCC 2014 and two 2020 Orders - - 60 day shot clock
     b. If "substantial" - - 47 USC § 332(c)(7) - - 90 days
  5. Generally state cell law shot clocks and the like apply if more restrictive

Part II - - Ninth Circuit 2020 Decision on FCC 5G/Small Cell Order

Part II.A - - Brief Summary of 2018 FCC 5G/Small Cell Order

- FCC Declaratory Ruling and Third Report and Order, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket 17-79, WC Docket 17-84, adopted, September 26, 2018 ("5G Order" or "Small Cell Order") https://docs.fcc.gov/public/attachments/FCC-18-133A1.pdf
- Order addresses two topics, as reflected in the following two 1-page summaries
  - Small cells in streets (best known for this), and
  - Certain aspects as to all other cell sites
  - Order is 106 pages long, so following summaries omit much detail - - Contact John Pestle or IMLA for copy of November, 2019 Webinar analyzing Small Cell Order in detail

1 Page Summary, Small Cells in Streets

- Small wireless facility ("SWF") defined: Up to 3 cubic feet for antenna, up to 28 cubic feet for equipment, on 50' structure or <10% taller than that structure or nearby structures
- ALL local gov't approvals needed for SWF acted on . . .
- 60 days from application (collocate on existing structure)/90 days (locate on new structure)
- Applicant can go to court if not approved/shot clock exceeded
- Fees limited to costs; presumes application fees of up to $500 for up to 5 SWF's; annual fees $270/SWF are less than costs
- Aesthetic requirements must be reasonable, published in advance, no more burdensome than for other infrastructure
- Undergrounding not allowed (equipment?)
- Existing small cell agreements not grandfathered per se, may reexamine case by case

1 Page Summary, All Other Cell Sites

- These two provisions of the Order apply to all applications for zoning, building or other permits or approvals for cell towers and antennas
  1. 90 day shot clock now applies to towers or antennas on any existing structure, even if it has no antennas now
  2. ALL local gov't approvals needed for a cell site must be acted on within the applicable shot clock (60, 90, 150 days)
- Cost-based cap on application fees/presumed reasonable amounts on prior page applies to SWF's located on government land outside the rights-of-way - - cap is for all local gov't approvals

Part II. B - - 2020 Ninth Circuit Decision

- Small Cell Order (and two related orders) were appealed to the Ninth Circuit in City of Portland v. United States, 969 F.3d 1020, 2020 WL 4669906 (9th Cir., 2020) reh'g en banc denied ("Portland"): In summary Portland:
  - Generally upheld the Small Cell Order on Chevron (deference to agency decisions) grounds, Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ("Chevron") but . . .
  - Rejected requirement for "aesthetic" standards to be "objective" and no more burdensome than those imposed on other infrastructure, and
  - Dissent would reject Order's prohibition on above cost fees for small cell deployments

Ninth Circuit - - Aesthetics

- Small Cell Order says, "aesthetics requirements are not preempted if they are (1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance." Small Cell Order ¶ 86; Portland 1040.

Ninth Circuit - - Aesthetics (cont'd)

- Aesthetic requirement rejected by Court for two reasons:
- First, it violates 47 U.S.C. § 332(c)(7)(B)(i)(I) which prohibits only "unreasonable" discrimination, and allows "reasonable regulatory distinctions among functionally equivalent, but physically different services".
  - Court rejected FCC argument that
    - Any difference in aesthetic requirements from other infrastructure (such as different paint colors for different providers), or
    - That increases costs
  - Is unreasonable and thus preempted. Id. 1040, 1041.

Ninth Circuit - - Aesthetics (cont'd)

- Second, the Court rejected the FCC requirement for
  - Aesthetic standards to be "objective", meaning with "clearly-defined and ascertainable standards, applied in a principled manner"
  - And ruled that the FCC position that all "subjective standards are without public benefit and address no public harm is unexplained and unexplainable" and "arbitrary and capricious". Id. 1042
- It said the Order impermissibly "targets for preemption regulations focused on legitimate local objectives, such as ordinances requiring installations to conform to the character of the neighborhood" and "limits regulations meant to serve traditional zoning objectives of preventing deployments that are unsightly or out of neighborhood character." Id. (emphasis supplied)

Ninth Circuit - - Costs

- By 2 to 1, the Court upheld the Order's limiting small cell fees to a municipality's costs, with a "safe harbor" of a $500 initial fee and $270/yearly fee presumed reasonable, with larger fees allowed if a municipality can show its actual costs are larger. Id. 1037-1039.
- Municipalities have argued for decades that 47 USC §253's language allowing "fair and reasonable" compensation for use of the right of way is not cost limited.
  - The court said "this does not mean that state and local governments should be allowed to make a profit by charging fees above costs." Id. 1039, and
  - Upheld the FCC conclusion that above cost fees "in the aggregate" have a prohibitive effect nationally, such that high fees in one jurisdiction prevent deployment in other jurisdictions."

Ninth Circuit - - Costs (cont'd)

- Then recited the FCC finding that "there was no readily available alternative" to determining what fees are reasonable "without a cost-based focus."
- And went on to state that:
  - "Administrability is important" when reviewing agency decisions under Chevron,
  - And municipalities challenging the Order did not suggest any "workable standard" that would not require "an examination of the prohibitive effect of fees in each of 89,000 state and local governments."

Ninth Circuit - - Costs (cont'd)

- The dissent strongly disagreed with the majority's conclusion on fees, as violating both 47 USC §253 and Ninth Circuit precedent not limiting fees to costs. Id. 1053-1056. Among other things:
  - "In my view, the FCC on this record has not adequately explained how all above cost fees amount to an 'effective prohibition' on telecommunications or wireless service under 47 U.S.C. §§ 253(a) and 332(c)(7)(B)(i)(II)." Id. 1053
  - Effective prohibition is the standard under both statutes, and "fees are prohibitive because of their financial effect on service providers, not because they happen to exceed a state or local government's costs" such as "by 1¢". Id. 1054
  - And the study the FCC relied on about fees only says that lower fees will save the providers money, which is obvious, not that fees above cost prohibit service. Id. 1055

Part II. C - - What Municipalities Can Do

In General

- Ninth Circuit decision was a facial challenge to the Small Cell Order, and in some respects, such as on costs, is disappointing to municipalities.
- But particularly on aesthetics (see below) was a major win for municipalities.
- And has occurred for 25 years since the passage of 47 USC § § 253 and 332 (c)(7) in 1996, municipalities can challenge the Order as applied on case-by-case basis in courts in their Federal Circuit (especially if not the Ninth Circuit) as/if providers invoke the Order locally, take municipalities to court for non-compliance

Aesthetics

- Decision is a strong reaffirmation of local zoning authority and principles on aesthetic grounds, as set forth in 25 years ago in 47 USC § 332 (c)(7) and its legislative history, recited in part by the Court
- In particular the Court's upholding zoning rules requiring "installations to conform to the character of the neighborhood" and preventing "deployments that are unsightly or out of neighborhood character." Id. 1042
- This is especially important with the major proliferation of small cells in the rights of way (ultimately in hundreds of thousands)

Aesthetics (cont'd)

- Resulting citizen/municipal questioning, pushback on same (e.g. Tucson) on grounds set forth by Court.
- May lead to appropriate changes in standard, unsightly, mass produced installations proposed by cell companies
- Such as where appropriate more stealth, concealed, harmonious installations - - such as in residential areas where all utilities are underground

Grounds for Legal Challenge

- Multiple grounds for challenge, several broad categories:
  - Statutory - - Non-compliance with, violation of underlying statutes, namely 47 USC §§ 253, 332(c)(7);
  - Chevron deference to agency decision making inapplicable, and may be overturned, restricted by more conservative judiciary, some of whom have questioned it
  - Constitutional grounds, such as violations of 5th and 10th amendments and Commerce Clause (see also discussion in Part III.D, below)
- Some grounds briefly outlined below, too complex to go into detail
  - For more detail see various briefs submitted to Ninth Circuit in Portland - - go into arguments in detail on issues, both pro and con

Statutory Challenges

- Several possible bases, some fairly technical, including items such as the following:
- FCC reliance on/use of § 253 misplaced because § 332(c)(7) (both Sections enacted at same time in 1996) says "nothing in this Chapter" (Chapter 5, Sections 151 to 623 of Telecommunications Act, which thus includes § 253) limits local authority over cell towers
- § 253 preserves local management of rights of way, Order effectively undercuts it with short time frames, especially for new poles or structures in rights-of-way
- FCC interpretation of statutes effectively gives it condemnation, eminent domain authority which it does not have

Statutory Challenges (cont'd)

- § 253 preserves local right to "fair and reasonable **compensation**" for use of rights of way, which is more than just reimbursement of "actual and direct costs" due to small wireless facility deployment
  - See Teleprompter, St. Louis cases discussed below
- § 253 requires the FCC to proceed case by case after notice and comment, "declaratory rulings" not allowed
- "Information service" and "telecommunications service" are two different, mutually exclusive types of service, see 47 USC §§ 153(24), (53).
  - §§ 253 and 332(c)(7) only apply to "telecommunications service" and thus are inapplicable because . . .
  - 5G/Broadband which is the focus of the Order and SWF's is an "information service"

Fees Limited to Costs

- Fact that Small Cell Order limits on fees to costs was upheld only 2 to 1, and over very strong dissent described above, suggests other Courts may rule differently
- Particularly if combined with a Fifth Amendment, taking property without compensation, Constitutional challenge

Fees - - Constitutional Challenge (cont'd)

- Takings clause of Fifth Amendment protects states and cities as well as private parties from having property taken by Federal government, U.S. v 50 Acres of Land, 469 U.S. 24 (1984) (City of Duncanville, Texas prevailed on takings claim for land taken by Feds for flood control project), Loretto v. Teleprompter 458 U.S. 419 (1982); and in particular
- Saint Louis v Western Union Telegraph Co 148 U.S. 92 (1893)

"[T]his use is an absolute, permanent, and exclusive appropriation of that space in the streets which is occupied by the telegraph poles . . . different in kind and extent from that enjoyed by the general public. Now . . . is there in the nature of things anything to inhibit the public from exacting rental for the space thus occupied? Obviously not." Id. at 99 (Holmes, J.)

Using Challenges

- Local representatives for providers unaware of preceding issues, or grounds for statutory challenges
- Important to raise Constitutional issues, especially as to applications under Order which municipality would not otherwise approve
  - Or approve as requested
  - May aid settlement, as providers basically can only lose from future court rulings on these issues

Part III - - Orders Requiring Approval of Tower Changes

Part III.A - - 2014 Order

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Order Implements Section 6409(a)

- Section 6409(a) is part of February, 2012 Middle Class Tax Relief Act (Feb. 22, 2012), codified at 47 U.S.C. Section 1455(a)
  - "Notwithstanding [47 U.S.C. Sec. 332(c)(7)]. . . or any other provision of law, a State or local government [1] may not deny, and shall approve, any [2] eligible facilities [3]request for a modification of an [4] existing wireless tower or base station that does not [5] substantially change the physical dimensions of such tower or base station"
  - "Eligible facilities request" or "EFR" 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."

FCC 2014 Order

- October 17, 2014 Report and Order ("2014 Order") interprets, applies Section 6409(a).
  - In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, WT Docket No 13-238, FCC 14-153
  - FCC Wireless Infrastructure Report and Order (https://bit.ly/2Oygxtp) and erratum (https://bit.ly/2v1LeyW)
  - Defined many key terms and concepts in Section 6409(a) which Congress had left undefined
  - 155 pages, half devoted to Section 6409(a) and shot clocks
- Adopts 10 pages of rules implementing Section 6409(a), codified at 47 CFR § 1.6100
- Order upheld in facial challenge by Fourth Circuit, Montgomery County, Maryland v. FCC, 811 F.3d 121 (4th Cir. 2015).

Summary of 2014 Order

- States and local government must approve qualifying modifications (expansions, changes) to towers, related facilities
  - Exceptions for building and safety codes, camouflaged towers
- Section 6409(a) covers all "communications towers", not just cell towers
- Clarifications, interpretations of key terms in Section 6409(a)
  - Different rules for antennas in streets and highways
- Providers must still apply for state, local approval
  - Showing why qualify under Section 6409(a)
- 60 Day shot clock to act on applications
  - Deemed granted if failure to act
- Disputes, enforcement go to local courts (not FCC)

Part III.B - - FCC June 2020 “Clarifying” Order

June 2020 "Clarifying" Order

- With change to Trump FCC, industry sought significant changes to 2014 Order as "clarifications", without going through the rulemaking process under Administrative Procedures Act
- Resulting Order ("2020 Order") was released June 10, 2020, FCC 20-75 see https://ecfsapi.fcc.gov/file/0610971105336/FCC-20-75A1.pdf, again contact John Pestle or IMLA for copy of the Order and July, 2020 webinar about it.

June 2020 "Clarifying" Order (cont'd)

- 2020 Order is in two parts,
  1. A Declaratory Ruling with purported "clarifications" (which it says are not rule changes) briefly summarized next, and
  2. A Notice of Proposed Rulemaking resulting in the November FCC Order and rule change covered further below extending the applicability of § 6409(a) to certain work 30 feet outside the current tower site
- 2020 Order has been appealed to Ninth Circuit, briefing due to be completed in April, 2021, decision probably in 2022

When 60 Shot Clock Starts

- Under 2014 Order 60-day shot clock starts when an application is submitted, and can be tolled if it is incomplete
- 2020 Order says shot clock starts when applicant both:
  1. Takes first "objectively verifiable" step within its control that municipality requires to consider an application, and
  2. Submits a Section 6409(a) application. Id. ¶¶ 16, 18.
- Examples in 2020 Order:
  - If city requires a pre-application meeting, shot clock starts when applicant "mak[es] a written request" for a meeting and submits an application, if both done at same time, delay until actual meeting occurs counts against shot clock. Id. ¶ 18.
  - If multiple "first steps" are required (e.g. - - pre-meeting with city, meeting with local citizens, consulting historic preservation review board), satisfying any one satisfies requirement #1 above. Id. ¶ 19.

- Key area with no change: Expansions, changes within § 6409(a) still must apply for, obtain health, safety code approvals
- The 2014 Order expressly applies § 6409(a)'s mandated approval - - and sixty (60) day shot clock - - to zoning and land use laws
- But not to building and safety related codes, e.g. ANSI/TIA 222-G-2 on tower structural safety, ASCE/SEI 7, and other laws:
  - "States and localities may continue to enforce and condition approval on compliance with
    - [1]generally applicable [2] building, structural, electrical, and safety codes and with
    - other laws codifying [1]objective standards [2] reasonably related to health and safety" 2014 Order ¶¶ 188, 203
  - Risk of Constitutional invalidation of Section 6409(a), 2014 Order greater without this exception

Height Increases

- For towers not in public rights of way, 2014 Order deems height increases substantial (outside §6409(a)) if the increase is more than (a) 10% of height of tower or (b) height of antenna array, and (c) the new antenna is separated from nearest existing antenna by less than 20 feet ("separation distance").
- 2020 Order states that for new antennas at or near the top of a tower, the 20 foot separation distance "refers to the distance from the top of the existing antenna to the bottom of the proposed antenna. Id. ¶ 25. In other words, the height of the new antenna is not included in the 20 feet separation distance.
  - 2020 Order says this will not lead to unlimited increases in tower height because the 2014 Order "already limits the cumulative increases in height from eligible modifications and nothing in this Declaratory Ruling changes those limits." Id. ¶ 27.

Concealment Exception Narrowed

- Under the 2014 Order, a change is "substantial" and outside/an exception to § 6409(a) if it "defeats the concealment elements" of the tower or base station.

Concealment Narrowed (cont'd)

- The 2020 Order:
  - Narrowly defines "concealment elements" as "elements of a stealth-designed facility intended to make the facility look like something other than a wireless tower or base station. Id. ¶ 33 (emphasis supplied), and
  - Says "concealment elements are those elements of a wireless facility installed for the purpose of rendering the 'appearance of the wireless facility as something fundamentally different than a wireless facility,' and that concealment elements are 'confined to those used in stealth facilities.'" Id. (emphasis supplied).
  - That other "attribute[s] that minimize the visual impact of a facility, such as "a specific location on a rooftop site or placement behind a tree line or fence" are not "concealment elements". Id. ¶ 35.

Concealment Narrowed (cont'd)

- The 2020 Order says (cont'd):
  - And that such other "attribute[s] cannot be enforced so long as the modification is an otherwise permissible change in height, equipment cabinets, etc allowed under § 6409(a)/2014 Order. Id. ¶¶ 34-38.
  - To "defeat concealment" the "proposed modification must cause a reasonable person to view the structure's intended stealth design as no longer effective after the modification." Id. ¶ 39, but
  - While concealment does not have to be "explicitly articulated" as a condition of original site approval, there must be "express evidence in the record" that "the facility would look like something else, such as a pine tree, flag pole,, or chimney." Id. ¶ 38.

Concealment Narrowed (cont'd)

- 2020 Order sets forth several examples on concealment and aesthetics in ¶¶'s 40, 44:
  - Tower shorter than and behind a tree line is not "concealed" and height can be increased above tree line (if increase is within greater of 10% or 20 feet standard)
  - Same example but "monopine". It can be increased above tree line so long a "reasonable person" standard is met
  - Placing cables up to around ½ inch in diameter on outside of stealth facility "unlikely" to render stealth design ineffective. Note: Many cell antenna cables are larger than this, and usually come in groups of 3 (3 cables, 6 cables, etc.)
  - Slightly different paint color unlikely to defeat concealment
  - Increasing height of stealth monopine does not defeat concealment if "reasonable person" standard is met

Concealment Narrowed (cont'd)

- Concealment/aesthetic examples (continued):
  - Walls/fences around ground equipment are not concealment elements without "express evidence" were conditions to "fully obscure" the equipment
    - Obvious need to state this in future approvals
  - Requirement to shroud/conceal a three-foot antenna with a three-foot shroud cannot be enforced if provider could instead put four-foot antenna in a four-foot shroud.
  - Footnote suggests concealment not defeated if diameter of utility pole, "flag pole" antenna or height of street light is increased. If applied only to antenna (top) portion of "flag pole" looks like a hot dog on a stick!

Equipment Cabinets

- Under 2014 Order companies can install no more than 4 new "equipment cabinets" and still be within § 6409(a), i.e. - - change is not a substantial change.
- Under the 2020 Order "equipment cabinets" do not include "small pieces of equipment such as radio heads and transceivers mounted behind antennas . . . if they are not used as physical containers for smaller, distinct devices." Id. ¶ 29.
- The change in number of equipment cabinets is per modification request, with no limit on the total number of ground mounted cabinets that can be added to a site. Id. ¶ 30.
- The 2020 Order declines to "address the industry parties' contention that . . . the term "equipment cabinets" applies only to cabinets installed on the ground and not to those mounted above ground level on the side of structures." Id. fn 83.

Part III.C - - FCC November 2020 Order on Work 30 Feet Outside Leased Area

Expansions 30 Feet Outside Leased Area

- Under 2014 Order, any excavation or deployment outside the approved site is "substantial" and subject to standard local approval proceedings, no approval is mandated under § 6409(a)
- November 3 Report and Order, FCC 20-153 ("30 Foot Order") amends preceding so certain changes up to 30 feet outside a tower site are not substantial https://docs.fcc.gov/public/attachments/FCC-20-153A1.pdf
  - Meaning such changes must be approved under § 6409(a)
  - Amends applicable rules at 47 CFR § 1.6100 accordingly
  - Petition for Reconsideration by the FCC of 30 Foot Order was filed on January 4, 2021, likely to be considered by the Biden FCC once a new Commissioner/Chair are appointed by the new administration

Specifics of 30 Foot Order

- "[A] modification of an existing site that entails ground excavation or deployment of transmission equipment of up to 30 feet in any direction outside a tower's site will not be disqualified from streamlined processing under §6409(a)". 30 Foot Order ¶ 9
  - Does not apply to towers in public rights of way. Id.
  - Only includes additional "transmission equipment", not an additional tower. Id. ¶ 19.
    - "Transmission equipment" is defined in 2014 Order implementing §6409(a) as both transmission equipment and the transceivers, backup power supplies, antennas, cables, etc. necessary for its operation. 2014 Order ¶¶ 158 ff.

Specifics of 30 Foot Order (cont'd)

- 30 foot rule applies only to expansions of tower site, not to its access and utility easements. Id. ¶ 20.
- Any expansion within the 30' area must comply with other requirements of §6409(a), 2014 Order (and presumably 2020 Order), such as number of equipment cabinets, concealment. Id. ¶ 22.
- It "preserve[s] localities' authority to impose requirements on local-government property" 30 Foot Order ¶ 33, meaning that the governmental/proprietary distinction set forth in the 2014 Order at ¶¶ 237 ff is unchanged.
  - Thus under 30 Foot Order Section 6409(a) still only applies to governments acting in their regulatory capacity, not as to government owned property, such as parks or City Hall

Specifics of 30 Foot Order (cont'd)

- As explained in ¶ 28 of the 30 Foot Order the "current boundaries" of the "existing site" from which thirty foot expansions are measured are the later of:
  - The last approval by a state or local government prior to the enactment of §6409(a) on February 22, 2012, or
  - After February 22, 2012 if that was a conventional (meaning not mandated by §6409(a)) approval
    - Or, in words of 30 Foot Order, "not . . . measured . . . from the expanded boundary points that were established by any approvals granted or deemed granted pursuant to an 'eligible facilities request' under § 6409(a)"

Specifics of 30 Foot Order (cont'd)

- Later portions of 30 Foot Order clarify that
  - Setback requirements are not affected, such as generally applicable setback requirements. 30 Foot Order ¶ 33
  - Nor is the requirement under the 2014 Order for changes under §6409(a) to get building permits, comply with building codes, Id. 33-34.
  - Or "require compliance with generally applicable health and safety requirements on the placement and operation of backup power sources, including noise control ordinances if any." Id. 34.
  - And changes are subject to prior/later easements such as for drainage, roads, sewers, etc. Id. 33.

Part III.D - - What Municipalities Can Do Regarding 2020 Orders

Support Challenges to Orders

- Join coalitions of local governments that are appealing 2020 Order, supporting Petition for Reconsideration of 30 Foot Order
  - Contact Jonathan Kramer - - His law firm is representing numerous municipalities at the FCC in this proceeding, or
- Contact Nancy Werner of the National Association of Telecom-munications Officers and Advisors, who is coordinating the response by municipalities, coalitions and the national municipal organizations
  - Nancy L. Werner
  - NATOA General Counsel
  - (703) 519-8035
  - nwerner@natoa.org

Specific Challenges to Orders (cont'd)

- Where warranted challenge in court on an as-applied basis (Ninth Circuit decision was a facial challenge) in any particular case or application by a provider under the 2020 Orders
- Such as 2020 Order not being a clarification but in fact a rulemaking without complying the requirements for rulemaking under the Administrative Procedures Act

Specific Challenges to Orders (cont'd)

- As set forth in dissenting statements of Commissioner Rosenworcel (currently Acting FCC Chair) and Commissioner Starks attached to 30 Foot Order, it:
  - Violates the plain language of § 6409(a) and 2014 Order in saying that expansions 30 feet outside a tower site do not "substantially change" the dimensions of the site
  - Order's reliance on similar definitions of substantiality under agreements about which antennas are subject to historic preservation review is misplaced, as those definitions derive from a different statute, the National Historic Preservation Act, not the specific language of § 6409(a)
- See the statements and 30 Foot Order at ¶¶ 2, 5, 11-18, 35-39 for discussion of these and other objections to it.

Specific Challenges to Orders (cont'd)

- Similar objections/challenges made by municipalities to the 2020 Order are set forth passim in that Order, e.g.
  - That allowable height expansions violate the plain language of § 6409(a), and
  - Reliance on definitions in agreements under the National Historic Preservation Act are misplaced and not allowed.
- In any challenge, contrast the 2020 Orders, and any specific application of them that is being challenged, to the plain language of § 6409(a): ***No "substantial[] change [in] the physical dimensions of [a wireless] tower or base station"***

Constitutional Challenges to §6409(a)

- Constitutional issues with Section 6409(a) and FCC Orders thereunder which repeat the "shall approve" mandate, e.g. - -
  - Commerce Clause limitations on Federal authority, especially after Affordable Care Act decision preventing Congress from compelling activity under the Clause.
  - Federalism, Tenth Amendment concerns in light of court decisions preferring, upholding localism on zoning and similar issues, preventing mandates, e.g. Murphy v. NCAA 138 S. Ct. 1461 (2018), Printz v U.S., 52 U.S. 898; SWANCC v. Corps of Engineers, 531 U.S. 159.
  - Impermissibly blurring of lines of political accountability, especially given directive to states, cities to "approve" qualifying modification requests, e.g. - -New York v U.S., 505 U.S. 144 at 168-169.

Constitutional Challenges (cont'd)

- See article "Section 6409(a) of the Middle Class Tax Relief Act is Unconstitutional" in the Sept-Dec, 2012 issue of Municipal Lawyer Magazine, or at www.varnumlaw.com/pestle-publications
- Constitutional and other challenges to rules rejected in appeal of 2014 Order, Montgomery County v FCC, above, but that was prior to the Supreme Court's 2018 Murphy v. NCAA decision, and was a challenge to 2014 Order on its face, not as applied.
- Other courts, Circuits may reach a different result
  - Compare hundreds of such court cases to date on specific cell tower zoning decisions involving 1996 Federal statutes on cell tower zoning, 47 U.S.C. § § 253, 332(c)(7).
  - Raising these and specific issues may aid settlement, as providers basically can only lose from court rulings on these issues

Practical Considerations

- Make sure staff knows that Orders do not apply to cell sites on municipal property
- And that code compliance, other health and safety reviews and requirements are not affected.

Practical Considerations (cont'd)

- Many cases can be easily resolved, due to general local preference for collocations
- Compromises possible until dust settles on challenges to Orders
  - E.g. - - Go forward with local proceeding, both parties reserving rights under 6409(a)
    - City to rescind for if challenges upheld
    - Provider to compel automatic approval
- Municipalities should raise all claims, so as to preserve them, and may aid with local reps of cell companies, who may not be familiar with challenges to Orders.

Part IV - - Conclusion

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- Municipalities should comply with both state law and Federal law on cell tower zoning, to extent possible
  - Be alert to Section 6409(a) claims, shot clocks and Section 332(c)(7)'s procedural limitations (typically not present in local law), e.g.
    - Written decision on written record
    - Frequent Federal remedy of approval, not remand
  - Preserve statutory, Constitutional challenges to claims based on recent FCC Orders until courts rule on same - - may provide grounds for compromise in interim
  - Participate at/monitor the FCC on new developments