City of Calabasas
Community Development Department
Code Interpretation

Per Section 17.03.030 - Procedures for Interpretation

Reconciling Wireless Telecommunications Facilities Ordinance (Calabasas Municipal Code § 17.12.050) and § 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012

Background

On June 27, 2012 the Calabasas City Council adopted Ordinance No. 2012-295 regulating wireless telecommunications facilities (such as cell towers), including among other things, preferred and prohibited locations, installation standards, public hearings and findings. On February 22, 2012, the Middle Class Tax Relief and Job Creation Act of 2012 (the Act) became law (P.L. 112-96) which included § 6409(a) requiring local government approval of any certain requests to modify existing "wireless towers" or "base stations" as those terms are defined in federal law. The Wireless Telecommunications Facilities Ordinance requires interpretation in light of § 6409(a) to provide guidance to City staff, land owners and facility operators and the community so that the City can comply with federal law while protecting its local land use policy to the fullest extent possible. Accordingly, the City Attorney has prepared this interpretation to guide compliance with § 6409(a) until the City can amend its ordinance to address the matter.

Section 6409(a)

Section 6409(a) is deceptively short and on its face seems quite simple. However, its facial simplicity leaves many open questions. It states:

> Notwithstanding section 704 [of the Telecommunications Act of 1996] 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 wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.

"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.

While there is no statutory language that expresses Congress' intent in adopting § 6409(a), the wireless industry has repeatedly sought to preempt local zoning control of its facilities, in Congress, at the FCC and in the State Capitol. Congressman Fred Upton (R-MI) stated that § 6409(a) streamlines the siting of wireless facilities by preempting local authorities' power to delay collocation of wireless transmission equipment. (Congressional Record Vol. 158 No. 29, pp. E237–E239, at www.gpo.gov). He spoke after Congress adopted the Act and his statement is therefore of limited value in construing the Act. Likewise, the wireless industry claims the Act requires by-right approval of equipment meeting the standards set forth in § 6409(a) (www.thedasforum.org/wp-content/uploads/2012/02/PCIA-Federal-Siting-Legislation-Guidance.) Moreover, the FCC has yet to interpret § 6409(a) or to make any rules regarding it. Given the recent adoption of the measure, there are not yet any court decisions applying it, either. We have little but the text of the statute to go on at this point.

The City's Ordinance

The City's new ordinance is an exercise in zoning authority permitted under 47 U.S.C. § 332 c (7) (§ 704 of the Telecommunications Act of 1996) and is intended to strike a balance between the need for new or upgraded wireless facilities and protection of aesthetics, open space and residential environments from redundant and unsightly antennas and other wireless equipment. The ordinance obligates wireless carriers to demonstrate that a significant gap in their coverage exists and that a proposed facility is the least intrusive means to close that gap. The ordinance includes standards for personal wireless telecommunications facilities (§ 17.12.050 C. and D.), preferred and prohibited locations (§ 17.12.050 C. 3., D.1.c., D.3.), requires independent expert review of technical aspects of applications (§ 17.12.050C.5.), findings (§ 17.12.050 C.7. and E.4.), and public hearings before the Communications & Technology Commission and, for applications in non-preferred locations, the City Council, as well.

The ordinance applies to new personal wireless telecommunications facilities (§ 17.12.050B.1.) as well as to request to modify or expand existing facilities (§ 17.12.050B.4.).

Analysis

Section 8 of Ordinance No. 2012-295 states that the ordinance is to be construed to supplement, rather than contradict, Federal and State law so that courts will implement the ordinance to the extent possible, rather than strike it down if it is found to differ from rapidly developing state and federal law on this subject. Further, § 17.12.050A.4. states the City's intent to comply with applicable law, including the Telecommunications Act of 1996.

Although we have virtually no legislative history to assist interpretation, the language of § 6409(a) plainly evidences Congress' intent to facilitate approval of "minor" modifications of existing wireless towers or base stations, for it states that a "local government may not deny, and shall approve, any eligible facilities request for a modification." This can be read as silent as to process for review and approval, or to suggest a simple approval process is required. The Personal Communications Industry Association (PCIA) contends § 6409(a) requires local government to treat applications within its scope as uses by-right for which no approval is required or, at most, that an application can be required only to demonstrate compliance with the limits of § 6409(a) but that once an application is determined to be within the reach of that section, it must be unconditionally approved.[1]

Both federal law and the City's ordinance itself require the City to interpret the ordinance consistently with Congress's apparent intent of a streamlined process for minor collocation or minor replacement or removal modifications.

The City's ordinance provides detailed procedural and substantive requirements for those seeking approval for wireless facilities. These regulatory requirements along with the necessary significant gap / least intrusive means analysis are hard to reconcile with the federal mandate that the City "may not deny, and shall approve" applications within the reach of § 6409(a). Accordingly, we recommend against applying the ordinance's hearing and finding requirements to the collocation or replacement of transmission equipment under the provisions of § 6409(a).[2] Doing so will risk litigation the City is virtually certain to lose and will risk invalidation of the ordinance as a whole, limiting the City's power to regulate applications outside the sweep of that section. This

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[1]www.pcia.com/images/Docs/Advocacy_Outreach/pcia_federal_siting_legislation_guidance_may4_2012.pdf.

[2] The only potential defense is to challenge 6409(a) as an unconstitutional exercise of Congressional authority (see below). For purposes of discussion herein, we assume 6409(a) is constitutional.

is so because, once a carrier makes the choice to bear the political and financial cost of suing the City, it is likely to sue for as much as it can reasonably expect to win and will have incentive to attack the City's whole ordinance, not just its treatment of applications subject to § 6409(a).

Moreover, the City is also subject to the FCC's so-called "shot-clock" rule[3], which requires local governments to approve or deny wireless telecommunications facility applications within 90 days for collocation proposals and 150 days for new facilities. These periods apply in addition to the somewhat longer periods that apply under California's Permit Streamlining Act. Failure to comply with the shot clock will make it easier for a carrier to persuade a federal court that the City has violated the Telecommunications Act of 1996 by imposing an "unreasonable delay" on a carrier's efforts to provide service. Losing such a dispute would result in a court ordering the City to act on an application, could undermine the City's ordinance, and could result in an award of attorneys' fees to the carrier, although there is not currently authority to award damages to a carrier.

Complying with the shot clock and the mandate of § 6049(a) will not be easy if the City attempts to comply with the, notice, hearing, analysis findings and other requirements of the ordinance. Accordingly, we recommend the City interpret the ordinance and § 6049(a) together to require over-the-counter action on applications that the City has determined to fall within the scope of that section until such time as the Council can amend the ordinance to provide some better way to harmonize these two conflicting rules.

Open Questions

Some of the issues that can be expected to be addressed either through FCC rule-making, litigation, or both are:

a) What is a "wireless tower" under § 6409(a)? The ordinance defines "Telecommunications tower" as a freestanding mast, pole, tower, etc. designed and primarily used to support wireless antennas, but the industry can be expected to argue that under § 6409(a) the definition must also include both the tower and all its ancillary equipment whether tower-mounted or ground-based.

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[3] Petition for Declaratory 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 Rcd. 13994(2009) (Shot Clock Ruling).

b) What is a "base station"? The term is undefined in § 6409(a) but the FCC regulations define the term as "A station at a specified site authorized to communicate with mobile stations" and thus to include the tower, antennas and ancillary ground and tower-mounted equipment necessary for the operation of the facility. The ordinance defines "accessory equipment" as "any equipment installed, mounted, operated or maintained in close proximity to a personal wireless telecommunication facility to provide power to the personal wireless telecommunication facility or to receive, transmit or store signals or information received by or sent from a personal wireless telecommunication facility." Thus, a base station would appear to include both a "wireless telecommunications facility" and "accessory equipment" as the ordinance defines those terms.

c) What is a "substantial change [to] the physical dimensions of [a] tower or base station"? How may this affect a stealth facility, such as a mono-palm or other disguised wireless telecommunications facility? One can imagine a change that does not change the height, depth or width of a camouflaged tower but that undermines or destroys is stealth characteristics, like adding a large microwave dish antenna placed on the trunk of a mono-palm. The National Programmatic Agreement for the Collocation of Wireless Antennas, which appears as Appendix B to Part 1 of Title 47 of the Code of Federal Regulations does define "substantial increase in the size of the tower" and this definition may well guide the courts' interpretation of § 6409(a):

C. "Substantial increase in the size of the tower" means:

(1) The mounting of the proposed antenna on the tower would increase the existing **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 twenty feet**, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or

(2) The mounting of the proposed antenna would involve the installation of **more than the standard number of new equipment cabinets for the technology involved, not to exceed four**, or **more than one new equipment shelter**; or

(3) The mounting of the proposed antenna would involve adding an **appurtenance** to the body of the tower **that would protrude from the**

edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable; or

(4) The mounting of the proposed antenna would involve **excavation outside the current tower site**, 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.

As can be seen, this standard is very generous to the industry and local governments can be expected to argue that, had Congress intended such a generous standard, it would have referenced this Appendix B and not adopted such simple language in § 6049(a).

d) Does collocation include facilities of multiple carriers on a single site or tower, or does it refer only to collocation by a single operator? The language of § 6409(a) does not support the narrower view and City policy, too, encourages collocation (§ 17.50.020C. 3). Accordingly, we recommend the City apply § 6409(a) to any collocation proposal regardless of the number of carriers or operators involved so long as the result is not a substantial change to the physical dimensions of the tower or base station.

Finally, there is the overarching question of whether the mandated "approval" under § 6409(a) is beyond congressional power and therefor unconstitutional. See, e.g., *Printz v. United States* (1997) 521 U.S. 98 (Commerce Clause does not authorize Federal Government to compel states to implement Federal regulatory programs). This is to say, that while Congress may have power to preempt local governments' power to regulate certain wireless communications facilities, it does not have the power to compel them to act in a particular way. This is the distinction between restraining a particular exercise of local authority (which Congress certainly may do within the bounds of Commerce Clause case law) and compelling local action, which is generally forbidden.

In summary, there are many unresolved issues relating to the meaning and application of § 6409(a) and local regulation of wireless facilities. If the City applies the procedural and substantive requirements of the ordinance to an application within the scope of § 6409(a), it risks costly litigation which the City might well lose unless it could persuade a court that § 6409(a) is itself unconstitutional. For that reason, we presently recommend against applying the ordinance to such applications.

Accordingly, we interpret the ordinance, together with § 6409(a) and the "shot-clock rule" as follows:

1) The City may require those who wish to construct facilities protected by § 6409(a) to apply for a land use clearance to allow the City to ensure the facility does qualify for § 6409(a) treatment, as well as for building, electrical and other over-the-counter permits under the City's uniform building codes.

2) Accept, until and unless federal regulations and/or case law provide otherwise, the FCC's generous definition of "substantial increase in tower size", or make a record in each case to demonstrate why a facility is nevertheless deemed to be outside § 6409(a)'s limit on facilities which do not "substantially change the physical dimensions of such tower or base station." We suggest this be documented as visual impact analyses are performed for CEQA review of development with site photographs, photo simulations, or other evidence demonstrating whether there is a "substantial change" in the size, shape and appearance of the facility.

3) Consider for the purpose of the City's ordinance that § 6409(a) applies to collocations to those involving more than one carrier or operator.

4) Apply § 6409(a) to all cabinet components of a base station and adopt the National Programmatic standard for cabinets of no "more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter."

5) Require certification that any proposed facility meets FCC standards for radio-frequency emissions.

6) Require that modification or replacements satisfies the City's stealth requirements.

7) Applications within the scope of § 6409(a) should be processed by staff on an over-the-counter basis, although the City may wish to have some form of reporting to the CTC or City Council so those policy-making bodies can publicly review how City staff applies § 6409(a) and stay abreast of legal developments in this area.

This interpretation will be revisited upon the happening of any of the following:

1. Adoption of an ordinance to implement § 6049;
2. Adopting of FCC rules or other guidance regarding the meaning of § 6049; or
3. Significant case law developments regarding the meaning of § 6409(a).

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July 23, 2012
Date Signed