Wireless Facilities: Managing the Approval Process to Protect Municipal Interests and Comply with State and Federal Law

By: Katherine B. Miller, Esquire

DONAHUE, TUCKER & CIANDELLA, PLLC

225 Water Street, P.O. Box 630
Exeter, New Hampshire 03833
Telephone: (603) 778-0686

111 Maplewood Avenue, Suite D
Portsmouth, New Hampshire 03801
Telephone: (603) 766-1686

56 NH Route 25, P.O. Box 214
Meredith, New Hampshire 03253
Telephone: (603) 279-4158

I. Executive Summary: The Telecommunications Act of 1996, the FCC "Shot-Clock", Co-Location As-of-Right and Changes to RSA 12-K.[1]

A. Introduction.

When Congress enacted the Telecommunications Act of 1996 ("TCA"), local land use boards in New Hampshire and elsewhere began to approach their review of applications for personal wireless communication facilities ("PWCFs," commonly known as "cell towers" or "wireless towers") under this new "umbrella" of federal law. State and local land use laws and procedures still apply in the context of new tower construction, but all decisions must be made in the context of the limitations and requirements of the federal law. The last five years have seen major shifts in federal and state law, with (1) new requirements on the timeliness of decisions by local land use boards; and (2) the elimination of almost all land use board review of applications for new antennae on existing facilities ("co-location") and for modifications that are not "substantial." In 2009, the Federal Communications Commission ("FCC") issued an Order setting short time lines, or a "shot clock," for decisions on applications for both new towers and for wireless antennae on existing towers, buildings or other structures. The deadlines went into effect immediately. In 2012, a new federal law went into effect requiring approval for requests for co-location of new antennae on existing wireless towers or base stations. (See footnote 2 below) These changes could fundamentally change how some land use boards do business. At the state level, amendments to RSA 12-K went into effect in 2013, further limiting local land use boards' review of applications to co-locate additional or new antennae on any structure and to modify existing wireless facilities. It is very important that zoning board of adjustment

---

[1] These materials were originally prepared by Katherine B. Miller, Esquire and Sharon Cuddy Somers, Esquire, for the NHMA Lecture Series in 2010.

members, planning board members, local and regional planners, and municipal officials with a role in reviewing such applications be familiar with the new requirements.

These materials provide an overview of the federal and state requirements, as well as some practical suggestions on procedures and rules local land use boards may wish to adopt, to ensure compliance with the laws.

B. Does Federal Law Pre-empt State Law in Cell Tower Decisions?

As originally enacted, Section 704 of the Telecommunications Act of 1996, ("TCA"), codified at 47 U.S.C. § 332(c)(7) (reprinted in the Appendix), was a **federal** law that provides the parameters for local land use decisions on applications for the location of wireless towers and antennae. Originally it did not pre-empt decisions of local land use boards on wireless tower. A new law pertaining to antenna co-location applications does preempt most local law and regulations, Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012 (See Footnote 1), as do the 2013 amendments to RSA 12-K. Even when not preempting local and state law, the Telecommunications Act provides certain requirements in key areas for these decisions, in terms of the substance of the decision on a new facility (in the case of a denial), the documentation in the record, and the timeliness of the decision. Local land use boards that do not meet the federal requirements for new tower applications (and even some that do) may find themselves in federal and/or state court. While some applicants for cell tower permits are willing to work collaboratively with local land use boards, but it has also been our experience that some applicants have been willing to sue any municipality that denies an application for a new facility. Further, while municipalities frequently prevail, court is never a place that municipalities or their land use boards wish to be, even if they win.

Although federal law does not pre-empt most state law on new wireless tower applications, it does provide the context within which all decisions on wireless tower applications are made. In a 2008 decision, Daniels v. Town of Londonderry, 157 N.H. 519 (2008), the New Hampshire Supreme Court explicitly addressed the question of how the requirements under state law -- in that case an application for a use variance and two area variances -- mesh with the requirements of the TCA. Abutters unhappy with the ZBA's grant of the variances, which was upheld by the Superior Court, appealed the matter to the New Hampshire Supreme Court. The abutters argued that the ZBA had construed the TCA as pre-empting the applicant's burden to satisfy the statutory criteria for variances under state law. Disagreeing with the abutters, the Court noted that the TCA "preserves state and local authority over the siting and construction of wireless communications facilities subject to five exceptions specified in the Act." Id. at 524 (quoting Second Generation Properties v. Town of Pelham, 313 F. 3d. 620, 627 (1st Cir. 2002) (hereinafter "Town of Pelham")). Those five exceptions are noted in Section I, C below. The Court further noted: "if a board decision is not supported by substantial evidence … or if it effectively prohibits the provision of wireless services … then under the Supremacy Clause of the Constitution, local law is pre-empted in order to effectuate the TCA's national policy goals." Id. (quoting Town of Pelham, 313 F. 3d at 627)(emphasis supplied). The Court explained that the TCA was a deliberate compromise to reconcile the goal of preserving local land use authority with the need to facilitate the national build-out of personal wireless services facilities. Id. "The standards set forth in the TCA provide gloss over the deliberative process, and the ZBA [in Londonderry] correctly considered its implications." Id. at 525. In that case, the Supreme Court found that the ZBA appropriately determined that all of the variance criteria were met.

As noted above, in Section I, A, federal law has pre-empted state law on the timeline for decisions and in applications for co-locations of new or additional antennae on existing wireless towers or modifications of existing towers or base stations that are not substantial.

C. Federal Law and FCC Order.

The TCA has a number of substantive and procedural requirements summarized below. First, it prohibits state and local governments from unreasonably discriminating among "**providers** of functionally equivalent services." 47 U.S.C. § 332(c)(7)(B)(i)(I)(emphasis supplied). Although "unreasonable discrimination" is prohibited, local land use boards may treat applications for cell towers that would create different visual or safety impacts on the community differently, under normal zoning and land use regulations and procedures. In addition, it is important to note that this section applies to "providers," i.e., companies with an FCC license to provide service. It does not apply to tower construction companies, which are often the applicants before local land use boards. Recently, tower companies and providers have been acting as co-applicants to ensure the protection of this section of the TCA.

Second, the TCA prohibits local governments and their land use boards from issuing decisions that prohibit, or have the effect of prohibiting, the provision of personal wireless services in their communities. 47 U.S.C. § 332(c)(7)(B)(i)(II). This limitation applies to both zoning ordinances and to decisions of local land use boards on individual applications. It applies to outright bans, which are very uncommon now, as well as zoning and/or application criteria that are so difficult to meet that the practical effect is that an applicant will be unable to meet the standards, no matter what the applicant does. See Town of Amherst, New Hampshire v. Omnipoint Communications Enterprises, Inc. 173 F. 3d. 9, 14 (1st Cir. 1999) (hereinafter "Town of Amherst").

Third, the TCA requires that any local land use board act on applications for cell towers within "a reasonable period after the request is duly filed." 47 U.S.C. § 332(c)(7)(B)(ii). On November 18, 2009, the FCC issued a Declaratory Ruling or Order (FCC 09-99) in WT Docket No. 08-165 (hereinafter "FCC Order"), brought by the wireless tower industry. The Order creates a presumption for a reasonable period within which boards must act on applications. **In essence, it creates a "shot clock" for decisions: 90 days for an application for a new antenna on an existing facility (known as "co-location")[2], and 150 for construction of a new wireless tower, with shorter timelines for applications pending on the effective date of the FCC Order.** It is important to note that as interpreted by one New Hampshire Federal judge, these "shot clock" deadlines apply to the period following an initial decision to grant or deny an application while any request for rehearing is pending and, if the request is granted, during any period leading up to the rehearing and the issuance of a written decision by the Board on such rehearing. New Cingular Wireless PCS, LLC v. Town of Stoddard, NH, et al, 11 CV 388 – JL (Slip Op. 2/16/12) ("Town of Stoddard"). If those deadlines are not met, applicants may sue in federal or state courts, pursuant to 47 U.S.C. § 332(c)(7)(B)(v), and the court will presume the

---

[2] But see Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012, P.L. 112-96, which provides:

(a) Facility Modifications.—

(1) In general. – Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104-104) 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.

(2) Eligible facilities request. – For purposes of this subsection, the term "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.

(3) Applicability of environmental laws. – Nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969.

delay is unreasonable, unless the municipality can demonstrate otherwise. The FCC Order sets up a number of other timing requirements discussed more fully below.

Boards should be aware that "co-location," generally attaching a new antenna to an existing structure, is very broadly defined in the FCC Order to include significant increases in the height of structures (up to 10% of the height of the original structure, or 20 feet, whichever is greater[3]), and may exceed what is defined as "co-location" under local ordinances.

In addition, the order imposes a deadline for local land use boards to request additional information on applications: **30 days** from **receipt** of application. If additional information is requested during the first 30 days, the "shot clock" stops ticking while the applicant provides the requested information. Land use boards *may* request additional information beyond the initial thirty-day period, but the clock will not stop while the applicant responds to the request. For this reason, every effort should be made to review applications and to request additional information promptly. Recommended procedures to aid compliance in the FCC order are discussed below, Section II.

Fourth, the TCA requires that, if a local land use board denies an application for a variance or for site plan approval of a wireless tower or antenna, the denial must be in writing and supported by "substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). What constitutes "substantial evidence" has been defined by case law to mean "more than a scintilla of evidence." ATC Realty, LLC v. Town of Kingston, N.H., 303 F.3d 91, 94-95 (1st Cir. 2002)(internal citations omitted)(hereinafter "Town of Kingston"). Boards are

[3] This definition is from an agreement published in the Code of Federal Regulations, 47 C.F.R. Part 1, App. B – Nationwide Programmatic Agreement for the Co-location of Wireless Antennas, Definition, Subsection C, and incorporated into FCC Order at ¶ 46, FN 146.

wise to have "substantial evidence in a written record" for all the key elements of a decision denying an application.

Finally, the TCA prohibits municipalities from denying or regulating wireless antennae or wireless towers due to environmental concerns about the radio emissions, so long as the antennae comply with FCC rules on radio frequency emissions, which are codified at 47 C.F.R. § 1.1310. 47 U.S.C. §332(c) (7)(B)(iv). Generally, a document showing compliance with the FCC rules on radio frequency (RF) emissions is part of the application package presented to the local land use board. This is an area that can cause some confusion, as there is still some dispute about the safety of the FCC's RF standards. Nevertheless, local land use boards are legally prohibited from denying or regulating wireless antennae or wireless tower locations based on these concerns if the RF emissions meet the FCC standards.

D. Co-Location "As-of-Right".

Tucked into Public Law 112-96, signed into law February 22, 2012, is a change to Section 704 of the TCA, codified as 47 U.S.C § 332 (7) which preempts local law pertaining to the collocation of new "transmission equipment" on "an existing wireless tower or base station," PL 112-96, §6409(a), provided that the new transmission equipment does not substantially change the physical dimensions of such tower or base station. The new law is clear that the National Historic Preservation Act and the National Environmental Policy Act of 1969 still apply to such applications. How this will play out remains to be seen. Presumably, all existing building codes and code enforcement would continue to apply and such additional antennae would be subject to building inspector approval, etc., but not to Planning Board or ZBA review or approval.

E. Remedies Under Federal Law and FCC Order.

If **applicants** are dissatisfied with the **denial** of an application, the TCA entitles them to bring an action in federal or state court, within 30 days of the denial. 47 U.S.C. § 332 (c)(7)(B)(v). As a practical matter, such applicants normally choose federal court. The court may order a permit or variance granted if it finds a violation of the TCA.

As noted above, at I.C., even without a denial, if a board fails to meet the deadlines in the FCC Order for rendering a decision on an application, (150 days for a new structure), the applicant may sue in federal (or state) court, and the burden is on the municipality to show the delay is not unreasonable.

The TCA provides no private right of action to a disgruntled **abutter** or other person dissatisfied with a decision by a board to **grant** an application. However, an abutter has rights under State law in New Hampshire, in Federal or State Court, including the right to seek reconsideration of a decision granting an application and the right to challenge the approval in Superior Court. Furthermore, an abutter may seek to intervene in a federal challenge to the **denial** of an application brought by the applicant, to protect the abutter's **state** law interest in the decision of the land use board *denying* the application. This issue was recently explored in New Hampshire's federal district court and the First Circuit. Abutters challenged the authority of two towns to settle two TCA cases. Judge Laplante of the New Hampshire Federal District Court ruled that the abutters had no claim under the TCA to block the towns' settlements with the applicants, both of which decisions resulted in the allowance of wireless towers in each town. Industrial Communications and Electronics, et al v. Town of Alton, et al. No. 07-cv-82 (hereinafter Town of Alton) and Industrial Tower and Wireless, LLC v. Town of Epping, et al, No. 08-cv-122 (U.S. District Court, D.N.H., May 7, 2010) at pp. 8-9. The abutters appealed the

Town of Alton case to the First Circuit Court of Appeals. That court ruled that the abutters could block settlement of the case by the Town and the applicant, to protect their state law rights in the initial denial of the application. The applicants would need to either prevail on their TCA claims in Court or settle with the abutters too, not just the Town. Industrial Communications and Electronics, et al v. Town of Alton, et al. 646 F.3d 76 (1st Cir.,2011).

As noted above, under state law, **abutters** and others interested in the tower application process, who object to the **granting** of a variance or application for site plan approval, may challenge the approval in state court. RSA 677:4,15.

F. Changes to New Hampshire Law.

The New Hampshire law on wireless facilities, RSA 12-K: Deployment of Personal Wireless Service Facilities, was amended in 2013 to strike a new balance between the public policy promoting local planning and control with the equal public policy to promote access to broadband for all in New Hampshire. RSA 12-K:1. Beginning with its enactment in 2000, the statute states that carriers wishing to build wireless towers in New Hampshire should consider commercially available alternatives to tall cellular towers. The alternatives stated in the statute are:

a. lower antenna mounts which do not protrude far above surrounding tree canopies;

b. disguised PWSFs such as flagpoles, artificial tree poles, light poles and traffic lights, which blend with surrounding area;

c. camouflage PWSFs mounted on existing structures and buildings;

d. custom design PWSFs to minimize visual impact; and/or

e. other available technology

As noted above, recent amendments incorporate, and extend, the federal "Co-location as of Right" law discussed above Section V, B, 3. The state includes a definition of "Co-location" ("the placement or installation of new PWSF's on existing towers or mounts, including electrical transmission towers and water towers, as well as existing buildings and other structures capable of structurally supporting the attachment of PWSF's in compliance with applicable codes") RSA 12-K:2.X. It explicitly does not include "a substantial modification." "Substantial modification" is defined as:

> "The mounting of a proposed PWSF on a tower or mount which, as a result of single or successive modification applications:
>
> (a) Increases or results in the increase of the permitted vertical height of a tower, or the existing vertical height of a mount, by either more than 10 percent or the height of one additional antenna array with separation from the nearest existing antenna not to exceed 20 feet, whichever is greater; or
>
> (b) Involves adding an appurtenance to the body of a tower or mount that protrudes horizontally from the edge of the tower or mount more than 20 feet, or more than the width of the tower or mount at the level of the appurtenance, whichever is greater, except where necessary to shelter the antenna from inclement weather or to connect the antenna to the tower or mount via cable; or
>
> (c) Increases or results in the increase of the permitted square footage of the existing equipment compound by more than 2, 500 square feet; or
>
> (d) Adds to or modifies a camouflaged PWSF in a way that would defeat the effect of the camouflage."

RSA 12-K:2, XXV.

This last definition echoes the 2009 "Shot Clock" Order of the FCC setting up time limits for municipal review of applications for PWSF 150 days for new applications and 90 days for co-locations applications, with co-location defined in a similar way: attaching a new antenna to an existing structure (tower or building) in which the height of the structure is increased no more

than 10%, or 20 feet, whichever is greater. See Section I C., supra. Note that the 90-day timeline for co-location applications has been superseded by the federal "Co-location As-of-Right" law. See Section I.D.

Under RSA 12-K, wireless carriers doing business in the State, or their appointed agents, shall:

a. Be subject to municipal land use regulations, including those regulating the height of such facilities, (unless pre-empted by this law, federal law or FCC regulation);

b. Comply with all federal, state and municipal laws, including federal radio frequency radiation regulations;

c. Provide information at the time of the application to construct an externally visible PWSF "substantial or a modification" of a tower, mount or PWSF, or prior to construction if no approval is required, to both the municipality and to the New Hampshire Office of State Planning, as follows:

i. A copy of the FCC license establishing eligibility to deploy their system in the area being applied for or a copy of a contract between such a licensed provider and the applicant, along with a copy of that license;

ii. Upon request of the municipality, detailed maps showing all the carrier's current externally visible tower and monopole PWSF locations in New Hampshire within a 20 mile radius of the proposed externally visible PWSF, both active and inactive;

iii. Upon request, a description of why less visually intrusive alternatives for the facility which the applicant seeks approval for were not proposed ;

iv. The requirement upon request, for site descriptions for each of the locations, including antenna height and diameter and a depiction of all externally visible structures has been deleted.

RSA 12-K:3

The applicant can be required to pay reasonable fees for experts engaged by the municipality to review the application, including regional notification costs, in accordance with RSA 676:4, I (g).

Note that, under the 2013 amendments, fall zones for antennae only and co-locations that are not substantial modifications are deleted. RSA 12-K:5,

Any municipality or state agency which receives an application to construct a PWSF which will be visible from any other New Hampshire municipality within a 20 mile radius shall provide written notification to all such municipalities within that 20 mile radius by letter to the governing body of such municipalities along with published notice. If no approval is necessary, then the applicant is responsible for the notifications, RSA 12-K;7, II . Residents of the neighboring municipality itself may speak at any public hearing but do not have standing to legally challenge such decisions. RSA 12-K:7, III.

The most significant changes are in new RSA 12-K:10 and RSA 12-K:11, pertaining to "Co-location as of Right" with a forty-five (45) day time line. These new laws establish uniform application and approval criteria; for approval (contrasting with the 90 day timeline under the FCC's "Shot Clock" Order) and for review of application for PWSF Co-Locations. (See Section I, D. supra.) and requires approval with the only review for compliance with building permit requirements, but no zoning or land use requirements or public hearing. The statutes are set out below:

RSA 12-K: 10:

> Notwithstanding any ordinance, bylaw, or regulation to the contrary, in order to ensure uniformity across New Hampshire with respect to the process for reviewing a collocation application and a modification application, each authority shall follow the following process:
>
> I. Co-Location applications and modification applications shall be reviewed for conformance with applicable building permit requirements but shall not otherwise be subject to zoning or land use requirements, including design or placement requirements, or public hearing review.
>
> II. The authority, within 45 calendar days of receiving a collocation application or modification application, shall:

(a) Review the collocation application or modification application in light of its conformity with applicable building permit requirements and consistency with this chapter. A collocation application or modification application is deemed to be complete unless the authority notifies the applicant in writing, within 15 calendar days of submission of the specific deficiencies in the collocation application or modification application which, if cured, would make the collocation application or modification application complete. Upon receipt of a timely written notice that a collocation application or modification application is deficient, an applicant shall have 15 calendar days from receiving such notice to cure the specific deficiencies. If the applicant cures the deficiencies within 15 calendar days, the collocation application or modification application shall be reviewed and processed within 45 calendar days from the initial date received by the authority. If the applicant requires more than 15 calendar days to cure the specific deficiencies, the 45 calendar days deadline for review shall be extended by the same period of time;

(b) Make its final decision to approve or disapprove the collocation application or modification application; and

(c) Advise the applicant in writing of its final decision.

III. If the authority fails to act on a collocation application or modification application within the 45 calendar days review period, the collocation application or modification application shall be deemed approved.

IV. Notwithstanding anything to the contrary in this chapter, an authority may not mandate, require or regulate the installation, location, or use of PWSFs on utility poles.

V. A party aggrieved by the final action of an authority, either by an affirmative denial of a collocation application or modification application under paragraph II or by its inaction, may bring an action for review in superior court for the county in which the PWSF is situated.

RSA 12-K:11 Limitations on Applications:

I. In order to ensure uniformity across New Hampshire with respect to the consideration of every collocation application and modification application, no authority may:

(a) Require an applicant to submit information about, or evaluate an applicant's business decisions with respect to, its designed service, customer demand for service, or quality of its service to or from a particular area or site.

(b) Evaluate a collocation application or modification application based on the availability of other potential locations for the placement of towers, mounts, or PWSFs.

(c) Decide which type of personal wireless services, infrastructure, or technology shall be used by the applicant.

(d) Require the removal of existing mounts, towers, or PWSFs, wherever located, as a condition to approval of a collocation application or modification application.

(e) Impose environmental testing, sampling, or monitoring requirements or other

compliance measures for radio frequency emissions on PWSFs that are categorically excluded under the FCC's rules for radio frequency emissions pursuant to 47 C.F.R. section 1.1307(b)(1).

(f) Establish or enforce regulations or procedures for radio frequency signal strength or the adequacy of service quality.

(g) In conformance with 47 U.S.C. section 332(c)(7)(B)(iv), reject a collocation application or modification application, in whole or in part, based on perceived or alleged environmental effects of radio frequency emissions.

(h) Impose any restrictions with respect to objects in navigable airspace that are greater than or in conflict with the restrictions imposed by the Federal Aviation Administration.

(i) Prohibit the placement of emergency power systems that comply with federal and New Hampshire environmental requirements.

(j) Charge an application fee, consulting fee or other fee associated with the submission, review, processing, and approval of a collocation application or modification application that is not required for similar types of commercial development within the authority's jurisdiction. Fees imposed by an authority or by a third-party entity providing review or technical consultation to the authority must be based on actual, direct, and reasonable administrative costs incurred for the review, processing, and approval of a collocation application or modification application. Notwithstanding the foregoing, in no event shall an authority or any third-party entity include within its charges any travel expenses incurred in a third-party's review of a collocation application or modification application, and in no event shall an applicant be required to pay or reimburse an authority for consultant or other third-party fees based on a contingency or result-based arrangement.

(k) Impose surety requirements, including bonds, escrow deposits, letters of credit, or any other type of financial surety, to ensure that abandoned or unused facilities can be removed unless the authority imposes similar requirements on other permits for other types of commercial development or land uses. If surety requirements are imposed, they shall be competitively neutral, non-discriminatory, reasonable in amount, and commensurate with the historical record for local facilities and structures that are abandoned.

(l) Condition the approval of a collocation application or modification application on the applicant's agreement to provide space on or near any tower or mount for the authority or local governmental services at less than the market rate for space or to provide other services via the structure or facilities at less than the market rate for such services.

(m) Limit the duration of the approval of a collocation application or modification application.

(n) Discriminate on the basis of the ownership, including by the authority, of any property, structure, or tower when evaluating collocation applications or modification applications.

II. Notwithstanding the limitations in paragraph I, nothing in this chapter shall be construed to:

(a) Limit or preempt the scope of an authority's review of zoning, land use, or permit applications for the siting of new towers or for substantial modifications to existing towers, mounts, or PWSFs.

(b) Prevent a municipality from exercising its general zoning and building code enforcement powers pursuant to *RSA 672* through *RSA 677* and as set forth in this chapter.

Conforming changes are also made to (1) RSA 674:33 regarding no special exceptions or variance can be required for Co-Location or a modification of a PWSF as defined in RSA 12-K:2; (2) to RSA 674:43 re: no site plan review for such applications, and (3) RSA 676:13 regarding the timelines in new RSA 12-K:11 shall control over any other forms or sets of standards for the timeline for building inspectors to act on such applications.

This law brings state law in line with the requirements of the FCC's "Shot Clock" Order on approval of co-locations (and shortens the timeline) and implements the federal "Co-Location as of right" law enacted in 2012. 47 U.S.C. Sec. 1455 (a) (1).

II. The Role of Boards: Protecting the Interests of the Citizens While Staying Out of Court.

The job of a zoning board of adjustment or a planning board is a difficult one. Residents and business owners want reliable cell phone service. Residents also want an aesthetically pleasing and safe place in which to live and work. In the last decade, these two goals have sometimes come to loggerheads when it comes to placing and constructing new cell towers for personal communication wireless services.

The job of land use board members is to try to resolve these two potentially conflicting goals, while adhering to the language of the town's land use regulations and State law and being mindful of the "umbrella" requirements of the TCA; the FCC timelines for decisions and the new

state and federal limitations on any land use board review of co-location applications or applications for modifications of existing towers or base stations that are not substantial.

The first step in reconciling these goals is to understand the principles involved in the TCA, the FCC Rules and RSA 12-K, and to recognize that a cell tower application has different requirements than other applications seeking zoning approvals or approvals from the planning board. For town officials, or those who advise town officials, participating in the OEP 2014 Spring Conference for which these materials are prepared, and reviewing these materials is a solid first step in understanding these complicated issues.

The second step is to ensure, through your review of applications and conduct of public hearings, that the public, the applicants, and abutters who support or oppose the cell tower have confidence in the fairness and legitimacy of your decision making process. This will be difficult since applicants and abutters who oppose applications will have divergent views, and participants on all sides could be reluctant to understand that town land use decisions must be made within the confines of local land use law and the TCA.

The third step is to take steps to prevent lawsuits from any side and in the event that a lawsuit comes despite precautions, to have the necessary support to defend against it. There are no guarantees on how to do this because the FCC's "shot clock" Order, the "Co-Location As-of-Right" Law and the amendments to RSA 12-K, discussed previously in these materials, are relatively new, and few courts have provided guidance as to how they should be applied in different factual circumstances. That said, your best defense is to create evidence that you are acting in good faith and with the intention to comply with these requirements. Under the laws as they stand today, the best way to accomplish this goal is to document everything about a cell

tower application. In small towns, where staff is in short supply, or non-existent, this task will be challenging at best. Nevertheless, it must be done.

A. Where to Start? The Application.

Our suggestion is to start at the beginning when the application comes in the door at town hall.[4] We recommend immediately intercepting any new applications for "co-location" of additional antennae on current wireless towers or "base stations," removal or replacement of existing antennae or transmission equipment. Provided that the co-location does not result in a substantial change to the physical dimensions of the tower, then the co-location applications should only be reviewed by your Building Inspector for Life Safety Code and other regulations and approved accordingly.

We recommend creating a form specifically for cell tower applications; a specialized form will help with the review process and will assist with record keeping in general. The form should include language indicating what the submission deadlines are, in order to comply with statutory notice requirements under RSA 676:4 I (d) and RSA 676:7 I and to comply with the board's meeting schedule; further, in the event that the applicant submits an application after the relevant submission deadline, the form should note that the town reserves the right to ask for an extension in order to timely finish the 30 day "completeness" review required by the FCC Order. **For co-location and modification applications, the time for determining completeness is shortened to 15 days**. Although towns should do their very best to finish the review within the thirty days, there will certainly be times when such extensions are required. The OEP sample

[4] Of course, applicants can meet informally with staff, or in the case of the planning board, in a conceptual consultation, under RSA 676:4, II (a) even before an application is filed. This practice should be encouraged because it will provide towns and applicants more time to spot potential issues and/or information that needs to be submitted with the application.

form available on its website is a good place to start, although the above additions are recommended.

The special cell tower/co-location form should be filled out by the applicant, and be given to whomever in town is charged with physically receiving land use applications. (Make sure there is someone identified for this task!) In some towns, that person could be a planner, but in smaller towns, it could be a part time administrative assistant who handles all manner of tasks. In any event, whoever physically receives the documents should be instructed to review the form for basic completeness the moment it arrives. If the application form itself is incomplete, it should be rejected, noting same on the application and making a copy of the rejection note for town records. Alternatively, if the application form meets basic completeness standards, then it should be accepted for filing and date stamped.

Once this very basic review is done, and once the application is date-stamped, it should be reviewed to determine what relief is required, and it should be reviewed for substantive completeness; the test being whether the materials included in the application packet appear to be sufficient to allow a board to conduct an analysis (or if no board review is required, whether the information is sufficient for the building inspector), or whether there are crucial items missing, such as expert reports, RF emissions information, FCC license, etc. On the first point, all land use applications, including cell tower applications, need to be reviewed to ascertain whether the application needs to go to the zoning board of adjustment, or to the planning board, or both. This analysis should be handled in the normal course of affairs, and go to the same person or board who would otherwise make the determination if the application were unrelated to cell towers. The only difference in this step of the review is that it must be done quickly and efficiently in order to not lag behind in the "shot clock" or new RSA 12-K requirements. It is therefore

recommended that, as soon as the application is filed, it is calendared to have a determination made within fifteen days regarding the type of land use relief required. Where appropriate, and in order to meet the time lines, towns should not hesitate to use outside consultants (including planning and legal staff) to assist with the review. The determination regarding required relief should be in writing.

On the second point, the application must be reviewed for substantive completeness, either simultaneously with the above review of the relief required by the application, or immediately thereafter. This must be done within thirty (30) days of receipt of the application for new tower facilities, fifteen (15) days for co-location and modification applications. This review is much more in depth than the "basic completeness" review when the application was physically filed with the town.

For new tower applications, it is also strongly recommended that towns consider using the services of the regional planning commission or a consultant for the substantive completeness review. By using these outside services, the application review will not impose additional burdens on what may already be overburdened staff, thus ensuring that the review is conducted on a timely basis. Further, because the subject matter is highly complicated, the assistance of someone who has training in the field will ensure that, if additional materials are required to make the application complete, such materials will be promptly and accurately identified.

A checklist should be prepared to determine what should be in an application, and that checklist should be used to determine whether the application is complete. For example, a variance application may require, in addition to the normal explanation of how variance criteria are met, information to support a claim that a significant gap in wireless service exists and what

steps have been taken to determine alternative locations beyond the one being proposed. There are also special requirements for wireless tower applications in RSA Chapter 12-K, "Deployment of Personal Wireless Service Facilities," which include regional notification (RSA 12-K:7), and particular components of the application, such as a copy of the applicant's FCC license, maps of the applicant's facilities within a 20 mile radius and "a description of why less visually intrusive alternatives for this facility were not proposed." RSA 12-K:3, IV(a) (d). (Section I, F., supra.) Additionally, expert reports may be required on these or other topics, depending on your local ordinances.

Finally, many planning boards use a technical review committee and/or department head review to identify potential areas of concern and issues which may require further analysis before the matter can be addressed by the planning board. For towns that use a technical review and/or department head review process, we strongly recommend that this review be conducted within thirty days of the receipt of the application.

B. <u>But Who Will Pay for All of This?</u>

Most towns will immediately be concerned about the cost of using a regional planning commission or a consultant to analyze the application for completeness. If it is a planning board application, then statutory authority exists under RSA 12-K:4 and RSA 676:4, I (g) to charge the applicant "reasonable expenses" associated with special investigative studies, review of documents and the like. Given the specialized nature of these applications, a strong argument can be made that hiring someone to review the application for completeness falls within the statutory authority.

Similarly, pursuant to 2010 legislation, zoning boards can also charge applicants for special investigative studies, review of documents and "other matters required by particular

applications." Laws of 2010, (Chapter 303) HB 1380, pertaining to assessing fees by zoning boards of adjustment, amended RSA 676:5, RSA 676:4-b, and RSA 673:16, II, to allow zoning boards of adjustment to charge back to applicants various expenses which planning boards have historically charged. As with the planning board, there is a strong argument which supports the hiring of a specialist to review and generally assist with the applications. Zoning boards can and should take advantage of this new legislation to hire someone to review the application and determine whether it is complete.

New RSA 673:16, II (Supp. 2013) and RSA 676:4-b (Supp. 2013) allow towns to charge for third party review and consultation during the review process, thus providing an opportunity for peer review of expert reports prepared by applicants or possibly abutters. Towns should exercise caution however when peer review is done in connection with any concurrent planning board and zoning board of adjustment application since the above referenced legislation indicates that there can not be substantial replication in the peer review done for both boards.

When utilizing outside consultants to assist with the application review process and /or when using experts for peer review, the town must do so in conformance with the statute on documentation of expenses pursuant to RSA 676:4-b and new RSA 673:16, II, and must do so in a manner which documents that the expenses are reasonable. It is recommended that land use board regulations, whether site regulations or zoning board procedures, be amended to expressly reference the enabling statutes. The application form for cell tower application, as more particularly described elsewhere in these materials, should also contain language indicating that the town is authorized to make such "reasonable expense" charges. Cell tower companies may very well object to being asked to pay for these expenses; be prepared for such objections by documenting the expenses. Further, towns may wish to put out an RFP for consulting services

even prior to receiving any cell tower applications.[5] Doing so will prevent the need to scramble to find someone when an application is received, and will create a good body of evidence that the town is acting prudently in hiring an appropriate, and an appropriately priced, individual to provide the services.

As indicated elsewhere in these materials, the review for completeness must be done in the thirty days following receipt of the application (fifteen days for co-location applications). Adhering to these time frames is critical. If incomplete items are not timely flagged for attention and further action, the town forfeits its ability to stop the "shot clock" for new applications while an applicant provides the requested information, after the expiration of the initial thirty day time period. (Co-location applications will be deemed granted in forty-five days, and the statute provides no latitude for extensions, although presumably the applicant could agree to an extension.) Fortunately, the thirty day time period is consistent on its face with the existing time frames set forth in RSA 676:4, I (b) which require planning boards to determine within 30 days following delivery of an application, or at the next regular meeting (in accordance with notice requirements) whether the application is complete according to the regulations and to vote on this determination. Similarly, a public hearing for zoning board applications must be held within 30 days of the application under RSA 676:7 II. This second statute tends to be honored more in the breach than in actual practice, but given the "shot clock" order, towns are cautioned to do their completeness review for zoning board applications and hold public hearings on same within the thirty days.

---

[5] Because the need for consulting or other services for cell tower applications is unlikely to arise frequently for any given town, towns may wish to formally or informally work together to share a consultant. Additionally, regional planning commissions will likely be able to offer assistance with the application review process.

Extensions of time beyond the thirty days and extensions for decisions on the merits will undoubtedly be required from time to time. At times, those delays will be the result of administrative issues beyond the control of the town, such as when the applicant provides incorrect or incomplete information to prepare the abutter lists or when quorums are unavailable. At other times, the town may need additional time to conduct the review or to hold hearings.[6] Regardless of what the origin of the extension is, the reason(s) must be documented and any agreement to extend must be in writing.

C. So What Does It Mean to Be Complete?

We recommend using a checklist to determine the completeness of applications. This will ensure that the review is thorough and that all cell tower applications are treated in a uniform manner. For those applications which require zoning board relief, the application should of course provide information to make a decision regarding the five statutory requirements for a variance under RSA 674:33, I (b). Additionally, and unique to a cell tower application, the materials should provide information to indicate that there are significant coverage gaps which necessitate the siting and construction of additional towers. At a minimum, this information should include a coverage map showing the existing facilities of all of the carriers within a community and in the surrounding communities (not just the applicant's facilities) as well as relevant engineering reports for collected towers showing compliance with

---

[6] One of the problems that plagues many land use boards, particularly in small towns, is getting a quorum for any meeting, particularly in the summer months. On a similar note, often when there is a quorum, but not a full board, the applicant will opt not to proceed until there is a full board. These problems affect all applications, not just cell tower applications. There is no easy answer because it is always difficult to find volunteers to fill the board positions. That said, towns and boards should make best efforts to have a full complement of alternate members available to sit in when quorum problems arise. When it is not possible to conduct a meeting due to a quorum problem, it should be documented that the failure to take action was due solely to a quorum issue, and if it all possible, the board might offer to conduct a special meeting to keep the application process on track. Similarly, if the applicant opts to not go forward due to less than a full board, this fact should be clearly noted in the minutes, and there should be an explicit acknowledgement, in writing, that this choice will result in an extension, for an equal length of time, of the FCC's "shot clock" deadlines.

ANSI and industry and safety and structural codes. The materials should also contain a narrative description of the analysis conducted by the applicant to learn what alternative locations and/or proposals are feasible, or, if there are none that are feasible, why they are not feasible, with documentation of attempts to secure alternative locations.

For applications which call for planning board review, it will be necessary for the application to contain all waiver requests, and if waivers are required, then the applications should contain all supplemental material related to the waiver requests. For all applications, the boards should identify any expert reports that may be required, and if they are not submitted within the necessary thirty days, boards should create a writing indicating that the application is incomplete because of that fact. It is also recommended that all boards set up an escrow account (pursuant to RSA 673:16, II) to collect funds up front for anticipated expenditures.

D. <u>And Yet Another Wrinkle /SB 328 Incomplete Applications.</u>

A relatively new law, (Chapter 39, Laws of 2010)(SB 328), effective July 17, 2010, amended RSA 676:4, I (b) and was intended to prevent applications of any type, not just cell tower applications, from getting bogged down at the planning board level. In particular, the law was designed to prevent planning boards from requiring that DES or other state permits be obtained first before an applicant goes to the planning board, and to prevent the delays which sometimes occur when relief is required from the planning board and the zoning board and the application is bounced back and forth between boards for long periods of time. This statute became effective in 2010, and there are, as of 2014, no Court decisions interpreting how it might be applied in the context of cell towers. What can be inferred, though, is that the New Hampshire legislature does not want to see planning boards delay applications in order to require applicants to first obtain permits from other governmental bodies. This legislative intent,

coupled with the policy directives of the FCC's "shot clock" order, suggest that planning boards could be in serious jeopardy if they require cell tower applicants to first obtain any relevant state permits before the planning board accepts jurisdiction under RSA 676:4.

Questions have arisen about how the statute will be applied where relief is required from both the zoning board of adjustment and the planning board. We believe when a cell tower application requires zoning board of adjustment relief, typically for a use or height variance, that both the applicant and the respective boards will want the zoning board of adjustment to go first, because without the variance(s), the proposal cannot be approved by the planning board. However, regardless of which land use board the application goes to first, the decision should be conditional upon obtaining approval from the other board.

E. What Happens After the 30 Days?

Thus far, this discussion has focused on what needs to be done within the first thirty days following receipt of the application. However, the need to comply with the time deadlines in the FCC's "shot clock" order continues to be critical after the initial thirty days has run. The deadlines are that a final written decision needs to be made within 150 days for a new tower/construction application. Note that this rule applies not only to the initial decision granting or denying an application, but also the decision following a request for rehearing, and if the rehearing is granted, a written decision on the rehearing itself.

All of the issues pertaining to the 30-day deadline described for the "completeness" review apply with equal force here. Towns need a quarterback, whether a town employee or a consultant of some nature, to be responsible and accountable for calendaring the deadlines. For the 150 day deadline, it is recommended that the local land use boards calendar all public meetings when the application might possibly appear on the docket as a work session and/or

public hearing, and that notice be provided to the applicant at the beginning of the process as to when the deadlines are to provide documents for board packets prior to each of those meetings. Working backwards from these deadlines, towns can then determine what intermediate steps need to be conducted by staff and/or consultants to assist the land use boards in meeting these deadlines.

Even if the land use boards successfully work towards meeting the deadlines, the role of the public and disgruntled abutters can present unexpected challenges to the towns' ability to adhere to deadlines. In particular, the public and abutters have procedural due process rights, including being given an opportunity to be heard at public hearings. The opportunity, which could include the ability to make a presentation, to present evidence of their own experts, and/or to request that additional information be obtained to ensure that the final decision is an informed one, should be afforded in a manner consistent with board practice for any other type of application. Additionally, board members themselves may decide that additional information is needed to make an informed decision possible. All of these factors could make meeting the 150 day deadline problematic, particularly regarding the abutter involvement because, as a practical matter, abutter involvement does not begin until the 30-day completeness review is done. There are no easy or clear answers to these issues under the law at this time. It seems likely litigation will arise to resolve the potential operational conflict between the FCC order, the due process rights of the abutter, and the duty of the planning board to make decisions in an informed manner. Towns should protect themselves as much as possible by obtaining extensions from the applicant when appropriate, and by, as much as possible, requiring that abutters adhere to the same submission deadlines for materials to which applicants must adhere. In every instance where the board may go beyond the FCC's deadlines, either in requesting additional information

from the applicant after the initial 30-day "completeness" review, or in needing additional time to make a decision, the board should proactively request, in writing, an extension from the applicant and, if the applicant declines, require that it do so in writing.

Note that some applicants may take the position that the FCC's "shot clock" deadlines apply cumulative to all land use board approvals for a particular project, i.e., 150 days total for both planning and zoning board approvals if both are needed. In such instances, written extensions of the deadlines may be needed.

As noted above, at least one Federal judge in New Hampshire, Judge Laplante, has taken the position that the "shot clock" deadlines apply to rehearings as well. "Accordingly, the Shot Clock Rulings 150-day deadline for the processing of wireless communication facility siting applications encompasses not only the time it takes a local government to reach an initial decision on an application, but the time it takes to complete the rehearing process set forth in N.H. Rev. Stat. Ann. §677:2 and 677:3 as well." Town of Stoddard at pp. 13-14.

This decision came in a case with problematic facts for the town: the Stoddard ZBA rendered a decision granting the application for a 130 foot "unipole" tower (a single pole with a concealed, internal antenna) in a timely fashion. The ZBA had requested, and the applicant had agreed to, an additional three months. The Board conducted six public hearings and requested "voluminous" additional materials and "numerous" tests. Id. at p. 5. Then, two months later, after issuing its initial decision, granted a request for rehearing, at a meeting in which one Board member (who had been a vocal opponent of the application) speculated that it would "take 20 to 30 meetings" and suggested the Board needed a brand new consultant to review the applicant's purported coverage gap. Id., at pp. 6-7. Judge Laplante had no trouble concluding that such tactics could be used as a means to "impede or obstruct" applications, in violation of the TCA

and the FCC's Shot Clock Order. For this reason, he included the entire rehearing process, through "resolution" (which under the TCA means final written decision) within the 150-day deadline of the "shot clock." "To conclude that a rehearing under New Hampshire law is exempt from the Shot Clock Rulings deadline would encourage great mischief." Id. at p. 14. Although this decision is not binding legal precedent for other cases in New Hampshire, it is very likely it will be followed. Judge Laplante's decision was not appealed.

What can local land use boards do to comply with the requirement that final, written decisions on rehearing, also be produced within the 150-day deadlines of the "shot clock"? First, the same recommendations discussed previously in these materials apply: boards should pay scrupulous attention to deadlines, calendar them, even as they evolve, and do their very best to meet them. Second, boards should, upon receipt of the application, consider requesting that the applicant agree to a sixty day extension of the "shot clock" deadlines in the event that a request for rehearing is filed after the board renders its initial, "final" decision on the application. Third, if boards find themselves running out of time, they should request, in writing, an additional *reasonable* extension of the "shot clock" deadlines. The applicant's response, either agreeing to the extensions or declining, should also be in writing. Depending on the applicant's response to requests for an additional extension, the Board may need to schedule extra meetings. Fourth, boards retain a measure of control, even if applicants file an action in Court for a violation of the TCA due to the failure to meet the shot clock deadlines: if the board subsequently renders a final written decision on the request for rehearing, the Federal Court is very likely to dismiss the case as moot, especially if the board has been trying diligently to meet the deadlines and to get an agreement from the applicant to a reasonable extension. The importance of a solid record,

demonstrating that diligence, communication and reasonableness for the board's protection cannot be overstated.

Courts state over and over again that they will look not only at the time it may take to process an application, but also at the reasoning behind the board's decision. For that reason, the board's decision should not only be in writing indicating an approval, an approval with conditions, or a denial, but should set forth, with as much specificity as possible, *why* the board came to the decision it did and, in the case of cell tower applications, the evidence in the written record. That said, the requirement to explain the decision on a cell tower case is not unique. New Hampshire cases have long stressed the need for the board to explain its decision. In fact, this requirement was recently reiterated in Motorsports Holdings, LLC v. Town of Tamworth, 160 N.H. 95 (2010) when the Court ruled that board minutes were insufficient to tell the applicant why the application had been denied; instead, a written decision setting forth the reasoning is required. The interplay between state law and TCA requirements for the written decision is discussed more fully in Section III, below.

Although the preceding materials dealt mostly with new wireless facility applications, the changes to RSA 12-K effective in 2013, require equal vigilance by your building inspector or code enforcement officer. If applications for co-locations or wireless facility modifications are not addressed within forty-five (45) days, they are deemed granted, a dramatic outcome considering that the building inspector or code enforcement officer's review pertains to safety compliance.

III. Substantive: Application of TCA to Local Land Use Board Decisions.

A. How Would Land Use Boards Violate the TCA By Unreasonably Discriminating Among "Providers of Functionally Equivalent Services"?

It is unlikely that they would. The first aspect of the TCA that plays a role in local land use decisions is a very basic one: that those wireless service providers who provide functionally equivalent services may not be treated differently by local boards. For example, this means that carriers who have a PCS system (Personal Communications Service, which operates at a high frequency and is all digital) cannot be treated differently from traditional cell phone service providers who operate at a lower frequency. Due to the different technologies involved, PCS "cells" must be much closer together, in the range of one-half to two miles in diameter, whereas traditional cell phone technology could have cells of between three and fifteen miles in diameter depending on the topography.[7] Municipalities and their land use boards may not develop "unreasonably" different requirements for the two types of facilities, although they may treat facilities with varying impacts, such as height, differently. Conference Report to S. 652 and Joint Explanatory Statement of the Committee of Conference HR 104-458, 104th Cong., 2d Sess. at Section 704 (hereinafter "TCA Conference Committee Report"). This requirement has not been a major stumbling block for land use boards in New Hampshire or elsewhere in the country.

B. What Does It Mean That Denials By Local Land Use Boards May Not "Prohibit or Have the Effect of Prohibiting" Wireless Services?

This is one of the most challenging criteria of the TCA and one over which multiple federal cases have been litigated. In essence, it means that the decisions of local land use boards may not have the practical effect of preventing the personal wireless services **applicant** from being able to provide its services to customers in a particular community. [It is not a violation of

[7] For a succinct discussion of personal wireless services signals, see Omnipoint Holdings, Inc. v. City of Cranston, 586 F. 3d 38, 41-42 (1st Cir. 2009)(hereinafter "City of Cranston").

the TCA for a land use board to reject an application if other options for siting or height may be available to the applicant. Town of Amherst, 173 F. 3d at 24.]

Initially, some courts concluded that, if there was any cell phone service in a community, no further towers need be allowed. That position has been rejected in the First Circuit, the Federal Court of Appeals covering the State of New Hampshire. Southwestern Bell Mobile Systems v. Todd, 244 F. 3d 51, 63, (1st Cir. 2001) (hereinafter "Southwestern Bell") as well as the Ninth Circuit, on the west coast. Therefore, the current law in New Hampshire is that an applicant which is a provider of wireless services is entitled to serve customers in a particular community, even if there are existing cell phone companies already operating and serving customers in that area.[8] As noted above at Section I, B. 1, many applicants are tower construction companies, not wireless service providers themselves. However, providers often act as co-applicants, to ensure protection of this section of the TCA for the application.

A single denial of an application either for planning use approval or a ZBA decision may amount to a prohibition on the provision of wireless service by a particular applicant, but the burden for the carrier in those situations to demonstrate effective prohibition is "a heavy one." Town of Amherst, 173 F. 3d at 14. **The carrier must show "from language or circumstances not just that this application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try."** Id. at 14-15.

In addition, an applicant is not entitled to "perfect" service with absolutely no areas of dropped calls or "dead spots." The FCC regulations explicitly permit such small gaps or "dead

[8] In its "shot clock" Order issued November 18, 2009, the FCC also interpreted the TCA's requirement that denials of wireless facility applications "not prohibit or have the effect of prohibiting" wireless service to be consistent with the First and Ninth Circuit Courts of Appeals decisions, effectively making this the law of the land. Local land use boards may not deny applications just because other carriers can provide service in a particular locality. Furthermore, if a denial results in the applicant-carrier being unable to provide service, even if other carriers already provide their service in the area, the denial may violate the TCA. FCC Order at ¶¶ 54-65.

zones" in wireless coverage for FCC license purposes. Cellular service is considered to be provided in all areas, including "dead spots." 47 C.F.R. §22.99 and 22.911 (b).

If an applicant can demonstrate that there is a gap in service, which amounts to more than the incidental gaps or "dead zones" permitted by FCC regulations (see above), the denial of an application may still not amount to an effective prohibition of service, *if* there are alternative sites available.

> "For a telecommunications provider to argue that a permit denial is impermissible because there are no alternative sites, it must develop a record demonstrating that it has made a full effort to evaluate the other available alternatives and that the alternatives are not feasible to serve its customers. Such a showing may be sufficient to support an allegation that the zoning board's permit denial effectively prohibits personal wireless services in the area."

Southwestern Bell, 244 F. 3d at 63; Accord, Town of Pelham, 313 F. 3d at 635.

As noted above, the TCA provides an umbrella under which decisions of land use boards are made. As the federal First Circuit Court of Appeals commented, although the TCA does not **require** zoning boards to consider whether a decision denying an application amounts to an effective prohibition of service, "[s]ince board actions will be invalidated by a federal court if they violate the effective prohibition provisions, many boards wisely do consider the point." Town of Pelham, 313 F, 3d at 630.

In the earlier days of cases interpreting the TCA, many decisions involved fairly sparse records in which applicants had not demonstrated very clearly, as required by the court cases noted above, efforts to locate appropriate alternative locations. As an example of a thorough record establishing the uniqueness of the location chosen by an applicant, see City of Cranston, 586 F. 3d at 43-45. In that case, an engineer named Mr. Luutu described the requirements for the applicant, Omnipoint, for its particular signal level.

> "Luutu also explained how he created a search ring and evaluated candidates for facility around Phenix Avenue based on Omnipoint's specifications. He acknowledged he could have studied building multiple, smaller sites to cover the gap, but Luutu only considered building a single tower because Omnipoint instructed him to. Although no proposed site would fully remedy the coverage gap around Phenix Avenue, Luutu, accepting that the country club was unavailable, concluded a tower on the property of the Solid Rock Church was Omnipoint's best alternative."

Id. at 44. See id. at pp. 42-43 for additional description of Omnipoint's work to identify possible sites. In that case, the Court of Appeals analyzed the record and found that Omnipoint's calculation of a gap in coverage was sound and "the record contains no evidence that undercuts [the evidence of a coverage gap]". Id. at 49.

As noted in other cases for this circuit, it is the **applicant's** burden to show that there are no alternative sites that would solve the coverage problem. Id. at 50 (citing Town of Pelham, 313 F. 3d at 635). Importantly, the Court has noted that "the carrier could not insist on one, ideal way to provide service; the TCA required it to consider alternatives more palatable to local zoning authorities." Id. at 50 (citing Town of Amherst, 173 F. 3d at 14-15).

Equally important, the First Circuit has maintained the balance between the goal of the development of wireless services across the country with the preservation of local zoning. It has noted in several cases that, in general, zoning and land use decisions are exclusively the responsibility of the local governments. Whether a local zoning ordinance has a preference for fewer, taller towers, or conversely, multiple lower towers, it is a matter within the discretion of the community, so long as decisions do not effectively prohibit service.

> "When evaluating such claims 'we are in the realm of trade-offs' between the carrier's desire to efficiently provide quality service to customers and local government's primary authority to regulate land use. Town of Amherst, 173 F. 3d at 15. A carrier 'may think ... its solution is best' but 'subject to an outer limit, such choices are just what Congress reserved to the town' in §332 (c) (7). Id."

City of Cranston, 586 F. 3d at 51.

Ultimately, to prevail on an "effective prohibition" claim, applicants need to show that it is not possible to satisfy the criteria of the land use board, that any application for an alternative arrangement would be rejected and "so likely to be fruitless that is a waste of time even to try." Town of Amherst, 173 F. 3d at 14. Thus, applicants need to demonstrate that no other locations are feasible, because they are either unavailable for use, or technically would not meet the requirements of the applicant. As noted above, this requirement works in tandem with variance criteria involving hardship in the case of an application to the ZBA and with planning board criteria for site review applications.

C. What is a "Reasonable Time" For a Decision?

Until November 2009, the definition of a "reasonable time" for a local land use board to make a decision on an application involving a wireless tower or antenna had been the subject of few federal cases. The House-Senate Conference Committee Report from the passage of the TCA indicated that Congress intended "a reasonable period of time" under 47 U.S.C. § 332(c)(7)(B)(ii) to be "the usual period under such circumstances." "It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests or to subject their requests to any but the generally applicable timeframes for [a] zoning decision." TCA Conference Committee Report.

In spite of clear Congressional intent and the absence of significant problems with the timeliness of local land use decisions, as reflected by the dearth of court cases, the FCC opened a docket on the wireless tower industry's Petition for Declaratory Ruling to create specific timelines for review of applications for wireless towers and antennae and for other relief for the industry. After a period of comment, in which representatives of municipalities (including DTC

Lawyers) as well as the industry, provided significant comments to the FCC, the Commission issued its Order on November 18, 2009.

As noted above, Section I, C, the FCC Order creates a presumption of what constitutes "a reasonable period of time": **90 days for applications for co-location [but see new law, Footnote 1] and 150 days for other applications**, with some additional, shorter timelines added for applications pending on the effective date of the Order. If boards miss the new deadlines to act, applicants may file suit in state or federal court within 30 days of the missed deadline. The municipality would then have to overcome the presumption that the delay was not reasonable.

As described in Section I, C, the FCC Order also creates very short deadlines for a board to determine "completeness" of an application and to request additional information: **30 days from "receipt" of the application**.

As noted above, Sections I, C and II, E, according to one New Hampshire Federal judge, the 150-day deadline of the FCC Order apply to the *resolution* of a request for rehearing of a board's decision. Although this decision is not binding in future cases, until we have precedent to the contrary, municipalities will be well served to comply with it.

D. What Does It Mean That Denials Must Be "In Writing" And Based on "Substantial Evidence"?

First, the TCA requires that any decisions denying an application be in writing. This requires a degree of formality that most local land use boards have mastered due to their existing state law obligation. For example, RSA 676:4, I (h) (Supp. 2013) requires that, for any denials of applications to planning boards, "the grounds for such disapproval shall be adequately stated upon the records of the planning board," and RSA 676:3, I (Supp. 2013) requires that a local land

use board shall issue a final written decision which either approves or disapproves an application for a local permit. Nevertheless, boards need to adhere to this requirement.

Although the decision must be in writing, a decision recorded in the minutes is not sufficient under the TCA. The writing must be separate from the written record. Southwestern Bell, 244 F. 3d at 60. It may not just be part of the minutes. There is no requirement under the TCA, however, that a board create formal findings of fact and conclusions of law as part of its written decision. Notably, the First Circuit Court of Appeals has recognized that most local land use boards are staffed by lay people, who do this job on a volunteer basis and they cannot be expected to perform the role of judges. Id., at 59-60.

In the absence of a written decision, failure to decide may amount to a "denial," in violation of this section of the TCA. There have been some cases in which inaction has amounted effectively to a denial, without a written decision. Tennessee ex rel. Wireless Income Properties v. City of Chattanooga, 403 F. 3d 392 (6th Cir. 2005). Therefore, boards should be attentive not only to decisions on wireless tower and antennae applications being in writing supported by "substantial evidence," but also that inaction may effectively result in a denial, without the formality of a written opinion, in violation of the law. As a practical matter, the new FCC Order gives applicants the right to sue for inaction, after 150 days for tower applications so this "inaction" situation is unlikely to occur going forward. See Section II, C, above.

Next, denials should be clear about the reason(s) for the denial, with the reason(s) linked to the requirements under state law. As the First Circuit has noted, the "substantial evidence" requirement "surely refers to the need for substantial evidence *under the criteria laid down by the zoning law itself* (e.g. for setbacks, conditions, variances, special exception requirements)." Town of Amherst, 173 F.3d at 14 (internal citations omitted)(emphasis in original).

The next requirement is that the reasons for denial must be "supported by substantial evidence contained in a written record." 47 U.S.C. § 332 (c)(7)(B)(iii). This essentially requires that there must be substantial evidence, in writing, to form the basis in the record for the board's decision. Procedurally and substantively, the substantial evidence requirement supporting the reason(s) for denial pertains to those determinations under state law that the board would be making in any case in reviewing the application. Thus, the TCA's requirements regarding substantial evidence work in conjunction with the existing state law requirements for the land use board. "The TCA's substantial evidence test is a procedural safeguard which is centrally directed at whether the local zoning authority's decision is consistent with the applicable zoning requirements." Town of Amherst, at 16.

The amount of evidence required is not a majority, nor more than fifty percent of the evidence before the board. "Substantial evidence 'does not mean a large or considerable amount of evidence, but rather such evidence as a reasonable mind might accept as adequate to support a conclusion.' Cellular Tel. Co. v. Zoning Board of Adjustment of Ho-Ho-Kus, 197 F.3d 64, 71 (3d Cir. 1999) (internal citations omitted)." Town of Kingston, 303 F.3d at 94. As noted above, Section I, C, the decision of a local land use board will withstand federal court scrutiny under this section of the TCA "if it is 'supported by ... more than a scintilla of evidence'." Id. at 94-95. (quoting Cellular Tel Co. v. Oyster Bay, 166 F.3d 490, 494 (2nd Cir. 1999) (hereinafter "Town of Oyster Bay")) Therefore, a board needs to have some evidence, such as a reasonable mind would use, to support a decision, but it does not need to be a preponderance or more than 50% of the evidence.

> The substantial evidence test is highly deferential to the local board. See Penobscot Air Servs., Ltd v. Fed. Aviation Admin., 164 F. 3d 713, 718 (1st Cir. 1999). As Southwestern Bell [...] 244 F. 3d 51 explains: The 'substantial evidence' standard of review is the

> same as that traditionally applicable to a review of an administrative agency's findings of fact. Judicial review under this standard, even at the summary judgment stage, is narrow. ... Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion ... [T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Town of Pelham, 313 F. 3d at 627-28.

For example, in the Town of Kingston case, the planning board heard comments and concerns about the aesthetic impact of the proposed tower, with "nearly 40% of the residential abutters" of the proposed site opposing the application on aesthetic grounds. Town of Kingston, Id., 303 F. 3d at 97. The board also had testimony from one of the board members, who described her own experience when there was a "balloon test" (viewing a floating helium balloon at the proposed tower height) for an alternative location, where she noted she could barely see it. Importantly, in that case, the applicants presented no evidence to challenge these comments. Id. at 98.

Aesthetics were found to be the sole basis for denying a zoning approval in another case. Southwestern Bell, 244 F. 3d. at 60-62. What was relevant to both the Southwestern Bell case and the Town of Kingston case was the fact that there were specific, multiple and detailed items of information in the record. "A few generalized expressions of concern with 'aesthetics' cannot serve as substantial evidence" to support a denial. Town of Oyster Bay, 166 F. 3d. at 496.

Another area of evidence in the record may pertain to diminished property values for abutters. Testimony from abutters and other witnesses as well as a board member who was a realtor was relevant in a board's decision to deny a request for a variance, which was upheld on appeal. Town of Pelham, 313 F. 3d at 625. However, a few generalized concerns about decreases in property values, as with aesthetic concerns, are not sufficient, especially if there is

contradictory evidence presented by the applicant in the record. Town of Oyster Bay, 166 F. 3d. at 496.

Another ground for denial can include a preference in the Ordinance for lower towers, even if more numerous, rather than a single, very tall tower. Town of Amherst, 173 F. 3d. at 14-15. Likewise, evidence of the placement of towers in or near historic districts is also relevant. Id. at 16.

In sum, the same types of sound practices under state law to which New Hampshire boards strive, creating a written decision, based on and referencing evidence in the record, will stand them in good stead in creating a decision to deny an application for a wireless tower or antenna permit under the TCA.

F. What Happens If an Applicant Thinks a Denial Violates the TCA?

The TCA allows "any person adversely affected" by a "final action" by a local land use board "that is inconsistent" with the TCA to sue in state or federal court, within **30 days**. As noted above, most applicants choose federal court for violations of the TCA, but they often include some state law claims in the federal action.

One consideration is what constitutes the "final action" by a board. The First Circuit has held that it is "consummation of the [local unit of government's] decision-making process, even though the applicant had a limited right to challenge the decision in state court." City of Cranston, 586 F. 3d. at 47. Thus, applicants do not need to go to state court first if they believe a board has violated the TCA. As a practical matter, most applicants will make a motion for rehearing or reconsideration in a ZBA prior to filing in federal court, but they do not waste any time in getting to federal court once the motion for rehearing has been denied or rehearing granted and a new decision entered. As noted above, one New Hampshire federal judge has

ruled that boards must render a final decision after a request for rehearing, within the original 150 days or any extensions agreed to by the applicant.

With the new FCC Order creating a "shot clock," applicants may also sue if boards exceed the deadlines in the Order (150 days for decisions regarding new facilities). The right to sue does not mean the applicant has the right to a permit or approval, but it does put the burden on the municipality to show why such an approval should not be ordered. FCC Order at ¶ 45. It is important to note that the applicant and the board may mutually consent to extend the new timelines. Id. at ¶ 49.

G. What Remedies May A Court Order For A Violation of the TCA?

If a federal court finds that a violation of the TCA has occurred, there are a number of remedies that may be ordered, but there is at least one remedy that is off the table.

Most importantly for municipalities in these very difficult economic times, a Court may not order that a municipality that loses a court case on a violation of a TCA must pay the applicant any damages or attorney's fees. There were a number of jurisdictions in which cases alleging violations of 42 U.S.C. §1983 (under which attorney's fees and damages could be awarded) for violations of the rights of applicants, included monetary damages awarded against municipalities. That issue was firmly put to rest by the U.S. Supreme Court in City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005). This was a major victory for municipalities.

Generally, courts will either remand to the local authority for reconsideration if there is a violation of the TCA or issue mandatory injunctive relief, usually in the form of an order granting the application that was improperly denied in violation of the TCA. Omnipoint Communications Enterprises, Inc. v. Town of Amherst, 74 F. Supp. 2d 109 (D.N.H. 1998), reversed on other grounds, 173 F. 3d at 24 (1st Cir. 1999).

It is possible, though uncommon, for procedural violations to be remedied with a remand to the local land use board. For example, in a recent case involving the Town of East Kingston, the failure to provide an adequate written decision did not mean that the applicant was entitled to the granting of the application. In that case, the District Court remanded the case with instructions to the town to promptly provide the written decision. Industrial Tower and Wireless v. Town of East Kingston, No. 07-cv-399 (U.S. District Court, D.N.H., August 28, 2009).

For substantive violations of the TCA, most courts view injunctive relief as generally the remedy most in keeping with the TCA's directive to courts to hear and decide cases on an expedited basis. Brehmer v. Planning Board of Town of Wellfleet, 238 F. 3d 117, 120-122 (1st Cir., 2001)(hereinafter "Town of Wellfleet").

In addition, applicants and municipalities may settle violations of the TCA, or may settle applications to avoid the need for further litigation without conceding a violation on the part of a municipality. In Town of Wellfleet, 238 F. 3d at 120-122, the court noted that a consent decree agreed to by the parties could be entered as an order of the District Court and that the TCA superseded and pre-empted any state law requiring a new round of hearings at the local level on the approval being granted by the settlement. Id.

Likewise, in the recent cases involving the Towns of Epping and Alton, the New Hampshire District Court authorized the settlement reached by the municipalities to permit the construction of towers at lower heights than initially requested, to resolve the lawsuits. Town of Alton, at 12-13, however, the First Circuit preserved the right of abutters to continue to pursue a case settled by the Town, to protect the abutters' state law rights in the initial denial of the application. Industrial Communications and Electronics, et al., v. Town of Alton, 646 F.3d at 80.

The FCC Order with the "shot clock" timeline for decisions does not result in the granting of the application by the District Court if municipalities fail to meet the deadlines of the new Order. However, it does put the burden on the municipality to justify the length of time that has passed and to explain why the failure to make a decision is reasonable. There have been few cases locally involving litigation on the new FCC Order, so it is hard to say what the remedy might be for a violation of the new timelines. As a practical matter, the New Hampshire District Court has been relatively flexible with remanding matters to the local board for compliance with the procedural requirements of the TCA. See Town of East Kingston, above. Nevertheless, it is possible that a District Court could find that the delay was not justified and that the appropriate remedy would be ordering that a permit or variance be granted.

IV. Conclusion

Land use boards should, if they have not done so already, adopt the practice of good record keeping, written documentation, concerning land use applications and appropriate consultation with experts. We recognize that this is challenging, particularly in times of tight budgets and short staff; however, if this can be done on a foundational level, then it can be employed with cell tower applications and will help to protect towns in the face of litigation concerning cell tower applications.

Appendix

Selected Statutes

Telecommunications Act of 1996 (excerpts)

47 U.S.C. § 332 (c)

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof-

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) 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.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph-

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303 (v) of this title).

TITLE I
THE STATE AND ITS GOVERNMENT

CHAPTER 12-K
DEPLOYMENT OF PERSONAL WIRELESS SERVICE FACILITIES

Section 12-K:1

12-K:1 Goals; Purpose. –

I. The federal Telecommunications Act of 1996 regulates the deployment of wireless services in the United States. Its purpose is to make these services available to the American people quickly and in a very competitive manner. Nothing in this chapter is intended to preempt the federal Telecommunications Act of 1996.

II. The visual effects of tall antenna mounts or towers may go well beyond the physical borders between municipalities, and should be addressed so as to require that all affected parties have the opportunity to be heard.

III. Carriers wishing to build personal wireless service facilities (PWSFs) in New Hampshire should consider commercially available alternative PWSFs to tall cellular towers, which may include the use of the following:

(a) Lower antenna mounts which do not protrude as far above the surrounding tree canopies.

(b) Disguised PWSFs such as flagpoles, artificial tree poles, light poles, and traffic lights, which blend in with their surroundings.

(c) Camouflaged PWSFs mounted on existing structures and buildings.

(d) Custom designed PWSFs to minimize the visual impact of a PWSF on its surroundings.

(e) Other available technology.

IV. A PWSF map is necessary to allow for the orderly and efficient deployment of wireless communication services in New Hampshire, and so that local communities have adequate information with which to consider appropriate siting and options to mitigate the visual effects of PWSFs.

V. Municipalities will benefit from state guidance regarding provisions to be considered in zoning ordinances relative to the deployment of wireless communications facilities, including one or more model ordinances.

V-a. It is the policy of this state to facilitate the provision of broadband and other advanced personal wireless services across the state; and to promote access to broadband and advanced personal wireless services for all residents, students, government agencies, and businesses to ensure the availability of educational opportunities, economic development, and public safety services throughout New Hampshire. Deployment of personal wireless service facilities infrastructure is also critical to ensuring that first responders can provide for the health and safety of all residents of New Hampshire. Consistent with the federal Middle Class Tax Relief and Job Creation Act of 2012, Public Law 112-96, section 6409, which creates a national wireless emergency communications network for use by first responders that will be dependent on facilities placed on existing antenna mounts or towers, it is the policy of this state to facilitate the collocation of personal wireless services facilities on existing antenna mounts or towers in all areas of New Hampshire, while also allowing for expeditious modification of existing personal wireless service facilities to keep pace with technological improvements.

VI. Except as provided in RSA 12-K:10 and RSA 12-K:11, nothing in this chapter shall be construed as altering any municipal zoning ordinance, and this chapter itself shall not be construed as a zoning ordinance.

Source. 2000, 240:1, eff. Aug. 7, 2000. 2013, 267:1, 2, eff. Sept. 22, 2013.

TITLE I
THE STATE AND ITS GOVERNMENT

CHAPTER 12-K
DEPLOYMENT OF PERSONAL WIRELESS SERVICE FACILITIES

Section 12-K:2

12-K:2 Definitions. – In this chapter:

I. "Accessory equipment" means any equipment serving or being used in conjunction with a PWSF or mount. The term includes utility or transmission equipment, power supplies, generators, batteries, cables, equipment buildings, cabinets and storage sheds, shelters, or similar structures.

II. "Antenna" means the equipment from which wireless radio signals are sent and received by a PWSF.

III. "Applicant" means a carrier or any person engaged in the business of providing the infrastructure required for a PWSF who submits a collocation application or a modification application.

IV. "Authority" means each state, county, and each governing body, board, agency, office, or commission of a municipality authorized by law to make legislative, quasi judicial, or administrative decisions relative to the construction, installation, modification, or siting of PWSFs and mounts. The term shall not include state courts having jurisdiction over land use, planning, or zoning decisions made by an authority.

V. "Average tree canopy height" means the average height found by inventorying the height above ground level of all trees over a specified height within a specified radius.

VI. "Base station" means a station at the base of a mount or in the area near the PWSF that is authorized to communicate with mobile stations, generally consisting of radio transceivers, antennas, coaxial cables, power supplies, and other associated electronics.

VII. "Building permit" means a permit issued pursuant to RSA 676 by an authority prior to the collocation or modification of PWSFs, solely to ensure that the work to be performed by the applicant satisfies the applicable building code.

VIII. "Camouflaged" means for a personal wireless service facility one that is disguised, hidden, part of an existing or proposed structure, or placed within an existing or proposed structure.

IX. "Carrier" means a person that provides personal wireless services.

X. "Collocation" means the placement or installation of new PWSFs on existing towers or mounts, including electrical transmission towers and water towers, as well as existing buildings and other structures capable of structurally supporting the attachment of PWSFs in compliance with applicable codes. "Collocation" does not include a "substantial modification."

XI. "Collocation application" shall mean a request submitted by an applicant to an authority for collocation on a tower or mount.

XII. "Director" means the director of the office of energy and planning.

XIII. "Disguised" means, for a PWSF, designed to look like a structure which may commonly be found in the area surrounding a proposed PWSF such as, but not limited to, flagpoles, light poles, traffic lights, or artificial tree poles.

XIV. "Electrical transmission tower" means an electrical transmission structure used to support

high voltage overhead power lines. The term shall not include any utility pole.

XV. "Equipment compound" means an area surrounding or near the base of a tower or mount supporting a PWSF, and encompassing all equipment shelters, cabinets, generators, and appurtenances primarily associated with the PWSF.

XVI. "Equipment shelter" means an enclosed structure, cabinet, shed vault, or box near the base of a mount within which are housed equipment for PWSFs, such as batteries and electrical equipment.

XVII. "Height" means the height above ground level from the natural grade of a site to the highest point of a structure.

XVIII. "Modification" means the replacement or alteration of an existing PWSF within a previously approved equipment compound or upon a previously approved mount. Routine maintenance of an approved PWSF shall not be considered a modification.

XIX. "Modification application" means a request submitted by an applicant to an authority for modification of a PWSF.

XX. "Mount" means the structure or surface upon which antennas are mounted and includes roof-mounted, side-mounted, ground-mounted, and structure-mounted antennas on an existing building, as well as an electrical transmission tower and water tower, and excluding utility poles.

XXI. "Municipality" means any city, town, unincorporated town, or unorganized place within the state.

XXII. "Personal wireless service facility" or "PWSF" or "facility" means any "PWSF" as defined in the federal Telecommunications Act of 1996, 47 U.S.C. section 332(c)(7)(C)(ii), including facilities used or to be used by a licensed provider of personal wireless services. A PWSF includes the set of equipment and network components, exclusive of the underlying tower or mount, including, but not limited to, antennas, accessory equipment, transmitters, receivers, base stations, power supplies, cabling, and associated equipment necessary to provide personal wireless services.

XXIII. "Radio frequency emissions" means the emissions from personal wireless service facilities, as described in the federal Telecommunications Act of 1996, 47 U.S.C. section 332(c)(7)(B)(iv).

XXIV. "Tower" shall mean a freestanding or guyed structure, such as a monopole, monopine, or lattice tower, designed to support PWSFs.

XXV. "Substantial modification" means the mounting of a proposed PWSF on a tower or mount which, as a result of single or successive modification applications:

(a) Increases or results in the increase of the permitted vertical height of a tower, or the existing vertical height of a mount, by either more than 10 percent or the height of one additional antenna array with separation from the nearest existing antenna not to exceed 20 feet, whichever is greater; or

(b) Involves adding an appurtenance to the body of a tower or mount that protrudes horizontally from the edge of the tower or mount more than 20 feet, or more than the width of the tower or mount at the level of the appurtenance, whichever is greater, except where necessary to shelter the antenna from inclement weather or to connect the antenna to the tower or mount via cable; or

(c) Increases or results in the increase of the permitted square footage of the existing equipment compound by more than 2,500 square feet; or

(d) Adds to or modifies a camouflaged PWSF in a way that would defeat the effect of the camouflage.

XXVI. "Utility pole" means a structure owned and/or operated by a public utility, municipality, electric membership corporation, or rural electric cooperative that is designed specifically for and used to carry lines, cables, or wires for telephony, cable television, or electricity, or to provide lighting.

XXVII. "Water tower" means a water storage tank, or a standpipe or an elevated tank situated on a support structure, originally constructed for use as a reservoir or facility to store or deliver water.

Source. 2000, 240:1. 2003, 319:9. 2004, 257:44, eff. July 1, 2004. 2013, 267:3, eff. Sept. 22, 2013.

TITLE I
THE STATE AND ITS GOVERNMENT

CHAPTER 12-K
DEPLOYMENT OF PERSONAL WIRELESS SERVICE FACILITIES

Section 12-K:3

12-K:3 Wireless Carriers Doing Business in this State. – Each carrier or its appointed agent doing business, or seeking to do business, in this state shall:

I. Be allowed to construct new towers, provided that these towers comply with municipal regulations for maximum height or maximum allowed height above the average tree canopy height, subject to any exceptions, waivers, or variances allowed or granted by the municipality.

II. Comply with all applicable state and municipal land use regulations laws.

III. Comply with all federal, state, and municipal statutes, rules, and regulations, including federal radio frequency radiation emission regulations and the National Environmental Policy Act of 1969, as amended.

IV. Provide information at the time of application to construct an externally visible tower or to make a substantial modification to an existing tower, mount, or PWSF, or prior to construction if no approval is required, to the municipality in which the tower, mount, or PWSF is to be constructed and to the office of energy and planning as follows:

(a) A copy of its license from the Federal Communications Commission (FCC) demonstrating its authority to provide personal wireless services in the geographical area where the PWSF is located, or where a person is seeking to construct a new tower or make a substantial modification to a tower, mount, or PWSF on behalf of a carrier, a signed authorization from a representative of the carrier, and a copy of the carrier's license.

(b) Upon request, maps showing all of the carrier's current externally visible tower and monopole PWSF locations in the state within a 20-mile radius of the proposed externally visible new ground-mounted PWSF, including permanent, temporary or to-be-decommissioned sites, if any.

(c) Upon request, a description of why less visually intrusive alternatives for this tower or mount were not proposed.

Source. 2000, 240:1. 2003, 319:9. 2004, 257:44, eff. July 1, 2004. 2013, 267:4, eff. Sept. 22, 2013.

TITLE I
THE STATE AND ITS GOVERNMENT

CHAPTER 12-K
DEPLOYMENT OF PERSONAL WIRELESS SERVICE FACILITIES

Section 12-K:4

12-K:4 Payment of Costs. – A wireless carrier seeking approval to deploy a wireless communication facility may be required to pay reasonable fees, including regional notification costs, imposed by the municipality in accordance with RSA 676:4, I(g).

Source. 2000, 240:1, eff. Aug. 7, 2000.

TITLE I
THE STATE AND ITS GOVERNMENT

CHAPTER 12-K
DEPLOYMENT OF PERSONAL WIRELESS SERVICE FACILITIES

Section 12-K:5

12-K:5 Fall Zones. – Zoning ordinances may include provisions for fall zones for new towers and substantial modifications to the extent necessary to protect public safety.

Source. 2000, 240:1, eff. Aug. 7, 2000. 2013, 267:5, eff. Sept. 22, 2013.

TITLE I
THE STATE AND ITS GOVERNMENT

CHAPTER 12-K
DEPLOYMENT OF PERSONAL WIRELESS SERVICE FACILITIES

Section 12-K:6

12-K:6 Personal Wireless Services Facilities Map. – The director of the office of energy and planning shall develop a personal wireless service facilities map for the state. This map shall include all externally visible tower and monopole PWSF locations in the state, both active and inactive, for all carriers. This map shall also include for each of the above locations a site description. Upon request of the director, any wireless carrier or its appointed agent doing business in this state shall provide a map of all of its existing externally visible tower and monopole PWSF locations in the state and a site description of each.

Source. 2000, 240:1. 2003, 319:9. 2004, 257:44, eff. July 1, 2004. 2013, 267:6, eff. Sept. 22, 2013.

TITLE I
THE STATE AND ITS GOVERNMENT

CHAPTER 12-K
DEPLOYMENT OF PERSONAL WIRELESS SERVICE FACILITIES

Section 12-K:7

12-K:7 Regional Notification. –

I. (a) Any municipality or other authority which receives an application to construct a new tower or to complete a substantial modification to an existing tower or mount which will be visible from any other New Hampshire municipality within a 20-mile radius shall provide written notification of such application and pending action to such other municipality within the 20-mile radius.

(b) This notification shall include sending a letter to the governing body of the municipality within the 20-mile radius detailing the pending action on the application and shall also include publishing a notice in a newspaper customarily used for legal notices by such municipality within the 20-mile radius, presenting a synopsis of the application, providing relevant information concerning the applicable permits required and the date of the next public hearing on the application. Where a public hearing is scheduled by the local governing body, such notice shall be published not less than 7 days nor more than 21 days prior to the public hearing date.

II. (a) Any person, prior to constructing a new tower in any location where no approval is required but which will be visible from any other New Hampshire municipality within a 20-mile radius, shall provide written notification of such planned construction to such other municipality within the 20-mile radius.

(b) This notification shall include sending a letter to the governing body of the municipality within the 20-mile radius detailing the planned construction and shall also include publishing a notice in a newspaper customarily used for legal notices by such municipality within a 20-mile radius, presenting a synopsis of the planned construction.

III. Municipalities within the 20 mile radius described in paragraphs I or II and their residents shall be allowed to comment at any public hearing related to the application. Regional notification and comments from other municipalities or their residents shall not be construed to imply legal standing to challenge any decision.

Source. 2000, 240:1, eff. Aug. 7, 2000. 2013, 267:7, eff. Sept. 22, 2013.

TITLE I
THE STATE AND ITS GOVERNMENT

CHAPTER 12-K
DEPLOYMENT OF PERSONAL WIRELESS SERVICE FACILITIES

Section 12-K:8

12-K:8 Model Ordinances and Guidance. – The director of the office of energy and planning shall develop a set of model municipal ordinances relative to the deployment of personal wireless communications facilities. Prior to development, the director shall hold one or more public hearings and solicit comments from interested parties. The office of energy and planning shall provide a copy of the set of model ordinances to any New Hampshire municipality that requests it.

Source. 2000, 240:1. 2003, 319:9. 2004, 257:44, eff. July 1, 2004.

TITLE I
THE STATE AND ITS GOVERNMENT

CHAPTER 12-K
DEPLOYMENT OF PERSONAL WIRELESS SERVICE FACILITIES

Section 12-K:9

12-K:9 Rulemaking. – The director of the office of energy and planning, after holding a public hearing, shall adopt rules under RSA 541-A to provide sufficient information to municipalities, other state agencies, wireless companies doing business or seeking to do business in this state, and the public.

Source. 2000, 240:1. 2003, 319:9. 2004, 257:44. 2012, 171:3, eff. Aug. 10, 2012.

TITLE I
THE STATE AND ITS GOVERNMENT

CHAPTER 12-K
DEPLOYMENT OF PERSONAL WIRELESS SERVICE FACILITIES

Section 12-K:10

12-K:10 Application Review. – Notwithstanding any ordinance, bylaw, or regulation to the contrary, in order to ensure uniformity across New Hampshire with respect to the process for reviewing a collocation application and a modification application, each authority shall follow the following process:

I. Collocation applications and modification applications shall be reviewed for conformance with applicable building permit requirements but shall not otherwise be subject to zoning or land use requirements, including design or placement requirements, or public hearing review.

II. The authority, within 45 calendar days of receiving a collocation application or modification application, shall:

(a) Review the collocation application or modification application in light of its conformity with applicable building permit requirements and consistency with this chapter. A collocation application or modification application is deemed to be complete unless the authority notifies the applicant in writing, within 15 calendar days of submission of the specific deficiencies in the collocation application or modification application which, if cured, would make the collocation application or modification application complete. Upon receipt of a timely written notice that a collocation application or modification application is deficient, an applicant shall have 15 calendar days from receiving such notice to cure the specific deficiencies. If the applicant cures the deficiencies within 15 calendar days, the collocation application or modification application shall be reviewed and processed within 45 calendar days from the initial date received by the authority. If the applicant requires more than 15 calendar days to cure the specific deficiencies, the 45 calendar days deadline for review shall be extended by the same period of time;

(b) Make its final decision to approve or disapprove the collocation application or modification application; and

(c) Advise the applicant in writing of its final decision.

III. If the authority fails to act on a collocation application or modification application within the 45 calendar days review period, the collocation application or modification application shall be deemed approved.

IV. Notwithstanding anything to the contrary in this chapter, an authority may not mandate, require or regulate the installation, location, or use of PWSFs on utility poles.

V. A party aggrieved by the final action of an authority, either by an affirmative denial of a collocation application or modification application under paragraph II or by its inaction, may bring an action for review in superior court for the county in which the PWSF is situated.

Source. 2013, 267:8, eff. Sept. 22, 2013.

TITLE I
THE STATE AND ITS GOVERNMENT

CHAPTER 12-K
DEPLOYMENT OF PERSONAL WIRELESS SERVICE FACILITIES

Section 12-K:11

12-K:11 Limitations on Applications. –

I. In order to ensure uniformity across New Hampshire with respect to the consideration of every collocation application and modification application, no authority may:

(a) Require an applicant to submit information about, or evaluate an applicant's business decisions with respect to, its designed service, customer demand for service, or quality of its service to or from a particular area or site.

(b) Evaluate a collocation application or modification application based on the availability of other potential locations for the placement of towers, mounts, or PWSFs.

(c) Decide which type of personal wireless services, infrastructure, or technology shall be used by the applicant.

(d) Require the removal of existing mounts, towers, or PWSFs, wherever located, as a condition to approval of a collocation application or modification application.

(e) Impose environmental testing, sampling, or monitoring requirements or other compliance measures for radio frequency emissions on PWSFs that are categorically excluded under the FCC's rules for radio frequency emissions pursuant to 47 C.F.R. section 1.1307(b)(1).

(f) Establish or enforce regulations or procedures for radio frequency signal strength or the adequacy of service quality.

(g) In conformance with 47 U.S.C. section 332(c)(7)(B)(iv), reject a collocation application or modification application, in whole or in part, based on perceived or alleged environmental effects of radio frequency emissions.

(h) Impose any restrictions with respect to objects in navigable airspace that are greater than or in conflict with the restrictions imposed by the Federal Aviation Administration.

(i) Prohibit the placement of emergency power systems that comply with federal and New Hampshire environmental requirements.

(j) Charge an application fee, consulting fee or other fee associated with the submission, review, processing, and approval of a collocation application or modification application that is not required for similar types of commercial development within the authority's jurisdiction. Fees imposed by an authority or by a third-party entity providing review or technical consultation to the authority must be based on actual, direct, and reasonable administrative costs incurred for the review, processing, and approval of a collocation application or modification application. Notwithstanding the foregoing, in no event shall an authority or any third-party entity include within its charges any travel expenses incurred in a third-party's review of a collocation application or modification application, and in no event shall an applicant be required to pay or reimburse an authority for consultant or other third-party fees based on a contingency or result-based arrangement.

(k) Impose surety requirements, including bonds, escrow deposits, letters of credit, or any other type of financial surety, to ensure that abandoned or unused facilities can be removed unless the

authority imposes similar requirements on other permits for other types of commercial development or land uses. If surety requirements are imposed, they shall be competitively neutral, non-discriminatory, reasonable in amount, and commensurate with the historical record for local facilities and structures that are abandoned.

(l) Condition the approval of a collocation application or modification application on the applicant's agreement to provide space on or near any tower or mount for the authority or local governmental services at less than the market rate for space or to provide other services via the structure or facilities at less than the market rate for such services.

(m) Limit the duration of the approval of a collocation application or modification application.

(n) Discriminate on the basis of the ownership, including by the authority, of any property, structure, or tower when evaluating collocation applications or modification applications.

II. Notwithstanding the limitations in paragraph I, nothing in this chapter shall be construed to:

(a) Limit or preempt the scope of an authority's review of zoning, land use, or permit applications for the siting of new towers or for substantial modifications to existing towers, mounts, or PWSFs.

(b) Prevent a municipality from exercising its general zoning and building code enforcement powers pursuant to RSA 672 through RSA 677 and as set forth in this chapter.

Source. 2013, 267:8, eff. Sept. 22, 2013.