

# Federal Cell Tower Zoning: A Municipal Perspective on Section 6409

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# Varnum Law Firm

- One of Michigan's largest firms, over 100 years old
- Corporate law firm with significant communications and municipal law practice
- Represents municipalities nationwide in dealings with cable and telecommunications utilities
- Represents municipalities and private property owners on cell tower zoning and leases
- Cell tower blog at [www.varnumblogs.com/category/cell-phone-tower-leasing-and-zoning/](http://www.varnumblogs.com/category/cell-phone-tower-leasing-and-zoning/)

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# Introduction

- Federal laws and orders applicable to cell tower zoning
  - 47 U.S.C. Sec. 332(c)(7), a/k/a Section 704, added in 1996
  - Shot clock orders
  - Section 6409 of Middle Class Tax Relief Act, added on February 22, 2012
- Federal law now divides cell towers into two classes:
  - New towers - - Mainly Section 704
  - Modifications - - Mainly Section 6409

# Major Points on Section 704

- Adds to, overlay on, state and local zoning law
  - Have to comply with both
- In general good news for municipalities - -
  - Section 704 preserves local zoning
- But remedy for violations often an order approving tower, not a remand
- No attorneys fees, damages for successful challenges
- Procedural rules often different than state law
  - Written decision, written record, etc.
- RF emissions preclusion, to extent tower complies with FCC emissions rules

# Major Points on Section 704 (cont'd)

- Local zoning principles generally not affected, such as decision between
  - Fewer, higher towers
  - More, shorter towers
- Allowable grounds include standard items
  - Aesthetics
  - Number and height
  - Safety
  - Environmental
  - Impact on residential area, historic areas
  - Effect on property values
- Zoning conditions increasing cost generally OK

# Major Points on Section 704 (cont'd)

- Only “unreasonable” discrimination prohibited by Act
  - Some discrimination, different treatment, is allowed
- Generally cannot “prohibit or have the effect” of prohibiting service, i.e. gap in service
  - BUT Federal law and cases allow small gaps
  - Exact legal standard varies with Federal Circuit Courts
    - Alternate site analysis
    - Fill by least intrusive means

# Shot Clock Order

- Collocations
  - 90 days to act. Reasoning
  - Not a collocation if:
    - More than 10% increase in height
    - More than 4 equipment cabinets (or 1 shelter)
    - New antenna extends more than 20' from the tower
    - Excavation needed outside current site
- New Towers
  - 150 days to act presumed reasonable.



# Shot Clock Order (cont.)

- If Planning Commission decision can be appealed to City's Board of Zoning Appeals, do shot clocks apply just to Planning Commission decision or to appeal as well?
  - Good arguments under statute that shot clocks only apply to Planning Commission decision, not to appeal. FCC has refused to rule on this, but one court has agreed.
  - Address at start, get agreement and extension as needed
  - Applicant at risk here, has only 30 days to appeal any violation of shot clocks

# Section 6409(a) on Modifications

- Part of Feb payroll tax cut extension
  - “Notwithstanding section 704 . . . or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station”
  - “Eligible facilities request” means "any request for modification of an existing wireless tower or base station that involves ---
    - (A) collocation of new transmission equipment;
    - (B) removal of transmission equipment; or
    - (C) replacement of transmission equipment."

## Section 6409(a) (cont'd)

- Latest in long series of industry efforts to preempt local cell tower zoning
  - 1995 FCC Rulemaking - - preempt local zoning
  - Initial cases on interpreting Section 704
  - San Diego case challenging all local cell tower zoning under 47 USC 253
  - Shot clock order
  - Various proposed Federal bills

## Section 6409(a) (cont'd)

- Serious Constitutional questions, affected by how broadly Section 6409 is interpreted
  - Commerce Clause limitations on Federal authority
  - Federalism, Tenth Amendment (all powers not given Congress reserved to states) concerns in light of court decisions preferring, upholding localism on zoning and similar issues
  - Impermissibly blurring of lines of political accountability, especially given directive to states, cities to “approve” qualifying modification requests

## Section 6409(a) (cont'd)

- Types of state and local approvals potentially affected by Section 6409:
  - Zoning and land use
  - Building and safety codes, e.g. ANSI/TIA 222-G-2 on tower structural safety
  - Environmental and historic preservation laws
  - Private companies collocating on police, fire towers
  - Modifications, grants of tower leases with units of government
  - Modifications, grants of tower leases with private parties

# Section 6409(a) (cont'd)

- Key terms and definitions, e.g.
  - Existing
  - Wireless
  - Tower
  - Base station
  - Substantially change the physical dimensions
    - Especially of concern for camouflaged towers
- Industry argues that prior FCC definitions apply
  - Section doesn't state that
  - Many of FCC definitions are of different terms
  - In different contexts, for different purposes

# Interpretations of Not Deny, Shall Approve

- No approval necessary, provider need not even apply
  - Supported by PCIA
- Must apply, but only with info to show facility qualifies under Section 6409
- Must apply, but application has to be approved **as submitted** (no changes)
  - Also supported by PCIA - - but based on language not in Section (which is in Sections 704 and 253) that change could have “effect of denying”

# Interpretations (cont'd)

- Must apply, application has to be approved (even if violates state, local law), but can be changed or conditioned
  - Better reading of Section, reduces Constitutional problems
- No effect - - Section is unconstitutional
- Practical comment
  - The broader the preemption that is sought, the more likely the Section will be found unconstitutional



# Section 6409 - - Practical Considerations

- Major impact on new tower applications
  - Have to consider tower not just as proposed, but under cumulative impact of Section 6409 changes
  - Especially sensitive for camouflaged towers
- May result in initial approval either
  - Being for very small tower, or
  - Specifying conditions for taller tower with multiple, larger antennas, etc.
- Municipalities still retain authority
  - To choose between more shorter, fewer taller towers
  - To require monitoring for RF emissions compliance

# Section 6409 - - Practical (cont'd)

- Many/most cases likely can be easily resolved, due to local preference for collocations in many cases
- Compromises possible until (Constitutional) dust settles
  - E.g. - - Go forward with local proceeding, both parties reserving rights under 6409
    - City to rescind for unconstitutionality
    - Provider to compel automatic approval
- Await FCC, court cases interpreting Section 6409

# Section 6409 - - Practical (cont'd)

- Are in very early days of implementation of Section 6409
- Be alert to preceding issues, concerns
- Await FCC, court cases interpreting Section 6409

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