How Recent Legislation Will Affect Wireless Approvals

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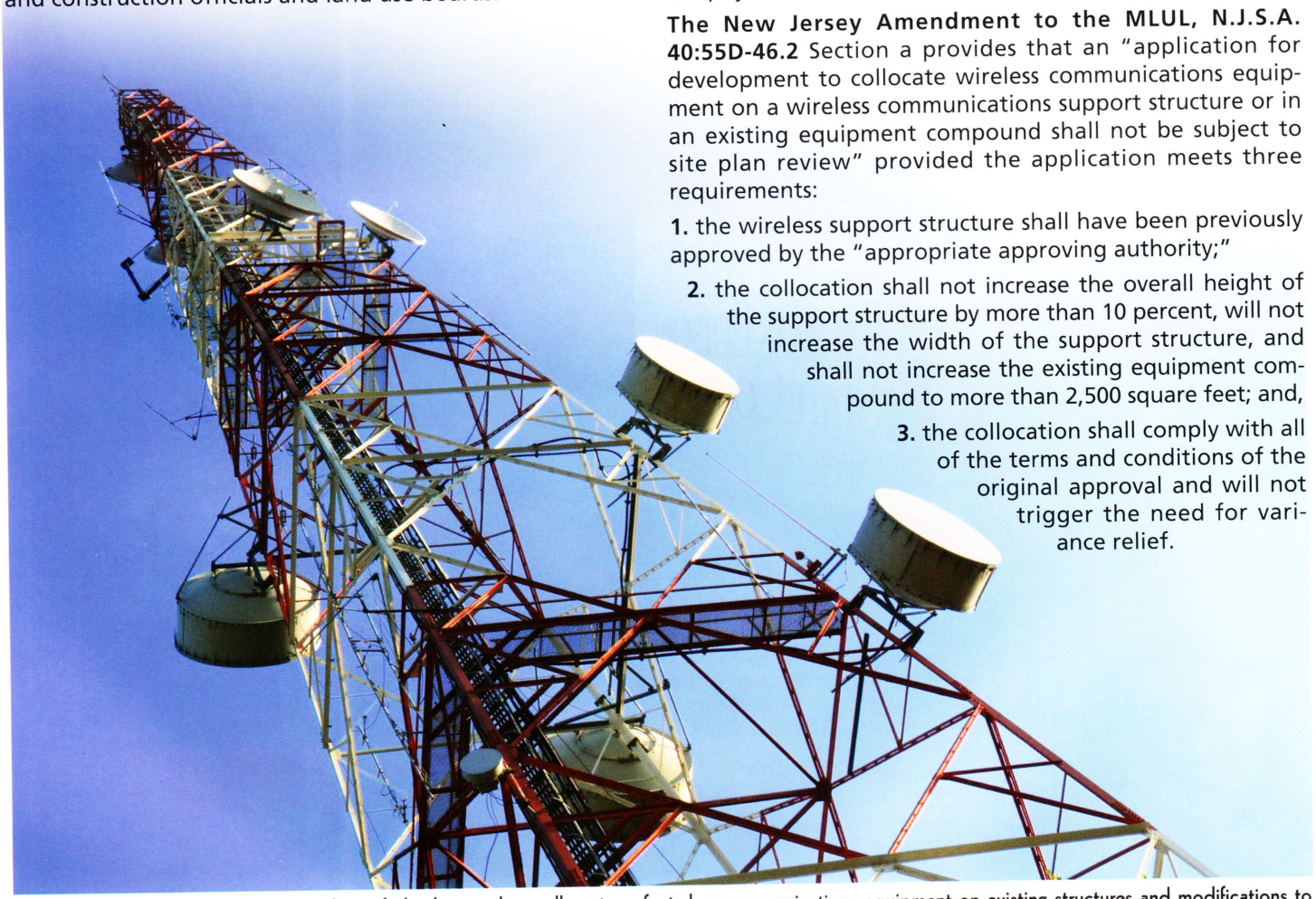
It makes good sense for telecommunication companies to place as many antennas as possible on existing towers, where it is technically and economically feasible. This reduces the need to build new towers. It helps the tower owners to maximize their assets by adding as many tenants as possible. This process, called collocation, is encouraged by the FCC.

With this in mind, two recent enactments, one state and one federal, regarding collocation of wireless communications equipment on existing structures and modifications to existing towers warrant attention by municipal zoning and construction officials and land use boards.



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The first, New Jersey P.L.2011, c.199, codified at N.J.S.A. 40:55D-46.2 (signed into law on January 17, 2012), amends the Municipal Land Use Law (MLUL) to exempt from site plan review certain types of applications to collocate wireless communications equipment on an existing support structure or in an existing equipment compound.

The second, P.L. 112-96 s. 6409, codified at 47 U.S.C. 1455 (signed into law on February 22, 2012) prohibits state and local governments from denying a request by an "eligible facility" to modify an existing wireless tower or base station, provided the modification does not "substantially change" the physical dimensions of such tower or base station.

The New Jersey Amendment to the MLUL, N.J.S.A. 40:55D-46.2 Section a provides that an "application for development to collocate wireless communications equipment on a wireless communications support structure or in an existing equipment compound shall not be subject to site plan review" provided the application meets three requirements:

1. the wireless support structure shall have been previously approved by the "appropriate approving authority;"
2. the collocation shall not increase the overall height of the support structure by more than 10 percent, will not increase the width of the support structure, and shall not increase the existing equipment compound to more than 2,500 square feet; and,
3. the collocation shall comply with all of the terms and conditions of the original approval and will not trigger the need for variance relief.

This new provision raises a fundamental question: who determines in the first instance whether the application is exempt from site plan review—the local land use board or the construction or zoning official? Industry attorneys have argued that these applications can be dealt with entirely administratively. I disagree and believe that it is the land use board that should determine whether the applicant has satisfied the three requirements so as to qualify for a site plan review exemption.

IT IS NOT FOR THE ZONING OR CONSTRUCTION OFFICIAL TO DETERMINE WHETHER THE COLLOCATION APPLICATION SHOULD BE EXEMPTED FROM SITE PLAN REVIEW; IT IS UP TO THE LAND USE BOARD.

N.J.S.A. 40:55D-46.2a states that an "application for development" to collocate wireless communications equipment is exempt from site plan review if the above-listed requirements are satisfied. The MLUL defines the term "application for development" as meaning "the application form and all accompanying documents required by ordinance for approval of a subdivision plat, site plan, planned development, conditional use, zoning variance or direction of the issuance of a permit pursuant to [N.J.S.A. 40:55D-34 or N.J.S.A. 40:55D-36]." Therefore, "application for development" to collocate as used in N.J.S.A. 40:55D-46.2a means an application to the land use board for site plan approval – or exemption therefrom – to allow the collocation, not an application to the construction official or zoning officer for a zoning or construction permit. It is not for the zoning or construction official to determine whether the collocation application should be exempted from site plan review; it is up to the land use board.

Further support for this argument lies in the statutory requirements themselves. Although the first two requirements are objective and involve no analysis, the third requirement – that "the proposed collocation (a) shall comply with the final approval of the wireless communications support structure and all conditions attached thereto, and (b) shall not create a condition for which variance relief would be required under [the MLUL] or any other applicable law, rule or regulation" – is more ambiguous and requires fact-finding and analysis.

The following scenario illustrates this ambiguity. An applicant obtains site plan approval to construct a 112-foot high monopole and equipment compound. The use is prohibited in the zone, so the applicant also obtains a "d(1)" use variance. The monopole exceeds the maximum permitted height by more than 10 feet or 10 percent

(see, N.J.S.A. 40:55D-70(6)), so the applicant also obtains a "d(6)" height variance. The board allows only one carrier on the monopole or in the equipment compound, and prohibits further increases to the tower's height. A carrier now submits a collocation application pursuant to N.J.S.A. 40:55D-46.2, for which it will need to increase the height of the tower by 11 feet. The proposal to add a second carrier to the tower, even though allowed pursuant to N.J.S.A. 40:55D-46.2, violates the terms of the d(1) variance; the proposal to increase the height of the tower, although within the 10 percent limitation set forth in N.J.S.A. 40:55D-46.2, triggers the need for another "d(6)" height variance because it raises the height of the tower by more than 10 feet. Pursuant to the terms of N.J.S.A. 40:55D-46.2, then, the proposed collocation would not be exempt from site plan review and approval. The analysis leading to this conclusion, however, is one that should be undertaken by the land use board, not the construction or zoning official.

Section 6409 of the Middle Class Relief and Job Creation Act of 2012, 47 U.S.C. 1455 This law provides that 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." An "eligible facilities request" is defined under the Act as any request for modification that involves "(A) collocation of new transmission equipment; (B) removal of transmission equipment; or (C) replacement of transmission equipment." The Act does not define "substantial change."

Industry attorneys have argued that "substantial change" should be defined in accordance with a 2001 agreement that the Federal Communications Commission (FCC) entered into with the National Conference of State Historic Preservation Officers and the Advisory Council on Historic Preservation governing the collocation of wireless antennas on sites listed or eligible for listing in the National Register of Historic Places, commonly referred to as the "Historic Places Collocation Agreement". The Agreement does not actually define "substantial change." Rather, it addresses "substantial increases" in the size of communication towers, which it defines as "mounting of a proposed antenna on the tower [that] would increase the existing height of the tower by more than 10 percent" or "mounting of the proposed antenna [that] would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater."

In my opinion, the Historic Places Collocation Agreement should not be used to define "substantial change." The agreement does not deal with the subject matter of 47 U.S.C. 1455; it only addresses collocation on towers located within 1,000 feet of sites listed or eligible for listing on the National Register. Moreover, it is only an agreement among three federal entities; it is not FCC rule or regulation. Although the FCC recently published a Public Notice on January 25, 2013 which states that "substantial change" should be defined in accordance with the Historic Places Collocation Agreement, this does not change my opinion because the Public Notice is not a FCC rule or regulation.

Some attorneys have argued that 47 U.S.C. 1455 preempts the discretionary review process conducted by a land use board and subjects "eligible facility requests" only to a non-discretionary administrative review process conducted by the municipal zoning or construction official. I disagree. The "substantial change" standard contained in 47 U.S.C. 1455 is subjective and calls for a case-by-case analysis to determine when a proposal involving a change in the physical dimensions of a support tower must be approved. Moreover, nothing in the statute indicates any intention to preempt local land use board review. To the contrary, the statute states that a modification request must be approved if it does not substantially change the physical dimensions of the tower or base station.

How can the request be evaluated for substantial changes without a discretionary review? The very fact that the "substantial change" standard is a subjective standard calls for discretionary review by the land use board, not ministerial review by the construction official or zoning officer.

I submit that both applications pursuant to N.J.S.A. 40:55D-46.2 and applications pursuant to 47 U.S.C. 1455 properly belong before the land use board that is charged with reviewing development applications, and not the construction official or zoning officer. In my opinion, a zoning or construction official faced with such an application should decline to issue permits and should instead refer the application to the appropriate board. ▲

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