

2018 FCC Report and Order Governing
5G Small Wireless Facilities
Applicants Right to Relief

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Mobile fifth-generation (“5G”) wireless communications systems are the next upgrade of wireless technology, which the wireless industry promises will provide faster broadband speeds, greater capacity and better reliability. To deploy this technology, the industry will use new infrastructure referred to as “small cell” or “small wireless facilities.” Small cells collect and target signals a short distance from one another and, therefore, require collocating small wireless facilities closer to one another than has been the case with 3G and 4G wireless technology.

This has led the Federal Communications Commission (“FCC”) to issue a Declaratory Ruling, Report and Order – FCC 18-133A1 – titled “Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Development” (the “2018 Report and Order”). Adopted on September 26, 2018, the 2018 Report and Order went into effect on January 14, 2019, with the stated purpose of facilitating the deployment of 5G technology. According to the FCC, eighty percent of 5G deployments will involve densely located small wireless facilities, in contrast to the more spread out and taller towers and structures supporting 3G and 4G cell antennas.

The 2018 Report and Order will affect all New Jersey municipalities, and should be understood by all local zoning and planning officials, departments

NJPO Calendar of Events

2019 Winter Spring Classes

| <u>Date</u> | <u>Venue</u> |
|-------------|---|
| Mar. 15 | Mullica Hill – Pleasant Valley School |
| Mar. 23 | Paramus Life Safety Building (Class Closed. Call office to be put on wait list) |
| Mar. 30 | Newton – Sussex Community College |
| Apr. 6 | Burlington Township |
| Apr. 13 | Manalapan Township Municipal Building |
| Apr. 27 | Hillsborough Township |
| Apr. 29 | Bergen Community College |
| May 4 | West Orange – Kessler Institute |

and boards. This article will lay out the basics of the 2018 Report and Order and offer a few recommendations for consideration.

Summary

The 2018 Report and Order addresses the time limitations municipalities and their officials, departments and boards have to review and act on applications for wireless infrastructure deployments, in three main areas. First, it

establishes a new set of “shot clocks”¹ for deployment of small wireless facilities. Second, it establishes an “expedited” injunction as a new and additional remedy for violations of the new small wireless facility shot clocks. Third, it clarifies issues relating to all of the shot clocks established by prior FCC reports and orders and, for purposes of this article, issues regarding completeness of applications and the tolling of the shot clocks when applications are incomplete.



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Definition of Small Wireless Facility

The 2018 Report and Order defines “small wireless facilities” as wireless facilities that: (1) are mounted on structures fifty feet or less in height, including the antennas; or (2) are mounted on structures no more than ten percent taller than other adjacent structures; or (3) do not extend existing structures on which they are attached to a height of more than fifty feet or by more than ten percent, whichever is greater.

Additionally, to be defined as a small wireless facility, each antenna associated with the deployment must be no more than three cubic feet in volume and all other wireless equipment associated with the antenna and the structure as well as any pre-existing associated equipment on the structure must be no more than twenty-eight cubic feet in volume. Finally, to be defined as a small wireless facility, the facility must not result in human exposure to radiofrequency radiation in excess of the applicable safety standards prescribed by the FCC.

New Shot Clocks for Small Wireless Facility Deployment

The 2018 Report and Order establishes two new shot clocks for small wireless facilities. The new shot clocks are: (1) Sixty days for review and action on applications for collocation of small wireless facilities; and (2) Ninety days for review and action on applications for attachment of small wireless facilities on new structures.

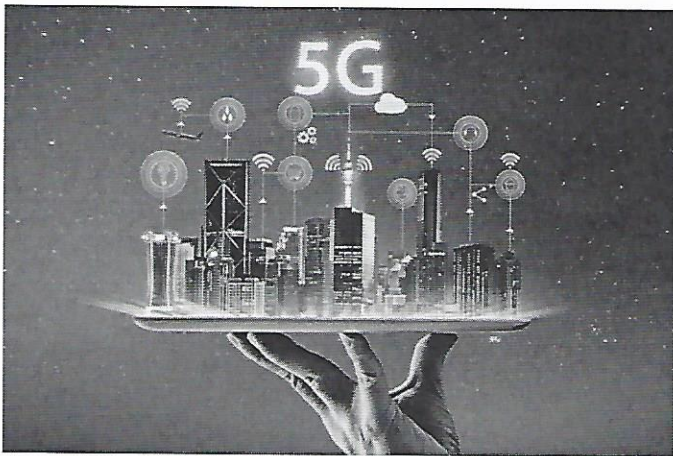
These new shot clocks are problematic as they are more stringent than the time periods provided by the FCC’s prior reports and orders, as well as much more stringent than the time periods provided by the Municipal Land Use Law (“MLUL”). Further, as will be discussed below, these shot clocks start upon submission of an application, not upon the application being deemed complete. And for the most part, a determination of incompleteness

¹ Shot clocks were developed for and are used in basketball to quicken the pace of the game. The FCC refers to the time periods within which municipalities and their officials, departments and boards must act on applications for wireless infrastructure deployment as “shot clocks.”



merely “tolls” (pauses) the shot clock but does not re-set it.

By way of contrast, the FCC established in its 2009 Report and Order a ninety-day shot clock for reviewing and acting on applications for wireless collocation and a 150-day shot clock for reviewing and acting on applications other than for collocations, such as new siting applications. Although these shot clocks did not include any additional time for a municipality to determine whether an application was complete, these time periods did not prove problematic for municipalities because they were more generous than the time periods established under the MLUL. For example, the MLUL provides forty-five days for a land use board to act on an application for minor site plan approval, preliminary site plan approval involving ten acres or less, and final site plan approval, and provides 120 days for a land use board to act on any application involving a variance.



Remedies for Failure to Review and Act Within the Shot Clock

Although the 2018 Report and Order does not establish a “deemed granted” remedy for violations of the new shot clocks, missing a shot clock deadline will constitute a presumptive prohibition of wireless service and will allow for expedited injunctive relief in court. The expedited injunctive

relief remedy is new and is in addition to the pre-existing remedies available for missing a deadline, such as being deemed to be a failure to act within the meaning of applicable law.

Clarification of Issues Related to all Shot Clocks: Application Completeness and “Tolling” of the Shot Clocks for Incompleteness

Finally, the 2018 Report and Order clarifies certain issues related to all shot clocks, including application completeness and “tolling” of the shot clocks for incompleteness.

By way of background, the FCC 2014 Report and Order clarified that a shot clock begins to run when an application is first submitted, not when the application is deemed to be complete. This is contrary to but preempts the MLUL.

The 2018 Report and Order clarifies that, while a municipality can toll (pause) a shot clock on the basis of an incomplete application, the burden is on the municipality to notify the applicant within thirty days that the application is incomplete (which preempts the forty-five-day period to deem an application incomplete under the MLUL). Moreover, unlike the MLUL – where the 45-day completeness determination period is re-set upon submission of missing or incomplete information or documents – the shot clocks are merely tolled and, once the missing or incomplete information or documents are submitted, the shot clock within which to act on the application starts to run again, from the point at which it was tolled.

That said, the 2018 Report and Order establishes a modified tolling system for applications to deploy small wireless facilities. The 2018 Report and Order states that this “modified tolling system [is] designed to ensure that [wireless] providers are submitting complete applications from day one.” It is unclear how the “modified tolling system” will accomplish anything other than further burdening municipalities.

The 2018 Report and Order provides that municipalities have ten days from the submission of an application for a small wireless facility to determine whether it is complete and, provided that the applicant is advised within the ten-day period that information or documents are missing or incomplete, the shot clock resets upon the submission of the required information or documents. However, this new rule shortens the time to determine completeness from thirty days to ten days, and it establishes only a one-time resetting of the shot clock. For any subsequent determination of incompleteness, the same tolling rules that apply to non-small wireless facilities apply, meaning that the shot clock will merely be tolled until the missing or incomplete information or documents is submitted. It is hard to understand how the FCC believes that this “modified tolling system [is] designed to ensure that [wireless] providers are submitting complete applications from day one.”

Pre-Application Procedures and Requirements Do Not Toll the Shot Clocks

The final clarification from the 2018 Report and Order relates to pre-application procedures that many municipalities have in place, such as Technical Coordinating Committees, Technical Review Committees, and the like. The 2018 Report and Order clarifies that municipal pre-application procedures and requirements will not toll the applicable shot clocks. That said, the FCC “encourages voluntary pre-application discussions, which may well be useful to both parties.”

Conclusions and Recommendations

The 2018 Report and Order, as with the prior FCC reports and orders, preempts the MLUL as to determination of application completeness and the time municipal land use boards have to review and act on applications for wireless facility deployment. As to small wireless facilities, the time periods

- imposed are now even more stringent. On the positive side, however, municipalities are still allowed to impose aesthetic requirements on small wireless facilities, provided they are: (1) reasonable; (2) no more burdensome than those requirements applied to other types of infrastructure deployment (not limited to wireless infrastructure deployment); and published in an ordinance.

Recommendations for dealing with the 2018 Report and Order are as follows:

1. Educate all local zoning and planning officials as to the applicable shot clocks and completeness determination requirements so that completeness determinations are timely made and hearings are timely scheduled to avoid shot clock violations.
2. Prioritize hearings on applications for all wireless facilities, with special priority given to applications for small wireless facilities to avoid shot clock violations.
3. Adopt ordinances that incorporate aesthetic requirements for all wireless facilities, but especially small wireless facilities and other types of infrastructure deployment, so that local land use boards have the authority to incorporate such aesthetic requirements in their approvals.
4. If the municipality has an existing wireless collocation ordinance or an existing right-of-way permit ordinance for collocation of small wireless facilities in existing rights-of-way, amend the ordinances to incorporate aesthetic requirements, or, if no such ordinances exist, consider putting them in place (but be sure to provide that the aesthetic requirements apply to other types of infrastructure deployment as well to ensure the aesthetic requirements are enforceable).