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The Erosion of Local Control? Federal Communications Commission is Currently Reviewing Implementation of the Spectrum Act

The Telecommunications Act of 1996 strikes a balance between the competing needs of accelerating the rapid deployment of personal wireless communications and retaining state and local government control over land use. Subject to federal preemption over five (5) procedural and substantive matters, municipalities maintain their authority over the installation, construction and maintenance of wireless communications facilities.

However, in February 2012, Congress enacted the Spectrum Act, 47 U.S.C. § 1455, also referred to as Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012. In particular, the Spectrum Act provides that a municipality "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." (Emphasis added).

There are three (3) categories of "eligible facilities requests" addressed by the Spectrum Act: (1) "collocation of new transmission equipment"; (2) "removal of transmission equipment"; and (3) "replacement of transmission equipment." 47 U.S.C. § 1455(a)(2). Even if there is an "eligible facilities request," the municipality is required to approve that request if the proposed change does not "substantially change the physical dimensions" of the existing facility—although this phrase is not defined by the Spectrum Act. Id.

The Spectrum Act creates an immediate concern to municipalities that have approved personal wireless communication facilities within their borders. A local zoning board may have approved a cell tower of a specific height, only to be confronted by a request from a tower developer or a wireless carrier seeking to now expand that height (and the visibility) of the tower pursuant to the Spectrum Act, without applying for a special permit. Or, a municipality may have approved a cell tower and be presented with a request for a new wireless carrier to locate its equipment on within the approved height of an existing tower and/or within an existing equipment compound, resulting in antennas visible on the exterior of a cell tower.

The Spectrum Act leaves open a number of unanswered questions, such as, but not limited to:

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- The meaning of the phrase "substantially change the physical dimensions"—how much of a change is "substantial"?
- What types of requests are protected by the Spectrum Act?
- On what basis can a municipality deny approval?
- How long does a municipality have to respond to a request for approval?
- Who is the appropriate local authority for considering a request under the Spectrum Act, and how shall such a request be handled?
- How does the Spectrum Act impact existing conditions for a prior local approval?

On December 20, 2013, the Federal Communications Commission ("FCC"), which is charged with administering the Spectrum Act, issued a Notice of Proposed Rulemaking ("NPRM"), seeking in part, comments on how it should clarify and implement the Spectrum Act. Comments to the NPRM are due on February 3, 2014, with reply comments due on March 5, 2014.

For the time being, the available guidance used for addressing Spectrum Act requests is a Public Notice issued by the FCC on January 25, 2013, entitled "Wireless Telecommunications Bureau Offers Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012" ("Public Notice"). In particular, this Public Notice uses a four (4) part test to determine whether the modification will "substantially change the physical dimensions":

> "1) [t]he mounting of the proposed antenna on the tower would increase the existing height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or
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> 2) [t]he mounting of the proposed antenna would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; or

> 3) [t]he mounting of the proposed antenna would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable; or
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> 4) [t]he mounting of the proposed antenna would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site."

Public Notice at 2.

The potential for FCC rulemaking may provide clarification for municipalities responding to requests under the Spectrum Act. However, it remains unclear whether and to what extent municipalities may preserve their control over land use matters involving telecommunications facilities.

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For questions about the Spectrum Act or the municipal regulation of telecommunications facilities, please contact Attorney Brandon H. Moss at (617) 479-5000, or your attorney. Murphy, Hesse, Toomey & Lehane, LLP is experienced with issues arising under the Telecommunications Act of 1996 and the Spectrum Act, and has advised and defended municipalities in connection with the construction and modification of proposed telecommunications facilities. The firm maintains a full-service practice, with offices in Quincy, Boston, and Springfield, Massachusetts.

For a discussion of these and other issues, please visit the update on our website at www.mhtl.com. To receive legal updates via email, contact information@mhtl.com.