

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

Petition for Declaratory Ruling to Clarify)
Provisions of Section 332(c)(7)(B) to Ensure)
Timely Siting Review and to Preempt under)
Section 253 State and Local Ordinances that)
Classify All Wireless Siting Proposals as)
Requiring a Variance)
_____)

WT Docket No. 08-165

COMMENTS OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

SUPPORTING PETITION FOR RECONSIDERATION

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SUMMARY

The International Municipal Lawyers Association ("IMLA") submits these comments in support of the Petition for Reconsideration or Clarification ("Petition") filed in this docket by the National Association of Telecommunications Officers and Advisors, et al. (collectively "NATOA"). IMLA is a non-profit, nonpartisan, professional organization consisting of more than 3,600 members that serves local government attorneys ("municipal attorneys") nationwide.

In these Comments, IMLA addresses the application of the "shot clocks" in the Commission's November order in this docket ("Order") in cases where there is a right of an administrative appeal from an initial municipal zoning decision. Many larger municipalities allow for such appeals, such as to a municipal Board of Zoning Appeals.

These administrative appeals allow for a "second look" in more complex zoning cases and allows redress at the local level that is far quicker and less cumbersome than a court appeal (for example, lawyers need not be involved). The appellate body at the municipality generally has the ability to modify or overturn an initial zoning determination either (1) directly or (2) by waiving provisions of local law that would otherwise apply to the zoning request at issue (typically the body making the initial decision lacks authority to grant such waivers).

The occurrence (whether an appeal is filed) and much of the timing of such appeals are beyond a municipality's control. Such appeals generally favor providers (due to their ability to obtain waivers in an appeal) and extend the time needed to reach a final decision at the local level on a personal wireless facility zoning request. The time required for the administrative appeals process makes it difficult and in some cases impossible for municipalities to achieve the time limits set by the shot clocks - - especially the 90-day shot clock for collocations - - if they are applied to that process.

The administrative appeals process was not discussed by the Commission in its Order. However, the specific language used by Congress in 47 U.S.C. Section 332(c)(7) distinguishes between initial and final action by municipalities on personal wireless facility zoning requests and requires that the shot clocks not apply to (or must be tolled during) such administrative appeals.

Thus Congress in Section 332(c)(7)(B)(ii) first required municipalities to "act" on personal wireless facility zoning requests "within a reasonable period of time". But then in Section 332(c)(7)(B)(v) it used different language - - stating that a party aggrieved "by any final action" or failure to act has 30 days to appeal (emphasis added). The difference in language is striking, especially when in the Conference Committee report on Section 332(c)(7), Congress said that "The term 'final action' . . . means final administrative action at the State or local governmental level." *Conference Report to S. 652 and Joint Explanatory Statement of the Committee of Conference*, HR-104-458, 104th Cong., 2d Sess. at 209 (emphasis added). In imposing time restrictions in Section 332(c)(7)(B)(ii) Congress did not state, as it could have, that municipalities "shall take final action" within a reasonable period of time, although its use of the phrase "final action" only a few sentences away shows that it was fully capable of imposing such a restriction.

Congress thus recognized that municipalities can have administrative appeals of initial zoning decisions, and imposed a time limit for action only on the initial decision. Congress had good reasons for this distinction - - (1) Whether there are appeals (and much of the time needed for them) are not within a municipality's control, (2) Administrative appeals of zoning decisions are completed much more quickly than the initial zoning decision, (3) Initial zoning decisions are more numerous than administrative appeals (only some initial decisions are appealed), such that a time limit on the former is more important, and (4) Administrative appeals tend to favor the provider (e.g. ability to get waivers) so Federal protections are less needed.

The Commission must modify its Order to accord with Congressional intent and the statutory language, so that it expressly provides that the shot clocks only apply to initial zoning actions, and do not apply to (or are tolled during) the time period from an initial zoning decision until the completion of "final action" on an administrative appeal.

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**COMMENTS OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
SUPPORTING PETITION FOR RECONSIDERATION**

The International Municipal Lawyers Association ("IMLA") submits these comments in support of the Petition for Reconsideration or Clarification ("Petition")¹ filed in this docket by the National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American Planning Association (collectively "NATOA").

I. INTRODUCTION AND SUMMARY

IMLA is a non-profit, nonpartisan, professional organization consisting of more than 3,600 members that serves local government attorneys ("municipal attorneys"), and has served them since 1935. Its membership is comprised of local government entities, including cities and counties, and their subdivisions, as represented by their chief legal officers; state municipal

¹ In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, *Petition for Reconsideration or Clarification*, WT Docket No. 08-165, filed Dec. 17, 2009.

leagues; and the individual attorneys who represent municipalities, counties, and other local government entities.

Since its establishment, IMLA has advocated for the rights and privileges of local governments, and the attorneys who represent them. IMLA has appeared as amicus curiae on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts. IMLA has often brought facts and legal issues of concern to municipalities and their attorneys to the attention of courts and administrative agencies, including this Commission. As one recent example, eleven months ago IMLA's amicus curiae brief and facts it brought to the Court's attention were cited repeatedly by the U.S. Supreme Court in its decision in Pleasant Grove City, Utah v. Sumnum 129 S. Ct. 1125; 172 L. Ed. 2d 853 (2009).

In these Comments, IMLA addresses the application of the "shot clocks" in the Commission's November order in this docket² ("Order" or "Declaratory Ruling") in cases where there is a right of an administrative appeal from an initial municipal zoning decision. The occurrence and much of the timing of such appeals are beyond a municipality's control and extend the time needed to reach a final decision at the local level on a personal wireless facility zoning request. As discussed below, the administrative appeals process makes it difficult and in some cases impossible for municipalities to achieve the time limits set by the shot clocks, if they are applied to that process. The administrative appeals process was not discussed by the Commission in its Order. However, the specific language used by Congress in 47 U.S.C. Section 332(c)(7) distinguishes between initial and final action by municipalities on personal wireless

² In the Matter of Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, *Declaratory Ruling*, FCC 09-99, WT Docket No. 08-165 (Nov. 18, 2009).

facility zoning requests and requires that the shot clocks not apply to (or must be tolled during) such appeals.

IMLA submits these comments regarding administrative appeals for two reasons: (1) because the Order did not expressly address the statutory language in the Communications Act ("Act")³ that distinguishes between initial and final actions, and therefore mandates that the time for administrative appeals be outside the shot clocks, and (2) to support the more general position in NATOA's Petition that the shot clocks must be tolled for matters beyond a municipality's control.

II. ADMINISTRATIVE APPEALS OF ZONING DECISIONS

Municipalities nationwide generally have two different procedures for reaching final decisions on zoning requests:

- A one-step procedure where (for example) a City Council makes a decision on a zoning request. That decision is final, and affected parties may then appeal it to court.
- An administrative appeal procedure (often used by larger municipalities) where there is an initial zoning decision which any party may appeal to a higher body at the municipality.⁴ Such a process allows for a "second look" in the more complex zoning cases and gives affected parties a means of redress at the local level that is far quicker and less cumbersome than a court appeal (for example, lawyers need not be and often are not involved).

In its Declaratory Ruling the Commission appears to have only considered the first of these zoning procedures. Yet it is municipalities that afford applicants and other parties the second

³ Communications Act of 1934, 47 U.S.C. 151 et seq.

⁴ If not timely appealed, the initial decision becomes final.

procedure, the option of an administrative appeal that would be the most affected by the Commission's imposition of shot clocks.

The specifics of zoning appeals are governed by applicable state and local law, which address such points as the time in which an appeal must be filed, whether appeals are allowed in all cases (or just certain categories), whether the appeal is on the record (or instead, whether new data may be introduced), and the commonly found provision allowing the appellate body (but not the initial body) to waive requirements of local law that otherwise might apply (such as by granting a variance⁵) so that zoning approval can be granted. See, for example, the discussion regarding the ability of a Board of Zoning Appeals to grant variances in Williamson Co. Regional Planning Comm. v. Hamilton Bank of Jackson City, 473 U.S. 172, 188, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) where, due to the petitioner's failure to seek variances from the Board, the Supreme Court held that the case was not ripe for decision on whether there had been a compensable "taking" under the Fifth Amendment of the property at issue in the case.

The general pattern of such administrative appeals is consistent, in that they allow a second level of local review of a zoning request, where the appellate body at the municipality generally has the ability to modify or overturn all or portions of an initial zoning determination either directly or by waiving provisions of local law that would otherwise apply to the zoning request at issue.

Whether such an administrative appeal is taken in any given case is beyond the municipality's control. In the personal wireless facility context an appeal can be filed by the provider, by a resident living near the proposed facility or by another affected party.

⁵ Under zoning law a variance waives a zoning provision which would otherwise apply, such as a provider obtaining a variance from a local zoning ordinance provision which requires cell towers to be set back X feet from a property line or requires camouflaged or "stealth" towers in certain sensitive areas.

Unfortunately appeals are most likely in the most difficult and hence most time-consuming cases, such as where a provider seeks permission to put a cell tower in a residential area or where particularly scenic, environmentally sensitive or historic areas are affected.

More generally, applications that require additional effort, such as where field strength studies must be conducted to determine the minimum tower height needed to fill the gap, other alternatives to filling the gap (multiple towers in less obtrusive locations) must be evaluated, or camouflage for the tower as a tree or part of a light standard or building must be considered, add significant time to the process of reaching an initial decision on the zoning request. Hence it is in these cases that the time needed for an appeal creates a risk that shot clocks, if applicable, will be exceeded. This risk is heightened due to the combination of the number of days after an initial decision in which parties can file an appeal, the time needed for the municipality to then provide notice of the appeal to the public and affected parties (usually by publishing a notice in a local newspaper, which takes some time to schedule), and the time needed to schedule and hold a hearing and issue a decision.

To illustrate an "administrative appeal" process and the time periods involved, assume that a municipality's Planning Commission⁶ makes an initial decision on a new personal wireless facility zoning request 120 days after it was filed. By law, any affected party has 15 days to appeal that decision to the municipality's Board of Zoning Appeals challenging the decision and/or requesting a variance (and most appeals are filed on or near the 15th day). The Board of Zoning Appeals meets and holds hearings every two weeks, but state law requires 15 days public

⁶ The proper names of the bodies in question vary by state and municipality. For simplicity's sake, the names "Planning Commission" and "Board of Zoning Appeals" are used in the illustrations in these Comments.

"notice of the hearing in a newspaper of general circulation"⁷, and the daily newspaper often requires copy to be provided 3 business days before the desired publication date. Depending on when the Planning Commission's decision was issued and how long thereafter a person filed an appeal, it may be anywhere from three to five weeks before the appeal can be scheduled to come before the Board of Zoning Appeals with proper notice.

Then, as noted in the Order at para. 44, and footnote 141, in order to assure compliance with several Federal Circuit Court of Appeals decisions⁸ under Section 332(c)(7) that require a "written decision" that is separate from the "written record" and contains an explanation of the decision adequate enough for the courts to review (especially in the case of difficult or controversial cases), at the conclusion of the hearing the Board will likely direct staff or counsel to prepare such a proposed written decision for the Board to consider and adopt at its next meeting, two weeks hence. Only once the written decision is adopted is there a "final decision" that can be appealed to the courts.

Thus administrative appeals, although often structurally favorable to a provider because they offer the potential for waivers of restrictions in local law, create a significant risk that the shot clocks, if applicable, will be exceeded. This is particularly true for administrative appeals of collocation zoning decisions, because the time needed to comply with procedural requirements for such appeals would take up much of the 90-day collocation shot clock.

⁷ For an example of a fifteen day notice requirement, see Michigan Compiled Laws Section 125.3103(1).

⁸ See, e.g. Southwestern Bell Mobile Systems v. Todd, 244 F. 3d 51 at 59 (1st Cir. 2001) ("Southwestern Bell") and cases cited therein. Other Circuits have followed Southwestern Bell or imposed similar requirements. See, e.g. Sprint Spectrum v. Platte County, 578 F. 3d 727 (8th Cir. 2009).

The Commission should be aware that its Order, as currently structured, creates a perverse incentive for providers to file administrative appeals only to ensure that the time limits in the shot clocks are exceeded in order to allow them to go to court. Providers uniformly argue to courts (and argued to the Commission in this docket) that the remedy for a violation of Section 332(c)(7) is for the zoning application to be approved as submitted to the municipality. As the Commission noted, some of the Federal Circuit Courts of Appeal have imposed this remedy, often indicating that this result is preferable to a remand to the municipality. *See* Order, para. 39, and cases cited in fn. 126. The Commission should not create an opportunity for providers to avoid initial zoning decisions they may not like (for example, ones requiring a cell tower in a residential area to be camouflaged as a tree) by "gaming the system" with such a procedural maneuver.

Congress has already addressed this issue and has prohibited the time needed for administrative appeals from counting towards the shot clocks, as discussed next.

III. THE COMMUNICATIONS ACT REQUIRES THAT SHOT CLOCKS NOT APPLY DURING ADMINISTRATIVE APPEALS

The express language of the statute, 47 U.S.C. § 332(c), recognizes the possibility of an administrative appeal, and requires that the shot clocks not apply to (or be tolled during) such appeals. The Conference Committee report makes this even clearer.

Congress in Section 332(c)(7)(B)(ii) first required municipalities to "act" on personal wireless facility zoning requests "within a reasonable period of time".

Then in Section 332(c)(7)(B)(v) it used different language - - stating that a party aggrieved "by any final action" or failure to act has 30 days to appeal (emphasis added).

The difference in language is striking, especially in the zoning context where administrative appeals are frequently allowed. The differences in language in Section 332(c)(7) show that Congress recognized and addressed the likelihood of administrative appeals of initial zoning decisions. This is made even clearer in the *Conference Committee Report*, which says that in reference to subsection (B)(v), where Congress gave persons 30 days from "any final action" by a municipality on a zoning request to appeal under Section 332(c)(7), "The term 'final action' . . . means final administrative action at the State or local governmental level." *Conference Report to S. 652 and Joint Explanatory Statement of the Committee of Conference, HR-104-458, 104th Cong., 2d Sess. at 209 ("Conference Committee Report")* (emphasis added). Congress thus explicitly recognized that where a municipality allows administrative appeals of zoning decisions, final action can only follow some time after the municipality's initial action on the request.

In contrast, when it imposed a timing requirement for action on zoning requests in Section 332(c)(7)(B)(ii), Congress used very different language. There Congress said only that "A State or local government shall act [on a personal wireless facility zoning request] within a reasonable period of time after the request is duly filed" (emphasis supplied). Congress did not state, as it could have, that municipalities "shall take final action" within a reasonable period of time, although its use of the phrase "final action" only a few sentences later shows that it was fully capable of imposing such a restriction.

Such deliberate choice of words shows that Congress recognized that some municipalities have an internal administrative process for appealing zoning decisions, and imposed a time limit for action only on the initial zoning decision by a municipality. That is, the initial decision must be made "within a reasonable period of time after the request is duly filed." The time limit does

not apply to decision-making within the administrative appeals process, which, as discussed above, is largely outside municipal control. This result is reinforced by the structure of the timing restriction as enacted - - the time period is measured from when the zoning "request" is duly filed. A comparable restraint on appeals would have to be measured from when an "appeal" is filed, but such wording does not appear in the statute. Thus the time limits of Section 332(c)(7)(B)(ii) apply only to a municipality's initial decision on personal wireless facility zoning requests, not to administrative appeals.

There are good reasons for Congress to have made this distinction.

- Whether there are appeals (and much of the time needed for them) are not within a municipality's control.
- Administrative appeals of zoning decisions occur more quickly than the initial zoning decision. It takes less time to review a zoning decision than to do the work to reach a decision in the first instance.
- Initial zoning decisions are far more numerous than administrative appeals (every zoning request leads to a decision, only some decisions are appealed), such that a time limit on the former is more important.
- Administrative appeals tend to favor the provider: As noted above usually it is the Board of Zoning Appeals (not the Planning Commission) which has the authority to waive zoning restrictions which would otherwise apply.⁹ There is thus less need to impose Federal restrictions aiding providers on this portion of the process.

⁹ Thus appeals can both challenge conditions imposed by a Planning Commission (e.g. - - not necessary or supported by the evidence below) and in the alternative seek a waiver (variance) from the zoning code provision causing the imposition of the condition.

But whatever its reasons, Congress imposed a "reasonableness" time limit only on the initial zoning actions (decisions) by municipalities regarding personal wireless facilities.

The Commission must modify its Order to expressly provide that the shot clocks only apply to initial zoning actions, and do not apply to (or are tolled during) the time period from an initial zoning decision until the completion of "final action" on an administrative appeal. Applying the shot clocks to administrative appeals of local zoning decisions is both impracticable and violates Congressional intent and the language of the statute. Policy arguments that providers may make to the contrary must be addressed to Congress, which wrote the statute as it currently stands, not to this Commission.

IV. OTHER MATTERS BEYOND LOCAL CONTROL, NATOA PETITION

The administrative appeals discussed above are just one example of a discrete and limited set of circumstances beyond a municipality's control that can cause delays in reaching initial or "final decisions" on personal wireless facilities under Section 332(c)(7). Other examples of such potential delays that are beyond municipal control include getting rulings and advice required by law from other agencies or units of government (*e.g.*, on environmental matters or historic preservation issues). IMLA supports NATOA's request in the Petition that delays caused by such third parties toll or otherwise do not count against the shot clocks.

Although IMLA has generally confined these comments to the issue of the tolling of the shot clock during administrative appeals, IMLA supports the NATOA Petition, including reserving the issue of whether under Section 332(c)(7) of the Act the Commission has authority to issue the Order.

V. CONCLUSION

For the reasons stated herein, IMLA respectfully requests that this Commission reconsider its November 18, 2009 Declaratory Ruling and affirm that the time constraints imposed by Section 332(c)(7)(B)(ii) (and any resultant shot clocks) apply only with respect to the initial decision by municipalities regarding personal wireless facilities, and do not apply to any administrative appeals process that may follow.

Respectfully submitted,

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