The Brave New World of Wireless Regulations for Planners

American Planning Association
California Chapter, Orange Section

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SCAN NATOA member of the year 2014 for pro bono advocacy in the 2015 Infrastructure Order

JD, University of San Diego School of Law
• Executive Editor, San Diego Law Review
• Executive Board, Moot Court
About the Presenters

• Admitted to Practice Law in California and New Mexico
  - Practice areas: Telecom Law (Wireless & Broadband)
    Telecom Site Leasing (governments and private landlords)
• Wireless advisor local governments (+1,700 planning cases)
• Radio Frequency and Broadband Telecom Engineer
• Expert witness in > 40 cases
• RF Emissions Safety Reviewer
  - Co-author, co-editor of the FCC’s publication:
    "A Local Government Official's Guide to Transmitting
    Antenna RF Emission Safety: Rules, Procedures, and
    Practical Guidance"
• FCC Licensee
  - Top commercial radio-telephone, marine digital, ship radar, and amateur licenses
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Changes in Industry & Technology Drive Deployment

• increased demand
  • cord-cutters
  • machine-2-machine / internet of things

• changes in how wireless is used
  • signal coverage vs. signal capacity
  • increased need for new sites w/ smaller coverage areas

• FCC spectrum auctions
  • carriers acquire licenses to use new spectrum bands
  • FCC requires carriers to “build-out” new spectrum
  • mostly modifications, some new sites
## Signal Coverage vs. Capacity

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<tr>
<td><strong>Wireless Subscriber Connections</strong></td>
<td>335.65M</td>
<td>326.48M</td>
<td>270.3M</td>
<td>158.7M</td>
<td>69.2M</td>
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<td># of active devices, including smartphones, feature phones, tablets, etc. Since users may have more than one wireless device, it is not equal to individual subscribers.</td>
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<td><strong>Wireless Penetration</strong></td>
<td>104.3%</td>
<td>102.2%</td>
<td>87.2%</td>
<td>53.6%</td>
<td>24.6%</td>
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<td>Equals # of active units divided by the total U.S. and territorial population (Puerto Rico, Guam and the U.S. Virgin Islands)</td>
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<td><strong>Wireless-Only Households</strong></td>
<td>39.4%</td>
<td>38.2%</td>
<td>20.2%</td>
<td>4.2%</td>
<td>N/A</td>
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<td>% of U.S. households</td>
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Signal Coverage vs. Capacity

Initial goal (FCC Requirement):
Build-out for Radio Frequency (RF) Coverage

End goal (**never reached**):
Building-out for Call Handling Capacity
Planners’ Dilemma

• three basic rules
  • always follow the federal and state laws
  • always follow direction from PC and CC
  • always follow your (potentially outdated) ordinance

you figure out how to reconcile the three basic rules
Regulatory Framework

• **Telecommunications Act [47 U.S.C. § 332(c)(7)]**
  - applies to all applications for “personal wireless services facilities”
  - generally preserves local police powers, subject to certain substantive and procedural limits

• **Middle Class Tax Relief Act [47 U.S.C. § 1455(a)]**
  - applies to all “wireless” applications (broader)
  - preempts local discretion over certain collocations and modifications to existing wireless sites

• **FCC Regulations**
  - interprets federal statutes; carries the force of law

• **California State Law**
  - permit streamlining act [Cal. Govt. Code §§ 65920 et seq.]
  - certain collocations [Cal. Govt. Code §§ 65850.6 et seq.]
Prohibit or Effectively Prohibit

“The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services.”

47 USC § 332(c)(7)(B)(i)(II)
Effective Prohibitions

can a *single* permit denial 
“effectively prohibit” the provision of personal wireless services?
Significant Gap

• no “bright-line” test
  • not all gaps are “significant” – depends on context
  • coverage vs. capacity issues

• single provider rule
  • only considers the applicant’s service
  • existing coverage from competitors does not factor

• comment: is this test still relevant?
  • difficult to prove, disprove or even understand
  • expensive to litigate (battle of the experts)
  • still need to prove least intrusive means regardless
Least Intrusive Means

• **local values set the standard**
  • the “least intrusive means” is the location and design that most closely conforms to the local values that a permit denial would serve
  • example: zone height limit as a local value

• **practical considerations may rule-out alternatives**
  • **technical feasibility** – alternative site must reasonably meet the technical needs
  • **potential availability** – applicant must be able to obtain a lease to build the site
How to Find the Least Intrusive Means

• process-based test (must actively participate)
  • applicant shows *prima facie* case with alt. site analysis
  • jurisdiction rebuts with potential alternatives
  • applicant may rule-out alts. on practical grounds, but not intrusiveness grounds
  • process continues until jurisdiction cannot rebut or applicant cannot rule-out

• tie goes to the jurisdiction
  • between two technically feasible and potentially available alternatives, jurisdiction’s preference prevails
  • but still subject to other federal limitations . . .
Unreasonable Discrimination

“The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . shall not unreasonably discriminate among providers of functionally equivalent services.”

47 USC § 332(c)(7)(B)(i)(II)
RF Regulations

“No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.”

47 USC § 332(c)(7)(B)(iv)
FCC’s RF Safety Rules

Measurable increase in temperature

Where does the FCC set its standard?

FCC’s 100% General Population Limit

Typical for Carriers: A Fraction 1%

50x Margin
What about the adequacy of the standards?

*Didn’t the government lie to us about cigarettes?*
Written Decision

“Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities **shall be in writing** and supported by substantial evidence contained in a written record.”

47 USC § 332(c)(7)(B)(iii)
Substantial Evidence

“Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities **shall be** in writing and **supported by substantial evidence contained in a written record.**”

47 USC § 332(c)(7)(B)(iii)
Reasonable Time

“A State or local government or instrumentality thereof **shall act** on any request for authorization to place, construct, or modify personal wireless service facilities **within a reasonable period of time after the request is duly filed** with such government or instrumentality, taking into account the nature and scope of such request.”

47 USC § 332(c)(7)(B)(ii)
Basic Shot Clock Rules

• **timeframes for review**
  - section 332(c)(7)
    - collocations → 90 days
    - all other requests → 150 days
  - section 6409(a) → 60 days

• **tolling (pause the clock)**
  - incomplete notices
  - mutual agreement

• **remedies for failure to act**
  - section 332(c)(7) → applicant may sue
  - section 6409(a) → permit “deemed granted”
Incomplete Notices

• general rule
  jurisdiction must specifically delineate incompleteness in a written notice within the first 30 days

• publicly-stated rule
  clock does not toll unless notice cites to a “publicly stated” source (but not necessarily a codified requirement)

• one-bite rule
  subsequent notices do not toll the clock for reasons not cited in the first notice

• 10-day resubmittal review period
  jurisdiction must deem resubmittal incomplete within 10 days or resubmittal deemed sufficient
Public Rights-of-Way

- telephone corporations’ statewide franchise
  - California grants access to ROW [§ 7901]
  - not compulsory access to poles
- reasonable time, place and manner control
  - local jurisdictions manage the ROW [§ 7901.1]
  - regulations applied on nondiscriminatory basis
  - includes aesthetic regulations [Sprint v. PVE]
- interaction with Telecom Act
  - cities cannot flat exclude carriers from ROW
  - significant gap relevant only to whether a less-intrusive alternative is technically feasible
SMALL CELL
NOT A SMALL CELL
Section 6409(a)

(a) Facility modifications.

(1) In general. Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104-104) 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.

(2) Eligible facilities request. For purposes of this subsection, the term “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.

(3) Applicability of environmental laws. Nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969.
Section 6409(a)

State and local governments “may not deny, and shall approve” any “eligible facilities request” so long as it does not “substantially change the physical dimensions of the existing wireless tower or base station.”
“[A]ny *structure built for the sole or primary purpose* of supporting any Commission-licensed or authorized antennas and their associated facilities”

**Test for Wireless Tower:**

- intended solely or primarily to support transmission equipment;
- does not need actual transmission equipment; and
- lawfully constructed (not necessarily permitted)
Tower
Base Station

“[T]he equipment and non-tower supporting structure at a fixed location that enable Commission-licensed or authorized wireless communications between user equipment and a communications network.”

Test for Base Station:
• not a wireless tower;
• transmission equipment installed; and
• valid permit for wireless use
Base Station
Transmission Equipment

“[A]ny equipment that facilitates transmission for any Commission-licensed or authorized wireless communication service, including, but not limited to, radio transceivers, antennas and other relevant equipment associated with and necessary to their operation, including coaxial or fiber-optic cable, and regular and backup power supply.”

Otherwise known as . . . pretty much everything
Substantial Change

• **Limited to Six Criteria**
  - height, width, excavation, new cabinets, concealment and permit compliance

• **Thresholds Depend on Site Type/Location**
  - generally larger mods for towers on private property
  - generally smaller mods for ROW and building sites

• **Other Rules**
  - legal nonconforming sites available for modification
  - carrier cannot replace entire support structure
  - modification must comply with all safety codes
  - excludes sites without all required permits or approvals
  - cumulative limit on height increases, but not total mods
Before you consider granting a 6409(a) request, go out and blow about $16 on a 100’ measuring tape.

Then go visit the site with a copy of all permits in hand.

Potentially a really, really good ROI.
Concealment Elements

• Mod Cannot “Defeat” Existing Concealment
  • no clear guidance on what “defeat” means
  • applies only to sites with existing concealment

• Rules Do Not Preempt Concealment Conditions
  • localities can still conditionally approve permits
  • FCC preempts prior conditions in conflict with all thresholds except concealment elements

• Impact on New Sites . . .
  • should require concealment as a condition of approval
Concealment Elements
Remedies and Penalties

• **New 60-Day Shot Clock**
  • clock begins when applicant files
  • same tolling rules apply

• **Permits “Deemed Granted” After Failure to Act**
  • no presumption like for other shot clocks
  • applicant must file written notice with jurisdiction
  • can build on day 61 after failure to act on day 60

• **Judicial Remedies**
  • aggrieved parties (including local government) may sue for injunctive or declaratory relief
Section 6409(a) Applications

• jurisdictions can (and should) require one

• FCC limits application content
  • may only require materials reasonably related to an issue within scope of local review
  • broad discretion over what materials to require to illuminate an issue within local scope
  • cannot require technical need or business case demonstrations (i.e., no more propagation maps)

• does time limit apply to building/encroachment?
  • maybe: FCC not clear, but suggested localities should consider “simultaneous” review process
  • does not include other agencies’ review (e.g., Costal)
Do Recent Changes Require an Ordinance?

- **legal considerations**
  - no explicit requirement in new regulations that jurisdictions create new ordinance, but may implicitly preempt local ordinances
  - jurisdictions with **no** wireless regulations do not need an ordinance at this time
  - jurisdictions with **comprehensive** wireless regulations will likely run into preemption issues

- **practical considerations**
  - 60-day timeframe
  - mandatory approvals
  - limited criteria for review
  - extremely new rules currently under judicial review
What Should a Section 6409(a) Ordinance Contain?

- mechanism to segregate 6409(a) projects from others governed under section 332(c)(7)
- plain-english definitions
- director-level approval/denial power
- authorization to create/update application materials in a publicly-stated format
- exemptions from preempted provisions
- automatic conditions of approval
- appeals process (subject to federal timelines)
What Should a Section 6409(a) Ordinance Leave Out?

• remedies
  • do not codify federal or state-law at the local level

• detailed procedural requirements
  • again, federal law applies whether codified at the local level or not
  • high margin for technical error (facial challenge), best left to informal/internal guidance materials

• the word “shall” in most cases
  • creates affirmative duties that could lead to a municipal code violation in addition to a federal or state violation
“Model Ordinance”

• Technical / Legal Problems
  • cements federal remedies and procedures in local code
  • provisions just as obtuse as the CFRs
  • typos and clerical errors

• Political / Legitimacy Problems
  • US Conference of Mayors withdrew support
  • NATOA, NLC and NaCo seem lukewarm at best
  • regional chapters not enthusiastic
General Wireless Ordinance Considerations

• delegate permit application authority
• consider appointments for application submittal
• include “safety valves”
  • limited exceptions to prevent effective prohibitions
  • place burden to prove applicability on the applicant
• consider development fee deposits rather than reimbursement
• general reliance clauses
• anti-dumping clauses
General Wireless Ordinance Considerations

• aesthetics
  • remember that the code expresses “local values”
  • create a roadmap for applicants: order preferences, articulate guidelines
  • do not attempt to control technologies (*i.e.*, DAS)

• RF exposure compliance
  • planned compliance reports
  • post-construction compliance reports?

• include/exclude?
  • HAM radio; government users; OTARD?
AB 57 (Quirk)

The people of the State of California do enact as follows:
Section 65964.1 is added to the Government Code to read:

(a) A colocation or siting application for a wireless telecommunications facility, as defined in Section 65850.6, shall be deemed approved if both of the following occur:

(1) The city or county fails to approve or disapprove the application within the time periods established by the Federal Communications Commission in In re Petition for Declaratory Ruling, 24 FCC Rcd. 13994 (2009).

(2) All public notices regarding the application have been provided consistent with the public notice requirements for the application.

(b) The Legislature finds and declares that a wireless telecommunications facility has a significant economic impact in California and is not a municipal affair as that term is used in Section 5 of Article XI of the California Constitution, but is a matter of statewide concern.
Abhorrently Bad ("AB") 57

- **bad policy**
  - FCC already rejected this proposal twice on the grounds that some projects simply take longer than others
  - will lead to a zero sum game; encourage bad behavior

- **poorly drafted**
  - vague: incorporates federal timeframes by reference
  - difference b/w “municipal affair” and “statewide concern” – the statute doesn’t use correct terms

- **potentially in conflict with Cal. Constitution**
  - could exclude due process notice requirements
  - compare with Permit Streamlining Act