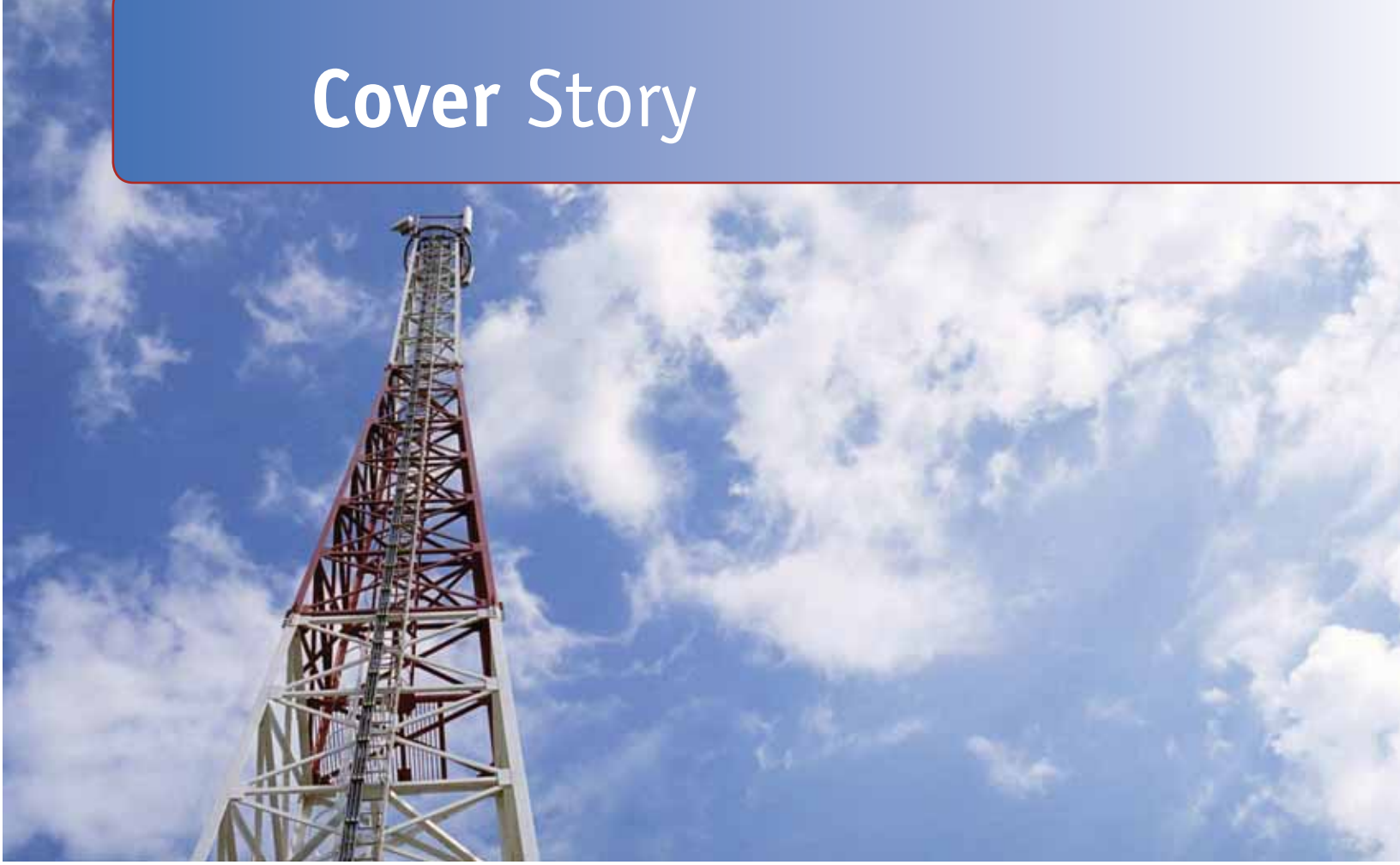

New laws impact handling wireless equipment requests

The cell phone industry likes to tout the "statistic" that more people worldwide own cell phones than own toothbrushes. Though that may be up for debate (and difficult to prove), the point is well-taken: cellular phones are becoming a growing part of our daily lives. Several signs suggest that this trend will continue full speed ahead: 1) cell phone providers are in the middle of implementing their new "4G LTE" high-speed systems; and 2) many cell phone customers are dropping their land lines and using only cell phones.

Not only are cell phones becoming more prevalent in our lives, but cellular technology—especially wireless technology—is also becoming a larger part of our lives. Consider this: Some businesses have recently begun offering wireless Internet service—which allows a consumer to receive Internet service without DSL, a cable modem or dial-up, outside of the home or office via a dongle that plugs into a USB port in a computer. In addition, some businesses have begun offering "fixed wireless" cellular services—which allow a consumer to obtain high-speed Internet service via a fixed wireless antenna on their home or office. Both of these wireless Internet services depend on equipment located on cell towers transmitting signals from the tower to the consumer's computer.

What does all of this mean? For the wireless industry, it means rolling out more and more cellular tower sites as part of a massive wave of wireless development. For townships, it means they will probably receive more and more requests involving wireless telecommunications equipment—such as requests to install a new cell tower, to locate wireless telecommunications equipment on an existing tower, or to change wireless telecommunications equipment that is already on a tower, perhaps as part of an upgrade. Many municipalities have ordinances in place that require those sorts of requests to go through their special use permit process for approval.

But not so fast.

Two recent laws have been enacted that change the rules of the game as to how a municipality can handle requests to locate wireless telecommunications equipment. This article summarizes those two new laws—a federal law and a Michigan law—that in many ways simplify the review process, but also prohibit running these sorts of requests through the special use permit review process.

EXISTING WIRELESS TELECOM EQUIPMENT LAWS

Several layers of rules and laws cover wireless telecommunications equipment. Congress has enacted rules, found in the Federal Telecommunications Act (47 USC 151, *et seq*.). The Federal Communications Commission (FCC) has enacted rules to supplement the federal act, and, of course, Michigan's Legislature has enacted laws as well.

The cell phone industry likes to tout the "statistic" that more people worldwide own cell phones than own toothbrushes. Though difficult to prove, the point is well-taken: cellular phones are a growing part of our daily lives.

By way of background, a brief summary of some of those rules follows:

The federal act

The Federal Telecommunications Act expressly allows municipalities to enact local zoning rules regarding wireless service providers' equipment. This allows, for example, townships to require cell phone providers to obtain a special use permit before it places wireless telecommunications equipment.

The federal act's key provisions on regulating wireless telecommunications equipment include:

- A municipality may not unreasonably discriminate among providers of equivalent services.
- A municipality may not prohibit one from providing personal wireless services (defined as commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services).
- A municipality must act on any request to place, construct, or modify personal wireless facilities (facilities to provide personal wireless services) within a reasonable time after the request is filed.
- A municipality's decision to deny a request to place, construct or modify personal wireless service facilities must be in writing and supported by substantial evidence in a written record.

The FCC's rules

For a while, townships did not have much guidance as to what equals "a reasonable time" under the federal act's requirement to decide requests within a reasonable time, since the federal act does not define "reasonable period of time." Seizing on its authority to clarify matters in the federal act, the FCC defined that term in a 2009 order that is commonly called the "Shot Clock Order." This order, among other things, set specific timelines for how long a township, and other municipalities, have to decide a request to locate personal wireless facilities:

- A "reasonable period of time" is presumptively 90 days to process a request for personal wireless service facility siting application that requests collocation.
- For all other requests, a "reasonable period of time" is presumptively 150 days.

If the township fails to act within those time frames, then a presumptive "failure to act" has occurred, and wireless providers may seek relief in court within 30 days of the failure to act per the act. The township will have the opportunity to rebut the presumption of unreasonableness.

The Fifth Circuit Court of Appeals recently upheld the Shot Clock Order, ruling that its 90- and 150-day timelines are reasonable. *(City of Arlington Texas v. FCC, 668 F3d 229 (5th Cir 2012))*

Court decisions interpreting the 'Shot Clock Order'

Since the Shot Clock Order was upheld, a few courts have been asked to decide whether a municipality's decision on a provider's wireless facilities application was invalid as exceeding the federal act's and Shot Clock Order's timelines. In one case, the court ruled the municipality's failure to decide a request within the Shot Clock Order's deadlines meant the provider was entitled to its requested permit. (*Bell Atlantic Mobile v. Town of Irondequoit, ___ F Supp 2d ___, 2012 WL 289963 (WD NY, Jan. 31, 2012) (No. 11-CV-6141-CJS-MWP)*

THE NEW LAWS

Public Act 143 of 2012

The Michigan Legislature enacted Public Act 143 of 2012, in what some view as record speed. Though some may view PA 143 as benefitting the wireless industry, it also simplifies, in many ways, the rules as to how a township may handle a request to locate wireless telecommunications equipment. The key parts of the new law are:

1. Wireless telecommunications equipment is a permitted use of property and not subject to a special use permit approval or any other approval if
   (a) the equipment would be located either on an existing wireless telecommunications support structure, such as a cell tower—commonly called collocated—or in an existing equipment compound;
   (b) the existing structure or compound complies with the municipality's zoning ordinance or was approved by the municipality;
   (c) the proposed collocation would not increase the overall height of the support structure by more than 20 feet or 10 percent of original height, whichever is greater; increase the width of the structure by more than the minimum necessary to permit collocation; or increase the area of the existing equipment compound to greater than 2,500 square feet; and

(d) the proposed collocation complies with the municipality's prior approvals for the structure or compound.

2. Any wireless communications equipment that meets 1(a) and 1(b) but exceeds the height, width and area requirements in 1(c) is permitted if it receives special land use approval through the new review procedure that PA 143 created.
3. PA 143's new review procedure is as follows:
   (a) The application is deemed administratively complete if the municipality does not notify the applicant that its application is incomplete within 14 days of receiving the application or if it fails to object to the application's completeness within the 14-day period.
   (b) The 14-day period is tolled if, before the 14-day period expires, the municipality tells the applicant that its application is administratively incomplete, specifying the information needed to make it complete, or notifies the applicant that a fee required to accompany the application has not yet been paid. The tolling continues until the applicant submits the specified information or fees due.
   (c) Municipalities may charge a fee with an application as long as it does not exceed the municipality's actual, reasonable costs to review and process the application or $1,000, whichever is less.
   (d) Within 60 days after the application is deemed administratively complete, the municipality must approve or deny the application. If it fails to approve or deny the application within that 60-day period, the application is deemed approved.
4. In addition to the scenario mentioned above, the municipality may also require special land use approval for any request that would not collocated equipment on an existing structure or existing compound, or for a request to install a wireless support structure. In that case, the same process as outlined above applies—i.e., the 14-day administratively complete determination window applies—but the municipality has 90 days *(not 60 days)* to decide.
5. A municipality may make a special land use approval of wireless communications equipment expressly conditional only on the equipment's compliance with other local ordinances and with federal and state laws before the equipment begins operation.
6. A municipality may authorize wireless communications equipment as a permitted use of property not subject to special land use approval.

Congress's Job Creation Act of 2012

In February 2012, President Obama signed the "Middle Class Tax Relief and Job Creation Act of 2012" (the "Job Creation Act") into law. Though most of the attention the act received related to its extension of unemployment benefits and tax cuts, Section 6409 of the Job Creation Act also contains a lesser-known clause that limits municipalities' power to review requests relating to modifying an existing cell tower or replacing existing equipment on a cell tower.

In short, that part of the Job Creation Act states that a municipality must approve "any eligible facilities request" to modify an existing wireless tower or base station "that does not substantially change the physical dimensions of such tower or base station." The Job Creation Act defines "eligible facilities request" as any request to modify an existing cell tower or base station that involves collocating new equipment; removing equipment; or replacing equipment.

CONCLUDING THOUGHTS

With the public's increased use of cell phones and wireless technologies, and desire for faster services, townships can expect to see an uptick in requests involving wireless telecommunications equipment. Navigating all the relevant rules can be challenging. But the new laws—PA 143 and the Job Creation Act—simplify the process to a great extent.

A township that is aware of these rules will be well-positioned to properly resolve those applications and, hopefully, stay out of court. ■

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Hear more from Foster Swift's attorneys at the firm's Business Solutions Session, "Ask a Lawyer," being held Wednesday, Jan. 23 from noon to 1 p.m., at MTA's 60th Annual Educational Conference & Expo in Detroit. Turn to pages 24-25 to learn more about the Conference & Expo, taking place Jan. 22-25, 2013.

Existing cell tower leases are gold mines:
How townships can keep the mine, and get the gold

Existing cell tower leases are gold mines for the landowner who granted the lease—including municipal landowners, like townships. If he were alive today, King Croesus of ancient Persia would be using his riches to buy these leases.

Many townships have cell towers on their property, and they may be missing out on or unwittingly giving up the very large amounts of money that these cell towers are worth. To illustrate this, consider one of the article author's clients, wh0 recently accepted a $310,000 offer to buy out a cell tower lease. The initial offer, just a short time previously, from the same company? To pay $10,000 to extend the term of the lease. The result? An increase of $300,000 in a little over a month!

Townships can follow some simple suggestions so that they, too, can mine the gold in a cell tower lease.

But first, *why* are they a gold mine?

- Because it costs more than $250,000 to replace a cell tower with a new one.
- There may not be a replacement site available, either at all or at a reasonable cost. That's because the new tower must be very close to the old one so as not to have a "gap" in the cell company's network.
- Big money comes because other cell companies will pay large rents to be the second, third or fourth antenna on an existing tower, thus avoiding the cost and difficulty of building their own tower. This can double, triple, etc., the base rent.
- As a result, although a lease may specify that the cell company can cancel it at any time, in reality, it cannot—it is locked in like a barnacle to its rock.

So an existing cell tower lease is extremely valuable. Leases often can be sold for several hundred thousand dollars—or held on to, in which case, over time, the property owner will get much more money. But to realize these sums, here are some do's and don'ts:

- *Don't* extend the term of the lease. Townships can get large amounts of money when the lease comes up for renewal, in return for allowing the tower and antennas to stay where they are. Extending the term of the lease removes this potential.
- *Don't* agree to lease amendments that harm the township's ability to sell the lease or sell its property. Property owners are often asked to amend cell tower leases. This request often comes in form letters from California or Massachusetts companies hired by the cell company. Don't sign the amendment! The fine print almost always contains provisions that either prohibit the property owner from selling the lease or significantly reduce the sale price of the property owner's main piece of land (the "parent parcel" on a small portion of which the tower is located).
- *Do* agree to amendments allowing changes in the antennas and towers—but only for those changes specifically set forth in detail in engineering drawings attached to the amendment. Get a substantial (30 to 100 percent, or more) increase in rent in return, often proportional to the increase in number of antennas or space being used. Nix any terms harming the value of the lease and have the tenant reimburse the township's legal fees.
- *Don't* allow the main lessee to sublease the tower to other providers. Such subleases can often double or triple the rent from the main lessee. The township should be getting this additional revenue.

- *Don't* agree to amendments that, in general terms, allow the cell phone company to modify, expand or upgrade its installation, even if they claim this is needed for 911 purposes. Most of the time, the tower is used for commercial purposes, not for 911 calls. Because towers often need upgrades, townships can get large rent increases (see previous item) in exchange for specific amendments. Granting a general right to modify or upgrade removes this possibility.
- *Don't* agree to a reduction in rent (or other changes in lease terms) based on the claim that "the cell company has too many towers" and that without the changes or rent reduction, it may cancel the lease. In fact, most companies are doubling the number of cell towers in the next few years. And like those barnacles previously mentioned, towers can't be moved.
- *Do* have any proposed amendment to an existing cell tower lease reviewed by attorneys or consultants specializing in such matters before you sign. Often, this leads either to: 1) significant improvements in both the rent being received and in the lease terms, with the cell phone company reimbursing the property owner's legal fees, or 2) rejection of the amendment, because it harms the property owner.
- *Do* be skeptical of offers to buy out a lease for what appear to be large sums of money. Usually the township can do better on its own, because the buyout company takes such a large cut (20 to 40 percent) of the income from the tower as its fee. If the township does decide to sell a lease, have a cell tower professional auction it off (there can easily be 10 to 20 prospective bidders). And have the actual sale documents reviewed by counsel specializing in these matters, as the documents supplied by the purchaser are usually woefully deficient. Note that one of the auction terms will be that the purchaser reimburses the seller's legal fees!

Townships would be wise to be very careful with existing cell tower leases. They truly can be gold mines. But there is a whole industry of "claim jumpers" hoping to use lease amendments to take mines away from property owners. ■

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Hear more from John Pestle at his educational session, "Renewing and Modifying Cable Franchise Agreements," on Wednesday, Jan. 23 from 3:15 to 4:30 p.m., at MTA's 60th Annual Educational Conference & Expo in Detroit. Turn to pages 24-25 to learn more.