



DONOHUE & STEARNS, PLC

October 11, 2012

Mr. Anthony J. Hood, Chairman
District of Columbia Zoning Commission
One Judiciary Square
441 4th Street NW
Washington, D.C. 20001

Cc: Ms. Karen Thomas
D.C. Office of Planning, Development Review
1100 4th Street SW, Suite E650
Washington, D.C. 20024

Re: ZC-12-06 - Proposed Text Amendment to Chapter 27 - Antennas: Section 2711

Chairman Hood:

I appreciate the opportunity to be heard by the District of Columbia Zoning Commission ("the Commission") this evening regarding the Office of Planning's ("OP") proposed amendments to Chapter 27 of the District of Columbia Zoning Regulations ("the Zoning Regulations"), specifically §2711.4.

I. The Middle Class Tax Relief and Job Creation Act of 2012 [H.R. 3630]

As you know the federal legislation promulgating the proposed amendments was H.R. 3630, the Middle Class Tax Relief and Job Creation Act of 2012 signed into law by President Obama on February 22, 2012. Section 6409(a), speaks to modification requests like that described in the proposed §2711.4

(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-

ZONING COMMISSION
District of Columbia

CASE NO. 12-06

EXHIBIT NO. 8

- (A) collocation of new transmission equipment;
- (B) removal of transmission equipment; or
- (C) replacement of transmission equipment.

A. Supplementing through Other Sources

National Programmatic Agreement for the Collocation of Wireless Antennas

As outlined in my letters to you on July 9, 2012 and July 24, 2012, §6409 is a good starting point but leaves undefined the exact parameters by which modification requests should be assessed by local jurisdictions. To fill in the gaps, we must look to other sources such as the *National Programmatic Agreement for the Collocation of Wireless Antennas* ("Programmatic Agreement"). The Programmatic Agreement provides the following definitions:

- i. Collocation
The mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes
- ii. Tower
Any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities
- iii. Substantial Increase
 - The 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
 - The 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
 - The 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
 - The 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.

B. Suggested Additions to §2711.4

Still, even with the consultation of such sources as the *Programmatic Agreement*, several terms remain ambiguous. “Existing antenna site” should be defined to include flagpoles, light poles, utility poles and church steeples. Water tanks and existing utility structures should be considered collocation opportunities as well. “Modification requests” should be qualified to apply to those submitted by installed providers and potential collocators alike. The use of the word ‘or’ within the “substantial change” test of §6409 creates a two-prong test where neither the base station nor the tower structure may be substantially changed if a carrier is seeking to avoid discretionary review. I would, therefore, ask that the Commission incorporate specific parameters i.e. percentage increases, for modifications not requiring an OP report.

II. The Telecommunications Act of 1996

The Middle Class Tax Relief and Job Creation Act of 2012 is not the first instrument by which the federal government has directed local jurisdictions to handle telecommunications facility siting applications. The Federal Telecommunications Act of 1996 (“TCA”) prescribes specific processes and guidelines for the consideration of these applications. As recently as January 23, 2012, the Fifth Circuit upheld the Federal Communications Commission’s (“FCC”) November 18, 2009 Declaratory Ruling that local jurisdictions must adhere to the established time limits for local governments to take action on telecommunications facility siting applications. This “Shot Clock Rule” within §332(c)(7)(B)(ii) of the TCA requires action within a reasonable period of time and §332(c)(7)(B)(v) creates the cause of action for any applicant alleging a failure to so act.

A. TCA’s Federally-Imposed Limits on Local Review

i. RF Certification Eliminated

The TCA is also clear on what local jurisdictions may not consider. In the review of a wireless siting application §332(c)(7)(B)(iv) prevents local governing bodies from denying an application based on radio frequency (“RF”) emissions as long as the emissions fall under the Maximum Permissible Exposure limits set by the FCC. Taking this into consideration, the District could render the review of siting applications more efficient by removing the RF Certification requirement which mandates that an Applicant attest to its compliance with this specific portion of the TCA when the Applicant is subject to comply with all federal law.

ii. OTARD

Another limitation on local municipalities’ review is referenced in the October 1, 2012 Final Report. The Over-the-Air-Reception-Device-Rule [47 C.F.R. 1.4000] (“OTARD”), codified by Congress in §207 of the TCA, prohibits restrictions on the installation, maintenance and use of satellite dishes less than one (1) meter in diameter, TV antennas and wireless cable antennas.

III. Expediency in the Modification Request Review Process

The ultimate goal of the above-described federal legislation and legal precedent is the development of an expeditious review process that effectively considers telecommunications facility siting applications while avoiding redundancies. Only when this process is achieved can the wireless infrastructure expand and adapt to meet the ever-increasing consumer demand for wireless coverage. This goal is one that is common to both the Office of Planning and the wireless industry who must answer to their constituents and customers respectively.

With this goal in mind, there are aspects of the existing process that delay the review period unnecessarily and which this text amendment gives us the opportunity to cure. As the Final Report points out, OP's review is not intended as a means of final approval and is redundant in combination with review by the Department of Consumer and Regulatory Affairs ("DCRA") and Board of Zoning Adjustment ("BZA"). Also, review by Planning and Historical Preservation is not needed in many circumstances.

A. The Height Act of 1910

Roosevelt High School & St. John's College High School

An application set to go before the Board of Zoning Adjustment later this month [BZA Case No. 18420] has brought to light another hurdle which has created undue delay in the review process. AT&T Mobility ("AT&T") has submitted a Special Exception application to install a one hundred and twenty-eight foot (128') high monopole at Roosevelt High School located at 4301 13th Street Northwest. AT&T proposes to replace one of the light poles surrounding the football field with the 128' structure and then remount the stadium lights at their original height of one hundred feet (100'). Section 2113.7 of the Zoning Regulations states:

Any antenna tower or monopole with a proposed height in excess of that permitted by the Act of June 1, 1910 (36 Stat. 452), as amended, shall not be permitted, unless the height is approved by the Mayor or his or her designee.

Section 5 of the Building Height Amendment Act [36 Stat. 452] restricts the height of buildings within the District according to frontage and street width. The monopole proposed by AT&T is clearly not a building, yet subsection (h) of the Amendment provides no relief as a waiver is still required. Semantics cloud the issue. AT&T's proposal was originally submitted as a replacement light pole which would therefore have not been subject to waiver requirement. However, AT&T was advised by the Zoning Administrator that the facility constituted a monopole and would therefore be required to comply with §2113.7.

The Height Act of 1910 ("the Height Act") was intended, as described by the National Capital Planning Commission, "to preserve the horizontal character of the national capital" by limiting the height of habitable spaces. A monopole should fall squarely outside the bounds of this Act.

This is not the first time that the Height Act has impacted an otherwise simple application. In 2009, Cricket Communications applied for a Special Exception to install a telecommunications facility designed as a stealth flagpole at St. John's College High School located at 2607 Military Road in Northwest. As part of the review process for the one hundred and twenty-six and one-half foot (126'5") flagpole on the R-1-A zoned property, the Applicant was required to obtain a waiver from the Height Act. As with Roosevelt, efficient allocation of resources, Office of Planning staff's already demanding work load and the need for improved wireless coverage support the elimination of superfluous submission requirements such as these from the review process.

IV. Conclusion

In closing, I would ask the Commission to consider the comments entered into the record by my July 9, 2012 and July 24, 2012 letters. I would propose that the following changes be incorporated into the final amendment:

1. Collocations by-right exist for proposals involving any eligible support structure;
2. "Substantial increase" as defined by the *National Programmatic Agreement for the Collocation of Wireless Antennas* be codified within Chapter 27 and be permitted by-right;
3. "Eligible facilities" include all wireless facilities; and
4. Specific and quantifiable parameters be put in place to assist in determining what constitutes "substantial increase."

I would also respectfully request that the Zoning Commission take this opportunity to consider redundant or irrelevant review procedures currently comprising, in part, the wireless siting application review process and eliminate them as appropriate.

I appreciate your time and consideration,



Edward L. Donohue