

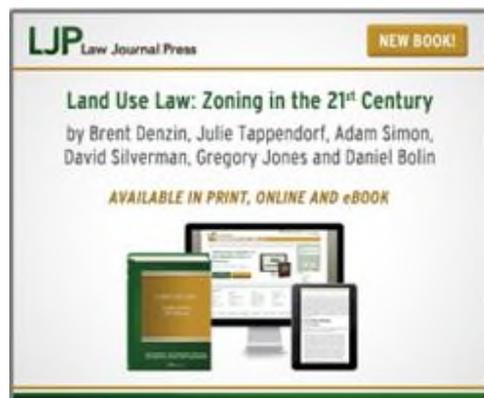
In the Zone
Current Trends in Land Use Law*Spring, 2015*

Welcome to **Ancel Glink's *In the Zone***. Our e-newsletter includes articles on lively land use topics designed to inform local government officials about current trends in land use law and provide useful resources to promote planning and zoning practice throughout the state.

In the Zone is a publication of Ancel Glink's Zoning and Land Use Group. For more than 80 years, Ancel Glink has counseled municipalities and private clients in zoning, land use, and other municipal matters.

Recent Publications

Check out our new book called *Land Use Law: Zoning in the 21st Century*, recently published by Law Journal Press, and authored by Ancel Glink attorneys Brent Denzin, Julie Tappendorf, Adam Simon, David Silverman, Gregory Jones, and Daniel Bolin. The book is available in print and digital bundles, and you can order the book [here](#).



Land Use Law: Zoning in the 21st Century was created to provide land use professionals with practical advice on zoning issues and up-to-date analysis of the legal issues they are likely to encounter in their practice. A range of modern topics is covered in this

volume, including:

- Promoting economic development
- Managing storm water
- Promoting pedestrian- and transit-oriented development
- Regulating adult use establishments
- Setting standards for gun sales and use
- Planning for urban agriculture
- Addressing foreclosures and blight
- Zoning for cellular communications
- Regulating hydraulic fracturing and wind energy
- Planning for wind-generated energy
- Regulating digital signage

The book includes checklists, tips and guidelines, as well as sample ordinances, agreements, forms and other documents that land use professionals will find practical and helpful.

Oh, no! They did it again!

The FCC once more made it easier to locate cellular antennas

Characterized as an "exercise in cooperative federalism," the Telecommunication Act reserves to local governments the authority over zoning decisions related to cellular tower and antenna placement and construction. However, several significant restrictions on local authority, contained in subsection 332(c)(7) of the Telecommunications Act, are designed to advance the federal policy of expanding broadband deployment and accessibility to wireless communications. While we have previously written about the substance of this law, the federal government continues to tinker with the appropriate mix of local and national control.

Most recently, section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 (the "Act") amended the Telecommunications Act to limit local government authority to control the collocation of new facilities on existing towers or structures. The relevant language is below:

Notwithstanding [section 332(c)(7)] of the Telecommunications Act of 1996 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 ...collocation of new transmission equipment."

The interpretation of this law is important, as applications within the scope of the law must be approved by local zoning authorities. The law raises a number of questions, including the following:

- What is an existing wireless tower or base station?
- What does it mean to substantially change the physical dimensions of a tower or base station?
- Is there a time limit within which an application must be approved?
- May a local government require an application for an action covered under section 6409(a)?

To provide clarity and guidance for antenna owners and local zoning authorities, the FCC issued a Report and Order on this new law on October 21, 2014. Below we will summarize the portions of the Report and Order which answer the questions described above.

To begin, it is important to recognize that section 6409(a) not only applies to cellular antenna facilities but to all telecommunications transmission equipment. Even so, this article will focus on new cellular facilities. Also, the Report and Order confirms that none of these rules limit a local government's exercise of authority as a commercial landlord, which remains essentially unfettered.

What is an "existing wireless tower or base station?"

While it may not seem like a controversial issue, this question attracted argument from both cellular carriers and local governmental organizations. As expected, the FCC decided to define "tower" to include any structure built *for the sole or primary purpose* of supporting any authorized antennas and their associated facilities. This will include monopoles and lattice towers, but it may also include other camouflaged structures erected specifically for personal wireless service facilities, including flagpoles and sport lighting towers.

Separately, the FCC elected to define a "base station" to include structures other than towers that support or house an antenna at the time the application for collocation is filed, even if the structure was not built for the sole or primary purpose of providing such

support. Broadly, a base station can include a tall building, a water tower or other utility infrastructure (e.g. ComEd transmission towers). Importantly, a "base station" excludes any existing structures that do not support or house transmission equipment at the time of filing the application for collocation.

What does this all mean? A municipality's first zoning decision to allow the placement of cellular equipment represents not only a discrete result, but a long-term judgment that the location is an appropriate place to install antennas and related equipment.

What does it mean to substantially change the physical dimensions of a tower or base station?

For this issue, the FCC chose to adopt a bright-line, one-size-fits-all standard, despite the fact that zoning is supposed to be sensitive to local conditions. The rules address both the maximum additional height and width of the attachments resulting from the collocation of new equipment. For towers outside of public rights-of-way, a collocation is considered within the scope of the Act if it increases the height of the tower by up to 20 feet, or 10%, whichever is greater. Attachments to towers located in the right-of-way and all base stations may increase the height by up to 10 feet, or 10%, whichever is greater. New appurtenances protruding from a tower are covered by the Act so long as they do not expand the width of a tower located outside the right-of-way by more than twenty feet or more than the width of the tower structure at the level of the appurtenance, whichever is greater. For those towers in the right-of-way and for all base stations, it may not extend out more than six feet from the edge of the structure. Incredibly, the FCC also preempted pre-existing conditions on prior zoning approvals which conflict with the dimensional rules described above.

Fortunately, the FCC recognized the importance of design elements that camouflage wireless facilities. That means that any collocation that would defeat existing architectural features which conceal the tower or base station would represent a substantial change and is not guaranteed approval.

Is there a time limit within which an application must be approved?

It is interesting that this is even a question following the enactment of the "Shot Clock" rules in 2009 which create a rebuttable presumption that ninety days is a reasonable time to evaluate

applications for collocation of cellular facilities. Nonetheless, the FCC found motivation to revisit this issue because of Congress' effort in section 6409(a) to expedite broadband deployment. Following the opportunity for public comment, the FCC concluded that a term shorter than the 90-day period applicable to review of collocations under section 332(c)(7) is warranted to reflect the more restricted scope of review of applications covered by section 6409(a). As a result, the FCC adopted a strict and absolute limit of sixty (60) days to review an application under section 6409(a) and held that the failure to reach a decision will be deemed an approval.

May a local government require an application for an action covered under section 6409(a)?

Fortunately, the FCC recognized that local governments should be allowed the ability to confirm whether an application is an "eligible facilities request" that does not "substantially change the physical dimensions" of the tower or base station. The agency was not convinced that antennas owners could regulate themselves. So, local zoning authorities may require applicants to file an application and provide documentation that is reasonably related to determining whether the request meets the requirements of section 6409(a). Consistent with the "Shot Clock" rules, the 60-day deadline may be tolled either by mutual agreement or when the municipality gives notice that an application is incomplete (in consideration of the narrow scope of review permitted).

The Commission also supported the authority to require applications because local governments may continue to enforce and condition approval on compliance with generally applicable building, structural, electrical, and safety codes and with other laws codifying objective standards reasonably related to health and safety.

In conclusion, municipal zoning authority to control the location of cellular facilities has been further eroded, especially as it relates to the collocation of antennas where existing transmission equipment already exists. As a result, there should be even greater emphasis on local regulations which define where new facilities are permitted to be erected. Careful planning is more essential than ever since section 6409(a), and the FCC's regulations implementing the law, frequently will require local governments to permit additional wireless facilities to be erected where existing equipment has previously been allowed. For assistance with strengthening your community's regulation of new cellular

facilities, please contact the Zoning and Land Use group.

Cases to Know

Bleacher Case Goes to the Illinois Supreme Court

Gurba v. Community HS Dist. No. 115, 2014 IL App (2d) 140098

We reported before about the case filed by neighboring properties owners against a school district for installing bleachers without obtaining the required zoning approvals. The appellate court upheld the trial court's ruling that the school district was required to obtain zoning approvals prior to installing the bleachers. The appellate court rejected the school district's argument that the city was preempted from applying its zoning regulations on school property because the state constitution declares public education to be a matter of statewide concern, concluding that schools must comply with local zoning.

Recently, the Illinois Supreme Court granted the school district's petition for appeal of the appellate court's ruling. A number of organizations have filed amicus briefs on both sides (pro-school and pro-municipality), and the case will be heard sometime this year. While the case is pending at that level, legislation has been proposed to make it clear that schools are subject to local zoning (reported below).

Village's Ordinance Declaring all Commercial Farming a Nuisance Preempted by State Statute

Village of Fayetteville v. Brown, 2015 IL App (3d) 130445

The Village of LaFayette adopted an ordinance that declared commercial farming within the Village's boundaries to be a nuisance. Shortly after adopting the ordinance, the Village brought a code violation action against the Browns, the new owners of 57 acres of property on which they were operating a commercial farm. 6 acres of the farmland were located in LaFayette. The Village alleged in its complaint that the commercial farming of the land was a nuisance, in violation of the new ordinance. The trial court granted the Village's request for an injunction against the Browns, ordering the Browns to stop engaging in commercial farming on their property in the Village. The court rejected the

Browns' argument that farming is protected by the Farm Nuisance Suit Act, a state statute.

On appeal, the appellate court vacated the judgment against the Browns, holding that the Farm Nuisance Suit Act preempted the Village's ordinance. Specifically, that Act provides as follows:

No farm or any of its appurtenances shall be or become a private or public nuisance because of any changed circumstances in the surrounding area occurring after the farm has been in operation for more than one year, when such farm was not a nuisance at the time it began operation, provided that the provisions of this Section shall not apply whenever a nuisance results from the negligent or improper operation of any farm or its appurtenances.

The court noted that the purpose of the statute is to protect and preserve farming uses because "Illinois is an agricultural state." Because the land had been used for commercial farming for decades, the statute protected the commercial farming use. In short, the Village's nuisance ordinance was preempted by state law and cannot be enforced against the Browns.

Legislation to Love or Loathe

School Zoning Bill Reintroduced

Last year, Senator Pamela Althoff introduced a bill (SB 2647) to clarify school districts' obligation to comply with local zoning laws. The legislation came on the heels of the zoning dispute discussed above, *Gurba v. Community HS Dist.* 115 2014 IL App (2d) 140098. For various reasons, SB 2647 was not voted out of committee.

Senator Althoff recently reintroduced legislation, designated SB 0036, that would amend the School Code to clarify that school district property is subject local zoning authority. SB 0036 is similar to SB 2647. The School Code does not expressly subject school district property to local zoning control, but impliedly does so by authorizing school boards to petition local zoning authorities for approval of rezoning, variance and special use requests. This ambiguity has created confusion regarding the extent of municipal zoning authority over school district property. The bill's proposed language is below.

105 ILCS 5/10-22.13a

A school district is subject to and its school board must comply with any valid local government zoning ordinance or resolution that applies where the pertinent part of the school district is located. The changes to this Section made by this amendatory Act of the 99th General Assembly are declarative of existing law and do not change the substantive operation of this Section.

As of this writing, the bill remains on third reading in the Illinois Senate, and still must pass both houses and receive the Governor's signature to become law.

Upcoming Presentations

March 26, 2015: American Planning Association Illinois Chapter's Spring Conference, Peoria, Illinois Greg Jones will speak on how to comply with the Freedom of Information Act without losing your sanity.

April 19, 2015: American Planning Association National Conference, Seattle Washington David Silverman will participate in a panel discussion on Urban Agriculture and the Law.

May 1, 2015: Government Social Media Conference, Reno Nevada Julie Tappendorf will speak on the topic "Keeping it Legal on Social Media."

May 26, 2015: [Northern Illinois University, Civic Leadership Academy](#)

Adam Simon and Dan Bolin will discuss "Sex, Guns, Marijuana & God - Issues that Local Government Tangle with Today" at a special evening workshop in Hoffman Estates.

ABOUT ANCEL GLINK

Visit Ancel Glink's web-site at www.ancelglink.com or email us at inthezone@ancelglink.com.

For current information about new and pending legislation, recent cases, and other topics of interest to local governments, you can visit our blog [Municipal Minute](#), follow the Land Use Group on

Twitter [@AncelGlinkLand](#), or like [Ancel Glink: Land Use](#) on Facebook.

Other Ancel Glink publications on land use and related issues are available on Ancel Glink's website (www.ancelglink.com) for public use and download:

[Zoning Administration Tools of the Trade](#)

[Zoning Administration Handbook](#)

[Economic Development Toolbox for Municipal Officials](#)

[Municipal Annexation Handbook](#)

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