Wireless Facilities: Managing the Approval Process

By: Katherine B. Miller, Esquire
    Justin L. Pasay, Esquire
I. **Legal Framework: The Telecommunications Act of 1996, the FCC “Shot-Clock”, Co-Location As-of-Right and Changes to RSA 12-K.**

A. **Introduction.**

These materials provide an overview of the federal and state requirements for review of personal wireless communication facilities ("PWCFs," commonly known as "cell towers" or "wireless towers") as well as some practical suggestions on procedures and rules local land use boards may wish to adopt, to ensure compliance with the laws.

The Telecommunications Act of 1996 ("TCA") reprinted in the Appendix, created an "umbrella" of federal law under which local land use boards in New Hampshire and elsewhere had to review applications for wireless towers. State and local land use laws and procedures still apply in the context of new tower construction, but all decisions must be made in the context of the limitations and requirements of the federal law, described more fully below. The rules for adding antennae to existing structures and towers, however, have changed dramatically. Those applications now are exempt from zoning and planning review.

- The last eight years have seen major shifts in federal and state law. In 2009, the Federal Communications Commission ("FCC") issued an order setting short time lines, or a "Shot Clock Order," for decisions on applications for both new towers and for wireless antennae on existing towers, buildings or other structures: **90 days for an application for a new antenna on an existing facility, and 150 days for approval of new tower construction.** The deadlines went into effect immediately.

- In 2015 new federal rules went into effect mandating approval for the addition of antennae to existing towers and structures, except for reasons of safety. 47 U.S.C. § 1455.

- At the state level, 2013 amendments to RSA 12-K went further, limiting review of applications to co-locate additional or new antennae on any structure and to modify existing wireless facilities to building code review only.

- **It is very important that zoning board of adjustment members, planning board members, local and regional planners, and municipal officials with a role in reviewing such applications be familiar with the new requirements, as these changes have preempted local and state law and fundamentally changed the review process for wireless facilities.**

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1 An earlier version of these materials was prepared originally by Katherine B. Miller, Esquire and Sharon Cuddy Somers, Esquire, and last distributed the NHMA Conference in November 2016 Lecture Series.
Even when not preempts local and state law, the TCA provides certain requirements in key areas for these decisions, in terms of the substance of the decision on a new facility (in the case of a denial), the documentation in the record, and the timeliness of the decision. Local land use boards that do not meet the federal requirements for new tower applications (and even some that do) may find themselves in federal and/or state court. Some applicants for cell tower permits are willing to work collaboratively with local land use boards, but it has also been our experience that some applicants have been willing to sue any municipality that denies an application for a new facility. Further, while municipalities frequently prevail, court is never a place that municipalities or their land use boards wish to be, even if they win. This program is designed to help keep your board out of court.

B. Does Federal Law Pre-empt State or Local Law for New Tower Construction?

No, except for timing of decisions and review of co-location applications. The TCA does provide the parameters for local land use decisions on applications for the construction of wireless towers and antennae. Originally it did not preempts decisions of local land use boards on wireless towers. The 2009 FCC Shot Clock Order preempts local and state law on the timing of decisions. A 2012 federal law pertaining to antenna co-location applications does preempt most state and local law and regulations: 47 U.S.C. §1455. The 2013 amendments to NH RSA 12-K also preempt local zoning and planning laws.

RSA Chapter 12-K is broader in scope than the new federal law. It now exempts co-location applications from zoning and planning laws, and all ZBA and Planning Board review, requiring only that co-location applications be reviewed by the local code enforcement officials to make sure they are in conformance with applicable building permit requirements. See RSA 12-K:10. RSA 12-K:11 creates a short window for requesting additional information, 15 days, and a forty-five (45) day deadline for review by the Code Enforcement Officer, or the application is deemed approved.

Conforming changes were also made to (1) RSA 674:33 regarding no special exceptions or variance can be required for co-location or a modification of a PWSF as defined in RSA 12-K:2; (2) RSA 674:43 re: no site plan review for such applications; and (3) RSA 676:13 regarding the timelines in new RSA 12-K:11 shall control over any other forms or sets of standards for the timeline for building inspectors to act on such applications.

In comparison, 47 U.S.C. § 1455 (a) requires a prospective co-location applicant to apply for state, and/or local approval in order to show why the prospective applicant qualifies for exemption. Such a requirement is not incorporated in RSA 12-K. Consequently, municipalities should follow the requirement of RSA 12-K and review co-location applications only for compliance with building permit requirements.

Although federal law does not pre-empt most state law on new wireless tower applications, it does provide the context within which all decisions on wireless tower applications are made. In Daniels v. Town of Londonderry, 157 N.H. 519 (2008), the New
Hampshire Supreme Court explicitly addressed the question of how the requirements under state law -- in that case an application for a use variance and two area variances -- mesh with the requirements of the TCA. Abutters unhappy with the ZBA's grant of the variances, which was upheld by the Superior Court, appealed the matter to the New Hampshire Supreme Court. The abutters argued that the ZBA had construed the TCA as pre-empting the applicant's burden to satisfy the statutory criteria for variances under state law. Disagreeing with the abutters, the Court noted that the TCA "preserves state and local authority over the siting and construction of wireless communications facilities subject to five exceptions specified in the Act." Id. at 524 (quoting Second Generation Properties v. Town of Pelham, 313 F. 3d. 620, 627 (1st Cir. 2002) (hereinafter "Town of Pelham")). Those five exceptions are noted in Section I, C below. The Court further noted: "if a board decision is not supported by substantial evidence ... or if it effectively prohibits the provision of wireless services ... then under the Supremacy Clause of the Constitution, local law is pre-empted in order to effectuate the TCA's national policy goals." Id. (quoting Town of Pelham, 313 F. 3d at 627)(emphasis supplied). The Court explained that the TCA was a deliberate compromise to reconcile the goal of preserving local land use authority with the need to facilitate the national build-out of personal wireless services facilities. Id. "The standards set forth in the TCA provide gloss over the deliberative process, and the ZBA [in Londonderry] correctly considered its implications." Id. at 525. In that case, the Supreme Court found that the ZBA appropriately determined that all of the variance criteria were met.

C. What Are the Rules for New Tower Construction?

The TCA has a number of substantive and procedural requirements, summarized below.

First, it prohibits state and local governments from unreasonably discriminating among "providers of functionally equivalent services." 47 U.S.C. § 332(c)(7)(B)(i)(I)(emphasis supplied). Although "unreasonable discrimination" is prohibited, local land use boards may treat applications for cell towers that would create different visual or safety impacts on the community differently, under normal zoning and land use regulations and procedures. In addition, it is important to note that this section applies to "providers," i.e., companies with an FCC license to provide service. It does not apply to tower construction companies, which may be applicants before local land use boards. Tower companies and providers often act as co-applicants to ensure the protection of this section of the TCA.

Second, the TCA prohibits local governments and their land use boards from issuing decisions that prohibit, or have the effect of prohibiting, the provision of personal wireless services in their communities. 47 U.S.C. § 332(c)(7)(B)(i)(II). This limitation applies to both zoning ordinances and to decisions of local land use boards on individual applications. It applies to outright bans, which are very uncommon now, as well as zoning and/or application criteria that are so difficult to meet that the practical effect is that an applicant will be unable to meet the standards, no matter what the applicant does. See Town of Amherst, New Hampshire v. Omnipoint Communications Enterprises, Inc. 173 F. 3d. 9, 14 (1st Cir. 1999) (hereinafter "Town of Amherst").
This is one of the most challenging criteria of the TCA and one over which multiple federal cases have been litigated. In essence, it means that the decisions of local land use boards may not have the practical effect of preventing the personal wireless services applicant from being able to provide its services to customers in a particular community, even if there are other all phone companies providing service in the community. Southwestern Bell Mobile Systems v. Todd, 244 F. 3d 51, 63, (1st Cir. 2001) (hereinafter “Southwestern Bell”)

An applicant is not entitled to “perfect” service with absolutely no areas of dropped calls or “dead spots.” The FCC regulations explicitly permit such small gaps or “dead zones” in wireless coverage for FCC license purposes. Cellular service is considered to be provided in all areas, including “dead spots.” 47 C.F.R. §22.99 and 22.911 (b).

If an applicant can demonstrate that there is a gap in service, which amounts to more than the incidental gaps or “dead zones” permitted by FCC regulations (see above), the denial of an application may still not amount to an effective prohibition of service, if there are alternative sites available.

“For a telecommunications provider to argue that a permit denial is impermissible because there are no alternative sites, it must develop a record demonstrating that it has made a full effort to evaluate the other available alternatives and that the alternatives are not feasible to serve its customers. Such a showing may be sufficient to support an allegation that the zoning board’s permit denial effectively prohibits personal wireless services in the area.”

Southwestern Bell, 244 F. 3d at 63; Accord, Town of Pelham, 313 F. 3d at 635.

As an example of a thorough record establishing the uniqueness of the location chosen by an applicant, see Omnipoint Holdings, Inc. v. City of Cranston, 586 F. 3d 38, 43-45 (1st Cir., 2009) (hereinafter “City of Cranston.”).

Importantly, “the carrier [can] not insist on one, ideal way to provide service; the TCA required it to consider alternatives more palatable to local zoning authorities.” Id. at 50 (citing Town of Amherst, 173 F. 3d at 14-15).

Ultimately, to prevail on an “effective prohibition” claim, applicants need to show that it is not possible to satisfy the criteria of the land use board, that any application for an alternative arrangement would be rejected and “so likely to be fruitless that is a waste of time even to try.” Town of Amherst, 173 F. 3d at 14. Thus, applicants need to demonstrate that no other locations are feasible, because they are either unavailable for use, or technically would not meet the requirements of the applicant. With the revisions to RSA 12-K, this can be very difficult for applicant to prove. As noted above, this requirement works in tandem with variance criteria involving hardship in the case of an application to the ZBA and with planning board criteria for site review applications.
Third, the TCA requires that any local land use board act on applications for cell towers within “a reasonable period after the request is duly filed.” 47 U.S.C. § 332(c)(7)(B)(ii). The 2009 FCC “Shot Clock Order,” created a very compressed schedule for decisions: 90 days for an application for a new antenna on an existing facility (known as “co-location”), and 150 days for construction of a new wireless tower. It is important to note that, as interpreted by one New Hampshire Federal judge, these “shot clock” deadlines apply to the period following an initial decision to grant or deny an application while any request for rehearing is pending and, if the request is granted, during any period leading up to the rehearing and the issuance of a new, written decision by the Board on such rehearing. New Cingular Wireless PCS, LLC v. Town of Stoddard, NH, et al, 853 F. Supp. 2d 198 (NH Dist. Ct. 2012) (“Town of Stoddard”). If those deadlines are not met, applicants may sue in federal or state courts, pursuant to 47 U.S.C. § 332(c)(7)(B)(v), and the court will presume the delay is unreasonable, unless the municipality can demonstrate otherwise. The FCC Shot Clock Order sets up a number of other timing requirements discussed more fully below. Note: There is a proposal for a new rule at the FCC to change the consequence of failing to meet the deadlines of the Shot Clock Order: instead of merely creating a presumption of unreasonableness, which an applicant would need to go to Court to enforce, the proposed rule would deem the application granted if the deadline passes. As of the date of these materials (8/8/17), this role has not been adopted, but the FCC is considering it.

The Shot Clock Order also imposes a deadline for local land use boards to request additional information on applications: 30 days from receipt of application. If additional information is requested during the first 30 days, the “shot clock” stops ticking while the applicant provides the requested information. Land use boards may request additional information beyond the initial thirty-day period, but the clock will not stop while the applicant responds to the request. For this reason, every effort should be made to review applications and to request additional information promptly. Recommended procedures to aid compliance in the FCC order are discussed below, Section II.

Fourth, the TCA requires that, if a local land use board denies an application for a variance or for site plan approval of a wireless tower or antenna, the denial must be in writing and supported by “substantial evidence contained in a written record.” 47 U.S.C. § 332(c)(7)(B)(iii). What constitutes “substantial evidence” has been defined by case law to mean “more than a scintilla of evidence.” ATC Realty, LLC v. Town of Kingston, N.H., 303 F.3d 91, 94-95 (1st Cir. 2002)(internal citations omitted)(hereinafter “Town of Kingston”). Boards are wise to have “substantial evidence in a written record” for all the key elements of a decision denying an application.

Fifth, the TCA prohibits municipalities from denying or regulating wireless antennae or wireless towers due to environmental concerns about the radio emissions, so long as the antennae comply with FCC rules on radio frequency (“RF”) emissions, which are codified at 47 C.F.R. § 1.1310. 47 U.S.C. §332(c) (7)(B)(iv). Generally, a document showing compliance with the FCC rules on RF emissions is part of the application package presented to the local land use board. This is an area that can cause some confusion, as there is still dispute about the safety of the FCC’s RF standards. Nevertheless, local land use boards are legally prohibited from denying or
regulating wireless antennae or wireless tower locations based on these concerns if the RF emissions meet the FCC standards.

Finally, municipalities may start to see applications for personal wireless service facilities in the public rights-of-way. This application or inquiry may come to the municipality in an innocent sounding question, such as “Do telecommunications providers have access to the public rights-of-way in your City of Town?” We recommend you consult with counsel before responding, as it may be a “trick” question. Cities and Towns should be aware that 47 U.S.C. § 253 requires that municipalities provide non-discriminatory access to their public rights-of-way to companies providing telecommunications services, which include cell phone service providers. RSA 231:159 et seq. provide the requirements for telecommunications companies to apply for permits or licenses to place their “facilities” in the public rights-of-way. We strongly recommend that municipalities implement a policy of requiring all providers of telecommunications services to apply for a license pursuant to RSA 231:160 to place conduits, poles, antennae or any attachments on poles in the public rights-of-way. By having the same process for all telecommunications companies, municipalities will, one hopes, avoid a federal lawsuit under 47 U.S.C. § 253. Developing such a process for licenses for use to the public rights-of-way for wireless antennae and other attachments is beyond the scope of this presentation and these materials, but the authors would be happy to discuss such a process with interested municipal officials. New Hampshire may also see pressure at the Public Utility Commission for the Commission to rule that personal wireless services facilities, such as “whip antennae” for a distributed antenna system, are “attachments” to poles covered by state pole attachment laws and regulations, and therefore entitled to attach to utility poles in the state. Similar petitions have been filed in other states and are pending.

D. Co-Location “As-of-Right”.

Tucked into a federal law signed February 22, 2012, is a change to the TCA, codified as 47 U.S.C § 1455 (a), which preempts local law pertaining to the collocation of new “transmission equipment” on “an existing wireless tower or base station, provided that the new transmission equipment does not substantially change the physical dimensions of such tower or base station by more than 10% of the height of the structure, or 20’, whichever is more.” As of the submission date of these materials, the new law is clear that the National Historic Preservation Act and the National Environmental Policy Act of 1969 still apply to such applications. There is a proposal pending in the FCC to eliminate that review.

Municipalities are encouraged to follow RSA:12:K for requests for co-locations, as it is more comprehensive and has shorter timelines. By following the provisions found within RSA 12:K, all existing building codes and code enforcement procedures would continue to apply and each additional antennae would be subject to building inspector approval, but not to Planning Board or ZBA review or approval. See RSA 12:K:10.
E. Remedies Under Federal Law and FCC Order.

If applicants are dissatisfied with the denial of an application, the TCA entitles them to bring an action in federal or state court, within 30 days of the denial. 47 U.S.C. § 332 (c)(7)(B)(v). As a practical matter, such applicants normally choose federal court. The court may order a permit or variance granted if it finds a violation of the TCA.

As noted above, at I.C., even without a denial, if a board fails to meet the deadlines in the Shot Clock Order for rendering a decision on an application, (150 days for a new structure), the applicant may sue in federal (or state) court, and the burden is on the municipality to show the delay is not unreasonable. The FCC is considering a change to the rule to have the application deemed granted if the deadline is missed.

The TCA provides no private right of action to a disgruntled abutter or other person dissatisfied with a decision by a board granting an application. However, an abutter has rights under State law in New Hampshire, in Federal or State Court, including the right to seek reconsideration of a decision granting an application and the right to challenge the approval in Superior Court. Furthermore, an abutter may seek to intervene in a federal challenge to the denial of an application brought by the applicant, to protect the abutter’s state law interest in the decision of the land use board denying the application. This issue was explored in the Federal First Circuit Court of Appeals when it ruled that the abutters could block settlement of the case by the Town and the applicant, to protect their state law rights in the initial denial of the application. The applicants would need to either prevail on their TCA claims in court or settle with the abutters, for the case to be resolved. Industrial Communications and Electronics, et al v. Town of Alton, et al. 646 F.3d 76 (1st Cir., 2011). The Town, however, is not required to continue the court case against the applicant, after it has settled. Defense of the Town’s decisions to deny the application becomes the responsibility of the abutters, once the Town has settled.

As noted above, under state law, abutters and others interested in the tower application process, who object to the granting of a variance or application for site plan approval, may challenge the approval in state court. RSA 677:4,15.

II. The Role of Boards: Protecting the Interests of the Citizens While Staying Out of Court.

The job of a zoning board of adjustment or a planning board is a difficult one. Residents and business owners want reliable cell phone service. Residents also want an aesthetically pleasing and safe place in which to live and work. In the last two decades, these two goals have sometimes come to loggerheads when it comes to placing and constructing new cell towers for personal communication wireless services.

The job of land use board members is to try to resolve these two potentially conflicting goals, while adhering to the language of the town’s land use regulations and State law and being mindful of the “umbrella” requirements of the TCA; the FCC timelines for decisions as well as
state and federal limitations on any land use board review of co-location applications or applications for modifications of existing towers or base stations that are not substantial.

The first step in reconciling these goals is to understand the principles involved in the TCA, the FCC Rules and RSA 12-K, and to recognize that a cell tower application has different requirements than other applications seeking zoning approvals or approvals from the planning board. For town officials, or those who advise town officials, reviewing these materials is a solid first step in understanding these complicated issues.

The second step is to ensure, through your review of applications and conduct of public hearings, that the public, the applicants, and abutters who support or oppose the cell tower have confidence in the fairness and legitimacy of your decision making process. This will be difficult since applicants and abutters who oppose applications will have divergent views, and participants on all sides could be reluctant to understand that town land use decisions must be made within the confines of local land use law and the TCA.

The third step is to take steps to mitigate the potential of lawsuits from any side and in the event that a lawsuit comes despite precautions, to have the necessary support to defend against it. There are no guarantees on how to do this because the FCC’s “shot clock” Order, the “Co-Location As-of-Right” Law and RSA 12-K, discussed previously in these materials, are relatively new, and there is little guidance as to how they should be applied in different factual circumstances. That said, your best defense is to create evidence that you are acting in good faith and with the intention to comply with these requirements. Under the laws as they stand today, the best way to accomplish this goal is to document everything about a cell tower application. In small towns, where staff is in short supply, or non-existent, this task will be challenging at best. Nevertheless, it must be done.

A. Where to Start? The Application.

Our suggestion is to start at the beginning when the application comes in the door at town hall. We recommend immediately flagging any new applications for “co-location” of additional antennae on current wireless towers or “base stations,” removal or replacement of existing antennae or transmission equipment. Provided that the co-location does not result in a substantial change to the physical dimensions of the tower, then the co-location applications should only be reviewed by your Building Inspector for Life Safety Code and other regulations and approved accordingly. For co-location and modification applications, the time for determining completeness is shortened to 15 days. RSA 12-K:10, II(a).

For new tower construction, we recommend creating a form specifically for cell tower applications; a specialized form will help with the review process and will assist with record

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2 Of course, applicants can meet informally with staff, or in the case of the planning board, in a conceptual consultation, under RSA 676:4, II (a) even before an application is filed. This practice should be encouraged because it will provide towns and applicants more time to spot potential issues and/or information that needs to be submitted with the application.
keeping in general. The form should include language indicating what the submission deadlines are, in order to comply with statutory notice requirements under RSA 676:4 I (d) and RSA 676:7, I and to comply with the board’s meeting schedule. Further, in the event that the applicant submits an application after the relevant submission deadline, the form should note that the town reserves the right to ask for an extension in order to timely finish the 30 day “completeness” review required by the FCC Order. Although towns should do their very best to finish the review within the thirty days, there will certainly be times when such extensions are required. The OEP sample form available on its website is a good place to start, although the above additions are recommended.

The special cell tower/co-location form should be filled out by the applicant, and be given to whomever in town is charged with physically receiving land use applications. (Make sure there is someone identified for this task!) In some towns, that person could be a planner, but in smaller towns, it could be a part time administrative assistant who handles all manner of tasks. In any event, whoever physically receives the documents should be instructed to review the form for basic completeness the moment it arrives. If the application form itself is incomplete, it should be rejected, noting same on the application and making a copy of the rejection note for town records. Alternatively, if the application form meets basic completeness standards, then it should be accepted for filing and date stamped.

Once this very basic review is done, and once the application is date-stamped, it should be reviewed to determine what relief is required, and it should be reviewed for substantive completeness; the test being whether the materials included in the application packet appear to be sufficient to allow a board to conduct an analysis (or if no board review is required, whether the information is sufficient for the building inspector), or whether there are crucial items missing, such as expert reports, RF emissions information, FCC license, etc. On the first point, all land use applications, including cell tower applications, need to be reviewed to ascertain whether the application needs to go to the zoning board of adjustment, or to the planning board, or both. This analysis should be handled in the normal course of affairs, and go to the same person or board who would otherwise make the determination if the application were unrelated to cell towers. The only difference in this step of the review is that it must be done quickly and efficiently in order to not lag behind in the “shot clock” or RSA 12-K requirements. It is therefore recommended that, as soon as the application is filed, it is calendared to have a determination made within fifteen days regarding the type of land use relief required. Where appropriate, and in order to meet the time lines, towns should not hesitate to use outside consultants (including planning and legal staff) to assist with the review. The determination regarding required relief should be in writing.

On the second point, the application must be reviewed for substantive completeness, either simultaneously with the above review of the relief required by the application, or immediately thereafter. This must be done within thirty (30) days of receipt of the application for new tower facilities and fifteen (15) days for co-location and modification applications. This review is much more in depth than the “basic completeness” review when the application was physically filed with the town.
For new tower applications, it is also strongly recommended that towns consider using the services of the regional planning commission or a consultant for the substantive completeness review. By using these outside services, the application review will not impose additional burdens on what may already be overburdened staff, thus ensuring that the review is conducted on a timely basis. Further, because the subject matter is highly complicated, the assistance of someone who has training in the field will ensure that, if additional materials are required to make the application complete, such materials will be promptly and accurately identified.

A checklist should be prepared to determine what should be in an application, and that checklist should be used to determine whether the application is complete. For example, a variance application may require, in addition to the normal explanation of how variance criteria are met, information to support a claim that a significant gap in wireless service exists and what steps have been taken to determine alternative locations beyond the one being proposed. There are also special requirements for wireless tower applications in RSA Chapter 12-K, “Deployment of Personal Wireless Service Facilities,” which include regional notification (RSA 12-K:7), and particular components of the application, such as a copy of the applicant’s FCC license, maps of the applicant’s facilities within a 20 mile radius and “a description of why less visually intrusive alternatives for this facility were not proposed.” RSA 12-K:3, IV(a) and (c). (Section I, F., supra.) Additionally, expert reports may be required on these or other topics, depending on your local ordinances.

Finally, many planning boards use a technical review committee and/or department head review to identify potential areas of concern and issues which may require further analysis before the matter can be addressed by the planning board. For towns that use a technical review and/or department head review process, we strongly recommend that this review be conducted within thirty days of the receipt of the application.

B. But Who Will Pay for All of This?

Most towns will immediately be concerned about the cost of using a regional planning commission or a consultant to analyze the application for completeness. If it is a planning board application, then statutory authority exists under RSA 12-K:4 and RSA 676:4, I (g) to charge the applicant “reasonable expenses” associated with special investigative studies, review of documents and the like. Given the specialized nature of these applications, a strong argument can be made that hiring someone to review the application for completeness falls within the statutory authority.

Similarly, pursuant to 2010 legislation, zoning boards can also charge applicants for special investigative studies, review of documents and “other matters required by particular applications.” Laws of 2010, (Chapter 303) HB 1380, pertaining to assessing fees by zoning boards of adjustment, amended RSA 676:5, RSA 676:4-b, and RSA 673:16, II, to allow zoning boards of adjustment to charge back to applicants various expenses which planning boards have historically charged. As with the planning board, there is a strong argument which supports the hiring of a specialist to review and generally assist with the applications. Zoning boards can and
should take advantage of this new legislation to hire someone to review the application and determine whether it is complete.

RSA 673:16, II (Supp. 2016) and RSA 676:4-b (Supp. 2016) allow towns to charge for third party review and consultation during the review process, thus providing an opportunity for peer review of expert reports prepared by applicants or possibly abutters. Towns should exercise caution however when peer review is done in connection with any concurrent planning board and zoning board of adjustment application since the above referenced legislation indicates that there can not be substantial replication in the peer review done for both boards.

When utilizing outside consultants to assist with the application review process and/or when using experts for peer review, the town must do so in conformance with the statute on documentation of expenses pursuant to RSA 676:4-b and RSA 673:16, II, and must do so in a manner which documents that the expenses are reasonable. It is recommended that land use board regulations, whether site regulations or zoning board procedures, be amended to expressly reference the enabling statutes. The application form for cell tower application, as more particularly described elsewhere in these materials, should also contain language indicating that the town is authorized to make such “reasonable expense” charges. Cell tower companies may very well object to being asked to pay for these expenses; be prepared for such objections by documenting the expenses. Further, towns may wish to put out an RFP for consulting services even prior to receiving any cell tower applications. Doing so will prevent the need to scramble to find someone when an application is received, and will create a good body of evidence that the town is acting prudently in hiring an appropriate, and an appropriately priced, individual to provide the services.

As indicated elsewhere in these materials, the review for completeness must be done in the thirty days following receipt of the application (fifteen days for co-location applications). Adhering to these time frames is critical. If incomplete items are not timely flagged for attention and further action, the town forfeits its ability to stop the “shot clock” for new applications while an applicant provides the requested information, after the expiration of the initial thirty day time period. (Co-location applications will be deemed granted in forty-five days, and the statute provides no latitude for extensions, although presumably the applicant could agree to an extension.) Fortunately, the thirty day time period is consistent on its face with the existing time frames set forth in RSA 676:4, I (b) which require planning boards to determine within 30 days following delivery of an application, or at the next regular meeting (in accordance with notice requirements) whether the application is complete according to the regulations and to vote on this determination. Similarly, a public hearing for zoning board applications must be held within 30 days of the application under RSA 676:7, II. This second statute tends to be honored more in the breach than in actual practice, but given the “shot clock” order, towns are cautioned to do their completeness review for zoning board applications and hold public hearings on same within the thirty days.

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3 Because the need for consulting or other services for cell tower applications is unlikely to arise frequently for any given town, towns may wish to formally or informally work together to share a consultant. Additionally, regional planning commissions will likely be able to offer assistance with the application review process.
Extensions of time beyond the thirty days and extensions for decisions on the merits will undoubtedly be required from time to time. At times, those delays will be the result of administrative issues beyond the control of the town, such as when the applicant provides incorrect or incomplete information to prepare the abutter lists or when quorums are unavailable. At other times, the town may need additional time to conduct the review or to hold hearings. Regardless of what the origin of the extension is, the reason(s) must be documented and any agreement to extend must be in writing.

C. So What Does It Mean to Be Complete?

We recommend using a checklist to determine the completeness of applications. This will ensure that the review is thorough and that all cell tower applications are treated in a uniform manner. For those applications which require zoning board relief, the application should of course provide information to make a decision regarding the five statutory requirements for a variance under RSA 674:33, I (b). Additionally, and unique to cell tower applications, the materials should provide information to indicate that there are significant coverage gaps which necessitate the siting and construction of additional towers. At a minimum, this information should include a coverage map showing the existing facilities of all of the carriers within a community and in the surrounding communities (not just the applicant’s facilities) as well as relevant engineering reports for collected towers showing compliance with ANSI and industry and safety and structural codes. The materials should also contain a narrative description of the analysis conducted by the applicant to learn what alternative locations and/or proposals are feasible, or, if there are none that are feasible, why they are not feasible, with documentation of attempts to secure alternative locations.

For applications which call for planning board review, it will be necessary for the application to contain all waiver requests, and if waivers are required, then the applications should contain all supplemental material related to the waiver requests. For all applications, the boards should identify any expert reports that may be required, and if they are not submitted within the necessary thirty days, boards should create a writing indicating that the application is incomplete because of that fact. It is also recommended that all boards set up an escrow account (pursuant to RSA 673:16, II) to collect funds up front for anticipated expenditures.

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4 One of the problems that plagues many land use boards, particularly in small towns, is getting a quorum for any meeting, particularly in the summer months. On a similar note, often when there is a quorum, but not a full board, the applicant will opt not to proceed until there is a full board. These problems affect all applications, not just cell tower applications. There is no easy answer because it is always difficult to find volunteers to fill the board positions. That said, towns and boards should make best efforts to have a full complement of alternate members available to sit in when quorum problems arise. When it is not possible to conduct a meeting due to a quorum problem, it should be documented that the failure to take action was due solely to a quorum issue, and if it all possible, the board might offer to conduct a special meeting to keep the application process on track. Similarly, if the applicant opts to not go forward due to less than a full board, this fact should be clearly noted in the minutes, and there should be an explicit acknowledgement, in writing, that this choice will result in an extension, for an equal length of time, of the FCC’s “shot clock” deadlines.
D. And Yet Another Wrinkle /SB 328 Incomplete Applications.

A relatively new law, (Chapter 39, Laws of 2010)(SB 328), effective July 17, 2010, amended RSA 676:4, I (b) and was intended to prevent applications of any type, not just cell tower applications, from getting bogged down at the planning board level. In particular, the law was designed to prevent planning boards from requiring that DES or other state permits be obtained first before an applicant goes to the planning board, and to prevent the delays which sometimes occur when relief is required from the planning board and the zoning board and the application is bounced back and forth between boards for long periods of time. This statute became effective in 2010, and there are, as of this writing, no Court decisions interpreting how it might be applied in the context of cell towers. What can be inferred, though, is that the New Hampshire legislature does not want to see planning boards delay applications in order to require applicants to first obtain permits from other governmental bodies. This legislative intent, coupled with the policy directives of the FCC’s “shot clock” order, suggest that planning boards could be in serious jeopardy if they require cell tower applicants to first obtain any relevant state permits before the planning board accepts jurisdiction under RSA 676:4.

Questions have arisen about how the statute will be applied where relief is required from both the zoning board of adjustment and the planning board. We believe when a cell tower application requires zoning board of adjustment relief, typically for a use or height variance, that both the applicant and the respective boards will want the zoning board of adjustment to go first, because without the variance(s), the proposal cannot be approved by the planning board. However, regardless of which land use board the application goes to first, the decision should be conditional upon obtaining approval from the other board.

E. What Happens After the 30 Days?

Thus far, this discussion has focused on what needs to be done within the first thirty days following receipt of the application. However, the need to comply with the time deadlines in the FCC’s “shot clock” order continues to be critical after the initial thirty days has run. The deadlines are that a final written decision needs to be made within 150 days for a new tower/construction application. Note that this rule applies not only to the initial decision granting or denying an application, but also the decision following a request for rehearing, and if the rehearing is granted, a written decision on the rehearing itself.

All of the issues pertaining to the 30-day deadline described for the “completeness” review apply with equal force here. Towns need a quarterback, whether a town employee or a consultant of some nature, to be responsible and accountable for calendaring the deadlines. For the 150 day deadline, it is recommended that the local land use boards calendar all public meetings when the application might possibly appear on the docket as a work session and/or public hearing, and that notice be provided to the applicant at the beginning of the process as to when the deadlines are to provide documents for board packets prior to each of those meetings. Working backwards from these deadlines, towns can then determine what intermediate steps need to be conducted by staff and/or consultants to assist the land use boards in meeting these deadlines.
Even if the land use boards successfully work towards meeting the deadlines, the role of the public and disgruntled abutters can present unexpected challenges to the towns’ ability to adhere to deadlines. In particular, the public and abutters have procedural due process rights, including being given an opportunity to be heard at public hearings. The opportunity, which could include the ability to make a presentation, to present evidence of their own experts, and/or to request that additional information be obtained to ensure that the final decision is an informed one, should be afforded in a manner consistent with board practice for any other type of application. Additionally, board members themselves may decide that additional information is needed to make an informed decision possible. All of these factors could make meeting the 150 day deadline problematic, particularly regarding the abutter involvement because, as a practical matter, abutter involvement does not begin until the 30-day completeness review is done. There are no easy or clear answers to these issues under the law at this time. It seems likely litigation will arise to resolve the potential operational conflict between the FCC order, the due process rights of the abutter, and the duty of the planning board to make decisions in a timely and informed manner. Towns should protect themselves as much as possible by obtaining extensions from the applicant when appropriate, and by, as much as possible, requiring that abutters adhere to the same submission deadlines for materials to which applicants must adhere. In every instance where the board may go beyond the FCC’s deadlines, either in requesting additional information from the applicant after the initial 30-day “completeness” review, or in needing additional time to make a decision, the board should proactively request, in writing, an extension from the applicant and, if the applicant declines, require that it be so in writing.

Note that some applicants may take the position that the FCC’s “shot clock” deadlines apply cumulative to all land use board approvals for a particular project, i.e., 150 days total for both planning and zoning board approvals if both are needed. In such instances, written extensions of the deadlines may be needed.

As noted above, at least one Federal judge in New Hampshire, Judge Laplante, has taken the position that the “shot clock” deadlines apply to re-hearings as well. “Accordingly, the Shot Clock Rulings 150-day deadline for the processing of wireless communication facility siting applications encompasses not only the time it takes a local government to reach an initial decision on an application, but the time it takes to complete the rehearing process set forth in N.H. Rev. Stat. Ann. §677:2 and 677:3 as well.” Town of Stoddard at pp. 13-14.

This decision came in a case with problematic facts for the town: the Stoddard ZBA rendered a decision granting the application for a 130 foot “unipole” tower (a single pole with a concealed, internal antenna) in a timely fashion. The ZBA had requested, and the applicant had agreed to, an additional three months. The Board conducted six public hearings and requested “voluminous” additional materials and “numerous” tests. Id. at p. 5. Then, two months later, after issuing its initial decision, granted a request for rehearing, at a meeting in which one Board member (who had been a vocal opponent of the application) speculated that it would “take 20 to 30 meetings” and suggested the Board needed a brand new consultant to review the applicant’s purported coverage gap. Id., at pp. 6-7. Judge Laplante had no trouble concluding that such tactics could be used as a means to “impede or obstruct” applications, in violation of the TCA
and the FCC’s Shot Clock Order. For this reason, he included the entire rehearing process, through “resolution” (which under the TCA means final written decision) within the 150-day deadline of the “shot clock.” “To conclude that a rehearing under New Hampshire law is exempt from the Shot Clock Rulings deadline would encourage great mischief.” Id. at p. 14. Although this decision is not binding legal precedent for other cases in New Hampshire, it is very likely it will be followed. Judge Laplante’s decision was not appealed.

What can local land use boards do to comply with the requirement that final, written decisions on rehearing, also be produced within the 150-day deadlines of the “shot clock”? First, the same recommendations discussed previously in these materials apply: boards should pay scrupulous attention to deadlines, calendar them, even as they evolve, and do their very best to meet them. Second, boards should, upon receipt of the application, consider requesting that the applicant agree to a sixty day extension of the “shot clock” deadlines in the event that a request for rehearing is filed after the board renders its initial, “final” decision on the application. Third, if boards find themselves running out of time, they should request, in writing, an additional reasonable extension of the “shot clock” deadlines. The applicant’s response, either agreeing to the extensions or declining, should also be in writing. Depending on the applicant’s response to requests for an additional extension, the Board may need to schedule extra meetings. Fourth, boards retain a measure of control, even if applicants file an action in Court for a violation of the TCA due to the failure to meet the shot clock deadlines: if the board subsequently renders a final written decision on the request for rehearing, the Federal Court is very likely to dismiss the case as moot, especially if the board has been trying diligently to meet the deadlines and to get an agreement from the applicant to a reasonable extension. The importance of a solid record, demonstrating that diligence, communication and reasonableness for the board’s protection cannot be overstated.

Courts state over and over again that they will look not only at the time it may take to process an application, but also at the reasoning behind the board’s decision. For that reason, the board’s decision should not only be in writing indicating an approval, an approval with conditions, or a denial, but should set forth, with as much specificity as possible, why the board came to the decision it did and, in the case of cell tower applications, the evidence in the written record. That said, the requirement to explain the decision on a cell tower case is not unique. New Hampshire cases have long stressed the need for the board to explain its decision. In fact, this requirement was reiterated in Motorsports Holdings, LLC v. Town of Tamworth, 160 N.H. 95 (2010) when the Court ruled that board minutes were insufficient to tell the applicant why the application had been denied; instead, a written decision setting forth the reasoning is required. The interplay between state law and TCA requirements for the written decision is discussed more fully in Section III, below.

Although the preceding materials dealt mostly with new wireless facility applications, the changes to RSA 12-K effective in 2013, require equal vigilance by your building inspector or code enforcement officer. If applications for co-locations or wireless facility modifications are not addressed within forty-five (45) days, they are deemed granted, a dramatic outcome considering that the building inspector or code enforcement officer’s review pertains to safety compliance.
It is not a violation of the TCA for a land use board to reject an application if other options for siting or height may be available to the applicant. Town of Amherst, 173 F. 3d at 24.

A single denial of an application either for planning use approval or a ZBA decision may amount to a prohibition on the provision of wireless service by a particular applicant, but the burden for the carrier in those situations to demonstrate effective prohibition is “a heavy one.” Town of Amherst, 173 F. 3d at 14. The carrier must show “from language or circumstances not just that this application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try.” Id. at 14-15.

III. Conclusion

When faced with applications for new wireless towers or for co-location of antennae on existing structures, land use boards should, if they have not done so already, adopt the practice of good record keeping, written documentation concerning land use applications and appropriate consultation with experts. We recognize that this is challenging, particularly in times of tight budgets and short staff; however, if this can be done on a foundational level, it will help to protect towns in the face of litigation concerning cell tower denials.
Appendix

Selected Statutes
Appendix

Selected Statutes
§332. Mobile services

(a) Factors which Commission must consider

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will—

(1) promote the safety of life and property;
(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;
(3) encourage competition and provide services to the largest feasible number of users; or
(4) increase interservice sharing opportunities between private mobile services and other services.

(b) Advisory coordinating committees

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established in this subsection shall not be subject to or affected by the provisions of part III of title 5 or section 1342 of title 31.

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that—

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;
(ii) enforcement of such provision is not necessary for the protection of consumers; and
(iii) specifying such provision is consistent with the public interest.

(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is

required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

(C) The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition. As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to August 10, 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that—

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue
exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation

Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 [47 U.S.C. 741 et seq.] of the corporation authorized by title III of such Act [47 U.S.C. 731 et seq.].

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of section 310(b) of this title to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) of this title.

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) 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.
(iii) 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.

(iv) 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.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph—

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

(8) Mobile services access

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Commission finds it to be in the public interest to apply such requirements to such services.

(d) Definitions

For purposes of this section—

(1) the term "commercial mobile service" means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (e)(1)(B) of this section; and

(3) the term "private mobile service" means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.


References in Text

Provisions of part III of title 5, referred to in subsec. (b)(2), are classified to section 2101 et seq. of Title 5, Government Organization and Employees.


This chapter, referred to in subsec. (e), was in the original “this Act”, meaning act June 19, 1934, ch. 652, 48 Stat. 1064, known as the Communications Act of 1934, which is classified principally to this chapter. For complete classification of this Act to the Code, see section 609 of this title and Tables.


CODIFICATION


AMENDMENTS

Subsec. (d)(1), (3). Pub. L. 104–104, §3(d)(2), substituted “section 153” for “section 153(a)”.

1993—Pub. L. 103–66 struck out “Private land” before “mobile services” in section catchline, struck out “land” before “mobile services” wherever appearing in subsecs. (a) and (b), added subsecs. (c) and (d), and struck out former subsec. (e) which related to service provided by specialized mobile radio, multiple licensed radio dispatch systems, and other radio dispatch systems; common carriers; and rate or entry regulations.

EFFECTIVE DATE OF 1993 AMENDMENT

Section 6002(c) of Pub. L. 103–66 provided that:

“(1) IN GENERAL.—Except as provided in paragraph (2), the amendments made by this section [amending this section and sections 152, 153, and 309 of this title] are effective on the date of enactment of this Act [Aug. 10, 1993].

“(2) EFFECTIVE DATES OF MOBILE SERVICE AMENDMENTS.—The amendments made by subsection (b)(2) [amending this section and sections 152 and 153 of this title] shall be effective on the date of enactment of this Act [Aug. 10, 1993], except that—

“(A) section 332(c)(3)(A) of the Communications Act of 1934 [subsec. (c)(3)(A) of this section], as amended by such subsection, shall take effect 1 year after such date of enactment; and

“(B) any private land mobile service provided by any person before such date of enactment, and any paging service utilizing frequencies allocated as of January 1, 1993, for private land mobile services, shall, except for purposes of section 332(c)(6) of such Act [subsec. (c)(6) of this section], be treated as a private mobile service until 3 years after such date of enactment.”

AVAILABILITY OF PROPERTY

Section 704(c) of Pub. L. 104–104 provided that: “Within 180 days of the enactment of this Act [Feb. 8, 1996], the President or his designee shall prescribe procedures by which Federal departments and agencies may make available on a fair, reasonable, and nondiscriminatory basis, property, rights-of-way, and easements under their control for the placement of new telecommunications services that are dependent, in whole or in part, upon the utilization of Federal spectrum rights for the transmission or reception of such services. These procedures may establish a presumption that requests for the use of property, rights-of-way, and easements by duly authorized providers should be granted absent unavoidable direct conflict with the department or agency’s mission, or the current or planned use of the property, rights-of-way, and easements in question. Reasonable fees may be charged to providers of such telecommunications services for use of property, rights-of-way, and easements. The Commission shall provide technical support to States to encourage them to make property, rights-of-way, and easements under their jurisdiction available for such purposes.”

TRANSITIONAL RULEMAKING FOR MOBILE SERVICE PROVIDERS
Section 6002(d)(3) of Pub. L. 103–66 provided that: “Within 1 year after the date of enactment of this Act [Aug. 10, 1993], the Federal Communications Commission—

“(A) shall issue such modifications or terminations of the regulations applicable (before the date of enactment of this Act) to private land mobile services as are necessary to implement the amendments made by subsection (b)(2) [amending this section and sections 152 and 153 of this title];

“(B) in the regulations that will, after such date of enactment, apply to a service that was a private land mobile service and that becomes a commercial mobile service (as a consequence of such amendments), shall make such other modifications or terminations as may be necessary and practical to assure that licensees in such service are subjected to technical requirements that are comparable to the technical requirements that apply to licensees that are providers of substantially similar common carrier services;

“(C) shall issue such other regulations as are necessary to implement the amendments made by subsection (b)(2); and

“(D) shall include, in such regulations, modifications, and terminations, such provisions as are necessary to provide for an orderly transition.”
§1455. Wireless facilities deployment

(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.

(b) Federal easements and rights-of-way

(1) Grant

If an executive agency, a State, a political subdivision or agency of a State, or a person, firm, or organization applies for the grant of an easement or right-of-way to, in, over, or on a building or other property owned by the Federal Government for the right to install, construct, and maintain wireless service antenna structures and equipment and backhaul transmission equipment, the executive agency having control of the building or other property may grant to the applicant, on behalf of the Federal Government, an easement or right-of-way to perform such installation, construction, and maintenance.

(2) Application

The Administrator of General Services shall develop a common form for applications for easements and rights-of-way under paragraph (1) for all executive agencies that shall be used by applicants with respect to the buildings or other property of each such agency.

(3) Fee

(A) In general

Notwithstanding any other provision of law, the Administrator of General Services shall establish a fee for the grant of an easement or right-of-way pursuant to paragraph (1) that is based on direct cost recovery.

(B) Exceptions

The Administrator of General Services may establish exceptions to the fee amount required under subparagraph (A)—

(i) in consideration of the public benefit provided by a grant of an easement or right-of-way; and

(ii) in the interest of expanding wireless and broadband coverage.

(4) Use of fees collected

Any fee amounts collected by an executive agency pursuant to paragraph (3) may be made available, as provided in appropriations Acts, to such agency to cover the costs of granting the easement or right-of-way.

(c) Master contracts for wireless facility sittings

(1) In general

Notwithstanding section 704 of the Telecommunications Act of 1996 or any other provision of law, and not later than 60 days after February 22, 2012, the Administrator of General Services shall—

(A) develop 1 or more master contracts that shall govern the placement of wireless service antenna structures on buildings and other property owned by the Federal Government; and

(B) in developing the master contract or contracts, standardize the treatment of the placement of wireless service antenna structures on building rooftops or facades, the placement of wireless service antenna equipment on rooftops or inside buildings, the technology used in connection with wireless service antenna structures or equipment placed on Federal buildings and other property, and any other key issues the Administrator of General Services considers appropriate.

(2) Applicability

The master contract or contracts developed by the Administrator of General Services under paragraph (1) shall apply to all publicly accessible buildings and other property owned by the Federal Government, unless the Administrator of General Services decides that issues with respect to the siting of a wireless service antenna structure on a specific building or other property warrant nonstandard treatment of such building or other property.

(3) Application

The Administrator of General Services shall develop a common form or set of forms for wireless service antenna structure siting applications under this subsection for all executive agencies that shall be used by applicants with respect to the buildings and other property of each such agency.

(d) Executive agency defined

In this section, the term "executive agency" has the meaning given such term in section 102 of title 40.


References in Text


The National Historic Preservation Act, referred to in subsec. (a)(3), is Pub. L. 89–665, Oct. 15, 1966, 80 Stat. 915, which was classified generally to subchapter II (§470 et seq.) of chapter 1A of Title 16, Conservation. The Act, except for section 1, was repealed and restated in division A (§300101 et seq.) of subtitle III of Title 54, National Park Service and Related Programs, by Pub. L. 113–287, §§3, 7, Dec. 19, 2014, 128 Stat. 3094, 3272. For complete classification of this Act to the Code, see Tables. For disposition of former sections of Title 16, see Disposition Table preceding section 100101 of Title 54.

CHAPTER 12-K DEPLOYMENT OF PERSONAL WIRELESS SERVICE FACILITIES

TITLE I
THE STATE AND ITS GOVERNMENT

CHAPTER 12-K
DEPLOYMENT OF PERSONAL WIRELESS SERVICE FACILITIES

Section 12-K:1

12-K:1 Goals; Purpose. —
I. The federal Telecommunications Act of 1996 regulates the deployment of wireless services in the United States. Its purpose is to make these services available to the American people quickly and in a very competitive manner. Nothing in this chapter is intended to preempt the federal Telecommunications Act of 1996.
II. The visual effects of tall antenna mounts or towers may go well beyond the physical borders between municipalities, and should be addressed so as to require that all affected parties have the opportunity to be heard.
III. Carriers wishing to build personal wireless service facilities (PWSFs) in New Hampshire should consider commercially available alternative PWSFs to tall cellular towers, which may include the use of the following:
   (a) Lower antenna mounts which do not protrude as far above the surrounding tree canopies.
   (b) Disguised PWSFs such as flagpoles, artificial tree poles, light poles, and traffic lights, which blend in with their surroundings.
   (c) Camouflaged PWSFs mounted on existing structures and buildings.
   (d) Custom designed PWSFs to minimize the visual impact of a PWSF on its surroundings.
   (e) Other available technology.
IV. A PWSF map is necessary to allow for the orderly and efficient deployment of wireless communication services in New Hampshire, and so that local communities have adequate information with which to consider appropriate siting and options to mitigate the visual effects of PWSFs.
V. Municipalities will benefit from state guidance regarding provisions to be considered in zoning ordinances relative to the deployment of wireless communications facilities, including one or more model ordinances.

V-a. It is the policy of this state to facilitate the provision of broadband and other advanced personal wireless services across the state; and to promote access to broadband and advanced personal wireless services for all residents, students, government agencies, and businesses to ensure the availability of educational opportunities, economic development, and public safety services throughout New Hampshire. Deployment of personal wireless service facilities infrastructure is also critical to ensuring that first responders can provide for the health and safety of all residents of New Hampshire. Consistent with the federal Middle Class Tax Relief and Job Creation Act of 2012, Public Law 112-96, section 6409, which creates a national wireless emergency communications network for use by first responders that will be dependent on facilities placed on existing antenna mounts or towers, it is the policy of this state to facilitate the collocation of personal wireless services facilities on existing antenna mounts or towers in all areas of New Hampshire, while also allowing for expeditious modification of existing personal wireless service facilities to keep pace with technological improvements.

VI. Except as provided in RSA 12-K:10 and RSA 12-K:11, nothing in this chapter shall be construed as altering any municipal zoning ordinance, and this chapter itself shall not be construed as a zoning ordinance.


Section 12-K:2

12-K:2 Definitions. — In this chapter:
I. "Accessory equipment" means any equipment serving or being used in conjunction with a PWSF or mount. The term includes utility or transmission equipment, power supplies, generators, batteries, cables, equipment
buildings, cabinets and storage sheds, shelters, or similar structures.

II. "Antenna" means the equipment from which wireless radio signals are sent and received by a PWSF.

III. "Applicant" means a carrier or any person engaged in the business of providing the infrastructure required for a PWSF who submits a collocation application or a modification application.

IV. "Authority" means each state, county, and each governing body, board, agency, office, or commission of a municipality authorized by law to make legislative, quasi judicial, or administrative decisions relative to the construction, installation, modification, or siting of PWSFs and mounts. The term shall not include state courts having jurisdiction over land use, planning, or zoning decisions made by an authority.

V. "Average tree canopy height" means the average height found by inventorying the height above ground level of all trees over a specified height within a specified radius.

VI. "Base station" means a station at the base of a mount or in the area near the PWSF that is authorized to communicate with mobile stations, generally consisting of radio transceivers, antennas, coaxial cables, power supplies, and other associated electronics.

VII. "Building permit" means a permit issued pursuant to RSA 676 by an authority prior to the collocation or modification of PWSFs, solely to ensure that the work to be performed by the applicant satisfies the applicable building code.

VIII. "Camouflaged" means for a personal wireless service facility one that is disguised, hidden, part of an existing or proposed structure, or placed within an existing or proposed structure.

IX. "Carrier" means a person that provides personal wireless services.

X. "Collocation" means the placement or installation of new PWSFs on existing towers or mounts, including electrical transmission towers and water towers, as well as existing buildings and other structures capable of structurally supporting the attachment of PWSFs in compliance with applicable codes. "Collocation" does not include a "substantial modification."

XI. "Collocation application" shall mean a request submitted by an applicant to an authority for collocation on a tower or mount.

XII. "Director" means the director of the office of energy and planning.

XIII. "Disguised" means, for a PWSF, designed to look like a structure which may commonly be found in the area surrounding a proposed PWSF such as, but not limited to, flagpoles, light poles, traffic lights, or artificial tree poles.

XIV. "Electrical transmission tower" means an electrical transmission structure used to support high voltage overhead power lines. The term shall not include any utility pole.

XV. "Equipment compound" means an area surrounding or near the base of a tower or mount supporting a PWSF, and encompassing all equipment shelters, cabinets, generators, and appurtenances primarily associated with the PWSF.

XVI. "Equipment shelter" means an enclosed structure, cabinet, shed vault, or box near the base of a mount within which are housed equipment for PWSFs, such as batteries and electrical equipment.

XVII. "Height" means the height above ground level from the natural grade of a site to the highest point of a structure.

XVIII. "Modification" means the replacement or alteration of an existing PWSF within a previously approved equipment compound or upon a previously approved mount. Routine maintenance of an approved PWSF shall not be considered a modification.

XIX. "Modification application" means a request submitted by an applicant to an authority for modification of a PWSF.

XX. "Mount" means the structure or surface upon which antennas are mounted and includes roof-mounted, side-mounted, ground-mounted, and structure-mounted antennas on an existing building, as well as an electrical transmission tower and water tower, and excluding utility poles.

XXI. "Municipality" means any city, town, unincorporated town, or unorganized place within the state.

XXII. "Personal wireless service facility" or "PWSF" or "facility" means any "PWSF" as defined in the federal Telecommunications Act of 1996, 47 U.S.C. section 332(c)(7)(C)(ii), including facilities used or to be used by a licensed provider of personal wireless services. A PWSF includes the set of equipment and network components, exclusive of the underlying tower or mount, including, but not limited to, antennas, accessory equipment, transmitters, receivers, base stations, power supplies, cabling, and associated equipment necessary to provide personal wireless services.

XXIII. "Radio frequency emissions" means the emissions from personal wireless service facilities, as

XXIV. "Tower" shall mean a freestanding or guyed structure, such as a monopole, monopine, or lattice tower, designed to support PWSFs.

XXV. "Substantial modification" means the mounting of a proposed PWSF on a tower or mount which, as a result of single or successive modification applications:

(a) Increases or results in the increase of the permitted vertical height of a tower, or the existing vertical height of a mount, by either more than 10 percent or the height of one additional antenna array with separation from the nearest existing antenna not to exceed 20 feet, whichever is greater; or

(b) Involves adding an appurtenance to the body of a tower or mount that protrudes horizontally from the edge of the tower or mount more than 20 feet, or more than the width of the tower or mount at the level of the appurtenance, whichever is greater, except where necessary to shelter the antenna from inclement weather or to connect the antenna to the tower or mount via cable; or

(c) Increases or results in the increase of the permitted square footage of the existing equipment compound by more than 2,500 square feet; or

(d) Adds to or modifies a camouflaged PWSF in a way that would defeat the effect of the camouflage.

XXVI. "Utility pole" means a structure owned and/or operated by a public utility, municipality, electric membership corporation, or rural electric cooperative that is designed specifically for and used to carry lines, cables, or wires for telephony, cable television, or electricity, or to provide lighting.

XXVII. "Water tower" means a water storage tank, or a standpipe or an elevated tank situated on a support structure, originally constructed for use as a reservoir or facility to store or deliver water.


Section 12-K:3

12-K:3 Wireless Carriers Doing Business In this State. – Each carrier or its appointed agent doing business, or seeking to do business, in this state shall:

I. Be allowed to construct new towers, provided that these towers comply with municipal regulations for maximum height or maximum allowed height above the average tree canopy height, subject to any exceptions, waivers, or variances allowed or granted by the municipality.

II. Comply with all applicable state and municipal land use regulations laws.

III. Comply with all federal, state, and municipal statutes, rules, and regulations, including federal radio frequency radiation emission regulations and the National Environmental Policy Act of 1969, as amended.

IV. Provide information at the time of application to construct an externally visible tower or to make a substantial modification to an existing tower, mount, or PWSF, or prior to construction if no approval is required, to the municipality in which the tower, mount, or PWSF is to be constructed and to the office of energy and planning as follows:

(a) A copy of its license from the Federal Communications Commission (FCC) demonstrating its authority to provide personal wireless services in the geographical area where the PWSF is located, or where a person is seeking to construct a new tower or make a substantial modification to a tower, mount, or PWSF on behalf of a carrier, a signed authorization from a representative of the carrier, and a copy of the carrier's license.

(b) Upon request, maps showing all of the carrier's current externally visible tower and monopole PWSF locations in the state within a 20-mile radius of the proposed externally visible new ground-mounted PWSF, including permanent, temporary or to-be-decommissioned sites, if any.

(c) Upon request, a description of why less visually intrusive alternatives for this tower or mount were not proposed.


Section 12-K:4

12-K:4 Payment of Costs. – A wireless carrier seeking approval to deploy a wireless communication facility may be required to pay reasonable fees, including regional notification costs, imposed by the municipality in accordance with RSA 676:4, I(g).

http://www.gencourt.state.nh.us/rsa/html/L/12-K/12-K-rreg.htm
Section 12-K:5

12-K:5 Fall Zones. – Zoning ordinances may include provisions for fall zones for new towers and substantial modifications to the extent necessary to protect public safety.


Section 12-K:6

12-K:6 Personal Wireless Services Facilities Map. – The director of the office of energy and planning shall develop a personal wireless service facilities map for the state. This map shall include all externally visible tower and monopole PWSF locations in the state, both active and inactive, for all carriers. This map shall also include for each of the above locations a site description. Upon request of the director, any wireless carrier or its appointed agent doing business in this state shall provide a map of all of its existing externally visible tower and monopole PWSF locations in the state and a site description of each.


Section 12-K:7

12-K:7 Regional Notification. –
I. (a) Any municipality or other authority which receives an application to construct a new tower or to complete a substantial modification to an existing tower or mount which will be visible from any other New Hampshire municipality within a 20-mile radius shall provide written notification of such application and pending action to such other municipality within the 20-mile radius.

(b) This notification shall include sending a letter to the governing body of the municipality within the 20-mile radius detailing the pending action on the application and shall also include publishing a notice in a newspaper customarily used for legal notices by such municipality within the 20-mile radius, presenting a synopsis of the application, providing relevant information concerning the applicable permits required and the date of the next public hearing on the application. Where a public hearing is scheduled by the local governing body, such notice shall be published not less than 7 days nor more than 21 days prior to the public hearing date.

II. (a) Any person, prior to constructing a new tower in any location where no approval is required but which will be visible from any other New Hampshire municipality within a 20-mile radius, shall provide written notification of such planned construction to such other municipality within the 20-mile radius.

(b) This notification shall include sending a letter to the governing body of the municipality within the 20-mile radius detailing the planned construction and shall also include publishing a notice in a newspaper customarily used for legal notices by such municipality within a 20-mile radius, presenting a synopsis of the planned construction.

III. Municipalities within the 20 mile radius described in paragraphs I or II and their residents shall be allowed to comment at any public hearing related to the application. Regional notification and comments from other municipalities or their residents shall not be construed to imply legal standing to challenge any decision.


Section 12-K:8

12-K:8 Model Ordinances and Guidance. – The director of the office of energy and planning shall develop a set of model municipal ordinances relative to the deployment of personal wireless communications facilities. Prior to development, the director shall hold one or more public hearings and solicit comments from interested parties. The office of energy and planning shall provide a copy of the set of model ordinances to any New Hampshire municipality that requests it.

http://www.gencourt.state.nh.us/rsa/html/12-K/12-K-mrg.htm
Section 12-K:9

12-K:9 Rulemaking. -- The director of the office of energy and planning, after holding a public hearing, shall adopt rules under RSA 541-A to provide sufficient information to municipalities, other state agencies, wireless companies doing business or seeking to do business in this state, and the public.


Section 12-K:10

12-K:10 Application Review. -- Notwithstanding any ordinance, bylaw, or regulation to the contrary, in order to ensure uniformity across New Hampshire with respect to the process for reviewing a collocation application and a modification application, each authority shall follow the following process:

I. Collocation applications and modification applications shall be reviewed for conformance with applicable building permit requirements but shall not otherwise be subject to zoning or land use requirements, including design or placement requirements, or public hearing review.

II. The authority, within 45 calendar days of receiving a collocation application or modification application, shall:

(a) Review the collocation application or modification application in light of its conformity with applicable building permit requirements and consistency with this chapter. A collocation application or modification application is deemed to be complete unless the authority notifies the applicant in writing, within 15 calendar days of submission of the specific deficiencies in the collocation application or modification application which, if cured, would make the collocation application or modification application complete. Upon receipt of a timely written notice that a collocation application or modification application is deficient, an applicant shall have 15 calendar days from receiving such notice to cure the specific deficiencies. If the applicant cures the deficiencies within 15 calendar days, the collocation application or modification application shall be reviewed and processed within 45 calendar days from the initial date received by the authority. If the applicant requires more than 15 calendar days to cure the specific deficiencies, the 45 calendar days deadline for review shall be extended by the same period of time;

(b) Make its final decision to approve or disapprove the collocation application or modification application; and

(c) Advise the applicant in writing of its final decision.

III. If the authority fails to act on a collocation application or modification application within the 45 calendar days review period, the collocation application or modification application shall be deemed approved.

IV. Notwithstanding anything to the contrary in this chapter, an authority may not mandate, require or regulate the installation, location, or use of PWSFs on utility poles.

V. A party aggrieved by the final action of an authority, either by an affirmative denial of a collocation application or modification application under paragraph II or by its inaction, may bring an action for review in superior court for the county in which the PWSF is situated.


Section 12-K:11

12-K:11 Limitations on Applications. --

I. In order to ensure uniformity across New Hampshire with respect to the consideration of every collocation application and modification application, no authority may:

(a) Require an applicant to submit information about, or evaluate an applicant's business decisions with respect to, its designed service, customer demand for service, or quality of its service to or from a particular area or site.

(b) Evaluate a collocation application or modification application based on the availability of other potential

http://www.gencourt.state.nh.us/rsa/html/0/12-K/12-K-mrg.htm
locations for the placement of towers, mounts, or PWSFs.

(c) Decide which type of personal wireless services, infrastructure, or technology shall be used by the applicant.

(d) Require the removal of existing mounts, towers, or PWSFs, wherever located, as a condition to approval of a collocation application or modification application.

(e) Impose environmental testing, sampling, or monitoring requirements or other compliance measures for radio frequency emissions on PWSFs that are categorically excluded under the FCC’s rules for radio frequency emissions pursuant to 47 C.F.R. section 1.1307(b)(1).

(f) Establish or enforce regulations or procedures for radio frequency signal strength or the adequacy of service quality.

(g) In conformance with 47 U.S.C. section 332(c)(7)(B)(iv), reject a collocation application or modification application, in whole or in part, based on perceived or alleged environmental effects of radio frequency emissions.

(h) Impose any restrictions with respect to objects in navigable airspace that are greater than or in conflict with the restrictions imposed by the Federal Aviation Administration.

(i) Prohibit the placement of emergency power systems that comply with federal and New Hampshire environmental requirements.

(j) Charge an application fee, consulting fee or other fee associated with the submission, review, processing, and approval of a collocation application or modification application that is not required for similar types of commercial development within the authority's jurisdiction. Fees imposed by an authority or by a third-party entity providing review or technical consultation to the authority must be based on actual, direct, and reasonable administrative costs incurred for the review, processing, and approval of a collocation application or modification application. Notwithstanding the foregoing, in no event shall an authority or any third-party entity include within its charges any travel expenses incurred in a third-party's review of a collocation application or modification application, and in no event shall an applicant be required to pay or reimburse an authority for consultant or other third-party fees based on a contingency or result-based arrangement.

(k) Impose surety requirements, including bonds, escrow deposits, letters of credit, or any other type of financial surety, to ensure that abandoned or unused facilities can be removed unless the authority imposes similar requirements on other permits for other types of commercial development or land uses. If surety requirements are imposed, they shall be competitively neutral, non-discriminatory, reasonable in amount, and commensurate with the historical record for local facilities and structures that are abandoned.

(l) Condition the approval of a collocation application or modification application on the applicant's agreement to provide space on or near any tower or mount for the authority or local governmental services at less than the market rate for space or to provide other services via the structure or facilities at less than the market rate for such services.

(m) Limit the duration of the approval of a collocation application or modification application.

(n) Discriminate on the basis of the ownership, including by the authority, of any property, structure, or tower when evaluating collocation applications or modification applications.

II. Notwithstanding the limitations in paragraph I, nothing in this chapter shall be construed to:

(a) Limit or preclude the scope of an authority's review of zoning, land use, or permit applications for the siting of new towers or for substantial modifications to existing towers, mounts, or PWSFs.

(b) Prevent a municipality from exercising its general zoning and building code enforcement powers pursuant to RSA 672 through RSA 677 and as set forth in this chapter.