

Exceptions Basics

The FTA forbids any denials of applications that are "prohibitive." So, we have to afford the applicants an opportunity to request exceptions to our rules (to remove this opportunity is apparently illegal).

Exceptions Chapters - or separate exceptions provisions (as are in SR's ordinance) - just set requirements that telecoms must comply with when requesting exceptions to the rules set forth in the ordinance.

For example, SR may say a facility must be 1500 feet from a school. But the telecom could say they can't operate their system unless they place a specific facility 500 feet from the school. They will claim that denying them that right is "prohibitive." But a strong ordinance could say, "Prove that it must go there, and prove that there's no viable alternative." Without robust standards for requesting an exception, almost any denial could be considered "prohibitive" by a court.

Fairfax's "new" ordinance currently has general language that says, for the telecom to request an exception, it has to prove that the denial violates the FTA law, and also prove that the exception should be granted. That's fine, but it's very general and allows the telecom lots of latitude - it could claim that almost any denial breaks the law, without further proof.

I'm advocating for more rigorous standards for requesting an exception, as per San Anselmo's ordinance. For instance, the telecom has to define its purpose and demonstrate why the exception request is necessary for its system to function. It has to show that it has done due diligence by comparing all possible alternative sites/designs. And it has to demonstrate why this exception is the least non-compliant option possible.

In the SA ordinance, there is an independent expert paid for by the telecom to review exceptions claims (SR has this too, I believe). And SA allows for the public to appeal any exception (and any approval as well) - and also allows the public to suggest alternative sites/designs. They also have a provision that says the telecom must comply with all state/fed laws - including the ADA (and I added The Endangered Species Act). See attached Combined FX/SA Exceptions Chapter.

By law, we can't make it impossible for the telecom to roll out its facilities. But we can set rules about what constitutes a viable exception. These rules hold the telecom responsible - and also hold the reviewing authority responsible. Who knows who will be reviewing applications 10 years from now? The reviewing authority might be a 5G fan and just let 'em have any exception.

In SR's ordinance, as I remember it, there are provisions sprinkled throughout other chapters that lay out requirements for exceptions - maybe in the location or co-locations sections, or the application section. I'm recommending pulling all these together into one chapter - but it's not crucial.

The other item I would like to see added to FX and SR is the Appeals Chapter (or a provision). Both FX and SR have appeals provisions for telecoms, but not the public. If I remember correctly, SR stated that it didn't add this because it would interfere with the shot clock time limits - understandable. But BB&K has recently put out recommendations that we NOT accommodate FCC regulations in case they are overturned in court - in which case we'd be stuck with weak provisions in our local laws. See below:

Please note that excluding any provision to accommodate FCC rules is inadvisable by BB&K:

https://www.bbklaw.com/news-events/insights/2019/legal-alerts/01/new-fcc-shot-clocks-and-other-rules-preempting-loc?utm_source=Constant+Contact&utm_medium=headline&utm_campaign=LA_FC_C_10th_Circuit&utm_content=Legal_Alert

"Final Words of Caution - Stay Flexible. Stay Tuned.

The order(s) may eventually be overturned. We believe there are substantial questions as to whether the FCC small cell order is valid and lawful, and we are representing numerous jurisdictions challenging it and the August moratoria order.

We are not recommending that you incorporate the FCC standards into local law per se. If you do so, then you will be bound by your own requirements,

even if the FCC order is vacated. Therefore, we think it is useful to develop regulations that provide you with maximum flexibility to make substantive determinations that you would be comfortable making — even if the FCC had not changed its rules — while still complying with procedural requirements, such as shot clocks that, if not complied with, may result in a loss of rights. If you are faced with a situation where you feel compelled to grant an application because of the FCC rules, you may wish to make the permit conditional, so that it terminates if the FCC rule is overturned."

So, I hope this is helpful. Holler if anything is unclear. I realized that when I spoke at meetings I never really explained exceptions! No wonder people were confused. ARG.

Love, Roberta