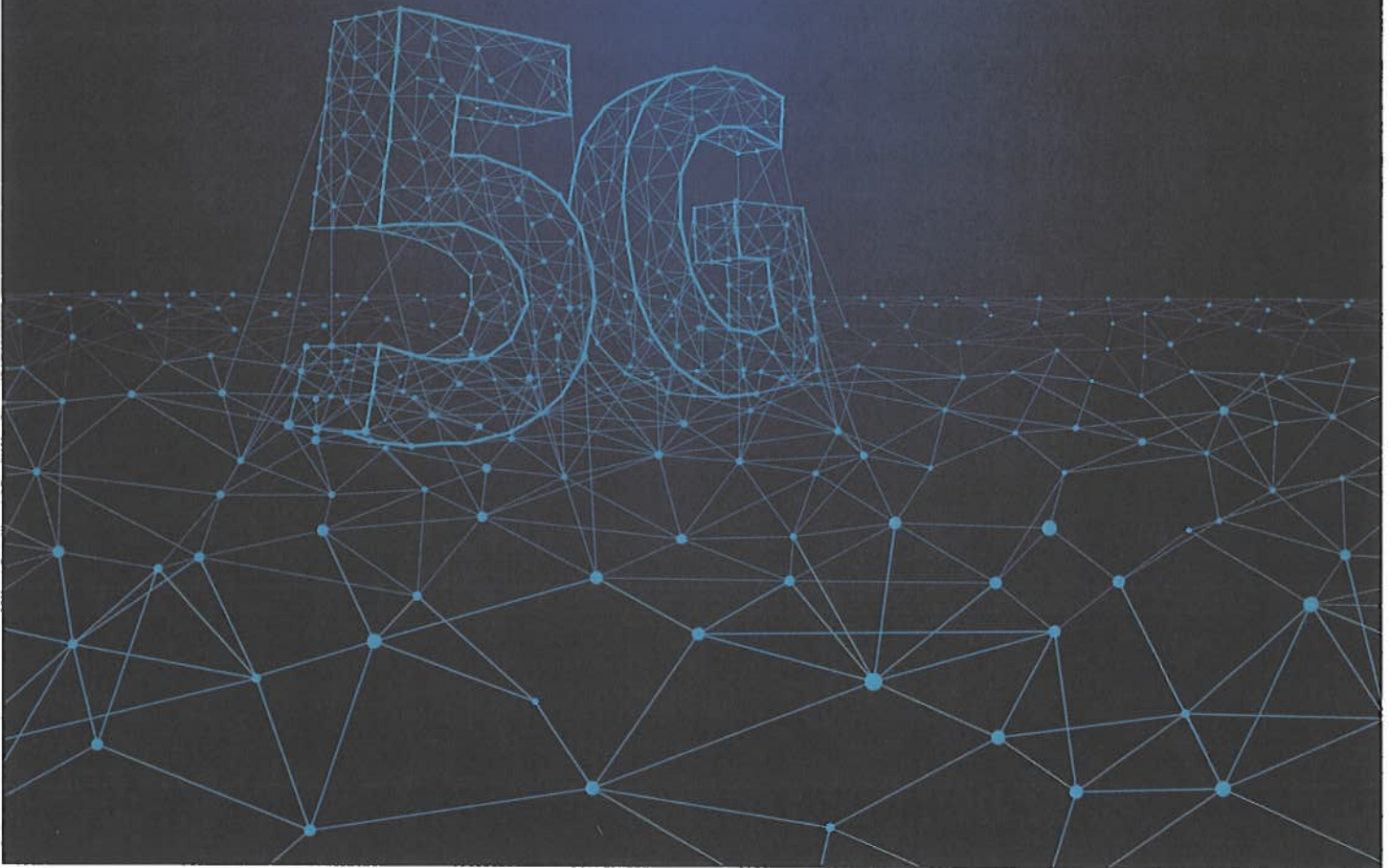


FCC Regulations on 5G Infrastructure

How will they impact upon New Jersey Municipalities?

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On September 26, 2018, the Federal Communications Commission (FCC) adopted a Declaratory Ruling and Third Report and Order (the Order), which sweepingly overrides and preempts State and local land use law with respect to 5G wireless infrastructure applications. The Order, together with another FCC order issued in 2020, would force municipalities to change their review procedures and fees, and amend their ordinances relating to such applications.

Once fully implemented, 5G will offer increased bandwidth and faster speeds than previous generations of mobile technology. Rather than single towers, the 5G network employs numerous “small wireless facilities (SWF)” placed close together to relay signals across longer distances and around obstacles. These SWFs can be as small as a backpack and can be installed on structures such as street lights, utility poles, or buildings.

The FCC issued the Order to remove state and local “regulatory barriers” to the deployment of SWFs. The Order, among others, limits fees local governments may assess on telecommunications carriers for the placement, construction, or collocations of SWFs. It also preempts various local non-fee requirements related to the deployment of 5G infrastructure. In addition, it sets time frames (shot clocks) for municipalities

to review the related applications.

The Order went into effect on January 14, 2019, despite the legal challenges to its validity. The Ninth Circuit Court of Appeals has recently upheld all the provisions in the Order except the rule preempting local aesthetic regulations.

The FCC issued the Order to remove state and local “regulatory barriers” to the deployment of SWFs.

Fee Limitations

Three-part test for fees. The Order adopted an all-encompassing “material inhibition” legal standard that a local law is preempted if it “materially limits or inhibits the ability of any competitor or potential competitor to compete” fairly in providing telecommunication services.

Consequently, the FCC declared that state or local fees for deployment of SWFs violate federal law unless they:

1. Are a reasonable approximation of the state or local government’s costs
2. Only factor in costs that are “objectively reasonable”
3. Are no higher than fees charged to similarly situated competitors.

These fees include right-of-way (ROW) access fees, fees for the use of government property in the ROW, as well as application or review fees and other similar fees imposed by local governments.

Safe harbor and presumptively-permitted fees. In addition to setting out the three-part test, the Order identifies specific fee limits that are presumptively allowed. For non-recurring fees, such as up-front applications for small cell site installations, municipalities may charge up to \$500, subject to certain exceptions. For recurring fees, such as access fees, municipalities may charge up to \$270 per year. Municipalities may charge fees above these amounts by showing that they nonetheless comply with the three-

part test due to local cost variations.

In addition, if a city provides not just the right to place antennas on city-owned poles, but ancillary facilities or services (such as access to electricity, existing underground ducts and underground casements at each pole), these guidelines do not apply and the city can set the usage fees differently.

Limitations upon three types of local regulations

Moreover, the Order applies the “materially inhibits” standard to override three types of local non-fee regulations, including aesthetic requirements, undergrounding requirements (i.e., burying the network infrastructure underground), and minimum spacing requirements.

The Order articulates another three-part test, declaring that these local restrictions are preempted unless they are: “(1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance.” Notably, due to the Ninth Circuit Court’s recent decision, local governments no longer need to follow the aesthetic requirements set forth in the Order.

Specifically, the Order preempts local laws requiring all wireless facilities be deployed underground. Furthermore, a municipality cannot promulgate a new minimum spacing requirement that, in effect, prevents a provider from replacing its preexisting facilities or collocating new equipment on a structure already in use.

Shot clocks

Under the shot clocks established in the Order, state and local governments must approve or deny applications within 60 or 90 days, depending on whether the installation will be on an existing structure or new structure. The Order states that the shot clock that applies to the batch applications is the same as one that would apply had the applicant submitted individual applications.

Should a batch application include both collocated and new construction of SWFs, the longer 90-day shot clock will apply. All relevant permits are subject to the shot clocks. Mandatory

In Your Town: What should New Jersey Municipalities do?

To prepare for the sweeping changes, New Jersey municipalities should expeditiously amend their land use ordinances, procedures and fee schedules for 5G wireless applications to comply with the FCC orders and better protect their citizens’ interests.

They should also enact:

- Local aesthetic requirements
- Undergrounding requirements
- Minimum spacing requirements for SWFs.

pre-application procedures and requirements (pre-approval reviews) do not toll the shot clocks.

The FCC declined, however, to adopt a “deemed granted” remedy, which would automatically deem an application granted whenever the municipality fails to rule on it within the shot clock periods. The FCC explains that in situations where a jurisdiction misses the shot clock deadline, the applicant should, in most cases, be able to obtain expedited relief in court.

The FCC retains the existing 90-day shot clock for collocations not involving SWFs. The Order also codifies the existing 150-day shot clock for new construction applications that are not for small wireless facilities.

2020 FCC Infrastructure upgrade order

On June 9, 2020, the FCC, with two commissioners dissenting, adopted a Declaratory Ruling and Notice of Proposed Rulemaking, also known as the Upgrade Order, which focuses on clarifying the FCC’s 2014 rule streamlining local approval processes for certain eligible collocations and modifications

to existing wireless structures.

The Upgrade Order clarifies when the 60-day shot clock for local review starts ticking under the 2014 rule, i.e., when an applicant takes the first procedural step required by the local government and states in writing why the project qualifies for the expedited review.


The ruling also clarifies how certain aspects of proposed modifications—weight increases, equipment cabinet additions, and impact on concealment elements and aesthetic conditions—affect eligibility for streamlined review.


New Jersey's Proposed Small Wireless Facilities Deployment Act

The proposed Small Wireless Facilities Deployment Act was introduced in the Assembly on January 14, 2020. It has been referred to the Assembly Telecommunications and Utilities Committee and Senate Economic Growth Committee.

As proposed, it broadly limits the

ability of a local authority to prohibit, regulate or charge for the collocation of SWFs in the State for a period beginning with the effective date of the bill and ending on July 1, 2022. The legislation, among others, would require that SWFs be classified as permitted uses

and subject to administrative review in accordance with the Act. 

 For more information, please contact the authors at Shain Schaffer PC, 908-953-9300 or lli@shainlaw.com.

For more information, attend the joint session with NJPO and JAG:

What's New with the FCC – 5G and More

Tuesday, November 17,
at 3:15 p.m.

As well as the session with a Washington, D.C., perspective:

Federal Legislative Update: CARES, 5G, and More

Wednesday, November 18,
at 11:00 a.m.

Speaker: Mark Shourds, County Engineer, Atlantic County



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