

Advisory Opinion #125

Parties: Howard and Betty Jo Western, SBA Communications Corporation and Delta City
Issued: May 31, 2013

TOPIC CATEGORIES

Compliance with Mandatory Land Use Ordinances Nonconforming Uses and Noncomplying Structures Appealing Land Use Decisions

Federal law requires a city to approve an “eligible facilities request” to modify an existing wireless tower that does not “substantially change” the tower’s physical dimensions. An “eligible facilities request” includes a request to modify an existing wireless tower by collocating new transmission equipment on the tower. A “substantial change” to the physical dimensions of a tower occurs if 1) the additional antennas would increase the height of the tower by more than 10%, 2) more than one new equipment shelter is installed, 3) mounting the additional antennas includes mounting any additional equipment to the body of the tower that protrudes more than 20 feet from the tower, or 4) mounting the additional antennas involves excavation outside of the current boundaries of the leased tower site, or outside of any existing access and utility easements. If federal law requires the approval of a project, it is not necessary to review whether a city correctly made certain other decisions relating to that project.

DISCLAIMER

The Office of the Property Rights Ombudsman makes every effort to ensure that the legal analysis of each Advisory Opinion is based on a correct application of statutes and cases in existence when the Opinion was prepared. Over time, however, the analysis of an Advisory Opinion may be altered because of statutory changes or new interpretations issued by appellate courts. Readers should be advised that Advisory Opinions provide general guidance and information on legal protections afforded to private property, but an Opinion should not be considered legal advice. Specific questions should be directed to an attorney to be analyzed according to current laws.



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ADVISORY OPINION

Advisory Opinion Requested by: Howard Western

Local Government Entity: Delta City

Applicant for the Land Use Approval: Herca Telecomm Services, Inc., on behalf of Gogo

Type of Property: Telecommunications

Date of this Advisory Opinion: May 31, 2013

Opinion Authored By: James S. Wright
Office of the Property Rights Ombudsman

Issues

Does federal law mandate the approval of a project to locate additional antennas on an existing telecommunications tower and a single associated equipment shelter on the tower site? If not, did a city properly 1) determine that the placement of additional antennas and an equipment shelter did not expand a nonconforming use, and 2) make appeal decisions relating to the project, including the decision to exclude certain issues from review in the appeal proceedings?

Summary of Advisory Opinion

Federal law requires a city to approve an “eligible facilities request” to modify an existing wireless tower that does not “substantially change” the tower’s physical dimensions. An “eligible facilities request” includes a request to modify an existing wireless tower by collocating new transmission equipment on the tower. A “substantial change” to the physical dimensions of a tower occurs if 1) the additional antennas would increase the height of the tower by more than 10%, 2) more than one new equipment shelter is installed, 3) mounting the additional antennas includes mounting any additional equipment to the body of the tower that protrudes more than 20 feet from the tower, or 4) mounting the additional antennas involves excavation outside of the current boundaries of the leased tower site, or outside of any existing access and utility easements. In this case, Gogo’s requested modifications qualify as an “eligible facilities request” because the modifications involve the collocation of new transmission equipment on the existing telecommunications tower owned by SBA Communications Corporation (“SBA”) and located on a site SBA leases. In

addition, this collocation project will not cause a “substantial change” in the tower’s physical dimensions because it will not increase the height of the tower, no added appurtenance will extend more than 20 feet from the tower, it will involve the location of only one equipment shelter, and it will not involve any excavation outside of the area leased by SBA for the tower or the existing utility easements. Federal law therefore requires Delta City, Utah (the “City” or “Delta”) to approve this project without any conditions or modifications. Any review of Delta’s conclusions or appeal procedures relating to this project will not change the outcome in this matter because federal law requires the approval of this project regardless of any conclusions or actions by the City.

Review

Under the provisions of UTAH CODE ANN. § 13-43-205, a party may file a Request for an Advisory Opinion with the Office of the Property Rights Ombudsman (“Office”) at any time prior to the rendering of a final decision by a local land use appeal authority. An Advisory Opinion provides an early review of significant land use questions before any duty to exhaust administrative remedies arises so that those involved in a land use application or other specific land use disputes can have an independent review of an issue. This review hopefully can help the parties avoid litigation, resolve differences in a fair and neutral forum, and understand the relevant law. The decision is not binding, but, as explained at the end of this Advisory Opinion, may have some effect on the long-term cost of resolving such issues in the courts.

The Office received a Request for an Advisory Opinion from Howard Western on January 14, 2013. A copy of that request was sent via certified mail to Gregory J. Schafer, Delta City Recorder, at 76 North 200 West, Delta, Utah 84624. The City received that copy on February 7, 2013.

Evidence

The Office reviewed the following relevant documents and information in preparing this Advisory Opinion:

1. Request for an Advisory Opinion, submitted by Howard Western and received by the Office on January 14, 2013.
2. Information, including appeal Power Point presentation slides, submitted by Howard and Betty Jo Western and received by the Office on January 25, 2013.
3. Additional information submitted by Howard and Betty Jo Western and received by the Office on February 11, 2013.
4. Response from Delta with attachments, submitted by Todd Anderson and received by the Office on March 27, 2013.
5. Response from SBA with exhibits, submitted by Jamie Hall and received by the Office on April 1, 2013 (the “SBA Response”).
6. E-mail from SBA counsel Jamie Hall on May 22, 2013.

Background

SBA leases land (the “Site”) located at 370 East 870 North in Delta where a telecommunications project (the “Project”) exists that includes a tower (the “Tower”), antennas, cabling and associated equipment within a fenced area. SBA’s predecessor completed the Project pursuant to a Conditional Use Permit issued by Delta on September 22, 2008. Howard and Betty Jo Western live in close proximity to the Site.

The Site is located within the Rural Residential zone. On August 16, 2012, Delta amended the provisions of the Rural Residential zone to prohibit the existence of similar telecommunications towers within that zone.

SBA desires to sublease a portion of the Project to Gogo, a provider of in-flight broadband internet, to collocate antennas on the Tower and place an associated 12’x14’ prefabricated equipment shelter within the fenced area on the Site. On November 7, 2012 Howard Western contacted the City about construction activity at the Site relating to Gogo’s collocation project. Ken Clark at the City confirmed that Delta had not issued any building permit for this activity. The City then issued a stop work order on November 8, 2012 relating to that construction. Shortly thereafter, Herca Telecomm Services, Inc. filed a building permit application on behalf of Gogo for the construction of the equipment shelter at the Site.

On November 19, 2012, the Delta Planning and Zoning Commission held a meeting to determine whether the building permit application 1) related to an allowed use within the Rural Residential Zone, and 2) would result in an expansion of a nonconforming use. Minutes of Planning & Zoning Commission Special Meeting, November 19, 2012. It determined that the building permit application 1) did not meet the requirements of the current zoning ordinance because it did not meet set back requirements, and 2) would not result in an expansion of a nonconforming use. Minutes of Planning & Zoning Commission Special Meeting, November 19, 2012.

Howard Western appealed the Planning Commission’s decision in an e-mail sent November 28, 2012, and in a letter dated December 5, 2012 that included 21 issues relating to Gogo’s project. Lawrence H. Hunt, the Delta City Appeal Authority (the “Appeal Authority”), heard the appeal on January 14, 2013. The Appeal Authority upheld the Planning Commission’s determination that the addition of antennas, cabling and placement of an accessory structure on the Site would not expand the nonconforming use, but did not consider any of the additional issues Mr. Western raised. Delta City Appeal Authority Report of Findings and Order, dated January 24, 2013. The Westerns object to the City’s determination that Gogo’s collocation project does not improperly expand a nonconforming use and question whether Delta correctly handled their appeals.

Analysis

The Middle Class Tax Relief and Job Creation Act of 2012 Requires Delta to Approve Gogo's Collocation Project.

Title VI of the Middle Class Tax Relief and Job Creation Act of 2012 (the "Act") states in part:

(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.

Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, § 6409(a)(1)-(2). This federal law requires a city to approve any request to modify an existing wireless tower so long as 1) it is an "eligible facilities request," and 2) it does not "substantially change the physical dimensions" of the tower. This federal statute does not give any discretion to municipalities to condition, alter or deny a project that fits within the parameters set forth in the Act.

The Act gives the Federal Communications Commission (the "FCC") the authority to implement and enforce Title VI of the Act as if it were a part of the Communications Act of 1934. Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, § 6003(a). The FCC issued a Public Notice (the "Notice") to assist interested parties in interpreting Section 6409(a) of the Act. Federal Communications Commission Public Notice DA 12-2047, dated January 25, 2013. Based upon an analysis of Gogo's collocation project under the Act, with the clarifications provided by the Notice, Delta must approve this project because it is an "eligible facilities request," and it does not "substantially change the physical dimensions" of the Tower. This conclusion makes it unnecessary to review the City's nonconforming use conclusions and its appeal process and determinations because regardless of the determinations of any review, the Act mandates the approval of Gogo's project.

A. A Request Relating to Gogo's Collocation Project Is an "Eligible Facilities Request" Under the Act.

Under the Act, an "eligible facilities request" means "any request for modification of an existing wireless tower or base station that involves—(A) collocation of new transmission equipment. . ." Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, § 6409(a)(2). The Notice indicates that the FCC has defined a "tower" as "any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities." Notice, p. 3 (other citation omitted). In addition, the FCC concludes that a wireless tower is not limited to a tower that provides exclusively "personal wireless services," and therefore if a provider uses a tower to supply any wireless services, the tower will still qualify as a wireless tower under the Act. Notice, p. 3.

In this project, Gogo proposes to collocate new antennas to transmit wireless signals on an existing wireless tower. SBA Response, p. 4. In addition, the tower at issue only supports FCC-licensed antennas and therefore meets the FCC definition of "wireless tower." E-mail from SBA counsel on May 22, 2013. This means that any request for this project qualifies as an "eligible facilities request" under the Act.

B. Gogo's Collocation Project Does not "Substantially Change the Physical Dimensions" of the Tower.

The FCC previously developed standards in a different context to determine when a substantial increase in the size of a tower occurs. After analyzing the policy reasons for these standards, it adopted these criteria for determining when a project "substantially changes the dimensions" of an existing tower pursuant to the Act. Notice, pp. 2-3. Under these adopted standards, a project will be deemed to "substantially change the physical dimensions" of a tower if:

- 1) [t]he mounting of the proposed antenna on the tower would increase the existing height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or
- 2) [t]he mounting of the proposed antenna would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; or
- 3) [t]he mounting of the proposed antenna would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of

the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable; or

- 4) [t]he mounting of the proposed antenna would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site.

Notice, p. 2. In this case, the addition of the antennas for Gogo's collocation project will not exceed the existing height of the Tower, nor will they protrude more than 20 feet from the edge of the Tower. SBA Response, p. 1. This project only requires the installation of one equipment shelter to house the accessory wireless equipment for the additional antennas. SBA Response, p. 1. Finally, this project only requires excavation within the leased Site or within the existing utility easements. SBA Response, p. 4. Based on the foregoing facts and the standards adopted by the FCC, Gogo's project does not "substantially change the physical dimensions" of the Tower.

Conclusion

The Act requires Delta to approve Gogo's request for its collocation project if it qualifies as an "eligible facilities request" and if it does not "substantially change the physical dimensions" of the Tower. Gogo plan to collocate new antennas on an existing wireless tower and therefore its requested project qualifies as an "eligible facilities request." In addition, this project does not "substantially change the physical dimensions" of the Tower because the additional antennas will not exceed the existing height of the Tower, nor will they protrude more than 20 feet from the edge of the Tower, the project only requires one additional equipment shelter, and all excavation will occur either within the area the SBA currently leases or the existing utility easements relating to the Site. Delta must therefore approve this project without imposing any conditions or modifications pursuant to federal law. Because the Act requires the approval of Gogo's project regardless of any City actions or conclusions, this Advisory Opinion will not analyze any of the City's determinations regarding nonconforming uses or any of its appeal procedures or determinations.

Brent N. Bateman, Lead Attorney
Office of the Property Rights Ombudsman

NOTE:

This is an advisory opinion as defined in § 13-43-205 of the Utah Code. It does not constitute legal advice, and is not to be construed as reflecting the opinions or policy of the State of Utah or the Department of Commerce. The opinions expressed are arrived at based on a summary review of the factual situation involved in this specific matter, and may or may not reflect the opinion that might be expressed in another matter where the facts and circumstances are different or where the relevant law may have changed.

While the author is an attorney and has prepared this opinion in light of his understanding of the relevant law, he does not represent anyone involved in this matter. Anyone with an interest in these issues who must protect that interest should seek the advice of his or her own legal counsel and not rely on this document as a definitive statement of how to protect or advance his interest.

An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to a dispute involving land use law. If the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion, the substantially prevailing party on that cause of action may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution.

Evidence of a review by the Office of the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action, except in small claims court, a judicial review of arbitration, or in determining costs and legal fees as explained above.