



Hot Button Land Uses

A Division of the New York Department of State

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Can a use be prohibited?

Exclusionary Zoning

- Regulations that singly or in concert tend to exclude low or moderate income housing municipal-wide; i.e.,
 - Large lot or high minimum square footage requirement
 - Excluding multiple dwellings or mobile home

Most non-residential uses may be zoned out if the exclusion is supported by the comprehensive plan



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Spot zoning

- Parcel can be rezoned to allow use supported by comprehensive plan
- Zoning changes must be reasonably related to legitimate public purposes

“the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners . . .”

Rogers v. Tarrytown, 302 NY 115,
96 NE2d 731 (1951)

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Inform and involve

- Unearth controversy early
 - Receptive to change
 - Before the public feels steamrolled
- Potentially controversial projects
 - Hold informational meetings with residents & stakeholders



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Positive press for controversial issues

Bad press usually results from ignorance, not bias:

- Inaccurate, or wrong conclusions from facts
- Accurate, but unfavorable tone
- Overly selective or unbalanced reporting
- Blurred lines between fact and opinion

Remedy ignorance with non-confrontation

- One spokesperson controls message
- Be prepared to correct false assumptions
- Response plan: phone, press release, news conference



Community opposition

If already permitted by zoning, and requirements are met, then community opposition is generally not a valid basis for denying most applications



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Comprehensive planning

- Reduces controversy
- Legal support
- Infrastructure investments
 - Identifies areas for municipal & private investment
- Public input on controversial issues

Municipalities with Comprehensive Plans

- Cities 92%
- Towns 71%
- Villages 66%
- All 76%


Source: NYS Legislative Commission on Rural Resources (2008)

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Moratoria

Adopt moratorium law to:

- Update comprehensive plan to consider new uses
- Update regulations to prevent:
 - hasty decision
 - unplanned & inefficient growth
 - construction inconsistent with comprehensive plan



Wrong reasons for moratoria:

- Slow development hoping developer will go away
- Halt development while municipality considers buying land

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Examples

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Barn “promotional” events



May be protected as part of a farm operation if:

1. directly relate to sale/ promotion of beverage produced on farm (at least 51% on-farm produced grain, hops, grapes/fruit/juice);
2. incidental and subordinate to retail sale of beverage on-site;
3. hosted by farm or farm customers (not outside, unrelated parties); and
4. feature beverage produced at the farm



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Farm Wineries/Distilleries in State Ag District

Although State Liquor Authority license may allow sale of alcoholic beverages not made from crops grown by farm, they are not part of a farm operation.

Production and sale not necessarily protected under AML Article 25AA §305-a.



State Alcoholic Beverage Control Laws define

- farm cidery,
- farm distillery,
- farm winery, and
- farm brewery




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Barn Weddings without Ag District Protection

If the barn is not in a state ag district or barn rental revenue exceeds that of food production, municipalities can restrict

- Hours of operation
- Number of events per month
- Prohibit regular rentals of farm buildings for weddings





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Farm worker housing

- Agriculture & Markets Law §25-AA
 - State Certified Agricultural Districts
- Address in zoning or adopt local law
 - Show proof of continuing employment on the farm
 - Do not allow the creation of new lots
 - Do not allow permanent additions to the home

Drones (Unmanned Aerial Vehicles)

- Federal Aviation Administration (FAA) regulates airspace
- All manned/unmanned aircraft need FAA approval
- Commercial use currently regulated on a case-by-case basis
- State and Local Laws attempting to regulate aircraft under the FAA's jurisdiction have been unsuccessful when challenged in court.



FAA proposed rules for commercial use

Commercial use

- Must be operated below 500 ft and under 100 mph
- Must be within operator's eyesight.
- Small drone must be less than 55 lbs.
- Can only be operated during the day
- Prospective drone operators need to pass a test of aeronautical knowledge

Recreational use

- Should be operated below 400 ft.
- Must be within operator's eyesight
- Should not be flown within 5 mile radius of an airport
- Should not be operated recklessly

Mining

Regulate with zoning:

- Restrict to districts or municipal-wide
- SUP with conditions:
 - Ingress & egress
 - Truck routes

Regulate without zoning:

- Site Plan Review



DEC mining permit process

Municipalities submit recommendations to NYS DEC:

Setbacks from

- property boundaries
- public R-O-W
- Dust control
- Hours of operation
- Barriers restricting access



Cell towers as public utility

- Cell towers defined as a public utility
- Compelling reasons to grant use variance:
 - Necessary to provide safe & adequate service
 - Significant gaps in coverage if placed on alternative sites




Cellular Telephone Co. v. Rosenberg (NYS Court of Appeals, 1993)

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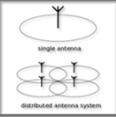
Telecommunications Act of 1996

Municipality must not	Municipality must
<ul style="list-style-type: none"> Prohibit personal wireless service Unreasonably discriminate among providers Regulate based on health effects from RF emissions 	<ul style="list-style-type: none"> Act on applications within "reasonable period of time" <ul style="list-style-type: none"> — 90 days for co-locations — 150 for new locations


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Section 6409

Middle Class Tax Relief & Job Creation Act of 2012

- Local governments must approve applications that do not substantially change physical dimensions of towers or base stations.
- "Substantial" – increase of more than 10% in height or by height of additional antenna array; mounting additional antenna that would protrude more than 20 feet or width of tower structure; excavation outside current tower site
- Distributed Antenna System (DAS)/small cell technology presents a new set of challenges.

A diagram contrasting a single antenna configuration with DAS

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Dish antenna (1m or less)


Over-the Air Reception Devices (OTARD) Rule

Municipality cannot:


- Delay or prevent signal use
- Unreasonably increase cost of installation

Municipality can:

- Regulate for safety
- Regulate in historic districts by least burdensome, clearly defined restrictions




www.fcc.gov/mb/facts/otard.html


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Street vendors and food trucks




PROS

- Low cost for both owners and customers
- Convenient
- Variety of food choices
- Creation of dynamic "urban" environment

CONS

- Congestion, litter
- Complicated and inconsistent permitting
- Unfair advantage over bricks and mortar food establishments

*Vendors cannot comply with vending laws they do not understand, be clear!



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Street Vendors and Food Trucks




Municipality can regulate:

- Vending districts
- Distance from curb (don't crowd sidewalks), business entrances, crosswalk, bus stop, restaurant, etc.
- Amount of time vendor can remain in one location
- Permit fees
- Increase number of permits for fresh fruits/veggies

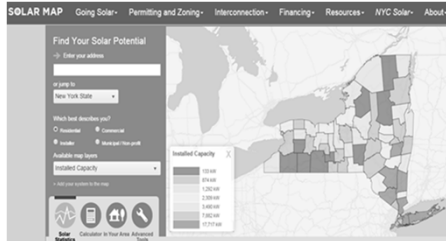
Justify regulations by citing pedestrian congestion and other effects of street vending, not protection of other businesses




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NY Sun

Solar Map & Portal:
<https://nysolarmap.com/>



Model*Law.4
www.cuny.edu/about/resources/sustainability/reports/NYS_Model_Solar_Energy_LawToolkit_FINAL_final.pdf
 Resource*Guide:*
https://training.nysun.ny.gov/images/PDFs/Zoning_for_Solar_Energy_Resource_Guide.pdf



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Solar systems

• Scale


• Solar access

• Comprehensive Plan

- Policy statement
- Resource map

• Potential adverse impacts

- Glare
- Neighborhood character



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Residential/small solar

Regulations & review

• Street & lot layout


• Setbacks

• Height

- Solar setback
- “Solar fence”

• Solar-ready construction

- Building Code or incentive zoning



Minor Solar Facility on Residential Property

Street or Common Access

Front Yard Prohibited (1)

Front Facade SLP (2)

Side Yard (4) (5) (3) (5) Side Yard (4)

Rear Yard (4)

Street/Common access or yard

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Solar systems & historic resources

Design Guidelines for Solar Installations (National Trust for Historic Preservation)

• locate on non-historic buildings or additions

• minimize their visibility from the road

• avoid permanent loss of character-defining features




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Commercial/ industrial solar

- Special Use Permit
- Site Plan Review
- Industrial & agricultural zones
- Adverse impacts
- Lot size
- Screening
- Safety
- Decommissioning
- Public Service Law Article 10






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Wind turbines

Distinguish between residential, agricultural or commercial turbines

- Regulate with zoning:
 - Restrict to districts or municipal-wide
 - Setbacks
 - Sound
 - Special Use Permit (SUP)
- Regulate without zoning:
 - Site plan review
- Article 10





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Pet facilities & uses

Commercial

- Veterinarians & animal hospitals
- Kennels, day care & boarders
- Groomers
- Breeders
- Trainers

Non-commercial

- Adoption centers
- Pounds
- Shelters
- Private pet ownership



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Pet facilities & uses

Regulate or require

- Number of animals
- Minimum lot size & setbacks
- Parking requirements
- Hours outside on run
- Sound attenuation, buffering & screening
- Emergency response plan

Reviews

- With zoning:
 - Special Use Permit
 - Site Plan review
- Without zoning
 - Site plan review
- Ability to impose condition on approval



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Doggie day care

- Define use
 - Number of dogs per day
 - No overnights
- Potential impacts
 - Noise
 - Parking
 - spaces per dog/ staff
 - drop off area



"Commercial facility for supervised dog care for less than 24 hours a day, not including facilities that provide boarding, breeding or selling of dogs, or facilities whose primary revenue is licensed veterinarian services." Town of Amherst



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Backyard chickens

PROS

- Urban agriculture movement
- Inexpensive protein source
- Therapeutic and educational
- Little space needed


CONS

- Noisy roosters (not hens)
- Fowl odor?
- Decreased property value fears
- May attract pests (foxes, coyotes)



Consider regulating:

- ✓ Number of birds, gender
- ✓ Setbacks for coops/pens
- ✓ Feed storage location
- ✓ Fences
- ✓ Cage size, height, materials



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Group homes for the disabled

- “A community residence established pursuant to this section and family care homes shall be deemed a family unit, for the purposes of local laws and ordinances.”
 - Mental Hygiene Law § 41.34
- Will facility result in a concentration of similar homes to the extent that community character is altered?



Religious Land Use & Institutionalized Persons Act (RLUIPA)

- Religious uses are not exempt from land use regulations
- Municipalities may not:
 - Place “substantial burden”
 - Zone out of residential districts
 - Prohibit if impact similar to other allowed uses



Regulate characteristics influencing physical environment: lot coverage, parking, signage

Nonretail uses in retail districts

Nonretail uses in “storefronts”

- Reduces critical mass of central business district

Zoning:


- Exclude residential on first floor
- Minimum percentage street-level retail
- SUP for nonretail



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Large-scale retail

- Maximum square footage
 - Absolute
 - SUP
- Economic Impact Study through SEQR
- Review criteria
 - Architectural style
 - Landscaping
 - Buffering & screening
 - Parking requirements




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Short-term rental housing

Precise definitions:

- Generally rented for less than 30 days
- Permanent provision for living, sleeping, eating, cooking, and sanitation
- Owner not necessarily on site




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Short-term rental housing

Pros	Cons
<ul style="list-style-type: none">• Supplemental income to owners• Discounted lodging and interesting tourist experience for guests	<ul style="list-style-type: none">• Transient guests• Excessive noise• Increased traffic• Commercial use in residential district• Unfair competition to hotels• Lost lodging tax revenue• Inflated housing costs



Quantitative Restrictions

- Restrict by zoning district
- Cap number of permits
- Restrict by proximity
- Maintain ratio of long-term dwelling units to short-term units



Operational Restrictions

- Maximum occupancy limits
- Rental period and frequency
- Parking
- Noise
- Emergency access
- Mandatory designated representatives
- Trash and refuse



Adult uses

- Cannot prohibit
 - 1st Amendment Protection
- Regulate with zoning
 - Must provide viable locations
 - Definitions must be clear
- Aim regulations at secondary effects



Billboards

- Can't regulate content
 - 1st Amendment protection
- Regulate size & location:
 - State Uniform Code
 - Zoning
 - Site Plan Review
 - Local Permit
- NYS DOT regulates signs along interstate & primary highways
 - Municipality may be more restrictive than DOT



Temporary signs

- Regulate physical characteristics:
 - traffic safety, aesthetics, property values
- Regulation should be content neutral:
 - size, height & location:
 - ban all signs on public property
 - Permits: apply to all signs
 - Duration: apply evenly
 - Fees: relate to administrative costs



Medical Marijuana: Legislation

- Federal Controlled Substances Act
- NYS Compassionate Care Act 2014
 - S7923/A6357-E
- NYS Medical Marijuana Program
 - Administered by the NYS Department of Health
 - Rolled out 1/7/16



Dispensary in Manhattan
Credit: Benjamin Norman for The NY Times

Local regulation of Medical Marijuana

- Police power: enact regulations regarding dispensaries necessary to protect public welfare of people in community
- Nuisance law: file public nuisance actions against dispensaries to abate "conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all"
- Currently no case law to suggest local bans of dispensaries would be invalidated
 - Concerned municipalities should commission health impact assessments

Registered organizations by county

Dispensaries

- | | |
|-----------|---------------|
| • Albany | • Manhattan |
| • Bronx | • Onondaga |
| • Broome | • Orange |
| • Clinton | • Queens |
| • Erie | • Suffolk |
| • Fulton | • Ulster |
| • Monroe | • Warren |
| • Nassau | • Westchester |

Manufacturing

- Fulton
- Monroe
- Orange
- Queens
- Warren

Monster houses

- Recognize desire for larger homes
 - Consider community's economic health
 - Balance affordable housing interests
- Limit size
 - Set floor area ratio
- Site plan review for new or expanded homes



Home day care

Enforceable:
fire, building and health regulations

Not enforceable:
anything beyond underlying residential use:

- minimum lot size
- minimum floor-space per child
- off-street parking
- off-street pickup/drop-off areas
- no outdoor play area after __ P.M.

Definitions are important:

- “Family home day care” and “Group family home day care” allowed by right in single-family and multi-family dwellings
- “Child day care center” and “school age child care” are different, and fully subject to zoning

[illegible]

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Solid waste facilities

Includes storage, transfer, disposal, treatment or internment of landfills, open dumps, and transfer stations

REGULATION

- With zoning: as of right, SUP
- Without zoning: site plan review
- State: NY ECL §27-0701(1) & 6 NYCRR 360
- Federal: Resource Conservation & Recovery Act of 1976 (40 CFR Part 258)



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Exceptions

**DEC permit & registration not needed
for certain Construction & Demolition
(C & D) landfills determined by:**

- Hours of operation (sunrise & sunset)
- No fee
- Debris type
 - Must be recognizable
 - Must originate & be disposed of on properties under same ownership or control

- Recognizable:
uncontaminated concrete
& concrete products
(steel or fiberglass
reinforcing rods
embedded in concrete,
asphalt pavement, brick,
glass, soil & rock)
- Trees, stumps, yard
waste & wood chips

6 NYCRR Part 360 – 7.1(b)



Transfer stations



PROS:

- Economically viable if dump is more than 15-20 miles
- Potential reuse of empty buildings

CONS:

- Increased traffic, noise, odors, litter
- May be sited in poor/minority areas

Regulate with zoning:

- Restrict to districts or municipal-wide
- SUP with conditions:
 - Ingress & egress
 - Truck routes

Regulate without zoning:

- Site Plan Review

Economies of scale

Single large station

- Less equipment, construction, waste handling, and transportation costs
- Easier than siting multiple facilities
- Conducive to barge or rail operations (less traffic impacts)
- Negative neighborhood impacts
- Longer travel means down time for collection crew, vehicle wear & tear
- No backup facility for equipment failure or other emergencies.

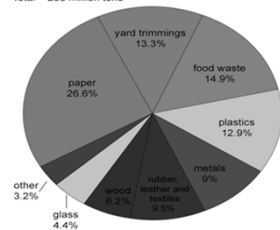
Serving smaller stations

- More costs relative to station with same total capacity
- Repeated siting processes
- Less conducive to barge or rail operations (increased traffic impacts)
- Impacts spread around neighborhood
- Reduced travel times means lower overall system costs
- Backups for scheduled/emergency shutdowns.

Composting



Total MSW generation in the United States by type of waste, 2014
Total = 258 million tons



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Commercial/municipal food composting

With zoning

- define: principal or accessory use
- compost source: generated on or offsite
- materials: plant-based food scraps; unharvested crops; animal waste
- setbacks: location of bins, piles, rows and distance from streets/buildings
- size: maximum square footage/cubic yards on parcel

Without zoning

- Nuisance controls to thwart odors and vermin/pests; access to water/moisture minimums

DEC requires permit/registration depending upon the operation's size; regardless, local approvals are still needed.



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Defending Your Decisions

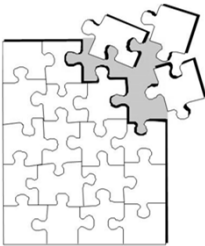



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The Record

Materials in the record tell the story of the application & typically include:


- Application & supporting documentation
- Newspaper notices
- Meeting minutes
- SEQR materials
- Public hearing testimony
- Written submissions from public
- Expert opinion
- Decision, conditions, findings

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Findings

- Describe application's reasons for denial or approval & may support:
 - Why a condition was imposed
 - Decision if challenged in court
- Conclusory statements are not "Findings"
 - "The standards were not met."
- A decision based on conclusory statements is:
 - Not supported by factual information in the record
 - Will be struck down in the courts



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NYS Department of State Division of Local Government

- Training Unit: (518) 473-3355
- Counsel's Office: (518) 474-6740
- Toll Free: (800) 367-8488
- Email: localgov@dos.ny.gov
- Website: www.dos.ny.gov
- www.dos.ny.gov/lq/lut/index.html



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Real Property Tax

§ 487. Exemption from taxation for certain solar or wind energy systems or farm waste energy systems. 1. As used in this section:

(a) "Solar or wind energy equipment" means collectors, controls, energy storage devices, heat pumps and pumps, heat exchangers, windmills, and other materials, hardware or equipment necessary to the process by which solar radiation or wind is (i) collected, (ii) converted into another form of energy such as thermal, electrical, mechanical or chemical, (iii) stored, (iv) protected from unnecessary dissipation and (v) distributed. It does not include pipes, controls, insulation or other equipment which are part of the normal heating, cooling, or insulation system of a building. It does include insulated glazing or insulation to the extent that such materials exceed the energy efficiency standards required by law.

(b) "Solar or wind energy system" means an arrangement or combination of solar or wind energy equipment designed to provide heating, cooling, hot water, or mechanical, chemical, or electrical energy by the collection of solar or wind energy and its conversion, storage, protection and distribution.

(c) "Authority" means the New York state energy research and development authority.

(d) "Incremental cost" means the increased cost of a solar or wind energy system or farm waste energy system or component thereof which also serves as part of the building structure, above that for similar conventional construction, which enables its use as a solar or wind energy or farm waste energy system or component.

(e) "Farm waste electric generating equipment" means equipment that generates electric energy from biogas produced by the anaerobic digestion of agricultural waste, such as livestock manure, farming waste and food processing wastes with a rated capacity of not more than one thousand kilowatts that is (i) manufactured, installed and operated in accordance with applicable government and industry standards, (ii) connected to the electric system and operated in conjunction with an electric corporation's transmission and distribution facilities, (iii) operated in compliance with the provisions of section sixty-six-j of the public service law, (iv) fueled at a minimum of ninety percent on an annual basis by biogas produced from the anaerobic digestion of agricultural waste such as livestock manure materials, crop residues and food processing wastes, and (v) fueled by biogas generated by anaerobic digestion with at least fifty percent by weight of its feedstock being livestock manure materials on an annual basis.

(f) "Farm waste energy system" means an arrangement or combination of farm waste electric generating equipment or other materials, hardware or equipment necessary to the process by which agricultural waste biogas is produced, collected, stored, cleaned, and converted into forms of energy such as thermal, electrical, mechanical or chemical and by which the biogas and converted energy are distributed on-site. It does not include pipes, controls, insulation or other equipment which are part of the normal heating, cooling or insulation system of a building.

2. Real property which includes a solar or wind energy system or farm waste energy system approved in accordance with the provisions of this section shall be exempt from taxation to the extent of any increase in the value thereof by reason of the inclusion of such solar or wind energy system or farm

waste energy system for a period of fifteen years. When a solar or wind energy system or components thereof or farm waste energy system also serve as part of the building structure, the increase in value which shall be exempt from taxation shall be equal to the assessed value attributable to such system or components multiplied by the ratio of the incremental cost of such system or components to the total cost of such system or components.

3. The president of the authority shall provide definitions and guidelines for the eligibility for exemption of the solar and wind energy equipment and systems and farm waste energy equipment and systems described in paragraphs (a) and (b) of subdivision one of this section.

4. No solar or wind energy system or farm waste energy system shall be entitled to any exemption from taxation under this section unless such system meets the guidelines set by the president of the authority and all other applicable provisions of law.

5. The exemption granted pursuant to this section shall only be applicable to solar or wind energy systems or farm waste energy systems which are (a) existing or constructed prior to July first, nineteen hundred eighty-eight or (b) constructed subsequent to January first, nineteen hundred ninety-one and prior to January first, two thousand twenty-five.

6. Such exemption shall be granted only upon application by the owner of the real property on a form prescribed and made available by the commissioner in cooperation with the authority. The applicant shall furnish such information as the commissioner shall require. The application shall be filed with the assessor of the appropriate county, city, town or village on or before the taxable status date of such county, city, town or village. A copy of such application shall be filed with the authority.

7. If the assessor is satisfied that the applicant is entitled to an exemption pursuant to this section, he or she shall approve the application and enter the taxable assessed value of the parcel for which an exemption has been granted pursuant to this section on the assessment roll with the taxable property, with the amount of the exemption as computed pursuant to subdivision two of this section in a separate column. In the event that real property granted an exemption pursuant to this section ceases to be used primarily for eligible purposes, the exemption granted pursuant to this section shall cease.

8. (a) Notwithstanding the provisions of subdivision two of this section, a county, city, town or village may by local law or a school district, other than a school district to which article fifty-two of the education law applies, may by resolution provide that no exemption under this section shall be applicable within its jurisdiction with respect to any solar or wind energy system or farm waste energy system which began construction subsequent to January first, nineteen hundred ninety-one or the effective date of such local law, ordinance or resolution, whichever is later. A copy of any such local law or resolution shall be filed with the commissioner and with the president of the authority.

(b) Construction of a solar or wind energy system or a farm waste energy system shall be deemed to have begun upon the full execution of a contract or interconnection agreement with a utility; provided however, that if such contract or interconnection agreement requires a deposit to be made, then construction shall be deemed to have begun when the contract or interconnection agreement is fully executed and the deposit is made. The owner or developer of such a system shall provide written

notification to the appropriate local jurisdiction or jurisdictions upon execution of the contract or the interconnection agreement.

9. (a) A county, city, town, village or school district, except a school district under article fifty-two of the education law, that has not acted to remove the exemption under this section may require the owner of a property which includes a solar or wind energy system which meets the requirements of subdivision four of this section, to enter into a contract for payments in lieu of taxes. Such contract may require annual payments in an amount not to exceed the amounts which would otherwise be payable but for the exemption under this section. If the owner or developer of such a system provides written notification to a taxing jurisdiction of its intent to construct such a system, then in order to require the owner or developer of such system to enter into a contract for payments in lieu of taxes, such taxing jurisdiction must notify such owner or developer of its intent to require a contract for payments in lieu of taxes within sixty days of receiving the written notification.

(b) The payment in lieu of a tax agreement shall not operate for a period of more than fifteen years, commencing in each instance from the date on which the benefits of such exemption first become available and effective.

SEQRA, ZONING REGULATION AND THE NORTH ELBA WAL-MART DECISION

Wal-Mart Stores, Inc. applied for a conditional use permit and site plan approval from the Town of North Elba to construct a store in the Adirondacks just outside the resort village of Lake Placid in a Scenic Preservation Overlay District with views of Whiteface Mountain. The Town's Planning Board denied the permits and Wal-Mart challenged the decision. The court held that a municipality may use the potential adverse economic and community-character impacts of a proposed "big-box" development on existing, small retail businesses as bases for the denials. A town's conditional (special) use permit regulation, however, must contain properly-worded explicit standards. In addition, the potential negative economic impact of the "big-box store" on smaller retail businesses and the visual, aesthetic, community-character and other socio-economic impacts must be explained in the State Environmental Quality Review Act (SEQRA) documents, local resolutions and findings.

The North Elba Planning Board had adopted a final environmental impact statement (EIS) that addressed the project's potential visual impact on scenic values and its effects on the community's general character and ambience. The EIS also analyzed secondary growth effects from increased competition and potential store closings on the adjacent Town and nearby Lake Placid Village areas. The SEQRA findings noted these significant adverse socio-economic and community character impacts.

The court also found, however,

[h]ere, it must be borne in mind that respondent concluded not only that the proposal did not meet the requirements of SEQRA, but also that it did not satisfy the relevant criteria set forth in the Town Land Use Code, including two of the three specific conditions for obtaining a conditional use permit (namely, those providing that a permit will only be granted if the proposed use "will not have a materially adverse impact upon adjoining and nearby properties," and "will not result in a clearly adverse aesthetic impact"). Additionally, respondent found that several "general development considerations," which it was constrained to evaluate and which have as their aim the avoidance of "any undue adverse impact on the natural, physical, social and economic resources of the Town," were not met. In making these findings, respondent was entitled to consider factors outside the scope of the environmental review mandated by SEQRA, insofar as they bear on matters legitimately within the purview of the Town Land Use Code.

The decision underscores that a municipality should conduct comprehensive planning and

- identify areas requiring special visual, aesthetic, community character and socio-economic protection;
- include specific standards for review in the zoning code;
- develop a strong record;
- derive conclusions from a thorough analysis of the impacts on the affected community; and
- articulate the reasons for denials.

It is important to remember, however, that permit denials based upon generalized opposition or sentiment unsupported by the written record are not likely to be upheld by the court.



PUBLIC NOTICE

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Washington, D.C. 20554

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TTY: 1-888-835-5322

**WIRELESS TELECOMMUNICATIONS BUREAU OFFERS GUIDANCE ON
INTERPRETATION OF SECTION 6409(a) OF THE MIDDLE CLASS TAX RELIEF AND
JOB CREATION ACT OF 2012**

DA 12-2047
January 25, 2013

On February 22, 2012, the Middle Class Tax Relief and Job Creation Act of 2012 (Tax Act)¹ became law. Section 6409(a) of the Tax Act provides that a state or local government “may not deny, and shall approve” any request for collocation, removal, or replacement of transmission equipment on an existing wireless tower or base station, provided this action does not substantially change the physical dimensions of the tower or base station.² The full text of Section 6409(a) is reproduced in the Appendix to this Public Notice.

To date, the Commission has not received any formal petition to interpret or apply the provisions of Section 6409(a). We also are unaware of any judicial precedent interpreting or applying its terms. The Wireless Telecommunications Bureau has, however, received informal inquiries from service providers, facilities owners, and state and local governments seeking guidance as to how Section 6409(a) should be applied. In order to assist interested parties, this Public Notice summarizes the Bureau’s understanding of Section 6409(a) in response to several of the most frequently asked questions.³

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

Section 6409(a) does not define what constitutes a “substantial[] change” in the dimensions of a tower or base station. In a similar context, under the *Nationwide Collocation Agreement* with the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation Officers, the Commission has applied a four-prong test to determine whether a collocation will effect a “substantial increase in the size of [a] tower.”⁴ A proposed collocation that does not involve a substantial increase in

¹ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, H.R. 3630, 126 Stat. 156 (enacted Feb. 22, 2012) (Tax Act).

² *Id.*, § 6409(a).

³ Although we offer this interpretive guidance to assist parties in understanding their obligations under Section 6409(a), *see, e.g., Truckers United for Safety v. Federal Highway Administration*, 139 F.3d 934 (D.C.Cir. 1998), the Commission remains free to exercise its discretion to interpret Section 6409(a) either by exercising its rulemaking authority or through adjudication. With two exceptions not relevant here, the Tax Act expressly grants the Commission authority to “implement and enforce” this and other provisions of Title VI of that Act “as if this title is a part of the Communications Act of 1934 (47 U.S.C. 151 et seq.).” Tax Act § 6003.

⁴ 47 C.F.R. Part 1, App. B, *Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, § I.C (*Nationwide Collocation Agreement*).

size is ordinarily excluded from the Commission's required historic preservation review under Section 106 of the National Historic Preservation Act (NHPA).⁵ The Commission later adopted the same definition in the *2009 Declaratory Ruling* to determine whether an application will be treated as a collocation when applying Section 332(c)(7) of the Communications Act of 1934.⁶ The Commission has also applied a similar definition to determine whether a modification of an existing registered tower requires public notice for purposes of environmental review.⁷

Under Section I.C of the *Nationwide Collocation Agreement*, a “substantial increase in the size of the tower” occurs 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.

Although Congress did not adopt the Commission's terminology of “substantial increase in size” in Section 6409(a), we believe that the policy reasons for excluding from Section 6409(a) collocations that substantially change the physical dimensions of a structure are closely analogous to those that animated the Commission in the *Nationwide Collocation Agreement* and subsequent proceedings. In light of the Commission's prior findings, the Bureau believes it is appropriate to look to the existing definition of “substantial increase in size” to determine whether the collocation, removal, or replacement of equipment

⁵ See 16 U.S.C. § 470f, *see also* 47 C.F.R. § 1.1307(a)(4) (requiring applicants to determine whether proposed facilities may affect properties that are listed, or are eligible for listing, in the National Register of Historic Places).

⁶ See Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, *Declaratory Ruling*, 24 FCC Rcd. 13994, 14012, para. 46 & n.146 (2009) (*2009 Declaratory Ruling*), *recon. denied*, 25 FCC Rcd. 11157 (2010), *pet. for review denied sub nom. City of Arlington, Texas v. FCC*, 668 F.3d 229 (5th Cir.), *cert. granted*, 113 S.Ct. 524 (2012); 47 U.S.C. § 332(c)(7).

⁷ See 47 C.F.R. § 17.4(c)(1)(B); National Environmental Policy Act Compliance for Proposed Tower Registrations, WT Docket No. 08-61, *Order on Remand*, 26 FCC Rcd. 16700, 16720-21, para. 53 (2011).

on a wireless tower or base station substantially changes the physical dimensions of the underlying structure within the meaning of Section 6409(a).

What is a “wireless tower or base station”?

A “tower” is defined in the *Nationwide Collocation Agreement* as “any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities.”⁸ The Commission has described a “base station” as consisting of “radio transceivers, antennas, coaxial cable, a regular and backup power supply, and other associated electronics.”⁹ Section 6409(a) applies to the collocation, removal, or replacement of equipment on a wireless tower or base station. In this context, we believe it is reasonable to interpret a “base station” to include a structure that currently supports or houses an antenna, transceiver, or other associated equipment that constitutes part of a base station.¹⁰ Moreover, given the absence of any limiting statutory language, we believe a “base station” encompasses such equipment in any technological configuration, including distributed antenna systems and small cells.

Section 6409(a) by its terms applies to any “wireless” tower or base station. By contrast, the scope of Section 332(c)(7) extends only to facilities used for “personal wireless services” as defined in that section.¹¹ Given Congress’s decision not to use the pre-existing definition from another statutory provision relating to wireless siting, we believe the scope of a “wireless” tower or base station under Section 6409(a) is not intended to be limited to facilities that support “personal wireless services” under Section 332(c)(7).

May a state or local government require an application for an action covered under Section 6409(a)?

Section 6409(a) states that a state or local government “may not deny, and shall approve, any eligible facilities request....” It does not say that a state or local government may not require an application to be filed. The provision that a state or local government must approve and may not deny a request to take a covered action, in the Bureau’s view, implies that the relevant government entity may require the filing of an application for administrative approval.

⁸ See *Nationwide Collocation Agreement*, § I.B.

⁹ See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, WT Docket No. 10-133, *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Fifteenth Report*, 26 FCC Rcd. 9664, 9481, para. 308 (2011).

¹⁰ See also 47 C.F.R. Part 1, App. C, *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, § II.A.14 (defining “tower” to include “the on-site fencing, equipment, switches, wiring, cabling, power sources, shelters, or cabinets associated with that Tower but not installed as part of an Antenna as defined herein”).

¹¹ 47 U.S.C. § 332(c)(7)(A). “Personal wireless services” is in turn defined to mean “commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services.” *Id.* § 332(c)(7)(C)(1).

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

Section 6409(a) does not specify any period of time for approving an application. However, the statute clearly contemplates an administrative process that invariably ends in approval of a covered application. We believe the time period for processing these applications should be commensurate with the nature of the review.

In the *2009 Declaratory Ruling*, the Commission found that 90 days is a presumptively reasonable period of time to process collocation applications.¹² In light of the requirement of Section 6409(a) that the reviewing authority “may not deny, and shall approve” a covered request, we believe that 90 days should be the maximum presumptively reasonable period of time for reviewing such applications, whether for “personal wireless services” or other wireless facilities.

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¹² See *2009 Declaratory Ruling*, 24 FCC Rcd. at 14012-13, paras. 46-47.

APPENDIX

SEC. 6409. 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.

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For Immediate Release**FCC FACILITATES DEPLOYMENT OF WIRELESS
INFRASTRUCTURE FOR 5G CONNECTIVITY*****Action Removes Regulatory Barriers to Infrastructure Investment***

WASHINGTON, September 26, 2018—Today, the Federal Communications Commission took another important step in its ongoing efforts to remove regulatory barriers that inhibit the deployment of infrastructure necessary for 5G and other advanced wireless services. This action, which builds upon those already taken by states and localities to streamline deployment, underscores the FCC's commitment to ensuring that the United States wins the global race to 5G.

The first part of the Commission's decision, a Declaratory Ruling, focuses primarily on local fees for the authorizations necessary to deploy small wireless facilities. Specifically, the Declaratory Ruling:

- Explains when a state or local regulation of wireless infrastructure deployment constitutes an effective prohibition of service prohibited by Sections 253 or 332(c)(7) of the Communications Act;
- Concludes that Section 253 and 332(c)(7) limit state and local governments to charging fees that are no greater than a reasonable approximation of objectively reasonable costs for processing applications and for managing deployments in the rights-of-way.
- Removes uncertainty by identifying specific fee levels for small wireless facility deployments that presumably comply with the relevant standard; and
- Provides guidance on when certain state and local non-fee requirements that are allowed under the Act—such as aesthetic and undergrounding requirements—may constitute an effective prohibition of service.

The second part of the Commission's decision, the Third Report & Order in the Wireless Infrastructure Docket:

- Establishes two new shot clocks for small wireless facilities (60 days for collocation on preexisting structures and 90 days for new builds);
- Codifies the existing 90 and 150 day shot clocks for wireless facility deployments that do not qualify as small cells that were established in 2009;
- Concludes that all state and local government authorizations necessary for the deployment of personal wireless service infrastructure are subject to those shot clocks; and
- Adopts a new remedy for missed shot clocks by finding that a failure to act within the new small wireless facility shot clock constitutes a presumptive prohibition on the provision of services.

Action by the Commission September 26, 2018 by Declaratory Ruling and Report and Order (FCC 18-133). Chairman Pai, Commissioners O’Rielly and Carr approving. Commissioner Rosenworcel approving in part and dissenting in part. Chairman Pai, Commissioners O’Rielly, Carr, and Rosenworcel issuing separate statements.

WT Docket No. 17-79; WC Docket No. 17-84

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This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC, 515 F.2d 385 (D.C. Cir. 1974).