Further Preemption of Zoning Jurisdiction over Telecom Facilities

Act 54 (H. 313), among other things, expands the jurisdiction of the Vermont Public Service Board (PSB) over telecommunications facilities, support structures, and ancillary improvements. Previously, a certificate of public good could only be obtained from the PSB for installation of three or more telecommunication facilities that were part of an interconnected network, and only when the structures extended more than 50 feet above the ground. 30 V.S.A. § 248a(a),(b). Now providers will be able to obtain a certificate of public good for a single facility regardless of height. The PSB's expanded jurisdiction encompasses not only cellular telephone facilities and structures but also smaller wireless Internet installations.

This change potentially presents a significant intrusion into local regulation of telecommunication facilities as the PSB's assumption of jurisdiction over a telecommunication facility exempts the facility from local zoning regulation. 24 V.S.A. 4412(8)(C). Regulations adopted by a municipality under 24 V.S.A. 2291(19) that would otherwise apply to telecommunication facilities are also expressly preempted. 30 V.S.A. 248a(h). Nevertheless, municipalities should be aware that telecommunication providers may still obtain telecom permits locally rather than seeking a certificate of public good from the PSB. Municipal regulatory bodies also appear to retain authority to amend existing local permits.

In light of these points, we still recommend that municipalities have zoning bylaw provisions or ordinances that address telecommunication facilities. Municipalities that seek to promote development of telecommunication infrastructure may consider adopting local bylaws or ordinances that are less stringent than the PSB's review criteria. The new law also provides that if an applicant obtains or is denied a permit by a local board, the applicant may not apply to the PSB for approval of the same or substantially similar facility.

In reviewing telecommunication facilities applications, the PSB is required to give substantial deference to the "land conservation measures in the plans of the affected municipalities and the recommendations of municipal legislative bodies and the municipal and regional planning commissions regarding the municipal and regional plans, respectively." Local officials may base their recommendations on a local telecom ordinance or zoning bylaw.

This change was effective June 1, 2009, when the bill was signed into law.

The legislature made additional amendments to Chapter 117 that bestow some new authorities on appropriate municipal panels (AMPs) and administrative officers. The additions to Chapter 117 are sections 4455 and 4470a in Title 24. Section 4455 allows a municipality to petition to the environmental court to revoke a municipal land use permit if a permittee violated the terms of a permit or obtained a permit based on "misrepresentation of material fact." This ability to petition the environmental court to

revoke a permit is similar to authority given to an Act 250 land use panel under 10 V.S.A. § 6027 (g).

Section 4470a also allows an administrative officer or an AMP to reject an application when an applicant makes a misrepresentation of material fact. This change should not have a significant effect on zoning administrators or AMPs, which have always had the authority to evaluate information provided by an applicant and reject an application on the basis that such information was factually incorrect. However, the addition of 4470a may have some implication for administrative officers. The ability to reject an application due to materially misleading information begs an administrative officer to question evidence or to ensure accuracy of the information on zoning permit applications. This authority could make a zoning administrator's job more difficult.

Curiously, this new section of the law also permits an AMP to award reasonable attorney's fees after notice and an opportunity for a hearing in accordance with 3 V.S.A. § 809. Section 809 outlines the process by which an AMP will notice and hear the case to award fees. It is decidedly different from the hearing process outlined in 24 V.S.A. § 4464. The AMP may award fees to "any party or person who may have become a party but for the false or misleading information or who has incurred attorney's fees or costs in connection with the application." The AMP should consider whom if anyone was affected by the misleading information and whether parties incurred attorney's fees. This is a quasi-judicial process where the AMP will take evidence and issue a written decision, which is appealable to a higher court. We recommend that, prior to holding a hearing and awarding attorney's fees, the town consults with its municipal attorney or the Municipal Assistance Center.

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