ZONING AND LAND USE APPROVAL FOR WIRELESS FACILITIES IN NEW JERSEY RIGHTS-OF-WAY

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OVERVIEW OF MLUL

"Development" is defined in the MLUL to include the construction, alteration and/or enlargement of any building or structure as well as the use or change in use of any building or structure for which permission may be required. N.J.S.A. 40:55D-4.

A "site plan" under the MLUL is a development plan of one or more lots on which is shown existing and proposed conditions of the lot or lots and the location of all existing and proposed structures including utilities as well as all other information that may be reasonable required in order to make an informed determination pursuant to an ordinance requiring review and approval of site plans. N.J.S.A. 40:55D-7.

Most municipal ordinances in New Jersey provide that, prior to the issuance of a construction permit and/or prior to commencement of any site work for any development, an application for site plan approval must be submitted to and approved by that municipality's land use board. Such ordinances exempt individual residential lot and detached one- or two-family dwelling unit buildings from the site plan review and approval process in accordance with N.J.S.A. 40:55D-37a.

In Garofalo v. Burlington Township, 212 N.J. Super. 458, 461 (Law Div. 1985), the court held that site plan approval can be required even for a mere change from one permitted use to another permitted use because legitimate municipal concerns may be implicated such as issues relating to traffic, access, parking, lighting, drainage, and buffer requirements, all of which are best treated through the process of site plan review.

The considerations mentioned in Garofalo apply to wireless structures in a municipal right-of-way.

Verizon Wireless, through one of its land use attorneys, Greg Meese, has recently argued that a ROW is a street and not a lot so that site plan review and approval cannot be required. I respectfully disagree based on long standing law in New Jersey that a ROW is an easement over a lot belonging to another. I cite Stuyvesant v. Woodruff, 21 N.J.L. 133 (Sup. Ct. 1847), 1847 WL 3010, for that proposition as well as Black's Law Dictionary (10th Ed. 2014) which defines "right-of-way" as "the right to pass through property owned by another." The key is determining who owns the land under the street or, in the case of wireless installations on poles, the land through which the pole passes. That land, in most cases, will be a part of a lot adjacent to the street.

There may be instances where the municipality owns all of the land under a street as well as the land adjoining the street which is not paved so that, technically, there is no ROW. In such instances, the street and adjacent land are not located on a lot so site plan review and approval would not be required under the MLUL. Further, municipality owned land has been held to be immune from the operation of the municipality's land development ordinances.

ARE CERTAIN TYPES OF USES OR USERS EXEMPT FROM SITE PLAN APPROVAL UNDER THE MLUL?

There is no MLUL exemption from site plan review and approval for wireless structures in municipal right-of-way easements. Similarly, there is no MLUL exemption for site plan review and approval for developments proposed by public utilities.

The argument has been made that collocation of wireless facilities is exempt from site plan approval in accordance with N.J.S.A. 40:55D-46.2, which would apply to collocation of wireless facilities both within and outside of rights-of-way. This MLUL section provides that "an application for development to collocate wireless communications equipment on a wireless communications support structure or in an existing equipment compound shall not be subject to site plan review" provided that the application meets three (3) specified criteria.

While this MLUL section certainly provides that the application is not subject to site plan review if the three (3) specified criteria are met, the section does not exempt the application from approval, and it is up to the municipality to determine whether its land use board, its zoning officer or some other official reviews the application to determine whether the three (3) criteria have been met.

Another argument that has been made is that entities that have been deemed to be "public utilities" are exempt from site plan approval.

The argument is that the applicable statutory provisions governing public utilities are found in the Public Utility law provisions of the New Jersey statutes, specifically, N.J.S.A. 48:3-18 and -19, and not the MLUL. I disagree with this argument on the basis that there is nothing in those provisions that provide for preemption of the MLUL. In fact, this argument is directly contradicted by the MLUL, which provides in N.J.S.A. 40:55D-19 that public utilities "aggrieved by the action of a municipal agency through said agency's exercise of its powers under [the MLUL]" may take an appeal to the Board of Public Utilities rather than the Superior Court as all other applicants must do. In New Jersey Nat. Gas Co. v. Borough of Red Bank, 438 N.J. Super. 164, 180 (App. Div. 2014), the court ruled that "public utilities are subject to the municipal zoning power."

ARE CERTAIN TYPES OF USES OR USERS EXEMPT FROM SITE PLAN APPROVAL UNDER FEDERAL LAW?

An argument has been made that wireless collocation is exempt from municipal site plan review and approval by virtue of section 6409 of the Middle Class Relief and Job Creation Act of 2012, 47 U.S.C. 1455. This statute provides that a “State or local government may not deny, and shall approve, an 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 vase station.”

The fact that a wireless development which qualifies as an “eligible facilities request” must be approved, and may not be denied, does not exempt the development from site plan review and approval. It just mandates approval if, after review, the land use board of municipal official performing the review, finds that the criteria are met.

WAIVER OF SITE PLAN PROCEDURE

One recommended procedure for zoning and land use approval of wireless structures in rights-of-way, as well as collocation of wireless facilities in general, is the “waiver of site plan” process.

Recognizing that the site plan review and approval process may be a time-consuming process, the Garofalo court intimated that a land use board might “waive” site plan requirements under certain circumstances. 212 N.J. Super. at 464. A number of municipalities have ordinance provisions which grant the municipality’s land use board or the zoning officer or some other designated municipal official discretion to waive site plan review and approval if, after considering the application for development, the board or official determines that certain criteria are met.

The most common criteria are that: (1) Previous site plan approval was secured and the proposed development will have insignificant impact on the previously approved site plan; (2) The proposed development involves normal repair, maintenance or replacement; or (3) The proposed development will not affect existing circulation, parking, drainage, building arrangements, landscaping, buffering, lighting and other considerations of site plan review.” Only one (not all three) of the above three criteria need be met to qualify for a waiver of site plan to be granted.

Many municipal officials believe that the most significant zoning issues related to locating wireless facilities in rights-of-way are related to height (aesthetics) and ground equipment location (safety). The waiver of site plan process complies with the MLUL as well as federal law and provides a speedy and efficient procedure that facilitates wireless deployment while still maintaining municipal control over site plan issues related to safety and aesthetics.

METHODS FOR APPLYING ZONING TO WIRELESS FACILITIES IN RIGHTS-OF-WAY

There are additional methods that can be used in conjunction with or in lieu of the waiver of site plan process for applying zoning to wireless facilities in rights-of-way so that wireless carriers or wireless facility developers are provided with a speedy and efficient procedure that facilitates wireless deployment while still maintaining municipal control over site plan issues related to safety and aesthetics. They include the following:

1. Master license
2. Site specific license
3. Non-site specific license
4. General consent to make land use board applications

The key to all of the above methods of proceeding is determining how fast and efficient the municipality wants to make the procedure for the wireless deployment and how much control the municipality wants to retain over site plan issues.

Licenses can be subject to conditions, such as (a) limitation to a site, an area of the municipality or the entire municipality, (b) limitation as to maximum height of the wireless facility on the pole, (c) restrictions on the color and aesthetics of the wireless equipment, and (d) restrictions on the location of ground equipment. If the license exempts the holder from having to apply for and obtain a site plan approval or a site plan waiver, the license would have to be adopted by ordinance with the ordinance expressly making the license exempt from zoning.

The other approach is to make all licenses expressly subject to the zoning ordinance and zoning approval (either by the land use board, the zoning officer or some other municipal official). Such licenses can be granted by municipal resolution.

Finally, where a street and adjacent unpaved land is located entirely on municipally owned property, the municipality has authority under the MLUL – N.J.S.A. 40:55D-26b – to adopt an ordinance requiring that the installation of wireless facilities on poles located on such municipally owned land be referred to the municipal planning board for a recommendation to either the governing body or a municipal officer for final action.

In my opinion, it would also be reasonable for the municipality to condition its consent to locate such wireless facilities on an application to the land use board.

DON'T FORGET ABOUT STANDING

We have addressed in this webinar the issues of the municipality having to consent to have wireless facilities located within its right-of-way, property owners of the land underlying the right-of-way having to consent to have the a new pole located technically on their property, and pole owners having to consent to have wireless facilities located on their poles. We have not, however, discussed the issue of the wireless carriers and wireless facility developers needing standing to make a zoning or land use application.

The MLUL defines "applicant" in N.J.S.A. 40:55D-3 as "a developer submitting an application for development." And, the MLUL defines "developer" in N.J.S.A. 40:55D-3 to mean "the legal or beneficial owner or owners of a lot or any land proposed to be included in a proposed development." A written consent of the municipality authorizing a wireless carrier applicant or a wireless facility developer applicant submit an application confers standing on that entity to make an application as an "applicant" and "developer" under the MLUL. Conversely, the absence of written consent would deprive the wireless carrier or the wireless facility developer of the standing to allow a zoning or land use application to be made.

Finally, in order to obtain standing to submit the application, the wireless carrier or wireless facility developer may also need the consent of the pole owner to locate the wireless facilities on the pole and the consent of the underlying property owner (if an entity or person other than the municipality).

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