

Please note: This packet is intended for general information purposes only and should not take the place of a thorough review of pertinent statutes, consultation with legal counsel, or other specific guidance on this subject.

Telecommunications Facilities

This packet includes the following attachments:

- ["Telecommunications Towers: 'Be Prepared' is a good motto to follow,"](#) *Maine Townsman*, July 1998
- Maine State Planning Office, *Sample "Wireless Communication Tower Ordinance"*
- ["Local Regulation of Tower Siting,"](#) *Maine Townsman*, July 2000
- Town of Arundel ["Telecommunication Tower Moratorium Ordinance"](#)
- League of Minnesota Cities, ["Model Site Lease Agreement,"](#) July 1996
- ["Wireless Towers: an Information Resource Guide,"](#) prepared by MMA's Resource Center
- William H. Dale, Esq., Jensen Baird Gardner & Henry, ["Regulation of Telecommunication Towers"](#) (1997)

Important issues and considerations include:

I. Generally

Municipalities have important roles to play in the regulation and location of telecommunications facilities, such as wireless telecommunications towers, satellite dish antennas and ham radio antennas. The revolution in telecommunications technologies in recent years has made those roles more important, and requires that even the smallest towns in Maine must be aware of the issues involved in this area. Both State and federal law address the regulation of telecommunications facilities and services, and so municipalities must be careful to comply with these statutes when exercising local regulatory authority. This information packet outlines telecommunications issues that municipalities frequently encounter and provides references to resources available to assist in the local regulation of telecommunications facilities and services.

II. Wireless Communication Towers

The regulation of wireless communications towers has become an important matter for municipalities of all sizes throughout the State. This is because wireless communications technologies (such as cellular telephones and wireless internet access devices) currently require many closely spaced towers to provide coverage throughout a service area.

Within certain limits, a municipality may regulate the location, construction or modification of telecommunications towers. Under federal law (Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)), municipalities may regulate "the placement, construction, and modification of personal wireless service facilities" so long as the regulation doesn't "prohibit or have the effect of prohibiting the provision of personal wireless services." Moreover, such regulations must not "unreasonably discriminate among providers of functionally equivalent services." Therefore, in order to regulate these structures, the municipal legislative body must enact a telecommunications tower ordinance or amend the local zoning ordinance appropriately, but the ordinance must regulate evenhandedly and cannot have the effect of prohibiting the telecommunications services. Also, the ordinance cannot regulate wireless services on the basis of electromagnetic radiation emitted from such a tower — this is exclusively within the jurisdiction of the Federal Communications Commission (FCC). Denial of an application to a municipality to place, construct or modify personal wireless service facilities must be in writing and must be supported by substantial evidence in the written record of the proceeding.

A wireless communications ordinance is useful to regulate the effects of such towers. For example, such an ordinance can require a “fall down” zone on the lot on which it is located to minimize the threat posed to neighboring properties and buildings by the collapse of a tower. A tower ordinance may encourage “collocation” of antennas on existing structures or on a single tower to minimize the need for multiple antennas. A tower ordinance also may require the tower owner to remove the tower when it no longer is functioning. The ordinance may be a separate “police power” ordinance, or may be part of a zoning ordinance in order to direct the location of towers into certain compatible districts or into an overlay district located along traffic corridors where mobile communications requires tower location. For a discussion of some of the concerns and limits of local control of wireless communications towers, see “Telecommunications Towers: ‘Be Prepared’ is a good motto to follow,” *Maine Townsman*, July 1998, linked above. A sample wireless communications ordinance is available from the Maine State Planning Office (<http://www.state.me.us/spo/landuse/pubs/telecommord.php>) and from MMA's website (www.memun.org). (The SPO sample is linked above.)

The courts have upheld such ordinances and their application. (See, for example, *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630 (2nd Cir. N.Y. 1999).) A federal court has upheld the Town of Falmouth's denial of conditional use and variance applications to locate a telecommunications tower where the board of appeals determined that the applications did not meet ordinance and variance standards for a tower. See *Industrial Communications and Electronics, Inc. v. Town of Falmouth*, Nos. 98-397-P-H and 99-96-P-H (D. Me. May 9, 2000). For an analysis of this case, see “Local Regulation of Tower Siting,” *Maine Townsman*, July 2000 (linked above). However, where local zoning and its administration prevent the closing of gaps in coverage, this may in effect prohibit the provision of personal wireless services, and so may violate federal law. *National Tower, LLC v. Plainville Zoning Board of Appeals*, 297 F.3d 14 (1st Cir. MA 2002).

If the application to construct a wireless communication tower arrives before your municipality has adopted an ordinance (or has amended an existing ordinance) to regulate towers, the municipality may be able to adopt a moratorium ordinance (as an emergency enactment) because of the lack of effective land use ordinances regulating the proposed use or activity. Any moratorium on telecommunications towers should not last longer than six months. A sample telecommunication tower moratorium ordinance is linked above, **but please have your ordinance reviewed by the municipal attorney before calling for a special town meeting or council meeting to act on it.** Please note that applications that have received a substantive review under existing ordinances may be protected from changes in law and therefore may be “grandfathered” under the old law. Moreover, an applicant's use or activity may acquire “vested rights” under the current law so that neither a moratorium nor a new or amended ordinance can be applied to it. **Because of these issues and others, always consult the municipality's attorney before preparing and adopting a moratorium ordinance.**

Municipalities may have the opportunity to encourage wireless service providers to locate their antennas on existing municipal property, such as municipal building rooftops or towers or police, fire and emergency antennas. The League of Minnesota Cities has prepared a “Model Site Lease Agreement” that can serve as a basis for a Maine municipality to enter into a lease of space on an existing municipal building, tower or antenna for this purpose; you should be sure to have the municipality's attorney prepare the actual lease. (See the Site Lease Agreement linked above.)

III. Amateur (“Ham”) Radio Towers

Municipalities generally are preempted from regulating the height of amateur radio (often called “ham radio”) towers and antennas. Although nothing in federal statute directly preempts local regulation of amateur radio antennas, the FCC issued a “Memorandum Opinion and Order In the Matter of Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities,” PRB-1, on September 16, 1985, 50 Fed. Reg. 38813. This Opinion and Order notes

“the strong federal interest in promoting amateur communication” and establishes that: “local regulations which involve placement, screening, or height of antennas based on health, safety, or aesthetic considerations must be crafted to accommodate reasonable amateur communications and to represent the minimum practicable regulation to accomplish the local authority’s legitimate purpose.” Applying this test, the U.S. District Court for the District of Northern Ohio overturned the City of Rocky River’s application of its zoning ordinance to deny an application for a 30-foot tall amateur radio tower attached to a residence (*MacMillan v. City of Rocky River*, 748 F. Supp. 1241 (N.D. Ohio 1990)). Similarly, the U.S. District Court for the District of Colorado overturned the Boulder County Board of County Commissioners’ decision to deny an application for a ham radio antenna between 60 and 100 feet tall because the county zoning ordinance contained a 35-foot height limitation on structures (*Evans v. County Commissioners of Boulder, Colo.*, 752 F. Supp. 973 (D. Colo. 1990)). Thus, it appears from these and other similar cases that flat prohibitions on such towers are preempted. Moreover, recent Maine legislation prohibits a municipality from adopting or enforcing an ordinance regulating amateur radio tower height that is preempted under federal regulation (PRB-1) (30-A M.R.S.A. § 3012).

IV. Satellite Dish Zoning

Many television viewers use satellite dishes as an alternative to cable television service. These satellite dishes include the larger (two meter diameter and larger) dishes seen in more rural areas and the more recently available direct broadcast satellite (DBS) dishes that typically are less than two feet in diameter.

With regard to all satellite dishes, an FCC rule (47 CFR § 1.4000) prohibits a local regulation that “(1) unreasonably delays or prevents installation, maintenance or use, (2) unreasonably increases the cost of installation, maintenance or use, or (3) precludes reception of an acceptable quality signal.” This same rule authorizes municipalities to adopt regulations for such antennas only if necessary to accomplish a clearly defined public safety objective or to preserve an historic district listed or eligible for listing in the National Register of Historic Places, but the regulation must be no more burdensome than is necessary to achieve the local government’s objective.

In addition, 47 CFR § 25.104 contains a presumption that any local land use regulation affecting the installation, maintenance or use of a satellite earth station antenna two meters or less in diameter and located in an area where commercial or industrial land uses generally are permitted is unreasonable and preempted by federal law. A person may petition the FCC for a declaration that local regulation of an antenna greater than two meters in diameter is preempted.

V. Additional Information

For additional information on wireless tower issues in general, see "Wireless Towers: an Information Resource Guide," prepared by MMA's Resource Center, linked above.

Date of last revision: 1/06

The statutes referenced here may have been amended during the last legislative session, and we will update them when the text becomes available.