



The FCC Shotclock Rule Fouls up the Special Permit Timelines Set Forth in M.G.L. c. 40A§9

Introduction

In November 2009, the Federal Communications Commission (“FCC”) issued a Declaratory Ruling and Order (FC 09-99) (“FCC Ruling”) interpreting § 704 of the Telecommunication Act of 1996 (“Section 704”) that has important implications for local governments in Massachusetts when reviewing special permit applications for personal wireless service facilities. The FCC Ruling imposes time limits on the review of applications by local governments that in some instances are inconsistent with the time limits imposed by Massachusetts General Law Chapter 40A § 9.

Section 704 and the FCC Ruling

Section 704 requires local governments to act on applications to construct or modify a personal wireless service facility within a reasonable period of time. Up until the November 2009 FCC ruling, the term “reasonable period of time” was not defined by either the Act itself or the FCC. This changed with the issuance of the FCC Ruling interpreting the term “reasonable period of time.” According to the FCC Ruling, state and local authorities must act within 90 days of the filing of a complete application for collocation (i.e. installing antennas on an existing tower) and within 150 days of the filing of a complete application for a new tower. If the local government does not issue a decision within the applicable time period or extended time, then an applicant may seek approval of its application through a court order . However, a failure to meet the 90 day or 150 day deadline does not automatically lead to the constructive approval of an application. The FCC Ruling acknowledges that some cases may require longer review periods and encourages a court to consider the facts of each case.

Under the FCC Ruling, a local government must advise an applicant within thirty (30) days of submission if an application is incomplete. The review period commences when the applicant receives notice of completion or thirty (30) days elapse from the date of submission without notice from the local government of an incomplete application. Thus, when measured from the date of submission, the review periods are actually 120 and 180 days. A local government can always seek the consent of the applicant to extend the review period.

Massachusetts Law

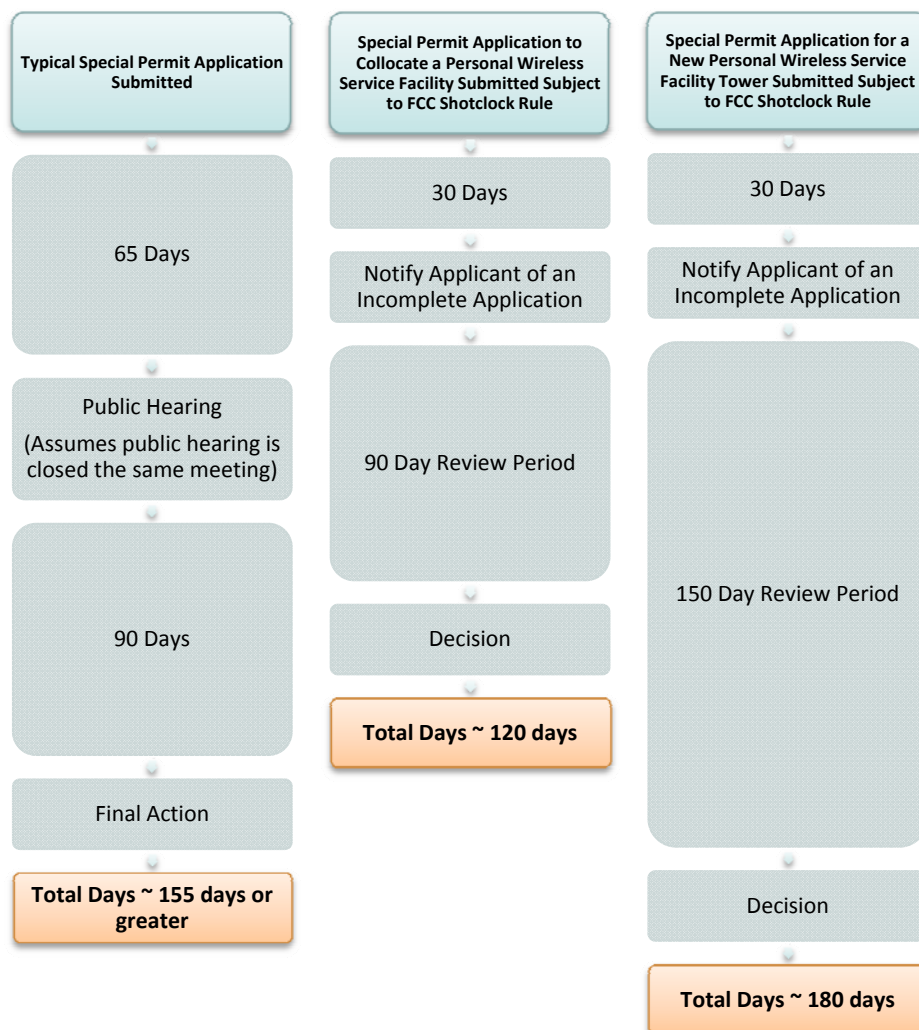
Massachusetts General Law Chapter 40A § 9 provides the relevant time periods for Massachusetts communities to review special permit applications. Under this section, the review period commences upon the filing of an application. It is important to note that there is no affirmative obligation on the part of a local government to notify an applicant of an incomplete application within a certain period of time. Section 9 requires a local government to open a public hearing on the special permit application

within sixty-five (65) days from the date of submission and it permits a local government to extend the public hearing beyond the date of the original hearing. Lastly, section 9 requires a local government to take final action on a special permit application within ninety (90) days following the date of the close of the public hearing. It is not unusual for public hearings to take several meetings and thus there can be a number of days between the opening and the closing of a particular public hearing. The time limit for a local government to hold its public hearing and to take final action may be extended by the mutual agreement of the local government and the applicant.

In Practice

In most Massachusetts communities, both collocation and the construction/modification of new personal wireless service facilities are allowed through the special permit process. Due to the differences between the FCC Ruling and M.G.L. c. 40A § 9, an uninformed local government can easily run afoul of the FCC Ruling by following its traditional project review process, as illustrated by Figure 1 below.

Figure 1 – Comparison of FCC Shotclock Rule & M.G.L. c. 40A § 9



Potential Pitfalls

1. The FCC Ruling does not supersede local regulations that require a shorter review period. For example, if a local regulation requires a decision within sixty-five (65) days then the local government must abide by the sixty-five (65) day period (i.e. the local government must adhere to the shortest required review period).
2. Under the FCC Ruling, a local government must notify the applicant of any deficiencies in its application for a personal wireless service facility or tower within thirty (30) days. Section 9 contains no such requirement.
3. When reviewing a special permit application for collocation, a local government must conduct its review and take action upon a complete application to collocate within the shortest required review period. In most instances the FCC Ruling (90 day review/120 days from submission) will require a shorter review period for collocation than Section 9 (155 + days from submission). A local government can always seek the applicant's consent to extend the review period.
4. When reviewing a special permit application for a new personal wireless service facility tower, a local government must conduct its review and take action upon a complete application within the shortest required review period. In most instances, section 9 (155 + days from submission) will require a shorter review period than the FCC Ruling (150 day review/180 days from submission) for the construction of a new tower. However, this will not always be the case, especially when a local government continues its public hearing. If a public hearing will be extended, it should be scheduled to ensure compliance with the FCC Ruling review period. A local government can always seek the applicant's consent to extend the review period.

Conclusion

Due to the preeminence of federal law over state law, local governments must follow the FCC Ruling whenever it requires a shorter review period. Thus, when faced with a special permit application a local government must identify the shortest required review period (FCC Ruling or § 9) and comply with it and if necessary, request an extension of time from the applicant.

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