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Municipal Law News

May 2013

MANAGING TELECOMMUNICATIONS EQUIPMENT REQUESTS JUST GOT MORE COMPLEX

- Ronald D. Richards, Jr.

The Michigan Townships Association's January/February 2013 edition of the *Michigan Township News* contained two excellent articles on cellular towers. The cover article noted that President Obama signed into law the "Middle Class Tax Relief and Job Creation Act of 2012." The MTA's article mentioned that Section 6409(a) of the Job Creation Act contains a clause that did not get as much press as the rest of the Act, but is important to municipalities. Section 6409(a) significantly limits a municipality's power to review requests relating to modifying an existing cell tower or replacing existing equipment on a cell tower:

> " . . . 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."

The same law defines an "eligible facilities request" as any request to modify an existing cell tower or base station that involves collocating new transmission equipment; removing transmission equipment; or replacing transmission equipment.

After Section 6409 was enacted, the Federal Communications Commission (FCC) received several questions on how exactly Section 6409(a) worked. In response, the FCC recently issued a Public Notice to give guidance on key parts of Section 6409(a). The Public Notice is technically just "interpretive guidance" to help parties understand their obligations under Section 6409(a). The FCC retains the ultimate discretion to interpret Section 6409(a) the same as or different than the Public Notice's interpretation. Nevertheless, the FCC's Public Notice gives Michigan municipalities some key insight into how Section 6409(a) works. The following is a recap of the highlights of the FCC's Public Notice:

WHAT DOES IT MEAN TO "SUBSTANTIALLY CHANGE THE PHYSICAL DIMENSIONS" OF A TOWER OR BASE STATION?

Under Section 6409(a), a municipality must approve applications if changes would not "substantially change the physical dimensions of the tower or base station." But Section 6409(a) does not define what constitutes a "substantial change" in the dimensions of a tower or base station. So what exactly does that phrase mean? The FCC's Public Notice answered this question by saying that a "substantial change in the physical dimensions of a tower" occurs if any of the following occur:

1. The 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 20 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 antennae.

2. The 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.

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1. The mounting of the proposed antenna would involve adding an appurtenance (an accompanying part or feature) to the body of the tower that would protrude from the edge of the tower more than 20 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.

2. The 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.

WHAT IS A "WIRELESS TOWER OR BASE STATION?"

Remember that Section 6409(a) applies to any request to modify an "existing wireless tower or base station." The FCC stated that a wireless tower or base station is not limited to facilities that support "personal wireless service."

MAY A MUNICIPALITY REQUIRE AN APPLICATION FOR AN ACTION COVERED UNDER SEC. 6409(a)?

Yes. A municipality may not deny any eligible request when it does not substantially change the physical dimensions of the tower or base station. But, a municipality may require the filing of an application for administrative approval.

IS THERE A TIME LIMIT WITHIN WHICH AN APPLICATION MUST BE APPROVED?

Section 6409(a) does not specify any period to approve an application. The Public Notice states that 90 days is the rough guide. If a municipality has not approved an application within 90 days, the municipality will likely be presumed to have taken an unreasonable amount of time to approve the application.

OTHER THOUGHTS

A municipality that receives an expression of interest regarding locating telecommunications equipment should keep this Public Notice in mind. Proactively consulting with an attorney can help clarify a specific telecommunications request and avoid costs down the road. A municipality should also remember the numerous other laws pertaining to locating telecommunications equipment, such as:

- MCL 125.3514 (the Michigan Legislature's May 2012 passage of its own cell tower law, Act 143 of 2012);
- the federal Telecommunications Act, 47 USC 151 et seq.; and
- the FCC Orders and federal rules on the subject.

Please contact Ronald Richards at 517.371.8154 or rrichards@fosterswift.com with any questions about how to handle a telecommunications request.

HUMAN RESOURCE GUIDE: EMPLOYEE HANDBOOKS & PERSONNEL POLICIES

Looking for a helpful guide to Michigan and Federal laws applicable to Michigan employers? *The Guide for Employee Handbook Policies* reviews topics appropriate for employee handbooks and personnel policies. Authored by the employment attorneys at Foster Swift and published by the Michigan Chamber, this guide is a great reference for supervisors and includes sample policies and job descriptions.

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MOTOR VEHICLE EXCEPTION TO GOVERNMENTAL IMMUNITY

- Karl W. Butterer

The Michigan Court of Appeals has issued recent opinions on the "motor vehicle exception" to governmental immunity. These cases will be of interest to any municipality that owns vehicles.

PAIN AND SUFFERING NOT RECOVERABLE BECAUSE THEY ARE NOT "BODILY INJURY"

In *Hunter v City of Flint Transportation Department, et al*, the Michigan Court of Appeals ruled that people injured by government motor vehicles driven by government employees may not recover damages for pain and suffering or emotional shock or distress. Harold Hunter's vehicle was struck by a dump truck owned and operated by the City of Flint Transportation Department. Mr. Hunter sued the Department, claiming damages for, among other things, pain and suffering as well as emotional shock and distress as a result of the accident. The Department conceded that the "motor vehicle exception" to governmental immunity permitted Mr. Hunter to recover economic damages, such as medical expenses, but argued that governmental immunity prohibited Mr. Hunter from recovering any emotional damages because they are not a "bodily injury."

In ruling in favor of the Department, the court observed that governmental agencies are generally immune from personal injury actions. However, there are several exceptions to the general rule. Among these exceptions, the "motor vehicle exception" to governmental immunity states that: "Governmental agencies shall be liable for bodily injury and property damages resulting from the negligent operation by any . . . employee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . " MCL 691.1405. The Court held that "bodily injury" has been traditionally understood to mean actual physical harm or damage to a human body. The court stated that [b]ecause "bodily injury" encompasses only "a physical or corporeal injury to the body," Mr. Hunter could not recover for damages for pain and suffering, shock and emotional damage. Other governmental agencies such as villages, townships and counties are given the same governmental immunity as the City of Flint under the motor vehicle exception to governmental immunity.

LOST WAGES RECOVERABLE AS TYPE OF DAMAGE CAUSED BY "BODILY INJURY"

The Court of Appeals in *Hannay v Department of Transportation*, ruled that a woman injured in a car accident involving a state-owned snow plow could collect wage loss damages under the motor vehicle exception to governmental immunity. Heather Hannay was injured when a MDOT snow plow ran a stop sign and hit her car. She suffered a serious shoulder injury that required several surgeries. Ms. Hannay's complaint alleged that she missed work as a result of the accident and asked for lost wages as a part of her damages.

As stated more fully above, governmental agencies are generally immune from personal injury actions, but, the "motor vehicle exception" provides that governmental agencies shall be liable for *bodily injury* and property damage resulting from the negligent operation of government vehicles driven by government employees. In this case, MDOT argued that any economic damages, including wage loss, are not "bodily injury" and therefore are not a proper element of damages against a governmental agency. The Court of Appeals – through a different panel than the one which decided the Hunter case discussed above – disagreed and held in favor of Ms. Hannay. The court stated that "damages for work loss and loss of services are not independent causes of action, but are merely *types of items or damages* that may be

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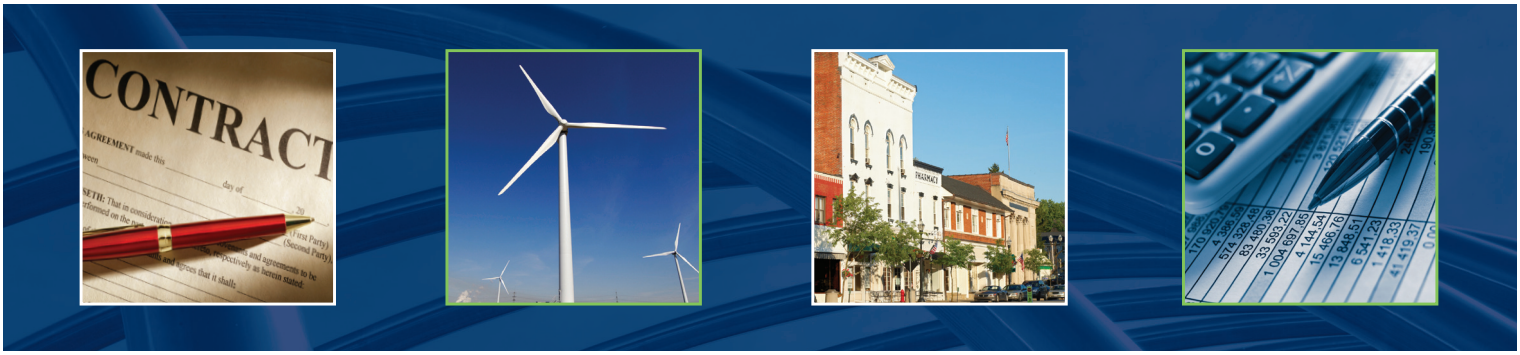

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recovered *because of bodily injury* sustained by plaintiff." As a consequence, an injured person may recover economic damages, like wage loss, when suing a governmental agency under the motor vehicle exception to governmental immunity.

If you have any questions about how these cases apply to your municipality, please contact Karl Butterer at 616.726.2212 or kbutterer@fosterswift.com.

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If you have ideas, please let us know. Send your suggestions to info@fosterswift.com. We appreciate your feedback.

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