

# **Cell Tower Placement Policy**



## City of Las Cruces

### Community Development Interoffice Memorandum

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To: Robert Garza, City Manager

From:  Vincent M. Banegas, Community Development Director

Subject: City Council Work Session Presentation – Telecommunication Structures

Date: March 28, 2012 M-12-072

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Pursuant to the upcoming April 9th City Council Work Session, staff has taken the liberty of inviting and securing the attendance of Mr. Jonathon Kramer, Esq. of the Kramer Telecom Law Firm, PC located in Los Angeles, CA to speak to several issues involving telecommunications. Mr. Kramer's credentials are included in this packet and to say the least, Mr. Kramer is considered to be one of, if not the premiere authority on issues regarding telecommunications. Mr. Kramer's law practice focuses on among many things, the regulatory aspects of the telecommunication laws and serves as consultant and advisor to many local, state and federal governmental entities on telecommunication matters. Just as a side note, Mr. Kramer has been advisor/consultant to various New Mexico communities and specifically the City of Albuquerque in matters involving telecommunication regulation and review processes.

Mr. Kramer is familiar with some of the recent events the City has encountered as it relates to telecommunication facility proposals submitted by service providers in the cell phone industry. Mr. Kramer has also been briefed on the City's need to amend the current telecommunication regulations within the 2001 Zoning Code, as amended (included in packet) and the concept that has been raised regarding a potential telecommunication master plan for the City. Regarding the master plan issue, Mr. Kramer has some initial thoughts, but was interested in hearing more about such a plan's purpose and expectations before talking to the possibility of enacting such a plan. City staff will conduct a brief presentation following Mr. Kramer's as it relates to what elements within the City's telecommunication ordinance are in need of update and what steps the City has taken to garner a better position for a more thorough review and analysis of applicable proposals.

On April 9<sup>th</sup>, Mr. Kramer will be prepared to address the Council with a presentation that talks to general telecommunication regulations and issues as a type of telecommunication primer. It's my understanding; however, that he will also illuminate during the discussion significant issues that impact local regulation such as the "shot clock", the time a local government has to act on a collocation request (90 days) and a new tower request (150

days) and the recent passage by Congress and signing into law by President Obama of the "Middle Class Tax Relief and Job Creation Act of 2012" (the "Act"). On the surface, the title of the Act seemingly has nothing to do with telecommunication regulation, but pursuant to Section 6409, an exemption was created that limits local government review of collocations and modifications to same when the proposed action does not substantially alter in size, the tower or structure on which it is placed. An article written by Mr. Kramer discussing this very issue is also included in this packet for your review.

Just so that you are aware, Mr. Kramer has asked and staff agrees that this is an incredible opportunity to have other communities learn about telecommunication issues. To this end, staff has taken the liberty to invite representatives from local, state (State Lands Office and NMSU) and federal (WSMR, Holloman AFB, and BLM) governmental entities to this work session. In fairness, staff will also invite representatives from the various cell phone providers to also hear the presentation/discussion. In total, staff is attempting to contact some 27 entities both public and private for this meeting.

With this, staff awaits the opportunity to present Mr. Kramer to the City Council at the stated work session. In the interim, should there be any issue you feel needs particular attention or inclusion into the discussion, please advise.

cc: Brian Denmark, Assistant City Manager/COO  
Mark Winson, Assistant City Manager/CAO  
David Weir, Community Development Director *DW*  
Robert Kyle, Building & Development Services Administrator  
Katherine Rogers, Senior Planner

# A Telecom Law Firm *Protecting Wireless Site Landlords*

Maximizing Revenue and Control for Wireless Site Landlords

## About KTLF's principal: Jonathan L. Kramer, Esq.

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**Jonathan L. Kramer**, Attorney and Counselor at Law  
*FSCTE, BTS, BDS, BPS, CBT*

Jonathan L. Kramer, Esq. is KTLF's founder and principal attorney. He has over 30 years of wireless telecom and cable television technology engineering and management experience.

Holder of the highest-grade FCC land-based commercial and amateur radio licenses, as well as the FCC's highest grade marine radio maintainer's license, Jonathan has also been licensed as a telecommunications contractor in California for over 25 years.

He's member of the State Bar of California and the United States District Court (C.D. CA), as well as the Federal Communications Bar Association and the International Municipal Lawyers Association.

Licensed by the Federal Communications Commission (General Radiotelephone Operator License **PG-11-35289**, with Ship Radar) (Previously licensed as a Second Class Radio Telephone Operator, Sept. 1975; First Class Radio Telephone

Testifying expert witness in federal and state court cases regarding cable television technology, and federal and state court cases regarding wireless technology.

Technology speaker at every NATOA National Conference 1988-2000; and 2002-2004. Technology speaker at many regional and local NATOA conferences and meetings.

Appointed Volunteer Counsel, American Radio Relay League, Southwestern Division.

Communications technology speaker at Society of Cable Telecommunications Engineers conferences, and cable industry conferences. Published author of book and magazine articles on communications technology, plant safety, construction and administration.

Cable system engineering and technical management experience six years: System Engineer/Chief Technician; Technical Manager; Regional Technical Manager.

Former Field Engineering Representative for Motorola Communications and Electronics, Area F Program Management team - Areas of experience

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### KTLF Firm Snapshot

Kramer Telecom Law Firm is one of only a few law firms in the U.S. with both legal and radio frequency engineering expertise.

Knowing the law *and* the technology is what sets us apart from most law firms.

KTLF was founded in 2006 when Jonathan was admitted to practice law in California. His wireless siting experience dates back over 18 years and

thousands of wireless siting issues, matters, and cases.

As a radio frequency engineer, tower siting expert, and later as an attorney, Jonathan has advised hundreds of governments about wireless siting matters, lease terms, radio frequency emissions safety, wireless regulations and ordinances, and more.

#### Jonathan Kramer's Wireless Speaking and Teaching Events

Jonathan is a regularly invited speaker on wireless issues to public agencies and private organizations, as well as at wireless industry events.

Some of his presentations also earn the participants MCLE credits.

[Click Here to Read About Jonathan's Upcoming Speaking Events!](#)

#### A (Cell Site) Picture is Worth A Thousand Words

Jonathan maintains one of the largest on-line collections of wireless site photos. He makes the photos available to government planners and the press.

Jonathan's cell site photos have been featured in:

*National Geographic*

Operator, Nov. 1977; General Radiotelephone Operator License, June 1987); GMDSS Radio Maintainer License **DM00000680**, with Ship Radar endorsement, May, 2008); GMDSS Radio Operator/Maintainer License **DB00000530**, with Ship Radar endorsement, May, 2008); Restricted Radiotelephone Operator License **RR00066117**.

Licensed by the Federal Communications Commission as an amateur radio operator since November 1970; currently licensed as an Extra Class operator (**W6JLK**). Formerly licensed as an Advanced class operator; Formerly licensed as a General class operator; Formerly licensed as a Novice class operator. (KD6MR, KP6AY, WB6FDE, WN6FDE).

Member of the Executive Board of the **Public Law Section** of the State Bar of California (Term: September, 2008 through August, 2011).

Book article author and review editor on amateur radio cable television radio frequency (RF) interference matters.

Served as the advisor to the League of California Cities during the key negotiations and hearing regarding SB1627, California wireless co-location law.

Wireless technology advisor to and testifying expert before the FCC's State & Local Government Advisory Committee (LSGAC).

Co-author, editor of wireless technology advisory to local governments based on OET Bulletin 65 published by the FCC, June 2000 titled, "**A Local Government Official's Guide to Transmitting Antenna RF Emission Safety: Rules, Procedures, and Practical Guidance**".

Former National Board of Directors member, National Association of Telecommunications Officers and Advisors

include microwave radio; baseband RF and audio; digital signaling; UHF and VHF two-way radio (including high stability Simulcast® radio operations); telephony; and command and control communications.

Certified by APCO Institute as a Public Safety Radio Technician (2008-2013)

Juris Doctor degree cum laude, Abraham Lincoln University School of Law (2001). Undergraduate education at CSUN, UCLA, LATTU, and WLAC; AS Degree in Radio Communications (with honors), Los Angeles Trade Technical College.

Founder/Sole Shareholder of the Kramer Telecom Law Firm, P.C., and Kramer.Firm, Inc.

#### *Memberships and Registrations:*

State Bar of California (State Bar of CA. No. 244074)

Bar of the United States District Court Central District of California

Federal Communications Bar Association

International Municipal Lawyers Association

Los Angeles County Bar Association

Second Life Bar Association

Martindale ISLN: 919263404

California Contractors State License Board: License C7-433113 (Class C7 - Low voltage systems)

Member, National Association of Telecommunications Officers and Advisors

Founding member and current Board of Directors Immediate Past President, States of California and Nevada Chapter of NATOA (SCANNATOA.ORG)

Senior Member, Society of Cable Telecommunications Engineers (U.S. Society). Elected to Senior Member status April 1993; SCTE Member since 1980. Member, SCTE (U.S.) Professional Development Committee (2008-2009). Member, SCTE (U.S.) Loyal Order of the

*Magazine*

*Architecture Boston Magazine*

*Palais / Magazine*

*Above Ground Level Magazine*

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(NATOA), an affiliate of the National League of Cities (previous term: 1997-2000, 1992-1994).

Former Co-chair of National Technical Standards Committee appointed by NATOA, National League of Cities, and US Conference of Mayors to develop the national RF technical standards for cable television systems adopted by the FCC in February 1992.

Witness before the FCC's State & Local Government Advisory Committee on OET 65, March 2000.

Invited witness before the FCC in Cable TV re-regulation hearings, March 1990 (Orlando, Florida).

Right of Way engineering and management expertise related to telecommunications networks and radio communications siting.

704 (Membership limited to those with 30 years or more in broadband engineering field).

Certified as a Broadband Transport Specialist (BTS designation) by the SCTE (U.S. Society).

Certified as a Broadband Distribution Specialist (BDS designation) by the SCTE (U.S. Society).

Certified as a Broadband Premises Specialist (BPS designation) by the SCTE (U.S. Society).

Fellow of Society of Cable Telecommunication Engineers (United Kingdom society; elected 2001) (FSCTE designation)

Certified Broadcast Technologist (CBT designation) awarded by the Society of Broadcast Engineers

Life member of the American Radio Relay League (ARRL)

*More detailed information, including case listings where Jonathan has served as expert or trial advisor, is available upon request.*

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*FSCTE, BTS, BDS, BPS, CBT*

*Founding Attorney of Kramer Telecom Law Firm, P.C.*



#### KRAMER TELECOM LAW FIRM, P.C.

Kramer Telecom Law Firm, P.C. was founded in 2006 by Jonathan Kramer.

Based in California, this we are a very specialized law firm dealing with complex wireless telecommunications law and technology matters.

Jonathan Kramer, the firm's founder and principal attorney, is a radio frequency engineer and broadband engineer with over 30 years of engineering and engineering management experience.

**We DO NOT accept wireless carriers as clients.**

Our law clients include:

- Homeowners Associations
- Houses of Worship
- City Governments
- School Districts
- County Governments
- Water Districts

Kramer Telecom Law Firm advises our law clients regarding:

- Wireless lease matters
- Lease buy-outs and long term easements
- Radio Frequency safety compliance
- FCC transmissions compliance issues
- FCC licensing
- Broadband telecom system contracts

Type of Wireless Matters Handled by Kramer Telecom Law Firm:

- Proposals to lease your raw land property to be used as a cell tower site
- Proposals to lease a portion of your building (typically the roof) to be used as a cell tower site
- Requests by to modify an existing wireless site lease
- Offers by to 'buy-out' your existing wireless lease
- Demands from your existing wireless lessee that you reduce the rent or risk lease termination

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As a radio frequency engineer, tower siting expert, and later as an attorney, Jonathan has advised hundreds of governments about wireless siting matters, lease terms, radio frequency emissions safety, wireless regulations and ordinances, and more.

- Raw Land Owners
- Real Estate Developers
- Commercial Office Property Owners
- Self Storage Centers
- Town Governments
- Private Citizens

To assist our clients, we maintain relationships with skilled professionals in related areas such as site compliance inspections; RF safety evaluations; and financial accounting.

#### **KRAMER.FIRM, INC.**

Prior to being admitted to the State Bar of California in 2006, Jonathan was (and is still) the head of Kramer.Firm, Inc., a telecommunications consultancy serving over 600 governments and private clients in over 30 states.

Kramer.Firm, Inc. traces its roots back to September, 1984.

Kramer Telecom Law Firm, P.C., and Kramer.Firm, Inc. are completely separate firms with missions unique to each. Some of our clients contract with both firms.

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As LightSquared Fades, What of Sprint? »

## Congress Gifts Wireless Industry with By-Right Collocation...Or Does It?

BY JONATHAN KRAMER, ON FEBRUARY 18TH, 2012

On February 17, 2012, Congress passed the "Middle Class Tax Relief and Job Creation Act of 2012" (the "Act") and sent it on to President Obama for his signature. It seems likely that the President will sign the Act.

The California Wireless Association said about the Act in an email bulletin to its members (of which I am one): "In effect, Section 6409 exempts from local discretionary review collocations and modifications that do not substantially increase the size of the tower." Well, that's one view, but it's not complete, and it's not that simple.

Let's review....

### *Congress's Election Year Gift to the Wireless Industry*

As I discussed in a prior post, the Act contains the following significant gift to the wireless industry, grafted on to this Act from its former home in the stalled S.911 :

#### Sec. 6409. WIRELESS FACILITIES DEPLOYMENT

##### (a) FACILITY MODIFICATIONS.-

(1) IN GENERAL.-Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104-104) or any other provision of law, 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.

(2) ELIGIBLE FACILITIES REQUEST.-For purposes this subsection, the term "eligible facilities request" means any request for modification of an existing wireless tower or base station that involves -

(A) collocation of new transmission equipment;

(B) removal of transmission equipment; or

(C) replacement of transmission equipment.

(3) APPLICABILITY OF ENVIRONMENTAL LAWS.-noting in paragraph (1) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969.

Since it appears very likely that Sec. 6409 will become the law of the land, let's take some time to dissect it for impact, defenses, and results.

### *What Types of Sites Are Protected by Sec. 6409?*

Sec. 6409 does not on its face apply to any structures other than existing wireless towers. The Act does not even define what constitutes a "wireless tower."

Absent some local government code definition to the contrary, a building with an existing cell site on it is *not* a wireless tower; a park light standard with an existing wireless cell site is *not* a wireless tower; a church steeple with a cell site inside it is *not* a wireless tower; a billboard with an existing wireless site is *not* a wireless tower; a mono-cross is *not* a wireless tower.

In reality, relatively few physical structures should be called a "wireless tower" (especially by governments).

While it's difficult to argue that monopoles are not wireless towers, if the monopole has a light standard on it located in a parking lot, and the monopole was put in to add wireless to a prior existing light standard, then it is straight-forward to argue that the monopole with the light standard is not a wireless tower. It was a replacement for a light standard that was not a wireless tower, and the original use was preserved. Yes, this is the wireless equivalent of "Who's on First?! Who! Who?"

Let's turn to the Act's coverage of a "base station" (no pun intended). The term "base station" is also not defined in the Act. Since the term can mean different things depending on which side of the planning counter you normally stand, let's take a closer look.

If the term "base station" means equipment cabinets, and a site presently has two cabinets, then doubling the number of cabinets to four would certainly be a substantial change in the physical dimensions of the base station. If the existing "base station" is contained within a closed room or building, then doubling the number cabinets of the base station might not be a substantial change. Context is important.

Since site configurations differ from site to site, carrier-to-carrier, and location-to-location, we can't say in knee-jerk fashion whether an expansion of 5% of 50% of a wireless tower or base station is a substantial change in the physical dimensions for the purposes of the Act. This will take a case-by-case reasoned analysis to reach a sound answer.

### *"Or" v. "And" Makes a Big Difference*

Next, let's look at how Sec. 6409 requires we evaluate a change in physical dimensions.

Sec. 6409(a)(1) does not say, "...a modification of an existing wireless tower and base station..." Rather, it bifurcates the analysis when it says, in fact, a "...modification of an existing wireless tower or base station..." (Emphasis added). This one word change unambiguously means that if a collocation proposal comes in for an existing wireless tower, then the government should conduct a two prong analysis.

The first prong is to determine whether the proposed expansion on the wireless tower will "substantially change the physical dimensions of [the existing] wireless tower." The second prong

asks whether the proposed collocation will "substantially change the physical dimensions of the [existing] base station."

If the answer to *either* prong is yes, then the collocation would fall outside of the rights and protections granted under Section 6409. That said, then the government must still consider whether the project is one that should be permitted, conditioned, or barred under the local code governing wireless site installations.

### ***An "Eligible Facilities Request" — Not As Obvious as it Might Seem***

Turning to Section 6409(a)(2), now let's look at what constitutes an "ELIGIBLE FACILITIES REQUEST."

The term 'eligible facilities request' has three distinctly separate meanings, all of which are important to governments. The first is that it means any request for modification of an existing wireless tower or base station that involves "collocation of new transmission equipment." This seems to be the main thrust of the Act, but it is interesting that the collocation of new transmission equipment does not mean the collocation of a new carrier or carriers on an existing tower. There may be some governments that look at the plain text and say that this subsection (a)(2)(A) only applies to the existing occupant(s) on the real wireless tower who are, for themselves only, collocating new transmission equipment.

Subsection (a)(2)(B) makes it clear that an existing carrier on the wireless tower may by right remove its transmission equipment on the tower or at the base station. Governments will like this section, since it will result in a reduction in the visual impact of a wireless site.

Subsection (a)(2)(C) makes it clear that an existing carrier on the wireless tower may by right replace its existing transmission equipment. Again, size matters, if the replacement will be substantially larger or smaller compared to the existing transmission equipment.

### ***NHPA & NEPA: Status Quo***

I'm not going to spill too much e-ink over (a)(3). The status quo is maintained and the as the FCC's duties under the National Historic Preservation Act or the National Environmental Policy Act of 1969 are reaffirmed.

### ***Recommendations to Governments***

As a government wireless planner, you are about to have gleeful carrier reps—and even more gleeful carrier attorneys—telling you that Sec. 6409 makes your job *sooooo* much easier now: Just say 'yes' to every collocation and your government won't get sued. They might even suggest that you tell the public that Congress is to blame for all this, rather than the carrier, right? Well, no, it's not that easy for you, the carrier, or the public.

A careful, informed, rational project analysis is *absolutely* required to insure that governments are not granting collocations "by right" where no "by right" truly exists.

Start by looking at your wireless ordinance. (You do have one, right?) Does your ordinance contain a provision that actually defines a "wireless tower" or a "tower" or a "base station"? You are certainly going to want to review and likely tighten up those definitions to limit undesirable spillover. For example, if you define wireless tower to mean every wireless site, then your definition will need to be changed *pronto!*

Use a detailed wireless application form (you should be using one, anyway). Don't blow your FCC Shot Clock deadlines because you didn't use a detailed application, and you didn't review the complete application at the time it hit your planning counter. Consider requiring wireless applicants to make appointments to tender applications so you'll block enough time to review project at the counter. If the application is incomplete, make sure the applicant leaves with an incomplete letter at the time so that the shot clock doesn't begin to run.

Sec. 6409 does not preempt a local government's right (and some think a duty) to evaluate current and planned emissions for compliance with the FCC's standards at 47 C.F.R. § 1.1307 et seq. and FCC OET Bulletin 65. If the the by-right collocation project won't comply with the FCC rules—and some don't as proposed—then don't be bullied into permitting a non-compliant project.

Especially consider legal non-confirming wireless towers and sites (a site that was legal under local law at the time it was constructed, but would not be permissible today under current local law...think "ugly monopole"). The Act's language would suggest that a government cannot deny a proposed collocation on a legal non-confirming site. Your government may well want to amend your local code *right now* to indicate that other than maintaining or replacing existing antennas with like sizes and shapes, any other material changes would be deemed to be 'substantial' for the purposes of collocation under the Act. I'm sure that a lot of wireless industry attorneys will disagree, but most governments tolerate legal non-confirming uses only so long as they are not exacerbated or extended in term.

Speaking of term, some states (like California) permit local government to limit the length of wireless site permits to some term of years. In California, the shortest term is normally 10 years, but modifying by expansion a legal non-confirming site would likely fall within the exception permitted in the Government Code (I helped write this section of the California Government Code...call me...I'll tell you more).

If you face granting a mandatory collocation on a wireless site that will term out, say, in 7 years, then you'll want to term-limit the collocation permit to expire at the same time as the underlying site permit. This will be especially important in legal non-confirming settings.

I'm sure that some governments will use the enactment of Sec. 6409 to justify adopting a siting moratorium. It may well be justified given the potentially drastic impacts the new law will have on a major sector of wireless siting. We'll have to wait and see.

### *Recommendations to the Industry*

Congratulations industry, you've earned a well-funded victory at Congress!

Now, don't overstate the scope of your new rights when dealing with governments.

Please don't say that diesel generators to provide standby power are somehow "transmission equipment." It won't fly, and you won't get points for creativity, either.

Don't make hollow threats of law suits, especially over technicalities such as trying to torture and graft favorable current meanings from ordinance terms created years ago for a substantially different purpose. You'll find enough legitimate bad-actor cases to develop case law that will rationally guide governments...and carriers...how to use the new law as a surgical tool where truly needed, rather than a blunt force instrument to inflict trauma simply for trauma's sake.

Remember that governments may consider using your blunt force instrument threats to justify a siting moratorium for up to a year, or even longer. Is that what you really want?

Work with governments to ease into this paradigm shift. You'll both be happier, even if the public won't be.

*Please (don't) let the games begin.*

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About the author:

Jonathan Kramer is a California-based radio frequency engineer, wireless siting advisor, and an attorney working primarily on behalf of local governments and wireless site landlords around the U.S. Jonathan notes that the opinions expressed in this article are his own, and do not necessarily reflect those of any of his clients, friends or foes. Kramer's main website is [TelecomLawFirm.com](http://TelecomLawFirm.com).

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« [TriStar Investors \(a.k.a. "David"\) v. American Tower \(a.k.a. "Goliath"\)](#)

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**3 comments to Congress Gifts Wireless Industry with By-Right Collocation... Or Does It?**



Jody Schmidt  
March 24, 2012 at 8:57 pm

I believe Congress will grant the FCC authority to interpret this section which will lead to a declaratory ruling or clarification, relying upon the National Collocation Programmatic Agreement, or similar, for definitions of terminology, as well as upon the comments in the Congressional Record: Extension of Remarks in order to determine legislative intent.

The Extension of Remarks by Fred Upton reads:

"Section 6409. This section streamlines the process for siting of wireless facilities by preempting the ability of State and local authorities to delay collocation of, removal of, and replacement of wireless transmission equipment."

Note the generality of this accepted source of Secondary Authority. It refers to 'wireless transmission equipment'. This will help guide the FCC.

Once the FCC assesses these comments as well as the law itself, they will rightly conclude and rule that it was intended to apply to all existing wireless facilities.

And, come on, China is breathing down our necks. Local governments have become the worst drag on this country of any institution. Imagine if there were such restrictions to the development of railroads, highways and power lines in the late 19th to early 20th century? Wireless is technically a private industry, so this rampant abuse of power by local governments has persisted long past usefulness, and has helped contribute to a lagging wireless infrastructure in the United States and, thus, a weaker economy and possibly less effective protective network.

I actually perform regulatory assessments and have to comb through local and state codes and interpret their wireless provisions for cellular carriers, so I will probably be out a job once this law gains traction, but I still cheered cause this is what is right for the progress of America.

JS



Jonathan Kramer

March 25, 2012 at 9:43 am

Jody, you said:

I believe Congress will grant the FCC authority to interpret this section which will lead to a declaratory ruling or clarification, relying upon the National Collocation Programmatic Agreement, or similar, for definitions of terminology, as well as upon the comments in the Congressional Record: Extension of Remarks in order to determine legislative intent.

The Extension of Remarks by Fred Upton reads:

"Section 6409. This section streamlines the process for siting of wireless facilities by preempting the ability of State and local authorities to delay collocation of, removal of, and replacement of wireless transmission equipment."

I would not be surprised if you're right about the FCC weighing in on definitions. It does not need congressional authority to do so (see, for example, the Shot Clock).

As for Sen. Upton's extended remarks, which occurred after the Act was passed, there are some problems actually created by the exact words he used. To the extent that a post-passage extended remark is give weight as legislative intent, his comments will cut both ways.

Once the FCC assesses these comments as well as the law itself, they will rightly conclude and rule that it was intended to apply to all existing wireless facilities.

That may be the case, but I suspect that for the industry to get this law to where it wants its be, there will be a number of court cases and FCC actions.

And of course we're all waiting to see whether there's another shoe to drop, which would preempt all local control over new site placement.

Your comment,

"Wireless is technically a private industry, so this rampant abuse of power by local governments has persisted long past usefulness, and has helped contribute to a lagging wireless infrastructure in the United States and, thus, a weaker economy and possibly less effective protective network.

is particularly telling. I agree that wireless is private, but Congress has given it extraordinary powers.

Anyway, thanks for a very interesting and thoughtful comment. I hope you don't lose your job!

Jonathan



Jody Schmidt

March 25, 2012 at 10:13 pm

Ha! Thanks. I hope so as well, and I probably seemed like a zealot, which I don't think I am. I was just channeling an unfiltered emotional response at the time. And, although my true viewpoint isn't as extreme as the above stream of consciousness, I still think the zoning/regulatory/permitting hurdles to existing site development are out of control.

And, I definitely don't think new site installation should be preempted. Then, pristine wilderness will be at risk, among other historic and scenic treasures. Just the ones that exist now. Let them be turned into Skynet-like monstrosities. They are finite in number. Guess it's the small price for the global village.

Thanks for kindly replying and have a great week!

JS

« [TriStar Investors \(a.k.a. "David"\) v. American Tower \(a.k.a. "Goliath"\)](#) »

[As LightSquared Fades, What of Sprint?](#) »

## Sec. 38-59 Antenna, Towers, Communication Structures, and Other Vertical Structures

### A. PURPOSE:

The purpose of this section of the Zoning Code is to address the placement, height, and other restrictions related to all types of communication structures, including antennas, towers, and other vertical structures not related to communications. This section also addresses the urban design criteria, special use permit and variance processes, and non-conforming issues for the same structures. This article is intended to address the public health, safety, and general welfare associated with such structures, in accordance with the Comprehensive Plan and other sections of this Code.

### B. DEFINITIONS:

*Antennas:* Any structure that radiates or receives radio or other communication signals.

*Collocation:* The physical attachment and/or placement of one communication structure upon another communication structure, and may include placing different or similar communication structures on the receiving structure. For example, a cellular transmitter being placed on a television receiver tower or a cellular transmitter on another cellular transmitter tower.

*Communication Structures:* Any structure, including antennas and satellite service devices, or any other device which is normally used for radio, television, microwave, or wireless communications. This shall include any device that is attached to a new or an existing tower, or attached to a building facade or roof or other non-communication structure, and such attachment is made to the facade or roof vertically, horizontally and/or diagonally.

*Facial Mount:* The physical attachment of a communication structure to a building or other non-communication structure, which does not substantially increase the height of the building or structure. Examples of other structures include, but are not limited to: freestanding signs and billboards, stadium lights, gas station canopies, electric poles, area and street lights, and church spires. This can include attaching the structure either vertically, horizontally, or diagonally along the structure's building facade, facades, walls, roofs, or other surfaces.

*Satellite Service Device (SSD):* Any structure used to receive satellite programming services specifically associated with television reception from the transmission of signals from a satellite to a receiver, usually a round "dish" that can vary in size. This does not include those dishes or devices used for two-way communications.

*Tower:* Any structure, vertical in inclination, which is normally used to support antenna or other communication structures. This may include television and radio towers, guy towers, and all other free standing towers, either for private or commercial purposes.

*Vertical Structure:* Any built object that is either independent of or attached to any building that is perpendicular in its direction to the nearest adjacent ground. May include such structures as spires, belfries, flag poles, steeples, and other similar structures, but does not include antennas, towers, communication structures, and satellite service devices.

*Commercial Purposes:* Structure used by any individual, firm, organization, or company, through leases for profit or any privilege granted to any other individual(s), firm, organization, or company for any type of communication service. This includes those non-profit agencies that provide such communication service to other users and not for the non-profit agencies' sole use. Home Occupations whose primary function is the leasing of communication service space on communication or other structures, permanent or portable, are considered commercial purposes.

*Private Purposes:* Structure owned by any individual, firm, organization, company, or an amateur radio operator as licensed by the FCC, not using the structure for profit as part of its communication needs. This includes any structure used by any local, state, or federal entity for the communication needs and functions of that entity, as authorized.

C. GENERAL STANDARDS AND CONSTRUCTION PROVISIONS:

1. All structure heights shall be measured from the lowest adjacent ground level vertically to the highest point of all structures, whether attached to the ground, the building, or other structure(s).
2. All structures shall be constructed and installed to manufacturer's specification, and constructed to withstand a minimum 75 mile per hour (mph) wind, or the minimum wind speed as required by the City's adopted Uniform Building Code, as amended, and required setback provisions as prescribed for the zoning districts below.
3. Structures shall be permitted and constructed to meet current, adopted City of Las Cruces Building Code requirements.
4. All structures shall conform to Federal Communication Commission and/or Federal Aviation Administration regulations, if applicable.
5. Any setback or bufferyard as prescribed within Matrix 1 of this Code that requires a greater distance than required of this Section, the greater setback shall apply.
6. Any increase to the height of or a reduction to the setbacks for private purposes in any residential zoning district require the approval of a variance by the Planning and Zoning Commission, and not a special use permit.
7. Business registrations are required for each communication structure for commercial purposes located inside the City Limits of Las Cruces, regardless whether said structure is freestanding, collocated, facial or roof mounted, or part of an integrated structure or improvement.
8. Abandonment or cessation of use of the communication structure shall require the removal of all facilities associated with the communication structure from the subject property within six months after the abandonment or cessation of use. Foundations for such structures should be altered or removed in order to be visually appealing and safe.

D. COLLOCATION, FACIAL & ROOF MOUNT, AND INTEGRATED COMMUNICATION STRUCTURES PROVISIONS:

Co-locating, facial and roof mounting, or constructing integrated improvements in which communication structures are disguised or made part of a new building or structure, is required for all commercial use communication structures in all zoning districts, historic districts, historic properties, and within 200 feet of historic districts or properties unless evidence is provided that clearly indicates that co-locating, facial or roof mounting, or improvement integration cannot and should not occur. Evidence, may include, but is not limited to, that no other structure suitable for collocation, mounting, or improvement integration exists:

- 1) within a 1 mile radius to meet the applicant's engineering requirements or structural strength or space availability needs for all improvements;
- 2) in which unavoidable electromagnetic interference would occur between the new and any existing communication structures;
- 3) in which other factors render the use of existing structures unsuitable;
- 4) in which urban design features and aesthetic views would be hampered, beyond the objectives desired with the creation of this requirement, of existing natural and man-made structures;
- 5) whose owners of existing structures would not allow the placement of the applicant's structure or such owners are requiring payments thereof that substantially exceed commercially reasonable rates; and
- 6) cases in which violations of this Code would be created.

Such evidence shall be presented to the Community Development Department for review and approval by the Community Development Director or designee. Such proof may be required as part of the special use permit and/or building permit approval processes, and only then shall an independent, freestanding communication structure be allowed in accordance with other requirements of this Code.

1. Collocation of structures shall be in accordance with the following provisions:
  - a. Height limit exceptions for collocation only:
    - 1) If the height of the receiving structure exceeds the maximum height permitted for that type of structure in the parcel's zoning district, then the receiving structure shall be granted a legal-nonconforming use certificate and the collocation of the new communication structure shall be allowed by right provided that the addition of the new structure does not increase the height of the receiving structure.
    - 2) If the height of the receiving structure meets or is below the maximum height permitted for that type of structure in the parcel's zoning district, collocation of the new communication structure shall be allowed by right provided that the addition of the new structure does not increase the height by more than 20 feet above the maximum

height allowed for that zoning. If the collocation of the new structure will exceed the 20 feet height limit above the maximum allowed height, then applying for, complying with, and receiving approval of a special use permit shall be required.

- b. If the receiving structure has previously received a special use permit for its use and placement, including necessary variances for height and setbacks, the original special use permit does not need to be amended provided all requirements of the original special use permit have been met, including landscaping and screening, and that all height and setback increases are in accordance with limits prescribed within items "a" and "b" above.
    - 1) Technical engineering information will need to be submitted with the building permit application indicating compliance with the building codes and structural provisions to ensure that the receiving structure can support the new communication structure.
    - 2) Additional buildings and/or additions to existing equipment and accessory buildings for towers will require compliance to architectural and urban design criteria and must be reflected on necessary special use permits, if applicable. If not reflected on special use permits, amendment provisions must be followed in accordance with the Special Use Permit section of this Code.
  - c. An unlimited number of communication structures may be placed on an existing tower and/or other communication structure, provided all other requirements are met, including building codes and urban design criteria.
2. Facial and roof mount placement of structures can be utilized on existing building and structures, not including other communication structures, provided that the addition of the communication structure does not: (1) exceed the maximum height allowed for the receiving structure and/or building, (2) violate setbacks required for that type of structure in that parcel's specific zoning district, and (3) encroach on required setbacks and/or bufferyards from adjacent land uses and zoning districts. Additionally, the proposed communication structure shall be compatible with the integrity and style of architecture of the receiving building and/or structure.

Facial and roof mounting of structures shall be in accordance with the following provisions:

- a. Facial and roof mounts must be securely mounted to the structure with approved fasteners in accordance with the current Building Code, as amended, or other accepted engineering practices for such attachments.
- b. If not governed specifically by this Section of the Zoning Code, the building or structure receiving the facial mount communication structure must comply with all applicable Zoning and Building Code provisions, if applicable, or other City ordinances and/or State laws related to their placement, use, and construction.

- c. All facial mounts must be an integrated architectural design feature and painted or textured such a color as to blend in with their visual background.
- d. When roof mounts are used, at a minimum, the first five feet of the communication structure shall be screened from view on all sides through the use of building design elements, such as varied roof heights and/or parapets.
- e. Facial mounts cannot project more than three feet from the surface of the facade of the building and the projection cannot violate any of the normally required building setbacks and/or bufferyards. Structures that are attached parallel to a pitch roof surface cannot project more than 3' above the surface of such roof.  
EXCEPTION: This does not apply to roof top mounted structures that vertically ascend upward from a flat roof or structures placed at the apex of pitched roofs.
- f. All facial mount communication structures must maintain a minimum clearance of eight feet above the nearest adjacent ground and/or walking surface.
- g. There shall be no limit on number of facial and roof mount structures, except in items h. and i. below, in any zoning district provided the structure is compatible with and integrated to the architecture of the receiving structure and can be demonstrated in plans to be submitted to the Community Development Department for review and approval.
- h. In the UAC and ADM Overlay Zones, the number of structures is limited to one (1) facial mounted structure only, and such structure shall be in accordance with design criteria and approval processes for the specific overlay zone and no other communication structure, either for private or commercial purposes, is located on the same parcel. In all R-1, R-2, R-3 and Rural Residential Zoning Districts, the number of commercial communication structures is limited to either one (1) facial mounted structure or one (1) roof mounted structure.
- i. In the West Mesa Industrial Park Overlay Zone, the number of structures is limited to one (1) facial mount and one (1) roof mounted structure, in addition to one structure for use by the property owners, and in accordance with design criteria and approval processes for this zone.

3. The placement of communication structures, for commercial purposes, as an integral part of a building, new, existing, or with improvements, is intended to provide more options for the placement and use of communication structures while integrating or concealing the communication structure into an improvement. This option may be used on privately or City-owned property that furthers the needs of both the community and the communication company.

- a. Communication structures integrated into public facilities shall be in accordance with the following provisions:

Approval for such facilities shall occur as an agreement between the communication provider and the City of Las Cruces City Council. Such

agreement shall serve as a lease to the specific property with clarification as to the type of facility, its use, access to the site, and maintenance provisions.

The City shall expect clear indication to the placement of the communication structure(s) within the public facility or improvement, terms for abandonment of the facility, and other minimum guarantees to protect the public health, safety, and welfare. Nothing within the agreement shall mandate the City's acceptance of the proposal and to allow the use of the public facility or to make improvement to allow the accommodation of a private or commercial communication structure(s).

All such proposals shall be submitted to the City's Property Manager or designee for review and recommendation to the City Council for review and approval. The Property Manager shall submit the request for review and comments to the Community Development Department, at a minimum, and other City departments, staff, and boards, as the Manager determines to be appropriate for review. Such reviews shall be to determine the impacts, if any, on the proposal as it relates to City use and functions of the existing public facility and the facility after the integration of a communication structure, with or without improvement to the public facility. The use of this section shall allow for the violation of standards and requirements for communication structures as allowed within the zoning district in which the public property is located.

- b. Communication structures integrated into private facilities shall be in accordance with the following provisions:

Approval for such facilities shall occur as part of a master plan or site plan approval process. The master plan or site plan approval process shall outline a clear indication to the placement of the communication structure(s) within a facility or improvement, terms for abandonment of the facility, and other minimum guarantees to protect the public health, safety, and welfare.

All such master plans and site plans shall be submitted to the Community Development Department for review and recommendation to the Planning and Zoning Commission for review and approval. Through the master plan or site plan approval process, this section shall allow for the violation of standards and requirements for communication structures as required within the zoning district in which the private property is located, provided that the integrated facility provides an aesthetic benefit to the community versus that of nonintegrated or freestanding communication structures.

- c. Examples of communication structures integrated and/or concealed into public or private facilities include but are not limited to:

- 1) Flagpoles,
- 2) Spires, bell towers, and other architectural features added to

- buildings,
- 3) Integrated communication structures on utility substations, buildings and water tanks,
- 4) Extensions of communication antennas to existing lighting poles at sports facilities, and
- 5) Any other proposed communication structure that is integrated and/or concealed within a building or structure and is approved in accordance with the provisions of this section.

E. URBAN DESIGN CRITERIA - ALL COMMUNICATION STRUCTURES:

1. General Provisions:

- a. Building architecture, not including the tower, shall be consistent with surrounding structures in both style and construction material.
- b. Access to all communication structures and associated buildings on the property shall be shown on the site plan as part of special use or building permit approval processes.
- c. No chain link fencing around any communication structures is allowed along arterial or collector streets.

2. Commercial Provisions:

- a. If a tower site or any other communication structure for commercial purposes is being built, it must conform to all City design standards, including landscaping as required within this Code and other City Codes.
- b. Opaque buffers are required for any freestanding tower, antenna, and other communication structure, and associated equipment buildings adjacent to single family residential zones unless there is no reasonable expectation that the adjacent property will be used for single-family residential purposes.
- c. Semi-opaque buffers are required for any freestanding tower, antenna, and other communication structure, and associated equipment buildings adjacent to all other residential zoning districts and the office zones unless there is no reasonable expectation that the adjacent property will be used for residential zoning district or office zoning district purposes.
- d. Equipment buildings associated with communication structures shall follow an architectural style, construction materials, and colors similar to existing buildings within the neighborhood; i.e. building facades for tower accessory buildings and the first twenty (20) feet of towers shall be painted earth-tones or similar colors to existing structures within the neighborhood and constructed of similar building materials.
- e. On-site driving aisle and parking stalls shall be required for all commercial communication structures. Driving aisles shall be at least 12' in width and

such length to provide access to the nearest public street or paved right-of-way. At least one parking stall shall be provided on the site and shall be 12' in width and 19' in length. Paved connection between the driving aisle and parking stall shall be provided.

- f. Antennas or other radiating/receiving devices are not required to have architectural treatments or other design features, such as painting and texturing, applied as required within this Code, as such treatments would interfere with the operation of the device. Such treatments are required of the supporting structure, including towers, and not the radiating/receiving device.

3. Residential Provisions:

- a. All private communication structures on residentially zoned property are encouraged to either be painted or treated the same color as the primary structure or the surface in which the structure is attached. This includes painting or screening roof-mounted communication structures.
- b. Screening and/or painting of roof-mounted structures is encouraged on all sides the residential property in which a communication structure is to be or is placed.

F. PLACEMENT PROVISIONS - Freestanding Communication Structures and other Vertical Structures.

TABLE 38-59-1: MAXIMUM PERMITTED HEIGHTS:

Zoning District	Towers	Other Communication Structures
FC	Prohibited	Prohibited
H, EE, RE, REM, R-1c, R-1a, R-1b, R-1cM, R-1aM, R-1bM, R-2, R-3, R-4, O-1, O-2, CBD	65' For Non-Commercial Use Only**	65' For Non-Commercial Use Only**
C-1, C-2, C-3	65'	65'
M-T, M1/M2, M-3	200'	200'
UAC, ADM*	Maximum Building Height and Non-Commercial Use Only	Maximum Building Height and Non-Commercial Use Only
WMIP	Limited Placement @ 65'	Maximum Building Height

\* Towers and communication structures are permitted for private purposes provided the structure is placed to the rear of the primary structure and is approved in accordance with the Overlay Zone for the University Avenue Corridor or the Avenida de Mesilla Corridor. Structures for commercial uses are prohibited within these Overlay Zones.

\*\* Structures for commercial purposes will be permitted only in accordance with facial and roof mount, improvement integration, and urban design provisions of this Section.

1. Towers and other Communication Structures, and Satellite Service Devices in Residential Zoning Districts (H, EE, RE, REM, R-1c, R-1a, R-1b, R-1cM, R-1aM, R-1bM, R-2, R-3, R-4, O-1, O-2, CBD, UAC, ADM, WMIP).
  - a. Setbacks: Structure shall be placed within the primary buildable area for the parcel's specific zoning district and must be to the side and/or rear of any and all residential dwelling structures (e.g., house, apartment, duplex, triplex, quadplex, townhouse, etc). Private communication structures in these zones may pursue a variance from the Planning and Zoning Commission for increases in height and reductions in required setbacks.
  - b. Structures for commercial purposes shall be permitted only in accordance with facial and roof mount, improvement integration, and urban design provisions of this Section.
  
2. Towers and other Communication Structures in the Commercial Zoning Districts (C-1/C-2/C-3).
  - a. Setbacks for antennas, communication structures, and satellite service devices:
    - 1) Structure shall be placed within the primary buildable area for the parcel's specific zoning district and must be to the side and/or rear of the primary building structure. If the antenna, communication structure, or satellite service device is the primary structure or use of the property, then such structure shall be within the primary buildable area, including all equipment buildings.
    - 2) Structures shall be set back at least one foot for each one foot in height from any residential dwelling structure on any adjacent parcel.
    - 3) Equipment and accessory buildings shall conform to building and accessory building maximum heights and minimum setbacks for the parcel's specific zoning district.
  
  - b. Setbacks and placement restriction for towers:
    - 1) Structure shall be placed within the primary buildable area for the parcel's specific zoning district and must be to the rear of the primary building structure. If there is no primary building, then the tower must be within the primary buildable area.
    - 2) Towers shall also be set back one foot for each one foot in height plus 10% of the total height from any residential use on any adjacent or the same parcel.

- 3) Towers shall not be constructed on lots adjacent to property zoned R-1c, R-1a, R-1b, R-1cM, R-1aM, R-1bM, unless approved through the special use permit process. A special use permit may be granted to permit such towers adjacent to R-1c, R-1a, R-1b, R-1cM, R-1aM, R-1bM zoned property.
- 4) A special use permit may be granted to permit tower height greater than what is allowed. The special use permit process shall be used to determine tower height greater than what is allowed. The special use permit process shall also be used for any variances related to setbacks and/or bufferyards.

4. Towers and other Communication Structures in Industrial Zoning Districts (M1/M2, or M-3).

a. Setbacks for antennas, communication structures, and satellite service devices:

- 1) Structure shall be placed within the primary buildable area for the parcel's specific zoning district and must be to the side and/or rear of the primary building structure. If the antenna, communication structure, and satellite service device is the primary structure or use of the property, then such structure shall be within the primary buildable area, including all equipment buildings.
- 2) Structures shall be set back at least one foot for each one foot in height from any residential dwelling structure on any adjacent parcel.
- 3) Equipment and accessory buildings shall conform to building and accessory building maximum heights and minimum setbacks for the parcel's specific zoning district.

b. Setbacks and placement restrictions for towers:

- 1) Structure shall be placed within the primary buildable area for the parcel's specific zoning district and must be to the rear of the primary building structure. If the tower shall be the only or primary structure on the parcel, the tower must be within the primary buildable area or setbacks.
- 2) Towers shall be set back one foot for each one foot in height plus 10% of the total height from any residential zone and/or use.
- 3) Towers shall not be constructed on lots adjacent to property zoned R-1c, R-1a, R-1b, R-1cM, R-1aM, R-1bM, unless approved through the special use permit process. A special use permit may be granted to permit such towers for commercial purposes adjacent to R-1c, R-1a, R-1b, R-1cM, R-1aM, R-1bM zoned property.
- 4) A special use permit may be granted to permit tower height greater than what is allowed. The special use permit process shall be used to determine tower height greater than what is allowed. The special use permit process shall also

be used for any variances related to setbacks and/or bufferyards.

5. Towers and other Communication Structures located in Historic Districts or on Historic Properties and all properties within 200 feet of a Historic District or Property. The 200 foot distance is based on minimal property notification requirements for this Code and the maximum height allowed for any tower without a special use permit. Historic District or Properties include any district or property listed or identified on any of the National, State, or Local Register of Historic Places, if any.
  - a. All Communication structures, not including towers:
    - 1) All structures, not including towers, shall not exceed 65 feet if located in a Historic District or on a Historic Property. Any request for these structures to exceed the maximum building height shall require a special use permit.
    - 2) These structures shall follow placement and setback provisions for the zoning district for the specific type of structure.
  - b. Placement restriction for towers:
    - 1) Towers shall not be permitted unless located within the C-3, M1/M2, or M-3 zoning district.
    - 2) Within Historic Districts or on Historic Properties:
      - a) Towers shall not exceed 65 feet in height.
      - b) Any tower height greater than 65 feet shall require a special use permit and the maximum tower height shall be determined as part of the special use permit process.
      - c) No tower shall exceed 200' if located in a Historic District or on Historic Property. Moreover, the special use permit process cannot be used to obtain a tower height variance greater than 200'.
    - 3) Within 200' of a Historic District or Property:
      - a) Towers shall not exceed 65 feet in height.
      - b) Any tower height greater than 65 feet shall require a special use permit and the maximum tower height shall be determined as part of the special use permit process.
    - 4) These structures shall follow placement and setback provisions for the zoning district for the specific type of structure.
6. Special Use Provisions for all commercial Communication Structures. All special use permit requests for any type of commercial communication structure shall follow submittal requirements as required within the Special Use Section of this Code, including the established fee and within the established submittal deadlines. Additional provisions for all commercial Communication Structures:

- a. A complete description of the commercial communication service to be provided or received and the proposed service area for commercial purposes.
  - b. A technical analysis prepared by a professional engineer for the proposed site. The analysis shall include:
    - 1) A comprehensive statement and justification for the proposed structure location and site.
    - 2) A communication coverage pattern calculation for the proposed structure location at:
      - a) the maximum height allowed for the respective zoning district for the site.
      - b) the proposed height,
      - c) at a mid-point height between the proposed height and the maximum height allowed for the zoning district of the site.
    - 3) Analytical evidence demonstrating that no other location or height exists to provide the commercial communication service including cellular or similar communication service.
  - c. As part of the review of the special use permit application for commercial Communication Structures, the applicant is required to pay the established special use permit fee and all expenses associated with the City hiring a qualified expert to review and provide written recommendation to the Planning and Zoning Commission of the technical information submitted as part of the application.
7. Vertical Structures in all Zoning Districts, not including communication structures.
- a. Height: The height of such structures shall be limited to 10' above the maximum building height.
  - b. All such structures shall be placed within the primary buildable area and all such freestanding structures shall be set back one foot for each one foot in height from any residential use or building on any adjacent property. All structures attached to or mounted on building or other structure shall meet the setback and placement provisions for the building or other structure.
  - c. Increases in heights and/or reductions to minimum setbacks for non-communication, vertical structures shall require the approval of a variance by the Planning and Zoning Commission.

G. FLEXIBLE DEVELOPMENT STANDARDS:

See Section 38-56. Deviating from specific development requirements may not be permitted in the event that a special use permit is required or approval of a variance by the Planning and Zoning Commission as referenced in this Section.