IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico
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No. A-1-CA-42000

CITY OF SANTA FE,

Petitioner-Appellee,

v.

ALBERT CATANACH; INFINITE INTERESTS ENT., LLC; and CNSP, INC. d/b/a NMSURF,

Respondents-Appellants.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Bryan Biedscheid, District Court Judge

Erin K. McSherry, City Attorney
Marcos D. Martinez, Senior Assistant City Attorney
Santa Fe, NM

for Appellee

Catron, Catron & Glassman, P.A.
Richard S. Glassman
Santa Fe, NM

for Appellants

OPINION

WRAY, Judge.

{1} In this second appeal, we consider whether the City of Santa Fe (the City) complied with 47 U.S.C. § 332,[1] a federal law that imposes substantive and procedural limitations on the authority of state and local governments (localities) to regulate telecommunications facilities. *See Preferred Sites, LLC v. Troup Cnty.*, 296 F.3d 1210, 1214-15 (11th Cir. 2002). In the first appeal, this Court determined that the City adequately informed Albert Catanach, Infinite Interests ENT., LLC, and CNSP, Inc., d/b/a NMSURF (collectively, Applicant) that the submitted telecommunications facility request would not be considered on an expedited basis under a different federal provision, 47 U.S.C. § 1455 (referred to as Section 6409). *See City of Santa Fe v. Catanach*, 2023-NMCA-017, ¶ 26, 525 P.3d 419. Because the district court had not determined whether the City complied with the requirements of Section 332, we remanded for that question to be decided in the first instance. *See Catanach*, 2023-NMCA-017, ¶ 32. The district court determined that the City complied with Section 332, and Applicant appeals. We affirm.

[1]We refer to 47 U.S.C. § 332 in text as Section 332 and by its full citation when referencing specific provisions.

BACKGROUND

{2} Because the facts were summarized in detail in *Catanach*, 2023-NMCA-017, ¶¶ 2-18, we provide only those facts necessary to understand the issues presented in this second appeal. City ordinances contemplate different types of review for proposed telecommunications towers, depending on the circumstances: building permits, administrative approval, and/or review by, at minimum, the planning commission. *See* Santa Fe, N.M., Code of Ordinances (SF Code) ch. 14, art. 14-6, § 14-6.2(E)(2)(b)(viii), (c) (2025)[2] (excluding from the planning commission review of the types of activities governed by Section 6409 but nevertheless subjecting those requests to the requirements of the building code), SF Code ch. 14, art. 14-6, § 14-6.2(E)(3) (2025) (describing administrative approval), SF Code ch. 14, art. 14-6, § 14-6.2(E)(4) (2025) (describing the process in the planning commission and before other boards, if necessary). On April 9, 2015, Applicant sought "administrative approval" from the City "to collocate and consolidate" two existing telecommunications towers, while also acknowledging that "a new tower would need to be built." In the request, Applicant cited the City administrative approval process as well as Section 6409, which requires an "expedited review process" for certain types of telecommunications requests, including collocations. *See Catanach*,

[2]The parties do not alert this Court to any relevant substantive changes to the SF Code in the years that have elapsed since Applicant made the initial request, and so we cite to the current SF Code.

2023-NMCA-017, ¶ 4 (describing the Section 6409 process). As we explained in *Catanach*, if Section 6409 applied, the City was required to act on a request within a particular time period or the request would be "deemed granted." *Catanach*, 2023-NMCA-017, ¶ 5 (internal quotation marks and citation omitted).

{3} The land use department responded (the Esquibel Letter) on April 28, 2015 and informed Applicant that because the request required construction of a new tower and a setback waiver was required, the authority to review the request "shift[ed] . . . to the [p]lanning [c]ommission." The Esquibel Letter provided a contact phone number and information to allow Applicant to arrange for the required planning commission procedures. In Applicant's first appeal, this Court affirmed the district court's conclusion that the Esquibel Letter notified Applicant that the expedited Section 6409 process would not apply because the request was for a new construction, not a modification. *Catanach*, 2023-NMCA-017, ¶¶ 24-26. Nevertheless, this Court did not agree "that the City's compliance with Section 6409 and its time frames also satisfied the requirements of Section 332." *Catanach*, 2023-NMCA-017, ¶ 30.

{4} As a result, the matter was remanded for the district court to "consider and resolve the Section 332 arguments that the parties have raised on appeal." *Catanach*, 2023-NMCA-017, ¶ 32. Section 332 contains substantive and procedural requirements for handling telecommunications facilities requests that are imposed

on localities by federal law. The dispute in the present case is centered on the procedural requirements. Under Section 332, decisions on such applications must be "in writing and supported by substantial evidence contained in a written record," 47 U.S.C. § 332(c)(7)(B)(iii), and actions must be taken "within a reasonable period of time after the request is duly filed," accounting for "the nature and scope of such request," 47 U.S.C. § 332(c)(7)(B)(ii). In the present case, the relevant "shot clock," or the presumptively reasonable time for the City to "act" to satisfy 47 U.S.C. § (c)(7)(B)(ii), is 150 days. *See In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review & to Preempt Under Section 253 State & Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance* (*Reasonable Period of Time Ruling*), 24 FCC Rcd. 13994, ¶¶ 32, 42, 44-45 (2009). Even though the shot clock is "presumptively reasonable," localities may establish that any delay "was reasonable despite its failure to comply" with the shot clock. *See City of Arlington v. FCC*, 668 F.3d 229, 236, 257 (5th Cir. 2012).

{5} On remand, the district court concluded that the Esquibel Letter was a sufficient denial under Section 332 and in the alternative, "that the course of conduct of the [p]arties reflected in the pleadings and exhibits submitted to the [c]ourt demonstrates that the City acted in a reasonable manner." For these reasons, the district court denied Applicant's request for a ruling to order the City to issue a

permit and accepted the City's invitation to remand the matter to the City "to process the Applicant's application according to the City's [o]rdinances governing telecommunication facilities applications and any required [p]lanning [c]omission approval." Applicant appeals.

DISCUSSION

{6} The parties dispute whether (1) the Esquibel Letter satisfied the City's obligations under Section 332; (2) any delay by the City was reasonable under the circumstances; (3) Applicant waived the right to enforce Section 332; and (4) the district court properly adopted the City's proposal to remand the matter to the City to process the application. The City's waiver argument implicates jurisdictional questions, which we are bound to address. *See Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 10, 142 N.M. 786, 171 P.3d 300 ("The question of jurisdiction compels an answer." (alteration, internal quotation marks, and citation omitted)). Our analysis of the first two issues, however, provides necessary context for our conclusion that Applicant satisfied any jurisdictional requirements. We therefore begin with the parties' arguments related to the City's compliance with Section 332.

I. The Esquibel Letter

{7} The City maintains that the Esquibel Letter was a Section 332 denial because the Esquibel Letter "reasonably notified [Applicant] that there were missing elements to its application" and the reasons for denial were identifiable. The

difficulty with the City's argument is that the Esquibel Letter does not explicitly deny anything, other than an expedited review process. The Esquibel Letter explains that Applicant's plans to construct a new tower did not comply with the City's requirements for distance between the property lines in relation to the height of the proposed tower—the setback requirement. For that reason, administrative review was not appropriate and "the authority of review" under SF Code ch. 14, art. 14-6, § 14-6.2(E)(3) shifted to the planning commission. The Esquibel Letter denied administrative—or expedited—review, but otherwise only provided contact information to set up meetings for the planning commission process.

{8} The denial of a particular process is not necessarily a denial of a request. The City permissibly required Applicant to proceed through the planning commission. *See* 47 U.S.C. § 332(c)(7)(A) ("[N]othing in this chapter shall limit or affect the authority of a [s]tate or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities."). But localities must "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time." 47 U.S.C. § 332(c)(7)(B)(ii). It is the request for authorization—not the request for the process—that must be resolved within a reasonable time. *See New Cingular Wireless PCS, LLC v. Town of Stoddard* (*Town of Stoddard*), 853 F. Supp. 2d 198, 203 (D.N.H. 2012) (explaining that the Section 332 shot clock "contemplates

not just that a local government will take some action on an application within the deadline, but that it will *resolve* the application before the deadline" (alteration, internal quotation marks, and citation omitted)); *T-Mobile Cent., LLC v. Unified Gov't of Wyandotte Cnty.*, 546 F.3d 1299, 1306 (10th Cir. 2008) (observing that Congress furthered its goals with Section 332 by "reducing the impediments that local governments could impose to defeat or delay the installation of wireless communications facilities"). Thus, to be a denial under Section 332, the requested authorization "to place, construct, or modify personal wireless service facilities" must be denied. 47 U.S.C. § 332(c)(7)(B)(ii). The City denied Applicant's request for expedited review. But the City, through the Esquibel Letter, did not deny the substantive request contemplated by Section 332, which was the request for permission to collocate or consolidate the telecommunications towers.

{9} For similar reasons, we are unpersuaded by the City's argument that the Esquibel Letter satisfied the requirements for a Section 332 denial because the reasons for denial were identifiable. For support, the City cites *T-Mobile S., LLC v. City of Roswell* (*City of Roswell*), 574 U.S. 293 (2015). The question for the *City of Roswell* Court was "whether, and in what form, localities must provide reasons when they deny telecommunication companies' applications to construct cell phone towers." *Id.* at 295. The Court determined that localities must give reasons for a denial in writing and those reasons must be "clear enough to enable [the] judicial

review" that Section 332 contemplates. *See City of Roswell*, 574 U.S. at 302-03; *see also* 47 U.S.C. § 332(c)(7)(B)(v) (permitting "an action in any court of competent jurisdiction" by "[a]ny person adversely affected by any final action or failure to act by a [s]tate or local government . . . that is inconsistent with this subparagraph"). The underlying premise of the *City of Roswell* holding, however, is that the locality denied the request. 574 U.S. at 307-08. Based on that premise, the *City of Roswell* Court evaluated what was necessary to include in such a denial. *Id.* That premise does not exist in the present case, because the Esquibel Letter did not deny the request to approve the telecommunications tower.

{10} Instead, as we explained in *Catanach*, 2023-NMCA-017, ¶ 31, the Esquibel Letter denied Section 6409 review, which shifted the request from the Section 6409 timelines to the Section 332 shot clock. As a result, to meet the "presumptively reasonable" time frame, the City was required to resolve Applicant's request within 150 days of the Esquibel Letter. *See Catanach*, 2023-NMCA-017, ¶¶ 2, 31 (noting that "if the reviewing state or municipality finds that Section 6409(a) does not apply . . . the presumptively reasonable time frame under Section 332(c)(7) will start to run from the issuance of the state's or municipality's decision that Section 6409(a) does not apply" (alterations, internal quotation marks, and citation omitted)). The City points to a November 2015 letter, but that letter was also limited, as the City acknowledges, to denying expedited review. The record reveals no other timely

written denial of Applicant's request for approval (as opposed to expedited review), and the presumption therefore arises that the City violated the procedural requirements of Section 332. Our next question is therefore whether the City established "that its delay was reasonable despite its failure to comply" with Section 332's presumptively reasonable shot clock. *See City of Arlington*, 668 F.3d at 257 (explaining that localities may rebut the shot clock's presumption of reasonableness with evidence that the delay was reasonable).

II. The Evidence That the Delay Was Reasonable

{11} Applicant contends that because the Esquibel Letter is not a sufficient Section 332 denial and the City can point to no other written denial of the telecommunications request, the Section 332 shot clock expired and the remedy is an order for the City to issue a permit. The district court, however, found that under the circumstances, "the City acted in a reasonable manner" in its handling of Applicant's request and therefore denied the relief sought by Applicant. To evaluate Applicant's argument that this finding by the district court was not supported by the evidence, we turn to the record.

{12} After this Court's remand to the district court, the parties set forth the timeline of events, and our review of the record confirms the parties' assertions. On receiving the April 2015 Esquibel Letter, Applicant's counsel wrote to the City in May 2015 and challenged the City's determination that the planning commission process was

required. In September 2015, Applicant contacted the City again, this time to arrange for meetings to discuss Applicant's questions. The City and Applicant met in October 2015 "to start the process of obtaining a waiver." In November 2015, the City sent a second letter to Applicant, clarifying the basis for denying Section 6409 review. Applicant submitted an application to the planning commission in January 2016[3] and until April 2016, Applicant engaged in the planning commission process. But in April 2016, Applicant sent a letter that disagreed with the City's November 2015 analysis regarding Section 6409 and noted that the City had also not complied with the timelines in Section 332. For these reasons, Applicant informed the City that the application was considered to be "deemed granted" under Section 6409. *See* 47 C.F.R. § 1.6100(c)(4) (2021) ("In the event the reviewing [s]tate or local government fails to approve or deny a request seeking approval under this section within the time frame for review . . . the request shall be deemed granted."). By letter in May 2016, the City again rejected Applicant's reliance on Section 6409 but stated that "this does not mean your client cannot pursue this plan, it just means he has to go through a certain process." Applicant proceeded to build the proposed tower. In response, the City red-tagged the tower and sought an injunction.

[3]To the extent the City argues that the January application was a second request for Section 332 purposes, which restarted the shot clock, we disagree. The January 2016 application initiated a new City process but did not restart the Section 332 timelines, because Applicant's initial request for approval had not been resolved. *See Town of Stoddard*, 853 F. Supp. 2d at 203.

{13} Applicant does not contest the facts set forth in the record. Instead, Applicant argues that the district court did not explain "why the presumptively reasonable 150 days was not enough for the City." We disagree with Applicant's position that the City was required to produce evidence that "the City needed extra time to make a decision under Section 332." Instead, the City was only required "to introduce evidence demonstrating that its delay was reasonable," which the district court could then "weigh . . . against the length of the government's delay—as well as any other evidence of unreasonable delay that the wireless provider might submit—and determine whether the state or local government's actions were unreasonable under the circumstances." *See City of Arlington*, 668 F.3d at 257. As we explain, we conclude that the City's actions and the resulting delay were reasonable based on the chronological evidence of the delay, beginning with the Esquibel Letter. *See Catanach*, 2023-NMCA-017, ¶ 31 (observing that the Section 332 shot clock began to run with the Esquibel Letter).

{14} In the Esquibel Letter, the City informed Applicant that the planning commission proceedings were necessary and provided a phone number to get that process moving. Applicant initially challenged the City's determination about the applicability of Section 6409 but eventually reached out with "questions" regarding City ordinances. The Section 332 shot clock expired during this time frame, but Applicant had not made the phone call to arrange for review by the planning

commission. Neither party suggested an extension of time to the shot clock. *See Up State Tower Co., LLC v. Town of Southport*, 412 F. Supp. 3d 270, 291 (W.D.N.Y. 2019) (explaining that "a reasonable period of time may be extended beyond" the shot clock based on "*mutual consent* of the" applicant and the locality (internal quotation marks and citation omitted)). When the shot clock expired, the City could have denied the request or continued to work with Applicant to move the request along. *See id.* (noting that when the deadline approaches, a locality may (1) deny the request and risk a substantive Section 332 claim that substantial evidence does not support the denial or (2) allow the shot clock to run and risk a Section 332 claim that the procedural requirements were ignored).

{15} The City chose to work with Applicant. Applicant started the process of working to obtain a waiver at the end of October 2015 but did not submit the necessary application until January 2016. The necessary meetings were arranged for March 2016 but in late April 2016, Applicant reverted to its earlier position that Section 6409 controlled. Thus, while we agree with Applicant that on our record, the City did not resolve the request in the presumptively reasonable timeline, we also agree with the City that Applicant abandoned the request. Applicant informed the City that the ongoing Section 332 request was deemed granted under Section 6409 and built the tower, despite the City's attempts to bring Applicant back to the Section

332 process.[4] Those attempts continued from the May 2016 letter until the City red-tagged the tower and requested an injunction. We hold that the City's responses to Applicant's actions were not "unreasonable under the circumstances." *See City of Arlington*, 668 F.3d at 257.

III. Section 332 and Jurisdiction

{16} Having concluded that the Esquibel Letter was not a Section 332 denial and affirmed the district court's findings that the City acted reasonably, we consider the question of jurisdiction. *State ex rel. Overton v. N.M. State Tax Comm'n*, 1969-NMSC-140, ¶ 8, 81 N.M. 28, 462 P.2d 613 (cautioning that appellate courts "cannot ignore jurisdictional questions"). The City argues that Applicant waived any challenge to the City's compliance with Section 332, because Applicant did not file suit to enforce the shot clock under 47 U.S.C. § 332(c)(7)(B)(v) within thirty days of either the Esquibel Letter or the November 2015 Letter. The City couches this argument as "jurisdictional," based on the premise that the timeline in Section 332

[4]While Section 332 permits the shot clock to be extended if the locality requires more information to resolve a request, we do not consider whether the City's communications satisfied the requirements of Section 332 and tolled the shot clock. *See Catanach*, 2023-NMCA-017, ¶ 3 (describing the process and requirements for extending the Section 332 shot clock). Our record does not show that the City specifically asked for more information. The City instead requested the information that had already been provided in the form of a different application. Because we conclude that the City acted reasonably, we decline to parse the time frames to determine whether the time tolled sufficiently such that the period between the Esquibel Letter and Applicant's 2016 letter was equal to or less than the presumptively reasonable 150 days.

is a "condition precedent to enforce" the Section 332 protections. *See Wilson v. Denver*, 1998-NMSC-016, ¶¶ 9-10, 125 N.M. 308, 961 P.2d 153 (explaining that time limitations in statutes are jurisdictional when they "establish a condition precedent to the right to maintain the action" (internal quotation marks omitted)). Applicant responds that the Third Circuit Court of Appeals determined that 47 U.S.C. § 332(c)(7)(B)(v) is not jurisdictional and argues that we should follow suit. *See T-Mobile Ne., LLC v. City of Wilmington*, 913 F.3d 311, 326 (3rd Cir. 2019) ("Because the text and context of this statute, and historical treatment of timing requirements in similar statutes, do not reveal a clear intent from Congress to make the review provision's timing requirement jurisdictional, we conclude that it is not."). Neither party explains whether state or federal principles of statutory construction apply to construe this federal statute or why we should follow their preferred precedent. In any event, we conclude that if 47 U.S.C. § 332(c)(7)(B)(v) is jurisdictional, its conditions were met.[5]

{17} Under 47 U.S.C. § 332(c)(7)(B)(v), "[a]ny person adversely affected by any final action or failure to act by a [s]tate or local government or any instrumentality

[5]We note that we have not decided the merits in lieu of determining first whether jurisdiction existed. Our Supreme Court has prohibited this approach, even when the resolution of "a difficult jurisdictional question . . . would not alter the ultimate outcome of the case." *Smith*, 2007-NMSC-055, ¶¶ 9-10. Instead, we have evaluated the requirements of 47 U.S.C. § 332(c)(7)(B)(v) and concluded that if the time-to-file provision is jurisdictional, the facts of this case establish that Applicant satisfied any such requirement.

thereof that is inconsistent with this subparagraph may, *within* [*thirty*] *days after such action or failure to act*, commence an action in any court of competent jurisdiction." (Emphasis added.) Regardless of whether this provision is jurisdictional, the last event that could have triggered a thirty-day window to file suit under 47 U.S.C. § 332(c)(7)(B)(v) for the City's failure to act did not occur until the City red-tagged Applicant's constructed tower. *See Reasonable Period of Time Ruling*, 24 FCC Rcd. 13994, ¶¶ 49-50 (explaining that 47 U.S.C. § 332(c)(7)(B)(v) creates a window for filing suit, because before the shot clock expires, the claim is not ripe, but after the thirty-day period, the claim has expired); *City of Arlington*, 668 F.3d at 236 (noting that the presumptively reasonable time period reflected by the shot clock may be rebutted by evidence of reasonable delay).

{18} We have already determined that the Esquibel Letter was not a Section 332 denial and that the City reasonably responded to Applicant's actions. Even after Applicant's April 2016 "deemed granted" letter, the City still did not deny Applicant's request but instead encouraged Applicant to "go through a certain process." It was not until the City red-tagged the constructed tower and sought an injunction that the City communicated to Applicant that the tower could not be built as requested. Applicant's answer and counterclaim, relying in part on Section 332, was filed within thirty days of the red-tag. We therefore conclude that if 47 U.S.C. § 332(c)(7)(B)(v) is jurisdictional, Applicant satisfied the time requirement.

IV. Remand to the Planning Commission

{19} The district court denied Applicant's request for a Section 332 hearing and accepted the City's invitation to remand the matter to the City to process the 2015 application according to City ordinances. This case, however, arose from the City's request for an injunction and not as an appeal from an action by the City on Applicant's application. *See* NMSA 1978, § 39-3-1.1(D) (1999) (affording the district court authority to "set aside, reverse or remand the final decision" of an agency under certain circumstances); *Maso v. N.M. Tax'n & Revenue Dep't*, 2004-NMCA-025, ¶¶ 13-14, 135 N.M. 152, 85 P.3d 276 (discussing the district court's original and appellate jurisdiction). Because this case did not arise from a planning commission decision, jurisdiction could not be returned to the planning commission by remand. *See Los Alamos Cnty. v. Beery*, 1984-NMSC-050, ¶ 3, 101 N.M. 157, 679 P.2d 825 ("The order of remand simply returns the jurisdiction of the cause to the lower court in which it originated."); *City of Albuquerque v. Am. Fed'n of State, Cnty. & Mun. Emps.*, 2015-NMCA-023, ¶ 18, 344 P.3d 1069 ("Complaints cannot be remanded to a tribunal if they did not originate there." (internal quotation marks and citation omitted).

CONCLUSION

{20} We affirm the district court's ruling on Applicant's motion, reverse the portion of the April 25, 2024, order that remands the matter to the planning commission, and remand for entry of final judgment.

{21} **IT IS SO ORDERED.**

KATHERINE A. WRAY, Judge

WE CONCUR:

MEGAN P. DUFFY, Judge

JANE B. YOHALEM, Judge