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# COUNTY ADVISORY BULLETIN

**CAB**

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## **COUNTY ZONING AUTHORITY FOR TELECOMMUNICATIONS TOWERS**

### **INTRODUCTION**

The General Assembly has enacted Am. Sub HB 291, effective October 31, 1996. The new law, which was sponsored by Representative Bob Schuler (R-Cincinnati), authorizes boards of county commissioners to adopt zoning regulations for telecommunications towers.

HB 291 also revises the zoning authority of township trustees to regulate telecommunications towers. The legislature first authorized townships to regulate telecommunications towers with the adoption of airport zoning legislation (HB 15) in 1991. The new law repeals inconsistent language in the township zoning law and provides counties and townships with identical authority to regulate telecommunication towers.

The purpose of this CAB is to provide a summary of the statutory procedure for applying county rural zoning to telecommunication towers.

This CAB should be inserted after the CCAO Information Tab of the COUNTY COMMISSIONERS HANDBOOK for future reference.

### **SCOPE OF ZONING AUTHORITY (ORC 303.211(A),(B)(2))**

Existing law generally limits the authority of a board of county commissioners to adopt zoning regulations with respect to the location, erection, construction, reconstruction, change, alteration, maintenance, removal, use or enlargement of any building or structure of a public utility or railroad or the use of land by any public utility for the operation of its business.

The new law creates an exception by authorizing a board of county commissioners or board of zoning appeals under specific circumstances to regulate the location, erection, construction, reconstruction, change, alteration, removal or enlargement of a

telecommunications tower. The law specifically precludes regulation concerning the maintenance or use of such a tower or any change that would not substantially increase the tower's height.

The law requires any person planning to construct a telecommunications tower as defined below to notify an affected board of township trustees and property owners . The law also requires notification of county commissioners if the tower is proposed to be located in a township subject to county zoning. (See provisions of notice procedures below). The county commissioners must notify the person proposing to construct the tower that the proposed tower will be subject to zoning regulation if any commissioner objects to the tower or if any property owner or the township trustees requests application of zoning to the tower.

It is important to note that the zoning authority applies to a particular tower only upon the provision of notice within a specified time by the county commissioners to the person proposing to construct the tower. If no notice is sent by the county commissioners to the person proposing to construct the tower within the specified time frame, then the tower is exempt from zoning.

#### **TELECOMMUNICATIONS TOWERS SUBJECT TO ZONING (ORC 303.21(B)(1))**

The law defines telecommunications tower for purposes of the act. Telecommunications tower is defined as any free standing structure or any structure to be attached to a building or other structure that meets all of the following conditions:

1. The tower is proposed to be constructed on or after October 31, 1996.
2. The tower is owned or principally used by a public utility engaged in the provision of telecommunications services.
3. The tower is proposed to be located in an unincorporated area of a township, in an area zoned for residential use.
4. a) The proposed tower is a free standing structure higher than the maximum allowable height of residential structures in a residential zoning district, or the maximum allowable height of accessory uses permitted by the zoning regulations;  
or  
b) The proposed tower or telecommunications device is attached to another building or structure and it is higher than either the height of the other building or structure to which it is attached, or is higher than the maximum allowable height of accessory uses permitted by zoning regulations.
5. The tower is proposed to have attached to it radio frequency transmission or reception equipment.

### **PROVISION OF NOTICE BY THE PUBLIC UTILITY (ORC 303.21(B)(3))**

Any person who plans to construct a telecommunications tower to which county zoning regulations apply must provide written notice by certified mail to each of the following:

1. Each owner of property, as shown on the county auditor's current tax list, whose land is contiguous to or directly across the street from the property on which the tower is proposed to be located.
2. The board of township trustees of the township in which the tower is proposed to be constructed.
3. The board of county commissioners.

The written notice to the affected property owners and the township trustees would have to provide the following information:

1. Person's intent to construct the tower
2. A description of the property identifying the proposed location
3. That the property owner and the township trustees have fifteen days after the date of mailing the notice to give written notice to the county commissioners requesting that zoning apply to the proposed location of the tower. If notice provided by certified mail to the property owner or trustees is returned unclaimed or refused, then the person must provide notice by regular mail. The failure of delivery of the notice does not invalidate the notice.

The written notice to the county commissioners must include the information specified in 1 and 2 above and verification that the person has provided written notice as required to affected property owners and township trustees.

### **COMMISSIONERS NOTICE TO THE PUBLIC UTILITY (ORC 303.211(B)(4))**

County zoning applies to a telecommunications tower if a board of county commissioners sends notice to that effect to the person proposing to construct the tower. This notice must be sent if any of the following occurs:

1. The county commissioners receive written notice from an affected property owner or the township trustees of the township in which the tower is proposed to be constructed requesting that zoning apply to the proposed location of the tower. The commissioners would have to receive this notice no later than 15 days after the date of the mailing to the property owner and the township trustees of the notice of intent to construct the tower.

2. Any member of the board of county commissioners makes an objection to the proposed location of the tower within 15 days after the date of mailing of the notice to the county commissioners of intent to construct the tower.

County commissioners would have to send notice of the application of zoning to the person proposing to construct the tower no later than five days after the earlier of the date the commissioners first receive a notice from a property owner or the trustees or the date upon which a commissioner makes an objection.

If the commissioners mail notice to a person proposing to construct a tower within the time frames provided by law, then from the date the notice is mailed the tower is subject to county zoning. If commissioners receive no notice from property owners or township trustees or no commissioner objects within the time frame provided by law, then the tower is “without exception” exempt from zoning.

### **ZONING OF CELLULAR TOWERS AUTHORIZED BY FEDERAL LEGISLATION**

Congress has enacted the Telecommunications Act of 1996 which is principally intended to deregulate the telecommunications industry by removing legal barriers to companies entering different lines of business. Congress resisted attempts to preempt local control over telecommunications towers opting instead to reaffirm local zoning control over such structures provided the following standards are met by state law and local regulations:

1. Zoning controls cannot “unreasonably discriminate” among “providers of functionally equivalent services.” This apparently gives political subdivisions the authority to treat different types of facilities with different visual, aesthetic or safety impacts differently under generally applicable zoning requirements.
2. Zoning controls cannot prohibit or have the effect of prohibiting cellular telephone service. Care must be taken to assure that setback and height requirements do not effectively prohibit any tower for cellular service.
3. Zoning officials must act in a reasonable period of time.
4. Denial of a request to place, construct or modify a tower must be in writing and supported by substantial evidence contained in a written record.
5. Zoning controls cannot regulate cellular towers on the basis of environmental concerns about their radio emissions.

The Telecommunications Act preempts local control with respect to satellite service by giving the Federal Communications Commission (FCC) sole authority to regulate direct to house satellite service and by directing the FCC to adopt rules prohibiting restrictions on satellite transmissions. The FCC issued rules on February 29 preempting local zoning, land use regulations, building regulations, and other similar regulations if they materially

limit satellite transmission or reception or they impose more than minimal cost on the dish user.

Exceptions to the federal limitations include local rules that have a clearly defined health, safety or aesthetic objection that is stated in the text of the regulation itself and do not unnecessarily burden access to satellite services. Unless a waiver from the FCC is granted, local regulations affecting satellite dishes of 1 meter or less in residential areas and 2 meters or less in commercial or industrial areas are preempted.

## **APPLICATION OF THE LAW TO EXISTING COUNTY ZONING**

The law permits a county to apply existing zoning regulations for free standing or attached structures to telecommunications towers, or to amend the zoning resolution to provide specifically for the regulation of telecommunications towers. As a practical matter, to the extent existing zoning resolutions specifically exempt public utilities such as telecommunications towers as exempted uses, application of the new law will require most jurisdictions to amend their zoning resolution to permit regulation of this previously exempt use.

The zoning resolution could be amended to require the applicant with plans to construct, locate, erect, reconstruct, change, alter, use, remove or enlarge a tower in an area zoned for residential use that is to be used in the provision of cellular telephone communications service to:

1. Provide evidence of compliance with the notice requirements of ORC Section 303.211(B)(3) to the zoning administrator, or the board of zoning appeals if location of a tower is made a conditional use.
2. Comply with all application and submission requirements of the zoning resolution to obtain a zoning certificate in the event the zoning administrator or board of zoning appeals receives timely notice from any person entitled to object to the location, following receipt of the required notice from the county commissioner's clerk.

One approach to regulating the siting of telecommunications towers is to establish specific standards or conditions in the zoning resolution for the issuance of a zoning certificate for a tower in an area zoned for residential use. For example, a zoning resolution could be amended to require an applicant for a zoning certificate to meet the following types of standards:

1. An applicant must provide proof that the proposal to construct a tower or attach equipment to an existing structure has been approved by all other agencies and governmental entities with jurisdiction (i.e. Federal Communication Commission, Federal Aviation Administration, Ohio Department of Transportation).
2. The applicant must demonstrate that no technically suitable and feasible site is

available in a nonresidential district and that the site is located in the least restrictive district that includes a technically suitable and feasible site.

3. The structure must meet the square footage requirements of the zone and a minimum footage requirement from adjacent property lines (i.e. 75, 100, 125 feet or other specified distance).
4. Structures must be screened with fencing, masonry, shrubbery or other screening specified in the resolution. Screening must be of a specified height (e.g. 4, 6 or 8 feet) and must be a specified distance from the property line (e.g. 30 or 50 feet). The resolution might require the use of specified landscaping materials and might require the landscaping to be maintained in good condition.
5. The applicant could be required to notify the zoning administrator or board of zoning appeals within so many days of ceasing operations at the site (e.g. 30 or 60 days). The resolution could require the removal of structures within a specified time (e.g. 1 year) after ceasing operations and could permit resale or renting of facilities subject to the obtainment of a zoning certificate.
6. The zoning resolution could specify that a zoning certificate would be revoked if any continuing condition of the certificate is violated and is not remedied within 30 days of written notice by the zoning official.

The zoning authority might encourage an applicant for a zoning certificate to construct a tower to determine if the tower antennae can be located on any other communication tower or facility in the vicinity. In some cases, an applicant may be willing to cooperate with other applicants or tower owners in the “co-location” of telecommunications equipment on a single tower.

A county may wish to treat zoning of a communications tower as a conditional use subject to the approval of a board of zoning appeals. This would provide an opportunity for public notice and a public hearing before a board of zoning appeals at which the board could take testimony and approve, disapprove or conditionally approve a conditional use certificate for each proposed tower or attachment to an existing structure. One advantage of treating zoning of telecommunication towers as a conditional use is that it allows generally for a more deliberative process. The process includes preparation of a plan or proposal by an applicant, preparation of a report recommending a course of action with respect to an application, notice of a hearing, hearing on the application, notification of a decision and opportunity for appeal of a decision. A zoning resolution could establish additional general and specific criteria that could be applied to the siting of a communications tower including specific criteria related to site layout, parking, landscaping buffers, security measures and terms for continuation of this use as specified in the application and the resolution of approval.

## **ACKNOWLEDGMENTS**

The legislature has provided counties and townships with authority to adopt zoning regulations for telecommunications towers. CCAO would like to thank Russell Sparks, Kelly Daniels, Fred Fowler, Mike Juengling and Keith Brooks for their helpful comments with respect to the CAB. Any errors or omissions however, are the sole responsibility of CCAO.