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July 14, 2015

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Mr. Michael McCreery
United Counties Council of Illinois
217 East Adams Street, Suite 101
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RE: Cell Phone Towers Close to Homes

Dear Mike:

Question:

A cell phone tower is being built within 260 feet of a constituent's house. The constituent is concerned about radiation. Are there state/federal statutes that regulate this and can a county enact ordinances dealing with this issue?

Analysis:

There has been much litigation throughout the country over zoning issues related to the siting of cell towers. For the sake of brevity, we will limit our discussion to the specific question presented to us.

Federal Statute

Section 332(c)(7)(A) of the Telecommunications Act of 1996 ("the Telecommunications Act") preserves the authority of State and local governments over decisions regarding the placement, construction, and modification of personal wireless service facilities (cell towers).¹ However, section 332(c)(7)(B) contains several limitations on the powers of State and local governments in this regard. One such limitation provides as follows:

No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the

¹ 47 U.S.C. § 332(c)(7)(A).

extent that such facilities comply with the Commission's regulations concerning such emissions.²

Accordingly, the county cannot regulate the placement of a cell tower based upon the fear of radiation if the cell tower complies with the Federal Communications Commission's regulations concerning such emissions.

Additionally, any regulation of the placement, construction, and modification of personal wireless service facilities by a county: (1) shall not unreasonably discriminate among providers of functionally equivalent services; and (2) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.³

Illinois Counties Authority to Regulate

Section 5-12001 of the Counties Code grants the county board the authority to regulate and restrict the location and use of structures.⁴ However, the authority granted in Section 5-12001 may only be exercised by a county board in a manner consistent with the provisions and limitations set forth in Section 12001.1.⁵ Section 12001.1 governs a county's authority to regulate facilities of a telecommunications carrier.⁶ Section 12001.1 is attached for your convenience.

Conclusion:

No, counties cannot regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions if the facilities comply with the Federal Communications Commission's regulations of those emissions.

Yes, a county can regulate the location of a cell phone tower as long as such regulations are not in conflict with the limitations on such authority set forth in the Telecommunications Act (42 U.S.C. § 332(c)(7)(B)(i) through (v)). A county board that wishes to regulate the location of cell phone towers must also comply with the requirements of 55 ILCS 5/5-12001.1, which gives county boards limited zoning authority over the location of cell phone towers outside the corporate limit of cities, villages, and incorporated towns that have municipal zoning ordinances in effect. However, that power can only be exercised to the extent and manner set forth in Section 5-12001.1.

² 47 U.S.C. § 332(c)(7)(B)(iv).

³ 47 U.S.C. § 332(c)(7)(B)(i).

⁴ See 55 ILCS 5/5-12001.

⁵ 55 ILCS 5/5-12001.

⁶ 55 ILCS 5/5-12001.1.

Mr. Michael McCreery

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Please feel free to call if you should have any questions.

Very Truly Yours,

GIFFIN, WINNING, COHEN
& BODEWES, P.C.



Matthew R. Trapp



Herman G. Bodewes

MRT/HGB/lrs
Attachment

Disclaimer: This opinion was prepared by Giffin, Winning, Cohen & Bodewes, P.C. at the request of UCCI and is to be used solely by UCCI and its members. The State's Attorney is the attorney for the County. Legal advice, if requested, should be sought from the State's Attorney.

55 ILCS 5/5-12001.1

Statutes current through Public Act 98-1130 of the 2014 Legislative Session

Illinois Compiled Statutes Annotated > Chapter 55 COUNTIES > Counties Code > Article 5. Powers and Duties of County Boards > Division 5-12. Zoning

55 ILCS 5/5-12001.1 Authority to regulate certain specified facilities of a telecommunications carrier and to regulate, pursuant to subsections (a) through (g), AM broadcast towers and facilities

- (a) Notwithstanding any other Section in this Division, the county board or board of county commissioners of any county shall have the power to regulate the location of the facilities, as defined in subsection (c), of a telecommunications carrier or AM broadcast station established outside the corporate limits of cities, villages, and incorporated towns that have municipal zoning ordinances in effect. The power shall only be exercised to the extent and in the manner set forth in this Section.
- (b) The provisions of this Section shall not abridge any rights created by or authority confirmed in the federal Telecommunications Act of 1996, P.L. 104-104.
- (c) As used in this Section, unless the context otherwise requires:
 - (1) “county jurisdiction area” means those portions of a county that lie outside the corporate limits of cities, villages, and incorporated towns that have municipal zoning ordinances in effect;
 - (2) “county board” means the county board or board of county commissioners of any county;
 - (3) “residential zoning district” means a zoning district that is designated under a county zoning ordinance and is zoned predominantly for residential uses;
 - (4) “non-residential zoning district” means the county jurisdiction area of a county, except for those portions within a residential zoning district;
 - (5) “residentially zoned lot” means a zoning lot in a residential zoning district;
 - (6) “non-residentially zoned lot” means a zoning lot in a non-residential zoning district;
 - (7) “telecommunications carrier” means a telecommunications carrier as defined in the Public Utilities Act [220 ILCS 5/1-101 et seq.] as of January 1, 1997;
 - (8) “facility” means that part of the signal distribution system used or operated by a telecommunications carrier or AM broadcast station under a license from the FCC consisting of a combination of improvements and equipment including (i) one or more antennas, (ii) a supporting structure and the hardware by which antennas are attached; (iii) equipment housing; and (iv) ancillary equipment such as signal transmission cables and miscellaneous hardware;
 - (9) “FAA” means the Federal Aviation Administration of the United States Department of Transportation;
 - (10) “FCC” means the Federal Communications Commission;
 - (11) “antenna” means an antenna device by which radio signals are transmitted, received, or both;
 - (12) “supporting structure” means a structure, whether an antenna tower or another type of structure, that supports one or more antennas as part of a facility;
 - (13) “qualifying structure” means a supporting structure that is (i) an existing structure, if the height of the facility, including the structure, is not more than 15 feet higher than the structure just before the facility is installed, or (ii) a substantially similar, substantially same-location replacement of an existing structure, if the height of the facility, including the replacement structure, is not more than 15 feet higher than the height of the existing structure just before the facility is installed;

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- (14) “equipment housing” means a combination of one or more equipment buildings or enclosures housing equipment that operates in conjunction with the antennas of a facility, and the equipment itself;
 - (15) “height” of a facility means the total height of the facility’s supporting structure and any antennas that will extend above the top of the supporting structure; however, if the supporting structure’s foundation extends more than 3 feet above the uppermost ground level along the perimeter of the foundation, then each full foot in excess of 3 feet shall be counted as an additional foot of facility height. The height of a facility’s supporting structure is to be measured from the highest point of the supporting structure’s foundation;
 - (16) “facility lot” means the zoning lot on which a facility is or will be located;
 - (17) “principal residential building” has its common meaning but shall not include any building under the same ownership as the land of the facility lot. “Principal residential building” shall not include any structure that is not designed for human habitation;
 - (18) “horizontal separation distance” means the distance measured from the center of the base of the facility’s supporting structure to the point where the ground meets a vertical wall of a principal residential building;
 - (19) “lot line set back distance” means the distance measured from the center of the base of the facility’s supporting structure to the nearest point on the common lot line between the facility lot and the nearest residentially zoned lot. If there is no common lot line, the measurement shall be made to the nearest point on the lot line of the nearest residentially zoned lot without deducting the width of any intervening right of way; and
 - (20) “AM broadcast station” means a facility and one or more towers for the purpose of transmitting communication in the 540 kHz to 1700 kHz band for public reception authorized by the FCC.
- (d) In choosing a location for a facility, a telecommunications carrier or AM broadcast station shall consider the following:
- (1) A non-residentially zoned lot is the most desirable location.
 - (2) A residentially zoned lot that is not used for residential purposes is the second most desirable location.
 - (3) A residentially zoned lot that is 2 acres or more in size and is used for residential purposes is the third most desirable location.
 - (4) A residentially zoned lot that is less than 2 acres in size and is used for residential purposes is the least desirable location.
- The size of a lot shall be the lot’s gross area in square feet without deduction of any unbuildable or unusable land, any roadway, or any other easement.
- (e) In designing a facility, a telecommunications carrier or AM broadcast station shall consider the following guidelines:
- (1) No building or tower that is part of a facility should encroach onto any recorded easement prohibiting the encroachment unless the grantees of the easement have given their approval.
 - (2) Lighting should be installed for security and safety purposes only. Except with respect to lighting required by the FCC or FAA, all lighting should be shielded so that no glare extends substantially beyond the boundaries of a facility.
 - (3) No facility should encroach onto an existing septic field.
 - (4) Any facility located in a special flood hazard area or wetland should meet the legal requirements for those lands.
 - (5) Existing trees more than 3 inches in diameter should be preserved if reasonably feasible during construction. If any tree more than 3 inches in diameter is removed during construction a tree 3 inches or more in diameter of the same or a similar species shall be planted as a replacement if reasonably feasible. Tree diameter shall be measured at a point 3 feet above ground level.

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- (6) If any elevation of a facility faces an existing, adjoining residential use within a residential zoning district, low maintenance landscaping should be provided on or near the facility lot to provide at least partial screening of the facility. The quantity and type of that landscaping should be in accordance with any county landscaping regulations of general applicability, except that paragraph (5) of this subsection (e) shall control over any tree-related regulations imposing a greater burden.
 - (7) Fencing should be installed around a facility. The height and materials of the fencing should be in accordance with any county fence regulations of general applicability.
 - (8) Any building that is part of a facility located adjacent to a residentially zoned lot should be designed with exterior materials and colors that are reasonably compatible with the residential character of the area.
- (f) The following provisions shall apply to all facilities established in any county jurisdiction area (i) after the effective date of the amendatory Act of 1997 with respect to telecommunications carriers and (ii) after the effective date of this amendatory Act of the 94th General Assembly [P.A. 94-728] with respect to AM broadcast stations:
- (1) Except as provided in this Section, no yard or set back regulations shall apply to or be required for a facility.
 - (2) A facility may be located on the same zoning lot as one or more other structures or uses without violating any ordinance or regulation that prohibits or limits multiple structures, buildings, or uses on a zoning lot.
 - (3) No minimum lot area, width, or depth shall be required for a facility, and unless the facility is to be manned on a regular, daily basis, no off-street parking spaces shall be required for a facility. If the facility is to be manned on a regular, daily basis, one off-street parking space shall be provided for each employee regularly at the facility. No loading facilities are required.
 - (4) No portion of a facility's supporting structure or equipment housing shall be less than 15 feet from the front lot line of the facility lot or less than 10 feet from any other lot line.
 - (5) No bulk regulations or lot coverage, building coverage, or floor area ratio limitations shall be applied to a facility or to any existing use or structure coincident with the establishment of a facility. Except as provided in this Section, no height limits or restrictions shall apply to a facility.
 - (6) A county's review of a building permit application for a facility shall be completed within 30 days. If a decision of the county board is required to permit the establishment of a facility, the county's review of the application shall be simultaneous with the process leading to the county board's decision.
 - (7) The improvements and equipment comprising the facility may be wholly or partly freestanding or wholly or partly attached to, enclosed in, or installed in or on a structure or structures.
 - (8) Any public hearing authorized under this Section shall be conducted in a manner determined by the county board. Notice of any such public hearing shall be published at least 15 days before the hearing in a newspaper of general circulation published in the county. Notice of any such public hearing shall also be sent by certified mail at least 15 days prior to the hearing to the owners of record of all residential property that is adjacent to the lot upon which the facility is proposed to be sited.
 - (9) Any decision regarding a facility by the county board or a county agency or official shall be supported by written findings of fact. The circuit court shall have jurisdiction to review the reasonableness of any adverse decision and the plaintiff shall bear the burden of proof, but there shall be no presumption of the validity of the decision.
 - (10) Thirty days prior to the issuance of a building permit for a facility necessitating the erection of a new tower, the permit applicant shall provide written notice of its intent to construct the facility to the State Representative and the State Senator of the district in which the subject facility is to be constructed and all county board members for the county board district in the county in which the subject facility is to be constructed. This notice shall include, but not be limited to, the following information: (i) the name, address, and telephone number of the company responsible for the construction of the facility; (ii) the name, address, and telephone number of the governmental entity authorized to issue the building permit; and (iii) the location of the proposed facility. The applicant shall demonstrate compliance with the notice requirements set forth in this

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item (10) by submitting certified mail receipts or equivalent mail service receipts at the same time that the applicant submits the permit application.

- (g) The following provisions shall apply to all facilities established (i) after the effective date of this amendatory Act of 1997 with respect to telecommunications carriers and (ii) after the effective date of this amendatory Act of the 94th General Assembly with respect to AM broadcast stations in the county jurisdiction area of any county with a population of less than 180,000:
- (1) A facility is permitted if its supporting structure is a qualifying structure or if both of the following conditions are met:
 - (A) the height of the facility shall not exceed 200 feet, except that if a facility is located more than one and one-half miles from the corporate limits of any municipality with a population of 25,000 or more the height of the facility shall not exceed 350 feet; and
 - (B) the horizontal separation distance to the nearest principal residential building shall not be less than the height of the supporting structure; except that if the supporting structure exceeds 99 feet in height, the horizontal separation distance to the nearest principal residential building shall be at least 100 feet or 80% of the height of the supporting structure, whichever is greater. Compliance with this paragraph shall only be evaluated as of the time that a building permit application for the facility is submitted. If the supporting structure is not an antenna tower this paragraph is satisfied.
 - (2) Unless a facility is permitted under paragraph (1) of this subsection (g), a facility can be established only after the county board gives its approval following consideration of the provisions of paragraph (3) of this subsection (g). The county board may give its approval after one public hearing on the proposal, but only by the favorable vote of a majority of the members present at a meeting held no later than 75 days after submission of a complete application by the telecommunications carrier. If the county board fails to act on the application within 75 days after its submission, the application shall be deemed to have been approved. No more than one public hearing shall be required.
 - (3) For purposes of paragraph (2) of this subsection (g), the following siting considerations, but no other matter, shall be considered by the county board or any other body conducting the public hearing:
 - (A) the criteria in subsection (d) of this Section;
 - (B) whether a substantial adverse effect on public safety will result from some aspect of the facility's design or proposed construction, but only if that aspect of design or construction is modifiable by the applicant;
 - (C) the benefits to be derived by the users of the services to be provided or enhanced by the facility and whether public safety and emergency response capabilities would benefit by the establishment of the facility;
 - (D) the existing uses on adjacent and nearby properties; and
 - (E) the extent to which the design of the proposed facility reflects compliance with subsection (e) of this Section.
 - (4) On judicial review of an adverse decision, the issue shall be the reasonableness of the county board's decision in light of the evidence presented on the siting considerations and the well-reasoned recommendations of any other body that conducts the public hearing.
- (h) The following provisions shall apply to all facilities established after the effective date of this amendatory Act of 1997 in the county jurisdiction area of any county with a population of 180,000 or more. A facility is permitted in any zoning district subject to the following:
- (1) A facility shall not be located on a lot under paragraph (4) of subsection (d) unless a variation is granted by the county board under paragraph (4) of this subsection (h).
 - (2) Unless a height variation is granted by the county board, the height of a facility shall not exceed 75 feet if the facility will be located in a residential zoning district or 200 feet if the facility will be located in a

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non-residential zoning district. However, the height of a facility may exceed the height limit in this paragraph, and no height variation shall be required, if the supporting structure is a qualifying structure.

- (3) The improvements and equipment of the facility shall be placed to comply with the requirements of this paragraph at the time a building permit application for the facility is submitted. If the supporting structure is an antenna tower other than a qualifying structure then (i) if the facility will be located in a residential zoning district the lot line set back distance to the nearest residentially zoned lot shall be at least 50% of the height of the facility's supporting structure or (ii) if the facility will be located in a non-residential zoning district the horizontal separation distance to the nearest principal residential building shall be at least equal to the height of the facility's supporting structure.
- (4) The county board may grant variations for any of the regulations, conditions, and restrictions of this subsection (h), after one public hearing on the proposed variations held at a zoning or other appropriate committee meeting with proper notice given as provided in this Section, by a favorable vote of a majority of the members present at a meeting held no later than 75 days after submission of an application by the telecommunications carrier. If the county board fails to act on the application within 75 days after submission, the application shall be deemed to have been approved. In its consideration of an application for variations, the county board, and any other body conducting the public hearing, shall consider the following, and no other matters:
 - (A) whether, but for the granting of a variation, the service that the telecommunications carrier seeks to enhance or provide with the proposed facility will be less available, impaired, or diminished in quality, quantity, or scope of coverage;
 - (B) whether the conditions upon which the application for variations is based are unique in some respect or, if not, whether the strict application of the regulations would result in a hardship on the telecommunications carrier;
 - (C) whether a substantial adverse effect on public safety will result from some aspect of the facility's design or proposed construction, but only if that aspect of design or construction is modifiable by the applicant;
 - (D) whether there are benefits to be derived by the users of the services to be provided or enhanced by the facility and whether public safety and emergency response capabilities would benefit by the establishment of the facility; and
 - (E) the extent to which the design of the proposed facility reflects compliance with subsection (e) of this Section.
- (5) On judicial review of an adverse decision, the issue shall be the reasonableness of the county board's decision in light of the evidence presented and the well-reasoned recommendations of any other body that conducted the public hearing.
 - (i) Notwithstanding any other provision of law to the contrary, 30 days prior to the issuance of any permits for a new telecommunications facility within a county, the telecommunications carrier constructing the facility shall provide written notice of its intent to construct the facility. The notice shall include, but not be limited to, the following information: (i) the name, address, and telephone number of the company responsible for the construction of the facility, (ii) the address and telephone number of the governmental entity that is to issue the building permit for the telecommunications facility, (iii) a site plan and site map of sufficient specificity to indicate both the location of the parcel where the telecommunications facility is to be constructed and the location of all the telecommunications facilities within that parcel, and (iv) the property index number and common address of the parcel where the telecommunications facility is to be located. The notice shall not contain any material that appears to be an advertisement for the telecommunications carrier or any services provided by the telecommunications carrier. The notice shall be provided in person, by overnight private courier, or by certified mail to all owners of property within 250 feet of the parcel in which the telecommunications carrier has a leasehold or ownership interest. For the purposes of this notice requirement, "owners" means those persons or entities identified from the authentic tax records of the county in which the telecommunications facility is to be located. If, after a bona fide effort by the telecommunications carrier to determine the owner and his or her address, the owner of the property on whom the notice must be served

cannot be found at the owner's last known address, or if the mailed notice is returned because the owner cannot be found at the last known address, the notice requirement of this paragraph is deemed satisfied.

No more than one public hearing shall be required.

History

P.A. 90-522, § 5; *94-728*, § 5; *95-815*, § 5; 96-696, § 5; 97-242, § 5; 97-496, § 5; 97-813, § 190.

Annotations

Notes

Note.

Section 995 of P.A. 97-813 contains a “no acceleration or delay” provision, and Section 996 contains a “no revival or extension” provision.

Effective Date.

This section became effective January 1, 1998 pursuant to *Ill. Const. (1970), Art. IV, § 10* and *5 ILCS 75/1*.

Effect of Amendments.

The 2006 amendment by *P.A. 94-728*, effective April 6, 2006, rewrote the section, adding references to AM broadcast stations.

The 2008 amendment by *P.A. 95-815*, effective August 13, 2008, added the third sentence in (f)(8).

The 2009 amendment by P.A. 96-696, effective January 1, 2010, added “held at a zoning or other appropriate committee meeting with proper notice given as provided in this Section” in the first sentence of the introductory language of (h)(4).

The 2011 amendment by P.A. 97-242, effective August 4, 2011, added (f)(10).

The 2011 amendment by P.A. 97-496, effective August 22, 2011, added (i).

The 2012 revisory amendment by P.A. 97-813, effective July 13, 2012, combined earlier multiple amendments to the section.

Research References & Practice Aids

Practice Guides and Treatises

Land Use Law (Illinois) § 1.21 Zoning (IICLE)

Illinois Compiled Statutes Annotated
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