CITY OF STOUGHTON
DEPARTMENT OF
PLANNING & DEVELOPMENT
381 East Main Street, Stoughton, WI. 53589

(608) 873-6619 www.ci.stoughton.wi.us

RODNEY J. SCHEEL
DIRECTOR

Date: December 4, 2019

To: Plan Commission

From: Rodney J. Scheel
Director of Planning & Development

Michael P. Stacey
Zoning Administrator/Assistant Planner

Subject: Agenda Item for the December 9, 2019 Plan Commission Meeting

Discuss potential zoning ordinance amendment related to communication tower requirements.

Changes in State laws have prompted municipalities to review their ordinances for compliance with those changes. The new laws significantly limit the ability to regulate the siting and construction of mobile service support structures and facilities. City Attorney Matt Dregne has provided a draft ordinance amendment for discussion. Some discussion points are:

- Should/Can we seek to limit placement of towers within residential areas?
- Should/Can surety requirements be added for removal of a tower and facilities in the event the tower and facilities are no longer in use?
- Should/Can we seek fall zone or setback requirements to the ordinance?

StaffordRosenbaum LLP
Attorneys

To Rodney Scheel, City of Stoughton Director of Planning & Development
Michael Stacey, Zoning Administrator

From Matthew P. Dregne, City Attorney

Date July 1, 2019

Re Mobile Tower Siting Requirements Ordinance Review

INTRODUCTION

This memorandum is in response to your request that we review (and adapt for the City's use) an ordinance drafted by the Wisconsin Towns Association in the wake of state regulation limiting local authority to regulate mobile service support structures and facilities ("Mobile Towers"). The model ordinance incorporates the permissible application requirements for Mobile Towers under Wis. Stat. § 66.0404. We have drafted the enclosed ordinance for the City's consideration, based on the model ordinance and State law. The main substantive features of the ordinance are as follows:

- Mobile Towers are permitted uses in all zoning districts.
- Application requirements are established.
- Colocation on existing structures is encouraged but not compelled.
- Towers are required to comply with applicable building code requirements.

The City may choose to require including additional provisions in the ordinance, such as set-back or fall zoning requirements that are not different from such requirements imposed on other structures in the City.

DISCUSSION OF LOCAL AUTHORITY UNDER STATE LAW

In 2013, the legislature adopted Wis. Stat. § 66.0404, a statute that significantly limits a municipality's ability to regulate the siting and construction of mobile service support structures and facilities ("Mobile Towers"). Ordinances that are inconsistent with the law are unenforceable. Section 66.0404 requires municipal regulations to comply with specific application procedures for Mobile Towers.

The statute identifies three types of Mobile Towers: (1) new construction of a new mobile service support structure and facilities, (2) class 1 collocations,[1] and (3) class 2 collocations.[2] The permissible requirements differ for new construction of a new mobile service support structure and facilities and class 1 collocations, compared with class 2 collocations. We have allowed for these differences in the attached draft ordinance.

Additionally, § 66.0404(4) imposes 25 specific limits on the City's authority to regulate any Mobile Tower. A complete list of those limitations is attached as Exhibit A. Significant among these, § 66.0404(4)(c) specifies that a political subdivision may not prohibit the placement of Mobile Towers in particular locations within the political subdivision.

The City currently regulates Mobile Towers as a conditional use. It is clear under § 66.0404(3)(a) that class 2 collocations may not be regulated as a conditional use and must be a permitted use in all zoning districts. Although the statute does not expressly prohibit doing so, we do not think it is feasible to treat new mobile service facilities and support structures as a conditional use. The application requirements for conditional uses are inconsistent with the mandatory application requirements in the statute. The standards for conditional uses in the current zoning code are also inconsistent with the requirements of the statute. Consequently, the attached ordinance treats such facilities as permitted uses in all districts.

Note that we inserted section 78-206(7)(c)4 in the draft ordinance as a blank placeholder, because although § 66.0404 lists many ways in which the City may not regulate Mobile Towers, § 66.0404 does not prohibit all regulations. The City may enact standards applicable to Mobile Towers as long as those standards do not conflict with § 66.0404. Some potentially allowable provisions include:

- Requiring removal of a mobile service support structure if it is abandoned, and requiring surety to secure such removal, so long as any required surety is competitively neutral, non-discriminatory, and commensurate with the City's historical record for surety requirements for other facilities and structures in the City that fall into disuse. There is a rebuttable presumption that a surety requirement of $20,000 or less complies with the statute.

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[1] A class 1 collocation is "the placement of a new mobile service facility on an existing support structure such that the owner of the facility does not need to construct a free standing support structure for the facility but does need to engage in substantial modification."

[2] A class 2 collocation is "the placement of a new mobile service facility on an existing support structure such that the owner of the facility does not need to construct a free standing support structure for the facility or engage in substantial modification."

- Requiring a Mobile Tower to meet setback or fall zone requirements, so long as those requirements are not different from the setback or fall zone requirements that are imposed on other types of commercial structures in the City.

Before the ordinance is finalized, it will be necessary to decide whether to attempt to include any additional provisions in the ordinance.

Please feel free to contact me if you have any questions or concerns. Thank you.

cc: Mayor Tim Swadley

Exhibit A

Limitations on a Municipality's Actions

Under Wis. Stat. § 66.0404(4), the City may not do any of the following with regard to the construction of Mobile Towers:

- Impose environmental testing, sampling, or monitoring requirements, or other compliance measures for radio frequency emissions, on mobile service facilities or mobile radio service providers;

- Enact an ordinance imposing a moratorium on the permitting, construction, or approval of any Mobile Tower;

- Enact an ordinance prohibiting the placement of a mobile service support structure in particular locations within the City;

- Charge a mobile service provider a fee in excess of one of the following amounts:

    - For a permit for a class 2 collocation, the lesser of $500 or the amount charged by the political subdivision for a building permit for any other type of commercial development or land use development.

    - For a permit for construction of a new tower or a class 1 collocation, $3,000.

- Charge a mobile radio service provider any recurring fee for the construction of any Mobile Tower;

- Permit third party consultants to charge the applicant for any travel expenses incurred in the consultant's review of the applicant's permits or applications;

- Disapprove an application based solely on aesthetic concerns;

- Enact or enforce an ordinance related to radio frequency signal strength or the adequacy of mobile service quality;

- Impose a surety requirement, unless the requirement is competitively neutral, nondiscriminatory, and commensurate with the historical record for

surety requirements for other facilities and structures in the municipality which fall into disuse. There is a rebuttable presumption that a surety requirement of $20,000 or less complies with this paragraph;

- Prohibit the placement of emergency power systems;

- Require that a mobile service support structure be placed on property owned by the City;

- Disapprove an application based solely on the height of the mobile service support structure or on whether the structure requires lighting;

- Condition approval of such activities on the agreement of the structure or mobile service facility owner to provide space on or near the structure for the use of or by the City at less than the market rate, or to provide the City other services via the structure or facilities at less than the market rate;

- Limit the duration of any permit that is granted;

- Require an applicant to construct a distributed antenna system instead of either constructing a new mobile service support structure or engaging in collocation;

- Disapprove an application based on an assessment by the municipality of the suitability of other locations for conducting the activity;

- Require that a mobile service support structure, existing structure, or mobile service facilities have or be connected to backup battery power;

- Impose a setback or fall zone requirement for a mobile service support structure that is different from a requirement that is imposed on other types of commercial structures;

- Consider a project to be a substantial modification if the project adds more than 20 feet to the height of a tower that is not more than 200 feet tall but the greater height is necessary to avoid interference with an existing antenna;

- Consider a project to be a substantial modification if the project adds 20 feet or more to the diameter of the tower but the greater diameter is

necessary to shelter the antenna from inclement weather or to connect the antenna to the existing structure by cable;

- Limit the height of a mobile service support structure to under 200 feet;

- Condition the approval of an application on, or otherwise require, the applicant's agreement to indemnify or insure the municipality in connection with the municipality's exercise of its authority to approve the application; and

- Condition the approval of an application on, or otherwise require, the applicant's agreement to permit the municipality to place at or collocate with the applicant's support structure any mobile service facilities provided or operated by, whether in whole or in part, a municipality or an entity in which a municipality has a governance, competitive, economic, financial or other interest.

CITY OF STOUGHTON

ORDINANCE OF THE COMMON COUNCIL	
An Ordinance Amending Multiple Parts of Section 78-105, and repealing and recreating Section 78-206(7)(c), Relating to Mobile Tower Service Facilities and Mobile Tower Support Structures Committee Action: Recommend approval - 0 with the Mayor voting. Fiscal Impact: N/A	
File Number: O - - 2019	**Date Introduced:**

RECITALS

A. *Purpose*. The purpose of this ordinance is to regulate the siting and construction of new mobile service support structures and facilities, class 1 collocations, and class 2 collocations in accordance with Wis. Stat. § 66.0404.

B. *Authority*. The City has the specific authority under Wis. Stat. § 62.23 and § 66.0404, to adopt and enforce this ordinance.

ORDINANCE

The Common Council of the City of Stoughton do ordain as follows:

1. **Section 78-105 (1) (a) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Rural Holding District:**

   Mobile tower (per section 78-206(7)(c))

2. **Section 78-105 (2) (a) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Exurban Residential (ER-1) District:**

   Mobile tower (per section 78-206(7)(c))

3. **Section 78-105 (2) (b) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Single-Family Residential -3 (SR-3) District:**

   Mobile tower (per section 78-206(7)(c))

4. **Section 78-105 (2) (c) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Single-Family Residential -4 (SR-4) District:**

Mobile tower (per section 78-206(7)(c))

5. **Section 78-105 (2) (d) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Single-Family Residential -5 (SR-5) District:**

Mobile tower (per section 78-206(7)(c))

6. **Section 78-105 (2) (e) 3. a. is amended to add the following to the list of principal land uses permitted by right in the Single-Family Residential -6 (SR-6) District:**

Mobile tower (per section 78-206(7)(c))

7. **Section 78-105 (2) (e) 3. a. is amended to add the following to the list of principal land uses permitted by right in the Single-Family Residential -6 (SR-6) District:**

Mobile tower (per section 78-206(7)(c))

8. **Section 78-105 (2) (f) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Two-Family Residential -6 (TR-6) District:**

Mobile tower (per section 78-206(7)(c))

9. **Section 78-105 (2) (g) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Multi-Family Residential – 10 (MR-10) District:**

Mobile tower (per section 78-206(7)(c))

10. **Section 78-105 (2) (h) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Multi-Family Residential – 24 (MR-24) District:**

Mobile tower (per section 78-206(7)(c))

11. **Section 78-105 (3) (a) 3. a. is amended to add the following to the list of principal land uses permitted by right in the Neighborhood Office (NO) District:**

Mobile tower (per section 78-206(7)(c))

12. **Section 78-105 (3) (b) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Planned Office (PO) District:**

Mobile tower (per section 78-206(7)(c))

13. **Section 78-105 (4) (a) 3. a. is amended to add the following to the list of principal land uses permitted by right in the Neighborhood Business (NB) District:**

Mobile tower (per section 78-206(7)(c))

14. **Section 78-105 (4) (b) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Planned Business (PB) District:**

Mobile tower (per section 78-206(7)(c))

15. **Section 78-105 (4) (c) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Central Business (CB) District:**

Mobile tower (per section 78-206(7)(c))

16. **Section 78-105 (5) (a) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Planned Industrial (PI) District:**

Mobile tower (per section 78-206(7)(c))

17. **Section 78-105 (5) (a) 2. b. is amended to remove "Communication Tower (per Section 78-206(7)(e))" from the list of principal land uses permitted as a conditional use in the Planned Industrial (PI) District.**

18. **Section 78-105 (5) (b) 2. a. is amended to add the following to the list of principal land uses permitted by right in the General Industrial (GI) District:**

Mobile tower (per section 78-206(7)(c))

19. Section 78-105 (5) (b) 2. b. is amended to remove "Communication Tower (per Section 78-206(7)(e))" from the list of principal land uses permitted as a conditional use in the General Industrial (GI) District.

20. Section 78-105 (5) (c) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Heavy Industrial (HI) District:

Mobile tower (per section 78-206(7)(c))

21. Section 78-105 (5) (c) 2. b. is amended to remove "Communication Tower (per Section 78-206(7)(e))" from the list of principal land uses permitted as a conditional use in the Heavy Industrial (HI) District.

22. Section 78-105 (6) (a) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Institutional (I) District:

Mobile tower (per section 78-206(7)(c))

23. Section 78-206(7)(c) is repealed and recreated as follows:

Sec. 78-206. – Detailed land use descriptions and regulations.

(7) *Industrial land uses.*

(c) *Mobile tower siting regulations.*

1. *Definitions.* All definitions contained in Wis. Stat. § 66.0404(1) are hereby incorporated by reference including:

a. *Antenna* means communication equipment that transmits and receives electromagnetic radio signals and is used in the provision of mobile services.

b. *Class 1 collocation* means the placement of a new mobile service facility on an existing support structure such that the owner of the facility does not need to construct a free standing support structure for the facility but does need to engage in substantial modification.

c. *Class 2 collocation* means the placement of a new mobile service facility on an existing support structure such that the owner of the facility does not need to construct a free standing support structure for the facility or engage in substantial modification.

d. *Equipment compound* means an area surrounding or adjacent to the base of an existing support structure within which is located mobile service facilities.

e. *Existing structure* means a support structure that exists at the time an application for a permit to place mobile service facilities on a support structure is filed with the City of Stoughton.

f. *Fall zone* means the area over which a mobile service support structure is designed to collapse.

g. *Mobile Tower* means all mobile tower service facilities and mobile tower support structures, including class 1 collocation and class 2 collocation.

h. *Search ring* means a shape drawn on a map to indicate the general area within which a mobile service support structure should be located to meet radio frequency engineering requirements, taking into account other factors including topography and the demographics of the service area.

i. *Substantial modification* means the modification of a mobile service support structure, including the mounting of an antenna on such a structure, that does any of the following:

A. For structures with an overall height of 200 feet or less, increases the overall height of the structure by more than 20 feet.

B. For structures with an overall height of more than 200 feet, increases the overall height of the structure by 10 percent or more.

C. Measured at the level of the appurtenance added to the structure as a result of the modification, increases the width of the support structure by 20 feet or more, unless a larger area is necessary for collocation.

D. Increases the square footage of an existing equipment compound to a total area of more than 2,500 square feet.

2. *Application Requirements for New Construction or Substantial Modification (Class 1 Collocation) of Facilities and Support Structures*:

a. An application for a permit to engage in the siting or construction of a new mobile service support structure and facilities or to

engage in a class 1 collocation shall be submitted in writing to the zoning administrator on forms furnished by the administrator before any construction may commence. The application shall contain the following information:

A. The name and business address of, and the contact individual for, the applicant.

B. The location of the proposed or affected support structure.

C. The location of the proposed mobile service facility.

D. If the application is to substantially modify an existing support structure, a construction plan which describes the proposed modifications to the support structure and the equipment and network components, including antennas, transmitters, receivers, base stations, power supplies, cabling, and related equipment associated with the proposed modifications.

E. If the application is to construct a new mobile service support structure:

i. A construction plan which describes the proposed mobile service support structure and the equipment and network components, including antennas, transmitters, receivers, base stations, power supplies, cabling, and related equipment to be placed on or around the new mobile service support structure; and

ii. An explanation as to why the applicant chose the proposed location and why the applicant did not choose collocation, including a sworn statement from an individual who has responsibility over the placement of the mobile service support structure attesting that collocation within the applicant's search ring would not result in the same mobile service functionality, coverage, and capacity; is technically infeasible; or is economically burdensome to the mobile service provider.

b. The zoning administrator or designee shall review the application and determine whether the application is complete. The zoning administrator or designee shall notify the applicant in writing within ten (10) days of receiving the application if it is found not to

be complete, and such notice shall specify in detail the required information that was incomplete. Applicants may resubmit their application as often as necessary until it is complete.

c. Within 90 days of his or her receipt of a complete application, the zoning administrator shall grant or deny the application in writing. The zoning administrator and the applicant may agree in writing to an extension of the 90-day period. The zoning administrator shall review the application to determine whether it complies with all applicable aspects of the zoning ordinances. If the decision is to deny the application, the zoning administrator shall include with the written notification substantial evidence that supports the decision.

d. An application may be denied if an applicant refuses to evaluate the feasibility of collocation within the applicant's search ring and provide the sworn statement described under subsection 2.a.E.ii.

e. If an applicant provides an engineering certification showing that a mobile service support structure, or an existing structure, is designed to collapse within a smaller area than the set back or fall zone area required under the Zoning Code, the Zoning Code does not apply to such a structure unless the City provides the applicant with substantial evidence that the engineering certification is flawed.

f. An application fee is required in such amount as has been established by the City.

3. *Application Requirements for Class 2 Collocations.*

a. An application for a permit to engage in a class 2 collocation shall be submitted in writing to the zoning administrator on forms furnished by the administrator and before construction commences. The application shall contain the following information:

A. The name and business address of, and the contact individual for, the applicant.

B. The location of the proposed or affected support structure.

C. The location of the proposed mobile service facility.

b. The zoning administrator shall inform the applicant within five (5) days of receiving the application if the application is not complete. Notification shall be in writing and shall specify in detail the

information that was incomplete. An applicant may resubmit an application as often as necessary until it is complete.

c. Within 45 days of his or her receipt of a complete application, the zoning administrator shall grant or deny the application in writing. The zoning administrator and the applicant may agree in writing to an extension of the 45-day period. Any decision to deny an application shall be supported by substantial evidence. Such evidence shall be included in the written decision

d. An application fee is required in such amount as has been established by the City.

24. This ordinance shall be in full force and effect from and after its date of publication.

Dates

Council Adopted:_____

Mayor Approved: _____

_____
Tim Swadley, Mayor

Published:_____

Attest_____

_____
Holly Licht, City Clerk

CITY OF STOUGHTON

ORDINANCE OF THE COMMON COUNCIL	
An Ordinance Amending Multiple Parts of Section 78-105, and repealing and recreating Section 78-206(7)(c), Relating to Mobile Tower Service Facilities and Mobile Tower Support Structures Committee Action: Recommend approval - 0 with the Mayor voting. Fiscal Impact: N/A	
File Number: O - - 2019	**Date Introduced:**

RECITALS

A. *Purpose*. The purpose of this ordinance is to regulate the siting and construction of new mobile service support structures and facilities, class 1 collocations, and class 2 collocations in accordance with Wis. Stat. § 66.0404.

B. *Authority*. The City has the specific authority under Wis. Stat. § 62.23 and § 66.0404, to adopt and enforce this ordinance.

ORDINANCE

The Common Council of the City of Stoughton do ordain as follows:

1. **Section 78-105 (1) (a) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Rural Holding District:**

   Mobile tower (per section 78-206(7)(c))

2. **Section 78-105 (2) (a) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Exurban Residential (ER-1) District:**

   Mobile tower (per section 78-206(7)(c))

3. **Section 78-105 (2) (b) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Single-Family Residential -3 (SR-3) District:**

   Mobile tower (per section 78-206(7)(c))

4. **Section 78-105 (2) (c) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Single-Family Residential -4 (SR-4) District:**

Mobile tower (per section 78-206(7)(c))

5. **Section 78-105 (2) (d) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Single-Family Residential -5 (SR-5) District:**

Mobile tower (per section 78-206(7)(c))

6. **Section 78-105 (2) (e) 3. a. is amended to add the following to the list of principal land uses permitted by right in the Single-Family Residential -6 (SR-6) District:**

Mobile tower (per section 78-206(7)(c))

7. **Section 78-105 (2) (e) 3. a. is amended to add the following to the list of principal land uses permitted by right in the Single-Family Residential -6 (SR-6) District:**

Mobile tower (per section 78-206(7)(c))

8. **Section 78-105 (2) (f) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Two-Family Residential -6 (TR-6) District:**

Mobile tower (per section 78-206(7)(c))

9. **Section 78-105 (2) (g) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Multi-Family Residential – 10 (MR-10) District:**

Mobile tower (per section 78-206(7)(c))

10. **Section 78-105 (2) (h) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Multi-Family Residential – 24 (MR-24) District:**

Mobile tower (per section 78-206(7)(c))

11. **Section 78-105 (3) (a) 3. a. is amended to add the following to the list of principal land uses permitted by right in the Neighborhood Office (NO) District:**

Mobile tower (per section 78-206(7)(c))

12. **Section 78-105 (3) (b) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Planned Office (PO) District:**

Mobile tower (per section 78-206(7)(c))

13. **Section 78-105 (4) (a) 3. a. is amended to add the following to the list of principal land uses permitted by right in the Neighborhood Business (NB) District:**

Mobile tower (per section 78-206(7)(c))

14. **Section 78-105 (4) (b) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Planned Business (PB) District:**

Mobile tower (per section 78-206(7)(c))

15. **Section 78-105 (4) (c) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Central Business (CB) District:**

Mobile tower (per section 78-206(7)(c))

16. **Section 78-105 (5) (a) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Planned Industrial (PI) District:**

Mobile tower (per section 78-206(7)(c))

17. **Section 78-105 (5) (a) 2. b. is amended to remove "Communication Tower (per Section 78-206(7)(e))" from the list of principal land uses permitted as a conditional use in the Planned Industrial (PI) District.**

18. **Section 78-105 (5) (b) 2. a. is amended to add the following to the list of principal land uses permitted by right in the General Industrial (GI) District:**

Mobile tower (per section 78-206(7)(c))

19. Section 78-105 (5) (b) 2. b. is amended to remove "Communication Tower (per Section 78-206(7)(e))" from the list of principal land uses permitted as a conditional use in the General Industrial (GI) District.

20. Section 78-105 (5) (c) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Heavy Industrial (HI) District:

Mobile tower (per section 78-206(7)(c))

21. Section 78-105 (5) (c) 2. b. is amended to remove "Communication Tower (per Section 78-206(7)(e))" from the list of principal land uses permitted as a conditional use in the Heavy Industrial (HI) District.

22. Section 78-105 (6) (a) 2. a. is amended to add the following to the list of principal land uses permitted by right in the Institutional (I) District:

Mobile tower (per section 78-206(7)(c))

23. Section 78-206(7)(c) is repealed and recreated as follows:

Sec. 78-206. – Detailed land use descriptions and regulations.

(7) *Industrial land uses*.

(c) *Mobile tower siting regulations.*

1. *Definitions*. The following definitions shall apply throughout this Chapter:

a. *Antenna* means communications equipment that transmits and receives electromagnetic radio signals and is used in the provision of mobile services.

b. *Class 1 collocation* means the placement of a new mobile service facility on an existing support structure such that the owner of the facility does not need to construct a free standing support structure for the facility but does need to engage in substantial modification.

c. *Class 2 collocation* means the placement of a new mobile service facility on an existing support structure such that the owner of the facility does not need to construct a free standing support structure for the facility or engage in substantial modification.

d. *Equipment compound* means an area surrounding or adjacent to the base of an existing support structure within which is located mobile service facilities.

e. *Existing structure* means a support structure that exists at the time an application for a permit to place mobile service facilities on a support structure is filed with the City of Stoughton.

f. *Mobile service* has the meaning given in 47 USC 153 (33).

g. *Mobile service facility* means the set of equipment and network components, including antennas, transmitters, receivers, base stations, power supplies, cabling, and associated equipment, that is necessary to provide mobile service to a discrete geographic area, but does not include the underlying support structure.

h. *Mobile service provider* means a person who provides mobile service.

i. *Mobile service support structure* means a freestanding structure that is designed to support a mobile service facility.

j. *Mobile tower* means all mobile service facilities and mobile service support structures, including class 1 collocation and class 2 collocation.

k. *Search ring* means a shape drawn on a map to indicate the general area within which a mobile service support structure should be located to meet radio frequency engineering requirements, taking into account other factors including topography and the demographics of the service area.

l. *Substantial modification* means the modification of a mobile service support structure, including the mounting of an antenna on such a structure, that does any of the following:

A. For structures with an overall height of 200 feet or less, increases the overall height of the structure by more than 20 feet.

B. For structures with an overall height of more than 200 feet, increases the overall height of the structure by 10 percent or more.

C. Measured at the level of the appurtenance added to the structure as a result of the modification, increases the width

of the support structure by 20 feet or more, unless a larger area is necessary for collocation.

D. Increases the square footage of an existing equipment compound to a total area of more than 2,500 square feet.

2. *Application Requirements for New Construction or Substantial Modification (Class 1 Collocation) of Facilities and Support Structures*:

a. An application for a permit to engage in the siting or construction of a new mobile service support structure and facilities or to engage in a class 1 collocation shall be submitted in writing to the zoning administrator on forms furnished by the administrator before any construction may commence. The application shall contain the following information:

A. The name and business address of, and the contact individual for, the applicant.

B. The location of the proposed or affected support structure.

C. The location of the proposed mobile service facility.

D. If the application is to substantially modify an existing support structure, a construction plan that describes the proposed modifications to the support structure and the equipment and network components, including antennas, transmitters, receivers, base stations, power supplies, cabling, and related equipment associated with the proposed modifications.

E. If the application is to construct a new mobile service support structure:

i. A construction plan that describes the proposed mobile service support structure and the equipment and network components, including antennas, transmitters, receivers, base stations, power supplies, cabling, and related equipment to be placed on or around the new mobile service support structure; and

ii. An explanation as to why the applicant chose the proposed location and why the applicant did not choose collocation, including a sworn statement from an individual who has responsibility over the placement of the mobile service support structure

attesting that collocation within the applicant's search ring: would not result in the same mobile service functionality, coverage, and capacity; is technically infeasible; or is economically burdensome to the mobile service provider.

F. If the application concerns work on or adjacent to a parcel that permits single-family residential use, then the setback requirement for a mobile service support structure is the height of the structure (except as provided in subsection 2.e). An applicable construction plan must demonstrate that the mobile service support structure will be setback at least the height of the proposed structure from the lot lines of parcels (adjacent and nonadjacent) that permit single-family residential use.

b. The zoning administrator or designee shall review the application and determine whether the application is complete. The zoning administrator or designee shall notify the applicant in writing within ten (10) days of receiving the application if the application is not complete. Notification shall be in writing and shall specify in detail the information that was incomplete. Applicants may resubmit their application as often as necessary until it is complete.

c. Within 90 days of receiving a complete application, the zoning administrator shall grant or deny the application in writing. The zoning administrator and the applicant may agree in writing to an extension of the 90-day period. The zoning administrator shall review the application to determine whether it complies with all applicable aspects of the zoning ordinances. If the decision is to deny the application, the zoning administrator shall include with the written notification substantial evidence that supports the decision.

d. An application may be denied if an applicant refuses to evaluate the feasibility of collocation within the applicant's search ring and provide the sworn statement described under subsection 2.a.E.ii.

e. If an applicant provides an engineering certification showing that a mobile service support structure is designed to collapse within a smaller area than the setback area required under subsection 2.a.F, then that requirement does not apply to such a structure unless the City provides the applicant with substantial evidence that the engineering certification is flawed.

f. An application fee is required in such amount as has been established by the City.

3. *Application Requirements for Class 2 Collocations*.

a. An application for a permit to engage in a class 2 collocation shall be submitted in writing to the zoning administrator on forms furnished by the administrator and before construction commences. The application shall contain the following information:

A. The name and business address of, and the contact individual for, the applicant.

B. The location of the proposed or affected support structure.

C. The location of the proposed mobile service facility.

b. The zoning administrator shall inform the applicant within five (5) days of receiving the application if the application is not complete. Notification shall be in writing and shall specify in detail the information that was incomplete. An applicant may resubmit an application as often as necessary until it is complete.

c. Within 45 days of receiving a complete application, the zoning administrator shall grant or deny the application in writing. The zoning administrator and the applicant may agree in writing to an extension of the 45-day period. Any decision to deny an application shall be supported by substantial evidence. Such evidence shall be included in the written decision

d. An application fee is required in such amount as has been established by the City.

24. This ordinance shall be in full force and effect from and after its date of publication.

Dates

Council Adopted:_____

Mayor Approved: _____ _____

Tim Swadley, Mayor

Published:_____

Attest_____ _____

Holly Licht, City Clerk

Court of Appeals Upholds Denial of Cell Tower Permit

Julia K. Potter, Attorney, Boardman & Clark LLP

In a recent case, *Eco-Site, LLC v. Town of Cedarburg*, 2019 WI App 42, the Wisconsin Court of Appeals upheld a municipality's decision to deny a permit to Eco-Site, LLC, a wireless infrastructure provider seeking permission to construct a cell tower on private, rural land. In doing so, the court clarified the scope of the limits placed on municipal regulatory authority by Wis. Stat. § 66.0404, which prohibits a municipality from denying a cell tower permit "based solely on aesthetic concerns."

Eco-Site sought a permit from the Town of Cedarburg to construct a 120-foot metal monopole cell tower, along with a supporting 5,600 square foot structure, on a horse farm located in the Town's A-1 agricultural zoning district (but surrounded by residential uses). Under the Town's ordinances, the permit could not be granted unless certain conditions were met, including that the tower be "[c]ompatible with adjacent land" – i.e., that "[t]he uses, values and enjoyment of other Town property in the neighborhood for purposes already permitted shall be in no foreseeable manner substantially impaired or diminished by the establishment, maintenance or operation" of the cell tower. After much discussion, the Town Board denied Eco-Site's permit application on a number of grounds, including failure to meet the ordinance's compatibility requirement.

Eco-Site sued the Town, making two primary arguments: (1) that the Town's determination that the tower was incompatible with adjacent land was a misapplication of its own ordinances; and (2) that the Town's decision was based solely on aesthetic concerns in violation of Wis. Stat. § 66.0404(4)(g). Both arguments failed.

The court held that the Town's conclusion that the proposed tower would be incompatible with neighboring land uses was reasonable, noting that the Town had placed the property and adjacent land in agricultural and residential districts in an effort to keep the area rustic, rural, and populated and that "[t]his intended use and lifestyle are clearly at odds with, and would be thwarted by, the introduction of a 120-foot tall telecommunications tower with its substantial related structure and fencing." In addition, the court concluded that the neighboring homeowners' concerns about the negative effect the cell tower would have on their property values fairly related to the residents' "uses, values and enjoyment" of their property and therefore to the compatibility factor set out in the ordinance.

Eco-Site also argued that that the Town's denial of its permit application on the basis of incompatibility, lost property values, and the effect on the public health, safety, and general welfare amounted to a denial based solely on aesthetics in contravention of Wis. Stat. § 66.0404. Eco-Site pointed to numerous comments during the discussion of each ordinance factor that related to the visual impact of the tower. The court acknowledged that the Town Board made comments regarding aesthetics, but concluded that Wis. Stat. § 66.0404(4)(g) only prohibits a denial of a cell tower siting permit if that denial is based "solely" on aesthetic concerns. Because the Board's decision that the tower did not meet the ordinance's incompatibility standard was also based on the impact of the tower on the uses and lifestyle for which the neighborhood was zoned and the economic impact on neighboring property values, it was not a denial based "solely" on aesthetic concerns.

This decision is an important one for municipalities looking to exercise their right to regulate the siting of cell towers within municipal limits. Municipalities should carefully consider the standards set out in local ordinances for the granting of cell tower permits to ensure that they incorporate factors that are not purely aesthetic (e.g., effect on property values and impact on the uses and enjoyment of nearby property), and should be sure to carefully document that the basis for denial of a permit includes non-aesthetic factors.

Licensing and Regulation 402

About the Author:

Julia K. Potter is an attorney at Boardman & Clark LLP, where her practice focuses on land use, real estate, right-of-way regulation, and general municipal law. She received her law degree, summa cum laude, from the University of Michigan Law School and her B.A. from Brown University. Julia was named an "Up and Coming Lawyer" by the Wisconsin Law Journal in 2018.

Boardman & Clark LLP is a Madison law firm that provides a full range of legal services to Wisconsin municipalities. Contact Julia at JPotter@boardmanclark.com