

MEMORANDUM

TO: City Council

FROM: Justin Eichmann

DATE: October 19, 2021

RE: Federal Telecommunications Act of 1996 (the “TCA”)
Wireless Communications Facility – Conditional Use Permit Application

This memorandum is to provide the City Council with background regarding the TCA and other relevant federal rule in order to highlight some relevant provisions for consideration to apply to permits for wireless communications facilities. Also included are the review guidelines for a conditional use permit (“CUP”) application for the City of Tontitown.

Background:

The TCA was adopted by Congress with the intention to foster competition among telecommunications providers to improve the quality of services and to “encourage the rollout of new technologies without delay.” *USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment of Des Moines*, 465 F.ed 817, 820 (8th Cir. 2006). “One of the means by which [Congress] sought to accomplish these goals was reduction of the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers.” *City of Rancho Palos Verdes, Cal. v. Adams*, 544 U.S. 113, 115 (2005).

Despite of the emphasis on avoiding delay, Congress preserved the authority of “[s]tate and local government or instrumentality thereof over decision regarding the placement, construction, and modification of personal wireless service facilities. See 47 U.S.C. § 332(c)(7)(A). This authority is limited in that any denial of permission to construct a cellular tower must “be in writing and supported by substantial evidence contained in a written record.” See 47 U.S.C. § 332(c)(7)(B)(iii).

Provisions:

The following provisions are highlights from the TCA:

- 1) Preservation of Local Zoning Authority - General Authority (47 U.S.C. §332(7)(A))

“Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over

decisions regarding the placement, construction, and modification of personal wireless service facilities.”

2) Limitations (47 U.S.C. §332(7)(B)(i))

“The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof-

-shall not unreasonably discriminate among providers of functionally equivalent services; and

-shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

3) Time Limit on Requests (47 U.S.C. §332(7)(B)(ii))

A State or local government shall act on any request to place, construct, or modify personal wireless service facilities within “a reasonable period of time.”

4) Denying Requests (47 U.S.C. §332(7)(B)(iii))

If a State or local government denies a request to place, construct, or modify personal wireless service facilities the denial “shall be in writing and supported by substantial evidence contained in a written record.”

The written decision must contain a sufficient explanation of the permit denial to allow a reviewing court to evaluate the evidence in the records supporting those reasons

5) Limitations – Environmental Effects (47 U.S.C. §332(7)(B)(iv))

No State or local government “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 extent that such facilities comply with the Commission's regulations concerning such emissions.”

6) Methods of Recourse from Adverse Decisions (47 U.S.C. §332(7)(B)(v))

- a. Action/Timing - If adversely affected by any final action or failure to act by a State or local government, a person may file an action in any court of competent jurisdiction within 30 days of the action or failure to act.
 - b. Expedited Process - The Court shall hear such an action on an expedited basis.
 - c. Relief - If the state or local government regulates the placement, construction, and modification of personal wireless services because of environmental effects, the person may petition the Commission for relief.
- 7) Middle Class Tax Relief and Job Creation Act – 47 U.S.C. §1455 Wireless Facilities Deployment
- a. Facility Modifications (47 U.S.C. §1455(a))

“[A] State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.”
 - b. Eligible Facilities Request (47 U.S.C. §1455(a)(2))

“Eligible facilities request” means any request for modification of an existing wireless tower or base station that involves the collocation of new transmission equipment; the removal of transmission equipment; the replacement of transmission equipment.
- 8) FCC Declaratory Ruling - In the Matter of 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 (24 F.C.C. Rcd. 13994, 14012 (2009))
- a. Timing of Processing Permits

“We find 90 days to be a generally reasonable timeframe for processing collocation applications and 150 days to be a generally reasonable timeframe for processing applications other than collocations.”

*Upheld by SCOTUS in City of Arlington, Tex. v. F.C.C., 133 S.Ct. 1863 (2013).

Conditional Use Permit - Review Guidelines:

Section 153.121 of the Tontitown Municipal Code provides the review guidelines for a request for a conditional use permit (“CU”). These guidelines are as follows:

- (A) All development shall be designed in such a way as to minimize any potential negative impact on the surrounding area. Special attention shall be given to buffering commercial developments from adjacent single-family areas. Design of the internal traffic circulation system, ingress and egress, off-street parking, loading and pedestrian ways shall be sensitive to such conditions as safety, convenience, separation of vehicular and pedestrian traffic, general attractiveness, and the proper relationship of different land uses. Landscaped areas shall be provided to protect water quality, and reduce erosion, heat and glare. Such areas shall be maintained in an attractive condition. Existing trees on a development site shall be retained where possible. Screening, open space, or other buffer may be required to give adequate separation between uses which are marginally compatible, and shall also be provided for the beautification and enhancement of the property.

- (B) In carrying out the purpose of this section, the following development standards and design specifics shall be subject to review and approval. The appropriateness of these standards shall be determined for each specific conditional use location.
 - (1) The proposed use is within the provision of "conditional uses," as set out in these regulations.
 - (2) The proposed use conforms to all applicable provisions herein set out for the district in which it is to be located.
 - (3) The proposed use is so designated, located, and proposed to be operated, that the public health, safety and welfare will be protected.
 - (4) The proposed land use is compatible with and will not adversely affect other property in the area where it is proposed to be located.
 - (5) The size and shape of the site, including the size, shape and arrangement of proposed structures, as well as signage related thereto, is in keeping with the intent of these regulations.
 - (6) The proposed ingress and egress, internal circulation system, location and amount of off street parking, loading and pedestrian ways are sufficiently adequate, and not inconsistent with requirements of these regulations.
 - (7) The proposed landscaping and screening of the proposed use are in accordance with provisions of these regulations.
 - (8) Safeguards proposed to limit noxious or offensive emissions, including lighting, noise, glare, dust and odor are addressed.