



## WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

### New Law Relating to Local Regulation of Cell Phone Transmission Towers

The 2013 Biennial Budget Act modified the regulatory powers of local governments in regard to cell phone towers. The new law specifies the manner in which a political subdivision can use zoning to regulate cell phone towers and lists specific regulations that a political subdivision may not apply.

#### **OVERVIEW**

The primary tool used by political subdivisions of the state to regulate the siting and construction of cell phone transmission towers, and other land uses, is zoning. Zoning serves to separate incompatible land uses by segregating them in zones, such as residential, commercial, and industrial zones. A typical zoning ordinance identifies land uses that are prohibited in a particular zone, those that are permitted, and those that are permitted subject to a conditional use permit. For example, cell phone towers are a land use that, under prior law, might have been prohibited in a residential zone but allowed, subject to a conditional use permit, in other zones. Note that not all political subdivisions have zoning ordinances, and those with zoning ordinances vary considerably in how they regulate various land uses.

Two other tools available to political subdivisions to regulate cell phone towers are building codes and other, non-zoning police-power regulations, such as license requirements. Again, not all political subdivisions require building permits; it is not known how many have enacted other police-power regulations, but it is presumed to be very few.

The new law created in 2013 Act 20 states specifically that a political subdivision may regulate cell phone towers under a zoning ordinance, but places strict limits on how it may do so. It specifies the procedures and standards a political subdivision must use in reviewing applications for permits to construct or modify towers. It also lists specific limitations or regulations that a political subdivision may not impose on the construction or modification of a tower. Significant among these, it specifies that a political subdivision may not prohibit the placement of cell phone towers in particular locations within the political subdivision, meaning essentially that it may not designate cell phone towers as a prohibited use in any zone.

The new law does not disturb existing building code requirements, but it expressly prohibits any regulation of cell phone towers except by zoning ordinances, as specified in the law, and building codes.

## **APPLICABILITY**

The new law applies to local regulation of three types of projects, all for the installation of various types of cell phone transmission facilities:

- Projects requiring construction of a new tower.
- Projects requiring substantial modification of an existing tower and facilities, but not construction of a new tower. Projects of this type are referred to as “class 1 collocations.”
- Projects requiring neither construction of a new tower nor substantial modification of an existing tower and facilities. Projects of this type are referred to as “class 2 collocations.”

The new law defines “substantial modification” as a project that does any of the following:

- For structures with an overall height of 200 feet or less, increases the overall height of the structure by more than 20 feet.
- For structures with an overall height of more than 200 feet, increases the overall height of the structure by 10% or more.
- 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.
- Increases the square footage of an existing equipment compound to a total area of more than 2,500 square feet.

The law defines “permit” as “a permit, other than a building permit, or other approval required by a political subdivision” for one of these types of projects. It defines “political subdivision” as a city, village, town, or county.

The new law specifies that a county ordinance to regulate the construction of a new tower or a class 1 collocation applies only in the unincorporated areas of the county, but not in any town that has such an ordinance in effect. It does not include a parallel provision regarding the applicability of county ordinances regulating class 2 collocations.

## **PERMITTED REGULATIONS AND REQUIRED PROCESSES**

The new law specifies the regulations a political subdivision may impose on cell phone transmission towers and facilities, and the process a political subdivision must follow in reviewing an application for a permit.

### ***PROJECTS REQUIRING NEW CONSTRUCTION OR SUBSTANTIAL MODIFICATIONS***

The new law treats a project requiring substantial modification of an existing tower and facilities the same as a project requiring construction of a new tower.

#### ***Permitted Regulations***

The new law specifies that a political subdivision may enact a zoning ordinance to regulate any of the following:

- The construction of cell phone towers.

- The substantial modification of existing towers and facilities (class 1 collocations).

However, it specifies that a political subdivision may only regulate these activities as provided in the law, and that any ordinance in effect on the effective date of the law that is inconsistent with the law does not apply to the activities and may not be enforced against them.<sup>1</sup>

### ***Required Processes***

The new law requires that an ordinance prescribe the application process for obtaining a permit or approval. The ordinance must require that an application include all of the following:

- The name and business address of, and the contact individual for, the applicant.
- The location of the proposed or affected tower.
- The location of the proposed facilities.
- A construction plan that describes the proposed new tower and facilities or the proposed modifications to the existing tower and facilities.
- If an application is to construct a new tower, an explanation as to why the applicant chose the proposed location and why the applicant did not choose collocation, including a sworn statement attesting to one of the following regarding collocation within the area in which the applicant needs to site the new facilities (termed the applicant's "search ring"):
  - Collocation would not result in the same mobile service functionality, coverage, and capacity.
  - Collocation is technically infeasible.
  - Collocation is economically burdensome to the mobile service provider.

The new law specifies that an application is complete if it contains all the information described above; by implication, a political subdivision may not require any additional information from an applicant. If a political subdivision does not believe that an application is complete, it must notify the applicant of this in writing, within 10 days of receiving the application. The notice must specify in detail the information that was lacking from the application. The applicant may refile the application as many times as is needed to complete it.

Within 90 days of receiving a complete application, a political subdivision must do all of the following:

- Review the application to determine whether it complies with all applicable aspects of the political subdivision's building code and, subject to the limitations in the new law, zoning ordinances.
- Make a final decision whether to approve or disapprove the application.

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<sup>1</sup> The law appears to contemplate that a political subdivision will require a person engaging in one of these activities to obtain a conditional use permit, since the language does not allow treating them as prohibited uses. However, a political subdivision could elect to treat them as permitted uses.

- Notify the applicant, in writing, of its final decision.
- If the decision is to disapprove the application, include with the written notification substantial evidence that supports the decision.

If the political subdivision fails to comply with these requirements by the 90-day deadline, the application is considered approved, except that the political subdivision and the applicant may agree to extend the deadline.

A political subdivision may disapprove an application if the applicant refuses to evaluate the feasibility of collocation within its “search ring” and to provide the sworn statement required in the application.

A party that is aggrieved by the political subdivision’s final decision may appeal the decision to the circuit court for the county in which the project was proposed. This appears to allow the aggrieved party to appeal to circuit court without first exhausting administrative reviews at the level of the political subdivision.

### ***Limitations***

The new law specifies that a zoning ordinance does not apply to a particular structure if the applicant provides the political subdivision with an engineering certification showing that the structure is designed to collapse in a smaller area than the setback or fall zone area required in the ordinance. However, the political subdivision may apply the ordinance to the structure if it provides the applicant with substantial evidence that the engineering certification is flawed.

### ***PROJECTS REQUIRING NEITHER NEW CONSTRUCTION NOR SUBSTANTIAL MODIFICATIONS***

As noted earlier, the new law refers to projects that involve neither new construction nor substantial modifications of towers as “class 2 collocations.”

### ***Permitted Regulations***

The new law specifies that a class 2 collocation is a permitted use under a zoning ordinance. It also provides that class 2 collocations are subject to the same building permit requirements as other commercial development or land use development.<sup>2</sup> Again, the law specifies that a political subdivision may only regulate class 2 collocations as provided in the law, and that any ordinance in effect on the effective date of the law that is inconsistent with the law does not apply to class 2 collocations and may not be enforced against them.

### ***Required Processes***

The new law specifies a process for the review of “an application for a permit to engage in a class 2 collocation.”<sup>3</sup> The process is a simplified version of the process for other projects, described above. It differs from that process in the following ways:

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<sup>2</sup> The provisions of the new law relating to construction of a new tower or a class 1 collocation do not include a similar statement, but the review process does require the political subdivision to determine whether the proposed project complies with its building code.

<sup>3</sup> As noted above, a class 2 collocation is a permitted use under a zoning ordinance, so there can be no conditional use permit to apply for. Further, building permits are excluded from the definition of “permit,” so the procedures described here do not apply to a building permit application. Consequently, it appears that the new law contemplates that a political subdivision may require a person engaging in a class 2 collocation to apply for a

- Only the first three items of information (identifying the business and the location of the project) are required for an application.
- The political subdivision must inform the applicant of deficiencies in the application within five days of receiving the application, rather than 10 days.
- The political subdivision must complete its actions within 45 days of receiving a complete application as opposed to 90 days, and the list of actions it must complete is slightly different:
  - Make a final decision whether to approve or disapprove the application.
  - Notify the applicant, in writing, of its final decision.
  - If the decision is to approve the application, issue the applicant the relevant permit.
  - If the decision is to disapprove the application, include with the written notification substantial evidence which supports the decision.
- The application is not considered automatically approved if the political subdivision does not take final action within the specified time frame.

### **LIMITATIONS ON POLITICAL SUBDIVISIONS' ACTIONS**

Under the new law, a political subdivision may not do any of the following with regard to the construction of a new cell phone tower or a class 1 or class 2 collocation:

- 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 such activities.
- Enact an ordinance prohibiting the placement of a cell phone tower in particular locations within the political subdivision.
- Charge a cell phone 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 cell phone service provider any recurring fee for a project covered by the law.
- Permit third-party consultants to charge the applicant for any travel expenses incurred in the consultant's review of cell phone service permits or applications.

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determination that the activity is, in fact, a class 2 collocation; that is to say, a determination that the political subdivision will not require a conditional use permit for the activity. This Information Memorandum assumes that it is an application for this type of approval to which the process described here applies.

- 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 political subdivision which fall into disuse. The law is a rebuttable presumption that a surety requirement of \$20,000 or less complies with this limitation.
- Prohibit the placement of emergency power systems.
- Require that a cell phone tower be placed on property owned by the political subdivision.
- 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 owner of the facilities to provide space on or near the structure for the use of or by the political subdivision at less than the market rate, or to provide the political subdivision 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 tower or using collocation.
- Disapprove an application based on an assessment by the political subdivision of the suitability of other locations for conducting the activity.
- Require that a mobile cell phone tower or facilities have or be connected to backup battery power.
- Impose a setback or fall zone requirement for a cell phone tower 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 cell phone tower to under 200 feet.
- Condition the approval of an application on, or otherwise require, the applicant's agreement to indemnify or insure the political subdivision in connection with the political subdivision's exercise of its authority to approve the application.
- Condition the approval of an application on, or otherwise require, the applicant's agreement to permit the political subdivision 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 political subdivision or an entity in which a political subdivision has a governance, competitive, economic, financial or other interest.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

This memorandum was prepared by David L. Lovell, Principal Analyst, on December 9, 2013.

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