

## Current Regulation of Wireless Towers

### **1. What authority do local governments have under federal law to influence the siting of wireless towers (and other similar communications structures)?**

- FTA does not preempt State or local government from regulating the siting of wireless towers. Subject to:
  - Any regulation must not *unreasonably discriminate*.
  - Any regulation must not have the effect of prohibiting the provision of wireless service.
  - State or local government must act within a reasonable time on a request.
  - A decision by a governmental body denying a request must be provided to an applicant in writing and supported by substantial evidence.
  - A decision by a governmental body denying a request may not be based upon the environmental effects of radio frequency emissions if the emissions meet FCC guidelines.
- Adversely affected parties may commence an action in a court of competent jurisdiction. This typically is a suit brought in federal district court. In Texas, the decision of a municipal zoning authority may be challenged in a state district court, county court, or county court at law.

### **2. Can a local government require that a permitted tower operator:**

#### **a. Notify the local government of their application to the FCC to construct a tower?<sup>1</sup>**

- Yes, provided the local government's zoning ordinances require notification of any FCC licensing or registration submissions.
  - Recent FCC rule changes provide for geographic area licensing procedures for all commercial mobile service operators (e.g. cellular, PCS, and paging) alleviating the need for individual antenna licensing.
  - Registration of a tower with the FCC may be required if the tower is over 200 ft. tall or in a FAA defined flight path. An exception does exist for towers in built-up areas that are not as tall as surrounding structures.

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<sup>1</sup> Response assumes that the tower owner is required to obtain a license or register the tower with the FCC. The industry trend is for commercial mobile service operators to lease space from tower operators that are not FCC spectrum license holders.

**b. Hold public hearings on the proposed tower location?**

- Yes, if required by local ordinance. Additionally, a zoning commission shall hold public hearings on a matter before submitting its report to the local governing body.

**c. Share a tower structure with other companies' communications devices?**

- Cannot require sharing; however, creating an incentive to do so is an option, such as: expedited consideration by the zoning authority of applications involving a tower that will have multiple users or ordinance requiring wireless towers be designed to accommodate multiple users.

**d. Remove the tower once it is no longer in use?**

- Maybe, § 214.002 of the Local Government Code addresses a municipality enacting ordinances to address the “repair, removal, or demolition of buildings or other structures.”
- There does not appear to be an equivalent county authority.
- The state under its general police power probably could exercise its eminent domain authority for limited public purposes as outlined in § 251.001 of the Local Government Code.

**3. Can a local government impose a moratorium on the construction of new towers on land under its jurisdiction, limit the total number of towers in a given area, or impose distance restrictions (such as a tower must be x feet from another tower, from a school, from a waterway, etc.) on tower construction?**

- Yes, but it must not unreasonably discriminate and not have the effect of prohibiting the provision of personal wireless service.

**4. Under Texas law, what types of local governments are able to exercise the authority granted by federal law? If not all types of local governments are permitted, can the Legislature expand the authority to include other local governments?**

- The power to exercise zoning regulation of “buildings and other structures” is conferred by the Legislature upon municipalities and certain counties.
- Home-rule municipalities must appoint a zoning commission.
- General-law municipalities may appoint a zoning commission.

- A municipality may appoint a board of adjustment to address variances and exceptions.
- A zoning commission or board of adjustment proceeding must comply with the provisions of the Texas Open Meeting Act.

**5. Does the state have any potential regulatory authority over the siting of wireless towers and other similar communications structures?<sup>2</sup>**

- The legislature may place restrictions on and provide the manner in which a municipality exercises zoning regulation.
- Various state agencies, commissions, and boards may possess implied authority to accomplish their legislatively delegated purpose as it relates to public areas (e.g. General Services Commission has charge and control of all state buildings, grounds, and property and is authorized to protect state property from damage, intrusion, or improper use).
- The Texas DoT issues construction permits for structures over 200 feet near airport flight paths that do not require a FCC construction permit, license, or authorization.
- Zoning regulation does not apply to buildings, other structures or land under the control, administration, or jurisdiction of a state or federal agency.
- An approach taken by some states and encouraged by the Communications Act is to encourage the use of state land and streamline the approval process for siting wireless towers on such land.
- The Communications Act, in theory, permits a State to conduct zoning regulation; however, local government has traditionally exercised this authority.

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<sup>2</sup> Assumes the authority granted by the FTA of 1996 could be exercised by the State of Texas rather than strictly by municipalities.