StaffordRosenbaum LLP
Attorneys

To City of Stoughton Plan Commission

From Rick Manthe and Matt Dregne

Date August 29, 2022

Re Mobile Support Structure Ordinance Revisions

The siting of towers designed for installation of telecommunication equipment, also known as mobile support structures or mobile towers, remains a challenge for all Wisconsin municipalities. While state law preempts many local requirements, the City does retain limited discretion regarding mobile support structure placement. In conjunction with City planning staff, we have developed a recommended proposal that would bring the City's code of ordinances up to date with recent state law changes while still maintaining some control over mobile support structure placement, and effectively encouraging the placement of towers in commercial or industrial districts.

1. State Law Prohibitions.

Before explaining the recommended changes to the City's ordinances, it is important to provide context for what the City can actually regulate regarding mobile towers.

As it relates to mobile towers, state law has preempted many types of local government regulations. The City may not do any of the following:

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

B. Impose a moratorium on the permitting, construction, or approval of siting and construction of mobile support structures.

C. Prohibit the placement of a mobile service support structure in particular locations within the City.

D. Charge a mobile radio service provider a fee in excess of $500 or $3,000 depending on the type of deployment.

E. Charge a mobile radio service provider any recurring fee.

F. Permit 3rd party consultants to charge an applicant for any travel expenses incurred in the consultant's review of mobile service permits or applications.

G. Disapprove a mobile tower based solely on aesthetic concerns.

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

I. Impose a surety requirement, unless the requirement is competitively neutral, nondiscriminatory, and consistent with surety requirements for other facilities and structures in the City which fall into disuse. There is a rebuttable presumption that a surety requirement of $20,000 or less complies with this restriction.

J. Prohibit the placement of emergency power systems.

K. Require that a mobile service support structure be placed on property owned by the City.

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

M. Condition approval of a mobile tower 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 market rate.

N. Limit the duration of any permit that is granted.

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

P. Disapprove an application based on an assessment by the City of the suitability of other locations for conducting the activity.

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

R. 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.

S. Limit the height of a mobile service support structure to under 200 feet.

T. Condition the approval of an application on, or otherwise require, the applicant's agreement to indemnify or insure the City.

U. Condition the approval of an application on, or otherwise require, the applicant's agreement to permit the City to place at or collocate with the applicant's support structure any mobile service facilities provided or operated by the City.

Wis. Stat. § 66.0404(4). This list of state preemptions is wide ranging and severely curtails the City's ability to regulate the siting and construction of mobile support structures.

While state law preempts many aspects of local cell tower regulations, recently the statutes were amended to grant more flexibility with setbacks in zoning districts that allow single-family residences. Under this exception, the City may enact a setback requirement equal to the height of a mobile support structure in any zoning district that allows single-family residential use, or on any parcel adjacent to a property that allows single-family residential use. Wis. Stat. § 66.0404(4e). The setback would be measured from the lot line of the parcels.

2. Current City Regulations of Mobile Support Structures.

The City currently regulates mobile support structures via a conditional use permit process. *See* Stoughton Code § 78-206(7)(c). The current ordinance was adopted prior to state law changes preempting many local requirements. As a result, many provisions of the City's current requirements have questionable validity and may not be enforceable.

3. Ordinance Recommendations.

We met with planning and zoning staff to discuss possible ordinance options for mobile support structures. After that discussion, we believe the most effective way to regulate the placement of mobile support structures is to utilize a setback requirement equal to the height of the tower in zoning districts that permit single-family residential uses, or on parcels adjacent to zoning districts that permit single-family residential uses.

Staff believe with the current amount and location of zoning districts that permit single-family residential uses, and the lot sizes in those districts, a setback restriction will effectively prohibit cell towers in those zoning districts. In turn, this will effectively lead to placement of cell towers in commercial and industrial type districts, where cell towers

are more suitable. To accomplish this, the proposed ordinance would make mobile towers a permitted use in all zoning districts, subject to the setback requirements explained above.

An additional option the City could consider is making mobile support structures a conditional use in some zoning districts and permitted uses in other districts. This option, while legally possible, does pose some challenges.

To use a conditional use approval, the City would need to create a conditional use process that has measurable standards for obtaining a conditional use permit. Wis. Stat. § 62.23(7)(de)2.b.. If the applicant establishes compliance with those standards with substantial evidence, then the City must grant the conditional use permit. Wis. Stat. § 62.23(7)(de)2.a.. Given the significant restrictions imposed by state law, creating measurable standards that provide the City with the regulatory authority it would desire would be difficult.

However, one criteria the City could include in a conditional use process is to require that a mobile tower cannot decrease property values on adjacent properties. Property values are measurable criteria, and the Wisconsin court of appeals recently determined such a consideration compliant with state law. *See Eco-Site, LLC v. Town of Cedarburg*, 2019 WI App 42, ¶21, 388 Wis. 2d 375, 933 N.W.2d 179.

With that said, a property value requirement could be difficult for the City to evaluate. One issue is determining what role staff would play. The City would need to decide if staff would do their own property value analysis, or simply rely on information that the applicant provides. The conditional use criteria could specify that the applicant must establish with substantial evidence that property values will not decrease. At that point, it would be up to members of the public to submit their own evidence of decrease in property values. Unless City staff or members of the public are able to provide evidence of a project's impact on property values, the only evidence available would be from the applicant.

The difficulties of administering a conditional use process for mobile towers is why we recommend that the City pursue the single-family residential setback option only. It will be much easier to administer, and effectively push mobile towers to more desirable locations.

CITY OF STOUGHTON

ORDINANCE OF THE COMMON COUNCIL	
An Ordinance Amending Sections 78-015 and 78-105, repealing and recreating Section 78-206(7)(c), and amending Appendix C to Chapter 78 of the Stoughton Code of Ordinances, Relating to Mobile service support structures Committee Action: Recommend approval - 0 with the Mayor voting. Fiscal Impact: N/A	
File Number: O - - 2022	**Date Introduced:**

RECITALS

A. *Purpose*. The purpose of this ordinance is to regulate the siting and construction of new mobile service support structures 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 78-015 is amended to remove the term "Communication tower."

2. Section 78-015 is amended to add the following term:

   Mobile service support structure: See Wis. Stat. § 66.0404(1)(n).

3. 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 service support structure

4. 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 service support structure

5. 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 service support structure

6. 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 service support structure

7. 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 service support structure

8. 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 service support structure

9. 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 service support structure

10. 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 service support structure

11. 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 service support structure

12. 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 service support structure

13. 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 service support structure

14. 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 service support structure

15. 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 service support structure

16. 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 service support structure

17. 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 service support structure

18. 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.

19. 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 service support structure

20. 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.

21. 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 service support structure

22. 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.

23. 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 service support structure

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

In zoning districts where single-family uses are permitted principal uses, or on parcels adjacent to a parcel where single-family uses are permitted principal uses, the setback requirement for a mobile service support structure shall be equal to the height of the mobile service support structure.

25. Appendix C of Chapter 78 is amended to replace "Communication tower" with "Mobile service support structure."

26. 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_____ _____

Candee Christen, City Clerk