

## **PROPOSED AMENDMENT TO THE UDO – OCTOBER 12, 2015 DRAFT**

This proposed, new section of the Whitestown Unified Development Ordinance (UDO) will streamline, in accordance with Federal and State law, the permitting process for the placement, construction, and modification of wireless facilities (such as “cell towers”). It incorporates the so-called “shot clock” feature that Indiana law now requires, pursuant to legislation passed by the General Assembly in April, 2015. Essentially, Town officials (including the Board of Zoning Appeals and planning staff) will be required to take formal action on any application to erect a new tower within 90 days after receipt of the application (or within 120 days where a use variance is necessary) – if there is a “shot clock” violation, an affected applicant must get a court order instead of having its application approved automatically by operation of law. Also, the WBZA will be barred from enforcing a “fall zone” provision based on the height of a support structure. This new section will take the place of existing UDO Section 5.2.6 (governing cell towers and “wireless communications facilities”), which contains superseded provisions governing WBZA approval of towers and some related definitions.

Additional pages which will be amended are the following:

Page 17; 33; 113, B.4.b—change WCF to “wireless facility”

Pages 126-127—replace with new draft

Page 318—replace definition of WCF with statutory definitions of “wireless facility” and “wireless support structure” from IC 8-1-32.3-13 and 14, respectively.

Finally, the proposal will permit the erection of a new “wireless support structure” (tower) only in the Industrial (I1 and I2) zoning districts; accordingly, wireless support structures will be listed as “Special Exception Conditional Uses” in the I1 and I2 districts. This means that a use variance will need to be approved by the WBZA before a new tower can be erected anywhere in the community other than in an Industrial district. The effective date will be January 1, 2016, which is concurrent with the effective date of the new Indiana statute.

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## **6. Wireless Communications Facilities**

1. **Generally.** The purpose of this Section is intended to implement the provisions of IC 8-1-32.3, but otherwise to comply with IC 36-7-4, in regard to the Town’s regulation of the placement, construction, or modification of wireless support structures.

2. **Definitions.** The following definitions apply throughout this Section.

a. "Antenna" means any communications equipment that transmits or receives electromagnetic radio signals used in the provision of wireless communications service.

b. "Base station" means a station located at a specific site that is authorized to communicate with mobile stations. The term includes all radio transceivers, antennas, coaxial cables, power supplies, and other electronics associated with a station.

c. "Collocation" means the placement or installation of wireless facilities on existing structures that include a wireless facility or wireless support structure, including water towers,

and other buildings or structures. The term includes the placement, replacement, or modification of wireless facilities within an approved equipment compound.

d. "Electrical transmission tower" means a structure that physically supports high voltage overhead power lines. The term does not include a utility pole.

e. "Equipment compound" means the area that:

- (1) Surrounds or is near the base of a wireless support structure; and
- (2) Encloses wireless facilities.

f. "Existing structure" does not include a utility pole or an electrical transmission tower.

g. "Small cell facility" means either:

(1) A personal wireless service facility (as defined by the Federal Telecommunications Act of 1996 as in effect on July 1, 2015); or

(2) A wireless service facility that satisfies the following requirements:

(A) Each antenna, including exposed elements, has a volume of three (3) cubic feet or less.

(B) All antennas, including exposed elements, have a total volume of six (6) cubic feet or less.

(C) The primary equipment enclosure located with the facility has a volume of seventeen (17) cubic feet or less. For purposes of this clause (C), the volume of the primary equipment enclosure does not include the following equipment that is located outside the primary equipment enclosure: electric meters; concealment equipment; telecommunications demarcation boxes; ground based enclosures; back up power systems; grounding equipment; power transfer switches; cut off switches.

h. "Small cell network" means a collection of interrelated small cell facilities designed to deliver wireless service.

i. "Substantial modification of a wireless support structure" means the mounting of a wireless facility on a wireless support structure in a manner that either:

(1) Increases the height of the wireless support structure by ten percent (10%) of the original height of the wireless support structure, or twenty (20) feet, whichever is greater;

(2) Adds an appurtenance to the wireless support structure that protrudes horizontally from the wireless support structure more than twenty (20) feet, or the width of the wireless support structure at the location of the appurtenance, whichever is greater; or

(3) Increases the square footage of the equipment compound in which the wireless facility is located by more than two thousand five hundred (2,500) square feet.

However, notwithstanding subdivisions (1), (2), and (3), the term does not include any of the following:

(4) Increasing the height of a wireless support structure to avoid interfering with an existing antenna.

(5) Increasing the diameter or area of a wireless support structure to shelter an antenna from inclement weather, or to connect an antenna to the wireless support structure by cable.

(6) Any modification of a wireless support structure or base station that involves only collocation, removal of transmission equipment, or replacement of transmission equipment.

j. "Utility pole" means a structure (other than a wireless support structure or electrical transmission tower) that is:

(1) Owned or owned or operated by a public utility, a communications service provider, a political subdivision, an electric membership corporation, or a rural electric cooperative; and

(2) Designed and used to carry lines, cables, or wires for telephony, cable television, or electricity, or to provide lighting.

k. "Wireless facility" means the set of equipment and network components necessary to provide wireless communications service. The term does not include a wireless support structure.

l. "Wireless support structure" means a freestanding structure designed to support wireless facilities. The term does not include a utility pole or electrical transmission tower.

3. **Delegation of Authority.** For purposes of IC 8-1-32.3 and Section 332(c)(7)(B) of the Federal Telecommunications Act of 1996 as in effect on July 1, 2015, the WBZA shall exercise the authority to conduct hearings, to make decisions, and to approve the issuance or denial of ILP's (except for collocation) under this Section. The Administrator shall exercise the authority to review applications for completeness, within the meaning of IC 36-7-4-1109, and to issue ILP's under this Section.

4. **Review of Applications.** The Administrator shall promptly review for completeness every application duly filed with the Town which requests authorization to place, construct, or modify personal wireless facilities. Every applicant shall be notified within ten (10) business days of the Town's receipt of an application whether its application is complete and whether a public hearing will be required regarding its request. Whenever no public hearing is required, the Administrator shall take final action on the request within a reasonable period of time after the request is duly filed. Whenever a public hearing is required regarding a request, the WBZA shall conduct the hearing and take final action on the request within a reasonable period of time. For purposes of this Section, any application that contains all of the following information shall be considered complete:

a. A statement that the applicant is a person that either provides wireless communications service or owns or otherwise makes available infrastructure required for such service.

b. The name, business address, and point of contact for the applicant.

c. The location of the proposed or affected wireless support structure or wireless facility.

d. A construction plan that includes evidence of conformance with all applicable building code requirements.

e. Except for an application that requests collocation only, evidence showing that the application complies with the applicable criteria set forth in Section 9.3 of this Ordinance for a Special Exception, or that the application complies with the applicable criteria for a Variance of Use under IC 36-7-4-918.4. An application that requests collocation only is required to comply only with subdivisions a, b, c, and d.

f. If the application requests an ILP for the construction of a new wireless support structure, a construction plan that describes the proposed wireless support structure and all equipment and network components, including antennas, transmitters, receivers, base stations, power supplies, cabling, and related equipment, along with evidence supporting the choice of location for the proposed wireless support structure, including a sworn statement from the individual responsible for the choice of location demonstrating that collocation of wireless facilities on an existing wireless support structure is not a viable option because collocation:

- (1) Would not result in the same wireless service functionality, coverage, and capacity;
- (2) Is technically infeasible; or
- (3) Is an economic burden to the applicant.

g. If the application requests an ILP for substantial modification of a wireless support structure, a construction plan that describes the proposed modifications to the affected wireless support structure and all equipment and network components, including antennas, transmitters, receivers, base stations, power supplies, cabling, and related equipment.

**5. Failure to Notify.** Any failure by the Administrator to notify an applicant within ten (10) business days whether its application is complete shall be considered a nonfinal zoning decision within the meaning of IC 36-7-4-1602(c), with the applicant consequently entitled to expedited judicial review of the nonfinal zoning decision.

**6. Deadlines for Final Action.** For purposes of Section 5.2.6.4 above, a reasonable period of time shall be determined as follows:

- a. If the request involves an application for collocation only, a reasonable period of time is not more than forty-five (45) days from the date that the applicant is notified by the Administrator that the application is complete. An application for collocation only is not subject to a public hearing before the WBZA, but the Administrator may review the application for compliance with applicable building code requirements before issuing the applicant an ILP.
- b. If the request involves an application for an ILP to construct a new wireless support structure or for substantial modification of a wireless support structure, a reasonable period of time is not more than ninety (90) days from the date that the applicant is notified that the application is complete, or not more than one hundred twenty (120) days in any case in which the approval of a Variance of Use is necessary. The WBZA shall conduct a public hearing on the request and shall make a decision on the request at the meeting at which it is first presented. Decisions made by the WBZA after a public hearing conducted in accordance with this Section are considered zoning decisions for purposes of IC 36-7-4 and are subject to judicial review under the IC 36-7-4-1600 series.
- c. If an applicant has requested additional time to amend its application or requested

or agreed to a continuance during the review or hearing process, then the period of time prescribed by subdivision a or b shall be extended for a corresponding amount of time. However, any failure by the Administrator or the WBZA to take final action on a request within a reasonable period of time shall be considered a nonfinal zoning decision within the meaning of IC 36-7-4-1602(c), with the applicant consequently entitled to expedited judicial review of the nonfinal zoning decision.

7. **Additional Rules.** Notwithstanding IC 36-7-4 or any rules adopted by the WBZ under that chapter, the following provisions apply to all applications submitted under this Section:

- a. In reviewing applications and conducting hearings, the Administrator and the WBZA shall comply with all applicable provisions of Section 332(c)(7)(B) of the Federal Telecommunications Act of 1996 as in effect on July 1, 2015, and Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 as in effect on July 1, 2015.
- b. Neither the Administrator nor the WBZA may require an applicant to submit information about or evaluate an applicant's business decisions with respect to the applicant's designed service, customer demand, service quality, or desired signal strength to a particular location.
- c. All meetings of the WBZA are subject to the Open Door Law (IC 5-14-1.5). However, neither the Administrator nor the WBZA may release to the public any records that are required to be kept confidential under Federal or State law, including the trade secrets of applicants, as provided in the Access to Public Records Act (IC 5-14-3) and other applicable laws.
- d. The Administrator shall allow an applicant to submit a single consolidated application to collocate multiple wireless service facilities, or for multiple small cell facilities that are located within the Town and that comprise a single small cell network. Whenever a consolidated application is approved, the Administrator shall issue the applicant a single ILP for the multiple facilities, or for the small cell network, in lieu of issuing multiple permits for each respective facility.
- e. The WBZA may not impose on an applicant a fall zone requirement for a wireless support structure that is larger than the area within which the structure is designed to collapse, as set forth in the applicant's engineering certification for the structure, unless evidence submitted by a professional engineer demonstrates that the engineering certification in the application is flawed. This subdivision e does not apply to any setback requirement prescribed by this Ordinance for the land use which is not based on the height of the wireless support structure.
- f. Neither the Administrator nor the WBZA may require or impose conditions on an applicant regarding the installation, location, or use of wireless service facilities on utility poles or electrical transmission towers.
- g. Neither the Administrator nor the WBZA may require an applicant to pay a fee associated with the submission, review, processing, or approval of the application unless the same or a similar fee also applies to applications for permits for similar types of commercial or industrial development within the Town. In addition, if a fee is imposed in connection with the submission, review, processing, or hearing of an application, including a fee imposed by a third party that provides review, technical,

or consulting assistance to the Administrator or the WBZA, the fee must be based on actual, direct, and reasonable costs incurred for the review, processing, and hearing of the application, and may not include:

- (1) Travel expenses incurred by a third party in its review of an application; or
- (2) Direct payment or reimbursement of third party fees charged on a contingency basis.