

**LILLEY TOWNSHIP PLANNING COMMISSION MINUTES
PUBLIC HEARING – AUGUST 19, 2021
DRAFT/UNAPPROVED**

The August 19, 2021 Public Hearing of the Lilley Township Planning Commission, held at the Multi-Purpose building was called to order by Chairman Cindy Israels at 7:30 PM.

The Pledge of Allegiance was recited and invocation was by Vice Chairman Robert Doornbos.

The roll was called with the following members present: Robert Doornbos, Anna Bonnett, Chris Moore, Cindy Israels and Judith Hoving.

Motion to approve the Agenda was made by Chris Moore and second by Anna Bonnett, All in favor aye. Apposed None

Motion to approve minutes moved prior to public comments

Motion to approved the minutes of the July 15, 2021 minutes was made by Robert Doornbos and seconded by Chris Moore. All in favor aye. Apposed None

Public Comments – None

Meeting was turned over to our Lilley Township Legal counsel Clifford Bloom to explain our responsibilities as a Planning Commission regarding the topic of this Public Hearing. He explained how the process will work in accordance with our zoning and state and Federal law. He went on to say how the township board will need to address this to fall within the 90 day time limit.

The next speaker was Tony Phillips representing Parallel Towers III LLC and AT&T. He provided us previously with additional documentation. One was SBA structural analysis of the current existing tower and Two, was a land map of the existing SBA tower visual of non-compliant setback. The third was an RF letter from AT&T mobility engineer Syed Z. Hussain, a study stating that it was determined that there are no existing structures in the area to meet AT&T Mobility's engineering objective. Number four was a letter of support of the new tower from Matt Hannah, who manages AT&T's high rent relocation program, which identifies high cost economically burdensome site leases. He supports moving to lower cost locations. His team selectively relocates equipment onto lower cost locations, while either improving or maintaining wireless coverage. AT&T is then better positioned to invest in new towers for improved coverage and to fund critical initiatives, such as First Net for first responders and emergency response, 5G support and other new technologies. The Commission was given opportunity to ask questions concerning the number of towers and proximity to each other as well as the current load on the existing SBA tower. Reference was made throughout the debate to the FTC act and FCC regulations. Both of those are contained in the letter to the Planning Commission from Bloom Sluggett, PC. Please see exhibit A attached.

Mr. Phillips explained that AT&T could upgrade their services as they are needed and not wait for room on the tower or other carriers to fall off before they could upgrade. This will provide flexibility to AT&T and all other carriers. According to the structural analysis report conducted by GPD Group the tower is at 103% capacity and maximum allowed is 105%.

Chuck Barron gave us history on the existing tower and information on how towers connect. They do not connect through the airwaves but underground through fiber-optic cable. Each tower dials your phone number to the next tower to connect your call.

Donnie Fulton asked what the capacities of both towers are and specifically the Verizon tower and we had no information about that. Jeff Wroblewski agreed to contact Verizon to get more information on their tower capacity and any co-locaters.

Ron Riddick spoke next. He is with Mika Meyers PC and is representing SBA Communications who is the owner of the existing tower where AT&T is currently located along with others carriers. The others carriers are Sprint, Casair, T-Mobile, Nextel, Newaygo County Government and Gerber Hospital.

In Mr. Reddick's presentation he claimed that there was still a 40% capacity available for upgrading. However that will not occur changes are made by current carriers. This raised the question, was there enough capacity available if other carriers wanted to also upgrade. He also claimed that the request violated our zoning ordinance, in that it appeared to violate the land division act. At that time Mr. Phillips rebuttal was that the property owners of the proposed tower site have agreed to a series of one year leases, if necessary, which makes the land division act irrelevant. A lengthy discussion between Mr. Reddick, Mr. Phillips, Mr. Craig McGrew and the commission members ensured to clarify some statements made in the presentation.

Carol Doornbos asked is there a cost to the township to construct a new tower? The answer is no. Carol then replied "then what do we have to lose as a township"?

The question was asked when AT&T joined the SBA tower. The answer is approximately 2010. The last upgrades were in made 2021 however, because of the cost incurred for every instance of improvements made, AT&T has only made minimal updates to equipment. This may also apply to the other carriers on the system. AT&T feels that having their own structure would allow them to make upgrades to equipment and services in a more timely and cost effective manner.

Donnie Fulton asked whether the presentation given was a fair assessment of necessary compliance with our zoning ordinance. Mr. Bloom answered that he and the zoning administrator would investigate the points made in both presentations and address them after the hearing was closed.

Sheli Hutchinson spoke in opposition and explanation of RF possible impact on the human body. She made very good points concerning the FDA and the design of cellphones and the EMF that they generate. A recent ruling handed down from the Second Court of Appeals that will require the FDA to investigate further the products approved for use by humans. She requested the Commission hold off on any decision until the data is in from that investigation and the court has made a ruling which could take years. Sheli exhibited great concern for the impact of current technology on health and the environment.

Current Federal Telecommunications Act Provisions and requirements state that a local government may not regulate the placement, construction, and modification of a cell tower on the basis of environmental effects of radio frequency transmissions to the extent that the facilities comply with FCC regulations concerning such emissions.

The chair read statements from community members that she had received outside the meeting in support of the proposed cell tower. She also read current master plan language from Merrill and Monroe Townships affirming the need for more cell towers in our area.

Public hearing was closed at this point for commission to deliberate based on the zoning ordinance.

Legal counsel at this time advised that the argument from either side regarding costs of upgrades et cetera is not a valid deliberation point and should not be considered. Planning for the future is a legitimate deliberation point. For deliberation purposes we are using Zoning Ordinance 20.07YY ensuring that the proposed tower meets this regulation. We are also required to consider section 20.04 Section A.

On section 20.07YY consensus was reached on the first paragraph with two dissenting votes and three yes votes. On questions one through five a consensus was reached with all five members voting yes.

On section 20.04 – general standards for approval:

Question one – All yes

Question two and question three were all yes

Question four was four yes and one no

Question five is not applicable

Motion was made by Bob Doornbos to recommend approval of cell tower application from Parallel Towers III LLC with conditions number one, that they allow co-locations and two, that they keep rates reasonable for co-locating. Motion was seconded by Judith Hoving.

Roll call: Chris Moore NO, Judith Hoving YES, Cindy Israels YES, Bob Doornbos YES, Anna Bonnett NO

Motion Passed

Motion to adjourn was made at 9:35 by Bob Doornbos and seconded by Anna Bonnett.

Motion carried.

Attachments: Exhibit A

Respectfully Submitted by Judith C Hoving Recording Secretary

Judith C Hoving

Bloom Sluggett PC

Exhibit A

Legal Counsel Opinion Letter on Cell Tower

Bloom Sluggett, PC

COUNSELORS & ATTORNEYS

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August 2, 2021

Ms. Cindy Israels
Chairperson of the Lilley Township Planning Commission
Lilley Township
10767N. Prospect
Bitely, Michigan 49309

Re: Special Land Use Application
Telecommunication Tower
Parallel Towers 111, LLC

Dear Ms. Israels:

We understand that Lilley Township (the "Township") has received an application from Parallel Towers III, LLC for special land use approval of a new telecommunication tower which will be considered by the Lilley Township Planning Commission. In that regard, we wanted to provide you with some background information on federal and state statutes applicable to zoning regulations and decisions on telecommunication towers ("cell towers"). Unfortunately, state and federal law has taken away some of the ability of Michigan municipalities to regulate telecommunication towers.

1. Federal Telecommunications Act

The Telecommunications Act (the "Act"), a federal statute, imposes certain requirements on zoning decisions. 47 USC 332 provides that the regulation of cell towers must 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. 47 USC 332(c)(7)(B)(i). In addition, the statute imposes the following procedural requirements on zoning decisions for cell towers:

1. A local government must act on a zoning application for a cell tower within a reasonable period of time, taking into account the nature and scope of the request.

2. Any decision to deny a request to place, construct, or modify a cell tower must be in writing and supported by substantial evidence contained in a written record.

3. A local government may not regulate the placement, construction, and modification of a cell tower on the basis of environmental effects of radio frequency

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transmissions to the extent that the facilities comply with FCC regulations concerning such emissions.

4. Any person adversely affected by any final action or failure to act by a local government inconsistent with these statutory requirements may, within, 30 days of such action or failure to act, commence an action in any court of competent jurisdiction. The court must then hear and decide such action on an expedited basis.

47 USC³³²(7)(c)(B)(ii-v).

With respect to the requirement that any denial of the construction or placement of a cell tower must be in writing, the U.S. Supreme Court has held that the Act does not require local governments to provide reasons for the denial in written denial letters or notices of denial. *TMobile South v. City of Roswell*, 135 S Ct 808 (2015). Instead, a local government may satisfy its statutory obligation if it states its reasons for denial in some other record issued contemporaneously with the denial. *Ibid.* Thus, the minutes of a meeting at which a denial occurred can satisfy the "writing" requirement. *Ibid.* However, the Court further held that if minutes are used to satisfy the requirement for a written decision, the minutes must be transmitted contemporaneously with the local government's denial. *Ibid.* Thus, if the application for special land use approval for the cell tower is denied, the Township must provide its written reasons for the denial at the time that the denial is issued.

As to the requirement that any denial be supported by "substantial evidence", the Sixth Circuit Court of Appeals has held that "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". *T-Mobile Central v. Charter Township of West Bloomfield*, 691 F3d 794 (2012). In the *T-Mobile Central* case, the Sixth Circuit overturned a township's denial of a new cell tower, making the following rulings:

1. General concerns of residents that a tower would be "ugly" or would be aesthetically objectionable did not constitute "substantial evidence" sufficient to deny a new cell tower.
2. The record did not support the township's conclusion that a 70-foot-tall tower would have sufficed rather than the proposed 90-foot tower.

3. The record did not support the township's conclusion that the applicant had not shown a sufficient need for the new tower.
4. The denial of a single application for a cell tower can have the effect of prohibiting the provision of personal wireless services in violation of the Telecommunications Act.
5. In reviewing whether the denial of a single application for a cell tower amounts to an effective prohibition, the court required only that the provider make a showing that there is a "significant gap" in service coverage for the applicant provider

(without regard to other service providers) and that the provider's proposed manner for filling the "significant gap" was the "least intrusive" means of doing so.

Based on the foregoing, the Sixth Circuit held that the township's denial of the provider's application for a new cell tower violated the Telecommunications Act because 1) the denial was not based on "substantial evidence", and 2) the denial had the effect of prohibiting personal wireless services, even though the township had acted on just a single application for a new cell tower, because the provider had demonstrated that there was a "significant gap" in the provider's coverage and the provider's proposal was the "least intrusive" means of remedying the gap.

11. Section 3514 of the Michigan Zoning Enabling Act

Under state law, the Michigan Zoning Enabling Act was amended in 2012 to add Section 3514 (MCL 125.3514). Although Section 3514 primarily focuses on the "collocation" of wireless communications equipment on an existing tower, Section 3514 also contains provisions applicable to new cell towers. Under Section 3514, if a local government requires special land use approval for the approval of a new cell tower, the following requirements apply to the special land use rocedures:

A. After the application for special land use approval is filed, the application is considered administratively complete when the body or official responsible for reviewing or approving the application makes that determination or 14 business days after the body or official receives the application, whichever is first, unless the body or official acts under Subsection B below.

B If, before the expiration of 14 days after receipt of the application, the body or official notifies the applicant that the application is not administratively complete, specifying the information to make the application administratively complete, or notifies the applicant that application fee has not been paid, the running of the 14day period is tolled until the applicant submits the specified

information or the fee amount due. The notice must be given in writing or electronic notification. The fee cannot exceed the local government's actual reasonable costs to review and process the application or \$1,000, whichever is less.

c. For new wireless communication support structures, the body or official responsible for approving special land uses must approve or deny the application not more than 90 days after the application is considered administratively. If the body or official fails to approve or deny within the application is considered approved.¹

¹This approval period is reduced to 60 days for an application to collocate new equipment on an existing wireless communication support structure.

III. Application of the Federal Telecommunications Act and the Michigan Zoning Enabling Act

Based on the Telecommunications Act (47 USC 332) and Section 3514 of the Michigan Zoning Enabling Act, the following requirements apply to the special land use procedures of the Township for a new cell tower:

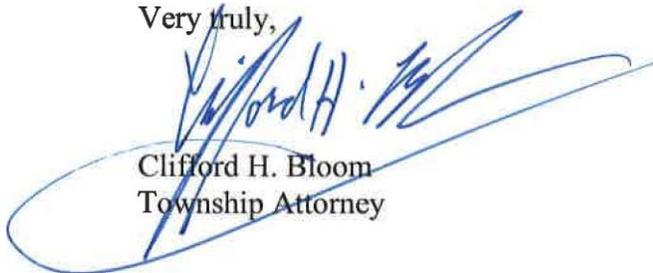
1. Once the Township has determined that the application for special land use approval is administratively complete, the Planning Commission is required by Section 3514 of the Michigan Zoning Enabling Act to approve or deny the application within 90 days. We believe that this 90-day period would also be considered a reasonable time period under the Telecommunications Act. If the application is not approved or denied within 90 days, the application is deemed approved under Section 3514.
2. Any decision to deny the application must be in writing and must be supported by "substantial evidence" on the record under the Telecommunications Act. The written reasons for the denial must be issued contemporaneously with the decision to deny.
3. A denial of a single cell tower can constitute the effective prohibition of personal wireless services in violation of the Telecommunications Act if the applicant/provider demonstrates a "significant gap" in the provider's own coverage area and the provider's proposed cell tower is the "least intrusive means" of remedying the gap.

4. Any decision or condition must not be based on the environmental effects of radio frequency transmission if the facilities are in compliance with FCC regulations for those transmissions, as provided in the Telecommunications Act.
5. The applicant may challenge a denial by filing an action with any court of competent jurisdiction within 30 days of the denial under the Telecommunications Act.

The Lilley Township Zoning Ordinance allows cell towers in the LI-Light Industrial zoning district (Subsection 14.03E) where the proposed tower would be located and requires special land use approval by the Planning Commission. The site plan standards are found in Section 17.04 of the Zoning Ordinance and the general special land use standards are in Section 20.04 thereof. You have indicated that the proposed cell tower appears to meet all of the specified requirements of Section 20.07(YY). Based upon all the state and federal preemption provisions discussed above, it is our legal opinion that special land use approval would have to occur by the Planning Commission for the proposed cell tower, assuming it meets all of the applicable standards and requirements of the Zoning Ordinance.

We trust that this general information is helpful.

Very truly,



Clifford H. Bloom
Township Attorney

cc: Township Supervisor
Township Clerk
Zoning Administrator

