

CCAC Member Report of Concern

Unlike many jurisdictions that borrow their wireless regulations from other jurisdictions or pick numbers for requirements without a great deal of evaluation, Hillsborough County has chosen to evaluate the County's existing cell tower regulations through a Cellular Communications Advisory Committee (CCAC).

The accepted task of the CCAC was to provide "informed advice" to the County Administrator on issues related to the regulation of cell towers. The established goal of the Committee was to conduct "informed and responsible review" of these issues, advancing, "where appropriate," specific recommendations for changes to the County's land development regulations for such towers.

A great deal of time and significant County funded expense has gone into looking at the issues. The result is six resolutions. There are good changes proposed in some of these resolutions; I have no objection to most of them, specifically Resolutions 3, 4, 5, and 6. I do, however, object to and recommend against part of Resolution #1 and all of Resolution #2, for the reasons indicated herein.

Controlling Legal Limits

As with all land development regulations, the provisions regulating cell towers must meet certain legal requirements. Those applicable in this situation can be summarized as follows.¹

The provisions, as an exercise of the state granted police powers, must relate to legitimate public purposes protecting the public health, safety, and welfare and the Code provisions must be tailored to actually implement those public purposes, based on an actual analysis of the situation. Additionally, the setback provisions must be the minimum distance necessary to satisfy the structural safety or aesthetic concerns they are intended to address; must be reasonable; and cannot impose unnecessary or excessive restrictions on a legitimate use of property.

Further, the Land Development Code provisions must be equal and impartial in their operation. They cannot apply to only certain uses while permitting other similar uses to go unregulated or with lesser regulation and cannot unreasonably encroach on one's right to conduct a legitimate business, even with the intent of promoting the public interests.

Resolution #1: Setback Requirement Change.

The CCAC voted 7 to 6 to amend 6.11.29.D.2.a. of the County's Land Development Code, which addresses the setback for Wireless Communication Support Structures (cell towers) from residential areas, to read:

Adjacent to ~~the rear or side yard~~ of residentially zoned property which is developed or developable for residential use, the minimum setback from the property line abutting said residential property shall be ~~one foot for every three feet of structure~~ 150 percent of the tower height;

I have no objection to the first part change, which makes the setback applicable from any side of residential property. My objection is to the arbitrary change from the existing setback to a setback of 150 percent of the tower height.

Resolution #2: New WCSS Setback Requirement from Residential and School Buildings.

The CCAC voted 7 to 6 to add an entirely new setback for cell towers from certain structures, through the following motion:²

The CCAC recommends that setbacks between WCSS and school buildings, residences, and daycare facility buildings be 150 percent of the tower height.

I object to this resolution in its entirety.

Grounds for Objections to the Setback Requirements of Resolutions #1 and #2.

Safety. One of the asserted purposes for the Resolution #1 setback, and the only apparent purpose for the Resolution #2 setback,³ is to protect safety. The proposed setbacks fail with regards to safety protection, however, for the following reasons:

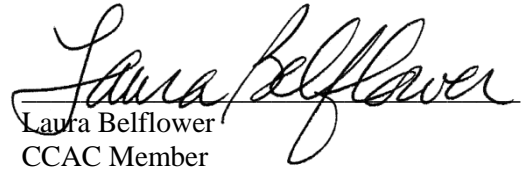
- a. **Although the protection of public safety is a legitimate public purpose, the proposed setbacks do not reasonably relate to that public purpose because they do not address actual safety issues.** The only relevant safety issue is structural safety;⁴ whether there is a reasonable safety risk of a cell tower falling on surrounding properties or structures. The expert in structural design and safety of towers,⁵ which the County paid to present evidence to the CCAC, made it clear that the Florida Building Code requirements for towers are very strong and provide all the safety protections that are necessary. The expert made clear that the risk of a monopole tower⁶ failing (falling) is exceedingly small⁷ and a setback to address tower failure is unnecessary to protect safety.⁸ As there is no reasonable safety issue⁹ that would be addressed by the setbacks, the proposed setbacks do not reasonably relate to public safety. Therefore, there is no safety justification for the proposals.
 - b. **The proposed setbacks are inconsistent with State law.** The setbacks must be the minimum distance necessary to address the structure safety issue of concern.¹⁰ As there is no reasonable expectation that the regulated towers will fall and no historic evidence of safety problems resulting from the existing setbacks, the proposed setbacks are not the minimum necessary. Since the setbacks are not the minimum necessary, they are inconsistent with State law.
 - c. **The setbacks are unreasonably and unnecessarily inconsistent with the rest of Hillsborough County regulations.** If there was a safety issue that needed to be addressed by a setback, it would need to be addressed for all similar uses. Hillsborough County clearly does not recognize that any such safety risk exists because there are no such setbacks required for other tall structures or uses¹¹ and there have not been for several decades of Hillsborough County regulation of tall structures.¹²
2. *Aesthetics.* The proponents of the Resolution #1 setback also stated the setback was justified to protect aesthetics.¹³ The proposed setback fails with regards to community aesthetic protections, however, for the following reasons:
- a. **Although the protection of community aesthetics can be a legitimate public purpose, the proposed setback does not actually relate to that public purpose.** There is absolutely no evidence that pushing a tower 150 percent of its height from residential properties does anything to protect community aesthetics. A setback does not change the tower's actual appearance. No reasonably possible setback can make the tower invisible or, by itself, even make the tower appreciably less visible. The proposed setback may result in pushing the tower further away from one area, but pushes it toward other areas, where it may be more aesthetically impacting.¹⁴ Similarly, setting the cell tower back from property lines, in most cases, makes the structure more visible, as it pushes it more into the normal view of people on adjacent properties.¹⁵ Additionally, a uniform setback does not allow consideration of the uses or vegetation on the

- property that might provide screening or even completely mitigate aesthetics impacts from a particular tower.¹⁶ Therefore, as the proposed setback does not actually relate to the protection of community aesthetics, aesthetics is not a justification for the proposed setback.
- b. **The proposed setback is inconsistent with State law.** The setback must be the minimum distance necessary to address the aesthetic issue of concern.¹⁷ As there is no evidence that the proposed increased setback will provide aesthetic protection over the existing setback, the proposed setback is not the minimum necessary to address aesthetics and, therefore, is inconsistent with State law.
 - c. **The proposed setback is unreasonably more restrictive than any other aesthetically based setback in the County's regulations.** As was addressed for the safety justification, there are no extraordinary setbacks for almost all other tall structures and there is nothing about their appearance that makes those structures more aesthetically appropriate than a camouflaged tower.¹⁸ There is no legitimate aesthetic reason to treat cell towers so much more restrictively than other similar structures are treated by the County's regulations. Therefore, the proposed setback is unreasonably unequal and restrictive, relative to the rest of the County's land development regulations.
 - d. **Hillsborough County already has significant, more effective, aesthetics protections relative to cell towers.** The towers that would be impacted by the proposed setback are almost all required to be of a camouflaged design. This requirement addresses aesthetics to a much better degree than a setback can. Therefore, the setback is unnecessary for aesthetic protection.
3. ***The setbacks for cell towers in other jurisdictions.*** The proponents of the increased setback of Resolution #1 made much of the fact that other jurisdictions require greater setbacks. This argument fails to justify the proposed setback, however, for the following reasons:
- a. **There was no evidence provided justifying those other regulations.** There was never any evidence presented to show that these other jurisdictions had conducted any studies to determine the legitimacy of their setbacks, what public purposes they advanced or how they did so, or the consistency or inconsistency of these setbacks with other regulations in their codes.
 - b. **Hillsborough County's regulations already provide several provisions that address the relationship of cell towers to residential areas.** All cell towers, except those in industrial or the most agricultural zoning districts, must be of a camouflaged design, so the ones most likely to be seen from residential areas must be camouflaged. Additionally, all towers in residential zoning districts and most towers near residential zoning districts must be reviewed through a public hearing process, allowing public input on the actual situation at the site.
 - c. **Hillsborough County has a long history with its current regulations.** The current setback from residential areas has been the setback requirement for all towers since the 1970s or earlier. There is no evidence that this setback has not protected public safety or needs to be changed to protect community aesthetics. There was no evidence provided on why some other jurisdiction's regulations should override the history and specific experience of Hillsborough County.
 - d. **What other jurisdictions have done is irrelevant to what is appropriate for Hillsborough County.** The appropriate setback requirement is not a calculation of the averages of what other jurisdictions have done or a negotiated number, like a used car price. It should (must) be an analysis of what actually reasonably advances the identified public purposes, to only the necessary amount of restriction, and that is fairly and equitably consistent with the other regulations of Hillsborough County.

Conclusion

The CCAC Resolution #1 and #2 setback recommendations do not represent the "informed advice" to the County Administration the CCAC was tasked to provide and are not consistent with the Committee goal of conducting "informed and responsible review" of the setback issue. The proposals are not legally

sound and were not well reasoned; they were numbers thrown out without support or careful consideration. The advocates of the setback requirements in Resolutions #1 and #2 have not reasonably established that it is necessary or appropriate to change or add to the existing setback regulations, that the proposals have the appropriate legal basis, that the proposals will not have unforeseen and undesirable consequences, or even that the proposals reasonably relate to legitimate public purposes. Consequently, it would be imprudent to change or add to the setback regulations as proposed. For these reasons, I object to Resolutions #1 and #2 and recommend against their consideration.


Laura Belflower
CCAC Member

Endnotes:

¹ Citations available on request.

² The setback proposed in Resolution #2 was thrown out for consideration in a rush at the last full meeting and would have failed as a motion if one member had not, with a statement that he didn't expect the proposal to go anywhere, decided to vote for it.

³ The only suggested justification for the proposed setback was safety, with it being mentioned that sometimes school buildings are used as hurricane shelters (even though it was specifically noted that hurricane shelters were not addressed as part of the motion).

⁴ Although not specifically stated or voted on, it appears that it was generally accepted by the CCAC that, under federal law, the regulations cannot address concerns about radio frequency emissions impacts.

⁵ Kevin Bauman of Paul J. Ford Company.

⁶ The type of tower addressed by this setback in the vast majority of Hillsborough County situations.

⁷ Based on the information Mr. Bauman provided, probably significantly less than 1/10 of one percent.

⁸ He also indicated he personally would not object to living within a fall zone of less than 100 percent. The captioning transcript of Mr. Bauman's presentation is not clear on this point, but a review of the audio tape of the meeting makes it very clear that he had no concern about living within 100 percent of the tower.

⁹ Given the expert testimony, there is little to suggest that a tower needs any extra setback to protect safety, but there certainly is no evidence that supports the proposed setback of 150 percent of the tower height. Proponents of the 150 percent setback said the 100 percent amount was to protect if a tower fell straight over and the additional 50 percent was a 50 percent safety factor. This is for a structure that already has a safety factor built into its design, that has a minuscule chance of failing, and an even smaller chance of falling within 100 percent of its height. That is not reasonable.

¹⁰ Sections 365.172(12)(b)2., Florida Statutes.

¹¹ For most tall structures, such as high voltage transmission line towers, telephone or power poles, flagpoles, amateur radio towers, and light poles, including sports lighting, there are no extra setbacks. See sections 6.08.03, 6.08.04, 6.08.05, 6.10.00 of the Land Development Code. According to the information provided to the committee by staff, there is a review process for power poles over 75 feet tall, but no indication of a setback requirement. For the few tall structures that do require extra setbacks (agricultural structures, under section 6.11.04, and wind turbines, under section 6.11.118), neither of which exceed a setback of more than 100 percent of the height of the structure, there is either no reason to believe the setback was required for safety reasons or the use is new, regulated after cell towers, with no known safety justification for the setback. Perhaps most significantly, radio and TV towers (the other tall structures with extra setbacks), some of which are 1,500 to 2,000 feet in height, have the same 3 to 1 setback requirement, under section 6.11.79, as is currently required for cell towers.

¹² For example, the existing 3 to 1 setback has been required for radio and TV towers since 1976, if not before.

¹³ The only aesthetic point raised by the proponents of the setback was the desire to push towers away from their houses because they think towers are ugly. This is a NIMBY (not in my backyard) argument, not a legitimate justification for a regulation. Where protections are provided by regulations, they must be for the protection of the general community or public, rather than just individuals. *State v. Lee*, 356 So. 2d 276, 279 (Fla. 1978) and *Liquor Store v. Cont'l Distilling Corp.*, 40 So. 2d 371, 374 (Fla. 1949).

¹⁴ For example, the proposed setback could push a tower on a commercial property away from the residents, but more toward the road, where it is more visible to everyone driving by, or push it from an area of screening trees to an open area where the full length of the tower is visible from the residential area.

¹⁵ Design studies (*Time-Saver Standards for Landscape Architecture*, Charles W. Harris and Nicolas T. Dines, coeditors, New York, McGraw-Hill, 1988) show that a normal field of vision is no more than 15 degrees above horizontal, so pushing the tower away from adjacent properties puts more of the tower in the viewer's normal vision.

¹⁶ A well placed tower, such as one screened from the residential area by mature trees or by buildings, can be virtually invisible to the adjacent neighbors because even relatively short screening in the viewer's foreground can block the entire structure and because people normally do not look up more than 15 degrees above horizontal. See *Time-Saver Standards*, *supra*

¹⁷ Sections 365.172(12)(b)2., Florida Statutes.

¹⁸ Especially as many of the camouflaged towers are of the same design as the other tall structures, such as flagpoles and light poles.