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**Marion County
Health Department**

MEMORANDUM

TO: Marion County Planning Commission and Staff
FROM: Scott A. Michie, Bucher, Willis & Ratliff Corporation, Project Consultant
SUBJECT: **Wireless Communication Regulation**
DATE: February 19, 2004 **Project #** 2003-154

**Marion County, Kansas
Wireless Communication Regulation**

The Telecommunications Act of 1996 preserves the authority of cities and counties to regulate the placement, construction, and modification of Towers and Antenna Support Structures and to protect the health, safety and welfare of the public. Marion County has the authority to enact legislation to regulate the construction, placement, and operation of telecommunications towers and antennae pursuant to its zoning powers and its general and specific police powers established by statute authorizing the regulations herein to protect the public health, safety, and welfare.

The Legislative Findings.

- 1) On February 8, 1996, Congress enacted the federal Telecommunications Act of 1996 P.L. No. 104-104. The purpose of the Act included deregulation of the telecommunications industry and providing a more competitive environment for wired and wireless telecommunication services in the United States.
- 2) The Federal Communications Commission (FCC) has exclusive jurisdiction over (1) the regulation of the environmental effects of radio frequency emissions from Telecommunication Facilities, and (2) the regulation of radio signal interference among users of the radio frequency spectrum.
- 3) Consistent with the Telecommunications Act of 1996, the regulations of this Section will not have the effect of prohibiting the provision of personal wireless services, and do not unreasonably discriminate among functionally equivalent providers of such service. The regulations also impose reasonable restrictions to protect the public safety and welfare and ensure opportunities for placement of antennae with prompt approval by the county. The Article does not attempt to regulate in areas within the exclusive jurisdiction of the FCC.
- 4) The uncontrolled proliferation of Towers in the county is threatened without adoption of new regulations, and would diminish property values, the aesthetic quality of the county, and would otherwise threaten the health, safety and welfare of the public.

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Purpose.

The general purpose of this section is to regulate the placement, construction and modification of telecommunications towers, support structures, and antennae in order to protect the health, safety and welfare of the public, while at the same time not unreasonably interfering with the development of the competitive wireless telecommunications marketplace in Marion County, Kansas. Specifically, this section is intended to:

- 1) Provide for the appropriate location and development of telecommunications facilities and systems to serve the citizens and businesses of the county;
- 2) Minimize adverse visual impacts of communications antennae and support structure through the careful design, siding, landscape screening and innovative camouflaging techniques;
- 3) Maximize the use of existing and new support structures so as to minimize the need to construct new or additional facilities;
- 4) Maximize the co-location of facilities on any new support structures.
- 5) Ensure that any new telecommunications tower or structure is located in an area compatible with the neighborhood or surrounding community to the extent possible;
- 6) Ensuring that regulation of telecommunications towers and structures does not have the effect of prohibiting the provision of personal wireless services, and does not unreasonably discriminate among functionally equivalent providers of such service.

General Requirements

The requirements set forth in this section shall be applicable to all towers, antennae and other support structures installed, built or modified after the effective date of this Article to the full extent permitted by law.

- 1) Principal or Incidental Use: Antennae and support structures may be either a principal use in all zoning districts or an incidental use to institutional or non-residential uses, subject to any applicable district requirement relating to yard or setback.
- 2) Building Codes, Safety Standards, and Zoning Compliance: To ensure the structural integrity of antenna support structures, the owner shall see that it is constructed and maintained in compliance with all standards contained in applicable state and local building codes and the applicable standards published by the Electronics Industries Association, as amended from time to time. In addition to any other approvals required by this section, no Antenna, Tower, or support structure shall be erected prior to receipt of a Certificate of Zoning Compliance and the issuance of a Building Permit.
- 3) Regulatory Compliance: All antennae and support structures shall meet or exceed current standards and regulations of the FAA, FCC and any other state or federal agency with the authority to regulate communications antennae and support structures. Should such standards or regulations be amended, then the owner shall bring such devices and structure into compliance with the revised standards or regulations within the time period mandated by the controlling agency. No approval for any placement, construction or modification of any antenna or structure permitted by this section shall be granted for any applicant having an uncured violation of this section or any other governmental regulatory requirement related to such antenna or structures within the county.

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- 4) **Security:** All antennae and support structures shall be protected from unauthorized access by appropriate security measures. A description of proposed security measures shall be provided as part of any application to install, build or modify antennae or support structures. Additional measures may be required as a condition of the issuance of a Building Permit or Administrative Permit as deemed necessary by the Zoning Administrator or by the Planning Commission in the case of a Conditional Use Permit.
- 5) **Lighting:** Antennae and support structures shall not be lighted unless required by the FAA or other state or federal agency with authority to regulate, in which case a description of the required lighting scheme will be made a part of the application to install, build or modify the antennae or support structure. Equipment cabinets and shelters may have lighting only as approved by the Zoning Administrator on the approved Site Development Plan, and should generally be white in the day and red at night.
- 6) **Advertising:** Except for a disguised antenna support structure in the form of an otherwise lawfully permitted pylon sign, the placement of advertising on structures regulated by this section is prohibited.
- 7) **Design:**
 - a) Subject to the requirements of the FAA or any applicable state or federal agency, Towers shall be painted a neutral color consistent with the natural or built environment of the site.
 - b) Equipment shelters or cabinets shall have an exterior finish compatible with the natural or built environment of the site and shall also comply with any design guidelines as may be applicable to the particular zoning district in which the facility is located.
 - c) Towers shall not exceed the height limitation of any airport overlay zone as may be adopted by the county.
 - d) Antennae attached to a building or disguised antenna support structure shall be of a color identical to or closely compatible with the surface to which they are mounted.
 - e) All towers shall be surrounded by a minimum 6 foot high decorative wall constructed of brick, stone or comparable masonry materials and a landscape strip of not less than 10 feet in width and planted with materials, which will provide a visual barrier to a minimum height of 6 feet. The landscape strip shall be exterior to any security wall. In lieu of the required wall and landscape strip, an alternative means of screening may be approved by the Zoning Administrator in the case of Use permitted by Administrative Permit, or by the Planning Commission in the case of a Conditional Use Permit, upon demonstration by the applicant that an equivalent degree of visual screening will be achieved.
 - f) All towers, disguised support structures, and related structures, fences and walls shall be separated from the property line of any adjacent property zoned for a residential use at least a distance equal to the height of the tower, and shall be separated from all other adjacent property lines at least a distance equal to one-half of the height of the tower or structure.
 - g) Vehicle or outdoor storage on any tower site is prohibited, unless otherwise permitted by the zoning.
 - h) On-site parking for periodic maintenance and service shall be provided at all antenna or tower locations consistent with the underlying zoning district.
- 8) **Shared Use**

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- a) Existing Towers. Prior to the issuance of any permit to alter or modify any tower existing on the effective date of this Article, the owner shall provide to the county a written and notarized agreement committing to make said tower available for use by others subject to reasonable technical limitations and reasonable financial terms. The willful and knowing failure of a tower owner to agree to shared use or to negotiate in good faith with potential users shall be unlawful and shall, among other remedies of the county, be cause for the withholding of future permits to the same owner to install, build, or modify antennae or towers within the county.
- b) Tower Inventories. Prior to the issuance of any permit to install, build or modify any tower, the tower owner shall furnish the Zoning Administrator an inventory of all of that owner's towers in or within one and one-half miles of the Marion County limits. The inventory shall include the tower's reference name or number, the street location, latitude and longitude, structure type, height, type and mounting height of existing antennas and an assessment of available ground space for the placement of additional equipment shelters. Upon being modified, any such tower shall be placed on the Multi-Use Interest Area Map for required collocation.
- c) Shared Use Required - New Towers. Any new tower approved at a height of 60 feet AGL (Above Ground Level) or higher shall be designed and constructed to accommodate at least one additional user unless a larger number is indicated by the response to the Notification provisions herein. A written agreement committing to shared use as required by subsection one shall be submitted by the tower applicant. The willful and knowing failure of the owner of a tower built for shared use to negotiate in good faith with potential users shall be unlawful and shall be a violation of this Article and, among other remedies of the county, shall be cause for the withholding of future permits to the same owner to install, build or modify antennae or towers within the county.
- d) Communications Tower Multi-Use Area Map. Any new tower approved within a Communication Tower Multi-Use Interest Area as designated by the map of the same title, shall be designed and constructed to accommodate the number of users indicated by the Plan to the extent feasible. The willful and knowing failure of the owner of a tower build for shared use to negotiate in good faith with potential users shall be a violation of this Article and, among other remedies of the county, shall be cause for the withholding of future permits to the same owner to install, build or modify antennae or towers within the county.
- e) Notice of Tower Applications. Prior to any application for the construction of a new tower or Disguised Support Structure, a copy of the application or a summary containing the height, design, location and type and frequency of antennae shall be delivered by certified mail to all known potential tower users as identified by a schedule maintained by the Health Department. Proof of such delivery shall be submitted with the application to the county. The Zoning Administrator may establish a form required to be used for such notifications. Upon request, the Zoning Administrator shall place on a list the name and address of any user of towers or prospective user to receive notification of applications. The Zoning Administrator shall, before deciding on the application or forwarding it to the Planning Commission for consideration, allow all persons receiving notice at least 10 business days to respond to the county and the applicant that the party receiving notice be permitted to share the proposed tower or locate within one mile of such area. Where two or more parties seek to locate within one mile of each other, or such other distance as is demonstrated to the Zoning Administrator to be reasonable

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pursuant to the objectives of this Article, the Zoning Administrator shall designate such area as a Multi-Use Interest Area on the map. The failure of the receiving party to use this process or respond to any such notice shall be considered cause for denying requests by such party for new towers or structures.

- f) **Appeal of Shared Use Violations.** Any party seeking shared use of a tower subject to this provision shall after responding to notice of an application, negotiate with the applicant for such use. The applicant may on a legitimate and reasonable business basis choose between multiple requests for shared use on the same tower or structure, and may reject any request where legitimate technical obstacles cannot be reasonably overcome or where the party requesting shared use will not agree to reasonable financial terms. Any party believing that the applicant has breached its duty to negotiate in good faith for shared use shall immediately notify the applicant and the Zoning Administrator in writing. The Zoning Administrator may reject the application upon a finding that shared use has been improperly denied. A notice of breach of duty shall explain the precise basis for the claim and shall be accompanied by payment of an administrative review fee of \$500 to the county to offset the cost of review. After the applicant's receipt of the notice, the applicant shall have 10 calendar days to provide a written submission to the Zoning Administrator responding to the alleged violation of the shared use requirement. If deemed necessary by the Zoning Administrator, he/she may engage, at the cost of the party alleging the violation, a neutral, qualified technical consultant to provide an opinion on feasibility or costs of the shared use request. If the Zoning Administrator receives a notice alleging a violation of the shared use requirement, the time for a decision on an Administrative Permit is automatically extended for up to 30 days until the Zoning Administrator has determined that the applicant has complied. An application for Conditional Use Permit shall not be deemed complete for acceptance until a decision on compliance is reached.

Permitted Uses

Placement of Antenna and Towers is permitted in all zoning districts subject to the following:

- 1) The attachment of additional or replacement of antennae or shelters to any tower existing on the effective date of this Article or subsequently approved in accordance with these regulations, provided that additional equipment shelters or cabinets are located within the existing tower compound area.
- 2) The mounting of antennae on any existing building or structure, such as a water tower, provided that the presence of the antennas is concealed by architectural elements or fully camouflaged by painting a color identical surface to which they are attached.
- 3) The mounting of antennae on or within any existing high-voltage electric transmission tower, but not exceeding the height of such tower by more than 10 feet.
- 4) The installation of antennae or the construction of a tower or support structure on buildings or land owned by the county following the approval of a lease agreement by the County Commission.

Authorization by Permit.

The placement of Antenna and Towers requires a permit approved by the Zoning Administration and may be subject to the following:

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- 1) The attachment of additional or replacement antennae or shelters to any tower existing on the effective date of this Article or subsequently approved in accordance with these regulations and requiring the enlargement of the existing tower compound area as long as all other requirements of this section and the underlying zoning district are met.
- 2) The one-time replacement of any tower existing on the effective date of this Article or subsequently approved in accordance with these regulations so long as the purpose of the replacement is to accommodate shared use of the site or to eliminate a safety hazard. The new tower shall be of the same type as the original except that a guyed or self-supporting (lattice) tower may be replaced by a monopole. If the guyed or lattice tower to be replaced is 180 feet or less in height, it shall only be replaced with a monopole. The height of the new tower may exceed that of the original by not more than 20 feet. Subsequent replacements shall require the approval of a Conditional Use Permit.
- 3) The construction of a Disguised Support Structure provided that all related equipment shall be placed underground or concealed within the structure when the structure is located in any district other than a district authorizing industrial uses. Equipment may be placed in a cabinet if the Disguised Support Structure is incidental to an industrial, commercial, institutional or other non-residential use.
- 4) The placement of dual polar panel antennae on wooden or steel functioning utility poles not to exceed 40 feet in height in any residentially zoned district and on any such poles (or functional replacement poles of no greater height) existing in any other district on the date of adoption of this Article. All related equipment for antennae permitted by this sub-section shall be wholly contained in a cabinet.
- 5) Towers erected and maintained for a period not to exceed 45 days for the purpose of replacing an existing tower, testing an existing or proposed network, or special events requiring mobile towers.

Application Procedures: Applications for Administrative Permits shall be made on the appropriate forms to the Zoning Administrator and accompanied by payment of \$500.00, or such other fee as may be established by the County Commission.

- 6) A detailed site plan, based on a closed boundary survey of the host parcel, shall be submitted indicating all existing and proposed improvements including buildings, drives, walkway, parking areas and other structures, public right-of-way, the zoning categories of the subject and adjoining properties, the location of and distance to off-site residential structures, required setbacks, required buffer and landscape areas, hydrologic features, and the coordinates and height AGL of the existing or proposed tower.
- 7) The application shall be reviewed by the Zoning Administration to determine compliance with the above standards and transmit the application for review and comment by other departments and public agencies as may be affected by the proposed facility
- 8) The Zoning Administrator shall issue a decision on the permit within 45 days of the date of application or the application shall be deemed approved unless the time period for review and action was extended pursuant to Section. The Zoning Administrator may deny the application or approve the application as submitted or with such modifications as are, in his/her judgment, reasonably necessary to protect the safety or general welfare of the citizens consistent with the purposes of this section. The Zoning Administrator may consider the purposes of this section and the factors established herein for granting a Conditional Use Permit as well as any other considerations consistent with the Article. A

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decision to deny an application shall be made in writing and state the specific reasons for the denial.

- 9) Appeals: Appeals from the decision of the Zoning Administrator shall be made in the same manner as otherwise provided for the appeal of administrative decisions.

Conditional Use Permit Required.

All proposals to install, build or modify an antenna or support structure not permitted by Sections V or VI above, shall require the approval of Conditional Use Permit following a duly advertised public hearing by the Planning Commission, subject to the forthcoming limitations.

- 1) Applications: Applications of Conditional Use Permits shall be filed and processed subject to the requirements of and in the manner and time frame as established in Article 8 of the Zoning code. A decision by the Planning Commission shall be accompanied by substantial evidence supporting the decision, which shall be made a part of the written record of the meeting at which a final decision on the application is rendered. Evidence shall be under oath and may be submitted with the application or thereafter or presented during the public hearing by the applicant or others.
- 2) Additional Minimum Requirements: No Conditional Use Permit shall be issued unless the applicant has clearly demonstrated by substantial evidence that placement of an antenna or support structure pursuant to Article 5 (Permitted Uses) or Article 4(Administrative Permits) of this section is not technologically or economically feasible. The Planning Commission may consider current or emerging industry standards and practices, among other information, in determining feasibility.
- 3) Findings Required: In addition to the determinations or limitations specified herein and by Article 6 of the Zoning Code for the consideration of Conditional Use Permits, the Planning Commission shall also base its decision upon, and shall make findings as to, the existence of the following conditions:
 - a) That the proposed tower is not and cannot be located within a Communications Tower Multi-Use Interest Area as designated by such map, or if so located, meets the co-location requirements of this section.
 - b) No existing towers, structures or buildings within the necessary geographic area for the applicant's tower meet the applicant's necessary engineering requirements considering (1) height, (2) structural strength, (3) resulting signal interference, (4) feasibility of retrofitting, (5) feasibility of redesigning the applicant's tower network, or (6) other limiting conditions that render towers, structures or buildings within the applicant's required geographic area unsuitable.
 - c) Applications for a new tower structure shall be considered only after a letter, certified by a Radio Frequency Engineer, clearly demonstrates that the planned telecommunication equipment cannot be accommodated on an existing or approved transmission tower and clearly demonstrates one or more of the following conditions;
 - i. Planned telecommunications equipment would exceed the structural capacity of an existing or approved transmission tower, and the transmission tower cannot be reinforced to accommodate planned telecommunication equipment at a reasonable cost;

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- ii. Planned telecommunications equipment will cause radio frequency interference with other existing or planned telecommunications equipment for that transmission tower and the interference cannot be prevented at a reasonable cost.
 - iii. Existing or approved towers do not have space on which the planned telecommunications equipment can be placed so it can function effectively and at least in parity with other similar telecommunications equipment in place or approved by Marion County.
 - iv. Addition of planned equipment to an existing or approved transmission tower would result in NIER levels in excess or those permitted under item E of this Section; or
 - v. Other reasons that make it impractical to place the telecommunications equipment planned by the applicant on an existing and approved transmission tower.
- d) No Application for a new tower structure shall be considered unless the applicant is unable to lease or otherwise secure space on an existing or planned telecommunication tower.
- i. Shared use of an existing or approved tower shall be conditioned upon the applicant's agreement to pay reasonable fees and costs associated with adapting existing facilities to the proposed use, including but not limited to reasonable costs for reinforcing or modifying a tower or structure, for preventing radio frequency interferences, and other changes reasonably required to accommodate shared use
 - ii. The county may consider expert testimony to determine whether the fees and costs are reasonable.
 - iii. Once the county finds that the telecommunications equipment proposed by the applicant cannot be accommodated on an existing or approved tower, each tower so found is presumed unable to accommodate similar equipment that may be proposed in the future, unless evidence is introduced to demonstrate otherwise.
- e) That the design of the tower or structure, including the antennae, shelter and ground layout maximally reduces visual degradation and otherwise complies with provisions and intent of this section. New towers shall be of a monopole design, unless it is shown that an alternative design would equally or better satisfy this provision.
- f) That the proposal minimizes the number and/or size of towers or structures that will be required in the area.
- g) That the applicant has not previously failed to take advantage of reasonably available shared use opportunities or procedures provided by this Article or otherwise.
- h) That no land owned by any agency of the federal or state government, or by any political subdivision of the state, is available for locating the structure or tower.

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- i) The county may require, at the expense of the petitioner, any additional studies or the hiring of an external consultant to review exhibits and/or other requirements in accordance with this section.

If any one, but not more than one, of the first six determinations is not satisfied, approval may be granted only on a finding of unique circumstances otherwise necessitating approval to satisfy the purposes of this section.

- 4) Additional Height Limitations: No tower shall be approved at a height exceeding 150 feet AGL unless the applicant clearly demonstrates that such height is required for the proper function of the applicant's system or that of a public safety communications system of a governmental entity sharing the tower. Such showing must also be supported by the opinion of a telecommunications consultant hired by the county at the expense of the applicant. The opinion of the consultant shall include a statement that no available alternatives exist to exceeding the height limit or the reason why such alternatives are not viable.
- 5) Nonionizing Electromagnetic Radiation Standards: All transmission facilities shall conform to the relevant sections of the "American National Safety Levels with respect to Human Exposure to Radio Frequency Electromagnetic Fields, 300 kHz to 100 kHz". This standard as identified by as ANSI- C95.1-1982 and is published by the American National Standards Institute, a copy of which is incorporated herein by reference and is maintained on file in the office of the county Planning Department.

Obsolete Non-Complying Tower Structures

Any upper portion of a tower which is not occupied by active antennae for a period of twelve months, and any entire tower which is not so occupied for a period of six months, shall be removed at the owner's expense. Removal of upper portions of a tower manufactured as a single unit shall not be required. Failure to comply with this provision shall constitute a nuisance that may be remedied by the county at the tower or property owner's expense. Any applicant for a new tower or disguised structure not built as disguised part of another existing or permitted structure shall place a bond or other security with the county prior to any final approval for the purpose of removing any tower or disguised structure as required herein and to compensate the county for performing proper maintenance of such towers or disguised structures to ensure such structures do not become unsafe or otherwise fail to be maintained in compliance with this Article. The bond or security shall be in the form approved by the Zoning Administrator, and in the amount of \$15,000, or such other amount as is determined by the Zoning Administrator to satisfy the requirements hereof with regard to the specific tower or structure to which it would apply.

Commercial Operation of Unlawful Tower or Antennae

Notwithstanding any right that may exist for a governmental entity to operate or construct a tower or structure, it shall be unlawful for any person to erect or operate for any private commercial purpose of any antenna, tower or Disguised Support Structure in violation of any provision of this Article, regardless of whether such antenna or structure is located on land owned by a governmental entity.

Penalty

Any person violating this provision shall be subject to penalties established by Marion County.

Severability

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If any section, subsection, sentence, clause, phrase or portion of this Chapter is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions hereof.

Repeal of Laws in Conflict

This Article supersedes all Articles or parts of Articles adopted prior hereto, which are in conflict herewith, to the extent of such conflict.

Definitions.

As used in this Section, the following terms shall have the meanings and usages indicated:

- 1) **Antenna:** Any device that transmits and/or receives radio waves for voice, data or video communications purposes including, but not limited to, television, AM/FM radio, microwave, cellular telephone and similar forms of communications. The term shall exclude satellite earth station antennae less than 2 meters in diameter (mounted within 12 feet of the ground or building-mounted) and any receive-only home television antennae.
- 2) **AGL:** Above ground level. Ground level shall be determined by the average elevation of the natural ground level within a radius of 50 feet from the center location of measurement.
- 3) **Cabinet.** A structure for the protection and security of communications equipment associated with one or more antennae where direct access to equipment is provided from the exterior and that has horizontal dimensions that do not exceed 4 feet by 6 feet, and vertical height that does not exceed 6 feet.
- 4) **Communication Tower Multi-Use Interest Area:** An area as designated by the map of the same title indicating general locations in which more than one wireless service provider may potentially seek to locate an antenna facility and in which the construction of co-locatable towers will be required. The map may be periodically revised in response to new information received regarding tower sites sought by wireless providers. A Multi-Use Interest Area shall be designated as appropriate for towers within one mile of each other, unless the applicant demonstrates to the contrary. The Multi-Use Interest Area Map shall include the area within the county limits and within one and one-half miles of its corporate boundaries..
- 5) **Disguised Support Structure:** Any free-standing, man-made structure designed for the support of antennae, the presence of which is camouflaged or concealed as an appropriately-placed architectural or natural feature. Depending on the location and type of disguise used, such concealment may require placement underground of the utilities leading to the structure. Such structures may include but are not limited to clock towers, campaniles, observation towers, light standards, flag poles and artificial trees.
- 6) **FAA:** The Federal Aviation Administration.
- 7) **FCC:** The Federal Communications Commission.
- 8) **Height:** The vertical distance measured from the average grade of the base of the structure at ground level to its highest point and including the main structure and all attachments thereto.
- 9) **Incidental Use:** Any use authorized herein that exists in addition to the principal use of the property.

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- 10) Modification: Any addition, deletion, or change, including the addition or replacement of antennae, or any change to a structure requiring a building permit or other governmental approval.
- 11) Shelter: A building for the protection and security of communications equipment associated with one or more antennae and where access to equipment is gained from the interior of the building. Human occupancy for office or other uses or the storage of other materials and equipment not in direct support of the connected antennas is prohibited.
- 12) Support Structure: A Tower or Disguised Support Structure.
- 13) Tower: A structure designed for the support of one or more antennae and including guyed towers, self-supporting (lattice) towers or monopoles but not disguised support structures or buildings. The term shall also not include any support structure including attachments of 65 feet or less in height owned and operated solely for use by an amateur radio operator licensed by the Federal Communication Commission.
- 14) Zoning Administrator: The Zoning Administrator of Marion County or his/her designee.

