



Matthew G. Bevin
Governor

Charles G. Snavelly
Secretary
Energy and Environment Cabinet

Commonwealth of Kentucky
Public Service Commission
211 Sower Blvd.
P.O. Box 615
Frankfort, Kentucky 40602-0615
Telephone: (502) 564-3940
Fax: (502) 564-3460
psc.ky.gov

Michael J. Schmitt
Chairman

Robert Cicero
Vice Chairman

Daniel E. Logsdon Jr.
Commissioner

August 22, 2016

PSC STAFF OPINION 2016-018

Mr. David A. Pike
Pike Legal Group, PLLC
1578 Highway 44 East, Suite 6
Shepherdsville, Kentucky 40165-0369

RE: Request for Legal Staff Opinion
Jurisdiction over Cellular Tower Applications within Extra-Territorial Jurisdiction
of City of Elkton, Kentucky (Todd County)

Dear Mr. Pike:

Commission Staff acknowledges receipt of your letter dated Jun 2, 2016, requesting a staff advisory opinion to address issues relating to Commission jurisdiction over proposed wireless communication facilities to be located in unincorporated areas of Todd County, Kentucky, which are within three miles of the city limits of the city of Elkton. Currently, Elkton has extraterritorial jurisdiction for three miles outside of its city limits for the limited purpose of enforcement of its subdivision regulations. This opinion represents Commission Staff's interpretation of the law as applied to the facts presented, is advisory in nature, and is not binding on the Commission should the issues herein be formally presented for Commission resolution.

You state that New Cingular Wireless PCS, LLC d/b/a AT&T Mobility ("AT&T Mobility") is currently reviewing locations in Todd County, Kentucky, in order to resolve coverage gaps through colocation or constructing new facilities. Todd County has no county-wide joint planning commission, and in areas outside the cities of Elkton, Guthrie and Trenton (all of whom have individual planning units), construction of a wireless tower must be submitted to the Commission pursuant to KRS 278.650.

You state that some of the locations AT&T Mobility is reviewing are within three miles of the corporate boundaries of Elkton which, pursuant to KRS 100.131 exercises extraterritorial jurisdiction within three miles of the city boundary for the purposes of "subdivision regulation." You state that the grant of extra-territorial jurisdiction only mentions subdivision regulation and does not reference application of Elkton's cell tower provisions in its Zoning Ordinance.

You are concerned that this extraterritorial expansion, “effectively provided the Elkton Planning Commission with jurisdiction over cellular towers in the three mile area based on KRS 100.987(1).” You presume that if a Uniform Application, as defined in KRS 100.985(5), is deemed necessary for a new cellular tower within this three mile area, the application requirements would follow KRS 100.985 *et seq.* and not Elkton’s cellular tower regulations.

Your letter also notes that KRS 100.987(1) provides that, “[a] planning unit ... that has adopted planning and zoning regulations may plan for and regulate the siting of cellular antenna towers” However, you further note that no provisions in KRS Chapter 100 establish whether subdivision regulations are or are not included in “planning and zoning regulations,” and, therefore, it is unclear whether the adoption of subdivision regulations invokes a planning unit’s jurisdiction in KRS 100.987(1).

You reference KRS 100.201(2) as using terms such as “land use regulation” and “zoning regulations” in describing the land use authority granted to local governments and that the breadth of these terms could be interpreted to include subdivision regulations. However, you also state that because subdivision regulations can be adopted without legislative approval (*contra* adoption of local zoning regulations pursuant to KRS 100.201 and 100.203), the argument could be made that subdivision regulations are different from “planning and zoning regulations” as used in KRS 100.987(1).

You request that Commission Staff render its opinion as to whether, under the circumstances described above, an application for construction of a cellular tower located in the three mile area must be filed with the Commission pursuant to KRS 278.650 or with the Elkton Planning Commission consistent with KRS 100.987(1).

The Commission is a state agency empowered to regulate utilities and enforce the provisions of KRS Chapter 278. One provision of that Chapter is KRS 278.650, which requires Commission authorization of the “construction of an antenna tower for cellular communications services or personal communications services which is to be located outside the jurisdiction of a planning commission....” Thus, as this statute has been interpreted by our Supreme Court in *Kentucky Public Service Comm’n. v. Shadoan*, 325 S.W.3d 360 (Ky. 2010), the construction of a cellular tower will be outside the jurisdiction of local planning commission only when the area does not have such a commission. Therefore, in the scenario that you present to the Commission, if the planning commission’s jurisdiction extends to the extraterritorial jurisdiction allowed outside a city’s limits, then the Commission would not have jurisdiction over the placement of a cellular antenna in that area.

The Supreme Court in *Shadoan*, further explained that

If the area of the proposed cellular tower has a planning unit that *has adopted planning and zoning regulations*, the jurisdiction over matters relating to cellular tower placement and construction rests with that planning commission, not the PSC, regardless of whether the planning unit has enacted regulations specifically relating to cellular towers.

Shadoan at 365 (Ky. 2010) (Emphasis added.)

Thus, it still appears that a condition *a priori* for the geographic jurisdiction of a planning unit to be invoked pursuant to KRS 100.987, the local planning unit must have adopted some manner of planning and zoning regulations. Even if subdivision regulations do not specifically address the construction of cellular antennae, it may be sufficient to invoke the jurisdiction found in KRS 100.987 if subdivision regulations qualify as planning and zoning regulations.

Commission Staff agrees with the argument you present in your letter that subdivision regulations, since they are adopted with finality by a planning and zoning commission, are “planning and zoning regulations” as used in KRS 100.987(1). Subdivision regulations, regardless of content, necessarily imply planning and land use regulations. Moreover, KRS 100.131 specifically extends the *geographic* jurisdiction of a city’s planning unit to beyond the city’s political boundary.

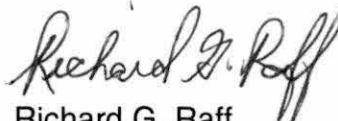
KRS 100.131 provides that a city planning unit may “exercise extraterritorial jurisdiction for the purposes of subdivision regulations and *other regulations . . .*” (Emphasis added). Therefore the extraterritorial jurisdiction of a planning unit is not limited solely to subdivision regulations, should the planning unit choose to enact “other” regulations. The “other” regulations as referenced in KRS 100.131 presumably could include any manner of planning and zoning regulations, including, but not limited to, the placement of cellular antennae. Commission Staff believes that this permissive grant of jurisdiction to enact “other regulations” in addition to subdivision regulations under extraterritorial jurisdiction to be analogous to the Supreme Court’s reasoning in *Shadoan* that, “a planning unit has the discretion to enact regulations pertaining to cellular antenna towers, as they do with any other activities or structures, but this exercise of discretion is not a condition of jurisdiction.” *Shadoan* at 365. The lack of any planning and zoning regulations, except for subdivision regulations, in areas of extraterritorial jurisdiction pursuant to KRS 100.131 does not deprive the local planning unit of jurisdiction over the construction of cellular antennae in areas of extraterritorial jurisdiction.

Therefore, Commission Staff concludes that if a planning unit has invoked extraterritorial jurisdiction pursuant to KRS 100.131, the local planning unit has the *jurisdiction* to control land use in that area and *could* adopt regulations specific to the placement of cellular antennae. Pursuant to *Shadoan*, the permissive grant of

jurisdiction is sufficient to deprive the Commission of jurisdiction over cellular antenna construction in the extraterritorial jurisdiction area.

This letter represents Commission Staff's interpretation of the law as applied to the facts presented. This opinion is advisory in nature and not binding on the Commission should the issues herein be formally presented for Commission resolution. Questions concerning this opinion should be directed to Staff Attorney J.E.B. Pinney at 502-782-2587 or at jeb.pinney@ky.gov.

Sincerely,



Richard G. Raff
General Counsel

JEP/ph