SUBJECT: Regulating construction of communication towers in certain counties

COMMITTEE: Regulated Industries — committee substitute recommended

VOTE: 7 ayes — P. King, Hunter, Baxter, R. Cook, Crabb, Hartnett, Turner

0 nays

WITNESSES: For —Mark Mendez, Tarrant County Commissioners Court; Fran Kubesh, Rob Kubesh (*Registered, but did not testify*: Brandon Aghamalian, City of Fort Worth; Travis Brown, Public Citizen; Ron Hinkel, Verizon Wireless; Edward Sterling, Texas Press Association and Texas Daily Newspaper Association; Michael Vasquez, Texas Conference of Urban Counties)

Against — Ben Watson, Sprint (*Registered, but did not testify*: Thomas Ratliff, T-Mobile USA)

BACKGROUND: Federal law (47 C.F.R.§17.7) requires notification to the Federal Aviation Administration (FAA) of any antenna construction that is higher than 200 feet or within certain distances of airports. Other provisions call for painting and lighting of antennae to enhance flight safety.

Texas municipalities control the location of antennae for cellular telephone and wireless communication systems though zoning ordinances. Placement of these towers frequently requires special use permits that involve notice to adjacent property owners and public hearings before the city council or the zoning board of adjustment.

DIGEST: CSHB 843 would allow the commissioners court of a county with a population of at least 1.4 million (Dallas, Harris, and Tarrant) to regulate the location of a communication facility structure in an unincorporated area if the structure was located within a quarter mile of a residential subdivision.

"Communications facility structure" would be defined as:

- an antenna support structure for a telecommunications facility;
- a cell enhancer for mobile telephones;

- a mobile radio system facility, commercial radio system facility, commercial radio service, or other service or receiver; or
- a monopole tower, steel lattice tower, or other communication tower.

"Residential subdivision" would be defined as a subdivision:

- for which a plat was recorded on county records;
- in which the majority of lots were for residential use; and
- that included at least five lots designated as homesteads.

Permit for construction. A county could require a permit for the construction or expansion of such a facility and could require fees on regulated persons to recover the cost of administering these regulations.

Not later than the 45th day after a permit application was filed, the commissioners court would have to:

- grant or deny the application;
- provide a written explanation why the commissioners court had not acted on the permit, and grant or deny the permit within 30 days after the applicant received this explanation; or
- agree with the applicant on a date by which the court would grant or deny the application.

If the commissioners court failed to act on a permit as required, the commissioners court could not collect any permit fees and would have to refund any fees already collected.

Notice by sign. At least 60 days before filing a permit application, an applicant would have to post an outdoor sign at the location proposed for the structure. The sign would have to state that a communication facility structure was planned for the location and provide the name and address of the applicant. The sign would have to be 24 by 36 inches and be printed in English as well as any other language likely to be spoken in the area.

Variances. A person proposing to construct or increase the height of a communication facility structure that violated a county regulation could apply to the commissioners court for a variance from regulation. The commissioners court would have to hold a public hearing on the request. The commissioners court could authorize a variance if the regulation

would have caused unnecessary hardship and if granting the relief would not be contrary to the public interest or the intent of the bill.

Additional filing requirements. A person would have to file notice with the commissioners court 90 days before beginning construction on a communication facility structure that was taller than 60 feet. The notice would have to include:

- the date upon which construction would begin;
- copies of applicable approvals from the Federal Communications Commission (FCC) or the FAA;
- contact information for each entity involved in construction; and
- a map of the proposed location.

A violation of an order adopted under the bill would be an offense if the commissioners court specified a violation as an offense and would be a class C misdemeanor (maximum fine of $500). The county could file an injunction against a violation of the bill, and a court could grant relief.

Applicability. The bill would not apply to a structure built to replace an existing communication facility structure, if:

- the replacement structure was constructed within 300 feet of the existing structure;
- the replacement structure was the same size and built for the same purpose as the existing structure; and
- the existing structure was removed no later than 14 days after the new structure began operation.

In addition, the bill would not apply to a communication antenna or antenna tower located in a residential area that was used by an amateur radio operator for amateur radio communication or public safety and was licensed by the FCC.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2005.

SUPPORTERS SAY:

CSHB 843 would be a reasonable method to prevent circumvention of municipal ordinances restricting placement and construction of cell phone towers. Currently, a cell phone company can construct a cell phone tower

in an unincorporated area with little regulation. A family living in a city but near an unincorporated area could find a cell phone tower built right next to their property, as long as that tower was built outside the city limits. In this manner, a company can avoid municipal ordinances restricting construction of these massive structures. A family moves into a community under the assumption that their investment will be protected by municipal zoning, and it is unfair that these laws can be circumvented.

Most cities regulate towers because they can be eyesores as well as safety hazards. CSHB 843 is needed because Texas law provides little authority for land use regulation by counties and no specific authority for counties to regulate the placement of wireless communications towers.

There has been at least one instance in the Dallas-Fort Worth area of a family leaving home for the day and returning to find construction well underway on a tower just beyond its backyard fence. Maintenance workers regularly service the facilities, and bolts, tools, or even the workers themselves could fall from the structures. With children and residents just below these structures, it is important that counties have some means for protecting homeowners living nearby.

The regulations under CSHB 843 would not be overly burdensome and would apply only in the state's three largest counties. The bill would institute a process for notifying nearby residents and allow a county to require a permit for towers located within a quarter mile of a residential subdivision. The county would have to act on a permit within a specified time period and could grant a variance when circumstances warranted special consideration. Cell phone companies have operated under much more restrictive ordinances in cities across the state and have acted as good corporate citizens to negotiate compromises in many neighborhoods. This bill would facilitate such a process by balancing the rights of homeowners, companies, and owners of land on which towers are constructed.

Concerns that a county could needlessly delay a construction project are unfounded. If a county did not act upon an application for construction of a cell phone tower located near a municipal boundary, nothing would prevent the applicant from simply abandoning the application and constructing the tower more than a quarter-mile from a subdivision.

OPPONENTS

CSHB 843 would burden the wireless communication industry with

SAY:

restrictive regulations at a time when companies are working to meet demand and improve service to customers throughout the state. Cell phone companies have no interest in antagonizing residents and potential customers, and standard practice is to consider community concerns when selecting a site for a tower. However, the company must strive for quality

service, and such considerations dramatically would be restricted under this bill.

Residents who have towers built in their vicinity benefit from the improved service provided by the facility, and those who live near unincorporated areas likely would suffer from inferior coverage if this bill were enacted. The bill also would infringe upon the property rights of landowners by dictating how and where they could sell or lease their land for construction of a communication facility. The industry has done an adequate job of self-regulation up to this point, and the extensive requirements under CSHB 843 would increase cost and delay expansion of this vital infrastructure in some of the fastest growing parts of the state.

OTHER OPPONENTS SAY:

Unregulated cell phone towers are a problem throughout the state, not just around Houston, Dallas, and Fort Worth. The bill should include all counties, particularly since a great deal of facility construction is occurring in rural areas.

CSHB 843 could be interpreted to mean that a county could choose not to act upon a permit application as long as the application fees were refunded. The bill explicitly should state that if a permit application was not acted upon, the applicant could go ahead with construction at the proposed site.

NOTES:

As filed, HB 843 would have applied only in the extraterritorial jurisdiction of a municipality. It would have required filings to have been made 180 days before construction, and a person proposing construction in an area regulated under the bill would have been required to have held a public hearing on the proposal.

The committee substitute specified that a county could regulate the location of a facility. The substitute added provisions governing permitting, public sign requirements, and applications for variances. The substitute also specified that a residential subdivision would have to include at least five homesteads.