

**From:** [Emily Anderson](#)  
**To:** [Emily Anderson](#)  
**Subject:** FACERS - Cell Towers and ROWs - Responses to question from George Webb (PB County) and request for input from Eric Poole (FAC)  
**Date:** Tuesday, August 23, 2016 1:30:49 PM

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**From:** John Goodknight <[jgoodknight@bellsouth.net](mailto:jgoodknight@bellsouth.net)>  
**Date:** August 18, 2016 at 11:12:07 AM EDT  
**To:** <[lkoontz@lakecountyfl.gov](mailto:lkoontz@lakecountyfl.gov)>  
**Subject:** Cell Towers and ROWs - responses to question from George Webb (PB County) and request for input from Eric Poole (FAC)

FACERS Members,

Please see the following communications from Eric Poole of FAC.

*From:* Eric Poole [<mailto:epoole@fl-counties.com>]  
*Sent:* Wednesday, August 17, 2016 11:22 AM  
*Subject:* Cell Towers and ROWs

Gentlemen – Hope you are well. We are hearing a lot of chatter from counties and cities about ROW access from cell tower providers (the vendors who lease the space to telecoms)? In brief, these companies are arguing that they are “utilities” and have the right to use county right-of-way. In contrast, counties have zoning regulations that address the placement of these facilities, whether inside or outside of the ROW. The bottom line is they want unrestricted access to our ROW without having to pay for it. FDOT is dealing with this issue but it seems to be coming up a lot locally. And, as I understand it, it is not necessarily the large towers but more of the small repeaters. Any information on this. Can FACERS start a discussion? County attorneys under the FAC umbrella will be discussion next week.

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*Eric S. Poole, Assistant Legislative Director  
Florida Association of Counties  
100 S. Monroe Street  
Tallahassee, FL 32301  
(850) 922-4300 - Office  
(850) 294-9405 – Cell*

This is a subject that many of you have been dealing with. I have also attached a copy of the responses many of you provided to George Webb about cell towers in the right of way. Any information we can furnish Eric will help FAC deal with this issue on behalf of the Counties. I believe there are two main issues here:

1. Are the cell towers considered a utility by your County or City? Do you allow them on County or City right of way by permit or for a fee(lease)?
2. The issue of city vs county jurisdiction over regulation of towers on county rights of way within a city was addressed by George's inquiry, and the responses to George's question on this point are attached.

If you have any further comments to share, please send copies to:

*Eric Poole* [epoole@fl-counties.com](mailto:epoole@fl-counties.com)

*George Webb:* [GWebb@pbcgov.org](mailto:GWebb@pbcgov.org)

*John Goodknight:* [jgoodknight@bellsouth.net](mailto:jgoodknight@bellsouth.net)

As we receive additional information, we will make that available to the FACERS membership.

Thanks

John Goodknight

*FACERS Executive Liaison*

*Email from George Webb <[gtwebb@bellsouth.net](mailto:gtwebb@bellsouth.net)>*

*Wed 8/17/2016 1:38 PM*

I have attached a summary of the responses that I received from my previous question. I would ask that it be distributed. Several responses had attachments - I am going to consolidate those emails into one and send that separately - and ask that it be distributed as well.

thanks

George

**Original question from George Webb:**

We issued a permit for the installation of a fairly small tower/pole in our county right of way inside a municipality. We just got the following communication from them:

*In consultation with our Town Attorney, we believe that the pole erected by Crown Castle is subject to the Town of Haverhill zoning and building regulations, including the telecommunications ordinance and building code.*

*In support of this opinion, he has directed our attention to the following:*

*Article VIII, Section 2(b), of the Florida Constitution*

- *Sec. 166.021(4), Fla. Stat.*
- *City of Temple Terrace v. Hillsborough Assoc. Etc., 322 So.2d 571 (Fla. 2d DCA 1975)*
- *Hillsborough Assoc. Etc. v. City of Temple Terrace, 332 So.2d 610 (Fla. 1976)*
- *Section 1.3, Palm Beach County Charter*
- *Chap. 56, Haverhill Code of Ordinances.*

*With respect to the two statutes cited (F. S. 125.42 and 337.401), our Attorney has advised that they do not give the County unfettered discretion within municipal boundaries. For example, F.S. 125.42 seems to be applicable only "...with respect to property located without the corporate limits of any municipality..."*

**Any experience regarding this issue in your county/city?  
Further, with respect to the language in 125.42 -- if one reads/interprets that the entire statute section is applicable only outside municipal limits -- what authority do counties have to issue utility related permits on county roads inside municipal limits?**

**Responses to FACERS question (from George Webb) on communication towers:**

**Fred Schneider (Lake) - George:** See my 2016 email to County Attorney below which includes my Discussion with Thomas Bane of FDOT Central Office. This should be helpful to you. Until, or If, FDOT policy gets overwritten, I believe that all local agencies may follow the same FDOT policy. Lake County rejected the permit applications. A letter was received back from the applicant suggesting that Florida Statutes allows their use of the right of way. I also found an

interesting read on it which I attached from back in 2012.

**From:** Schneider, Fred  
**Sent:** Wednesday, July 27, 2016 8:23 AM  
**To:** Marsh, Melanie  
**Cc:** Johnson, Diana M.  
**Subject:** FW: Further guidance on Utility Permitting with regards to wireless devices.

Melanie: I have contacted FDOT in Tallahassee about the use of wireless towers in FDOT right of way. I spoke with Thomas Bane. The conversation was very interesting. There was actually a lawsuit in Federal Court brought against FDOT , but it was later withdrawn.

FDOT does not consider these wireless towers as utilities. According to their reading of the statute, they allow only utilities in the right of way. They consider utilities to be hard infrastructure (pipes, electric, telephone cables, fiber). Wireless devices do not have to occupy or cross the right of way to serve the public need. They can beam their signal over the right of way without having any hard infrastructure in the r/w. The wireless does not have to occupy the right of way to work. Therefore, FDOT believes that wireless is not afforded the same protections as Utilities are afforded in the Statute (337.401-404). FDOT has some towers on their properties which they will allow others to access for lease, such as at Turnpike rest stops.

Erik Fenniman, email below, is the FDOT attorney who handles these. He is out of Tallahassee. I emailed him and asked for a draft lease agreement.

Thank you,

Fred

**From:** Bane, Thomas

[\[mailto:Thomas.Bane@dot.state.fl.us\]](mailto:Thomas.Bane@dot.state.fl.us)

**Sent:** Wednesday, July 27, 2016 8:02 AM

**To:** Schneider, Fred <[FSchneider@lakecountyfl.gov](mailto:FSchneider@lakecountyfl.gov)>

**Cc:** Fenniman, Erik <[Erik.Fenniman@dot.state.fl.us](mailto:Erik.Fenniman@dot.state.fl.us)>

**Subject:** FW: Further guidance on Utility Permitting with regards to wireless devices.

Fred,

Below and attached is the guidance for wireless devices provided to FDOT utility permitting offices. This guidance mentions a separate executed agreement. The terms of the agreement, processing and review are not under my purview. I can only refer you to Eric Fenniman for guidance on that aspect.

**From:** Bane, Thomas

**Sent:** Wednesday, September 09, 2015 11:53 AM

**To:** Powell, Jr., Rudy; Cook, Dale; Barnhill, Deborah; McCrary, Shirley; Smith, David M; McCarthy, John; Lee, Nathan; Walker, Connie; Harris, Jonathan; Toole, Kimberly; Brock, Tim; Wang, William; Sosa, Geysa; LoPiccolo, Victor; Shinabery, Stephanie; Garner, Ty; Soto, Tony; Al-Said, Ali; Khalilahmadi, Ali; Cornwell, Katasha; Kilkenny, John R; Kervin, James G.; Ekback, Daniel  
**Cc:** Snelling-Perry, Cynthia; Wheeler, Gordon; Wood, Roger; Watts, Jason

**Subject:** Further guidance on Utility Permitting with regards to wireless devices.

As everyone knows, wireless devices are not to be permitted under a Utility Permit. These are to be allowed under a separate executed agreement. There are presently, two cases that are being encountered by FDOT permitting offices that need clarification with regards to fiber-optic lines and wireless devices on and off the State R/W. I have attached further guidance to address these cases. Please read and implement this guidance immediately on all Utility Permits involving wireless devices. If anyone has any question, please, call me directly.

Thomas.R.Bane P.E.  
State Utilities Engineer  
Florida Department of Transportation  
605 Suwannee Street, Mail Station 75  
Tallahassee, FL. 32399-0450

**Gerald Brinton (Volusia)** - We received 11 ROW use permit applications back in June. Attached is my latest correspondence with Mobilite. Our attorneys are collaborating with several other county attorneys throughout the state where similar pole requests have been made. The poles in Volusia County are proposed to be 65' to 90' tall and many within the clear zones.

Have not received a response from them since June. I'm copying our attorneys re the Town Attorneys position in your county.

**Scott Herring (Nassau)** - The City of Fernandina Beach has recently issued these permits. See attached Newspaper Article. None were on County Roads inside the City, but one was/is on a state road. Keep us informed on this. I can see lots of permit apps coming.

**Chris Thompson (Tavares)** - Please see below comment from our P&Z Director. Hope it helps some.

**From:** Jacques Skutt  
Chris,

Off the top of my head, I would say that the city should be issuing a building permit and it must conform to all applicable city regulations, but the County should first approve the location in their ROW.

**Sage Kamiya (Manatee)** - Our attorneys are actually chewing on this exact same type of request, as we speak. Apparently these folks are blanketing our state at the same time. I don't recognize these particular statutes as ones they're mulling over; however, I've not been directly involved.

Currently, we're requiring they go through our right of way use permitting process and if they don't meet sight/visibility requirements we are prohibiting.

I'm also copying Benton Bonney with Orlando, as he mentioned the same issue at our summer meeting. Benton, any more success in your area?

**Benton Bonney (Orlando)** - We have also seen this new phenomenon that we call small cells. Various companies want to add small devices to be able to sell increased data rather than voice to fixed and mobile customers. Our legal folks told us we cannot outright prohibit them due to FCC regulations and Florida Statute, but we can regulate them consistent with other developments. We have handled the permitting for all requests inside the City of Orlando unless inside right of way controlled by FDOT or the expressway authority or a functionally classified county road.

We determined the requests don't fall under the rules for traditional cell site as long as they are under 35 ft tall. We do regulate them as far as aesthetics (no wooden poles in areas that don't already have them, must match existing style of street light and/or utility poles, must try to co-locate with street lights or other structures, all utilities (power and communications) must be underground where there is no existing overhead, etc). We do not allow them on traffic signal structures.

I copied the City's downtown Architectural Review Board wizard. You may want to contact him for specific changes we made to City Code to cover small cells.

**Doug Metzger (Orlando)** - just to follow-up on Benton's comments...

When Orlando received our first permits for these new wireless communication facilities we modified our code language to address separation requirements, height limitations and aesthetics. I have attached a copy of that code update for your review. We refer to the small cell equipment as "Wireless Communication Facilities" in the new code and have added a lot of requirements for installations inside of the right-of-way towards the end of the ordinance.

A couple observations and basics about our procedures:

1. We limit node height based on zoning. Max 35-feet in residential

districts, 45-feet in office and commercial districts, 55-feet in industrial districts. Anything over those heights require conditional use permits.

2. We do not let the providers install on existing utility poles. Aesthetically, we determined that exposed conduit and wiring was the worst visual characteristics of these equipment installations. Providers are allowed to install at locations where there are existing street light and utility poles but we require them to install a replacement pole so that the wiring and conduit can be internal to the pole. We also strongly discourage aerial power, aerial fiber connections. We prohibit above ground cabinets and battery back-ups unless required by police or fire. In some instances in our Downtown area, vendors will be installing stealth trash cans. Half the can is a functioning trash can, the other half of the can contains and conceals the radio units.

3. Most importantly, these vendors are more than willing to collaborate with local governments on design, location and configuration. They have specialty vendors who can design and manufacture just about any pole style or design.

I basically negotiate the location, pole style and equipment configuration for each individual node. Right now we have concrete streetlight poles, concrete monopoles and are awaiting the installation of our first black double acorn decorative stealth pole that matches our Downtown streetlights. I have attached photos of a few completed Orlando nodes and a recent installation of a neutral host stealth pole in Miami Beach that can accommodate the cell service providers in a single monopole.

that is basically the quick overview of our rules and procedures. I would be more than happy to discuss this in more detail on the phone if you'd like.

**Tony Park (Leon)** - We are in the process in developing our policy for this new concept of telecommunication. We will let you know where we go with our policy.

**Kevin Wilson (Monroe)** - I don't know of any similar situation here but, I am copying Judith Clarke (Sr. Director (aka Department Head – also a P.E.), Engineering & Roads Dept.) and Christine Limbert (Assistant County Attorney who is the primary legal contact for Judy's department).

They have been discussing the topic of towers in County Rights of Way in the context of utilities (as have many counties recently) and are better versed in the topic than I. Your inquiry is an interesting twist on the topic which gets into jurisdictional issues as well.

**Judith Clarke (Monroe)** - We haven't had any issues such as this as we have few county roads within municipalities (three or four within Key West). Since we are responsible for just the maintenance of the road bed and associated drainage anything outside of that would be handled by the City directly. For any utility work within the roadway we coordinate with the City but even that is fairly easy since our offices are about a mile apart and we all know each other.

**Carolyn Eastwood (Sarasota Co.)** - Please see response below. Hope this is helpful.

Thanks.

Carolyn

**From:** Charlie Richison  
**Sent:** Wednesday, August 03, 2016 2:37 PM  
**To:** Carolyn Eastwood**Cc:** Salvatore DePaolis  
**Subject:** RE: telecommunication towers/poles in county rw inside a municipality

Carolyn,

To date we have had no problems with what has been permitted in county right-of-way inside city limits. We only permit utility lines, FPL poles/lines, communication lines and gas lines.

All Towers are on private property. If we tried to permit 120' tall towers in the right-of-way we probably would get pushback from the Cities.

If you have more questions please advise. Thanks, Charlie..

**Mark Massaro (Orange)** - Nothing to date.

**Don Donaldson (Martin)** - We do not have any experience with a municipality objecting to our road construction or a right-of-way use permit. The County routinely permits utility infrastructure within our ROWs without regard to municipal jurisdiction. We have received a request for a mono pole in County right-of-way but have not processed or taken action to permit the request.

Other experience includes: FDOT approved a sound wall associated with a road project that did not comply with County Codes regarding its height and FDOT told us their requirement superseded Martin County; they built the wall and did not ask us for a permit. FEC built a cell tower in their ROW and we objected. FEC claimed it was for their use and told us we did not have jurisdiction. After it was constructed FEC allowed other private users to share the space on the tower.

I am interested in how your issue is concluded.

**Maria Cahill (UF T2 Center)** -

This is interesting so you might want to look at the definition of development as well. So it appears the City attorney raises some valid issues but the City's code does not specifically address lands owned by the County rights of way. Ch 56 in Haverhill appears to control the construction of towers on municipal lands and private lands. The Palm Beach County Charter does not appear to directly provide that construction and maintenance within County road rights of way overrides City ordinances.

I think you can defer to 337.401 in which the County is the "authority" for the purposes of land development regulations applicable to County's rights of way. And also the definition of development which guides what is considered development for the purposes of land development regulations which excludes from "development" work by the highway or road agency. In this case the applicable road agency is the "county". I did not look at the two Hillsborough cases cited but you might want to note that the definition of development has been amended several times since those early cases cited. I hope this helps.