

Town of Union
PLAN COMMISSION MONTHLY MEETING
Minutes of October 27, 2011

The Town of Union Plan Commission monthly meeting was called to order at 7:01 p.m. on Thursday, October 27, 2011 at the Evansville Fire Station, 425 Water St., Evansville, WI by Chairman Alvin Francis. Members in attendance included Chairman Francis, Vice Chairman Doug Zweizig, Eric Larsen, and Dave Pestor. Clerk Regina Ylvisaker, Attorney Matt Dregne, and Town Supervisor Kim Gruebling were also in attendance.

Approve September 14 and September 29, 2011 meeting minutes

Motion to approve the minutes of the September 14, 2011 meeting as written made by Zweizig/Larsen. Motion carried by unanimous voice vote.

Motion to approve the minutes of September 29, 2011 as written made by Pestor/Larsen. Motion carried by unanimous voice vote.

Public comment (10 minutes max. per issue)

Francis is still not happy with the new agenda posting methods. Kim Gruebling stated that the Board decided to continue with the new method as it is anticipated that it will save the Town thousands of dollars over the course of a year. He also noted there has been no significant drop in attendance at the meetings as a result of the change in posting.

Tower & antenna ordinance development

Commission agreed to start with the questions they developed for attorney review.

Attorney Matt Dregne explained that he had prepared a memo responding to the Commission's specific questions, as well as reviewing the draft ordinance. He has provided a copy of the ordinance with suggested changes to the group.

Regarding question 1: Can, and if so, how can the ordinance require a conditional use permit to build a telecommunications tower and a license to place any device on such a tower?

Dregne stated that there is no reason why both a CUP and license could be used to regulate the towers/antennas. Zweizig noted that in many cases, the tower owner and land owner will not be the same people. There may also be a third class of people involved when others co-locate on the tower. Dregne stated that the CUP process will ensure that the proper use of the land is considered, and conditions regarding land use could be attached to the CUP during the application/approval process. Zweizig is concerned that there are more parties involved than just the land owner and such parties and their actions need to be regulated in some manner. Dregne provided, as an example, that a condition could be attached to the CUP stating that the tenant would provide the kind of assurances/securities that the Town would want prior to a tower being constructed. Dave Pestor stated that the land the tower/antenna is located on is just leased, and doesn't know why the landowner should have more restrictions placed on him beyond just renting out the land. Dregne explained that the party putting up the tower would enter into an agreement with the landowner to use the land, and they would also likely be the applicant for the CUP. The Commission needs to decide what issues they want to address during the review/approval process, and be sure they have the tools in place to address such issues. Part of such an agreement, or a condition put in place by the Town, could be that the tower owner has to meet all the conditions the Town puts forth, and the landowner would not be

responsible for such things. Dregne noted that there is currently a case in the Wisconsin Supreme Court in which a Town utilized a licensing approach for an issue which, it is being argued, is really a zoning issue. The outcome of this case could affect how licensing vs. CUP processes are utilized by municipalities.

Francis noted that there is an existing tower in place within the Town, which has a CUP that will be reviewed in March 2012. Renee Exum noted that this existing tower would be nonconforming with the proposed ordinance, and questioned how the Town could best handle this situation. Dregne explained that if it is a lawful tower today, then under State law it is considered to be a lawful nonconforming use if new ordinances/regulations are put into place. If it is taken down, abandoned, etc. then the CUP holders would have to come into compliance with the new ordinance. Francis noted that Magnolia granted a CUP for a tower but has a yearly performance review as their method of monitoring the tower. The yearly performance review is an annual information report and also requires payment of an annual review fee of \$250. Their ordinance is not specific as to what exactly the information is they require each year, other than certification from the tower owner that it is being operated lawfully and in compliance with any requirements of the Town.

Regarding question two: Should the reason for the setback for towers over 199' be explained in the setback section of the ordinance?

Dregne explained that there is no legal requirement to explain the reasoning behind the setbacks, but can be helpful. Proposed language was supplied. Dregne was unsure what an "alternative support structure" was; Zweizig clarified that it would be something existing, such as a silo, to which an antenna would be mounted.

Regarding question three: Recommendations for the efficient administration of the ordinance.

Most of the work related to the ordinance will come when an application is received, there shouldn't be much work after that other than the annual reporting requirements.

Regarding question four: Scope of review – Federal and State law.

Research into federal and case law has not yet been done by Dregne. He did review State statutes and Wis Stat 62.23 (7)(he) and (hf) does refer to the regulation of towers and antennas.

Dregne stated that if an applicant can point to law that doesn't allow the Town to regulate towers over 199', or allows for a different setback, then the Town's ordinance may be unenforceable. If the ordinance is unenforceable with regard to the towers over 199' and required setback, there is a severability clause in the ordinance to address this. Additionally, there is a good neighbor clause that allows for shorter setbacks if neighboring property owners agree.

Dregne suggested the ordinance could be adopted as an amendment to the Town's existing zoning code instead of as a separate stand alone ordinance; if it was handled this way the Town would need to decide if the licensing regulations would also go in the zoning ordinance or if they should be a separate chapter. He noted that many municipalities have a chapter on licensing separate from their zoning ordinance, i.e. the Town of Union has an alcohol licensing chapter. The most efficient way to address the issue might be to adopt the ordinance as a stand alone chapter in the Town's code of ordinances. Dregne would not be concerned about any legal issues if it was handled this way. A statement could be added to the zoning code stating "no

towers are permitted in any district except in accordance with Chapter XX (tower & antenna ordinance)” Zweizig noted that the conditional uses listed in zoning districts in the zoning ordinance will need to be updated with the adoption of the tower & antenna ordinance; Dregne stated “in accordance with chapter XX (tower & antenna ordinance)” should be included in the zoning ordinance, as well as definitions for terms that are used in the tower & antenna ordinance such as telecommunications facilities, towers, etc.

Zweizig feels that 1) establishing a separate chapter for the entire tower and antenna ordinance, 2) revising the zoning chapter as appropriate, 3) cross referencing the new tower chapter in the zoning chapter, and 4) establishing consistent definitions in both chapters is the way to go with regard to adopting the new ordinance.

Review of suggested ordinance changes:

Agreed by all to add language in red to Section 2.00 Definitions, Non-Conforming:

Non-Conforming: Any pre-existing telecommunications facility that was in existence prior to the adoption of this ordinance and that has not been issued a Conditional Use Permit **under this ordinance**.

The Commission noted the need to address the issue of existing non-conforming towers at some point. Dregne explained that the situation may be such that a tower existing today and conforming to the current ordinance will not be subject to any of the new requirements adopted with respect to zoning. Health and safety issues/standards may be able to be applied, but it is a complicated issue. More guidance may be available once the Wisconsin Supreme Court case regarding zoning and licensing is settled.

Agreed by all to add language in red and delete struck language in Section 2.00 Definitions, Setback:

Setback: The minimum horizontal distance between the lot line and the nearest point of a building, **tower, or alternative support structure**, or any projection thereof, ~~excluding uncovered steps~~.

Amateur radio towers are not defined in the current list of definitions; the term should be defined with reference to personal non-commercial use.

Agreed by all to add language in red and delete struck language in Section 3.00, Exempt from Town Review, (1), (2):

- (1) The personal and non-commercial use of all television antennas and satellite dishes.
- (2) **Personal and non-commercial use of Amateur** radio towers are exempt from the provisions of this ordinance, including the installation of any antenna and supporting towers, poles and masts that is owned and/or operated by a federally licensed amateur radio operator or is used exclusively for receive-only antennas.

Agreed by all to delete struck language in Section 6.00, Conditional Use Application, (1):

The Town Clerk shall notify all Commission members of the meeting and provide copies of the Conditional Use Permit Application Form and attachments to them. ~~See Wisconsin Statutes Chapter 236 for a timeline for the Commission to review the application.~~

Agreed by all to add language in red and delete struck language in Section 6.00 Conditional Use Application, (1) (g) & (i):

- (g) In the case of a leased site, a lease agreement or binding lease memorandum which shows on its face that it does not preclude the ~~site tower~~ owner from **allowing collocation of other devices on the site** ~~entering into leases on the site with other provider(s) and the legal description and amount of property leased.~~
- (i) Copies of approvals from the FCC and a statement that **all antennas and other devices on the site, individually and collectively, comply** ~~the facility complies~~ with the limits of radio frequency emissions **and other regulations and standards** set by the FCC. The statement shall list the particular FCC Measured Permitted Emissions (MPE) limit and the tested or design limit for the proposed telecommunication facility.

The above statement applies to all the antennas located on a tower, and clarifies that all devices on the tower should perform within the FCC limits. The Commission feels it is important to know that both the individual and collective emissions don't exceed the emission limits set by the FCC.

Agreed by all to add language in red and delete struck language in Section 6.00 Conditional Use Application, (1) (j):

- (j) An alternatives analysis shall be prepared by the **actual** applicant or on behalf of the applicant by its designated technical representative, **except for exempt facilities as defined in Section 3.00**, subject to the review and approval of the Commission, which identifies **not less than up to three (3) reasonable**, technically feasible, alternative locations and/or facilities which would provide the proposed telecommunication service. The intention of the alternatives analysis is to present alternative strategies which would minimize the number, size, and adverse environmental impacts of facilities necessary to provide the needed services to the Town. The analysis shall address the potential for collocation and the potential to locate facilities as close as possible to the intended service area. It shall also explain the rationale for selection of the proposed site in view of the relative merits of any of the feasible alternatives. Approval of the project is subject to the **Town Board** making a finding that the proposed site results in fewer or less severe environmental impacts than any feasible alternative site. The Town may require independent verification of this analysis at the applicant's expense.

Above, "technically feasible" could be a site that would work but the company could not obtain a lease for the land. The Commission also wanted an analysis of whether it is technically feasible to site a tower/antenna on Town owned property.

The following language was suggested:

"Approval of the project is subject to the **Town Board** making a finding that the proposed site results in fewer or less severe environmental impacts than any feasible alternative site **that is both technically feasible, meets the requirements of the ordinance, and where the land is available.**"

Dregne feels the proposed language might not work as there may be other issues that prevent the use of other sites. He knows that alternatives analysis are required for other kinds of projects, and are likely used by the PSC, and wonders how they determine the "reasonableness" of the proposal. The language suggested above may be too narrow. The definition of "feasible" could also be argued. Availability of land is a tricky subject, defining when land is "available" - does the land have to be for sale to be considered "available?" Zweizig feels engineer input is required on this issue.

Larsen wants shorter towers when they will suffice; questioned how the Town can be sure this is enforced. The issue should be addressed in Section 6.00, Conditional Use Application, (5) Standards for Granting Conditional Use Permits. Zweizig believes the issue is addressed in Section 6.00 (1) (j): "The intention of the alternatives analysis is to present alternative strategies which would minimize the number, size, and adverse environmental impacts of facilities necessary to provide the needed services to the Town." Larsen feels that the statement seems contradictory, as limiting the size of the towers will result in more towers, and the Commission also seeks to minimize the number of towers. Dregne thinks "size" should be changed to "height." Larsen thinks issues should be listed in order of importance, and would like height listed first, followed by size and adverse environmental impacts. Agreed by all to change language in Section 6.00 Conditional Use Application, (1) (j) from:

"The intention of the alternatives analysis is to present alternative strategies which would minimize the number, size, and adverse environmental impacts of facilities necessary to provide the needed services to the Town."

to

"The intention of the alternatives analysis is to present alternative strategies which would minimize the height, number, and adverse environmental impacts of facilities necessary to provide the needed services to the Town."

Dregne thinks the statement "Approval of the project is subject to the Town Board making a finding that the proposed site results in fewer or less severe environmental impacts than any feasible alternative site" should be moved to Section 6.00, Conditional Use Application, (5) Standards for Granting Conditional Use Permits.

Agreed by all to add language in red and delete struck language in Section 6.00 Conditional Use Application, (2) Technical Review:

(2) **Technical Review.** The Town may employ an independent technical expert to review **the application and** all materials submitted ~~including, but not limited to, those required under this Section and in those cases where a technical demonstration of unavoidable need or unavailability of alternatives is required.~~ The applicant shall pay all the costs of said review. The payment to the Town shall be due upon receipt of the invoice. All invoices, fees and charges accumulated for the technical review and administrative costs must be paid in full prior to the issuance of the Conditional Use Permit.

Zweizig thinks that issues such as Section 6.00 (1) (w) "NIER (non-ionizing electromagnetic radiation) exposure studies" and other similar issues and standards are operational issues and therefore should be handled with a licensing procedure and not a CUP. Francis felt that these issues have to be met initially and would therefore be taken care of in the CUP process; however, Larsen noted that the tower could be built with no antennas and in such cases would not need to address such issues at the time of CUP issuance. Zweizig thinks this is the point at which the line is drawn between licensing and CUPs - issues that have to do with operation should be handled in the licensing of the devices. Francis disagrees with Larsen's view of the process, and stated that the height of a proposed tower could not even be argued if there were no antennas on it at the time of application. Zweizig proposed that making a condition of the CUP that at least one operator be licensed, would achieve their ultimate goal. Any new devices would then also need a license which would be an opportunity to review compliance.

Agreed by all to add language in red and delete struck language in Section 6.00 Conditional Use Application, (4) Collocation:

(4) **Collocation.** All facilities, ~~towers, or alternative support structures~~ shall make available a minimum of six (6) unused spaces for col-location of other telecommunication devices, including space for these entities providing similar, competing services. A lesser number of spaces may be allowed by the Commission based upon data supplied by applicant stating six (6) spaces would be structurally and/or technically unfeasible. Col-location is not required if the ~~host facility~~ **applicant** can demonstrate that the addition of the new service or devices would impair existing service or cause the host to go offline for a significant period of time. ~~All col-located and multiple-user telecommunication facilities shall be designed to promote site sharing.~~ Telecommunication towers, **alternative support structures**, and necessary appurtenances, including but not limited to parking areas, access roads, utilities and equipment buildings, shall be shared by site users whenever possible.

Following extensive discussion, it was agreed by all to insert the following language into Section 6.00, Conditional Use Application, (5) Standards for Granting Conditional Use Permits:

“The proposed site is shown, by the alternatives analysis required by section ____, to be the optimal, feasible location for the proposed tower and devices, in terms of minimizing the height, number and environmental impacts of towers to be located in the town, and maximizing the level of service provided. In determining whether the site is optimal, locations that allow towers shorter than one hundred ninety-nine (199) feet shall be weighted more favorably than locations requiring towers taller than one hundred ninety nine (199) feet, in order to reduce the impacts of flashing lights on the rural character of the Town.”

Zweizig suggested repeating the nine standards for Conditional Use Permits from the zoning code, Section 17.18 (6) (b) at this point in the ordinance.

It was suggested to also include “no taller than needed for proposed device or devices and required collocation” as a standard.

Regarding Section 7.00 Annual Information Report: Zweizig would like annual review fee added to Town’s existing schedule of fees. Agreed by all to recommend to the Board establishment of an Annual Information Report Fee in the amount of \$250, and to modify wording in Section 7.00 and Section 15.00 (2) as appropriate. Suggested wording included “as established by the Town Board in Resolution XX”.

Agreed by all to insert the following language and delete struck language in Section 7.00, Annual Information Report, (2) Annual Information Report Fee:

(2) **Annual Information Report Fee.** Following the Conditional Use Permit approval, every year thereafter the tower ~~or alternative support structure~~ owners shall submit, on or before January 31 of each year, to the Town Treasurer, the annual review fee of Two Hundred Fifty Dollars (\$250), ~~plus actual costs incurred, per tower site. Professional fees will cover radio frequency emissions review by a professional selected by the Town, to ensure compliance with FCC regulations.~~ The fee submittal is the responsibility of each tower ~~or alternative support structure~~ owner.

It was also noted that Section 14.00 Permits, (2) Transfer of Permits should address the fee amount, with language such as “as set by the Town Board by resolution from time to time”. Dregne also noted the restructuring of the section on the redlined copy provided by legal counsel.

Dregne’s suggested approach overall regarding licensing and CUPs is as follows:

- leave licensing provisions in the ordinance;
- add to the CUPs a requirement that a maintenance and operation agreement be established with the land owner;
- add something to the device licensing section tying their licensing and review into the maintenance and operation agreement so everyone is required to meet the requirements of maintenance and operation agreement.

Dregne further explained that the CUP process allows some zoning districts to be strictly off limits for certain land uses. Licensing is focused not on appropriate land use, but on whether or not other concerns such as technical, health and safety are being addressed. Larsen suggested that perhaps the concerns addressed by licensing are what the Town is most concerned with, and therefore a licensing approach would be better. It was noted that per the current ordinance, wind towers are permitted uses in any district as long as a license is obtained.

Regarding the Annual Information Report, it is the intention of the Commission that the Town will have a professional annually determine compliance with all FCC regulations including radio emissions (the professional will be designated by the Town, paid for by the operator). Dregne suggests requiring the operator to provide a deposit specifically for these costs. He would like to see an agreement in place prior to issuing a CUP wherein the applicant agrees to engage in said review process, with a deposit paid to the Town to cover anticipated fees for the first year and require the deposit be renewed each year. He suggests putting the language into the ordinance, a requirement that the applicant enter into an agreement and provide a deposit annually. Agreed by all that such an agreement should be utilized, and should be listed as another standard.

The review of the ordinance ended at page 15 of the redlined draft of the ordinance.

Dregne states that he feels all licenses should be based on compliance of the tower with the ordinance.

Zweizig would like to make note of his opinion that poor use of time was made at this meeting due in part to the fact that the Town Engineer's services were not made available at the meeting, and a number of issues came up which needed his input and remain unresolved due to his non-attendance. All members of the Commission found the attorney's attendance and input at tonight's meeting valuable and worthwhile.

Motion to request the attendance of the Town Attorney and Town Engineer at the next Plan Commission meeting (November 17, 2011) to complete the review of the draft ordinance and address outstanding questions and issues made by Zweizig/Larsen. Motion carried by unanimous voice vote.

Motion to adjourn made by Larsen/Zweizig. Meeting adjourned at 10:30 p.m.

Respectfully submitted by Clerk Regina Ylvisaker.

Note: minutes are considered draft until reviewed and approved by the Plan Commission at a properly noticed meeting.

