

**MINUTES
HARVEY COUNTY REGIONAL PLANNING COMMISSION
HARVEY COUNTY BOARD OF ZONING APPEALS
Harvey County Courthouse
Community Room
November 9th, 2010
7:00 PM**

Members Present: Clifford Kirk, Carroll Harder, William Wilson, , Dorothy Thiessen, Chad Fuqua, Wayne Alison, , Jack Bender, Larry Emmel, Robert TenEyck & Al Heine

Members Absent: Larry Goering, Ron Peters, Harlan Foraker, Bonnie Wendling & Alan Beam

Staff Present: Scott Davies, Planning & Zoning Administrator

Others Present: Curtis Holland, John Gray, Raeanne & David Briar, Mike & Mary Owens

At 7:00 pm Chairman Kirk called the meeting in order.

Chairman Kirk asked for any additions or corrections to the October 5th, 2010 minutes, there being none, the Chairman accepted as submitted.

Staff Report: Two single family dwelling permits, two residential accessory permits, two commercial permits, and one agricultural permit were issued during October for a total construction estimate of; \$667,100.00

Public Hearing: Case No. 29-33-3W, Request by New Cingular Wireless PCS, LLC dba AT&T Mobility on behalf of John C. Gray and Deloris I. Gray to rezone approximately 70 acres in the southwest quarter of Section 29 of Burrton Township from an R-S Rural Single Family Residential zoning district to an A-1 Agricultural zoning district.

Staff Report:

An application has been submitted by New Cingular Wireless PCS, LLC dba AT&T Mobility on behalf of John C. Gray and Deloris I. Gray to rezone approximately 70 acres in the southwest quarter of the southwest quarter of Section 29 of Burrton Township from an R-S Rural Single Family Residential zoning district to an A-1 Agricultural zoning district. If approved the applicant wishes to apply for a conditional use permit to construct a communications tower.

The property in question is located on the northeast corner of the intersection of S. Wheat State Rd and SW 24th St.

A copy of an aerial photo of the property in question and a copy of a map showing the property's location in relation to the rest of Harvey County is attached.

I have reviewed the application in light of the specific criteria to be considered for any rezoning request and have the following comments:

1. **Character of the area.** The immediate area is a mix of agriculture and residential in nature; it is in the rural transition area as designated in the comprehensive plan. The rural transition area is planned to allow minimal development. Properties surrounding the Gray's parcel are a mix of agriculture and residential in character. Although the property is zoned residential, it does not have any homes on it but rather is being used for agriculture purposes.

2. **Nearby zoning and uses.** The properties adjacent to the applicant's on the north side are I-S for industrial uses and R-S for rural single family dwelling uses and to the west and south are A-1 for agricultural uses and properties to the east are the city of Burrton. The uses are comprised of an agriculture and home sites.
3. **Suitability of land.** The question involved here is whether or not the current zoning designation is suitable for the existing uses on the property. The answer to this question would have to be yes, the current zoning designation is suitable for the existing uses. Agriculture is allowed in all zoning districts. The applicant is requesting a rezoning to apply for a conditional use permit to erect a communication tower on the property. Communication towers are not permitted by right or condition in a Residential zoned district.
4. **Detrimental effects on nearby property.** I feel there would be no detrimental effects upon nearby property should this property be rezoned to the district requested. It is currently agriculture in use and would remain agriculture. However, agriculture uses may permit by condition businesses agriculture in nature. This includes; salvage yards, ethanol plants, asphalt and concrete plants to name a few.
5. **Timeliness of the rezoning.** This factor deals with the length of time the subject property has remained vacant as zoned. The property has been zoned residential uses for 30 years (since the County adopted zoning regulations in 1975). There has been no residential development, only agricultural uses. The property has been used in a manner allowed by the zoning designation in which it is located.
6. **Relative gain to the public health, safety, and welfare by the destruction of the value of the plaintiff's property as compared to the hardship imposed upon the individual landowner.** There would appear to be no gain to the public health, safety, and welfare that would occur with the rezoning of this property. It would be hard to argue that the rezoning would result in a destruction of the value of the adjacent properties because, as mentioned previously, the zoning designation requested, and the use allowed by that designation, would be consistent with the types of uses already found in the area. On the other hand, it is hard to argue that failure to rezone the property would impose a hardship upon the landowner. The owners are legally able to use their property for farming.
7. **Traffic.** The rezoning should not materially affect the volume of traffic in the area.
8. **Conformance to the comprehensive plan.** The last draft of the proposed comprehensive plan update included this area within the rural transition of the city of Burrton. The zoning designation requested conforms to the concept expressed for the urban fringe area.
9. **Availability and adequacy of required utilities and services to serve the proposed use.** No utilities or services would be needed for the proposed use.
10. **The environmental impacts generated by the proposed use including, but not limited to, loss of prime farmland, flooding problems, excessive storm water runoff, soil erosion, and sedimentation, adverse effects on water supplies, including surface and ground water, air pollution, noise pollution, excessive lighting, or other environmental harm.** The rezoning of this property would not result in a loss of prime farm land. The site has been used for farming and would continue to be used for farming.
11. **The extent to which the proposed use will result in the destruction, loss, or damage of any natural scenic or historic feature of significant importance.** The rezoning of this property should result in none of the above.
12. **The ability of the applicant to satisfy any requirement (i.e. site plan) applicable to the specific use imposed pursuant to these regulations in the Unified Development Code and other applicable regulations.** No site plan is required since a conditional use permit is not required. A

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rezoning request is different from a conditional use request in that you are not really considering a specific use as proposed by the applicant. You have to consider whatever uses are allowed in that zone; therefore the site plan really carries no weight. As mentioned earlier, if the rezoning is approved, the applicant has applied for a conditional use permit to construct a communication tower; a site plan has been submitted with that application.

In summary, it is my feeling the request would be more consistent with the actual uses in the area, and would be consistent with the goals and objectives expressed in the latest draft of our comprehensive plan update. In addition, though failure to obtain the zoning designation requested would not technically result in a hardship on the applicants, the rezoning in itself would not have an adverse effect on adjacent properties.
End of report.

Mr. Bender asked if concrete plants were agriculture, staff said they were permitted by condition in the agriculture zoning district. Mr. Bender asked for clarification of the statement under number 4 of staff report stating agriculture in nature. Staff corrected the third sentence in number 4 above to read; However, the A-1, Agricultural zoning district may permit by right or condition businesses primarily agriculture in nature, but in addition, other businesses as listed in 9.03 and 9.04 of the zoning regulations. Examples of other businesses are; concrete plants, salvage yards, and ethanol plant to name a few.

The Chairman asked for the applicant to present their case. Curtis Holland, attorney for the Gray's said that they are requesting a rezoning of the property; the property has been used for farming since Mr. Gray has owned the property. Mr. Holland said that by changing the zoning, it would make it consistent with the existing use.

The Chairman opened up for public hearing. No one spoke for or against, Chairman closed the hearing.

At this time Mr. Bender moved to approve the zoning change from R-S, Rural Residential Single Family to A-1, Agricultural, Mr. Emmel seconded, the Chairman called for a vote, the vote was 10 in favor and 0 opposed, motion carried.

Public Hearing: CUP 29-23-3W, Request by New Cingular Wireless PCS, LLC dba AT&T Mobility on behalf of John C. Gray and Deloris I. Gray to obtain a conditional use permit to erect a 300 ft. communication tower in the A-1, Agricultural zoning district.

Staff Report:

An application has been submitted by New Cingular Wireless for a conditional use permit to erect a wireless communications tower 300 feet in height on property in the A-1 Agricultural zoning district.

The property is located at the northeast corner of S. Wheat State Rd. and SW 24th ST.

I have evaluated the request in light of the criteria to be reviewed when considering a conditional use permit and have the following comments.

All of the criteria require subjective judgments on the part of the Planning Commission.

1. The establishment, maintenance, or operation of the conditional use will not be detrimental to or endanger the public health, safety, comfort, or general welfare.

This particular proposed use should not be detrimental to or endanger the public health, safety, or general welfare.

2. The uses, values, and enjoyment of other property in the surrounding area or neighborhood for purposes already permitted shall in no foreseeable manner substantially be impaired or diminished by the conditional use.

The property the applicant wishes to construct the communications tower on and the adjacent property to the north is zoned residential, the property to the east is located in the city of Burrton and zoned residential, and the properties to the west and south are zoned agricultural.

3. The establishment of the conditional use will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district, and will not represent an invasion of an inappropriate use.

The proposed use is located in the rural transition area as designated by the adopted countywide comprehensive plan. The rural transition area is the land adjacent to the urban fringe and is intended to accommodate limited suburban and urban development.

It is felt the proposed use would not be an invasion of an inappropriate use since provision is made in the regulations for such a use provided a conditional use permit is obtained. As you are aware, the fact that such a use may be located within the agricultural zoning district does not mean it has to be allowed at any particular location. Each application should be considered on its own merits including a determination that the use is appropriate for the site requested.

4. Adequate utilities, access roads, drainage and other necessary improvements are present on the site or planned to be made.

Access to the site is from S. Wheat State Rd which is an unpaved township road. The applicant will be responsible for access and culverts for the service drive.

The proposed use is essentially an open-air use with very little paved or impermeable surfaces to be constructed. Because of this drainage should not be an issue.

5. Adequate measures have been made or planned to provide ingress and egress designed so as to minimize traffic congestion in the public streets or highways.

As mentioned previously the site will be accessed from S. Wheat State Rd. which is a low traffic road. The nature of the use proposed is such that the only traffic to and from the site will be the occasional maintenance vehicle.

6. The conditional use shall conform to all applicable regulations of the district in which it is located.

If approved, the conditional use must conform to all applicable regulations of the A-1 zoning district and with any additional conditions that are placed on it by the Planning Commission and Board of County Commissioners.

Section 16.06 of the Harvey County Unified Development Code stipulates the following requirements for a communications tower:

A. The applicant shall present satisfactory proof that the proposed location and use is reasonably necessary to provide transmission/reception coverage for the service area.

- B.** If the tower is proposed to be located on a site where night-time warning lights would intrude in an area used for a residential purpose, the applicant shall be required to document as to why the tower cannot be reasonably located in a remote area.
- C.** Towers and communications devices shall not be required to comply fully with the lot size and height regulations of the zoning district where they are located except as may be required by the conditions imposed upon the applicant.
- D.** Towers shall be set back from all adjacent property lines and buildings a distance equal to not less than its height plus 50 feet. An exception may be allowed for towers located adjacent to buildings owned by the applicant. Towers located adjacent to streets and highways shall be set back a distance as required by the applicable zoning district.
- E.** Towers shall be located on sites that provide a setback distance from structures at least equal to the height of the tower, except those owned and occupied by the owner/lessee.
- F.** The applicant must document that co-location on an existing tower or other structure within five (5) miles of the proposed location is not feasible or that efforts were made to locate on existing towers or other structures but such efforts were not successful. The applicant or intended user of the tower shall place documentation of this requirement in the record.
- G.** All proposed communications towers 150 feet or less in height shall be designed to accommodate at least one (1) additional PCS/Cellular or other similar platform in addition to the applicant's current need. All proposed communication towers in excess of 150 feet in height shall be designed to accommodate at least four (4) additional PCS/Cellular or other similar platforms in excess of the applicant's current needs.
- H.** Any application for a proposed tower in excess of 150 feet in height shall include documentation regarding the necessity for the proposed height from a Licensed Professional Engineer. Such documentation shall be in the form of plans and specifications acceptable to the Planning Commission and sealed professional engineer. At the request of the Planning Commission additional evidence in the form of testimony may be required from said Engineer.
- I.** The tower and accessory equipment must meet all requirement of the Federal Aviation Administration. To the extent allowed by such requirements, any required lighting for such tower shall be red during time of darkness and white strobe lights shall not be allowed for nighttime lighting.
- J.** Relative to all tower or monopoles, the applicant shall give Harvey County, Kansas the option of co-locating, for governmental use, where such co-location will not interfere with other providers. There shall be no access fee or rent charge for said co-location.

 - a.** Subject to the requirement of noninterference, the co-location may be on top or side mount at the option of Harvey County.
 - b.** In addition to the co-location option noted above, all applicants shall provide Harvey County, Kansas space in the equipment shelter building, If an equipment shelter building is not built or space is not available in the building then the applicant shall provide ground space for a radio cabinet. There shall be no access or rental fee for said space.
- K.** Any modification of an existing monopole or tower telecommunication structure may be permitted only upon approval by the Harvey County Regional Planning Commission or granting of a conditional use permit by the governing body, as the case may be. All applicants for any modification of such an existing monopole or tower shall provide co-location and equipment space for Harvey County as required in paragraph 10 above.

- L. All applications for communication towers will require a third party review of the completed application. The responsibility to select the third party will be Harvey County's. All costs associated with the third party review will be the responsibility of the applicant.

SUMMARY:

As you are aware, your task in evaluating a conditional use permit request is to determine if the proposed use is appropriate for any particular location. The fact that the regulations make provision for such a use does not necessarily mean a use has to be allowed at any location. I would remind you that whatever your decision is, it has to reflect the reasons for making that decision. Those reasons are to be based solely on those criteria outlined above, and any motion must document those reasons by including the appropriate criteria within it.

Last year the county approved a third party review of all cell tower applications. I have enclosed a copy of the third party review for this application. I have also enclosed the application with detail drawings, an aerial showing the property, and a map of the county showing the property in relation to the county.

Staff Recommendation: Staff recommends approval of the tower but based on the third party review; restrict the height to 200 feet.
End of Report.

Mr. Fuqua asked about why the 200 foot recommendation from the 3rd party review and if the lights were a problem. Staff said that towers less than 200 feet usually do not require lighting from the FAA, towers over 199 feet do. Staff said that the consultant said that a tower height of 199 feet would meet the objectives of the applicant and prevent the need for lighting.

Mr. Bender had issues about the consultants wording and grammar under condition number 1 on page 4 of the third party review. Chairman said that it was the consultant's report and his words and that we could change the wording in our motion but his report should remain unchanged.

The Chairman asked for the applicant to make his presentation. Mr. Holland spoke on behalf of the applicant and landowner. He briefly talked about how cell phones rely on towers to send signals. He said from their studies there was a need to provide better coverage between Newton and Hutchinson as well as inside the city Burrton. Mr. Holland said they prefer to collocate on existing towers when possible so they do not have to bring an application to the local body. They could not find an existing tower that would meet their coverage needs, he said. The searched for property in the area and found Mr. & Mrs. Gray's property to be a very good location, Mr. Holland said. He said the regulatory process is very lengthy not only at the local level but also at the federal level. They completed their due diligence at the federal level and now ready to comply with local requirements, he said.

Mr. Holland wanted to address the 3rd party review. He said that their internal engineering has more information than the 3rd party review and that their conclusion was that a 300 foot tower was the best option to meet their coverage objectives. Mr. Holland also said that a 199 foot tower would suffice and they were willing to comply if that was the decision of the board but their preference was a 300 foot tower. Mr. Holland said their RF engineers had internal data that dealt with dropped calls and other complaints that the 3rd party reviewer did not. Mr. Holland said that although the lighting comment from the 3rd party review is correct, he believed that lighting will not be an issue for this site. The lights will not be a strobe light and will not shine in peoples homes he said. The lights will be white during the day and red at night, he said. He said the nearest home is about 1,700 feet away. The 300 foot tower would provide better collocation opportunities for other companies and better utilize the tower if it was the taller height, Mr. Holland said. He said that they would comply with the engineered certification to support four additional collocation sites on the tower as stated poorly by the 3rd party reviewer. He said the tower would be built to support four additional platforms but would not put the platforms on the tower; they would only put one platform on the tower. Mr. Holland said that

the tower would have little impact on the adjacent area whether it was a 200 or 300 ft. tower. He asked for consideration of the taller tower.

Mr. Bender asked why they were willing to accept the 200 foot tower. Mr. Holland said that they would accept the 200 foot tower over a denial by the board. They preferred a 300 ft. tower but would accept the 200 foot tower over a denial. A commissioner asked about differences in dropped calls. Mr. Holland said that because of the number of homes in Burrton they were engineering the tower to improve in home coverage, a taller tower would provide better inside coverage. Mr. Allison asked about percent improved coverage and reduced dropped calls between a 200 ft. and 300 ft. tower. Mr. Holland said his best estimate would be approximately a 30% improved transmission between a 200 and 300 ft. tower. Mr. Holland said they look at the terrain of the land in the area and amount of foliage in determining the coverage area. He also said that this tower although not reaching Newton or Hutchinson, would fill in gaps between the two cities.

Staff asked if the tower would only benefit AT&T customers. Mr. Holland said yes, it would only help AT&T customers. He said if there was a roaming agreement other customers would benefit from the tower. However, the tower would be there to provide collocation if other companies needed better coverage in the area.

Mr. Alison commented that they would not spend the additional money on a taller tower unless they would get added benefit from the increased costs. He also said that there would be a better chance to have another collocation if it was a taller tower. Staff asked if the tower would be a self supporting tower or a guyed cable tower. Mr. Holland said the tower would be a self supporting tower, some what like a windmill support to the shape.

There were more questions about the lighting, Mr. Holland said that FAA regulates the type of lighting on towers but they are usually white lights during day and red lights during night.

The Chairman opened up the public hearing; there were no comments for or against. The Chairman closed the public hearing. . Mr. Emmel commented that he did not think the 3rd part review was poorly written and that it should address the county's regulations more directly concerning communication towers.

At this time Mr. Alison moved to approve a 300 ft. communications tower based on C thru F of staff report. Mr. Fuqua seconded. Chairman called for a vote, the vote was 10 for and 0 opposed, motion carried.

Briar Split Off: Request from David and Raeanne Briar to split off a 17 acre parcel for permission to obtain a residential building permit on a parcel less than 40 acres.

Staff Report:

David and Raeanne Briar, landowners are requesting a building permit to construct a single family dwelling under the provision mentioned in Article 9.05 of the Harvey County Unified Development Code. That provision stipulates that the minimum lot size in the A-1 zoning district shall be equivalent to a quarter of a quarter section of land; however, smaller lots with a minimum area of five acres shall be permitted provided the following conditions are met:

- a. Newly created lots shall have at least fifty percent (50%) Class IV or lower productivity soils as designated in the soil survey of Harvey County, Soil Conservation Service, November 1974 as amended.
- b. A proposed lot or tract may be designated as low productivity by the Board of Harvey County Commissioners after receiving a recommendation from the HCRPC if at least fifty percent (50%) of the lot or tract to be created can not reasonably be farmed because of steep topography, the separation of the tract from other contiguous agricultural land by significant natural or man made boundaries, such as ravines or highways, or the prevalence of natural features such as waterways or shelter belts.

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The site in question is comprised of Class III soils; consequently it is not eligible for a building permit on the basis of poor soils (a). The applicant is requesting the building permit be issued based on the second (b); on the contention that the presence of trees, a waterway, and steep topography makes it unable to be farmed.

Attached is an aerial photo showing the site in question and a copy of a map showing the location of the site in relation to the rest of Harvey County?

As you are aware, your task is to make a judgment as to whether you believe the site meets the criteria outlined previously under b. I would remind you that your decision should be made on the basis of whether you feel the site meets or doesn't meet the criteria established above and those criteria only. If you choose to recommend that this tract of land be eligible for a residential building permit, then your recommendation will go to the Board of Harvey County Commissioners for their decision.
End of Report.

There was a question about the location of the floodplain. Staff said that the floodplain was on the western ½ half of the property. Staff felt there was enough room to build outside the floodplain, if not they would be required to comply with floodplain regulations.

At this time, Raeanne Briar, landowner knew that they needed 40 acres to build a house on the site and wanted to find out if this tract was eligible for building permit. She wanted to find out so they knew which direction to go when they build their house.

Chairman opened up for public hearing. Mike Owens adjacent landowner had a question about an acre of ground that was on the east side of the road and he understood that he owned that one acre. Ms. Briar said that a quit claim was done on the one acre piece of ground and they now owned it. Mr. Owens asked if they plan to clear out trees and build near the road. Ms. Briar said no, they plan to build on the east side the property on higher ground. Mr. Owens said that he had heard that the fill very fast during a heavy rain.

There were no more comments from the public so the Chairman closed the public hearing.

Mr. Fuqua moved to recommend approval of the split off based on 9.05 (B), Mr. Bender seconded. The Chairman called for a vote, the vote was; 10 in favor and 0 opposed, motion carried.

Old Business: Staff reported that the Gowin wind turbine had been approved by the county commission and that a building permit had been issued.

New Business: Staff announced the time of the annual appreciation dinner, it will be December 14th, 6:30 pm at Fox Ridge restaurant.

The Chairman adjourned the meeting at 8:25 pm.