

**MINUTES**  
**HARVEY COUNTY REGIONAL PLANNING COMMISSION**  
**HARVEY COUNTY BOARD OF ZONING APPEALS**  
**Harvey County Courthouse**  
**Community Room**  
**August 10<sup>th</sup>, 2010**  
**7:00 PM**

**Members Present:** Clifford Kirk, Wayne Alison, Bonnie Wendling, Larry Goering, Carroll Harder, Robert TenEyck, Jack Bender, Larry Emmel, William Wilson Ron Peters, Dorothy Thiessen, Alan Beam, Harlan Foraker, & Al Heine

**Members Absent:** Chad Fuqua

**Staff Present:** Scott Davies, Planning & Zoning Administrator

**Others Present:** See attached list

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

Chairman Kirk asked for any corrections to the July 7<sup>th</sup>, 2010 minutes, there being none, Mr. Peters moved and Mr. Alison seconded to approve the minutes, motion carried.

Staff Report: Ten building permits were issued during July for a total construction estimate of \$140, 000.

**Public Hearing, Amendments to Article 15, Floodplain Development Overlay District:**

Staff Report:

This is a public hearing to consider amendments to Article 15, Floodplain Development Overlay District. As you are aware, we are in the six month adoption period for the new Flood Insurance Rate Maps and that the new maps will become effective October 6<sup>th</sup>, 2010, As part of adopting new flood maps, the floodplain regulations are to be updated to include referencing the new flood insurance rate maps and including any other changes to the regulations that have occurred since the last update. The proposed amended regulations were sent to the Chief Engineer with the State Division of Water Resources for him to review and sign off. The Chief Engineer approved the proposed amendments on July 15<sup>th</sup> and returned them to us.

**The amendments include:**

Referencing the date of the new maps as **October 6<sup>th</sup>, 2010** under Section 15.02, letter C, number one (1) and under Section 15.04.

Amend Section 15.23 (A) and (B), Section 15.24 (C) and (D) to add "The elevation of the lowest floor shall be certified by a licensed land surveyor or a professional engineer".

Amend Section 15.23 to change a portion of the first sentence from "below the base flood elevation" to "**below one foot above the base flood elevation**".

Amend Section 15.24; Add after last sentence; "The elevation of the lowest floor shall be certified by a licensed land surveyor or a professional engineer";

Amend Section 15.24; (D) Add after last sentence of #2 "The elevation of the lowest floor shall be certified by a licensed land surveyor or a professional engineer.

I have enclosed a copy of the approved proposed amendments for you to review. The proposed amendments have been highlighted. State statutes require a public hearing to be held to adopt new amendments.

I have also enclosed a page from FEMA's pamphlet on Adopting New Flood Insurance Rate Maps" concerning a question "what happens if a community does not adopt the appropriate floodplain regulations during the six month adoption period.

Your recommendation will then go to the Board of County Commission for their final decision.

Chairman Kirk asked for any questions from the planning commission concerning the proposed changes. Mr. Foraker asked about the article he had read in the Halstead Independent about the county flying LIDAR. Staff said that the USGS and several other organizations had committed to flying the western part of Harvey County and that the county if it wished to participate could pay to fly the eastern part of the county. Staff said that the county just recently committed funding to fly the eastern part of county. Staff said the county would be flown next March and FEMA had agreed to incorporate the new information into revising the flood maps. Staff said that the revision of the flood maps could take one to two years and in the mean time would have to use the October 6<sup>th</sup>, 2010 maps.

Mr. Emmel asked about the sanctions imposed on a community who does not adopt the new maps. Staff read the five sanctions that apply if a community does not adopt the floodplain regulations.

Mr. Alison asked if property owners would be able to get bank loans if the county is suspended from the insurance program. Staff said that banks are allowed to make loans for insurable buildings in flood hazard areas but that the lender must notify the applicant that the property is not eligible for Federal disaster assistance.

Mr. Foraker asked about properties being brought into the floodplain that have hazardous materials on them and whether they would get a letter saying they needed to move the hazardous material out of the floodplain. Staff said that is a possibility that a landowner could get such a letter. Mr. Foraker wanted to know how tightly the regulations would be enforced. Staff said that he works with the landowner to help them comply with the regulations but that he also has the State and Federal people watching to see that we are enforcing our floodplain regulations. Staff said that if the county does not enforce its regulations, FEMA could suspend the county from the NFIP. There was discussion about propane tanks and other auxiliary structures that also need to be either raised or anchored in the floodplain.

Mr. Foraker also asked houses that are destroyed, do they need to be elevated. Staff said that if more than 50% of the market value of the house is damaged, FEMA considers it substantial damage and the entire house must be brought into conformance with current regulations.

The Chairman opened up for public hearing. He asked for those in favor to speak, there was none. He asked for those opposed to speak. First to speak was Jeremy Carlson who asked about the LIDAR that the County and the USGS will be flying and whether the new maps will be put on hold. Staff said that the new maps would not be put on hold and that they would need to be adopted to remain in the NFIP. Mr. Carlson also said that he was unable to purchase flood insurance when he talked with his insurance agent, Staff said that congress had not renewed the NFIP sometime during the summer but thought that it had recently been reinstated.

Next to speak was Jerry Graber, he asked if the county had changed the requirement that houses needed to be one foot above the 100 yr. flood. Mr. Foraker explained that for existing houses, if you can prove through a licensed surveyor that the lowest adjacent grade around your house is at or above the base flood elevation which is different than if someone is building a new structure, then it must be certified that the lowest floor be elevated to one foot above the BFE.

Next to speak was Phil Considine, who lives near Burrton. He built a house about 10 years ago and met with the planning director at the time to make sure house was not in floodplain and built his house 1 foot higher just to make sure. He is now being brought into the floodplain and has been told that it will cost him about \$12,000 to get a Letter of Map Amendment. There was discussion on cost for surveying and application costs to FEMA. Mr. Considine expressed concern that flood insurance only covers hot water heaters and furnaces in the basement. Mr. Harder said that he thought it also covered the concrete walls.

Anna Kilpatrick said she had surveying done and it indicated that her house was elevated high enough that it was out of the floodplain. She wanted to know how to go about getting the house out so she doesn't have to pay flood insurance. Staff explained how to obtain a Letter of Map Amendment.

Linda Graber spoke next, she was wondering why the hurry to adopt the new maps in light of the LIDAR that would be flown, she wanted to know why the county couldn't stop the new maps. Staff explained that the new maps have been a long process and that if they were not adopted that the county would be suspended from the NFIP. The Chairman asked staff to explain the procedure the County took to protest the maps. Staff said that the county had hired a surveyor to do sample surveying at various places around the county. They found areas where there were 3 to 4 foot elevation differences but FEMA said that was within their tolerance range and protest was denied.

Mr. TenEyck asked if there was a time limit on getting the LOMAs. Staff said there was not. Mr. TenEyck suggested that maybe it would be less expensive to obtain the flood insurance and wait till the LIDAR is done to see if the revision would bring them out.

Mr. Graber said there was detailed elevation work done when the dam was built near his house and that it showed a property they were developing above the dam not in the floodplain but with the new maps it showed they were in the floodplain. Mr. Foraker suggested that FEMA may not have had that information and it should be provided to them to get more accurate information.

Mr. Goering said that when they fly the county the light beams may be hitting trees and not providing accurate readings, they are not out on the ground getting accurate elevation information.

Staff said that when they fly LIDAR there will also be on ground surveying done to check accuracy of flyover.

There was a question by Mr. Graber if a LOMA has been done and the maps change again, will the LOMA's be honored. Staff said it was his understanding they would be because FEMA considers that process to be very accurate.

Larry Friesen spoke next, he owns a home above a watershed dam and when it was built the 100 yr. and 500 yr. floodplain was identified. He believes the new maps are inaccurate because the floodplain was well identified at the time the dam was built. Staff said that information should have gotten to FEMA but it appears that it did not. Staff said that the LIDAR should help and that FEMA has marked this area in red to do a closer look when they fly LIDAR.

There was a question about impact on property values being brought into a floodplain. Staff said that he had asked the county appraiser that question and he said that it can vary, in some cases the values remain steady and some cases they decrease.

Corey Harder spoke next, he has done a survey and it indicated that his house is elevated high enough to get out of the floodplain, they have started the process but it will not be approved till after the maps become effective, he wanted to know if he needed to purchase flood insurance. Staff said that lenders will have so much time to contact people with mortgages that are being brought into the floodplain, and that might be enough time to get the LOMA processed with FEMA. Purchasing flood insurance does give you some protection in case you do flood, staff said.

The Chairman closed the public hearing and asked for comment from the board. Mr. Foraker asked if the County Commission would be making the final decision on the regulations. Staff said yes. He said he did not like the new maps but would be voting to approve them. He hoped that common sense would be used in interpreting the new maps. He had questions about sewer systems in the floodplain and additions to houses.

Mr. Emmel said he said he was not in favor of the new maps but compared it to the IRS when they do an audit, you have to hire accountants to prove them wrong, that is how it is here, FEMA has drawn the map and the landowner has to go to the expense of proving them wrong, he did not feel that was right but it is how it is. He said that he was opposed to the maps but felt strong armed to approve the maps.

Mr. Bender moved to approve the regulations as presented, Mr. Peters seconded. The Chairman called for a vote, the vote was 12 in favor and 1 opposed, motion carried.

**Case No. VAR 4-22-1W;** Request from Greg Ferris on behalf of T-Mobile Central LLC for a variance from the minimum setback from a property line for a communications tower.

**Staff Report:**

With this particular request you will be sitting as the Board of Zoning Appeals. The authority of the Board of Zoning Appeals is somewhat different from that of the planning commission in that actions taken are the final decision. These matters are not sent on to the Board of County Commissioners. The Board of Zoning Appeals is authorized to issue variances to the regulations in instances in which it is felt the variance would not be contrary to the public interest and where, owing to special conditions, a literal enforcement of the provisions of the zoning regulations would, in an individual case, result in an unnecessary hardship, provided the spirit of the regulations is observed, public safety and welfare secured, and substantial justice done.

An applicant must show that the property in question was acquired in good faith; and, where by reason of exceptional narrowness, shallowness, or shape of the specific piece of property at the time of the effective date of the district zoning regulations, or where by reason of exceptional topographical conditions or other extraordinary or exceptional circumstances that the strict application of the terms of the zoning regulations actually prevent the use of the property in the manner similar to that of other property in the zoning district where it is located.

In this particular instance, an application has been submitted by Greg Ferris on behalf of T-Mobile Central LLC for a variance from Article 16.06 paragraph 4 of Harvey County's Unified Development Code (Zoning and Subdivision regulations). The applicant is requesting a variance from the requirement that all communication towers be setback from property lines the height of the tower plus 50 feet. The applicant is requesting that a 250 foot tower be 250 feet from the west property line instead of 300 feet.

I have reviewed the application in light of the specific criteria to be considered for any variance request. Those criteria and my comments are as follows:

1. ***Whether or not the variance requested arises from such conditions which are unique to the property in question and which is not ordinarily found in the same zone or district; and is not created by an action or actions of the property owner or applicant.***

This particular parcel is zoned A-1 for agricultural uses. As mentioned above the applicant wishes to locate the tower 250 feet from the west property line instead of the required 300 feet. A small drainage creek meanders through the property and prevents the tower from being located 300 feet from the west property line.

2. ***Whether or not the granting of the variance will adversely affect the right of adjacent property owners or residents.***

In this particular instance, I do not feel the granting of the variance would adversely affect the right of adjacent property owners or residents. The tower would be setback the height of the tower and if it falls to the west, will land on the property it is located.

3. ***Whether or not the strict application of the provisions of the zoning regulations from which the variance is requested will constitute an unnecessary hardship upon the property owner represented in the application.***

I believe the strict application of the regulations does constitute an unnecessary hardship upon the applicant because of the shape of the property and because of the creek running through the property.

4. ***Whether the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity, or general welfare.***

The granting of the variance should not adversely affect the public health, safety, morals, order, convenience, prosperity, or general welfare

5. ***Whether the granting of the variance desired will not be opposed to the general spirit and intent of the zoning regulations.***

I feel the granting of the variance would not be opposed to the general spirit and intent of the zoning regulations because of the unique circumstances associated with this property. In summary, I would have no objections to a variance being granted for the reasons stated above.

Enclosed is a copy of the application from Mr. Ferris, the aerial you received with the conditional use permit and county map shows the location.

The Chairman asked for Rick Edwards with CityScape Consulting to make any comments. Mr. Edwards said it was not their position to make recommendations concerning this kind of decision. They requested further explanation from Greg Ferris, who sent him a map showing the site and the frequency coverage with a 250 foot tower. Chairman Kirk asked if there were questions for staff, Mr. Emmel asked what the setback from the south property line was, staff though 320 feet but was corrected by Mr. Edwards that it was 430 feet. Mr. TenEyck asked what the 143 foot measurement was. Staff said that was the setback from the right of way. Mr. TenEyck said that the tower could land on the interstate. Staff explained the setback requirements from state highways are less than the requirements for private property lines.

Ms. Thiessen commented that she had driven by the property and noticed the culvert. Mr. Goering said that this site had been a borrow pit for the interstate.

Greg Ferris spoke on behalf of the application. Mr. Ferris said that he believed that the variance meets the 5 criteria. He said towers do not fall over, they break in sections or if the guys fail only part of it falls.

Mr. Edwards interjected and said that towers can fall out straight, he cited a recent example in West Virginia where 2 towers fell over straight out from 75 mile hour winds. He used to believe that they couldn't fall over but reality has proven differently.

Mr. Ferris said he had not heard of this, he said that a tower north of Wellington fell and it went down in sections. He said the old standards were for 75 mph winds, now they are 85 mph.

Chairman opened and closed the public hearing since there was no one from the public to speak.

The Chairman opened up to the board to comment or ask questions. There was discussion about the setback from the interstate but it was decided to address the issue under the conditional use permit.

Mr. Emmel asked about placing the tower south of the creek. Mr. Ferris said that because of guy wires and engineering the southern site was not suitable. The site is not in a floodplain.

Mr. Harder moved to approve the variance, Mr. Goering seconded, Chairman called for a vote, there were 11 for and 2 opposed, motion carried.

**Case No. CUP 4-22-1W:** Request by Greg Ferris on behalf of T-Mobile LLC for a conditional use permit to erect a tower 250 feet in the A-1, Agricultural zoning district.

**Staff Report:**

An application has been submitted by T-Mobile for a conditional use permit to erect a wireless communications tower 250 feet in height on property in the A-1 Agricultural zoning district.

The property is located approximately ½ mile east of N. Emma Creek Rd. On the north side of NW 96<sup>th</sup> 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.

- A. **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.

- B. **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 properties to the west, north and east are zoned A-1 Agriculture, however the property to the south falls in the City of Hesston and is Zoned I-2, Industrial. Interstate 135 runs along the east side of the proposed site.

- C. **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 urban fringe area as designated by the adopted countywide comprehensive plan. Development in this area is to allow for cities to expand their boundaries and to promote compact urban development. I contacted the City of Hesston and they are not interested in annexing this property at this time.

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.

- D. **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 NW 96<sup>th</sup> which is a low maintenance road. I contacted the applicant about any needed improvements to NW 96<sup>th</sup>; he said that the site would only be accessed 2-3 times a year once it is built. He said that during construction if any gravel is needed to access the site, they would take care of it.

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.

E. **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 via NW 96<sup>th</sup>, which is a low maintenance township road with very little traffic due to dead ending at the interstate. The nature of the use proposed is such that the only traffic to and from the site will be the occasional maintenance vehicle.

F. **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:

- (1) The applicant shall present satisfactory proof that the proposed location and use is reasonably necessary to provide transmission/reception coverage for the service area,
- (2) 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,
- (3) 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,
- (4) 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,
- (5) 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,
- (6) 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,
- (7) 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,

- (8) 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,
- (9) 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.
- (10) 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.
- (11) 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.
- (12) 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.

Mr. Edwards commented on their review of the tower, their research indicates that a tower is needed near this location. The existing towers in the area are not suitable for co-location. Mr. Edwards said that it came down to lighted or non lighted tower. If the planning commission went with a no lighted tower it would mean a tower 199 feet in height, which reduced their coverage, a lighted tower would allow it to be 250 feet in height.

There was a question about having a licensed engineer sign off on the plans. Mr. Edwards said that electrical engineers do evaluations on towers but there is no such thing as a RF engineer. He said that a certified Kansas engineer would need to sign off on the plans prior to issuing the building permit.

Mr. Foraker asked Mr. Edwards what his take was on the public safety of the tower being located that close to the interstate. Mr. Edwards said it was more of local matter to determine the setback; however he said that their attorney had looked at Kansas State Statutes and they could not find anything in them that dealt with setbacks, that is was up to the local governing body to determine the setbacks.

Mr. Peters commented that there was no one from Hesston to comment on the impact of the tower or its lights.

The Chairman requested the applicant to give a report. Mr. Ferris spoke on behalf of T-Mobile. He explained that his job was to find a location for T-Mobile's antennae not a tower. They applied for co-location on a tower northeast of Hesston but it failed structural analysis. They then applied to co-locate on Southern Star's tower west of Hesston but SS does not allow co-location. He answered Ms. Thiessen's question about T-Mobile coverage in the area. Mr. Ferris said there is no coverage in Hesston. Their objective is to provide in building coverage for Hesston and coverage along I-135. There is no coverage in Moundridge and they are planning to provide coverage there an along the interstate to McPherson.

There was a tower 2.72 miles away but too far away to meet coverage objective, Mr. Ferris said. As a site selector, Mr. Ferris said that he tries to find property that is well planned for a tower, a property that has low use potential and not near high uses such as residential. When they studied the site, the southern part of the lot was low and posed drainage problems, Mr. Ferris said. The location to the north of the drainage swale was more conducive for the tower. Mr. Ferris reviewed the coverage scenarios of different height towers and the 250 foot tower met their coverage objectives.

Mr. Ferris said that they would be accessing the site 1-2 times per month after the tower is built. It is a very low traffic use and no improvements are needed for the township road. Mr. Ferris then addressed concerns about proximity to the highway. He said that light poles along the interstate are more likely to fall on the highway than a tower. He said the tower would be about 250 feet from the centerline of the right of way, that the tower would be about 200 feet from the road itself. He said T-Mobile does not want the bad PR from a tower falling onto a highway and does everything its ability to insure its structural stability.

George Wyrick with T-Mobile said that he has worked with various state departments of transportations about locating towers in the right of way so having a tower just outside the ROW should not be an issue, he said.

The Chairman opened the public hearing, there being no comment, closed the public hearing. The Chairman called for any questions from the commission.

Mr. Harder asked if it there would be lights on the tower. Mr. Ferris said that the tower would comply with the recommendations of CityScapes to have red at night and strobes during the day.

Mr. Goering moved to approve the 250 foot communications tower with the conditions recommended by CityScapes, Mr. Alison seconded. The Chairman called for a vote, the vote was 12 for and 1 opposed, motion carried.

**OLD BUSINESS:** Ms. Thiessen said that the gun range was up for sale. She had not heard whether they had appealed at the state level the decision of the district court.

**NEW BUSINESS:** Mr. Bender thanked Mr. Edwards for his coming and providing input into the tower permit decision.

The meeting adjourned at 9:15 pm.