



City of Grand Island

Tuesday, June 22, 2010

Council Session

Item G2

Approving Minutes of June 15, 2010 City Council Study Session

Staff Contact: RaNae Edwards

CITY OF GRAND ISLAND, NEBRASKA

MINUTES OF CITY COUNCIL STUDY SESSION

June 15, 2010

Pursuant to due call and notice thereof, a Study Session of the City Council of the City of Grand Island, Nebraska was conducted in the Council Chambers of City Hall, 100 East First Street, on June 15, 2010. Notice of the meeting was given in the *Grand Island Independent* on June 10, 2010.

Mayor Hornady called the meeting to order at 7:00 p.m. The following Councilmember's were present: Gericke, Nickerson, Ramsey, Gilbert, Niemann, and Meyer. Councilmember's Zapata, Dugan, Carney and Haase were absent. The following City Officials were present: City Administrator Jeff Pederson, City Clerk RaNae Edwards, and City Attorney Dale Shotkoski.

INVOCATION was given by Mayor Hornady followed by the PLEDGE OF ALLEGIANCE.

Discussion of Proposed Wireless Telecommunications Regulations. Chad Nabity, Regional Planning Director reported this item was brought to a Study Session at the request of the City Council at their June 8, 2010 City Council meeting. The proposed regulations would amend the Wireless Tower Regulations for the City of Grand Island (Article XI). The new regulations would establish a consistent framework for approving wireless communications facilities across the County. A proposed contract with the Center for Municipal Solutions (CMS) was recommended for their technical expertise and extensive experience with wireless communications facilities. The regulations proposed a payment into an escrow account to be maintained and used to pay the consultants when a conditional use permit was applied for.

Mr. Nabity presented a PowerPoint presentation explaining why we regulate towers and wireless facilities.

Goals/Purpose:

- Assuring a rational, logical, orderly approach that gives the carrier what it needs
- Assures a minimum number of new towers, the maximum use of co-location and that the facilities be made as "invisible" as possible to assure the absolute minimal visual impact and effect
- Facilitate the expansion of service and deployment of the latest technology

This starts with requiring the applicant to show Proof of need for what is requested.

Application review:

- Cost of expert assistance – no cost to community
- Aesthetics/Appearance – a wireless facility should use the least visually and physically intrusive means possible that is not commercially or technologically impracticable
- No towers on "Speculation" – tower companies have no 'need' – only carriers have a need
- Verification/Determination of actual need

Location, height, total number, public safety, and non-tax revenue would be part of the application review.

Federal Limitations on Local Authority

- May not discriminate
- May not prohibit wireless service
- May not take an unreasonable amount of time to act on the application
- May not deny an application based on RF (NIER) Emissions if the applicant meets the FCC's standards for RF Emissions
- Denial must be in writing and supported by substantial evidence contained in a written record

Bob Naumann representing Center of Municipal Solutions (CMS) explained pictures with designs concealing impact of towers on buildings and pictures of tower failures. Mentioned was the inspection requirements of the towers included in the ordinance.

The following people spoke in opposition of the proposed ordinance:

- Dan Lindstrom, Attorney, 322 West 39th Street, Kearney
- Eugene Carroll, 2057 Wilderness Drive, Lincoln – Viaero representative
- Katie Zulkowski, 530 South 13th Street, Lincoln – Attorney representing AT & T and Verizon
- Randy Blair, 1901 West Louise

The following person spoke in support of the proposed ordinance:

- Pat O'Neill, 1516 So. Gunbarrel Road – Chairman Hall County Planning Commission

Discussion was held on location of the towers so service doesn't overlap. Mr. Carroll commented on a third party telling a company where their tower needed to be placed. Co-locating was mentioned.

Mr. Blair had concerns of the following sections in the proposed ordinance:

- 36-178 (b) – Height of Telecommunications Tower(s)
- 36-174 (c) – Exclusions
- 36-183 – Retention of Expert Assistance & Reimbursement by Applicant

Submitted into the record was a written letter from Mr. Blair.

Mr. O'Neill commented on the importance of having an independent expert review these applications. Between 600 to 700 communities across the United States had adopted a similar ordinance. He stated the concerns Mr. Blair had and suggested changes were valid.

Council discussed the increased fees and escrow accounts proposed in the ordinance and how those fees came about, which was based on research within Nebraska communities. The Request for Proposal process and the one response received by the City was mentioned. Mr. Nabity stated

CMS submitted the only proposal. Mr. Nabity explained the benefits for all of Hall County communities to adopt the same or similar ordinance.

Council had questions concerning the cost of new towers versus co-locating which no one had an answer for. Mr. Naumann commented on other communities they represented throughout the United States from very small to very large. Cost to the customer was absorbed through the national system and revenues would more than cover the cost of the application and escrow amount required. Mr. Naumann stated those communities who had an ordinance in place had increased applications for telecommunication towers. CMS worked with telecommunication companies to get information and look for safety issues when co-locating. Mr. Naumann stated this ordinance was the Council's and it could be changed however they wanted.

Lowell Brookes, Attorney, Suite 984 Wells Fargo, Lincoln representing PCIA spoke of concerns of wording within the proposed ordinance that conflicted with State and Federal laws, definitions, and ambiguities within the ordinance. Mr. Brookes suggested the Council look at this as "if there was a problem of the current process and if there was what the appropriate measure was to take to solve it."

Craig Lewis, Building Department Director commented on the time it took to process the tower applications and stated the current fee of \$200.00 did not cover the cost. Mr. Nabity stated the current ordinance did not have a pecking order of where towers could be put up. There were height requirements within certain areas.

Councilmember Nickerson recommended we keep the current process in house and hire the consultant if needed and figure a rate from there. City Administrator Jeff Pederson commented on fees and stated 100% recovery was the target.

Mr. Nabity stated there was a public hearing scheduled for the council meeting next week and council could open the public hearing and enter the minutes from this meeting and leave it open for action at a further date.

ADJOURNMENT: The meeting was adjourned at 9:10 p.m.

RaNae Edwards
City Clerk

Comments for Council Study Session Re: Proposed Ordinance 9262

I have no vested financial interest in the final form of this ordinance. I am more than seven years removed from the wireless industry and I have no direct or passive financial investment in any aspect of the industry. I do, however, have a personal concern that my city government is overreacting to illogical concerns about future litigation and, in doing so, is overstepping its authority regarding the operation of private business.

This is essentially an issue of aesthetics vs. economics. It is not an issue of public safety. That is appropriately addressed in our existing ordinance. It is the dilemma that has confronted Planning & Zoning Commissions and City Councils from the time that the first wireless telecommunication towers were being constructed for paging services in the 1970's. We have all become dependent upon wireless communication. We not only want to be able to talk with one another, but also to be able to text one another, chat with one another, send pictures to one another, be found by emergency services when we get lost or have an automobile accident, and even be able to watch our favorite movies and television programs, all over a device that we can hide in the palm of our hand. We demand those services at the lowest possible price and, by the way, we want them provided without having to look at a telecommunication tower.

This conflict is nothing new. I appreciate the position that Planning & Zoning and the City Council finds itself in. It is a no-win situation for you. If you approve a new telecommunication tower, someone is going to chastise you for it. If you deny a permit for a new tower, you are anti-business. Such is the nature of public service. Since this is an issue of personal aesthetic preferences rather than public safety, there is no definitive solution; there is only well-structured compromise. That is what I would like to see come out of this meeting.

What appears to be driving this change in the existing ordinance is a fear of potential litigation from wireless carriers if their special use permit applications are denied. If the Council believes that turning the decision making over to a third-party of wireless engineers is going to lessen the possibility of future lawsuits, you obviously have not spent much time around trial lawyers. I would contend that the ordinance as currently presented is only going to invite a legal challenge, not only now but in the future. Contrary to what many municipalities seem to believe, wireless service providers are not in the business of suing city governments. They do not make their money by winning lawsuits. Legal action is an expense that any successful corporation seeks to avoid. Likewise, wireless service providers are well aware that they cannot be successful by alienating the very customer base that they are attempting to serve. They are not attempting to run roughshod over the concerns of local citizens.

U.S. Cellular, Verizon, and Viera are not enemy marauders seeking to level our landscape and build on it a forest of telecommunication towers. Every time a wireless company makes application for a site, it costs money. Every time that it is denied an application and chooses to take legal action, it costs money. Every time it has an application approved and moves forward to build a site, it costs money. For-profit organizations do not succeed by seeing how many expenses they can rack up. Wireless service providers are not going to build more transmission sites than they need to carry out their business plan. It makes no financial sense. Wireless service providers are not going to build a new site when they can accomplish the same service provision by co-locating on an existing site. It makes no financial sense. Wireless service providers are not going to insist on circumventing a sound tower location ordinance through litigation just to flex their legal muscles. It makes no financial sense. We need to

acknowledge that these wireless service providers are not the enemy, but tax paying members of our community, and we need to treat them as such.

Fortunately, there are existing tools that the Council can use to forge a compromise and create an ordinance that can be reasonably and economically implemented, while standing up to legal challenges in the future. The first tool that we should use is Ordinance 9262 currently before you for consideration. For the most part, it is well thought out, well constructed, and provides a means of balancing the interests of the community's aesthetics with the needs of the wireless service providers. I have a concern only over a few points:

Paragraph 36-178, sub-paragraph b concerning tower lighting – What recourse does the owner of a tower have if the FAA should lower the minimum height requiring lighting and not allow it to be “grandfathered?”

Paragraph 36-174, sub-paragraph c concerning exemptions from the ordinance – One has to question why DBS, MMDS, and TVBS providers are exempt from the provisions of this ordinance. They are, after all, private, for-profit corporations in a business that is quite similar to wireless service providers.

Paragraph 36-183 in its entirety – There are many reasons why I believe that the use of a third-party consultant is not in the best interest of our community, but I will limit my comments to the following:

1. The consultant is paid by the City to draft an ordinance that directly inures to the financial benefit of the consultant. That is a blatant conflict of interest.
2. The consultant benefits financially by requiring as many reviews as possible, at a charge of \$200.00 per hour for consulting, \$100.00 per hour for travel time, and all related travel expenses. Since the Council is taking the position that they do not have the expertise to make wireless site location decisions, it stands to reason that they also lack the expertise to know when they are being over-charged for unnecessary consulting time. However, the Council wants the community to accept that such a possibility is not really a problem because the wireless applicant will be footing the bill.
3. The initial fee (escrow payment) is exorbitant and has no cap. The fact that the ordinance requires potential future payments of at least \$2,500.00 into escrow each time that the balance falls below \$2,500.00 indicates that the costs for review could very well exceed \$8,500.00. What mechanism is in place to stop these costs from exceeding \$15,000.00, \$20,000.00 or more?
4. To require additional fees when antenna changes or modifications are made to a site, even when there is no change to the height of the structure, is draconian at best.

I would suggest that the city council consider adding some of the more detailed and descriptive language found in the PCIA Model Ordinance in order to more clearly define what its requirements are for telecommunication tower sites. Some might say that PCIA is an industry organization looking out primarily for the best interests of its members. I would counter that an ordinance drawn up by a consulting organization planning on playing a continuing role in an approval process that inures to the financial benefit of the consulting organization is an even more slippery ethical slope. A case could be made that a municipality that uses the PCIA model as a guide for its tower location ordinance is less likely to have that ordinance challenged by members of the very industry that PCIA represents. We need an ordinance that dismisses the “us vs. them” mentality and focuses on the overall benefits to the Grand Island community.

It would be unfair of me to point out what I perceive to be flaws in this ordinance without making some suggestions as to how I believe it can be improved. I would recommend the following:

1. Retain the majority of the ordinance as it has currently been presented.
2. Modify 36-178 (b) to accommodate existing towers should the FAA alter its regulations in the future.
3. Modify 36-174 (c) to include DBS, MMDS, and TVBS providers under this ordinance.
4. Eliminate 36-183 in its entirety.
5. Allow co-locations on existing structures to be approved by administrative review if there is no increase in tower height.
6. Allow modifications to existing towers to be approved by administrative review, providing there is no increase in tower height.
7. Prioritize new tower approval not only by zoning, but also by tower type, such as:

Non-Residential Zoning

- a. Monopoles
- b. Free-standing Towers
- c. Guyed Towers

Residential Zoning

- a. Monopoles
- b. Stealth Towers

8. Restrict towers in non-residential zones to 150' in height or less.
9. Restrict towers in residential zones to 60' in height or less.
10. Require that new towers constructed in non-residential zones be capable of supporting a total of 4 carriers and that the tower owner be willing to permit co-location at reasonable commercial rates for the market.
11. Require that new monopole towers constructed in residential zones be capable of supporting a total of 3 carriers and that the tower owner be willing to permit co-location at reasonable commercial rates for the market.
12. Require that new stealth towers constructed in residential zones support additional carriers when feasible, and that the tower owner be willing to permit co-location at reasonable commercial rates for the market.

I want what is best for our community, both in aesthetic appeal and in economic growth. I believe that this can be accomplished without city government intrusion through unnecessary regulation of local businesses.

Thank you.

Randy Blair