

BUTLER COUNTY PLANNING COMMISSION

April 2nd, 2019

Butler County Courthouse-4th Floor

205 W. Central

El Dorado, Kansas 67042

MINUTES

The rescheduled meeting of the Butler County Planning Commission began at 7:00 p.m., on Tuesday, April 2nd, 2019 on the 4th Floor of the Butler County Courthouse located at 205 W. Central in El Dorado, Kansas.

Members Present: Jeremy Sundgren, Bryce Flaming, Jeff Varner, Kristi Sullivan and David Greene Jr.

Members Absent: Kermit Frey, Jim Ralston, Andy Jones and Debbie Logsdon

Guests: Terry Huelskamp, Patrick Erwin, Jack Scheidt, Harris Butler, Rita Butler, Iris Pearce, Terry Pearce and Heidi Thornburg

The meeting was called to order and a quorum was declared

Approval of the April 2nd, 2019 Planning Commission Agenda

Motion: Jeremy Sundgren

Second: David Greene Jr.

Approved

Approval of the March 5th, 2018 Planning Commission Minutes

Motion: Kristi Sullivan

Second: David Greene Jr.

Approved

Old Business:

CU 19-02

Request for the placement of an AT&T Telecommunications Tower

Applicant/Owner: Ann Staples - ATT

Agent: N/A

Location: 4819 SW Santa Fe Lake Rd, Augusta KS 67010

Discussion: Staff recommends approval

Staff: We are revisiting this case today, which was heard on February 5th 2019. Staff recommendation then was to approve the request but after discussion with the Planning Commission and concerned individuals, the request was denied for the following reasons:

1. Concern about possible health implications to the neighbors
2. How the tower may impact the neighbor to the south of the site and the use of his private airstrip

3. Could possibly disrupt the neighbors view
4. There was a question of true need and how many people would be impacted by the placement of the tower
5. The placement of the tower could have a possible negative effect on property values

As required, on February 26th, 2019, the Board of County Commissioners discussed the application and felt the request should be remanded back to you, the Planning Commission for further discussion after receiving a letter from legal counsel representing ATT. The discussion included comments to the commissioners stating that they received several calls with concerns about the tower and felt the request should be denied based upon esthetics, potential health effects associated with the radiation, reduction in property value as well as interruption of the use of the private air strip. After a vote of 3-2, the BOCC, remanded the case back to you, the Planning Commission. Included in your packet is a letter from Legal Counsel for ATT detailing reasons why the request can not be denied based upon State and Federal Regulations. Staff provided the letter to Terry Huelskamp, Legal Counsel, to which he responded to as well. A copy of his letter was also included in the packet. Mr. Huelskamp is present this evening and can further explain his response as well as answer any questions.

Terry Huelskamp, Butler County Legal Counsel: I have a summary prepared of the 250+ page letter I received. This is a bare minimum summary I put together based on the short time that was provided as to whether or not this request can go forward. This letter is not my opinion whether or not you can deny this tower; I merely reviewed the basis on which you have to make your decision.

Page 2, Subsection F goes over each of the issues that came up. You can review that and make a decision as to whether or not you followed those guidelines. I think the bottom line is that as long as you make a reasonable inquiry; you have a reasonable basis for your decision; if there is a presumption that what you did is reasonable, it is a rebuttable presumption. In other words, as an example, if you say nothing in the records as to why you denied the request then that's not reasonable' an appeals court would just reverse the decision based upon that alone. You have to have substantial evidence in your record as to what your decision is and why. That is very important when it comes to denials.

No questions were asked of Mr. Huelskamp at this time.

Jack Scheidt, Network Real Estate for ATT: This evening I would like to just re-visit a few highlights from the last meeting and then move forward and answer questions rather than going through it in full.

The thing I would like to highlight tonight is the areas of your code that we used when we chose this location. We do a lot of work to assure we meet your codes and a couple things in there are that we met all the set-back requirements and we also meet the use of existing tree lines to prevent the view from different areas as much as possible.

Board: [Inaudible question]

Jack Scheidt: This tower will be for ATT which will be providing Broadband Internet and Cellular Service. The technology on these towers always changes.

Board: partially inaudible what the words government program was mentioned and less populated areas rather than areas that may already have those service.

Jack Scheidt: The Connect America Fund is a Government program which highlights areas that they deem necessary to get additional broadband to. This is one of those areas that qualified

under that program. There are other sites that are being built in the country to address that as well.

Board: There is no broadband in that area now?

Jack Scheidt: I am not sure if there is or not but I do know that they designated areas that need additional broadband. The government has requirements that ATT has to meet in order to qualify for the America Fund Program.

Board: Will this tower have a red light at the top?

Jack Scheidt: We follow all FAA regulation and it has been recommended that it does. It wasn't required but recommended due to the private airstrip.

Board: [inaudible]

Jack Scheidt: It is from the previous meeting as well as the Commissioners meeting.

Board: How much coverage will it add?

Jack Scheidt: I have some information on coverage but since it based on internal information and isn't required under the statues.

Staff: I think it is important to reference back to Mr. Huelskamp's letter; section F-1 actually addresses this issue.

Board: Will this tower be able to supply that? From what I have read ATT is kind of falling short.

Jack Scheidt: I believe the speed that ATT will provide goes beyond the scope of zoning purposes.

Staff: I believe this also goes back to the letter under section F-1.

Harris Butler: My airstrip currently isn't registered with the FAA however in November 2018 I applied for registration which is about a 3 year process. At the least I would think, ATT would apply the same standard when it comes to safety as they would if it was a registered airstrip. I would like to talk about a compromise with ATT that would work for them and also benefit the whole community. ATT has provided a statement that said that they

Leon Trammel who owns approx. 700 acres over on Santa Fe Lake Road has said that he would consider allowing ATT to erect the tower on his land. The proposed site would be approx. 4000 feet east and 1000 feet south of the current proposed location. It also seems as if the location is approx. 30 feet higher as well. Power would be available on the newly proposed site as well.

I respectfully request the Planning Commission to table this item for 30 days or more if needed to give ATT time to investigate this alternate location and to discuss the details with Mr.

Trammel. I want everyone to know that should ATT not consider this new location, I am still against erecting the tower in the current proposed location. I will be obtaining and submitting affidavits from 12 experienced pilots stating that the pole poses a safety hazard to the aircraft coming in and out of the airstrip located at 11199 SW 50th St., Towanda KS. I would further request the Planning Commission keep this record open for 14 days or until April 16th, 2019, to submit these affidavits to the Planning Commission.

Staff: I would like to note that one concern with the request to table this is that as part of the Federal Telecommunications Act of 1996, any request is required to be ruled upon within 150 days. This was submitted on December, 13th of 2018 so the "drop dead" date would be May 12th of 2019 and if we were to consider a different location, I am not sure that the process would start all over again; we will have to ask counsel about that.

Board: So that would be the date for?

Staff: That would be the latest date the commissioners can rule in this case.

Harris Butler: I would think that if ATT would be willing to accept the compromise, the whole thing would restart.

[Inaudible short discussion]

Terry Huelskamp: Right now all you have is this one 1 application before so I think if ATT is willing to table it or withdraw or amend it, that's a different story but you as a body can't do anything about the request that was just made.

Staff: I would like to state that in the BOCC meeting this morning I made them aware of the fact that this case was coming back this evening. There was some discussion about since we don't have to meet the 21 days case separation like we did from the initial request, we can take this back as early as next week. Mr. Johnson, County Administrator, as well as several other BCC Members thought that maybe we should wait a week or 2. I am not sure what Legal Counsel thinks.

Terry Huelskamp: My first thought would be; do we need to take ATT's position on this before we move any further.

Jack Scheidt: I believe the new location mentioned would be quite a ways away from our proposed site, possibly 2 to 3 times further away than the search area within our ring and would be outside of our search area ring and wouldn't be acceptable. Also negotiations with a specific land owner through Zoning would be a difficult step and ATT may have some serious issues with that as well. Please also keep in mind that we negotiate leases for these locations and that there is a business aspect to that. To be pushed by a Zoning Board to only be able to negotiate with 1 land owner would be a problem.

Board: Would you please explain that ring area a little more?

Jack Scheidt: So they, ATT, gives us a search area where if we place a tower, it will provide acceptable coverage and if you get outside of that search area, coverage will get a little more worse and will not meet the need.

Board: So does the ring determine the Federal Grant money ATT gets?

Jack Scheidt: Ultimately it does since it provides an area of where the need for the service is.

Board: So what you are proposing doesn't cover a lot of area?

Jack Scheidt: It will cover a large area which is based on the number of people it would service.

Board: Do you know where the nearest tower to this location?

Jack Scheidt: Yes we do and I do believe it was shown in Exhibit B2 that shows the other towers. I think it would be worth noting that whenever they design sites, it is a little more complicated than just drawing a circle around an area. A substantial amount of work goes in from our Engineer to determine exactly where there is a need for a tower. So it may look like simply moving the circle area may not be a big deal but it just isn't that simple, it can have a drastic effect on coverage quality.

It was noted that on Exhibit 1 it appears that Mr. Leon Trammel was contacted about his site but was unresponsive to ATT.

[Inaudible]

Terry Huelskamp: Kansas Statue clearly defines a search ring as a shape drawn on a map to indicate a general area to which a wireless services support structure should be located to meet radio frequency engineering requirements taking into account other factors including topography and demographics of the surface area.

Ann Staples: I want to make it known as to why this application happened in the first place. My husband and I bought this property about 40 years ago. He passed away 15 years ago and I still reside there. Mr. Butler flies over my house and my pond and has been for 20 years and now

suddenly he is talking about the safety on his journey with his airplane. One of reasons I accepted the offer from ATT is due to Butler County raising my taxes \$1700 in one year which could have forced me to have to sell my home. ATT came and said they would rent a little parcel of my land and yes, I was concerned with the aspects of cancer. We made a thorough investigation with the American Cancer Society and there was no indication of cancer coming from this tower. Also the tower will be back in an area where there are trees so the only thing visible would be the rising top of it and I don't think that it too terrible. If I don't get this rent from ATT then I will most likely have to sell my land which it could possibly be divided. Right now Mr. Butler has a nice strip he can fly from the north to the south without any interruption other than my house and pond. Speaking of danger, he has had one crash with his plane, not on my place but to the south of his. I just don't think this tower will interfere with his flying path at all.

Iris Cox-Pearce: I own property NW of Miss Ann's property. I contacted our Realtor that sold us the house in 2010 and he told me that it does have an impact on re-sale value. I do have to wonder that out of all places they could have put that couldn't they have gone somewhere else? This is pretty much the most and densely populated area between the Turnpike and Hwy. 254 between Towanda and Benton. Why is this the only location where they can put this tower? It sounds like Mr. Trammel is offering to at least consider another location on his property where they could put this tower. It would be well worth looking into it especially since the proposed site sits lower than anything else in the area. I would like to think that looking at another location would be at least an option. So if you are looking for maybe for or against it, I am against it.

Staff: I was made aware of Mr. Trammel's possible site and would like to add that I did put an Elevation Layer, 10 foot intervals, on Mr. Trammel's location and his site is actually lower than the proposed site.

Board: I have a question for Mr. Butler. When you do fly, would this tower be in your line of flight?

Harris Butler: It is not directly in the flight path but as my plane is in process of climbing with the nose up in the air, I may not be able to see the tower. When I come in, I try my best not to pass over her house but sometimes the wind blows me over a little.

Board: Am I understanding correctly that we cannot override State and Federal statutes?

Terry Huelskamp: Not unless you have substantial evidence in the record.

Board: As far as the airstrip, even if it was registered, we would have no control over that. The FAA would step in and have control over it. It is not registered at this time.

Staff: F-6 in the letter actually addresses this.

Jack Scheidt: to go back to the local ordinance about the 150 foot tower; is what is allowed in Rural Residential. When you over the letter from Legal Counsel and then compare it to the local statute, you will find that we have met all the requirements.

Board: How big of an issue would a 2000 foot move be?

Jack Scheidt: A 2000 foot move would be a substantial move. Engineers would have to determine the exact impact. Also, moving 2000 feet, you would have to have a willing landlord.

[inaudible]

Board: F-6 was referred to earlier which states "Authorities shall not impose any restrictions at or near civilian airports with respect of objects in navigable airspace height limitations, proximity to civilian airports or markings etc. So it states very clearly that an Authority shall not impose any restrictions. It is also stated that we have to have reason and this can not be a reason according to this.

Board: I believe the only thing we do have to validate would be the health concern. Everything else isn't allowed but even with the health concerns, I am not sure we can validate it. The internet would bring up pros and cons.

Board: Things are just changing fast, with the technology, the towers are going to become more and more common in areas to the point where 15 years from now, they will be a public utility type necessity and won't be here anymore since they will put them up wherever they want.

No further questions or comments were made

Motion: Kristi Sullivan

Second: Kermit Frey

Action: Approved 3-2

It is unclear as to when this will go back to the BOCC but Hearing notices will be sent out. It could be as early as next week but we do not have a definite date. It will be on a Tuesday morning at 9AM.

New Business:

CU 19-04

Request for a Conditional Use Permit for the placement of a Telecommunications Tower

Applicant/Owner: Mann's ATP and Skyward Land Services, INC.

Agent:

Location: 7865 NW 80th Street, Potwin, KS 67123

Discussion: Staff recommends approval

Staff: This is a request for a Conditional Use Permit by ATP and Skyward Land Service to erect a 190 foot self-supporting Telecommunications Tower, inside a 60ft. x 60ft.fenced compound with a total leased area of 100 ft. x 100 ft. for the placement of Communications Equipment such as Antennas, Shelters and Cabins. The proposed Wireless Infrastructure is critical to ensure that all citizens have true access to advanced technology and information which ultimately will have economic benefits to the area.

The Planning Commission may recommend approval of a Conditional Use and the Board of County Commissioners may approve such Conditional Use using the following factors as guidelines:

1. Whether approval of the Conditional Use would be consistent with the intent and purpose of these regulations:

Staff: The property is zoned AG-80. The intent and purpose of the zoning regulations as they apply to AG-80 zoning classification is to allow for limited development in rural areas outside Urban Growth Area (UGA). It could be suitable in rural locations outside the UGA where adequate public roads are available.

It is not necessarily whether the proposed use is consistent with the intent and purpose of the zoning regulations, but rather, whether the proposed use is appropriate for the area in which it is located. In this instance, staff feels the use proposed may not necessarily be consistent with the intent and purpose of the regulations but given the project is located on a Township maintained

road, will create a minimal increase in traffic and meets the 240' Fall Area it may not be a detriment to the area. In fact they are proposing a Fall Area of 250' just to be safe. The property is located outside the Urban Growth Area of the County.

2. Whether the location of the proposed use is compatible to other land uses in the surrounding neighborhood:

Staff: Based upon the type of use proposed it could be compatible with the current use in the surrounding area if operated in the manner proposed by the applicant, and if operated in accordance with any other conditions that might be placed upon it, State of KS requirements and Federal requirements, its impact upon the surrounding properties would be minimal.

A large cattle operation is across the road to the north, which is also operated by Mann's ATP so the placement of the Tower should not negatively impact the area.

3. Whether the proposed use places an undue burden on the existing transportation and service facilities in the area affected and, if so, whether such additional transportation and service facilities can be provided:

Staff: As mentioned the property is located in an AG-80 area and the road serving the area, is Township maintained road. There will be minimal traffic to and from the site, after the construction is completed, and it should not impact the neighbors accessing their property.

It will be suggested as a Condition for Approval that a Road Maintenance Agreement between the Applicant and Plum Grove Township is in place prior to the start of construction.

4. Whether the proposed use is made necessary or desirable because of changed or changing conditions in the area affected:

Staff: There are no changed or changing conditions in the area. The applicant is merely proposing to use the site for the placement of a Telecommunication Tower to provide accessibility to enhanced technology and information to any and all users in the area.

5. The length of time the subject property has remained vacant or undeveloped as zoned; (the use of land for agricultural purposes shall be considered as viable use of the land and not be considered as allowing the land to be vacant or undeveloped):

Staff: The property has agricultural related structures on site and it is just the wishes of the owners to provide a place for the placement of the Tower.

6. Whether the applicant's property is suitable for the proposed use:

Staff: It is felt the property is suitable for the proposed use. The nature of the use of the land will not change significantly as there will be minimal traffic to the site and virtually no increase in outdoor activity that would impact the majority of the adjacent properties.

7. The recommendations of professional staff:

Staff: Staff feels the proposed use would be appropriate in this location.

8. Whether the proposed Conditional Use would be in conformance to and further enhance the implementation of the county's Comprehensive Plan:

Staff: This particular site is outside the Urban Growth Area of the County as noted in the Butler County Comprehensive Plan.

The Comprehensive Plan stipulates that the property is outside the UGA. Many uses, even with an AG-80 designation, could be considered a commercial use therefore staff feels the use proposed could be considered to be in conformance with the Comprehensive Plan.

9. Whether the relative gain to the public health, safety, and general welfare outweighs the hardship imposed on the applicant by not upgrading the value of the property by approving the proposed Conditional Use:

Staff: Staff feels the hardship issue is irrelevant in this case. Zoning Regulations have been upheld in Courts for a long period of time. The very nature of zoning regulations implies that the public good is served by not allowing certain uses in certain locations. To imply that they serve as a hardship by not allowing a certain use on any particular property is incorrect. When a person buys property, he/she is not guaranteed a use of that property other than what is allowed at the time they buy it.

10. Whether the proposed Conditional Use, if it complies with any and all the conditions upon which the approval is made contingent, will not adversely affect the property in the area:

Staff: It is felt the proposed use could adversely affect the property in the surrounding area and is therefore proposing the following Condition:

No Flashing Strobe lights will be placed on the top of the Tower.

A Solid Red Strobe Light will be required on the top of the Tower as is currently being proposed.

A Road Maintenance Agreement between the Applicant and Plum Grove Township must be in place prior to the start of construction.

11. For uses as solid waste disposal facilities, including sanitary landfills, construction and demolition landfills and transfer stations, whether the proposed Conditional Use is consistent with the Comprehensive Solid Waste Management Plan for Butler County, and amendments thereto:

Staff: N/A-does not apply

12. Such other factors as may be relevant from the facts and evidence presented in the application:

Staff: Staff viewed the site and felt comfortable that if the Tower were to be placed on the site as proposed it would not impact any neighbors.

It is also imperative that any reasons for denial must be considered “substantial evidence”. If reasons do not have such designation the reasons for denial could result in the Case being taken to District Court and having the Case overturned.

Patrick Erwin: As mentioned by staff, our application meets all the set-back requirements and regulations set by the County, State and Federal Rule.

Board: Since this will be a 190’ tower is there not a variance issue?

Staff: It is 260’ in AG 80 zoning.

Board: What kind of tower is it, is it the same as the other one proposed this evening?

Patrick Erwin: It is an ATT tower. The previous application you heard is a monopole where ours is a 3 legged pole. We need the extra height being it is in such a rural area of the County. It will be for cellular, voice and data and there can be others on that tower as well.

Board: We appreciate that because it makes for fewer towers when the different companies can work together.

Heidi Thornburg: My brother and I own the property to the West of the proposed site which already has an ATT tower in place so I am not quite sure why they want to do another one so close. I thought we were trying to cut down the number of towers so why this one? The people I have been in touch with about the tower told me it is in fact an ATT tower with the lights on it already and everything.

Board: Do you know how tall that tower is?

Heidi Thornburg: I do not, I'm sorry.

Board: Are you for or against this new tower?

Heidi Thornburg: I am against it because I don't see why we need 2 towers that close together and since they both be ATT towers serving the same need; it just doesn't make any sense.

Patrick Erwin: What I do know about the current tower is that it is the intent of ATT to remove the equipment from that existing tower and move it on to the new tower we are proposing to build. I do want to mention that a tower can't be denied due to other towers being in close proximity as per 66-2019.

[Inaudible]

Board: what you just mentioned goes back to the ability to make logical decisions.

Staff: I want to refer back to the letter from Terry Huelskamp from the previous heard case, section F – 1. Cannot deny or request information as to why they chose to put the tower there.

No further questions or comments were made

Motion: Kristi Sullivan

Second: Bryce Flaming

Action: Approve 5-1

To be heard before the BOCC on April 23rd, 2019 @ 9:00am

*****MEETING ADJOURNED*****