

November 7, 2011

The regular meeting of the Town of Franklin Board of Aldermen was held on Monday, November 7, 2011 at 7:00 P.M. in the Town Hall Board Room. Mayor Joe Collins presided. Aldermen Verlin Curtis, Joyce Handley, Farrell Jamison, Billy Mashburn, Carolyn Pattillo and Bob Scott were present.

Approval of the minutes

Motion was made by Pattillo, seconded by Handley to approve the minutes for the October 3, 2011 meeting as presented. Motion carried. Vote: 6 to 0.

Public Session

Ronnie Smith – I am giving you information to look at about the Ruby Bash Rally. Information copies are attached. I am having problems with the 2012 motorcycle rally sponsored by the TDA. There has been confusion. Please give your attention to this matter. A copy of the information is attached.

Public hearing – Verizon Wireless Cell Tower special use application

Mayor Collins opened the public hearing on the Verizon Wireless Cell Tower special use application at 7:05 P.M.

The following persons spoke at the public hearing.

Michael Grubermann – Land Use Administrator – Town of Franklin - I received the application from Pennington Law Firm for a special use permit for a cell tower. I have been working with The Center of Municipal Solutions on this application. During the application review the first question was why locate the cell tower in a Residential zoned area first. We ask them to give us information relating why this site is the only one that will serve their needs. They indicated that they were unwilling to disclose this information due to it being proprietary. We told them that they could disclose this information to our consultants so that it would not be public record. They refused. They are saying that the application is complete. We are saying that the application is incomplete because of the lack of information indicating why this area is the best possible choice. We are at an impasse. We held the Neighborhood Meeting. The Planning Board met and in their Findings of Fact they indicated that the application is incomplete due to no information supporting the site selection as the only option available to them. The Board of Alderman scheduled the public hearing within forty-five days as required by the ordinance from the time of the Planning Board recommendation. We notified the applicant that the application is incomplete.

Informational copies are attached.

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Lisa Smith – Attorney - Pennington Law Firm – Verizon Wireless leased the property last year at Gaston Street. The application was done the first of the year on April 14, 2011. Application notebook is given as an exhibit. We received an email from Michael Grubermann on April 25, 2011 that the application was complete. On April 26, 2011 we received an email from Michael Grubermann that the application was incomplete with details to follow. On May 2, 2011 we received a letter from Michael Grubermann with a report from The Center for Municipal Solutions (CMS) stating the details of the part of the application that they consider incomplete. On May 3, 2011 we had a telephone conference with CMS regarding request for Erlang study. On May 4, 2011 we had a telephone conference with CMS. On May 12, 2011 we send a response letter with revised exhibits to CMS. Additional comments were received on May 20, 2011 from CMS. On May 23, 2011 we had a telephone conference with CMS regarding additional information requested (Erlang study). On May 26, 2011 we had a conference call with CMS in an attempt to resolve the completeness issue of the application. On June 1, 2011 we received additional email comments from CMS. On June 14, 2011, a letter from Tom Johnson was sent to CMS and the Town stating that all information has been provided by Verizon Wireless except for the Erlang study. The letter further states that the Erlang study will involve the disclosure of information that Verizon Wireless considers to be confidential and proprietary and is not required by state law. On June 15, 2011 we sent a letter to CMS about the additional capacity need information (plots). On June 22, 2011 we received additional comments from CMS. On July 19, 2011 we had a face to face meeting with CMS and the Town. On July 20, 2011 CMS sends email request for multiple affidavits and information regarding the Erlang study. On July 21, 2011 we had a telephone conference with CMS in an attempt to get approval that application is complete. Also, email to CMS with additional information on why Town property is not usable. On August 5, 2011 we send a letter to the Town demanding that the application be processed. On August 24, 2011 the Neighborhood Compatibility meeting was held by the Town. On September 12, 2011 we send a letter reaffirming our legal positions and objections to the request for the Erlang study. The Planning Board recommends denial of special use application due to the application being incomplete. Copies of all the above mentioned documentation are attached.

Gary Pennington – Attorney - Pennington Law Firm - I want to do a power point at this time.

John Henning, Jr. – Attorney – Town of Franklin – Do you hold a license to practice law in North Carolina?

Gary Pennington – Attorney - Pennington Law Firm – I do not. I am based in South Carolina.

John Henning, Jr. – Attorney – Town of Franklin – If you are appearing as an attorney that will not be appropriate given your licensure.

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Gary Pennington – Attorney - Pennington Law Firm – I will speak as a witness, not as an attorney. I have a power point which will show why the site on Gaston Street is the only feasible location for the proposed tower.

Mayor Collins – You sound like an attorney to me.

Gary Pennington – Attorney - Pennington Law Firm – I will let Lisa Smith do the rest of the presentation.

Lisa Smith – Attorney - Pennington Law Firm – The Gaston Street site is the only feasible location for the proposed tower. The purpose of the tower is to offload signals from our two existing sites. They are both nearing capacity. The search ring is the area we explored when looking for a site. We looked at the Macon County Fruit and Vegetable Stand that is zoned commercial. It was rejected since the setbacks could not be met. The Town of Franklin water tank site on Wilkie Street is zoned residential. The Town would not lease this property. The property would have to be subdivided. We could not meet the setbacks. We rejected this site. The proposed tower is not a coverage site. The purpose of the proposed tower would be to provide capacity to the Franklin and East Franklin sites. We have determined that the towers are nearing capacity. If this proposed tower is not done, service could be affected. We did the balloon test in March 2011 to determine the site impact of the proposed tower. A copy of the power point is attached.

Sean Jones – Electrical Engineer - Verizon Wireless - Verizon Wireless uses the Erlang study to determine capacity limits. It is a measure of voice capacity and analyzes the data on a daily basis. The Franklin and East Franklin sites could reach capacity by the end of 2012. This is based on proprietary data that Verizon will not release. The propagation maps shows why the Wild Mint site is the only feasible site. Soft hand off happens when you're traveling and taking a call that is communicated to two towers at the same time. If you're having capacity from multiple sites, you double the capacity that is needed for a call. If the tower is not constructed, service will be negatively affected. There will be dropped calls.

Lisa Smith – Attorney – Pennington Law Firm – The Erlang study was not provided because Verizon cannot be sure that it would not become part of the record and be subject to the public records law. There is a state statute that specifies what the town can require and what the decision may be based on. North Carolina law specifically prohibits a town from requiring proprietary information.

John Henning, Jr. – Attorney – Town of Franklin – I disagree on your interpretation.

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Susan Allen – 497 Wilkie Street - I have had lots of questions that have not been answered. I have attended three meetings. I am concerned that this will set a dangerous precedent in residential property. I don't want it in my neighborhood. I don't want it any of your neighborhoods. I don't want to look at it. This is the second time the Wild Mint site has been called a cow pasture. You can't convince me that there is no other option. A letter was mailed to my neighbors from Verizon that sounds like a threat.

Jeanne Marie Booth – 155 Trimont Trail – I live less than 1,500 feet from where the proposed tower will be located. A medical professional is prepared to do a letter stating that my deteriorating health condition will force me to sell my home if the tower is constructed at the Wild Mint site. I have been disabled for the last twenty years. I am in a residential zone.

Mayor Collins – We are sympathetic to your health condition. However, the Telecommunications Act prevents the Board from using any information relating to health conditions as a basis for denying the special use application of wireless facilities.

Lawrence Rusty Monroe – Town's consultant – The Center for Municipal Solutions – I have reviewed the application and find it incomplete. They have not proven the need for a tower of this height to the exclusion of all other solutions. They are looking for an optimal solution, but other sites would work. Proof of technical need was not provided. Federal law prohibits disparate treatment. If the Town permits the tower, without requiring this data, it would have to treat other petitioners the same. Verizon wants the tower and the request must be justified by proving the need.

Lisa Smith – Attorney – Pennington Law Firm – Under state law the Town cannot require proprietary data. Verizon objects to this portion of the town ordinance that requires it. Your ordinance predates the state statute. We ask that you deem the application complete and grant the permit.

Mayor Collins closed the public hearing at 8:30 P.M.

Board consideration on Verizon Wireless Cell Tower special use application

John Henning, Jr. – Our ordinance permits the Town to hire a consultant. The planner, consultant and The Planning Board all agree that the application is incomplete. You can give them time to complete the application or vote that the application is incomplete.

Alderman Curtis – I feel like they really need it. It's obvious the need is here.

John Henning, Jr. – A municipality would not have the ability to determine where any tower were placed if the applicant could claim it is a business decision.

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Alderman Jamison – I would like to give them a chance to give us the information required by the ordinance.

Alderman Scott – I think it is the future. I think the day is coming you will not have a landline in your house. I am not sure that they need that height at that location.

John Henning, Jr. – If you put off the decision on the application, you cannot hear additional evidence or talk about the tower application until you meet again.

Mayor Collins – We need information to be able to satisfy ourselves and our constituents that we made a decision based on the data.

Lawrence Rusty Monroe – Town's consultant – The Center for Municipal Solutions – I may be able to do a conference call with Verizon to discuss the data needed but put nothing in writing to ensure that confidentiality is not breached.

The Board agreed to consider the Verizon request at the continued meeting on November 21, 2011 at 5:30 P.M.

Recess

Mayor Collins recessed the meeting at 8:50 P.M.

Mayor Collins reconvened the meeting at 9:05 P.M.

Public session

Dan Williams – Tim Bates' oak tree fell over on my property blocking the road. My wall was damaged. He cleaned up the mess for me. He handled this matter.

Presentation on Little Tennessee Watershed from Franklin to Fontana

The presentation by Andrea Leslie was postponed until November 21, 2011.

Sidewalk maintenance agreement

Motion was made by Mashburn, seconded by Curtis to approve the sidewalk agreement with the North Carolina Department of Transportation. Motion carried. Vote: 6 to 0. A copy of the agreement is attached.

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Schedule a public hearing for truck route

Motion was made by Curtis, seconded by Handley to set the public hearing for the truck route on December 5, 2011 at 7:05 P.M. Motion carried. Vote: 6 to 0.

Appointment to fill vacancy on TDA board

Sam Greenwood said the TDA Board is recommending Karen Bacon to fill the vacancy on the TDA Board. Alderman Scott said we need to hold off on this appointment until the TDA Board gives us reports and have rules of procedure in place.

Motion was made by Handley, seconded by Pattillo to appoint Karen Bacon to a three year term on the TDA Board. Motion carried. Vote: 5 to 1. Voting yes: Curtis, Handley, Jamison, Mashburn and Pattillo. Voting no: Scott.

Recognition of achievement of the Franklin sports program

Alderman Curtis related the achievements of the Franklin sports program. Information copy is attached.

Motion was made by Curtis, seconded by Handley to officially recognize the achievements of the Franklin sports program. Motion carried. Vote: 6 to 0.

Lease on fire equipment

Sam Greenwood said we have finalized the lease on the fire equipment. The first payment will be in November 2012.

Other business

Departmental reports are attached.

Continuation of meeting

At 9:30 P.M., motion was made by Handley, seconded by Curtis to continue the November 7, 2011 meeting to Monday, November 21, 2011 at 5:30 P.M. Motion carried. Vote: 6 to 0.

Call to order

The regular November 7, 2011 meeting of the Town of Franklin Board of Alderman was continued at 5:30 P.M., Monday, November 21, 2011 in the Town Hall Board Room. Mayor Joe Collins presided. Aldermen Verlin Curtis, Joyce Handley, Farrell Jamison, Billy Mashburn, Carolyn Pattillo and Bob Scott were present.

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Presentation on Little Tennessee Watershed from Franklin to Fontana

Andrea Leslie – I have a power point for your information. Between 2008 and 2011, the North Carolina Ecosystem Enhancement Program led a watershed study and planning effort in the Franklin to Fontana watershed. The Franklin to Fontana watershed is a 154 square mile area that encompasses the Little Tennessee River watershed between Lake Emory and Lake Fontana. It lies within north Macon County and a small portion of Swain County and it includes much of the Town of Franklin. The objectives of this effort were to assess the health of the Little Tennessee River, identify the major stressors that impact stream quality, develop a plan that names specific recommendations to restore and protect watershed resources and produce an atlas of on-the-ground projects that can provide the greatest benefit to the watershed. The major stressors include the following: (1) lack of woody streamside vegetation, (2) channel modification/straightening, (3) excess sediment inputs, (4) excess nutrient inputs, (5) bacterial contamination, (6) storm water runoff, (7) tomato pesticides and (8) barriers to fish passage. The group developed thirty-six recommendations which are grouped into four categories: (1) Conservation Projects, (2) Policy and Institutional Measures, (3) Educational Activities and (4) Research and Assessment Activities. We want to evaluate town regulations, work with local groups, work with the North Carolina Division of Water Quality and develop storm water Best Management Practices. Information copies are attached.

Board consideration of Verizon Wireless Cell Tower special use application

John Henning, Jr. said since there have been no changes to the Verizon Wireless Cell Tower application you need to approve the Findings of Fact. Lisa Smith, attorney with Pennington Law Firm, said I have some comments. She said the Board has to take action. She said your alternatives are approval, approval with conditions or denial. Mr. Henning, Jr. said that state courts have said that towns lack jurisdiction to approve incomplete applications. Ms. Smith said we consider the application complete. She said no further information will be provided by Verizon Wireless. Rusty Monroe said I cannot give you a recommendation on the application since we do not have the information to do so.

Motion was made by Mashburn, seconded by Scott to adopt the following Findings of Fact on the Special Use Application for Wireless Telecommunications Facility. Motion carried. Vote: 6 to 0.

In accordance with Chapter 154, the Town of Franklin’s Wireless Telecommunications Facilities Ordinance (hereinafter referred to as “the Ordinance”), the Board of Alderman held on November 7, 2011 a public hearing on the Special Use Permit Application of Cellco Partnership, d/b/a Verizon Wireless, (hereinafter referred to as “the Applicant”) for a new telecommunications tower. Based upon the record before it, the Board of Aldermen makes the following findings of fact:

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(a) This project is for the proposed construction of a 140' tall monopole tower on a portion of the property located at 60 Gaston Street. This property is zoned for residential use.

(b) The Ordinance requires documentation that demonstrates the need for telecommunications facilities in Section 154.05(F)(1). Pursuant to Section 154.06 of the Ordinance, applicants shall locate facilities on sites according to priority, with collocation on existing towers or structures being the highest priority and property zoned for residential use being the lowest priority. These priorities are intended to ensure the facilities are located within the Town's zoning districts that are most compatible to that use. If a site of lower priority is selected, subsection (B) of that section requires applicants to provide a detailed explanation as to why a site of higher priority was not selected. Subsection (E) of that section requires applicants to demonstrate the technological reason for the selection of a lower-priority site.

(c) The Applicant has refused and continues to refuse requests to supply the Town with an Erlang study and other technical data studies. The Board of Aldermen is informed by the Center for Municipal Solutions (the Town's consultant in this matter, hereinafter "CMS"), that such studies are the only means to determine the need for a new wireless telecommunications facility pursuant to Section 154.05(F)(1) of the Ordinance, and further that the same are the only means of proving the technical need to locate on a lower-priority site pursuant to Section 154.06(E).

(d) The Applicant was offered the option of disclosing the contents of the Erlang and other data studies to CMS pursuant to a confidentiality agreement in order to avoid public disclosure of proprietary information. The Board of Aldermen is informed by CMS that Verizon Wireless has entered into such agreements in other jurisdictions for the same purpose. Here, the Applicant declined to do so.

(e) Following submission of the application and review of the same by the Town Zoning Administrator, the Planning Board heard a presentation from the applicant on September 20, 2011. The Town Zoning Administrator advised the Planning Board that he found the application to be incomplete, and the Planning Board adopted findings of fact that also found the application to be incomplete.

(f) The Board of Aldermen finds for the foregoing reasons that the application is incomplete.

(g) The Board of Aldermen is advised by its legal counsel that there are decisions of the courts of this state holding that municipal boards do not have jurisdiction to approve special use applications that are incomplete.

WHEREFORE, the Board of Aldermen for the Town of Franklin therefore finds that it is without jurisdiction under North Carolina law to approve the application.

Mayor Collins recessed the meeting at 6:00 P.M.

Mayor Collins reconvened the meeting at 6:10 P.M.

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Truck route discussion

Michael Grubermann said we will hold a public hearing on December 5, 2011 about the proposed truck route. He said a decision needs to be made on how to restrict traffic on Wayah Street. Informational copies are attached.

After some discussion, motion was made by Curtis, seconded by Handley to adopt a policy to restrict thru-commercial trucks on Wayah Street between Porter Street and Depot Street with three axles or more. Motion carried. Vote: 6 to 0.

Other business

Sam Greenwood said we need to have a dinner meeting with the ABC Board on December 12, 2011 to discuss the new store location and an ABC officer.

Sam Greenwood said I am giving you a memo about Arthur Drake Road for information only at this time. A copy is attached.

Alderman Scott said I think it would be a good investment to get iPads for the Board for agenda items. He said it will save staff time and save on paper. The Board agreed to let Alderman Scott bring back information about the cost and benefits of iPads.

Alderman Curtis said John Boaze needs to send a letter to DENR asking for the outline of Duke Energy plan for dredging Lake Emory.

Motion was made by Pattillo, seconded by Handley to approve John Boaze doing a letter asking for the outline of Duke Energy plan for dredging Lake Emory. Motion carried. Vote: 6 to 0.

Adjournment

Motion was made by Scott, seconded by Handley to adjourn the meeting at 6:50 P.M. Motion carried. Vote: 6 to 0.

Joe Collins, Mayor

Janet A. Anderson, Town Clerk

