

Marion County Planning Commission & Board of Zoning Appeals

Record of Proceedings

March 28th, 2019

Members (Present)

Jeff Bina
Derek Belton
Jim Schmidt
Mel Flaming
Kathy Inlow
William Kroupa
Dwight Flaming
Brad Vannocker
Marty Dalke

Members (Absent)

Staff (Present)

Sharon Omstead, Secretary
Brandon Meierhoff, Recording Secretary
Russ Ewy, Planning Consultant
Duane Bair, Inductee
Glen Thiessen, Inductee

1. **Call to Order**~ Omstead called the meeting to order at 7:02p.m. with 9 members present, 3 staff present, and 2 inductees.
2. **Approval of Minutes**~ Belton made a motion to approve the December 6th, 2018 Record of Proceedings as presented. Inlow seconded, motion carried (9-0).
3. **Installation/Reorganization**~ Omstead swore in Glenn Thiessen. Omstead swore in Duane Bair. Inlow nominated Belton for President. Vannocker seconded, motion carried (9-0). Vannocker nominated D. Flaming for Vice President. M. Flaming seconded, motion carried (9-0). Bair nominated Omstead for Secretary, seconded by Inlow. The motion carried (9-0). This motion was made after Item 4.
4. **Work Session on Zoning Processes**~ Belton stated that we are having a work session for our new members and as a review for the other members of the board. Ewy states there are several state statutes with impacts including Chapter 19, Article 29: Counties; Chapter 3, Article 7: Airport Zoning; Chapter 2 Article 32: "Right to Farm"; and Chapter 12, Article 5: Annexation. Today we will be mostly going over Chapter 12. First we will

look over the enabling clause in K.S.A. 12-741. The act is enabling legislation for the enactment of planning and zoning laws and regulations. It is not intended to prevent the enactment or enforcement of additional laws and regulations on the same subject which are not in conflict with the provisions of this act. In K.S.A. 12-744: outlines provisions for the creation of the Planning Commission. This includes a minimum number of Commission members and the length of terms will be set by the Governing Body. The K.S.A. 12-745 provides organizational requirements for the Planning Commission. K.S.A. 12-742(10) defines what zoning means. The regulation or restriction of the location and uses of buildings and use of land. K.S.A. 12-753 to K.S.A. 12-757 authorizes the adoption of zoning regulations, establishes procedures and jurisdictions, and provides for initial adoption procedures and numerous other provisions. K.S.A. 12-743 provides organization requirements for certain actions under this act which include the adoption of the Comprehensive Plan, Zoning Regulations, and Subdivision Regulations. With local land use regulations, the power is vested through the state. Statutes authorize regulations by cities and counties. This does not take the property rights away. The regulations are applied to the land use, not to the people. They must be reasonable and serve a public purpose. The local land use regulations apply to the changes in the use of the land. The regulations are to establish the local minimum standards. The regulations should be based upon a plan. For Marion County this would be the Comprehensive Plan. These regulations should avoid being ambiguous and vague. The regulations are put in place to give direction on “how” to develop. The Comprehensive Plan gives us direction on “where” development is appropriate. The main purpose of zoning regulations are to implement the Comprehensive Plan. They promote the health safety, morals, comfort, and general welfare of all citizens in Marion County. Zoning regulations are also put into place to conserve and protect property and building values. They preserve features of historical significance, natural resources, and agricultural land. The zoning regulations are put into place to make sure everything is done legally. When looking at who applies for zoning amendments, let’s look at the procedures. The procedures require requests for amendments and revisions to come from the Planning Commission or the Governing Body. After the Public Hearing process, the Planning Commission will make its recommendations to the Governing Body. In the *Golden v. City of Overland Park* case

we learned zoning bodies should specify factors they are considering when making a decision. It is not just a simple yes or no. The courts will look at the fairness of a decision. Just because a big portion of a County/City is against it, does not mean it should be shot down. You must take out the emotions of a decision. The Golden Factors are not mandatory but the courts suggest it. District court found in this case the decision was made legally and they had an accurate Record of Proceedings. In the Combined Investments Co. v The Board of Butler County Commissioners, we learn the District Court determines the lawfulness and the reasonableness of an action taken. The land owner has the burden of proving the unreasonableness by the importance of evidence. Whether the action is considered unreasonable or not, is a question of law to be determined upon the basis of the facts which were presented to the zoning authority. The court makes its decision based upon facts which were presented to the zoning authority. If an application comes to the commissioners with facts from both sides, it is irrelevant. The process has to come before public comment. If the County Commissioners feel a topic of a Conditional Use Permit application (CUP) was not discussed, or missed, they can send it back to the Planning Commission for more evidence. During the Planning Commission meeting, when discussing the Conditional Use Permit application, no new information can be brought to the table unless it is about the specific topic. The court can only make decisions based upon what was brought through the Planning Commission. Proof with what reasonably falls into public health, safety, and welfare. Jeremy Loewen, citizen, asks what is defined as “reasonable” in Ewy's previous statement. Ewy stated that you need to look at both the good and bad of the project. If a company decided to build a manufacturing building off of a dirt road in the county, there would be more traffic on the roads that were not built to handle it, but it would add fifty-plus jobs in the County. This is a catch all mantra that we define in the Comprehensive Plan. You have to look at pros and cons of the general welfare of the community as a whole. When considering the “public health, safety, and welfare” in zoning decisions it must be remembered the public is the community at large, not just the neighbors; although their wishes are also considered. Proceedings must be fair, open and impartial. No prejudgments must be made by the Planning Commission. They must keep an open mind and consider all of the evidence. Members of the Planning Commission should disclose everything. When the

public talks to you about a Conditional Use Permit application you should disclose it. Planning Commission members should legally tell the public, they have no facts and to wait until the public meeting. As long as everything is disclosed there shouldn't be any issues. Members may need to recuse themselves if there is a conflict of interest. As an example, Ewy stated in the previous windfarm CUP, if one of the Planning Commissioners had land in the project area, they should disclose it in the public forum and recuse themselves. They should even leave the room, not to sway the other members of the Planning Commission one way or the other. Ewy then discussed the basic application procedures. Once an application is complete and submitted there would have to be a publication in the official newspaper indicating the date, time, and place of the Public Hearing. According to the Regulations for Marion County, the notice must be published 20 days in advance of the Public Hearing. There will also be a written notice to the owners with "real property interest". During the Planning Commission meeting there will be a staff overview of the application. Followed by the applicant presenting its case, there will be a period for public comment, in which they will have 3 minutes to state the pros and cons of the project. The applicant will then have time for a rebuttal. The public hearing will be closed while the commission deliberates. There is an option for executive session if the Planning Commission needs consult with their attorney concerning legal matters. A motion will be made, followed by a second, and the Planning Commission will vote. The recommendations will be based on facts, avoiding opinions. Ewy asked if there were any questions. A member of the public asked if there was any way for a longer comment period. Three minutes is too short. Ewy answered they should be concise. They have the option to ask for more time. They also have the option to submit their comments before the public hearing. The limit is set into place to cut down on repetitive comments. The case can also be tabled if the board feels there is more information and they need more time to review it. The application requires due process be followed. The proceedings need to be conducted in an orderly, fundamentally fair, and in an impartial manner. This starts with the proper notification and ends with a written record of the decision. Procedural mistakes are where zoning actions get overturned in court. Due process will ensure there was adequate notice, unbiased decision-making, and an opportunity to be heard from both sides. By following the procedures correctly, the

appeals court will not be deciding on procedural mistakes but, on the substance of the decision by the Governing Body. This is how it should be. The Planning Commission will make a recommendation to the Governing Body. They may place additional conditions on the Conditional Use Permit applications. The Governing body will then act on the recommendations of the Planning Commission. Their decision may be appealed to the District Court. Legal battles take a lot of time and money. There are no guarantees of winning in court. If the process is followed, you will have that on your side. The Planning Commission follows a Code of Ethics. No member shall seek or offer favors. All members should disclose any interest before the hearings. Ewy asked if there were any other questions. Tom Britain, citizen, asked "whose responsibility is it to vet the company?" Ewy stated there was no one. Subdivision Regulations are made by the Planning Commission and submitted for approval by the County Commissioners. A Board of Zoning Appeal is required. The Board may be the Planning Commission. In Marion County this is the case. You must apply for variances, special exceptions, and appeals. Variances require a unique set of conditions that are not self-imposed hardships. This is where 99% of people fail to meet requirements. They also must not harm the rights of the surrounding properties. Appeals can be made when an administrative decision is alleged or an error has been made.

5. **Off Agenda Items**~ Omstead reported that Expedition Wind, LLC, has submitted a CUP application for a Wind Energy Conversion System in the South Central part of Marion County.

Belton closed the public hearing at 8:34. Belton called for a 5 minute recess.

6. **Executive session**~ Bair motioned for a 20 minute executive session at 8:39 p.m. for attorney/ client matters (Pursuant to K.S.A. 75-4319b(2)). Vannocker amended the motion by inviting Jeff Bina and Russ Ewy in to the executive session, and Inlow seconded. Motion carried (9-0). Belton closed executive session at 8:59. Open session resumed with no action.

7. **Adjournment**~ Motion to adjourn made by Bair, seconded by Schmidt. Motion carried (9-0). Belton adjourned the meeting at 9:05 p.m.

Passed and Approved (Date) May 29, 2019

Derek Belton

Derek Belton, Chair

Attest:

Sharon Omstead

Sharon Omstead, Secretary