

EXCERPT MINUTES OF JANUARY 24, 2019, WICHITA-SEDGWICK COUNTY METROPOLITAN AREA PLANNING COMMISSION MEETING

Case No. DER2018-00016: Amendments to the Wireless Communication Master Plan.

Background: In 2016, the State of Kansas enacted K.S.A. 66-2019 establishing numerous State mandates regarding how local units of government can regulate wireless communication facilities. The statute prohibited the following Wichita-Sedgwick County policies established by the Wireless Communication Master Plan:

- 1) Requiring applicants to document that no collocation opportunity is available prior to permitting construction of a new wireless communication facility.
- 2) Requiring applicants to demonstrate that a wireless communication facility addresses a wireless service provider need rather than being constructed as a speculative facility.
- 3) Evaluating the merits of an application based on collocation opportunities.
- 4) Requiring small cell facilities in lieu of macro facilities in visually/ environmentally sensitive locations.
- 5) Requiring applicants to agree to permit collocation on their facility by other service providers as a condition of approval.

Additionally, the statute deems an application for a wireless communication facility approved if the application is not acted upon within 150 days for a new facility or 60-90 days (depending on type) for a collocation application. Finally, the statute requires equal treatment of wireless communication facilities with utility installations when applying to locate in right-of-way but establishes a right-of-way fee cap on local governments that is significantly lower than the fee charged utilities.

In response to the statute, the Wichita-Sedgwick County Metropolitan Area Planning Commission (MAPC) approved an amendment of the Wireless Communication Master Plan (WCMP) and associated amendments of the Wichita-Sedgwick County of the Unified Zoning Code (UZY) in September 2016. The Sedgwick County Board of County Commissioners adopted the UZY amendments but not the WCMP amendment in December 2016. The Wichita City Council tabled both the WCMP and UZY amendments in December 2016 with the stated intention of seeking changes to the statute. No changes to the statute have been approved.

In October 2018, the Federal Communications Commission (FCC) issued a Declaratory Ruling that becomes effective January 14, 2019. The ruling establishes additional mandates regarding how local units of government can regulate wireless communication facilities as follows:

- 1) Requiring small wireless facilities up to a certain height and size to be permitted in the right-of-way and establishing “presumptively reasonable” fees that local governments can charge for the use of right-of-way.
- 2) Requiring that local aesthetic requirements be reasonable, non-discriminatory, objective, and published no later than April 14, 2019.
- 3) Limiting the time to review of an application for small wireless facility for completeness to 10 days and establishing a procedure for written notification of application deficiencies.
- 4) Requiring that a single application be accepted for multiple locations.

Staff in consultation with the Advanced Plans Committee has developed the attached draft of the Wireless Communication Master Plan and the attached draft of Amendments to the Wichita-Sedgwick County of the Unified Zoning Code. Combined, these documents contain the amendments to the Wichita-Sedgwick

County Comprehensive Plan and Unified Zoning Code needed to comply with changes to State law and the new FCC ruling.

The MAPC set a public hearing for January 24, 2019, to consider adopting the draft of the Wireless Communication Master Plan as an element of the Wichita-Sedgwick County Comprehensive Plan and to consider adopting the implementing amendments of the UZC.

Recommended Action: Approve the resolution adopting the attached draft of the Wireless Communication Master Plan as an element of the Wichita-Sedgwick County Comprehensive Plan and recommend that the governing bodies adopt the attached draft of Amendments to the Wichita-Sedgwick County of the Unified Zoning Code.

This recommendation is based on the following findings.

1. **The extent to which removal of the restrictions will detrimentally affect nearby property:** While the proposed amendments provide regulations and development standards that are less restrictive than existing regulations, the proposed amendments comply with state law and FCC ruling and help mitigate detrimental impacts on nearby properties from the development of wireless communication facilities.
2. **Relative gain to the public health, safety and welfare as compared to the loss in value or the hardship imposed upon property owners:** The proposed amendments will further the health, safety, and welfare of the community by providing regulations that increase the compatibility of wireless communication facilities with surrounding properties and give those property owners more notice of potential facilities than would otherwise be provided under the provisions of state law or the FCC ruling alone. The proposed amendments comply with state law and the FCC ruling and provide sufficient development opportunities for wireless communication facilities as to not create an undue hardship for developers of facilities.
3. **Conformance of the requested change to the adopted or recognized Comprehensive Plan:** The adopted 2035 Wichita-Sedgwick County Comprehensive Plan, the *Community Investments Plan*, inadvertently does not have an element addressing wireless communication plan. Adopting the Wireless Communication Master Plan will provide the needed guidance in the Comprehensive Plan regarding wireless communication facilities.
4. **Impact of the Proposed Development on Community Facilities:** The Wireless Communication Master Plan provides guidance for wireless communication facilities located within the public right-of-way to help mitigate detrimental impacts on traffic or pedestrian safety and existing or planned locations of utilities, drainage, street lights, sidewalks, driveways, turn lanes, etc.

Attachment: Resolution
Draft Wireless Communication Master Plan, December 2018
Draft Amendments to the Wichita-Sedgwick County of the Unified Zoning Code

KNEBEL, PLANNING STAFF, presented the staff report.

RICHARDSON are we changing the compatibility setback to the height of the tower from the other standards because of the FCC or state mandate.

KNEBEL under the previous guidelines we were required to treat wireless facilities the same as any other structure. The setback for a structure that is not a wireless facility where adjacent to duplex or single-family

zoning results in a 600 to 800-foot setback for a typical wireless support structure. Such setbacks are not practical in an urban area, and we would end up having to waive the requirement all the time. A revised analysis of the statute indicates that we are not required to treat wireless facilities the same as buildings. The new reading is we are not supposed to discriminate against a wireless facility.

RICHARDSON the intention is to have the county and city have the same regulations.

KNEBEL yes. Now the zoning code has two sets of rules for wireless facilities depending upon if the site is in the City or in the County.

FOSTER asked a number of questions that clarified the recommended language.

RICHARDSON is a wireless facility considered a utility so that you could put one of these in a person's backyard.

KNEBEL no it is not considered a utility based upon the definition of a wireless communication facility.

GREG FERRIS, expressed concerns; on page 14, Item no. 6, the appearance of a proposed facility...in photo simulations. Photo simulations make sense in environmentally sensitive situations. In a regular setting everyone knows what a cell tower looks like. In an area developed with commercial or industrial uses it is an unnecessary expense to require a photo simulation. Additionally, the proposed requirement that a zoning application and building permit application be submitted concurrently is onerous. After you apply for zoning you have to go through the FCC process. The FCC process takes anywhere from four to six months. The reason why most people do not do the FCC review before they get zoning is it costs between \$25,000 and \$50,000. The other issue is a building permit in Wichita is good for six months. You can usually get a six month extension but it is not automatic. Most companies are not going to be willing to invest that much not knowing if the zoning will be approved. If one applies for zoning and a building permit at the same time the building permit may not be good by the time the FCC approval comes through. No one should have to file for both the zoning and the building permit at the same time. If they are forced to spend all that money up front every cell tower that is denied will almost certainly result in a lawsuit because so much money has already been invested.

SUSAN CUNNINGHAM, wanted clarification if the proposed plan protects private property or the river corridor or sensitive areas. Is this plan replacing the earlier plan; just making changes or what.

KNEBEL with respect to visually and environmental sensitive locations Kansas statutes expressly prohibits a locality from using that sort of criteria to require a different development standard. Gregg is right that we used to require photo simulations only in those circumstances unless it was determined by the planning director that photo simulations were not required. A photo simulation is helpful for neighbors to place the proposed tower in context. The proposed plan does not retain language regarding visually and environmentally sensitive areas because of earlier mandates. The plan that is proposed is an amendment to the current plan, and the changes included are all of the items contained in the staff report and in the presentation, which are being done because of mandates by the state and federal governments. Regarding the shot clock ruling, there are several pages clarifying what is meant by the shot clock. He agrees it is a pain and staff would rather not have both zoning and building permit applications submitted at the same time, but we cannot assure processing both a zoning and a building permit within 150 days when we allow the applicant to control when the second part of the permit is filed. Given the state law saying that if the city does not act within 150 days, the easiest way to get approval is to file the zoning application and then 151 days later say, hey it's been approved and I don't even have to get a building permit. The building permit that I never filed for is deemed approved by law.

RICHARDSON is it possible for the applicant to suspend the clock.

KNEBEL the language should read: it is required that an application for a building permit shall be submitted at the time a zoning application is filed unless the applicant submits a tolling agreement for the building permit. The shot clock would stop once zoning is approved and not start until a building permit is filed.

FOSTER asked about who determines when an application is complete.

KNEBEL the director of planning.

MOTION: To approve per staff recommendation as discussed today.

McKAY moved, **WARREN** seconded the motion, and it carried (13-0).
