

January 5, 2017
Planning Commission Meeting
3005 S 1200 West Perry UT 84302
7:00 p.m.

Commissioners Present: Chairman Travis Coburn, Vice Chairman Devin Miles, Commissioner Blake Ostler, Commissioner Vicki Call, Commissioner Lawrence Gunderson, and Commissioner Stuart Grover.

Others Present: Greg Westfall, Perry City Administrator, Susan K. Obray, Minutes Clerk, Craig Hall, Perry City Attorney, Nefi Garcia, Verizon Representative, Daniel Thurgood, Verizon Representative, Amie Coburn, Tresa Peterson, Madeline Ewell, Tyler Ewell, Randy Matthews.

1. 7:00 p.m.- Call to Order and Opening Ceremonies

A. Invocation- Stuart Grover

Commissioner Grover gave the invocation.

B. Pledge of Allegiance to the U.S. Flag-Devin Miles

Commissioner Miles led the Pledge of Allegiance.

C. Declare Conflict of Interest, if any

Conflicts of interest will be addressed on each item. None found.

D. Review and Adopt the Agenda

MOTION: Commissioner Grover moved to adopt the agenda and switch agenda items 3A and 3B. Commissioner Call seconded the motion. Roll call vote.

Commissioner Gunderson	Yes	Chairman Coburn	Yes
Commissioner Miles	Yes	Commissioner Call	Yes
Commissioner Ostler	Yes	Commissioner Grover	Yes

Motion Approved: 6 Yes 0 No

E. Approval of the Minutes

(a) October 5, 2016 General Plan Meeting

(b) October 6, 2016 General Plan Meeting

MOTION: Commissioner Ostler moved to approve October 5, 2016 and October 6, 2016 General Plan minutes. Commissioner Miles seconded the motion. Roll call vote.

Commissioner Gunderson	Yes	Chairman Coburn	Yes
Commissioner Miles	Yes	Commissioner Call	Yes
Commissioner Ostler	Yes	Commissioner Grover	Yes

Motion Approved: 6 Yes 0 No

(c) November 3, 2016 Regular Meeting

MOTION: Commissioner Grover moved to approve the November 3, 2016 minutes with the corrections noted. Commissioner Call seconded the motion. Roll call vote.

Commissioner Gunderson	Yes	Chairman Coburn	Yes
Commissioner Miles	Yes	Commissioner Call	Yes
Commissioner Ostler	Yes	Commissioner Grover	Yes

Motion Approved: 6 Yes 0 No

(d) December 1, 2016 Regular Meeting

These minutes will be approved at the next meeting.

F. Make Assignments for Representative to Attend City Council Meetings (January 12, 2017 and January 26, 2017)

Commissioner Grover will attend the January 12, 2017 City Council Meeting and Commissioner Call will attend the January 26, 2017 City Council Meeting.

2. A. 7:10 p.m. Public Hearing Regarding an Application for a communication tower to be placed on the Perry City property near the Perry City Offices 3005 South 1200 West Perry UT 84302

MOTION: Commissioner Gunderson moved to close the regular meeting and open the public hearing. Commissioner Grover seconded the motion. Roll call vote.

Commissioner Gunderson	Yes	Chairman Coburn	Yes
Commissioner Miles	Yes	Commissioner Call	Yes
Commissioner Ostler	Yes	Commissioner Grover	Yes

Motion Approved: 6 Yes 0 No

Greg Westfall stated that this is a requested second public hearing. He said all adjacent landowners have been notified of this public hearing. Greg Westfall stated that this cell tower would be located in the southeast corner of the public works yard.

There were no comments during the public hearing portion of the meeting.

MOTION: Commissioner Grover moved to close the public hearing and open the regular meeting. Commissioner Gunderson seconded the motion. Roll call vote.

Commissioner Gunderson	Yes	Chairman Coburn	Yes
Commissioner Miles	Yes	Commissioner Call	Yes
Commissioner Ostler	Yes	Commissioner Grover	Yes

Motion Approved: 6 Yes 0 No

2B. Public Comments

There were no public comments.

3A. Discussion/Action Regarding the R-2 Zone

Commissioner Call stated that it makes a clarification on the R2 zoning. She said based on the discussion that came up 2 months ago with the zone change application, she stated that it clarifies now that it is in the R2 zone. Commissioner Call stated based on the General Plan paragraph 3.1.c Medium/high Density Residential it states that the function of providing a more compact variety of housing is no longer to be provided by this land use. She said the land use charts and the paragraphs describing the R2 zone usage would be cleaned up to include that statement. Greg stated that we leave the verbiage in our current ordinances because we currently have R2 zones in Perry. He said that is why it is not wiped out on the

books. Commissioner Grover stated that he read it and suggested that it state “Perry City General Plan R2 zone” and not reference “paragraph 3.1.c”. He said it reflects in the two paragraphs.

MOTION: Commissioner Call moved to recommend to the City Council that they approve this modification to the R2 zone definition, however modifying as such that we remove the reference to specifically paragraph 3.1.c in the General Plan. Commissioner Miles seconded the motion. Roll call vote.

Commissioner Gunderson Yes
Commissioner Miles Yes
Commissioner Ostler Yes

Chairman Coburn Yes
Commissioner Call Yes
Commissioner Grover Yes

Motion Approved: 6 Yes 0 No

3.B. Final Approval and Recommendation to the City Council for Verizon Wireless. Address of Site: 3005 South 1200 West Perry UT 84302. Applicant: Nefi Garcia

Greg Westfall, Perry City Administrator, stated that the applicant was at the last meeting and there was a lengthy conversation in regards to the applicant giving the Planning Commission time to understand our ordinance a little better and get some clarification. He said that in the meantime the City Attorney, Craig Hall, has issued an opinion on the initial question that was asked at the last meeting. He said there was a follow-up e-mail sent from Commissioner Call on the other question that was discussed regarding if a precedence had been set by the White Cloud tower. Greg Westfall said that after reading our City Attorney’s letter and talking with him again we are not setting a precedence because it is a permitted use. Greg Westfall stated that we are back at the stage where Verizon is asking for final approval of this application, which would be a recommendation to the City Council from this board.

Chairman Coburn asked if these were the same plans from last time. Susan Obray stated that they are the same ones from last month. Chairman Coburn asked if the fencing was added to the plans. Greg Westfall stated that they have not received anything from the applicant, but he know they are willing to make that change. He said it is very specific but also a very minor change. Commissioner Gunderson stated that we have not had any public comments tonight but asked if there were any public comments that were addressed to the Staff. Greg Westfall stated that the Staff has not had any public comments regarding the tower. Commissioner Ostler stated that the opinion letter says that specific language gets a senior position over general language. He wanted clarification on how zoning maps and land use charts are considered general and subordinate to another section of the ordinances. Craig Hall, Perry City Attorney, stated that the zoning map is not what he is worried about. He said the zoning map is governed by the text of the zoning ordinance that the City Council has approved. Mr. Hall explained that if you have an R1 zone you go back to the text what is permitted is permitted and what conditional is conditional and you follow those conditions. He said if you look at the cell tower ordinance 15.34 the City is given greater power then private property owners. Mr. Hall stated the ordinance states the following uses are specifically permitted Antenna’s, or Towers located on property owned, leased, or otherwise controlled by the City, it is a permitted use. He stated that there should be no opportunity for discussion. He said it is a permitted use if they meet the other technical conditions. Commissioner Ostler stated that the text of the land use chart says that they are prohibited in residential zones. Craig Hall stated except.... Commissioner Ostler and Commissioner Call stated that there is no exception. Greg Westfall explained the land use chart says where things are permitted and if it is not permitted, it is

left blank. Commissioner Call stated that if it not permitted there is a notation that is defined at the bottom of the chart and it says not permitted. Greg Westfall stated what he believes that the City Attorney is stating is that the text trumps the land use chart. Craig Hall stated that the text says Antennas are allowed on property owned by the city. Commissioner Ostler stated that the land use chart also says that they are not permitted. Craig Hall stated they asked for his opinion and his opinion is towers and antennae's located in residential zones on property owned, controlled, or otherwise regulated by the City are allowed regardless of what the land use chart states. He said it says specifically in the text.

Commissioner Ostler asked what the intent was of the City Council when the telecommunications tower ordinance was first adopted. He said if the ordinance was adopted after the telecommunications tower was added to the land use chart, he finds it hard to believe they would not go in and modify the land use chart to match. Commissioner Ostler asked what the binding effect of zoning maps and land use charts adopted by ordinance is. He said that he found a few relevant things in the state code Section 10-9a-505 of the State of Utah code that states: "The legislative body may divide the territory over which it has jurisdiction into zoning districts of a number, shape, and area that is considers appropriate..." "Within those zoning districts, the legislative body may regulate and restrict the erections, construction, reconstruction, alteration, repair, or use of buildings and structures, and the use of land." "A municipality may by ordinance exempt from specific zoning district standards a subdivision of land to accommodate the siting of a public utility infrastructure." He said this exception might be relevant to the subject Verizon application. However, Commissioner Ostler states that Perry City ordinance says that these telecommunications towers are not to be treated as public utilities. He says that causes him to question why to say yes to put them on public property and yet they are not public utilities.

Craig Hall stated that the Federal Telecommunications Acts gives priority to towers throughout the country. Mr. Hall stated if you go back to the 80's and 90's when cable TV was coming to being installed, nobody wanted their front yard dug up and nobody wanted another power pole in their back yard. He said throughout the country there was this upheaval saying "we don't want you." That was when the Federal Telecommunications Act was passed federally giving them access to power lines, access to fiber conduits where cities could do reasonable regulations with no prohibitions, and the same thing has happened regarding towers. Mr. Hall stated that technology has evolved over the past years so there is some preemption put upon cities in their regulations of this technology. He said we could regulate them but not ban them. Commissioner Ostler asked if towers could go into power utility easements. Craig Hall stated no. Commissioner Ostler stated that in the ordinance there is a phrase that states, "No provision of this title (Title 15) or the municipal code shall be interpreted to nullify more restrictive provisions of a covenants, agreements, ordinances, codes, or laws." He said you have to go with the more conservative. He said not allowing it would be a more conservative position. Commissioner Ostler stated the telecommunications tower section of the city ordinances specifically indicates that it is to protect the residential areas and land uses are to be protected from potential adverse impacts of towers and antennae and "Encourages the location of towers in non-residential areas." He said he did not know how we protect the residential areas near the subject tower application than if there is a statement in City Ordinance where they can be put it on City owned property.

Commissioner Call stated the way the ordinance actually reads is "antennas or towers located on property owned, leased, or otherwise controlled by Perry City ("City land") provided a license or lease authorizing such antenna or tower has been approved by Perry City; and no such license or lease on City

land shall be issued for an antenna or tower that is to be located within three hundred (300) feet of any residentially zoned property within Perry City limits. She said it also says that the only way that it can be put on property owned by the City is if the City grants that license. Greg Westfall stated it also says until a public hearing has been held. He said we have held a public hearing tonight. Craig Hall stated that the Mayor has said that it was the intent of the City to enter into an agreement provided the zoning approval was granted. He said they have had a copy and a review of a potential lease for many months. Mr. Hall explained that the lease has been pending because of the other tower and the agreement that the City Council entered into in March 2015 for another tower prohibited the City from entering into any other competing leases for a period.

Commissioner Ostler stated that there is a non-compete agreement that exists with a previously approved tower. He asked if that agreement is separate from the approval for the building of that tower. Craig Hall stated it is not, it is the same. Commissioner Ostler said that he read in the Utah Code, "the continuing validity of an approval of a land use application is conditioned upon the applicant proceeding after approval to implement the approval with reasonable diligence." He said that a few years have passed and wondered if that agreement continues to be binding. Craig Hall stated the agreement or lease was entered into with the approval of the City and White Cloud did not do anything for 18 months. The City has had several meetings with White Cloud and asked them what they are going to do. Mr. Hall felt White Cloud has violated the terms of the agreement. He said their Counsel stated that they intend to go forward. Mr. Hall stated that they have meet with White Cloud's principals and it's legal counsel and told them that their contract has a problem. He said he told them if they are thinking about going forward, then Perry City wants to renegotiate the financial terms. Commissioner Ostler asked what the nature of the Commission's decision is: Administrative, Legislative or Quasi-Judicial? He said that the application is an Administrative decision and that it is a land use application. He said that the Utah League of Cities and Towns training materials indicate that Administrative decisions require "applying the law" that the applicable land use authorities authority/flexibility is "much more restrictive." Public input is "very limited for information only." Administrative decisions are characterized by: "application of existing law," "no policy considerations" allowed and the standard of review is "substantial evidence on the record." He said the Utah State code defines a Public Hearing as "a hearing at which members of the public are provided a reasonable opportunity to comment on the subject of the hearing." Commissioner Ostler asked if an Administrative decision were to be made with very limited public input then why would a permitted use have a public hearing. He said the telecommunications tower section of City ordinance calls for a public hearing when a permitted-use tower is within 300 feet of a residential zone.

Craig Hall stated if you choose to have a public hearing, you could not deny the application based on public clamor. Commissioner Ostler asked, "Why call for a public hearing?" Craig Hall stated because the ordinance calls for one. Commissioner Ostler indicated that based on the current zoning map, the proposed site is zoned RE1/2. Consequently, is the City's current use of the proposed site an existing non-conforming use, i.e. municipal uses in a residential zone. If so, will the approval and operation of a telecommunications tower on the proposed site violate the code applicable to the expansion or change of use of the nonconforming use. He explained Title 15 of the City ordinance defines the term "Non-conforming Use" as, "A use which lawfully occupied a building or land at the time the zoning ordinance became effective and which does not conform to the use regulations of the zoning district in which it is located." i.e. municipal uses in a residential zone. Commissioner Ostler continued by saying "the non-

conforming use of land, existing at the time this ordinance became effective may be continued, provided no such nonconforming use of land shall be expanded in any way or extended either on the same or adjoining property..." Commissioner Ostler asked if this application violates this Title by expanding in any way or extending a nonconforming use of land. He said this was a question for the Commissioners to consider.

Commissioner Ostler asked if the Applicant has investigated other site possibilities: Walmart, which is already an established commercial area or a Gravel Pit, which (the neighboring tower site in Brigham City is located at a gravel pit); a water storage tank/pond on the east bench. He asked if a cell tower could go in a power line right of way, as there are already similar structures in place with the power lines or the City's Subdivision across from Three Mile Creek Elementary. Commissioner Ostler stated that the Planning Commission has to make a decision tonight regarding this tower. He said he also has a suggested recommendation. He suggested the General Plan zoning map calls this area civic and so there is a land use for governmental use so the proposal would be to re-zone this area civic and add telecommunications towers. Commissioner Ostler stated that his position is doing the right thing for the City.

Commissioner Call stated that she appreciates the research that Commissioner Ostler has done. She asked is the proposal to approve a conditional use permit. She said the land use chart does not refer to a conditional use permit being needed at all. Greg Westfall stated that the application from the Applicant does say a conditional use permit but we would never issue a conditional use permit. He said it is a permitted use. Commissioner Call stated that her concerns are driven by the inconsistencies in our ordinances that on the one hand says protect the residential areas. She said the location of towers is not permitted in residential areas and is permitted in M/I areas. She said we do have them in our city and that is where they are specifically cited as being allowed on the land use chart. Commissioner Call stated that she was wrong, it does say conditional use in the M/I zone. Commissioner Grover stated that any telecommunication towers whether on City property or not in an M/I zone are permitted through conditional use. If it is Perry City land in an M/I they are permitted. Commissioner Call stated her concern has nothing to do with conditional use, or permitted use. Her concern has to do with residential versus a decided appropriated area that is allocated which is M/I. Commissioner Call stated if this were a City owned property in a park, would we want a tower. She said a tower could be in a park it could be anywhere that is owned by the city. Chairman Coburn asked if it were zoned civic would they have the Commissioners have the same concern even if it were next to residential. Commissioner Call stated no, because the land use chart allows that. She said there might be a battle if we decide to re-zone this piece of property.

Commissioner Grover stated that at the December 1st meeting the motion to approve the design review failed, and since then based on Mr. Hall's legal opinion and our assessment we have deemed it a permitted use on this site hence no design review. He said he agrees with Mr. Hall's assessment and he thinks it is clear that there is specific language there that goes beyond the general provisions of the land use chart. Commissioner Grover stated based on that and provided the applicant meets City ordinance we would be bound to approve it.

Commissioner Gunderson stated we have a legal opinion that says we are okay doing it and that is what we have asked for. He said we all recognize that our ordinances conflict at times, but if the legal opinion is that we can we can, approve this, and then we are obligated to approve it.

Commissioner Grover asked the Verizon Applicant, Daniel Thurgood, about the noise of the tower. He said Perry City ordinance says, "No permit shall be issued for any facility which generates a noise level greater than fifty decibels (50db)." He asked what the decibels were for their tower. Mr. Thurgood stated that their generator is 35 decibels and that is the only thing that makes noise. Commissioner Grover asked if the fencing will be constructed of masonry block, and will be 6 to 8 feet in height. Mr. Thurgood stated they have agreed to do the masonry block wall. He said there was another discrepancy in the code in 15.34.030.6(11) it says," Chain link fences (and/or other fences approved by the Planning Commission) may be placed around a tower or related structures or buildings." He said they would go with whatever fence the Planning Commission wants. Mr. Thurgood stated that they could not place towers in a power utility easements. He said that telecommunication towers still have not received designation as a public utility easement. Mr. Thurgood stated that they could not just go and place a tower with in a public right of way or a utility right of way. Commissioner Ostler asked if Mr. Thurgood could work with the owners of these right of ways to do that. Mr. Thurgood stated that Rocky Mountain Power would not allow it. He said they have tried but the issue is safety. He said Rocky Mountain Power has its own regulations on who can climb their poles and where things can be located. Mr. Thurgood stated that it was submitted as a conditional use permit with his understanding if the towers does not meet the permitted use section. He said Verizon Wireless does not have a current lease in place with the City, so we do not meet that requirement today. Mr. Thurgood said if the City Attorney does not have an issue, we could move forward with a permitted use knowing there has to be a lease agreement in place.

Commissioner Grover stated the Municipal Code 15.34.30.9 refers to removal of abandoned antennae and towers. He said looking ahead, "Any antenna or tower that is not operated for a continuous period of ninety (90) days shall be considered abandoned, and the owner of such antenna or tower shall remove the same within ninety (90) days of receipt of notice from Perry City." He said he is just bringing it to the applicant's attention. Mr. Thurgood stated that this particular matter of removal is covered in the lease agreement.

MOTION: Commissioner Gunderson moved to recommended to the City Council for final approval. There was no second. Motion failed.

MOTION: Commissioner Grover moved to recommend to the City Council for final approval of the Verizon Wireless Telecommunications Tower 3005 South 1200 West Perry with the modification that it be a permitted use rather than a conditional use permit and to change from chain link fencing to masonry block fencing 6 to 8 feet in height. Commissioner Gunderson seconded the motion.

Commissioner Gunderson Yes

Commissioner Grover Yes

Commissioner Ostler No

Commissioner Call No

Chairman Coburn Yes

Commissioner Miles No

MOTION: fails

Greg Westfall stated there could be another motion, if not the application is denied. He said the Planning Commission needs to form a letter for the reasoning of their denial. Chairman Coburn asked if there was another motion.

Commissioner Ostler asked about the non-conforming use that was brought up, he said that was his only issue. He asked how that could be resolved and if it could be resolved tonight.

Greg Westfall stated that we have a current application. He said it goes to the City Council's next meeting regardless. He said if the Council approves it, they approve it. If they deny it, they deny it. If the applicant wants to continue then they can. He said then the application would go to the Special Uses and Appeals Board for review. He said the application follows this process unless the applicant asks for the application to be pulled.

Commissioner Ostler asked if it was legal for the City to enter into a lease agreement with the applicant based on the non-conforming use. Craig Hall stated he did not understand what he meant by non-conforming use. Commissioner Ostler said the site where the tower is proposed to be placed is being used for municipal purposes. He said it is zoned for residential purposes so that makes it a non-conforming use. He said as he understands it you cannot expand a non-conforming use. Commissioner Ostler asked if the tower would not be an extension of a non-conforming use. Craig Hall stated he did not think so, because it says that permitted uses is a tower on property, owned or controlled by the City is a permitted use. He said it is not a non-conforming use because it is brand new. Craig Hall stated the take away from tonight is this body should look at creating a new zone whether you call it public zone, or government zone or whatever you want to call it. He said from a land use standpoint it is very difficult to reconcile some of the language and intent of our code with some of the uses the same code allows and permits. Mr. Hall stated he does not hear significant opposition to towers. He said it is significant opposition the way the code is written.

Chairman Ostler volunteered to draft a letter to the City Council explaining the reason for the Commission's decision on the subject application.

4. Land Use Application

A. Concept Application for Matthews Subdivision located on 1200 West Parcel #02-035-0024.

Applicant: Randy Matthews.

Randy Matthews stated that this is a concept plan for Matthews Subdivision. He said it is located on the parcel north of Cherry Ridge Subdivision. He said they would like to start with phase 1, which would take in the first 16 lots (lots 1-8 and lots 30-37). Commissioner Call stated this was the piece of property that there was a zone change. She asked what the current zone is. Greg Westfall stated it is R1 and it was Agricultural. Mr. Matthews stated that most of the lots are over 10,000 square feet. He said that they have left 30 feet at the bottom of the subdivision for the railroad easement. Mr. Westfall stated that is in our ordinance. He said Mr. Matthews has gone through the process and this is just concept. He said for concept the Planning Commission needs to determine if it is allowed in this zone. Commissioner Ostler asked if the concept approval is for the whole subdivision or for phase 1. Greg Westfall stated on the concept they are ok to approve the entire subdivision. Commissioner Grover stated that the ordinance states that the railroad corridor is a 35-foot setback from the railroad property line. Greg Westfall stated that this is a concept plan and the preliminary plan will show this on the drawings. Commissioner Ostler asked if this concept plan fits with the Master Plan of the City. Greg Westfall stated that it does fit the plan. He asked about the railroad corridor ordinance that was included in the packet. He said he does not see it in the current code.

MOTION: Commissioner Miles moved to approve the concept application for the Matthews Subdivision. Commissioner Call seconded the motion. Roll call vote.

Commissioner Gunderson Yes
Commissioner Miles Yes
Commissioner Ostler Yes

Chairman Coburn Yes
Commissioner Call Yes
Commissioner Grover Yes

Motion Approved: 6 Yes 0 No

5. Discussion

None

6. Training

None

7. Review next Agenda and Adjourn

(1) Zoning for City Property

(2) Matthews Subdivision

A. Motion to Adjourn

MOTION: Commissioner Gunderson moved to adjourn. Commissioner Miles seconded the motion. Roll call vote.

Commissioner Gunderson Yes
Commissioner Miles Yes
Commissioner Ostler Yes

Chairman Coburn Yes
Commissioner Call Yes
Commissioner Grover Yes

Motion Approved: 6 Yes 0 No

