

TOWNSHIP OF LOWER MAKEFIELD  
PLANNING COMMISSION  
MINUTES – SEPTEMBER 22, 2008

The regular meeting of the Planning Commission of the Township of Lower Makefield was held in the Municipal Building on September 22, 2008. Vice Chairman Friedman called the meeting to order at 7:30 p.m.

Those present:

Planning Commission:       Karen Friedman, Vice Chair  
                                      Dean Dickson, Secretary  
                                      Mark Fried, Member  
                                      John Pazdera, Member

Others:                         Nancy Frick, Director Zoning, Inspection & Planning  
                                      John Donaghy, Township Solicitor  
                                      James Majewski, Township Engineer  
                                      Steve Santarsiero, Supervisor Liaison

Absent:                         Tony Bush, Planning Commission Chairman

**DISCUSSION OF PROPOSED AMENDMENT TO THE TOWNSHIP ZONING ORDINANCE BY ADDING A NEW ARTICLE XIIC THAT ESTABLISHES A NEW AMATEUR RADIO OVERLAY DISTRICT WHICH SHALL ALLOW AND PROVIDE FOR THE REGULATION OF THE ERECTION AND USE OF AMATEUR RADIO TOWERS AND SUPPORT STRUCTURES IN CERTAIN DESIGNATED AREAS IN THE TOWNSHIP**

Mr. Steve Levin and Mr. Dominic DiClemente were present.

Mr. Dickson stated he feels the first few pages are self-explanatory. Ms. Friedman stated she does not feel the first paragraph on page 1 should be in the Ordinance as she feels it is irrelevant and subjective and has nothing to do with the guidelines and requirements. Mr. Donaghy stated the beginning pages are simply background for the Ordinance and are not the operative portions. Mr. Dickson stated it appears that everything up through Page #3 is fairly standard and feels they should start with the definitions beginning on Page #4. Mr. Donaghy stated he tried to take the comments from the earlier meetings and include them in this draft.

Ms. Friedman stated under A. Purpose and Findings she feels #11 meshes well with #1 and suggested #11 be placed as #1 because she feels it is a better opening statement. Mr. Donaghy agreed to incorporate #11 with #1.

Mr. Fried stated while the earlier sections are not the operative parts of the Ordinance, if the Ordinance were ever challenged, he feels whoever is presiding, they would look at these purposes and the process behind it to make an interpretation, and Mr. Donaghy agreed and stated this is why in all Ordinances and Statutes, there is often this introductory basis.

Definitions were reviewed. With regard to the definition of amateur radio tower, Ms. Friedman asked if these are always permanent structures since at some level these could be removable, and Mr. Levin stated this is true and many operators do take their towers with them if they move. Mr. Donaghy suggested that they change the wording to “a structure.”

With regard to the Amateur Radio Facility Overlay District, Ms. Friedman asked how this would work in a multi-family, high density R-4 Zoning District. Mr. Majewski stated there are several parcels which are single-family Residential in the R-4 District which are large enough to accommodate an antenna. Ms. Friedman asked if the Ordinance could create a legal problem if someone in a development such as Polo Run wished to put an antenna on top of the building. Mr. Donaghy stated from a Zoning standpoint, this would be permitted; but it could be prohibited through a Lease or a Homeowners' Association.

There was discussion with regard to the height of the amateur radio tower, and Mr. Donaghy stated the idea would be that the 35' height or any additional height for which relief was granted would go to the highest point whether it is the tower itself or an antenna. He stated he still needs to work further on this section to make it clearer. Mr. Majewski noted the reference made to “nearest established grade” and he stated “established grade” is not defined in 200-7. He stated he feels it may be better to use “finished grade.”

Mr. Fried asked about the distinction between a Conditional Use and a Permitted Use. Mr. Donaghy stated a Permitted Use is just that, and provided you meet the requirements of the Ordinance, you can apply for and receive a Permit, and install a tower. He stated a Conditional Use or Special Exception are Uses which are subject to certain requirements. Mr. Santarsiero stated for a Conditional Use, the Applicants would come before the Board of Supervisors and a Special Exception would go before the Zoning Hearing Board. Mr. Donaghy stated the Planning Commission felt it would be more appropriate for an Applicant to go before the Board of Supervisors as a Conditional Use as opposed to the Zoning Hearing Board as a Special Exception. Mr. Santarsiero stated when this matter was last before the Board of Supervisors, the question was that 65' may be too tall, and it would be better dealt with on a case-by-case basis. He stated at the last meeting it was felt that this would be a good compromise for the residents and the Township. It was suggested that the language in F (1) be clarified to indicate that a Conditional Use would be required for any request above 35'.

With regard to General Regulations G (1) Ms. Frick stated she feels something must be included covering corner lots. Ms. Frick suggested they indicate that it would have to be placed in a portion of the lot that is furthest removed from any street. Mr. Donaghy agreed to work on this section and discuss this again in the future.

There was discussion on lighting, and Mr. Dickson stated lighting may be a problem for adjoining property owners. Ms. Friedman questioned if there would be a need for lighting on a tower, and Mr. DiClemente stated the only time there would be a need for lighting would be if the tower were 200' high, and he does not feel they would get to this height. Mr. Donaghy stated he feels they still need to have something that relates to lighting so that any tower that goes in complies with all applicable regulations. Mr. Donaghy suggested this section state that no lighting would be permitted on a tower or antenna unless required by Federal regulations.

With regard to maintenance and inspection of the Amateur Radio Tower and Antenna, Ms. Friedman asked if this should be done by an outside source rather than the Township engineer. Ms. Friedman asked if the Township engineer would be cognizant of safety regulations for radio antennas. Mr. Donaghy stated this would relate only to the structural concerns. Mr. Majewski stated he questions how often they would need to make these inspections and who would pay for it. He stated he feels there should be an inspection agreement similar to the Stormwater Management Operations and Maintenance Agreements which gives the Township the right to go onto the property. He stated they then submit a letter to the owner of the property on what needs to be corrected if there are any deficiencies. Ms. Friedman stated they could require that an inspection be done according to an agreed upon timeframe by an approved authority and that a letter indicating that this was done would have to be sent to the Township so that it can be included in the Township's files. Mr. Donaghy stated he feels the Township should still have the ability to inspect the tower if they choose to do so. Mr. Fried suggested that they include language that the Township has the right to inspect a tower at any time but not more often than once a year. Ms. Frick stated the Zoning Officer or her designee would have this right already. Mr. Donaghy stated he feels they will have to come up with some kind of Inspection Agreement as part of a Permit similar to what Mr. Majewski discussed earlier regarding the Stormwater Management Agreements. Mr. Donaghy stated he also feels they should make it clear that the Township is under no obligation to inspect as they do not want to take responsibility if the tower falls down.

Mr. Fried asked the process which takes place if a neighbor would contact the Township about a tower which they feel is in danger of falling down, and Ms. Frick stated the Township would investigate this and this could include inspection by the Building Inspector and/or Mr. Majewski or other Township personnel depending on the nature of the complaint.

With regard to fencing, Ms. Frick stated while it states the fence should be at least 7', the maximum fence height permitted is 7' unless it is around a tennis court for which they are allowed to go to 10'. It was agreed to change this to read "a 7' high fence." With regard to the type of fence, it was suggested they refer to the fence requirements for swimming pools for specifics on the type of fence rather than listing specifically the types in this Ordinance.

With regard to (7) Plans Required, Ms. Frick stated they should also include the Building Codes and Mr. Donaghy agreed to add language to this effect.

With regard to insurance, Mr. Fried asked if they feel \$100,000 is sufficient. Mr. Donaghy stated this amount was in the original draft, but there had been discussion as to whether or not there should even be an insurance requirement. Ms. Frick asked who will be keeping the update on this. Mr. Fried stated the Township could be named as a Certificate Holder and the Agent should send the Township this information including notice of cancellation. Mr. Donaghy stated there will be a requirement on the Certificate of Insurance that they must provide the Township the information in a certain number of days. Mr. Fried stated he feels this will be a rider on the homeowners' insurance. Ms. Friedman asked if the Township is liable if something happens, and Mr. Donaghy stated they should not be. Mr. Fried stated if the tower falls which results in damage and the Township allowed the tower to be erected, this could be a concern. Mr. Donaghy stated they discussed this previously. Mr. Santarsiero noted most States have Tort Claims Acts. He stated the common rule law was that you cannot sue the sovereign, and Tort Claims Acts typically carve out certain exceptions. He stated Tort Claims Acts do not apply to Government exercising its ordinary authority. He stated possibly they should research this to see if it would fall under this, and the Township should have an answer on this before the Ordinance is finalized.

Mr. Fried stated he is concerned that there could something wrong with the tower and the Township would need to do something about it that will cost money. He stated this would be a bonding question versus an insurance question. He is concerned that there could be a problem with a tower and the owner is no longer at the property, and the Township will have to deal with it. Ms. Frick asked why the Township would have to remove it as she feels the new property owner would have to deal with it. Ms. Friedman stated she feels the people who would purchase the house would be responsible for the tower whether they use it or not. Mr. Donaghy stated if it were a condemnation situation because of health, safety, and welfare, the charges to demolish it would be charged back against the property owner as a Municipal lien.

Mr. Fried questioned if there is really a need for insurance, and Mr. Donaghy stated this was discussed previously. Ms. Friedman stated her concern was if the tower were to fall over or went flying that another property could be damaged including wires, etc. Mr. Donaghy stated he feels the concern is that others could be injured by the tower falling.

Mr. Fried stated if it is a separate structure sometimes with Homeowners' Insurance there are issues with separate structures and the only proof the Township may want to require is that the antenna is covered under the existing policy. Mr. Donaghy stated they could indicate in the Ordinance that they must provide evidence of sufficient insurance that includes the tower. Mr. Santarsiero stated the thing he feels would be related to the Township would be the payment of a defense but not the actual indemnity.

Mr. Donaghy agreed to research this further. Mr. Donaghy stated this was one of the reasons he did not want to make the inspection mandatory and instead that it would be at the discretion of the Township.

Mr. Fried asked what would happen if the person lost their license. Mr. Donaghy stated there is nothing in the Ordinance that indicates the tower would have to be removed if someone was no longer using it. Mr. Levin stated the Licenses are issued for ten years. Mr. Fried asked if the new owner of the property would have to maintain it, and Mr. Donaghy stated they would have to maintain it or take it down. The Agreement would be recorded. Mr. Santarsiero stated he feels in most cases the new owner would have as a Condition of Sale that the tower would have to be taken down if they were not going to use it. Mr. DiClemente stated normally a ham operator would take their antenna with them if they were to move.

Mr. DiClemente thanked the Planning Commission for continuing the process. He stated since the last meeting when this was discussed, they obtained some additional information to provide to the Planning Commission. He stated last week House Bill No. 1777 was passed which included the following language: "A Municipality that adopts an Ordinance, Regulation or Plan or takes any other action involving the placement, screening or height of antennas or antenna support structures shall reasonably accommodate amateur radio service communications and shall impose only the minimum regulations necessary to accomplish the Municipality's legitimate purpose. Under Reasonable Accommodations it states "A Municipality may impose necessary regulations to insure the safety of amateur radio antenna structures but must reasonably accommodate amateur service communications. No Ordinance, Regulation, Plan or other action shall restrict amateur radio antenna height to less than 65 feet above ground level." Under Construction it states: "The provisions of this Section shall not be construed to prohibit a Municipality from taking action to protect or preserve a historic or architectural district that is established by the Municipality or pursuant to Federal or State law. He stated this Act shall take effect in 60 days. He stated Senate Bill No. 884 went to the Senate floor today. Copies of House Bill No. 1777 and Senate Bill No. 884 were provided to the Planning Commission this evening. Mr. DiClemente stated they may want to consider this information when writing the Ordinance so they are not writing something that is conflicting with State law. Mr. DiClemente stated it is his understanding that the House Voted on Bill No. 1777 and it passed. He feels the Senate Bill was on the floor today for a vote. Mr. Santarsiero asked if they expect to have this before the Governor before the end of this Session, and Mr. Levin stated they do.

Ms. Friedman stated this indicates that they cannot restrict the antenna height to less than 65 feet above ground level and the Township. Mr. Levin stated this would pre-empt anything the Township does. Mr. Santarsiero stated if this State regulation is approved, everything in the Ordinance related to the 35' restriction would be preempted by this.

Mr. Santarsiero proposed that Mr. Donaghy make the changes they have discussed so far and if this legislation is enacted, they would still have time to change the Ordinance. He stated there would be no point in passing an Ordinance now that would be preempted by State law. Mr. Donaghy stated it would be easy to change the Ordinance and make it 65' rather than 35'.

Mr. Levin stated he did some additional research after the last meeting. He noted a Bucks County Court of Common Pleas Case Civil Action Suit involving the Zoning Hearing Board of Lower Makefield Township. He provided information to the Township this evening regarding this matter. Mr. Levin stated in December 26, 1978, the Township granted the Applicant a Permit for a 50' radio tower. He stated the Applicant went to Court and was permitted to put up a 88' tower with the condition that he could only raise it between 6 p.m. and 9 a.m. It was noted there were some pages missing in the information provided by Mr. Levin. Mr. Levin stated it has been three years since he was denied his Permit because of the 15' rule and he questions whether this has been a reasonable accommodation. He stated he would like to have the matter resolved before having to file a civil action lawsuit. Mr. Donaghy stated what has been provided by Mr. Levin is an Appeal from Zoning. Mr. Levin stated if he was required to go to the Zoning Hearing Board, it does not mean he would necessarily get a Permit, and it would cost him \$500 to \$1,000 to go before the Zoning Hearing Board. Ms. Frick stated she cannot issue a Permit based on what is permitted by Ordinance today and she feels she has been trying to work with Mr. Levin. Mr. Levin was asked to provide the additional pages which appear to be missing. Mr. Santarsiero stated he feels they should still move the Ordinance along at this time.

Mr. DiClemente asked about the requirement for an anti-climbing device, and Mr. Donaghy stated some of this language came out of another Ordinance relating to radio towers. Mr. DiClemente stated he feels they should require either a fence or an anti-climbing device and not both. He stated if the purpose is to prohibit someone from climbing the tower, an anti-climbing device should be sufficient and it should not be required to have a fence as well which would be an additional expense. Ms. Friedman stated she feels they were also concerned that if someone got over the fence they wanted to have something to insure that they could not climb the tower. Mr. DiClemente stated someone could jump a fence to get into a pool as well. It was agreed that they should change this to require either a fence or an anti-climbing device.

Mr. DiClemente noted Paragraph F (5) and he stated he feels that the owner should be given time to correct a problem as opposed to being required to immediately remove it. This was acceptable to the Planning Commission, and Mr. Donaghy agreed to change the language.

Mr. Donaghy stated he will make the changes and this matter will come back before the Planning Commission in the future.

#### OTHER BUSINESS

Ms. Frick reminded the Planning Commission that there will not be a meeting on October 13, 2008 due to the holiday.

There being no further business, Mr. Pazdera moved, Mr. Dickson seconded and it was unanimously carried to adjourn the meeting at 9:00 p.m.

Respectfully Submitted,

Dean Dickson, Secretary