

STAFF REPORT

**Henry County Board of Zoning Appeals
(November 7, 2019 Meeting)**

Docket # / Project Title: C: 2322 BBRWF administrative appeal of Case B: 2228
Staff: Darrin Jacobs, Zoning Administrator
Applicant: Big Blue River Wind Farm, LLC
Location: Portions of Fall Creek, Jefferson, Prairie, Henry, Harrison, and Greensboro Townships
Staff Recommendation: To **Deny the Appeal**

Background Summary:

On July 23, 2019 the Henry County Planning Commission held a hearing on Case B: 2228 an Application for a Commission Approved Use for a Wind Energy Conversion Systems (WECS) Project to be known as the Big Blue River Wind Farm. The vote on CAU question #3 was 4-4. At the hearing the application was stated to have been “not approved.” Subsequent Findings of Fact have passed by a vote of 7-0 that have stated that since all three CAU question were not found in the affirmative, the application was deemed denied. Past cases with similar votes have been deemed denied. Big Blue River Wind Farm is appealing the decision.

Key Issue Summary:

A Commission Approved Use is not a binary yes or no question. The use sought in a CAU request is already an unapproved use. The applicant is starting from an unallowable use. It is the burden of the applicant to convince a majority of the Planning Commission Members to turn an established no into a yes. If the applicant fails to convince a majority of the Planning Commission to vote yes the use it remains unallowable.

Salient Points and Background:

- 1.) The meeting met all notice requirements, the facility was adequate, and all in attendance were aware of the rules of the hearing.**

Background:

On July 23, 2019 the Henry County Planning Commission held a hearing on an Application for a Commission Approved Use for a Wind Energy Conversion Systems (WECS) Project to be known as the Big Blue River Wind Farm. The Project was to consist of not more than 38 wind turbines and be located in portions of Fall Creek, Jefferson, Prairie, Henry, Harrison, and Greensboro Townships. Over 800 notices were mailed to individuals directly affected by the proposed project, as well as legal notices being ran in both Henry County newspapers and the Greenfield newspaper, more than ten days prior to the meeting. The hearing was held at Bundy Auditorium, 601 Parkview Drive, New Castle, IN 47362, an ADA compliant facility capable of holding over a thousand individuals. The hearing began at 5:00 PM and ended at 9:35 PM. The rules for the proceedings were read at the beginning of the meeting and throughout the evening.

2.) The Planning Commission had an even number (8) of eligible voting members, due in part to the actions of the applicant and the Henry County Board of Commissioners.

Background:

The Planning Commission consists of nine members who are appointed by various entities. One member of the Planning Commission, Olene Veach, recused herself from the hearing due to the fact that she was a signed participant in the Big Blue River Wind Farm. Mrs. Veach is one of four citizen appointments made by the Henry County Board of Commissioners. It was announced at the June 20th Planning Commission meeting that Mrs. Veach would be recusing herself from the July 23rd hearing. I.C. 36-7-4-220 (a) states that *“the appointing authority may also appoint an alternate member to participate with the Commission in a hearing or decision if the regular member appointed by the appointing authority has a disqualification under section 223 (c) of this chapter.”* The Henry County Board of Commissioners had an opportunity to appoint an alternate to serve in place of Mrs. Veach and chose not to. With Mrs. Veach’s recusal, the Planning commission was left with only 8 members who were eligible to participate and vote during the hearing.

3.) All WECS projects must receive approval from the Planning Commission through the Commission Approved Use (CAU) process.

Background:

On June 13, 2018 the Henry County Board of Commissioners passed Resolution 2018-06-13 (11), *A Resolution Initiating Proposal to Amend The Henry County Code*. The amended code required that; *“prior to construction of a WECS, the Applicant shall obtain approval for the following: (1) a Commission Approved Use to provide for WECS use from the Henry County Planning Commission.”*

4.) Indiana Code allows for the establishment of a BZA hearing officer whose decisions are only appealable to the BZA, and Henry County has designated the Planning Commission as such a hearing officer in the case of Commission Approved Uses.

Background:

Resolution 2018-06-13 (11) also included a section marked Exhibit “B” which stated the following: *“A Commission Approved Use is a Special use or conditional use that is permitted in accordance with the provisions of this Section and other provisions of this Code. The Henry County Planning Commission is appointed as the hearing officer, pursuant to Indiana Code 36-7-4-923, and subject to the provisions of Indiana Code 36-7-4-924, for the purpose of hearing and determining whether to approve or deny a request for a Commission Approved Use.”* I.C. 36-7-4-923 allows for the establishment of a hearing officer who would hear cases normally heard by the Board of Zoning Appeals. I.C. 36-7-4-924 states that decisions of the hearing officer may be appealed to the Board of Zoning Appeals.

- 5.) A CAU is granted only after 5 or more Planning Commission Members have answered all 3 questions with a yes vote. The burden is on the applicant to convince 5 or more Members, through evidence, that they will meet the requirements stated in all 3 questions.

Background:

Henry County Code defines Commission Approved Uses as: “Uses that are permitted in any Zoning District **only after a majority vote** of the Planning Commission as provided in the Planning Commission’s Rules of Procedure.”

Henry County Code also states that:

“The Planning Commission shall order the Zoning Administrator to issue an Improvement Location Permit for the Commission Approved Use following the hearing and **upon an affirmative finding** by the Planning Commission that:

1. The proposed Commission Approved Use is to be located in a Zoning District wherein such use may be permitted;
2. The requirements set forth in the Zoning District and this Section for such Commission Approved Use will be met;
3. The proposed uses are consistent with the spirit, purpose and intent of these regulations, will not substantially and permanently injure the appropriate use of the neighboring property and will serve the public convenience and welfare.”

The burden was on the applicant to convince 5 or more Planning Commission Members that: “the proposed uses are consistent with the spirit, purpose and intent of these regulations, will not substantially and permanently injure the appropriate use of the neighboring property and will serve the public convenience and welfare.” The applicant was thoroughly questioned during the hearing by one Planning Commission Member who raised personal doubts about the validity of much of what the applicant presented. The applicant did not present sufficient evidence to convince a majority of the Commission that they would meet all the requirements in question 3.

- 6.) At the July 23rd hearing, the application for a CAU failed to receive a majority (5) affirmative vote on CAU question number 3, and was announced to have not been approved. This appeared to satisfy the Planning Commission that the hearing was over and the applicant had received an answer to their request.

Background:

The Planning Commission votes on the Commission Approved Use questions were as follows: CAU **Question number 1** received 6 yes votes and 2 no votes, CAU **Question number 2** received 6 yes votes and 2 no votes, CAU **Question number 3** received 4 yes votes and 4 no votes. After the vote was taken it was first announced that the application was denied, then it was restated that the application was not approved. Following the announcement that the motion was not approved there were no motions from the Planning Commission to table the matter since question 3 was split in a 4 to 4 vote. There were also no motions to retake the vote or continue the hearing.

7.) Past practice and precedence has shown that when all 3 CAU questions are not found in the affirmative by a majority of the Commission the application is deemed denied.

Background:

On April 24, 2003 the Planning Commission heard **Case B: 1929**, a request for a CAU for a kennel on (A1). On question number 3 the vote was 3-3 with one abstention. The CAU was deemed denied.

On July 24, 2014 the Planning Commission heard **Case B: 2166**, a request for a CAU for Auto Salvage on property zoned Industrial. On question 1 the Commission voted 3 yes and 4 no, on question 2 the Commission also voted 3 yes and 4 no, and on question 3 the Commission voted 2 yes and 5 no. The July 24, 2015 minutes state: *"Zoning Administrator Rachel White announced that because the Planning Commission did not find in the majority on any of the questions, and it must find in the majority on all three questions for the request to be granted, that the request was DENIED."*

8.) The Planning Commission approved Findings of Fact 7-0 that declared that question 3 was not found in the affirmative and therefore the application was denied, as past practice and precedence have dictated.

Background:

At the September 19th Planning Commission meeting the Commission was presented with Findings of Fact for their consideration. The Findings restated that question 3 was not found in the affirmative. The burden was on the applicant to convince 5 or more Planning Commission Members that: *"the proposed uses are consistent with the spirit, purpose and intent of these regulations, will not substantially and permanently injure the appropriate use of the neighboring property and will serve the public convenience and welfare."* The applicant was thoroughly questioned during the hearing and a majority of the Planning Commission Members did not find that the applicant had supplied sufficient information to approve question 3. The Findings stated that: *"an application that fails to receive a majority approval is deemed denied"* as has been the past practice. The Findings also stated that: *"without all three necessary findings being found in the affirmative, the Henry County Planning Commission does not grant the approval of the Application for a Commission Approved Use. An Improvement Location Permit cannot be issued for a Commission Approved Use. The Application is deemed denied due to the lack of majority affirmative finding on all three Commission Approved Use questions. Any subsequent applications will need to present substantial new evidence or file one (1) year after the final denial of the prior Application."* The Planning Commission approved the Findings of Fact by a vote of 7-0 with Olene Veach recusing herself from the vote.

Options:

The Board of Zoning appeals may (1) approve the appeal and overturn the decision of the Planning Commission, (2) deny the appeal and uphold the decision of the Planning Commission, (3) return the matter back to the Planning Commission with instructions (4) continue the request to the next meeting.

Preliminary Staff Recommendation:

Staff recommendation is to **Deny the Appeal.**

This report was compiled by the staff with the best available data at the time. Any errors or omissions are unintended. If errors are discovered please inform staff as soon as possible.