County attorney says height proposal has no teeth

BY ANNE ADAMS • STAFF WRITER

MONTEREY — Supervisors left wind project opponents again baffled by another discussion on height limits last Friday. During a work session, the board unanimously agreed to send a second proposal on new height regulations to the planning commission despite concerns from county attorney Melissa Dowd.

The height ordinance as written can be interpreted several different ways, and Highland New Wind Development's request for an amendment exempting industrial wind energy towers brought attention to the vague wording. Consequently, supervisors agreed to have Dowd simplify the language based on Rockingham County's ordinance before it took up HNWD's application for its 39-megawatt "wind farm."

That first draft had been approved by the board, but questions about its lawfulness were raised by the commercial wind developer. Just before the new wording was to be discussed by planners last month, supervisors changed their minds, withdrew the draft language, and had Dowd rewrite it again.

The second draft Dowd presented to the board last week condensed some of the paragraphs, and removed the requirement that any applicant must swear under oath all other federal and state regulations had been met regarding any facility or structure. It was replaced with a paragraph that simply stated those requirements must be met, giving no deadline to an applicant for meeting them.

Dowd raised red flags about the second draft, saying without a time schedule, the ordinance had "no teeth."

"This section is troubling to me," she told the board. Dowd said from her perspective, in legally writing ordinance language, every word should have a reason for being there. But as it's written, it only states that the applicant has a responsibility for complying with other state and federal requirements without providing any consequence for not meeting them. "If you mean to hold somebody's feet to the fire, to make them meet these requirements, then you have to say when they must be met," she said. "Otherwise, it's just a piece of information ... There's no point in the process where the applicant has to prove he's done these things."

Dowd advised the board could choose at what point an applicant would have to be in compliance, either before the application is submitted, before the conditional use permit is approved, or before a building permit is issued. "You can require it before the first shovel of dirt, before construction begins, or when it's complete," she said, adding if the board didn't add a schedule for compliance, "You're basically saying, if you don't do it we could care less."

Supervisor Jerry Rexrode explained he wanted the language to be open in the ordinance, and add restrictions only as conditions attached to an approved conditional use permit, on a case-by-case basis with each applicant.

Dowd said while it wasn't wrong to draft ordinance language this way, it didn't hold anyone accountable. If an applicant had conditions attached to a permit that required them to meet other regulations, and then they were not met, Dowd asked, would the board then take away a permit? "You can't enforce those words under this section," she told Rexrode. "From a legal standpoint, I'd like to see some teeth in it," Dowd said.

Dowd reminded the board that senior planners at the Central Shenandoah Planning District Commission had given supervisors the same advice. "I'm harping on the same tune you all heard from the PDC," she said. "Their position has been that you all ought to require the applicant to prove it to you, that they've done these things, that they've met every other state and federal regulation."

In addition to having no enforcement in the language, she said, it also made county officials' decisions on each applicant subjective, especially as members of the boards changed over time. "You have a subjective set of criteria here for each and every conditional use permit application," she cautioned.

Rexrode said he wanted it that way.

"As long as you know what you're doing," Dowd said. "Don't you want every applicant to meet state and federal regulations?"

"Certainly," Rexrode said, "But it may take a different time factor (for each one)."

Dowd replied, "So if an applicant doesn't get one hurdle passed, you revoke his conditional use permit, and there they sit with gazillion dollars invested ..."

Supervisor Robin Sullenberger interrupted, saying he had personally spoken to some members of the planning commission about this. "They would lean toward being even more explicit," he said. "Suggestions from them may take it further ... We're not doing anything except saying here it is (to the planners). Come back to us with recommendations."

"You have a chance to get it tinkered with before a public hearing," Dowd explained, saying as long as there was a final version before a hearing, there were opportunities to change the draft.

The second draft also makes it clear that any applicant requesting a conditional use permit which also includes a request for a height exception would only be required to apply for one permit. Applicants would not be required to apply for a second permit solely for height exceptions.

Sullenberger said, "There were numerous people in the early stages (of discussion about HNWD's project) who said we needed to move slowly. Now, some of the same people are saying let's get on with it, which I find intriguing." With that, he moved the board go ahead and send the second draft to planners as written, ask them for a thorough review, "and get this process moving."

Planners will review the new language at their regularly scheduled meeting, Thursday, Feb. 24 at 7:30 in the modular conference center. Supervisors will attend.