

# Just what did happen at the second public hearing?

By Julie Ann Madden

*Editor's Note: Beginning with the first subheading below, all the words were taken from The Akron Hometown's tape recording of this public hearing. Words in parentheses are paraphrases or clarifications of what the person said. The Akron Hometown is providing this because there have been things said and reported that were not factual.*

The public hearing continued at 4 p.m., Monday, July 21 at the Union County Courthouse.

South Eastern Council of Governments Senior Planner Toby Brown and Union County Land Use Administrator-Planning Director Dennis Henze began the public hearing portion of the meeting by answering residents' questions from the July 14 public hearing.

**Dennis Henze:**

**The Aquifer Protection Overlay District: Zone A and Zone B.** That was just put into the ordinance as added protection for Union County.

**Prohibition of public utility wind conversion systems.** That restriction only applies to residential, privately-owned wind power generation. It is not to be sold to public utilities.

There is a separate section in the Agricultural District for wind systems. They are 100 percent allowed, and you can sell it to public utilities.

**Different separation distances for private wells and public wells.** That's just what it is. Public wells have longer separation distances in regards to livestock operations.

**Odor Footprint Tool:** It was talked about that it's not a proven science. Maybe it's not. It's just a screening tool that P & Z Board can look at. A producer can get a lesser setback with it through the Conditional Use Permit process. At no time can they get a setback of less than one-half mile.

**Board of Adjustment:** The Board of Adjustment is the Planning & Zoning Board members. It's state law. County Commissioners can either appoint people to be the Board of Adjustment or be the Board of Adjustment themselves. Union County Commissioners appointed Planning & Zoning as the Board of Adjustment.

**Toby Brown:**

The 2008 Revised Zoning Ordinance looks very similar to another county's and how much did the county pay to have this document created.

I'm the fourth SECOG person to work on this project over the past five or six years. My understanding of it is that when SECOG started working with the county -- SECOG is a voluntary organization and the county is a member of it. We don't charge anything separate for this, it's part of the membership dues.

My understanding was that when SECOG came down here, the zoning regulations were the 1978 version, and it was even difficult for county staff to give SECOG a copy of it. I know for a fact there was no electronic copy of it until I converted it two, three, fourth months ago.

So how we started this process, and state mandated this process, we gave them a copy of Minnehaha County's ordinance and copies of other counties' ordinances and asked them to review them.

I work with a six-county area so I have all those ordinances. We try to point out things, changes, etc. when we work with a county. All the ordinances look a lot alike. What we're trying to do is create uniform regulations, that is easily understandable by the people who have to enforce it and secondly, for

the public to understand it.

**Referenced documents weren't included in the 2008 Revised Zoning Ordinance.**

The first one was a 1978 zoning map. This map hangs in the Union County Commissioners' meeting room. It's a large map so it is not something that we can publish or put in this document. Second, it's not an electronic version. We're not going to make any changes to the map. We're going to attempt to get an electronic version.

Second one was a reference to a flood plain map. There was a comment that we could adopt the specific panel number of this document, and that probably is a good recommendation.

Another reference map was the Aquifer Protection Overlay District map, which was based on U.S. Geological Survey and S.D. Geological Survey data that SECOG has put together. This will also have a reference number but we will not put a date on this map because the data in this map can change, and it can only change by qualified staff of South Dakota Geological Survey. Once that's done through additional surveying, testing and drilling, this map would be updated.

**2005 Comprehensive Plan - whether it's still accurate or not.** It is the existing Comprehensive Plan, and at this time, I don't think there has been any discussion to update or to make changes it. What's in the 2005 Comprehensive Plan is what we have to use to make and adopt zoning regulations.

**Section 102 -** Lessen congestion in the streets. It's a purpose and an objective. No we don't have any problems with congestion in the streets but part of the purpose of adopting zoning regulations is to hopefully proceed with process of regulations so we can either prevent or adapt and grow with the community.

**Section 102 -** The objective of this document is zoning regulations. The objectives are what we hope the zoning regulations do.

**Section 201-** Official zoning map. It is available for viewing upstairs. It's adopted by reference. There have been no changes in any of the zoning.

**Section 501 -** Date of flood plain map. That's a good comment. We'll adopt the panel number.

**Section 903.11 E & J- Heavy and light industrial districts.** One section refers to air contaminants and the other is air emissions. The first section refers to contaminants. Anything that is released in those districts as far as contamination is regulated by state and federal governments. The second is a policy on air emissions. That basically says that when P & Z or Commission is considering changes, rezones to property, they take into effect the other policies about emissions and how it would interact with other properties in the vicinity.

**Section 1102.6 -** how does it make sense when compared to 1103.12? This is in the Ag District. Eligibility for one per quarter-quarter. The first part says that if this is enacted, the landowners would have to abide by the one dwelling per quarter-quarter rule. Since policy has not been in effect, everyone will be granted a Lot of Record, which is the explanation on the second part. So if you've parceled out part of your property already, you have a building eligibility. Hopefully I explained that one right.

**Section 1205.3** Why was reversibility clause deleted? This was in reference to the Planned Development District. In that district, there is a paragraph that if the rezone that takes place doesn't meet fruition or doesn't happen, within a certain amount of time, then that rezone would just go

away; it would just disappear. And the question I have had legally that is, the process that adopted that changed those districts was through a rezoning process similar if you wanted to take your property to a commercial or industrial use. (Since it went through the process, my question is) then how can that just disappear without legislative action taking place. That's still under review by my understanding at the state's attorney's office and attorney general's office.

**Dale Harkness:** (When Brown quit talking at this point, he pointed out that they hadn't discussed everything yet.)

**Adult Use Section**

I think we answered most of Ed Cable's questions. Some questions that have come up is on the Adult Use Section.

My explanation on the Adult Use Section is: In the 1978 existing zoning regulations there is no reference to Adult Uses. I'm not an attorney but if someone wanted to come into Union County today, as zoning regulations exist, it's of my opinion, it would be a permitted use. Which means, that it isn't identified anywhere in the ordinance, it is not restricted, there are no restrictions on it. If someone came into Dennis' office, it would be a permitted use, another commercial use.

So in order to regulate that, and I'd hope everyone in this room would agree that there needs to be some type of regulation on that, we need to identify what those uses are, then we need to put it into an appropriate district. In Union County, we drafted it in the Commercial District. So if someone wanted to have an Adult-Oriented Business in Union County, first, they'd have to rezone the land to Commercial Zoning and second, they'd have to come in for a Conditional Use Permit. And it would take a public hearing to do that.

The second thing is, and I hear this in all of my counties, the definitions are explicit. I'll agree with you on that. The definitions are taken from state law. On July 1 of this year, a new state law was enacted that regulated Adult Uses in South Dakota. The definitions they have applied for those are all listed in state law and will be part of our ordinance. Under state law, all adult businesses have to be (one-fourth mile) away from a church, school, business, playground, etc.

Second thing is under state law, there is established hours of operation for adult businesses.

Now, in the 2007 Revised Ordinance, the definitions were existing in that ordinance that we had proposed and also there was a setback distance of 1,000 feet.

I think everyone in this room would agree that the state's restriction of 1,320 feet is much more restrictive than the 1,000 feet we proposed. We've taken out any reference to setbacks and hours of operation -- all that will fall under the state's jurisdiction.

Again, my explanation for this is that Adult Uses are protected by the First Amendment. We cannot prohibit them; we can't keep them out of the community but what we can do is regulate them. We can regulate them through the state's setbacks and hours of operation and put them in the appropriate district. So there's no way they will be in an Agricultural District, they'll be in a Commercial District.

**Kathy Lessek:** The I-29 exits are already zoned Commercial so they can be at the exits.

2) Article 22, Section 2204 states that "Uses not listed in the District Regulations as eligible for a Condition Use Permit shall not,

in any circumstances, be granted a Conditional Use Permit." Therefore, if you didn't listed it, it falls under (Article 22), and it wouldn't be here.

And as far as setbacks, it wouldn't hurt. You can always have larger setbacks than the state, not smaller. You can also include that.

It also seems to be the only part of these regulations where you say notification has to be by mail to individual property owners near something with a Conditional Use Permit is on a Concentrated Animal Feeding Operation. There is no reason why you can't have notification by mail to individual property owners that would be affected by an Adult Business.

There are things that you can put in here that would be more restrictive and still within the law, and in fact, Section 2204 states that right there. It seems to me that you need to go and write an ordinance that agrees with the moral values of this county, not some other county.

**Brown:** Again, I'll clarify it that I'm not an attorney but in this area, I think we're all aware of what happened down in Sioux City. So my limited knowledge of this is that we can't prohibit it but we can restrict it.

**Lessek:** You can restrict it more than this is saying it is.

**Carolyn Harkness:** This is our county, not theirs. We want it kept clean. You can dirty our air, land and water but stay away from our morals and stay away from what happens to the morals of our kids and grandkids. And you can try to keep them out.

**Dale Harkness:** This board had the attitude that they would get sued if they tried to fight Hyperion. Well, why not get sued for the right reason instead of the wrong reason? And what you have done was the wrong reason but it's been done and it's behind us. This is ahead of us. We're not going to let this happen and if you guys don't want to be part of stopping it, then get up and leave. You are drawing our tax dollars, and you are using our time. Use it right.

**Carolyn Harkness:** If you don't want to do your job, then get a different job.

**Board Member Tom Smith:** Wow. There are amendments to begin with that state (unable to hear ending of statement).

**(Man in audience):** It's hard to hear you guys. Speak up.

**Smith:** I don't know how much louder I can speak without hollering like the people in the front are and I'm not going to holler like them.

**Carolyn Harkness:** Nobody's stuck it to you like you stuck it to us.

Smith: I didn't stick anything.

**Carolyn Harkness:** Yes, you did. You voted for that refinery.

**Smith:** That was my opinion. Does everybody have a different opinion here or is that allowed?

**Carolyn Harkness:** Yes.

**Smith:** Is it allowed that I can have a different opinion than you? I have a different -- can I speak?

**Carolyn Harkness:** Yes

**Smith:** Or do you want to speak? Which one's going to speak here? Between you and her (pointing to

the Harknesses). I don't care.

I disagree. I think Hyperion was a good thing. That's behind us supposedly by your husband but it doesn't seem to be behind him yet.

Now as far as the Adult Industry, we can't change that. There's amendments and that's our Constitution of the United States and we don't have anybody coming in here that I know of in the Adult Industry.

**Lessek:** They are here. They tried to buy (a bar-restaurant in the county).

**Carolyn Harkness:** They are here. You go talk to (Sheriff) Dan Limoges.

**Smith:** I just wanted to clarify that I don't think I made a mistake and there are amendments in this Constitution.

**Carolyn Harkness:** You aren't going to have to give up your home.

**Smith:** Because I'm not going to give up my home and another thing I'm going to give up my job in this county because it's really not a job anyway so somebody else will have to be appointed to do what I'm doing, and thank you very much.

(Smith left the meeting. Applause and confusion between audience and the Planning & Zoning Board as to what to do next. No input from Henze or Brown.)

**Doug Maurstad:** Can we address issues that still need to be talked about?

**Liz Merrigan** (standing and taking the floor): I'd like to have everyone here to take a deep breath and remember we are here to address issues because I think it will be a better situation.

**(Addressing Toby:)** You say that we have to have Adult Businesses in the ordinance and in the definitions. SECOG also helped Clay County not too long ago with their ordinances and there are no definitions (for Adult Businesses) of any type, so my question would be if it doesn't have to be in their ordinance and the sleazy business on Highway 50 is closed, I trust from lack of people, then why do you have to include it in the Commercial District, which is all along the interchanges. Why do you have to include in Article 8 Adult Oriented Businesses and definitions? Why do you have to have those words in the ordinance if you don't have those in the Commercial District. Then, it might well be that someone wants to come into the county and do this, but isn't there a process for that? Can you build into that that they have to have a public hearing?

And there is the threat of litigation that these businesses use always make people too alarmed.

And I don't necessarily look at this in any kind of religious or moral issue. I think these kind of businesses are sexist, oppressive and demeaning to both men and women. And there is no place for them in a county, specifically in Union County, where one of the six supplemental purposes is to make this a beautiful, decent and wonderful county.

So my question is do we actually have to have these put in or are they being put in because governmental entities are so worried the sleazy businesses are going to come and sue them?

**Brown:** No, I think the reason that we want this as a Conditional Use is because the public is con-

urned.  
I'll give you an example of Clay County.

**Merrigan:** The committee and many of us attended those meetings regularly, there was absolutely no discussion concerning Adult Business Use so that was also part of my question, which many people here also have, was why were those definitions expanded?

**Brown:** The definitions were expanded because state law took effect July 1, 2008. When you go home tonight, you can go to the state's Web site, and go to South Dakota Codified Law, Chapter 11-12 and you can go through the definitions in the first section and those definitions are exactly the way they are written in the ordinance I drafted. Why is that -- because we want to be consistent with state law.

Second, state law is very restrictive. State law is more restrictive than any county or community had in this state.

The state law basically states hours of operations and setbacks.

I'll give you an example. Clay County had an adult business in their county. That was a permitted use. They took out a building permit and they came in. There was no public notification, no public hearing. There was no right to protest it or anything. There was nothing.

Lincoln County has nothing in their existing regulations about Adult Uses. They have an Adult Uses located near Tea. That was a permitted use.

I recommend that you guys have it as a Conditional Use in the county. If you don't want any reference in there at all, we can take it out. I'm not an attorney but I'm giving you guidance that I believe it's a permitted use, that they still can come in.

**Lessek:** What about Article Section 2204 that says if it's not listed, it's not going to come in?

**Brown:** I'm telling you it's a permitted use as a business. That article means that under Conditional Uses if it's not listed, it's not a Conditional Use.

**Lessek:** So you're saying it's a permitted use. Then if you are saying this is absolutely true, then may we expand to a mile rather than one-quarter? You can do it stronger than the state.

**Brown:** Yes.

**Lessek:** And can you also have notification by mail, the same as a CAFO, instead of just putting a sign up?

**Brown:** My recommendation on that again, is that the process, there has been a lot of court cases on Adult Uses because it's protected under the First Amendment. And what the courts tell us is in order to enact these types of restrictions you have to have findings of facts, you have to do studies, and you have to find negative secondary effects. If the county is willing to go through that process, then they would have good legal grounds to implement more than that.

Under this requirement, what we're saying the state has restrictions, the state's going to have to fight for that.

**Lessek:** But certainly notification by mail does not fall under that.

**Brown:** (was interrupted by Lessek).

**Lessek:** I'm not asking you, I'm asking the commissioners. Couldn't we at least have notification by mail, the same as we do for a CAFO for something this controversial?

**Jerry Eilers (chairman as Bob James was absent):** We could.

**Lessek:** I mean what would be the

to let property owners or a church or a day care be aware?

**Carolyn Hanson:** Not everybody's home at the same time you try to call, but they will get a letter in the mail.

**Lessek:** They don't call. By law, the only way you will know is by the Legals (in newspapers), it's posted here in the courthouse or there's a sign on the property (that has applied for a permit). That's the only way the public or a neighbor would know by law that this would be coming in.

(At this point, Brown realized he'd earlier said three-quarters of a mile setback but it was only one-quarter setback, i.e., 1,320 feet.)

**Lessek:** Then we definitely need that further than one-fourth of a mile.

**Merrigan:** So it is possible to be more restrictive than the state. We could have three-fourths of a mile.

**Brown:** Correct.

**Merrigan:** Or a mile? Does it say from church, cemetery, dwelling, day care?

**Brown:** Yes. It says private or public school, public playground, public recreation facility, or business.

**Lessek:** How about church, mortuary?

**Brown:** And place of worship, too. Place of worship is defined in the ordinance.

Again, this was a new state law; because it did say the communities could enforce their own regulations, it could be more restrictive or less restrictive.

**Merrigan:** But in your opinion, Toby, you are absolutely sure it has to be in there in the Conditional Use so that there has to be a public hearing and there must be explicit definitions?

**Brown:** I'm not an attorney so I'll refer that. We can talk to States Attorney Jerry Miller but it would be of my opinion if they came in here, and this is my experience with Lincoln County and Clay County, when they came in, that because it wasn't explicitly stated that they were Conditional Uses, it was permitted.

I'll give you an explanation. Most particular counties felt because they hadn't listed it, it wasn't going to happen, that they couldn't come in. And their legal counsel advised them that just wasn't the case because this is protected under the First Amendment and that it was a permitted use unless it was explicitly defined as a Conditional Use.

I'm just giving you an explanation. Again, my assistance throughout this process was never to sway public opinion or sway any ordinance adoption. It was simply to offer the best advice and guidance as I can.

**Lessek:** I would suggest unless there is a bigger setback and notification by mail, we're going to go through the same process that we did last year.

**Brown:** Certainly and if the Planning Commission wants to add that into the regulations, we can certainly add under that particular use for notification.

**Woman A:** Sir, why was this added to the whole plan? How come this was added? It wasn't in there before.

**Brown:** The Adult Use Section?

**Woman A:** Yes.

**Brown:** It was added in the 2007 revision and it was also continued and added in this one because there

was no regulation.

**Woman A:** So we have to accept it no matter what we feel? It's a law we have to accept it? Are you saying we don't have a right to say no, we don't want it in our county at all?

**Brown:** I'm just trying to explain it. The answer to this is that you are basically saying we don't want them here. What I'm telling you is under rezoning, it's a protected First Amendment right that we have to identify locations in the county where they can and can't locate. I'm not an attorney; I'm just advising you of that.

**Ken McDonald:** Let's say they have the right to come in. Do we have the right to regulate what they can have on site? Such as with dancing women, separate the women from the booze and the whole bit?

**Brown:** If it's established as a Conditional Use---

**McDonald:** Does it have to be on paper?

**Brown:** No. If it's set up as a Conditional Use, we're allowing them based on testimony for the Planning Commission and County Commission, and in a sense when the Board of Adjustment adopts them, we're allowing them to put specific conditions on them, within reason.

**Merrigan:** Toby, if it's a Conditional Use and you have to have a public hearing, are you actually saying that it's not possible in a public hearing, let's say many people come and testify they don't want it, it's still not possible for the Planning & Zoning or the commissioners to totally reject the business, they can only put conditions on it?

**Brown:** That is typically the intent of a Conditional Use. I wouldn't advise anyone that they could deny or approve something. That's up to the Planning Commission and what the States Attorney would allow.

**Steve Hoflund:** There would be economic considerations, too, at this discussion that it would be rezoned. Do you agree?

**Brown** said he didn't have an opinion on that.

**Hoflund:** If they were starting to build them, there could be 100 or 300 of these little places...how much more law enforcement? Are they going to have to hire 10 more deputies? There is a huge economic consideration that should be addressed. Say, no more than 1 per six square miles or I don't know what regulations you'd put on that but it certainly should be addressed.

**Brown:** And I'm just telling you, within reason. What we're trying to do is advise the county in the adoption of these regulations of something reasonable and something defensible that we can win if we are challenged. I'm advising the county that the best place for this would be in the Conditional Use and in whatever district they want it to be. If they want it to be in the Industrial District or it can be in the Commercial District as it's drafted. That's up to the discretion of the county.

Again, I'm not here to tell them what to do. I'm just here to advise them of what the proper requirements are.

**Lessek:** I would suggest then at this point, because this is such another decisive issue that the board take some time to look at different things that can be done because I think Steve (Hoflund) is right, we're looking at quite a few. And we may never get an oil refinery but I can guarantee you we'll get a strip joint.

**McDonald:** It's just a matter of time. They are coming.

**Lessek:** We need some time, and I'm just asking if maybe you can spend some time dealing with---

**Jerry Eilers:** We can recommend to the commissioners to have some of that.

**Lessek:** And I'm sure you will have some of your own ideas because I'm sure you guys don't want a strip club in Union County either.

**Dale Harkness:** If you guys do that, you'll be the ones that do it because Dennis Henze was asked to take a motion to the Commissioners last Fall and he didn't take the motion. So if this is going to be done, I want you three guys to do it.

**Jerry Eilers:** If we move this to the Commissioners, that will be along with these recommendations.

**Carolyn Harkness:** Right before you approve it, can't you figure out what needs said or done, what restrictions? Doesn't that start with you guys?

**Jerry Eilers:** You mean notification by mail or---

**Carolyn Harkness:** What is your job exactly?

**Board Member Dan Fullenkamp:** We make recommendations to the Commissioners.

**Ed Cable:** One of the things that might be helpful is if SECOG, with the resources they have, that since July 1 what other counties have attempted to further restrict that issue. Give you a little table and a little record, so you can see what other counties have done or are likely to do as of July 1.

**Jerry Eilers:** For example, Salem up there has this place out east of Salem that's been in the works for a couple of years and I don't know if they ever got it settled.

**Cable:** But I think a summary from SECOG to you might be a resource to you and if it's published in the newspaper, we could all benefit from that.

**Merrigan:** Also, Toby, are you saying it could be moved from a Commercial District to another District? I say we have a list of names in the ordinance who do not want these businesses next to them. I don't know that that's possible. I know that's unwieldy and unworthy but is that not more reason why you couldn't take more time to do what Ed said to suggest what Toby has done.

There really isn't any time line is there that you could not take this? This is a public hearing, can you not table this discussion until you include more things?

**Brown:** I'll answer really quickly. I'll answer Ed's question. Right after this meeting, I've got to go up to Lincoln County where they are going through the same process. It's drafted the same way it's drafted here: definitions, Conditional Uses, Commercial District, then we'll follow state law for setbacks and hours of operation. They just adopted the City of Vermillion ordinance two or three weeks ago, the same thing.

Again, I'll make it really brief. In every district you have a Permitted and Conditional Use. A Permitted Use is just buy-right rule. I, as a landowner, can go in there, buy the building, meet with Dennis and utilize the property for that use. If we place these items in the Conditional Use, it requires a public hearing, it requires notification of adjoining property owners. With that, it will allow you guys to come in with these issues you have tonight and apply those spe-

cifically to a business operation as opposed to talking in general.

**Lessek:** Wouldn't it be simpler to have the ordinance in such a way the setbacks are part of it; it satisfies people and that notification is given far enough a head of time so we stop these fights every time there is a Conditional Use Permit.

**Brown:** But again, I'll advise you on this, and this comes from my experience in working with other counties and going through this process, and that is the law is very specific. If you are going to establish these regulations, that you just can't pull numbers out of the air, make it impossible for these types of businesses to locate within your jurisdiction.

**McDonald:** You can make it so it financially hurts them. You can hurt them financially so they won't want to come.

**Brown:** Which is what hours of operation and setbacks do.

**McDonald:** No. Sioux Falls did. Separate the girls from the people. The girls won't be there because they aren't going to get the tips. Separate the girls from the booze because the guys won't go in there if all they can do is look at the girls, if they can't drink.

**Brown:** Let me back up. Yes. In South Dakota, you can control things with liquor license, and secondly, Sioux Falls does.

You can have a county ordinance. This is kind of hard to explain. A county ordinance on decency or public nudity that the county can. I don't know if the county has this ordinance in place or not. But that's an additional step to these regulations, the county can do to restrict, and essentially, it's a decency ordinance that restricts complete, total nudity.

**Lessek:** So there's another reason to table this whole thing until you find out if there is a county ordinance on the decency and nudity. My understanding of pornography in laws throughout the country is that it's according to community standards, what's against community standards, and you can tell by the crowd here what the community standard is, and I'm sure your community standards are the same. This is offensive to us and this is something that has to be researched. It has to be a written county ordinance.

**Merrigan:** That has to be a written ordinance? You can't just adopt that?

**Brown:** That would have to be adopted by the county commissioners, and I'm not sure if they have that.

**Merrigan:** It's not in the current ordinances right?

**Brown:** No. It wouldn't be in zoning.

**Lessek:** It would be in the county ordinances.

**Carolyn Harkness:** So, Dennis, can't you write something like that before this is ever approved?

**Dennis Henze:** Sure, you can before it goes onto the commissioners, or this board could recommend to the commissioners as is with changes to more restrictive setbacks for them, etc.

What I'd like to say about current zoning. In the Highway Commercial District, an allowable use is drinking and such, bars. If somebody would rezone some land, open up a bar, and later on say I'm going to make it into a strip club, we can't stop it because it's not in here.

**McDonald:** Can't you regulate it through their liquor license?

**Woman, who refused to give name to Hometown:** Why isn't the county already filled up with these things if that is the case?

**Dale Harkness:** Why isn't Elk Point full of them now? I'll tell you why because the public won't allow it and we're not going to allow it. I don't care what the state says. We're not going to allow this. Put something in there to eliminate it right now. We'll take care of them when they come to the door and say they want to do it.

**Henze:** All I'm saying is that just allowing the bar, without this language in here, where you can regulate it through Conditional Use, they can open up a bar and a week later, turn it into a strip club and there's nothing the county can do about it.

**Lessek:** (In 2008 Revised ordinance) bar is a Conditional Use. (It's a permitted use in the current zoning ordinance.)

**Dale Harkness:** In the city, they can open a bar. In the county, they can't without the county commissioners given them the permission to do it.

**Henze:** Right. They have Commercial zoning. Get a beer license from the county, open up a bar and later (convert it) to a strip club, there isn't much this county can do.

**Woman, who refused to give name to Hometown:** I think the liquor licensing laws would prevent any of that. There's got to be a reason we don't already have our county filled up with these things if they are allowable as it is now.

**Brown:** Again, a lot relies on market forces. The dialogue were getting here, I don't think anyone disagrees with you that we don't want this to prevail in the county but the issue of this is we are just trying to give the county the best advice as how to best position themselves with the regulations to have an effect over these types of uses.

**McDonald:** You have to hit them financially. If they can't make a buck off them, they aren't going to invest their money. These ladies they get paid very dearly.

**Several Women:** Quit picking on the ladies (gender bias).

**Stan Foltz:** My understanding is the way you've got the rules set up in the Conditional Use permit are at the state standards, and if somebody comes in to get a Conditional Use permit, then they go through this process, and if the people say no to this and that. But using the state standard, then if they come in and fight it, then it's up to the state to defend it. That's the reason why with the setbacks that you don't want them to be higher right now because this way the county doesn't have to fight it; it's at the state level. It's still under a Conditional Use permit.

**Brown:** There's more local control.

**Foltz:** That's all you hear about with counties and cities being in court all the time with the Dr. Johns or whoever but then it would be to our responsibility as a county to set other things like signs, dancing, etc. That would be under the Conditional Use Permit.

**Lessek:** So we're just trying to save the county money by letting the state take the lawsuits?

**Foltz:** On the original setbacks and hours and such.

**Merrigan:** Stan, are you saying that you feel one-quarter of a mile is sufficient?

**Foltz:** No, not for me but then we could go into the Conditional Use Permit and make things like (McDonald) was saying alcohol can't be allowed by semi-nudes.

**Merrigan:** Can you make the distance more restrictive like Stan is saying, if they originally come in with one-quarter of a mile? Can you say the condition is beyond the state's one-quarter of a mile?

**Lessek:** It has to be written here or you're not going to get it.

**Brown:** No. With a Conditional Use, you can apply the standard that your county commission wants within reason.

**Foltz:** But would three-quarters of a mile be within reason? Would that be what considerations other court cases have been?

**Brown:** I'm not going to throw out the word "reasonable", I think it's more for a court to decide those things but my understanding is that I actually worked with another county. Before the state law took effect, we were going to implement these regulations. Their states attorney basically said, again this is under, a lot of these things are federal jurisdiction, and the experience with the federal jurisdiction was that you have to have findings of fact and you have to have secondary effects.

**Foltz:** So like there up at Salem they probably had some regulations like Ken was saying, take the money away from them, they couldn't serve alcohol, it was just a juice bar then, which probably hurt the value of the stripper then.

**Brown:** If they came in today, they could locate anywhere in Union County and there's nothing you could do about it.

**Foltz:** And that's why the Adult part of it would be Conditional Use.

**Brown:** Adult uses: juice bars, book stores, you name it.

**Lessek:** If Clay County has a quarter of a mile and Lincoln County has a quarter of a mile and we have three-quarters of a mile, they are going to locate over there so I say let's put three-quarters of a mile and let Clay County have them.

(Laughter and applause)

**Lessek:** It seems simple to me.

**Doug Maurstad:** Mr. Chairman. This is de javu all over again. We went through this a year ago with the CAFO and (Dwellings one per) quarter-quarter. I strongly suggest that the Planning & Zoning table sit down and have a committee, the rationale, the ramifications of what's going to happen on this because this was not in the 2007 ordinance. (The ordinance) was defeated in 2007 so we have to go back to the 1996 ordinances.

This is a new issue. It needs to be discussed. It needs to be discussed thoroughly, and you're not going to make a decision today. You're not going to shove this off on the county commission to make the decision. It's your responsibility to develop the ordinances and then submit a best and final offer to the commission so that when they have their planning for their public hearing that we don't rehash this all again.

It's not going to hurt you to table this so this can be resolved and get everything down in writing and then have a public hearing and say this is what we came up with, now do you have any disagreements? For us to sit here this afternoon, we've been going at this for almost an hour and we're where we were an hour ago.

I don't see the reason we have to hurry it, do this and get it passed. The only thing I can say is my personal feeling is you are running on

the impression that this ordinance is automatically going to be referred and put to an election, and you want to time it so that it comes in conjunction with the General Election in November so it doesn't cost the county a lot of money. The special election last year cost you \$8,000, and that had to come out of the county's coffers.

It's better to be sure of what you are doing, have the answers of what you are looking for, and then present it to a public hearing. To sit out here and do it like this, you are not accomplishing anything. It's mayhem.

Have a plan. Have an objective. Pursue it and then bring it back to the table. I don't see any reason that you need to make a decision on this within the next day, within the next month. If you do it right the first time, you don't have to do it the second time. We're redoing the zoning the second time because you didn't do it right the first time. The county didn't think we had the resolve to defeat that ordinance a year ago but we did it. Now, they are thinking we can't do it again. We can but we don't have to.

If you look at this thing, and you look at it rationally and you discuss it and bring a final product back to the public hearing, I don't think you'll have a problem because it will have all been solved in a rational view.

(Applause)

Board members laughed.

**Merrigan:** Jerry, I'd just like to second what Doug said. There are still several contentious issues that have not been resolved: the dwelling eligibilities, the CAFOs, the Board of Adjustment might still be a question even though what Toby talked about was law, and then the Adult Use, all of this that has come up today. I think, and I've been attending meetings for three years since the Comprehensive Plan was addressed. I think it's better if you take the time for you to do this document, to table it or whatever, rather than forward it to the commissioners with recommendations. Because if you do that, there will be this never-never land of who's going to write what and how the issues are going to be resolved. And I don't think it needs to be an issue of voting referral or anything. It needs to be an issue that you are responsible to what the citizens of Union County really have brought to your attention, and I think you can rightfully say these are complex issues.

I recommended years ago that we do what Clay County did, they had a committee for 15 months to hash out these ordinances before they were ever approved.

These are complex issues; you can rightfully say you need to take the time. What we do have here even though it's mayhem and rancor, it's still been very interesting. You do have the time you can take so I certainly hope you take the time.

**Melinda Gylfe:** There are going to be large numbers of people pouring in here so let's get our P's and Q's taken care of now and not try to do it when there is so much going on that we don't have time for any of this. Let's get it done, right, now and then we won't have to later. I don't want one of these in my backyard.

A mile from my house, that's still not enough and I understand the laws of the state are going to tell different so let's do what we can now to keep our kids out that way safe. What we need to do is protect everybody. I don't want that kind of stuff around my children and that's where they are going to go. I think (strip clubs) will go as close as they can to (Hyperion) to make the money. That's the whole idea behind a business.

I don't want one within a quarter mile of my house.

**Lessek:** Can I point out one small little thing I found going through the Hyperion's Development District. They refer many, many times to Section 1304, and in this new ordinance that has been changed to 12 but it hasn't been changed in the Hyperion. In this new one, Article 13 is the Aquifer (overlay district) rather than the Planned Development.

We all know what they are referring to is the Planned Development but 15 years from now, nobody may know what in the world this is talking about. Is there any way to fix that?

**Henze:** The Hyperion ordinance refers to the current zoning ordinance.

**Lessek:** I know but they are referring to the 13th article. By incorporating their ordinance into this ordinance, it refers to the Aquifer section.

**Henze:** No. The Hyperion ordinance refers to the 1978 ordinance. So we have to keep a copy of the 1978 ordinance around because that refers to it.

**Lessek:** No where in here does it say that it's referring to the old one. It's just a technicality. Ten years from now when you need to have a reference, you may not be here any more, and somebody may say what's it talking about.

**Brown:** We prerequisite by ordinance number it was adopted by and again, like Dennis says, we'll have to keep a copy of the 1978 ordinance because that goes back to that ordinance.

**Jerry Eilers:** We can't keep this going forever. We're operating on a 25-year or 27-year old law right now and things have changed a lot in the last 27 years. And this has been going on for a year now.

**Doug Maurstad:** Two years.

**Dale Harkness:** There was an opportunity last Fall to finish the book, and handpicked people made a motion to do away with the committee that was trying to do what they were asked to do. If that would have continued, we probably wouldn't be sitting here.

**Carolyn Harkness:** There are a couple of other things we haven't talked about. Maybe I misunderstand but I thought if the refinery does not come, then that rezoned land would revert back into agricultural land; and that's been taken out? Is that true?

**Henze:** That refers back to the 1978 ordinance, and that is exactly what it says.

**Carolyn Harkness:** And it does say that so if the refinery doesn't come, they can't let somebody else come in.

**Henze** nodded his head.

**Carolyn Harkness:** The other thing is I think we need some protection from any Heavy Industrial or any Industrial (a buffer zone). (Regarding the dispute between Hyperion officials telling people considering land options that there would be a two-mile buffer zone and the one-eighth that is in their ordinance). I think we need some protection more than one-eighth of a mile for the next thing that might come along. People have to be protected from something like this.

**Lessek:** We don't have one-eighth of a mile in here, we have 25 feet.

**Carolyn Hanson:** (said that Hyperion officials said at her home there would be a one to two-mile setback but later when she confronted the man, he told her he had said 'we hope to have' but she said she hears really well when a person is just three feet from her).

**Burdette Hanson:** (said Hyperion

officials told his family the same thing.)

**Arden Hanson:** We all know what we were told. You may not believe us but you believe Preston Phillips and those guys.

**Carolyn Harkness:** We need protection for further down the road, for the future.

**Ed Cable:** If we could get back to questions on the ordinance. We just don't understand, and this is one of the reasons we kept asking for some public documentation in the paper, etc. why you are now proposing this wholesale change in the ordinance.

We're just not aware that Dennis is having problems with the old ordinance; we aren't aware that there are issues that the law requires us to update these ordinances in a large way. So, absence that demand that we need to do it right away for this reason and that reason. It's hard for the public to understand why there is such a hurry to push this through. Perhaps you could enlighten us with what that reason is.

**Dan Fullenkamp:** We've been at it for a couple of years basically.

**Ed Cable:** If you take Woodbury County, for example, they had 40 meetings and have been at it for more than 1.5 years and understand it's going to be a lengthy process. But as several have mentioned before, it's much more important that the public be willing to support the end result rather than hurry it through and face another referral. It just doesn't make sense to the public.

**Dale Neely:** (Woodbury County messed up on the timetable and had to start over).

**Ed Cable:** I don't think that 40 meetings are the reason they messed up on the notification.

**Dale Harkness:** The statement that we've been at it a couple of years that is not quite right. The committee was at it seven months or a little longer. As soon as the quarter-quarter and CAFO were done, absolutely no one wanted to go any further. The committee made a motion to go to the Commission and ask them if they wanted us to go farther, we would but we needed some directive back from them. Dennis did not take that message to them. (The committee) was dissolved and here we sit today. So that statement is not quite right.

We were at it seven months, and Dennis and Toby took it over and are doing it the way they were asked to do it, in my opinion by Hyperion and a few people who think they are going to put a buck in their pocket.

That's what this whole thing is about. It's not about the best thing for the county; it's about I think I'm going to gain a dollar on it.

Now you guys have a job to do. Take your time and do it right.

**Ed Cable:** A bigger problem all the way through with the committee was that there was never one mention by either Planning & Zoning, the Commission, Dennis or SECOG, that the plan was to come back with this wholesale change to the ordinance. For example, SECOG's representative redrafted those areas the committee worked on based on the 1978 ordinance. There was not one single mention that this would be part of a larger picture and we're always planning to do this 90-pages change. No one ever mentioned that, and I think that's misleading.

**Dale Neely:** The committee with some of that 1978 ordinance didn't use it. They liked the terminology better in the 1978 than the 2007 ordinance.

**Dale Harkness:** So why Dale, couldn't that have been done last

all? Why all of the sudden, bang, we're done with this. Let somebody finish it up. There were 10 people in the beginning that chose to do that job...some of us showed up at every meeting and we tried to listen to what the concerns of the public were. I thought the Heavy Industrial should have been addressed and the rest of this, the 1978 handbook, the 1996, but they didn't wait so here we are today, starting all over again.

**Brown:** Let me explain a little bit. The 2007 revision was referred; the committee worked on the two issues. I took those changes and put in the 2007, and based on legal counsel advice made changes. There was a question about what are we changing. Somebody said what was exactly changed.

So what we did was scanned in the 1978 ordinance and we crossed out everything that was changed and we underlined everything that was added.

We didn't add anything different than what was included in the 2007 revision or the two changes the committee came up with. Hopefully, it's a much larger document and it's a little bit more difficult to look at, but essentially it's the same thing we accomplished before but it's trying to show exactly word for word where the changes were.

So to say it's a wholesale change or a wholesale document is not completely accurate.

**Dale Harkness:** The public has been misled in the (Leader Courier) paper. If I'm correct, Dennis stated it was 99 percent of what we had. There are 90-some new pages. Out of 150, how can it be 99 percent the same?

**Henze:** Of the 2007 version.

**Dale Harkness:** But the public didn't understand that. Walk up the street and ask them. They think this is what we had, and there is only 1 percent difference and I guess it will be all right.

**Brown:** Let me explain this. I think with the 2007 version, somebody could look at it and say where did you change it, what are you proposing; there is so much confusion. Hopefully, with this document, anybody who has questions about it, if they don't believe me or Dennis, they don't believe the county, you can look at this document and say it is exactly what's being proposed or changed. It's explicitly stated in that document. That's why when I stepped up here last week, I didn't go into any detail. To say, it's 99 percent, I typed the whole thing and I couldn't tell you if it was 99 percent or 80 percent of change, I don't have any idea.

What I can tell you is what I told you is I took the 1978 ordinance, and the 2007 revision and the two changes the committee proposed and put it into that document. That's all it is. Period.

**Lessek:** The 2007 ordinance was thrown out. That should have totally been ignored. You should have gone from the 1978 ordinance.

**Brown:** But I can only do what the county asked us to do. The committee worked on those two things. Whether you disagree or not, all I can do is move forward. I sat in every one of those meetings; they weren't the most easy meetings to go to; there was a lot of dialogue, heavy dialogue but I think at the end of it after it was adjourned, everybody said this is better for the county because we went through this process. I felt better about the process. Did everybody agree and walk out of there happy? Nobody ever all walks out of there happy but I can tell you this that I felt better about the process because we walked through it.

Dennis explained the quarter-quarter process probably 15 times, and I think a lot of it was educa-

tion.

**Lessek:** There were compromises made but we still go back to the Adult Businesses. That wasn't addressed by that, this is just something new. It is boom; it hit the community and there's not a large number of people here because this started at 4 p.m. today, but you can multiply that by lots and lots of people who are concerned about this issue. I really think you should at least spend some time to revise this on the Adult Business.

**Ed Cable:** I think Toby's comment that it's easy to go through word for word and see what changes were made. It's easy to say that's absolutely true but just imagine how many of the 12,000 residents have the ability or time to read through this to do that. That's why we still ask the commission and county to publish some summary of what the changes are, including this very important one of Adult Businesses and have that in a paper, published, and then have another meeting so that people other than those of us who have spent the time to go through it have an opportunity to address you and understand the issues before you act.

**Lessek:** I think you will end up with lots less problems, if you do it like (Mrs. Gylfe) says and do it right. I've been here, too, for three years, and I'm just as tired of it as you are. I don't ever want to come back here.

**Steve Hoflund:** (What is the time if the zoning's changed such as for Hyperion and the project isn't completed?)

**Henze:** I don't know quite how to answer that. What I'm wondering now since Toby said that's a legislative act by the county to change that zoning, maybe (reversion) is not even legal. That it will not revert back. Maybe it will stay as a Planned Development. But if it does stay, that is its use. If Hyperion never came, then if somebody else was to buy that land, they would have to rezone it to something else if they were to develop it.

**Hoflund:** So if somebody wanted to farm it, they'd have to ask for a zoning change?

**Henze:** Yes, to change it back.

**Carolyn Harkness:** So we were lied to again, Dennis, because that was what we were told.

**Henze:** That it reverts back. That's the way it reads today that it will revert back. But the question is, like Toby said, it's a legislative act. Maybe that part of the ordinance isn't legal.

**Brown:** That's a question to ask the states attorney office. I don't know.

**Woman A:** Who added this stuff -- the Adult Section. It wasn't in there before.

**Henze:** It was in the 2007 version.

**Carolyn Hanson:** Wasn't the 2007 ordinance voted down?

**Henze:** Yes.

**Carolyn Hanson:** If it was voted down in 2007, why does that count for anything now?

**Henze:** That's what we're here for -- zoning. We put together different documents, the boards review them, have a public hearing.

**Jerry Eilers:** It's in there to protect you now. Otherwise, they'll just come in and start it.

**Dan Fullenkamp:** Follow his train of thought. Just having it in there is better protection for you than if it was omitted when he explained the two examples. I think that's

pretty factual.

**Doug Marustad:** I'm here from the government, and I'm here to help you.

**Man A:** This (Hyperion) rezoning ordinance was approved by the county commissioners, and now how could that be approved and legal if you say that automatic reversion to ag land can't be in there?

**Henze:** That will be up to a judge to decide whether that part is legal.

**Man A:** You mean to tell me the zoning commissioners approved that and they didn't know that, didn't have that question answered?

**Henze:** The ordinance says that it will revert back to ag if it's not built on.

**Ed Cable:** The interesting thing is the same states attorney drafted both (Hyperion and the 2008 zoning) documents and now it's two different things. So that's the question we ought to be asking.

**Man A:** I have another question on Planned Development. They have 3,200 or 3,800 acres. Why is Hyperion still taking options on land?

**Henze:** I have no idea.

**Carolyn Hanson:** Dennis, if that Planned Development, if that does not revert back, then how could any part of that be allowed? If people were allowed to believe that if it didn't get built on by Hyperion for an oil refinery, then it would go back to agriculture and that turns out not to be so --

**Henze:** Maybe.

**Brown:** We don't have an opinion.

**Henze:** We don't have an opinion on that yet.

**Carolyn Hanson:** So shouldn't that be looked at and checked out before this whole thing? I mean that's an important part for farmers.

**Lessek:** Before you cross that line out (the reversion statement in the 2008 zoning regulations), get an opinion, Dennis.

**Henze:** Yes.

**Lessek:** The line is crossed out in this draft. Before you cross it out, get a legal opinion.

**Carolyn Hanson:** I would think that would make that whole thing null and void if one part of it is not true. How can you say this can be done because you put in one breath, you say that they can change this to Planned Development, with the thought that if it doesn't go into a refinery that it will go back to ag? And then you say now we don't know whether or not that can be? Well, then it's high time someone found out whether or not that's true.

**Henze:** We are trying to find out.

**Carolyn Hanson:** And before we pass anything else.

**Lessek:** That would be another reason to table the discussion until we get a legal opinion.

**Jerry Eilers:** As far as I know, it's all optioned. Nobody's got paid (for their land), and if they walk away from their options, it reverts back. It's got to.

**Steve Hoflund:** That number has to be written somewhere. Without regard to whether it's legal or not, what is that number: one year, two years, three years, when does it revert back according to the 1978 zoning ordinance? There has to be

a number in there.

**Henze:** Three years.

**Steve Hoflund:** Three years from the date that the rezoning went into effect?

(Dennis searches for it but can't find it in the ordinance.)

**Brown:** The thing that was crossed out was essentially that it reverts back to the previous zoning. But technically that is just a change there because it still says it will be null and void.

Again, when we say we don't know. That's not true. It's drafted as it is and it's been implemented that way and so the question is when this is being adopted, the states attorney reads through the whole thing to see if everything is legal and consistent with state law. But, what they (P & Z Board) are doing is making a recommendation to the county commissioners of adoption with these proposed changes.

**Steve Hoflund:** But my question was just what is the number? If in fact, that is a legal document, what is that number?

**Brown:** Actually there isn't any set time. Just a reasonable time established by the Planning & Zoning Commission. I don't remember if there was a time set. I wasn't involved with that.

**Merrigan:** I think it's possible if you table the discussion, you can table the discussion without a date or you can table it and put a specific date on it. So if you are interested in tabling this until further discussion, you can.

**Jerry Eilers:** You can table it but you have to take it up at the next meeting.

**Merrigan:** You have to make a motion at the next meeting to take it up.

**Jerry Eilers:** You can't continue it on.

**Doug Maurstad:** Jerry, If I understand your motion correctly, you only have one option and that is to recommend the ordinance be adopted. If you say no, it's a dead horse. It stops here, it doesn't go to the commissioners.

(Discussion amongst public if they could table it indefinitely and if they had a quorum. At the same time the commissioners were whispering between themselves.)

**Dale Neely:** Mr. Chairman, I'm going to make a motion to move this forward to the county commissioners with the recommendation that they increase the setback on Adult Entertainment, and on notification by mail and possibly check into an ordinance to restrict it completely.

**Jerry Eilers:** I'll call for a vote.

**Dan Fullenkamp:** Just for a quick clarification, would you repeat that please.

**Dale Neely:** Move it forward to the county commissioners for their review and recommendations and to recommend that the Adult Entertainment setback be increased, and notification be made by mail to affected property owners and also possibly to investigate an ordinance to restrict--

**Dan Fullenkamp:** entirely--

**Dale Neely:** to get with the states attorney and see if that's possible.

**Dan Fullenkamp:** I'll second it.

**Jerry Eilers:** All those in favor -- no, no. Any other discussion?

(No comments)

**Jerry Eilers.** Very well. Those in

favor signify with aye.

**Fullenkamp:** Aye.

**Neely:** Aye.

**Jerry Eilers:** Opposed? (silence) Carries.

**Doug Maurstad:** What did you just do?  
(Murmur of they'd voted went through the crowd.)

**Merrigan:** When will you forward this to the commissioners?

**Neely:** The next meeting.

(Eilers called for motion to adjourn. Fullenkamp made it, and Neely seconded it. The vote was unanimous.)

