

## Ordinance No. 1-2011

### **AN ORDINANCE REPLACING ORDINANCE NO. 1-2003, ESTABLISHING A PERMITTING PROCESS FOR WIRELESS COMMUNICATION FACILITIES, WIND ENERGY CONVERSION SYSTEMS (WECS), AND OTHER TALL STRUCTURES IN MADISON COUNTY, MONTANA**

- Section 1. Purpose
- Section 2. Authority
- Section 3. Definitions
- Section 4. Applicability
- Section 5. General Standards
- Section 6. Permitting Process
- Section 7. Modifications
- Section 8. Appeals
- Section 9. Severability
- Section 10. Penalties

#### **Section 1. Purpose**

To accommodate development in Madison County and the region, while protecting the public health, safety and general welfare and visual environment of Madison County. This ordinance is established to outline a permitting process for wireless communication facilities, wind energy conversion systems, and other tall structures, while providing a balance between private interests and public concerns.

These standards shall be construed to be consistent with any federal or state regulations which preempt or take precedence over the standards herein. In the event that either federal or state government adopts standards more stringent than those described herein, the more stringent standards shall apply.

#### **Section 2. Authority**

The general powers of county commissioners are broadly described in Montana law, as follows: "The board of county commissioners has jurisdiction and power, under such limitations and restrictions as are prescribed by law, to represent the county and have the care of the county property and the management of the business and concerns of the county in all cases where no other provision is made by law" (7-5-201, MCA).

#### **Section 3. Definitions**

For the purposes of the Ordinance, the following definitions shall apply:

*Co-Location:* Locating wireless communication equipment for more than one provider on a single structure.

*Tall Structure:* A structure, including antenna or other projection, standing 100 feet or more above ground level.

*Wind Energy Conversion System (WECS) Facility:* The equipment, physical plant and portion of the property needed to convert wind power into energy, including but not limited to the base, tower, cables and wires, rotor blades, inverters, conductors, transmission lines, accessory buildings, landscaping, fencing and screening, and parking areas.

*Wireless Communication Facility:* The equipment, physical plant and portion of the property and/or building used to provide power and communication services, including but not limited to cables and wires, conduits, pedestals, antennas, towers, concealed structures, electronic devices, equipment buildings and cabinets, landscaping, fencing and screening, and parking areas.

#### **Section 4. Applicability**

With the following exceptions, any structure or facility standing 100 feet or more above ground level or any WECS facility producing 250 kilowatts (kW) per hour or more within the unincorporated areas of Madison County, whether upon public or private lands, shall be subject to this Ordinance. Hereinafter, the term “facility” or “facilities” refers to any wireless communication facility, WECS facility, or other structure covered by this Ordinance.

Exceptions:

1. Pre-existing facilities standing 100 feet or more above ground level.
2. Facility maintenance or repair.
3. Reconstruction that involves 50% or less of a pre-existing facility standing 100 feet or more above ground level.
4. Co-location of wireless communication equipment on a pre-existing facility or on a facility permitted under this Ordinance.
5. Temporary communication facilities for emergency communications by public officials.
6. Structures used primarily for human habitation.

#### **Section 5. General Standards**

All facilities must demonstrate compliance with the following general standards prior to County issuance of a permit.

##### *A. Public Safety*

The proposed facility shall be located and designed to ensure public safety. The following measures shall be implemented:

1. From property lines, rights-of-way, or overhead power lines, each element of the facility shall be set back a minimum distance that is equal to 120% of its maximum height. A smaller setback may be allowed, if it can be demonstrated that there will be no public safety hazard.
2. At least one weatherproof warning sign shall be posted at the site.
3. The facility shall comply with the Federal Aviation Administration (FAA) recommendations for airspace and shall not penetrate any airport protection zones designated by the County.
4. A water supply adequate for firefighting may be required.

##### *B. Compatibility with Adjoining Land Uses and Scenic Resources*

The proposed facility shall be located and designed to maximize compatibility with adjoining land uses and minimize negative impacts on scenic resources.

1. The facility should be located to minimize its visibility from any existing residential development on immediately adjacent properties or within a radius of one-half mile from the project site, whichever distance is greater.
2. Existing natural vegetation and grades on the site shall be preserved to the fullest extent possible.
3. The site shall be covered by a noxious weed management plan approved by the Madison County Weed Board.
4. All elements of the facility (except the warning sign covered in A.2. above) should maintain a galvanized steel finish or, subject to any applicable standards of the FAA or

other applicable local, state, or federal agency, be painted a neutral color so as to reduce visual obtrusiveness.

5. Security lighting on the site may be mounted up to 20 feet in height and shall utilize cut-off lighting directed towards the ground to reduce or minimize light pollution.
6. Except for 5. above, the facility shall not be artificially lighted unless required by the FAA or other state or federal agency. If lighting is required, the use of red beacons is preferred to flashing strobe lights.
7. Noise levels during facility operation shall not constitute a public nuisance, as described in 27-30-1010 et seq., MCA.
8. Where reasonable, less visible alternatives exist, applicant must demonstrate they have been explored and found to be unworkable.
9. In the case of wireless communication facilities, co-location on existing towers is preferred.

#### *C. Migratory Birds*

The proposed facility shall be located and designed to minimize negative impacts on migratory birds.

#### *D. Abandonment*

A facility will be considered to be abandoned if it is totally unused for a period of 12 consecutive months. Determination of abandonment shall be made by the county planner, who shall have the right to require documentation from the facility owner regarding the record of facility usage. Upon determination of abandonment, the facility owner shall have 90 days to:

1. Re-use the facility, or transfer it to another owner who will re-use it; or
2. Remove the facility. If the facility is not reused or removed within 90 days of determination of abandonment, the County may remove the facility at the facility and/or property owner's expense, unless the landowner assumes responsibility for the facility and has an alternate use for the same. Madison County may require that the operator provide a financial guarantee, good for one year beyond the life of the project, in an amount sufficient to cover the cost of removing the facility.

The site where a facility has been abandoned is to be restored to at least its original condition upon removal of the facility. Madison County may require that the operator establish an escrow account for this purpose, which would be available to Madison County in the event the site is abandoned. Upon approval by the Madison Board of County Commissioners, payments may be made into the account at a rate to ensure sufficient funds would be available at the end of the facility's intended life for the purpose of restoring the site.

#### *E. Indemnification and Insurance.*

The facility owner and/or property owner, jointly and severally, shall indemnify, defend, and hold harmless Madison County and all of its agents and employees from all claims, damages, and causes of action arising from the operation and presence of the facility, and occasioned by the conduct of the facility owner and/or property owner. The facility owner shall maintain insurance against any liability arising from the operation and presence of the facility, including bodily injury, death, and damage or destruction of the property of others, in the following amounts as per 2-9-108, MCA: \$750,000 for each claim, and \$1.5 million for each occurrence. Over the life of the facility, the facility owner shall annually submit a certificate of insurance to the Madison County Planning Office.

## **Section 6. Permitting Process**

#### *A. Permit Required*

A permit must be obtained from Madison County prior to construction and operation of a new or expanded facility (Exception: co-location).

*B. Permit Application – General Requirements*

Applicants should use Exhibit A. in assembling their permit application package.

*C. Consultation with Pertinent County, State, and Federal Agencies*

Applicant shall demonstrate that the following agencies were notified of the proposed facility, and given at least 45 days to contact the Madison County Planning Office with any comments (Sample notification letter available from Planning Office).

- Madison County Airport Board
- Madison County Road Department
- Madison County Weed Board
- Local Fire Department (and/or Fire Prevention Specialist)
- Any Municipality within five miles
- Montana Aeronautics Division, Montana Department of Transportation
- Montana Department of Environmental Quality (if transmission lines are proposed that would require review under the Montana Major Facility Siting Act)
- Montana Department of Transportation (if project would require highway access)
- Federal Aviation Administration
- U.S. Fish and Wildlife Service

*D. Notification of Property Owners*

Applicant shall demonstrate that adjoining owners, any applicable property owners association (as identified by the county planner), and properties within one-half mile from the project site, were notified by certified mail of the proposed facility, and given at least 45 days to contact the Madison County Planning Office with any comments (Sample notification letter available from Planning Office).

*E. Application Submittal and Review (for both types of facilities)*

1. Five copies of a facility application shall be submitted to the Madison County Planning Office, along with an application review fee of \$500.
2. The county planner shall verify that the application is complete and schedule a public hearing before the Madison County Commissioners.
3. The county planner shall issue a legal notice of the public hearing. The notice should run two consecutive weeks.
4. The county planner shall notify the applicant, each adjoining property owner, any applicable property owners association (as identified by the county planner), and owners of property within one-half mile from the project site, of the hearing by first-class mail not less than 15 days prior to the date of the hearing.
5. The applicant shall place a copy of the application in the local public library nearest the proposed facility site.
6. The applicant and property owner shall allow County representative to visit the site as a part of their application review. Such visit shall be conducted in accordance with Montana open meeting law.
7. Prior to the public hearing, the county planner shall prepare a report and recommendation for the County Commissioners. The report should address the extent to which the proposal complies with this Ordinance.
8. The Madison County Commissioners shall hold the public hearing and accept both written comment and verbal testimony from the public and the applicant.

*F. Application Decision*

1. The Madison County Commissioners shall act to approve, conditionally approve, or deny the application.

2. Written notification of the Commissioners' decision shall be mailed to the applicant and shall include an explanation of the basis for the decision.
3. In the event of conditional approval, all conditions must be met prior to the County's issuance of the permit.
4. The approved permit must be recorded at the County Clerk and Recorder's Office, at the applicant's expense.

#### **G. Construction Period**

Unless otherwise specified by the Madison County Commissioners, the applicant will have two (2) years after Madison County Commissioners have approved or conditionally approved an application in which to complete construction and receive the permit. A request to extend the construction period may be submitted to the Planning Office at least three months before the expiration of the approval. Notification and a public hearing as outlined in Section 6.C-F will be required for those projects for which construction has not started, or minimal construction completed, or minimal equipment has been purchased. The request for an extension must include a narrative addressing the following:

1. The general standards in Section 5.A-C, including supporting studies;
2. The estimated time needed to complete the project, with a schedule showing major milestones and estimated completion date;
3. The progress made to date;
4. Changes in land use and development patterns within one-half miles of the site that have occurred since the application was originally approved or conditionally approved; and
5. An explanation as to why the extension is necessary.

### **Section 7. Modifications to Existing Permits**

Modifications to the equipment and/or facilities for a permitted facility and time extensions for constructed facilities may be requested by submitting the permit application form with the review fee to the Madison County Planning Office. Notification and a public hearing as outlined in Section 6.C-F will be required for those projects where the Madison County Planning Office has determined the proposed modification is a significant change in the project scope, equipment, facilities, and/or facility duration.

Modifications may be approved by the Madison County Commissioners upon documented showing of:

1. Substantial compliance with the terms and conditions of the approved application; and
2. Either no change or improved compliance with the general standards listed in Section 5.

### **Section 8. Appeals**

Those aggrieved by a decision of the governing body may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within thirty (30) days of the date the decision was made by the governing body at public meeting.

The following aggrieved parties may appeal a permit decision

1. The property owner requesting the permit.
2. The tower operator requesting the permit.
3. A property owner with a property boundary contiguous to the tract containing the proposed building site.
4. A property owner within one-half mile of the building site.
5. Any aggrieved person or party, which is a person or party who can demonstrate a specific personal and legal interest, as distinguished from a general interest, who has been or is likely to be specially and injuriously affected by the decision.

**Section 9. Severability**

If any part or portions of this Ordinance shall be declared invalid or unenforceable for any reason by a court of competent jurisdiction, the remainder shall nonetheless continue in effect.

**Section 10. Penalties**

Any person, firm, or corporation that violates the provisions of this Ordinance shall be guilty of a misdemeanor and punishable by a fine of up to \$500 and/or a jail term of not greater than six months. Criminal responsibilities of firms or corporations shall be governed by relevant provision of 45-2-311 and 45-2-312, MCA.

PASSED BY THE BOARD OF MADISON COUNTY COMMISSIONERS and signed after the First Reading, the \_\_\_\_\_ day of \_\_\_\_\_, 2011.

\_\_\_\_\_  
David Schulz, Chairman

\_\_\_\_\_  
James P. Hart

\_\_\_\_\_  
Dan Happel  
Board of Madison County Commissioners

-----

This Ordinance shall take effect as of \_\_\_\_\_.

PASSED BY THE BOARD OF MADISON COUNTY COMMISSIONERS and signed after the Second Reading, this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

\_\_\_\_\_  
David Schulz, Chairman

\_\_\_\_\_  
James P. Hart

\_\_\_\_\_  
Dan Happel  
Board of Madison County Commissioners

\_\_\_\_\_  
Peggy Kaatz-Stemler  
Madison County Clerk & Recorder

[SEAL]

Exhibit A.

MADISON COUNTY, MONTANA  
PERMIT APPLICATION / MODIFICATION FORM

For Wireless Communication Facilities, Wind Energy Conversion Systems, and Other Tall Structures

Madison County Planning Office  
205 N. Broadway  
P.O. Box 278 Virginia City, MT 59755

Telephone: (406) 843-5250  
Fax: (406) 843-5229

Applicant (Property Owner and Owner/Operator of Proposed Facility Must Sign):

Property Owner Name(s): \_\_\_\_\_

Address: \_\_\_\_\_

Telephone and Fax Numbers: \_\_\_\_\_

Signature and Date: \_\_\_\_\_

*[Note to Property Owner: If approved, this permit will be issued to both you and the facility owner/operator. The permit will be recorded and the rights and obligations pertaining thereto will run with the land. You will be liable for the cost of removing an abandoned facility and restoring the site. An approved permit will affect your legal rights. You may wish to check with legal counsel before signing this application.]*

Facility Owner/Operator Name(s): \_\_\_\_\_

Address: \_\_\_\_\_

Telephone and Fax Numbers: \_\_\_\_\_

Signature and Date: \_\_\_\_\_

Permit Application is for (select one):

- Wireless Communication Facility
- Wind Energy Conversion System (WECS)
- Other Tall Structure (specify): \_\_\_\_\_

Request is for (select one):

- New Facility
- Construction Period Extension
- Modification (describe): \_\_\_\_\_

Intended Facility Life / Duration of Permit: \_\_\_\_\_

Estimated Construction Start Date: \_\_\_\_\_ Construction Completion Date: \_\_\_\_\_

Property Location: \_\_\_\_\_

Legal Description: \_\_\_\_\_ Section: \_\_\_\_\_ Township: \_\_\_\_\_ Range: \_\_\_\_\_

Permit Application / Modification is:  Approved  Conditionally Approved  Denied

\_\_\_\_\_  
Chairman, Board of County Commissioners

\_\_\_\_\_  
Date

**Checklist of Permit Application Requirements:**

- Site Plan.
- Vicinity map. Identification of existing adjoining landowners and land uses.
- Topographical map at a scale which accurately represents ground features.
- Drawings and description of proposed facility.
- Photorealistic renderings of the proposed facility from public vantage points.
- Verification of agency notifications.
- Verification of neighborhood notifications.
- Proof of liability insurance (provide either now or prior to permit).
- County road encroachment permit, as appropriate.
- Verification of County-approved noxious weed management plan.
- Signatures of both the facility owner/operator and the landowner.
- Narrative addressing the General Standards (Section 5).

**Application Submittal Instructions:**

1. Five complete copies of the permit application/request for modification shall be submitted to the Madison County Planning Office. An application review fee of \$500 must accompany the application.
2. Applicant shall place a sixth copy of the permit application/request for modification in the local public library nearest the proposed facility site.
3. Where more than one facility is proposed, a permit application and review fee shall be submitted for each site.

**Permit Recording Requirement:**

An approved permit takes effect once it has been recorded at the Madison County Clerk and Recorder's Office. Recording and associated fees are the responsibility of the Applicant.

**Note:**

Lease agreements between the property owner and facility owner/operator are subject to the Montana Subdivision and Platting Act. Easement agreements are not.