

**Frankfort Planning Commission  
Special Meeting Minutes  
February 23, 2010**

**Call to Order: 7:00 PM**

**Roll Call:** Condon, Duncan, Larson, Martin, McLaughlin, Ogilvie, Storrer, vacancy **Excused?:**  
Duncan, Hommel

**Quorum present**

**Public present:** JoAnn Holwerda/City Council, Josh Mills/City Superintendent, Jenn Ryan, Eric Van Dussen, Kathleen Hibbard, Dale Schneider, Mary Armstrong, Bonnie Warren, Wes Blizzard, Joshua Stoltz, Christina Ryan-Stoltz, Bob Dittrich, Thelma Ryder-Novak, Jim Barnes, Kathy Zalar, Don Rorick and Greer Johnson

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**Approval of Minutes: Regular Meeting of 9 FEB 2010 no action taken**

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**Approval of Agenda: Moved Storrer; seconded Martin; all ayes; Motion passed**

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**General Public Input**

**Bonnie Warren**, 590 Corning: reads letter from Tree Board to amend their previously submitted response objecting to one of the goals stated on page 63 that makes Biomass appear to be the preferred energy alternative. Until a community conversation about this issue occurs, the Tree Board advises that the Master Plan should not advocate for any specific form of alternative energy. They strongly recommend that the words be changed and that an initiative be undertaken to have a public forum. Specific concerns were expressed and a copy was distributed to each commissioner.

**Christina Ryan-Stoltz**-137 George St. agrees w/ Warren and is interested and concerned with the mention of biomass as part of the Master Plan.

**Thelma Ryder-Novak:** expressed curiosity about how this got put into Master plan as it was not in the previous draft.

**Kathleen Hibbard:** 1165 Bailey St. Benzonia: encourages commission to omit language about Biomass plant in the Master Plan because a plant of that size and scope would affect the county and whole area.

**Eric Van Dussen:** refers to Goals on Energy in Master Plan where it says that to accomplish its goals, Frankfort needs to pursue a number of different energy initiatives including wind and solar energy and incorporate these into the city's zoning ordinances as allowable uses subject to an administrative review and approval. Van Dusen states that in most communities substantial wind energy proposals have to go through Planning Commission approval, not just an administrative review. He suggests that the Planning Commission might want to consider whether that is appropriate. Quoting from current draft Master Plan "...working with the entrepreneurs to *prioritize* alternative energy production in Frankfort's industrial area *with a focus* on Biomass energy", questioning what specific industrial areas are being included, what a "focus on biomass energy" means ; and in what specific Planning Commission meeting was that discussed and referenced in the minutes.

**Shauna Fite, Parks Ave. Interlochen and representing MLUI,** reports that there is a lot of controversy going on over a proposal for a plant in TC and MLUI is looking with due diligence at the pros and cons and will be sending out a clear message in a few weeks. She acknowledges the importance of including options in a Master Plan and also having a good review process. She has information on biomass for those who want it and compliments the Planning Commission on including Renewable Energy alternatives in its Master Plan.

**Ogilvie** encourages people to look on the website, download, discuss, and send comments. He is pleased that people have read to page 63 and invites them to read the appendixes. They have spent 27 meetings, 19 months with 300 comments and conducted surveys. He does not know which meetings or forums where renewable energy came up, but does recall it being discussed. Biomass was not the only form of energy discussed and no one thing took precedence over another. **Storrer** adds that they were presented as possible alternatives and nothing more.

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**Reports to the Commission:**

**DRAFT Master Plan Report by Charles Smith, AICP, Wade Trim Consultants**

## 1) ; Draft Zoning Ordinances – electronic transmittal on Friday 19 Feb 2010

**Charles Smith** mentions that public comments are being compiled at which time he will be directed to make changes. He discusses the Tobin judgment and its impact on the Master Plan, stating that it is his understanding that the lawsuit was the result of a procedural error. He indicates that there are very specific, technical and confusing rules you have to follow otherwise judgments seem arbitrary or capricious. For instance, the city cannot approach a petitioner with an idea for a conditional zoning. That has to come from a private party. He and his zoning experts have determined that it was not about the zoning ordinance but was a procedural error. As they go forward it will have a very minimal impact. The map will be altered to reflect the change. Outdated and no longer legal references, and big loopholes that drove the procedural lawsuit, have been cleaned up and simplified keeping it as straight forward and succinct as possible. The zoning ordinance update now has a very clear and well-stated purpose of intent for each district. It shows a petitioner what they can and cant do. The public input and meetings strengthen it. His legal experts are very comfortable with where they are at this time.

**Ogilvie:** You're going to mark it out on the regulating plan map, but is there something else we should be concerned about with Tobin?

**Smith** replies "Not really"; that he changed the designation on the future land use map in accordance to the judge's rules. The judge said that there was a violation of due process involved. Therefore, as he puts together the revision he will put in there exactly what the city has to do for a conditional rezoning so they know how to do it, in sequence with no deviations. There is a very established precedence; State law tells how to do it.

**Ogilvie:** In 1993 did we have a zoning ordinance that stepped us through this process? So the potential was there when Mr. Tobin first bought the property and made the application for a special use, for a zoning change. The planning commission at that time was not complicit in not following the law per se...

**Smith** replies that he has seen a great progression in zoning over the last 20 years to get things above board so that the development community isn't filing lawsuits alleging they have been extorted or communities don't feel they have the ability to negotiate any deals. Especially in the last 4 years, they have codified.

**McLaughlin:** with the precedent that was set in Judge Batzer's ruling on Nov. 20<sup>th</sup> and the fourth count of that ruling that dealt with the unconstitutionality of the zoning in terms of Mr. Tobin's property, how do you propose to address that in terms of zoning for the Master Plan?

**Smith** presumes while not being privy to the original lawsuit and negotiations, that Tobin made the argument that he couldn't do anything to recoup his investment. With a very property rights leaning judiciary in this part of the state, they often will side with the property owner when it comes to robbing the potential value. There is often speculative purchasing of land, with the argument that if a municipality is not willing to negotiate (i.e. I will extend your sewer if you rezone my property), sophisticated developers know how to challenge this and say that they are not being allowed to do anything. If you find a sympathetic judge, you lose.

**McLaughlin:** it seems that we need to consider a codicil for conditional rezoning; and this is not a method that has been tried in Michigan courts, so how do you intend to deal with that?

**Smith** says that his zoning experts are involved in litigation for this all the time; that they will, for example, look at Milford's Township's zoning ordinance, which has been challenged repeatedly over 20 years. He gives an example of someone who wants to build a 10-story office building in an R-1 zoning, they can't challenge the fundamental standing of the zoning ordinance. The Supreme Court has upheld a number of times a local jurisdiction's ability to apply a zoning ordinance.

**McLaughlin** claims that is exactly what happened in the Tobin situation.

**Smith** responds that you have to look at the context of speculative buying, the judicial environment, and the fact that you entered into negotiation. The biggest thing that he read was that it wasn't the zoning ordinance but a violation of due process, which jumps out to him as procedural.

**McLaughlin** has a different perspective; that it certainly never came up in court that there were minor procedural issues in the ten plus years they've been in court on this.

**Smith** is not thinking they were minor, they were probably pretty major. **McLaughlin** states that actually none of the counts had anything to do with procedural aspects on the ruling, so that's the confusing aspect. **Smith** questions that if her interpretation of the judge's ruling is that their R-1 designation was not constitutional. He didn't interpret that as being the case at all. He offers to have his zoning expert write a memo as to what all of it means. He indicates that this would be a Benzie County judge challenging 75 years of historical precedent from the federal level, which would generally be struck down several times

over, as there is a long history of upholding municipal zoning ordinances.

**Ogilvie** brings up the topic of Euclidean zoning versus Form-based Zoning and asks what Smith what he would call this current draft. **Smith** calls it a Graphic interpretation of the Euclidean zoning ordinance, confirming that it is still proscriptive. He describes form-based zoning as the way cities evolved historically with businesses on the ground floor and living spaces up above in a mixed-use district. Over time our central cities have disintegrated, activities have gone away from the developed urban core, communities have put in hundreds of millions of dollars in infrastructure to service industries that move out of central cities and then move away, there has been a complete sprawling of urban centers across the state and country. The idea of form-based code is to not separate so many uses; to look at how the private realm relates to the public realm and how buildings relate to one another. **Ogilvie** has a copy of The Smart Code as the template for a form-based zoning ordinance. This is a fairly new invention, so there isn't a lot of legal precedent on it. **Smith's** assessment of the potential pitfalls of form-based code is that somebody can challenge it, just like anything else. But he feels that because it is so detailed there is not a lot to challenge. In light of the skittishness about lawsuits it is the clearest definition that you can provide and he feels that this gives the most legal cover. In response to a question by **Ogilvie** about what happens in a non-conforming situation, **Smith** replies that non-conforming buildings or lots could not change use unless they meet the requirements. That's where he needs direction. While one of the difficult things in being a planning commissioner or city council person is that sometimes you have to say no to the person who lives next door to you, ultimately there is protection is in being able to say that the ordinance is legal and by following all the procedures, you have to say no. How much flexibility do you want? How much protection do you need?

**McLaughlin** states that the interesting scenario that **Smith** just painted was the clearest case of what exactly happened in the Tobin situation and that the thing she's learned is that nothing is above being challenged legally. The aspect to her that was so amazing, was that the ink was barely dry on the current Master Plan when it began to be challenged. Mr. Tobin had just purchased his property and clearly knew what that zoned piece of property was. So, whether it is form based or Euclidean, the thing that kept the lawsuit at bay for so long was the community's support of upholding the Master Plan. Because the community was engaged in the Master Plan process and clearly recalled that residential areas were to be sacrosanct. She feels that the issue is that outside entities have very deep pockets while municipals and small non-profits don't; and that it doesn't matter what is done, what matters is how much the public is engaged so that no matter who sits on this side of the bench or on the council, everybody understands where they are going to stand together on these issues.

**Smith** agrees, adding that while she may doubt the level of engagement, they have been at this for 19 months and he's worked with municipalities of 500,000 people that don't have this level of engagement. There are 1400 people who live here. Short of going door-to-door, from an outsider's point of view, the dialogue has been outstanding and can be held up as a model. As to her point about zoning, anyone can sue you at any time. Some of it depends on money, some on context and some on judges. The key aspects the community told him were important were put into language that can become the zoning ordinance. It is his opinion that the form-based code is a better mechanism, but that is for them to decide.

**Ogilvie** asks planning commission to indicate what kind of zoning ordinance they want. **Martin** feels that they should stick to the conservative-based, tried and true system that has worked. If they try these new ideas they may find themselves in a similar situation. **Storrer** asks if what they have so far is a modified Euclidean .

**Smith** explains that he took aspects of the Smart Code and introduced that into Frankfort's traditional Euclidean mindset. The existing zoning ordinance is a very obtuse document, so he put together a use matrix to indicate permissible use in each district. He gives examples of the level of specificity needed.

**McLaughlin** asks if it is feasible to take one of the districts and write up 3 different general proposals so that people can see the differences. **Smith** recommends going online to [formbasedcodeinstitute.org](http://formbasedcodeinstitute.org) to download a template. It's not a quick thing he can do over a weekend. He has to worry about investing hours going down the wrong path. **McLaughlin** explains that is why she is suggesting this so they aren't going into this blind; that they need a general guideline and example of the basic differences.

**Condon** asks if they are really going to be comfortable moving forward with a complete form-based zoning that is not going to be held up in a Michigan court? She is leaning towards meeting in the middle or going back to the Euclidean.

**Storrer** is satisfied to take the best of both. We don't want to be pioneers- leading edge can be

bleeding edge – but to take the best of both, as Chip has been doing.

**Ogilvie** describes the city of Fremont (MI) form-based coding, where they are trying to look like the village they used to be without giving up the opportunity for mixed use in their downtown to keep it viable with residential, manufacturing and industrial components. What the public likes about Frankfort is definable; he is not sure he's opposed to form based coding.

**Smith:** The only city in the country that has a full form-based zoning ordinance is Miami, Florida, but communities all over use form-based in certain districts. He says they can steal from how form-based code is presented, such as the use matrix and more graphic zoning ordinance, and weave the elements together.

**Ogilvie** touches on the amount of time spent on environmental issues in the Master Plan, such as steep slope; wetlands, waterway ordinances; that there is a big range as to how restrictive you are, how much regulation the community can stomach.

**Smith** says that taking the biomass statement out will not affect the work that much.

**Ogilvie:** Public comment will be taken until March 6<sup>th</sup>. **Storrer** has received 9 letters. There is a display ad going into the newspapers for stimulating more public comment. Ogilvie received an email that indicated they were doing something that was not disclosed. They have disclosed everything and are asking for all public comments. They are not afraid of being confronted or criticized. They are working for the people, not for themselves.

**Storrer** adds that they will be looking for the trends and collate so that the planning commission can decide what to do with these items. Input needs to come in written form, including date, topic, etc.

**Smith** says that the important thing is that as they get into the more complicated districts, they get those comments collated and be very specific as to what they want him to do.

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**Horizontal review” of Draft Master Plan residential zone provisions – Pat Storrer.** In the Section called guidelines, she found it hard to compare districts with each other, so she drew up a matrix to make it easier to see any holes, misinterpretations, errors, etc. She cites specific examples. **Smith** clarifies that where there are seeming omissions it, is intentional. There is rationale for all of it. **McLaughlin** asks if that would that explain why the biomass came in as a focus for the industrial area.

**Smith** explains that the whole reference to biomass came from a workshop held last summer at the height of the governor's push for green jobs and clean energy jobs. These goals represent what he heard; he just needs to hear that's not what they want him to do. Responding to a remark from the audience “that's what we are here to do”, Smith explains how it works is that the Planning Commission is his client; the citizens have to tell them and they will tell him.

**Ogilvie**, referring to horizontal review, explains that this satisfied their yearning to have it laid out in some kind of a sequential understanding so they don't have that nagging question: did I forget something?

**Smith** says that is inevitable. It's not a light, easy thing to read or write. His job is to listen to what they want, give them the pros and cons, and they make the decision. If he seems to be advocating for something, he is pushing them to get the wider dialogue. He suggests that they think about a form based code and think about very restrictive wetlands.

**Ogilvie:** The County has recently rescinded their master plan and zoning ordinance affecting seven townships, including our neighbor Crystal Lake Township. What should be our response as a city?

**Smith:** Because Frankfort is a resort destination and the key to the sustainability is natural resources, he would be looking at topography, wetland , and water-use issues. Essentially, their renunciation of zoning impacts the Bay, Frankfort's meal ticket. 90% of the community supports collaborative planning for the health of the Bay. There is a symbiotic relationship that is always going to be there. There are avenues you can explore depending on whether you want to be an aggressive city. You need to have that conversation that says what you care about is the impact of development on the watershed. It is a financial argument. When you have a sensitive resource that is the key to your future, economically and culturally, you have to take steps to preserve that. The efforts made with Elberta as it impacts the Bay are a great model.

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#### **Public comment on agenda items only**

**Thelma Novak-Ryder** comments that these people have showed up tonight because they do not want biomass on the master plan, asking “what do we have to do to get biomass off of the master plan?”

**Ogilvie** replies that it is a form of alternative energy they are interested in. When Novak-Ryder presses

him to describe who is interested in it, Ogilvie replies "I am." **Novak-Ryder** replies that he is one person and that her understanding is that this master plan is to reflect the majority of the community. "Do I need to FOIA you for the document where the majority of the people said they wanted biomass on the master plan?"

**Ogilvie** states that at two meetings he can recall, there was a discussion about alternative forms of energy in a public, open meeting and that they included it because it is a recognized form of alternative energy generation.

**Novak-Ryder** responds that it might be recognized but it wasn't one that the majority said they wanted. **Ogilvie** interjects that there wasn't a vote. **Novak-Ryder** accuses Ogilvie of saying that it is a non-issue and **Ogilvie** denies saying it.

**Storrer** advises Novak-Ryder to describe what she wants done in writing by March 6<sup>th</sup> with additional signatures if she prefers. **Novak-Ryder** asks how many signatures are needed before they will consider it the majority? **Storrer** explains that the committee will compile all the work and look for the trends; then the Planning commission as a whole will decide what to do with this and all other issues. **Novak-Ryder** asks if there are more people who say they don't want it on there, is that that's the way it will go? **Storrer** says that it depends on how the commission will vote. **Novak-Ryder** implies that she is saying that the commission can override the public majority.

**Ogilvie** interjects, "that's enough, we are not going to have any more conversation on this" to which **Novak-Ryder** responds "and that is exactly why you never have people come to these meetings. You saw them tonight, they came with an issue and they came for a reason and you shut them down because you can't come up with the democratic answer, you come up with what you as a commission want to do. It's not what the public, people, the majority of the public want, it's about what you want to do. Thank you".

**Van Dussen** comments on the Tobin issue and Judge Batzer's ruling stating that The Friends of Betsie Bay have filed a motion for reconsideration that was denied and prior to that they had requested all the transcripts for all their hearings for their appeal which will take place 21 days after Judge Batzer's determination. On the determination of Batzer's ruling, he agrees with Smith that the negotiation was the problem that opened the city up to the lawsuit. Regarding the Alternative energy issue, what is alarming to him is the specific language in the zoning ordinance. The concern is how that discussion got into this document as a priority and a focus for a biomass plant to be placed in an industrial portion of Frankfort. People want an explanation.

**Ogilvie** responds that they don't have a vote on every thing in every paragraph in the Master Plan; that it is a consensus process. He explains that one person, a man from SE Michigan stood up and said they put a biomass plant in his community. They concurred that it was something to explore as an interesting way to get rid of waste and create heat and electricity as we have an industrial park that is practically empty. Maybe someone might bring a plant here.

**Smith** adds that there are a lot of goals and objectives in there. If it wasn't correct, that's why we have a review process. Knowing this planning commission I might get direction following the compilation of comments to strike out prioritizing biomass in that sentence.

**Ogilvie** continues that if this Planning Commission didn't have alternative energy of any kind in the Master Plan and somebody comes along who wants to put up a community wind tower, they would have to amend the master plan and zoning ordinance and fight the battle about how to put up huge towers and get bogged down in nitty-gritty detail. It is much easier to mention that there are 3 or 4 types of alternative energy available in our Master plan. If we have ordinance language to support it then we have a basis as a Planning Commission for dealing with it. If we don't we have to go back to square one.

**Condon:** could we not say something along the lines of including but not limited to wind and solar, and just say alternative energy? We are caught up in.... **Ogilvie** interjecting, "we are caught up in a polarized environment in which one small public utility company is thinking about a biomass plant. I bet not one person in this room has actually seen a biomass plant. **McLaughlin** indicates that she has pictures and aerial views of the one in Cadillac.

**Ogilvie** asks if anyone in the room has been to Dusseldorf, Germany; if anyone likes to walk on clear streets that don't have to have a plow or salt ever touch them... that nobody pays an electric bill in Dusseldorf Germany... "Have you ever seen it?"

**Van Dussen** asks if he can finish his public comment. **Ogilvie** continues "Do you know how far north Dusseldorf Germany is.?"

**Mary Armstrong:** questions what that has to do with it to which **Ogilvie** responds that it is a biomass plant. **Armstrong** interjects "and 90% of its forest is diminished because of it".

**Ogilvie** replies that it is not using one piece of wood and that he is responding to Mr. Van Dussen.

**Van Dussen**, interjecting to finish his public comment, points out that wind and solar are mentioned in the bullet point preceding biomass but there's no language to put a wind tower or wind turbine up on the hill or anywhere else in Frankfort. There is not a priority... **Ogilvie**: "How do you know it wasn't there originally?" **Van Dussen** continues that in this draft what it seems to be a priority for this planning commission throughout this Master Plan is to go out and seek entrepreneurs to come in and put a biomass plant in the industrial portion of Frankfort and that if that's the position of this Planning Commission, then that that should be stated by each one in a vote on that specific issue.

**Ogilvie**: it may come to that. **Van Dussen**: "I guarantee it's going to come to that. That's why I'm here, because the public is concerned and has been calling me all day, so I think that it's of great concern and I think people should, like you're saying, write in comments about this issue".

**Ogilvie**: I was a great debater in high school and college and I am willing to take any position on it.

**Mary Armstrong**: couldn't we just use "alternative energy" instead of enlarging it? And my other comment is why would one comment from someone from SE Michigan be put in our Master Plan?

**Smith** offers to throw out how the process works since many did not participate in any of the sessions. One of the things they expressly tried to do was include people that vacation here, spend money and shop here and are a part of the economy. He thinks that the public here tonight is giving the Planning Commission some pretty clear direction and he asks them to trust that they will act in the best interest of the community; that they will give probably give him the direction they are asking for when they finalize this draft. To follow up on one other point, he states that this is not majority rule or else it would still be okay to redline and exclude minorities from the community. What they have tried to do is listen to what everybody said to create sustainable economic and environmental conditions. Perhaps the Planning Commission will tell him he has given too much weight to it. He thinks it's a safe assumption. What everybody has done here tonight has been an important civic exercise in saying that they read the plan and caught this on pg.63 and don't like it; take it out. That message is pretty loud and clear.

**Ryan-Stoltz** asks if Wade Trim or anyone else can provide the same kind of comparison for a horizontal review with the form-based zoning as McLaughlin requested.

**Ogilvie** responds that he has; that they aren't going to ask Wade Trim to do a lot of other additional work outside of their contract.

**Smith** suggests that for folks who are not familiar with Smart Code, these may seem like semantic differences but they are actually structural differences and a very detailed process. The reason he is hesitant to do a mock up is because of the budget since that exercise alone could easily cost \$5000. He advises everyone to go to the Form-Based Code Institute to look at the code and see how other communities have done it as an interesting exercise to engage in and to give feedback to the Planning Commission. A pdf will be set up on the website.

**Bob Dittrich**: acknowledges the Commission for an outstanding job and points to the dynamic that was going on, concerned that we may face more of it. He suggests that the community may be able to come away from an us vs. them to a let's do this together kind of process and encourages all to think about how to do that as we are all after the same goal. He sees a need to turn that energy of caring for our community into a productive kind of discussion as opposed to "I want my way and your way is wrong". He is concerned that we are at a critical point where things could go very well or get very messy.

**Smith** adds that it is really easy to pack a room full of people who don't like something. There is going to be a public hearing in April and they need people who support the idea of the Master Plan to come out and say that. There are going to be people who don't like things who come out and that skews everybody's perception about what's been done leading up to it. He asks that people who support it, to come out in April and affirmatively say that they are proud of where we've come. **Dittrich** continues that everyone has had a positive impact on the process and that we are now a little more invested in what the product is going to be.

**Van Dussen** suggests a discussion of the pros and cons of biomass and that they can use a model of what the Traverse City L&P is investigating for a discussion.

**Ogilvie**, responding "If necessary". He wishes a company would come in with a proposal for a biomass plant to facilitate a discussion.

**Ryan-Stoltz** refers to an email she received that the biomass proposal was wood and that Ogilvie said earlier that Dusseldorf doesn't use any wood products, questioning the comparison.

**Ogilvie** says that he does not know how to answer that question; it is too vague; too big; that Dusseldorf is Dusseldorf and Frankfort is Frankfort and that we are not planning to build a biomass plant.;

that if we were going to build one, it would have been made public.

**McLaughlin** supports Van Dussen's plan of action to consider that we look at having some kind of community discussion on alternative energy so people can come together; that whether they are bringing up negative issues, it's a positive aspect of the collective whole that they get this input. Referencing the effort to put ads in the paper to get input, she advises the commission to process that input in a way that gives people a sense of contribution. She suggests that this issue be put on the agenda for March 9.

**Ogilvie** is not sure they can have a complete discussion on March 9 on alternative energy, simply because the agenda is already full. **McLaughlin** clarifies that she is not asking for a complete discussion but to have some kind of public format on the agenda for discussion on March 9.

**Joanne Holwerda** compliments the Planning Commission as a resident of 29 years, stating that there has never been this much work that has gone into the process before and that "it is up to us as individuals to take notice". Repeating what Smith said that it is easy to fill a room when there is a negative, she feels that this commission needs to be applauded. [Applause]

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**Motion to Adjourn moved by Condon; seconded Larson; all ayes; Motion passed. Meeting adjourned 9:04pm**

Next Meeting: 9 March 2010: Regular Meeting at City Hall, 7 pm, Committee Meetings as posted:

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Commissioner Handouts: Draft Minutes for 9 FEB 2010, Consent Agreement discussion Tobin et al vs. City of Frankfort, Draft Zoning Ordinance transmittal from Chip Smith, 19 FEB 2010