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VIA E-MAIL

Dane County Zoning and Land Regulation Committee (ZLR)
c/o Roger Lane, Dane County Zoning Administrator
Room 116, City-County Building
Madison, WI 53703

Re: Conditional Use Permit #2578

Dear Members of the ZLR:

Along with my colleagues at Husch Blackwell LLP, I represent Iron Mountain Towers d/b/a TowerKing. This letter responds to a letter from Roger Lane to Derek McGrew dated March 7, 2023, regarding Conditional Use Permit #2578.

In that letter, Mr. Lane informed Iron Mountain that John Matson raised safety concerns about CUP #2578; that the CUP "is found to be defective"; and that, as a result, the CUP "has been placed on the March 14, 2023 [ZLR meeting agenda] for discussion and possible reconsideration at a future meeting."

As explained in detail below, the ZLR cannot reconsider its decision to grant the CUP. And, even if it could, the ZLR cannot deny the CUP for the reasons articulated in Mr. Lane's letter or based on Mr. Matson's concerns.

I. Any reconsideration of the CUP grant would be improper and untimely.

The Dane County Zoning Ordinance provides a specific mechanism for challenging a decision of the ZLR to grant a CUP. Specifically, "[a]ny person aggrieved by the grant or denial of a [CUP]" to "appeal [that] decision . . . to the Dane County Board of Adjustment." Dane Cnty., Wis., Code § 10.101(7)(c)4.a. And an aggrieved party must file an appeal "within 30 days." *Id.* § 10.101(7)(c)4.b.

The ZLR granted CUP #2578 with an effective date of December 13, 2022. Mr. Matson alleges he was aggrieved by the ZLR's decision to grant the CUP. To raise his objections, he had to appeal to the Board of Adjustment within 30 days. He did not.

The Zoning Ordinance contains no provision authorizing the ZLR, either on its own or at the request of a person aggrieved, to reconsider a prior decision that was not timely or properly appealed—particularly after the time for appeal has lapsed. If it were to now reconsider its decision to grant the CUP, the ZLR would wholly disregard the Zoning Ordinance's mechanism for challenges to decisions and would exceed its own authority in the process.

II. Under the state Mobile Tower Siting Law, the County cannot require an applicant to notify nearby airports.

Wisconsin statutory law sets parameters for municipal regulation of tower siting. *See* Wis. Stat. § 66.0404. "A political subdivision," including a county, "may regulate the activities described under par. (a) *only* as provided in [section 66.0404]." *Id.* § 66.0404(2)(h) (emphasis added). "Par. (a)," in turn, includes "[t]he siting and construction of a new mobile service support structure and facilities." *Id.* § 66.0404(2)(a)1.

Section 66.0404(2)(b) enables political subdivisions to "prescribe the application *process*." (Emphasis added.) But application *content* is controlled by statute. In particular, paragraph 66.0404(2)(b) enumerates six items that an application must contain. An application that "contains all of [that] information required under par. (b)," in turn, "shall [be] consider[ed] . . . complete." *Id.* § 66.0404(2)(c).

In short, the Mobile Tower Siting Law sets both the floor and the ceiling for what a political subdivision can require an application to contain. Notice to nearby airports is not part of the statutory list. The County cannot require it, and a decision to deny a CUP on that basis would be unlawful.

III. The state Mobile Tower Siting Law precludes reconsidering the application's completeness.

Even if the County could require an applicant to provide notice to nearby airports as part of an application, it cannot now change its decision to grant CUP #2578.

The state Mobile Tower Siting Law supplies a specific mechanism, within a strict timeline, for a political subdivision to notify an applicant of an incomplete application. In particular, "[i]f the political subdivision does not believe that the application is complete, the political subdivision shall notify the applicant in writing, *within 10 days of receiving the application*, that the application is not complete. The written notification shall specify in detail the required information that was incomplete." Wis. Stat. § 66.0404(2)(c) (emphasis added). Put differently, if the ZLR believed Iron Mountain's application was incomplete, then the ZLR had to notify Iron

Mountain of the specific missing information *within 10 days* of when the application was filed. Because ZLR did not do so, the application cannot now—especially *after* the ZLR already made a decision on the application—retroactively be deemed incomplete.

IV. Any decision to deny the CUP based on concerns about flight path or air safety would be preempted by federal law, state law, or both.

Mr. Matson expresses concern about Iron Mountain's tower on the ground that it is in the "path of the runway." If the ZLR were to deny the CUP on that or related grounds, the denial would be preempted by federal law, state law, or both.

Federal law defines "navigable airspace" to include "airspace needed to ensure safety in the takeoff and landing of aircraft." 49 U.S.C. § 40102(a)(30). Safety in navigable airspace is the "exclusive" domain of federal law. *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 639 (1973). "Federal law occupies the entire field of air safety, thereby preempting state regulation of that field." 8A Am. Jur. 2d Aviation § 25; *see Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400, 404 (7th Cir. 1974) (finding field preemption in airspace regulation); *Fawemimi v. Am. Airlines, Inc.*, 751 F. App'x 16, 19 (2d Cir. 2018) (same); *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1326 (10th Cir. 2010) (same); *Air Transp. Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 225 (2d Cir. 2008) (same); *Montalvo v. Spirit Airlines*, 508 F.3d 464, 468 (9th Cir. 2007) (same); *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 795 (6th Cir. 2005) (same). Indeed, "[c]ourts should more readily infer preemption in the field of aviation than in other fields because aviation is an area of law where the federal interest is dominant." *Lagomarsino v. Delta Airlines, Inc.*, 2020 WL 1955314, at *2 (C.D. Cal. 2020) (quoting 813 F.3d 718, 724 (9th Cir. 2016)).

"Congress, the Supreme Court, and [courts] have consistently stated that the law controlling flight paths through navigable airspace is completely preempted." *Nat'l Helicopter Corp. of Am. v. City of New York*, 137 F.3d 81, 92 (2d Cir. 1998) (citing *British Airways Bd. v. Port Auth. of N.Y. and N.J.*, 558 F.2d 75, 83 (2d Cir. 1977) ("[L]egitimate concern for safe and efficient air transportation requires that exclusive control of airspace management be concentrated at the national level.")). Runways, as a practical matter, cannot be used for takeoffs and landings without affecting flight paths through navigable airspace.

In addition, Wisconsin Statutes section 114.135 provides a comprehensive mechanism for owners of airports to obtain airspace "protection" in the vicinity of the airport. To obtain such protection, an airport owner must follow the statutory procedure and compensate affected landowners. There is no evidence that Mr. Matson ever did so here.

Section 114.135, along with Administrative Code chapter TRANS 56, also regulates "tall structures." Anyone proposing a tall structure must obtain approval from

the Secretary of Transportation. Here, the Secretary of Transportation opined that Iron Mountain's tower was not a "tall structure" requiring state approval.

Given the pervasive federal and state regulation of airspace, air safety, flight paths, and tall structures, there is no room for a local government to regulate to the same ends. Preemption principles govern to the exclusion of municipal regulation. *See Jackson Cnty. v. DNR*, 2006 WI 96, ¶¶ 19–20, 293 Wis.2d 497, 717 N.W.2d 713 (holding that state law preempts local law when "(1) [ ] the legislature has expressly withdrawn the power of political subdivisions to act; or (2) [ ] the political subdivision's actions logically conflict with the state legislation; or (3) [ ] the political subdivision's actions defeat the purpose of the state legislation; or (4) [ ] the political subdivision's actions are contrary to the spirit of the state legislation"). The ZLR may not deny the CUP based on concerns about flight path or air safety.

Sincerely,

HUSCH BLACKWELL LLP

/s/ Joseph S. Diedrich

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