



DANE COUNTY PLANNING & DEVELOPMENT

Room 116, City-County Building, Madison, Wisconsin 53703
Fax (608) 267-1540

July 2, 2014

Staff Report for Petition 10672 / Conditional Use Permit 2270

Property Owner: Stoughton Farms, Inc.

Property Location: South of 3768 Old Stage Road, Section 34, Rutland

Proposed Zoning: A-1EX (Exclusive Agriculture) to A-2(8) (Agriculture)

Proposed Conditional Use: Conditional Use Permit for a 486' Communications Tower

Proposal Summary: Magnum Communications is requesting a zoning change to A-2(8) and a conditional use permit for a new 15.5 acre parcel on which to site a communications tower. Applicant proposes to construct a 486-foot tall FM broadcast radio tower on the property for relocation of existing station WBKY FM (95.9, "Bucky Country"), currently located in Portage, WI. The applicant has obtained the required FCC licenses for the proposed relocation.

In accordance with FCC guidelines to ensure non-interference with adjoining FM frequencies, the tower must be located within an approximately 16 square mile area that includes portions of five sections in southern Rutland, and numerous sections in the town of Union, Rock County (see attached "area to locate / transmitter placement window" map). The proposed site is approximately 2,000 feet south of Old Stage Road, adjacent to a significant wooded area to the southeast, farmlands to the west, and numerous rural residential properties to the east and north.

Planning

(608)266-4251, Rm. 116

Records & Support

(608)266-4251, Rm. 116

Zoning

(608)266-4266, Rm. 116



This report includes the following sections:

1. Background
2. Decision-Making Considerations (pg 2)
3. Summary of Common Tower-Related Issues (pg 6)
4. Relevant Town / County Comprehensive Plan Policies (pg 8)
5. Radio Frequency Engineering Summary (pg 10)
6. Staff Recommendations (pg 11)

1. Background – previous petition 10275 / 2157

In 2011, Magnum Communications petitioned to create the same 15.5 acre A-2(8) parcel with a conditional use permit for the FM broadcast tower. The ZLR Committee held two public hearings in January and March 2011 on previous petition #10275 / CUP 2157.

The proposal generated significant opposition from residents in the area, with scores attending the town meetings on the proposal and also submitting oral and written comments in opposition to the ZLR committee. Those opposed to the tower expressed numerous concerns, including negative impacts on:

- property enjoyment and values
- aesthetics and rural character of the town
- nighttime light pollution
- bird kills associated with tall, guyed line towers

The proposal also generated significant support, evidenced by numerous letters of support from individuals and officials from the neighboring communities of McFarland, Oregon, Stoughton, and Verona. Supporters pointed to the benefits a radio station would bring to the southern Dane County area, including:

- coverage / promotion of local news, sports, and community events
- providing public notification assistance to public safety agencies during emergency situations
- providing area businesses and organizations with improved access to customers

Staff noted issues regarding consistency with town and county comprehensive plan policies, and also concerns regarding the potential negative impact on migratory bird populations.

The previous rezoning petition and conditional use permit application were denied by the town of Rutland board on May 3, 2011. The county zoning committee recommended denial of the rezoning petition at its August 9, 2011 meeting, and presented the following findings of fact in support of its action:

Findings of fact from 8/9/2011 ZLR Committee Meeting Minutes

“The property is located in an agricultural preservation area in a certified farmland preservation zoning district, has a history of farming activity, and consists primarily of class I, II, and III agricultural soils. The proposed zoning change and conditional use for an FM radio broadcast tower is essentially a commercial use that is inconsistent with an agricultural preservation area.

The proposal is inconsistent with goals, objectives, and policies of the *Town of Rutland Comprehensive Plan* component of the *Dane County Comprehensive Plan*, which call for preserving the agricultural and rural character of the town, avoiding or minimizing potential conflicts between incompatible land uses, and limiting commercial uses to rural-oriented businesses that provide services needed by residents of the town.

The proposed rezoning would not satisfy two of the four required statutory standards for rezoning land out of a farmland preservation zoning district as enumerated in s. 91.48(1)(a)(1), and (2) Wis. Stats. Specifically, the land is *not* better suited for a use not allowed in the farmland preservation zoning district; and the rezoning is *not* consistent with the applicable comprehensive plans.”

The committee took no action on CUP 2157 since the county board ultimately denied the proposed zoning change on August 18, 2011. The applicant filed a Certiorari action claiming that the town’s denial of the rezone and CUP were arbitrary and capricious. The applicant also sought to have the court retroactively apply the changes in the statute regarding local regulation of communication towers. The court declined to retroactively apply the new law and dismissed the certiorari action. No appeal was filed and it is now a final judgment.

2. Decision-Making Considerations

Town of Rutland action

The town of Rutland has disapproved the proposed rezoning petition. As indicated in the attached opinion from Dane County Corporation Counsel, the ZLR Committee, “...does not have the discretion to disregard or ignore the town’s disapproval.” In accordance with section 59.69(5)(e)3, the ZLR “may not recommend approval of the petition without change, but may only recommend approval with change or recommend disapproval.”

State statutes

The state biennial budget bill included significant new limitations on the authority of local units of government to regulate the siting of radio broadcast facilities (s. 66.0406).

Section 66.0406 of the state statutes includes the following limitations:

Wis. Stats. sec. 66.0406:

(2) LIMITATIONS ON LOCAL REGULATION. Beginning on May 1, 2013, if a political subdivision enacts an ordinance, adopts a resolution, or takes any other action that affects the placement, construction, or modification of radio broadcast service facilities, the ordinance, resolution, or other action may not take effect unless all of the following apply:

- (a) The ordinance, resolution, or other action has a reasonable and clearly defined public health or safety objective, and reflects the minimum practical regulation that is necessary to accomplish that objective.
- (b) The ordinance, resolution, or other action reasonably accommodates radio broadcast services and does not prohibit, or have the effect of prohibiting, the provision of such services in the political subdivision.

(3) CONTINUED APPLICATION OF EXISTING REGULATIONS. If a political subdivision has in effect on May 1, 2013, an ordinance or resolution that is inconsistent with the requirements that are specified in sub. (2) for an ordinance, resolution, or other action to take effect, the existing ordinance or resolution does not apply, and may not be enforced, to the extent that it is inconsistent with the requirements that are specified in sub. (2).

(4) DENIAL OF PLACEMENT, CONSTRUCTION, OR MODIFICATION OF FACILITIES. If a political subdivision denies a request by any person to place, construct, or modify radio broadcast service facilities in the political subdivision, the denial may be based only on the political subdivision's public health or safety concerns. The political subdivision must provide the requester with a written denial of the requester's request, and the political subdivision must provide the requester with substantial written evidence which supports the reasons for the political subdivision's action.

Wis. Stats. sec 91.48:

Rezoning land out of A-1EX (Exclusive Agriculture)

The A-1EX district is a state-certified farmland preservation zoning district. As specified in s. 91.48(1) Wis. Stats. and s. 10.123(12) Dane County Code, land may only be rezoned out of the A-1EX district if all of the following findings are made by the zoning committee after a public hearing:

1. The land is better suited for a use not allowed in the farmland preservation zoning district.
2. The rezoning is consistent with any applicable comprehensive plan.
3. The rezoning is substantially consistent with the county certified farmland preservation plan.

4. The rezoning will not substantially impair or limit current or future agricultural use of surrounding parcels of land that are zoned for or legally restricted to agricultural use.

The town of Rutland disapproved the proposed rezoning finding that the first two standards were not satisfied.

Please refer to the attached opinion from corporation counsel regarding the applicability of the relevant state statutes.

County zoning ordinance

The proposed 15.5 acre parcel necessitates a change in zoning classification from A-1EX (Exclusive Agriculture), to A-2(8) (Agriculture), and approval of a Certified Survey Map. Communication towers are a conditional use in the A-2 district.

As noted above, the ZLR Committee denied the previous rezoning petition finding that the proposal did not satisfy the first two standards of s. 91.48(1). The current zoning petition will be subject to review against the same standards.

Conditional Use Permit procedure

Normally, when granting CUPs, the ZLR committee and respective town board need to find that the proposed conditional use satisfies the following six standards outlined under §10.255(2)(h) of the D.C. Ords.:

1. That the establishment, maintenance, or operation of the conditional use will not be detrimental to or endanger the public health, safety, comfort or general welfare.
2. That the uses, values and enjoyment of other property in the neighborhood for purposes already permitted shall be in no foreseeable manner substantially impaired or diminished by establishment, maintenance or operation of the conditional use.
3. That the establishment of the conditional use will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district.
4. That adequate utilities, access roads, drainage and other necessary site improvements have been or are being made.
5. That adequate measures have been or will be taken to provide ingress and egress so designed as to minimize traffic congestion in the public streets; and
6. That the conditional use shall conform to all applicable regulations of the district in which it is located.

However, because of the statutory limitations placed on local regulation of radio broadcast facilities, it's likely that all six of the CUP standards cannot be applied to the

conditional use permit application for the FM broadcast tower. As noted above, local regulation is limited to public health and/or safety considerations. Staff is working with the corporation counsel's office to determine which, if any, of the CUP standards the ZLR Committee should apply to the review of the CUP application.

Consistency with Town / County plans

The petition is subject to review for consistency with the relevant goals, objectives, and policies of the *Town of Rutland Comprehensive Plan* and the *Dane County Comprehensive Plan*. Section 4, below, provides a listing of relevant town / county plan goals, objectives, and policies.

3. Summary of Tower Related Concerns / Issues

There are a number of issues that are commonly associated with the siting, operation, and maintenance of communication towers. Below is a summary these issues in the context of the FM radio tower proposed under CUP #2270.

Air navigation. The site is not within 5 miles of any public airport nor is there any privately operated airstrip within 3 miles. At the proposed height of 486' feet, Federal Aviation Administration (FAA) notification is required. The applicant filed for and has received an FAA "determination of no hazard to air navigation". The applicant has also received similar authorization from the WI Bureau of Aeronautics to construct the proposed tower at this location.

Fall-down radius. The fall-down radius is essentially the area around a tower that could be affected in the event that the tower fell down. For the previous petition, the applicant submitted a letter from a structural engineer regarding the "folding" design of the proposed tower in the event of a catastrophic fall down:

*"Due to the slenderness of the guyed tower mast in relation to the tower's height and considering the special factors of safety incorporated in the guys and their foundations, the expected failure mode would be buckling of tower mast leg members in the unlikely event of a collapse. Should gross failure of any one guy anchor occur, the outer guys anchored in the same row will prevent the tower mast from falling straight over. With this occurrence, the mode of collapse for this structure is expected to be a folding configuration with the majority of the tower mast falling within a radius from the mast base out to **25% of the tower height or 122 feet**. Some limited portion of the mast and other scattered debris could be expected within a radius from the base out to 50% of the tower height or 245 feet. For any distance beyond this we would only expect some light debris and only a part of the mast under an extremely unusual set of circumstances.*

Ice-fall radius. During the winter months, ice can build up on towers and subsequently melt and fall off the tower affecting the ground and structures in close proximity to the tower. Falling ice can drift further from the base of a structure due to strong winds, including "riding" down guyed wires, thus potentially impacting a wider area than that immediately around the base of the tower. The previous RF engineer's report

recommended that “ice breakers” be installed on the guyed wires to minimize the potential for ice-fall.

Visual aesthetics. This is a highly subjective issue and one of the most significant points of contention associated with new communication tower requests. The tower would be visible from many residences in the vicinity. The applicant has obtained FAA approval for an alternative lighting configuration that reduces the number of night time lights from 4 to 2.

Negative impact on property values. The installation of a tall communications tower can potentially have a negative impact on neighboring property values. An objective and quantitative evaluation of this issue is beyond the expertise of county staff. Nonetheless, neighboring property owners often site concerns with loss of property value as a primary issue.

Migratory bird populations. Research has shown that communications towers can result in significant migratory bird mortality rates. The US Fish & Wildlife Service (USFWS) has submitted a set of communications tower siting guidelines that include recommendations to mitigate the negative impacts on migratory birds. Bird collisions with towers are affected by a number of factors, including location of towers within migratory “fly ways”, weather patterns, tower lighting, and the use of guyed wires.

The property is located within one mile of two large tracts of publicly owned natural resource areas: the WI DNR-owned Badfish Creek State Wildlife Area (to the east), and the USFWS-owned Harvey’s Marsh Waterfowl Production Area. DNR and USFWS staff had previously expressed concerns with the potential impact of the tower on migratory bird species and waterfowl. The concerns were primarily related to the increased incidence of migratory bird mortality associated with taller guyed towers with steady burning night time lights. USFWS has produced siting guidelines for communications towers that are intended to mitigate, to the extent possible, the negative impacts on migratory bird species. Essentially, the USFWS prefers that shorter, unlit, and unguyed towers be developed wherever feasible. However, in an email dated 10/25/2012, Jim Lutes of the USFWS indicates that, if taller, guyed towers are necessary, then eliminating the use of steady burning lights can significantly reduce the incidence of migratory bird mortality. As noted above, the applicant has obtained FAA approval for an alternative lighting configuration that will employ “flashing red obstruction” lights (30 flashes / minute) at two locations on the tower (top and mid-tower), instead of the standard FAA requirement of steady burning lights at 4 locations on the tower. Additional research and consultation with outside experts may be needed to effectively ascertain the potential impact of the proposed tower on migratory bird populations.

Electromagnetic radiation. The issue of electromagnetic radiofrequency (RF) emissions is commonly raised in response to communication tower proposals. However, an evaluation of the issue is somewhat outside of the County’s jurisdiction given that there are no relevant County regulations; Department staff do not have the technical capabilities to evaluate and comment on this issue; and it is regulated and governed by

the FCC through the federal licensing and permitting process. This is a relatively low-density rural / agricultural area, which should mitigate any negative affects associated with RF emissions. If so desired, the Committee/County has the option of referring specific questions to the County's contracting RF engineering consultant, Evans Associates. Otherwise, the issue is deemed to be governed entirely by the FCC.

4. Relevant Town / County Comprehensive Plan Policies

The following is a preliminary list of the relevant / applicable policies contained in the *Town of Rutland Comprehensive Plan* and the *Dane County Comprehensive Plan*. As per the comprehensive plan consistency requirement enumerated in state statutes and county ordinance, the committee must consider the proposed rezoning and use in light of these plan policies and render a decision that is consistent with the adopted plans.

Town of Rutland Comprehensive Plan

The subject property is located in the town's Agricultural Preservation Area. Town goals and objectives for the agricultural preservation area include preserving agricultural land, existing farm operations, and the rural character of the town.

The town's overall land use goals and objectives include the following:

Goal 7 Land Use

Create a pattern of development that fosters the rural character and agricultural land preservation and that minimizes potential conflicts between incompatible land uses.

Objectives:

1. Maintain the agricultural land base to the greatest extent possible.
2. Minimize the negative effects of incompatible land uses.

Relevant town plan policies include the following:

Policies (note: numbers below correspond to the policies as they appear in the town plan)

2. Use open space areas as buffers between incompatible land uses, to protect environmentally sensitive lands, or to compliment other land development.
3. New commercial development adjacent to residential developments shall provide adequate open space, buffers, and screening.
12. Require buffers between incompatible land uses to minimize potential negative effects.

The town's policies on commercial development include the following:

2. In agricultural areas of the Town allow agricultural related commercial uses only if a rural location is required to serve farmers, and if it must be in proximity to a resource; if no prime agricultural land is used; and if wastewater can be adequately handled by a soil absorption system.
3. To limit any non-agricultural commercial or recreational use to small, rural-oriented businesses which provide services needed by residents of the town. Such uses must meet the following criteria prior to zoning approval:
 - a. Be consistent with agricultural policies for farmland preservation.
 - b. Have access to a state or county highway.
 - c. Shall not adversely affect the traffic capacity and safety of the highway.
 - d. Provide a buffer between the commercial use and any adjacent non-commercial use.
 - e. Not endanger the environment or groundwater of the area.
4. Encourage the provision of technology-based infrastructure such as high-speed Internet connections.

Town policies on environmental protection include the following:

Goal 11 Natural Environment

Protect natural resources and environmentally sensitive land from inappropriate use and/or development.

Objectives:

1. Minimize disruption to environmentally sensitive lands (e.g., wetlands, floodplains, recharge areas, riparian habitat, etc.).

Policies:

1. Identify and protect the unique natural resources such as: wetlands, woodlands, groundwater, and native prairies.
2. Protect scenic vistas from inappropriate development.
3. Ensure that floodplain areas are protected from development or filling to maintain their natural flood accommodation capacity.
4. Restrict development along stream corridors to protect riparian habitat, water quality, and aesthetics.
5. Protect rare and endangered species and maintain their habitat.
6. Support the efforts of landowners to keep natural areas from being developed by using conservation easements or other means.

Dane County Comprehensive Plan

Utilities and Community Facilities Element

Telecommunications Policies & Programs

1. Encourage Dane County communities to adopt enforceable guidelines for siting and removing telecommunications facilities.
2. Strengthen consideration of aesthetics in the building of towers (e.g., education, design competition, exhibits).
3. Maximize coordination of telecommunication facility needs with existing structures, buildings, water towers, etc.
4. Adopt ordinance requiring feasibility study of alternatives before allowing new tower construction.
5. Because Internet communication has become necessary in the conduct of commerce and provision of services in the county, promote countywide wireless Internet service (WiFi).
6. Encourage exploration of municipally owned telecommunication facilities to furnish wireless service to all areas of the county.

Agricultural, Natural, and Cultural Resources Element

Land Resources

B. Minimize encroachment and adverse impacts of utilities and transportation facilities on land and water resources in Dane County.

Wildlife Resources

F. Before approving any changes in zoning, consider the impact on wildlife habitat, potential locations of rare plant and animal species and archeological sites.

J. Preserve and enhance wildlife habitats through cooperation on acquisition and management of wildlife habitat in Dane County, maintaining large areas of open space in the county, and minimizing the disturbance caused by development.

5. Radio Frequency Engineering Report

The county's RF engineering consultant, Evans Associates, conducted a review of the proposed tower to determine compliance with the county communications tower ordinance. The consultant's report finds that the proposed tower complies with the technical requirements of the county tower ordinance and includes a number of recommendations (see attached report).

6. Staff Recommendations

In light of the town's disapproval of the rezoning petition, and based on the opinion of corporation counsel, the ZLR's options for action are limited. As indicated in the attached opinion from Dane County Corporation Counsel, the ZLR Committee, "...does not have the discretion to disregard or ignore the town's disapproval." In accordance with section 59.69(5)(e)3, the ZLR "may not recommend approval of the petition without change, but may only recommend approval with change or recommend disapproval."

If the ZLR committee chooses to recommend approval of the rezoning petition "with change" (amendment), note that, if approved by the county board and executive as such, the amended petition would be sent back to the town for final action as specified under sec. 59.69(5)(e)6.

The final paragraph of the corporation counsel opinion summarizes the options available to the committee: *"In conclusion, ZLR does not have the discretion to disregard the town's disapproval of the zoning petition. Section 59.69(5)(e)3 is explicit, and the committee has no authority to consider the underlying reasons for the town's denial. Therefore, ZLR's options are approval with amendment or disapproval. If the committee approves with amendment, they should make findings whether all of the conditions listed in §91.48(1) are met."*