

Staff Report



**Zoning and
Land Regulation
Committee**

Questions? Contact:
Majid Allan – 267-2536 or
allan@countyofdane.com

Public Hearing: **November 26, 2019**

Zoning Amendment Requested:

CONDITIONAL USE PERMIT FOR: Communication Tower

CUP 02481

Town/Section:

ALBION, Section 4

Size: **0.13 Acres**

Survey Required: **No**

Owner

**RANDY RAY
KNICKMEIER**

Applicant

**TILLMAN
COMMUNICATIONS**

Reason for the request:

260' self support communication tower - lighted

Address:

**APPROXIMATELY 400'
NORTH OF 869
COUNTY HIGHWAY A**



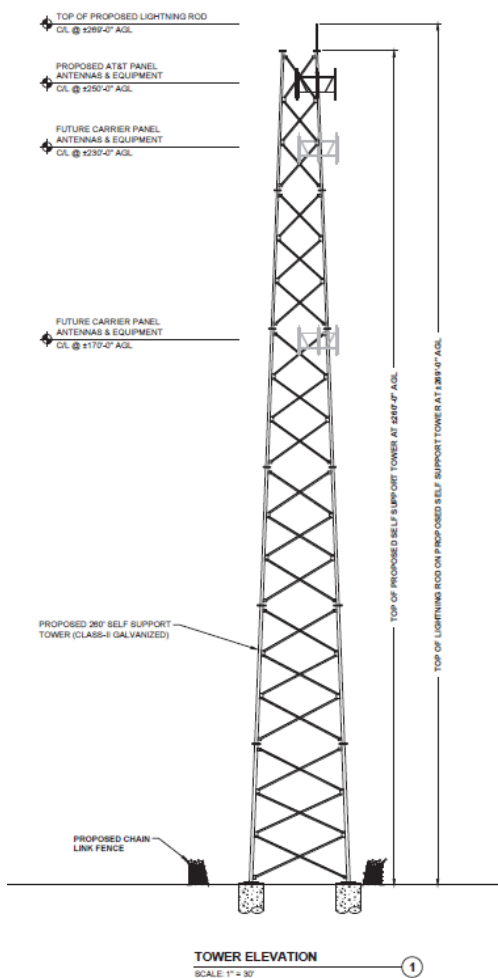
DESCRIPTION: Tillman Infrastructure, in coordination with AT&T Mobility, is requesting approval of a Conditional Use Permit (CUP) to allow installation of a 260' tall self-support lattice-style communication tower (269' with lightning rod). Tillman has negotiated a lease on a 75' x 75', 5,625 square foot area of land owned by Randy Knickmeier located southwest of the intersection of Interstate 39/90 and County Highway A in section 4 of the town of Albion. The property is part of a vacant ~25 acre agricultural use parcel zoned FP-1 (Small Lot Farmland Preservation).

The proposed tower is located within approximately 400 hundred feet of an existing 160' communication tower owned and operated by SBA Communications from which AT&T Mobility is currently providing its personal wireless services. In the application submittal, Tillman Infrastructure states that AT&T Mobility is seeking "Relocation due to economically burdensome lease terms at existing tower".

Pursuant to applicable state law, action on the proposed Conditional Use Permit application for a new communication tower must be completed within 90 days unless the timeframe is extended by mutual agreement of the applicant and

county. The complete signed CUP application was received on September 4, 2019, so county action on the application is due by Tuesday, December 3, 2019.

CONDITIONAL USE PERMIT PROCESS: Conditional uses are those uses which, because of their unusual nature and potential for impacts on neighboring lands, public facilities, the environment or general welfare, warrant special consideration and review. The zoning ordinance includes specific requirements and standards for review and approval of conditional use permits.



In order to obtain a Conditional Use Permit, an applicant must provide **substantial evidence** to demonstrate that the application, and **all** requirements and conditions established by the county relating to the conditional use, are or shall be satisfied. Substantial evidence means, *“facts and information, other than merely personal preferences or speculation, directly pertaining to the requirements and conditions an applicant must meet to obtain a conditional use permit and that reasonable persons would accept in support of a conclusion.”*

Prior to granting or denying a conditional use, the zoning committee shall make written findings of fact based on evidence presented and issue a determination whether the proposed conditional use, with any recommended conditions, meets all of the following standards:

- General standards for approval of a conditional use under s. 10.101(7)(d)
- Any prescribed standards specific to the applicable zoning district
- Any prescribed standards specific to the particular use under s. 10.103

The zoning committee must deny a conditional use permit if it finds that the standards for approval are not met, and must approve if it finds that the standards for approval are met.

The decision to approve or deny a conditional use permit must be supported by substantial evidence. Any conditions imposed must be based on substantial evidence, related to the purpose of the ordinance, reasonable, and, to the extent practicable, measurable.

As indicated above, many conditional uses are subject to prescribed standards found in section 10.103 of the ordinance – including communications towers under section 10.103(9) (see below). The zoning committee must find that all the following general standards for approval are met for the proposed conditional use:

- a. 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;
- b. 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;
- c. 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;
- d. That adequate utilities, access roads, drainage and other necessary site improvements have been or are being made;
- e. 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;
- f. That the conditional use shall conform to all applicable regulations of the district in which it is located.
- g. That the conditional use is consistent with the adopted town and county comprehensive plans.

Since the proposed conditional use is located in a Farmland Preservation Zoning district, the town board and zoning committee must also make the findings described in s.10.220(1):

1. The use and its location in the Farmland Preservation Zoning District are consistent with the purposes of the district.
2. The use and its location in the Farmland Preservation Zoning district are reasonable and appropriate, considering alternative locations, or are specifically approved under state or federal law.
3. The use is reasonably designed to minimize the conversion of land, at and around the site of the use, from agricultural use or open space use.
4. The use does not substantially impair or limit the current or future agricultural use of surrounding parcels of land that are zoned for or legally restricted to agricultural use.
5. Construction damage to land remaining in agricultural use is minimized and repaired, to the extent feasible.

Dane County communication tower ordinance: Approval of a Conditional Use Permit is required for a new or substantially modified communication tower. In addition to the review procedures and standards for all Conditional Use permits, communication tower applications are subject to the provisions of the Dane County communication tower ordinance, section 10.103(9). The purpose of the ordinance is to ensure that facilities are sited in a manner that:

1. Protects and promotes public health, safety, community welfare and the quality of life in Dane County as set forth within the goals, objectives and policies of the Dane County Comprehensive Plan, this ordinance, and s. 66.0404 Wis. Stats;
2. Respects the rights and interests of towns, neighboring property owners, and existing land uses on adjoining properties in the decision making process;
3. Recognizes the public necessity for telecommunication facilities and the numerous benefits and opportunities a robust wireless infrastructure make possible for county residents, including improved public safety, efficient production and distribution of goods and services, access to educational resources, and economic development opportunities;
4. Allows appropriate levels of service to be obtained throughout the County, including expansion to rural areas seeking access to personal communications and broadband internet services;
5. Minimizes the number of transmission towers throughout the County;
6. Encourages the joint use of new and existing telecommunication facilities as a preferred siting option;
7. Ensures that all telecommunication facilities, including towers, antennas, and ancillary facilities are located and designed to minimize the visual and environmental impact on the immediate surroundings and throughout the county;
8. Avoids potential damage to adjacent properties from tower failure or ice falls through sound engineering and careful siting of structures; and
9. Provides a public forum to assure a balance between public concerns and private interests in establishing commercial telecommunications and related facilities.

The ordinance places an emphasis on collocation of facilities to minimize the number of towers needed to provide wireless communication services. The ordinance also includes a height limitation on towers to no more than 195' unless a variance is granted, *"...based on unique transmission condition problems which cannot be overcome by another location."*

RELEVANT FACTS & INFORMATION

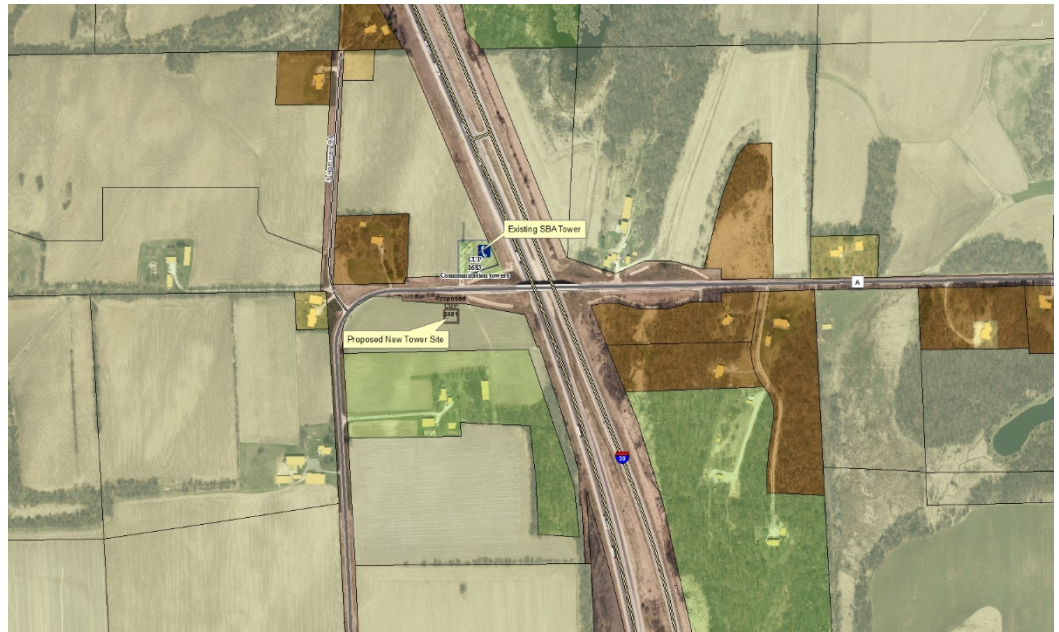
Location, size, existing use and characteristics of subject property: The subject property is a ~25 acre parcel of land located southwest of the intersection of County Highway A and Interstate 39/90 just south of the town of Albion / Christiana line in town of Albion section 4. The CUP site is located in a cropped field with gently sloping topography comprised of 100% Class II soils. Applicant indicates the ground elevation of the site is 943' above Mean Sea Level (AMSL). Existing use of the property is agricultural.

Current zoning and applicable district regulations: The property is zoned FP-1 (Small-lot Farmland Preservation). Communication towers are available as a conditional use in this district. All conditional uses are subject to the additional farmland preservation conditional use standards noted above.

Surrounding land uses / neighborhood: Surrounding land uses include agriculture / open space, scattered rural residences, including the nearby residential subdivision of Blue Meadow Estates. There are 17 residences located within 1/2 mile of the proposed site, 65 within 1 mile, and 388 within 3 miles.

No sensitive environmental features or resource protection areas located on the proposed CUP site.

The property is located in a designated farmland preservation area per the Town of Albion and Dane County comprehensive plans.



As noted above, there is an existing 160' SBA Communications tower located approximately 400' to the north of the site at the northwest intersection of County Highway A and Interstate 39/90. According to a letter from Kent Meier, SBA Communications Site Marketing Manager, AT&T Mobility has been a tenant on the existing SBA Tower since October, 2000.

Utilities, access, drainage, and other necessary site improvements: The applicant indicates that power consisting of a minimum 600 amp single phase service is proposed. The applicant proposes a 60'x60' fenced compound area which would have a gravel base with outdoor cabinets housing electronics and related equipment placed on a small concrete pad. Landscaped screening consisting of a line of arbor vitae trees on the north and eastern sides of the fenced compound is proposed. Access to the site is proposed via a 12' wide gravel access road out to County Highway A. It is unclear if a County Highway access permit has been applied for at this time.

Applicable additional standards: In addition to the noted county code standards and requirements, other state and federal regulations apply to siting of communication towers.

TOWN / COUNTY PLAN: The property is within a designated agricultural preservation area as shown in the Town of Albion Comprehensive Plan / Dane County Comprehensive Plan and Dane County Farmland Preservation Plan. Within designated agricultural preservation areas, plan policies focus on preserving both farmland and the town's rural character by strictly limiting the density and siting of nonfarm development. This includes the town's density policy of no more than "one lot or non-farm use per 35 acres of contiguous acres held in single ownership as of June 29, 1979". Communication towers proposed after May 2007 count toward the nonfarm density limitation. Town plan policies also discourage access drives from bisecting farmland and seek to minimize the negative impacts of incompatible land uses.

In addition, the town plan includes a policy to, "Ensure that development of new cellular towers is consistent with Dane County's ordinance...".

The Dane County Comprehensive Plan includes policies supporting maximizing coordination of telecommunication facility needs with existing structures (i.e., collocation). Like the town plan, the county plan also includes provisions that seek to limit conversion of agricultural land to nonagricultural uses.

As indicated above, the town density “1 per 35” density limitation applies to communication towers. See attached density study. The subject property was part of the larger Gurena Iverson farm totaling approximately 190 acres as of 6/29/79. It appears Mr. Knickmeier acquired approximately 40 acres of Iverson farm, including the original farm residence which he subsequently separated onto a smaller 14 acre parcel of land in 1991 (parcel 0512-042-8670-9, owned by George and Rebecca Zeimet). The town / county plan does not include any explicit policy regarding allocation of remaining development rights when an original 1979 landholding is distributed among multiple owners. Generally in the absence of any documentation indicating the allocation of remaining development rights, they are said to “run with the land” and distributed proportionally based on amount of land currently owned. With Mr. Knickmeier owning less than 35 acres from the original farm, it appears he is ineligible for any of the remaining development rights.

BACKGROUND: Staff first became aware of a possible new tower proposal by Tillman Infrastructure on February 1, 2019 when contacted by the applicant’s agent, John Wallace of LCC Telecom. During that and subsequent phone conversations with Mr. Wallace, staff provided information about the application procedure and county ordinance requirements. Staff learned that the proposal would be to site a new tower in close proximity to an existing tower based on a claim by the prospective anchor tenant (AT&T) of economically burdensome collocation lease terms at the existing tower site. Staff also met with Rodney Carter and Mike Long, legal counsel for Tillman/AT&T/Verizon, on April 9, 2019. Staff again reiterated county ordinance requirements.

During those contacts with the applicant’s agents, staff repeatedly explained that this type of proposal would challenge the fundamental principle of collocation as a preferred siting option which underlies both the county ordinance and applicable state statute. Staff also explained that there is an existing remedy under the county ordinance to address the allegation of burdensome lease terms and costs. If there is merit to the complaints leveled against SBA regarding burdensome lease terms and costs, it may in fact constitute a violation of a condition on their permit which requires that collocation spots be made available, “...at the prevailing market rate in the region and upon contractual provisions which are standard in the industry.” If such a violation were discovered, and not remedied, it would be grounds for revoking the permit. Staff has shared this perspective with all the stakeholders from the outset, and suggested that should be the first avenue pursued for remedy of the alleged economic burden.

Tillman Infrastructure, a cellular tower and telecom infrastructure company founded in 2016, has established a joint agreement with AT&T and Verizon to build hundreds of cell towers across the country in an effort to, “...fulfill the need for new locations where towers do not exist today...”, and provide the two carriers the opportunity, “...to relocate equipment from current towers.” The joint collaboration between the companies was announced in November 2017 via press releases and reported on extensively in industry media outlets. As indicated in those press releases and media reports, as well as the affidavit provided in support of the present application, one of the primary purposes of the build to suit joint agreement is to provide the carriers with cost savings over their current lease arrangements with other telecom infrastructure companies at existing tower sites around the country. See attached example press release and media report summarizing the Tillman - AT&T / Verizon agreement.

DECISION MAKING CONSIDERATIONS: In addition to reviewing proposals against the standards and criteria for approval of a conditional use permit and compliance with other applicable county zoning code provisions and federal law, there are several state statutes that apply to local consideration of a proposed Conditional Use Permit and/or new mobile service support structure. 2017 Wisconsin Act 67 established criteria for local consideration and action on Conditional Use Permit requests. The Act requires that conditional use permit applications, as well as decisions on such applications, must be based on “substantial evidence”, and not merely personal preference or speculation.

Act 67 requirements: Specifically, the Act requires that, “The applicant must demonstrate that the application and all requirements and conditions established by the county relating to the conditional use are or shall be satisfied, both of

which must be supported by substantial evidence. The county's decision to approve or deny the permit must be supported by substantial evidence." Section 59.69(5e)(b)2 Wis. Stats.

Substantial evidence means, "facts and information, other than merely personal preferences or speculation, directly pertaining to the requirements and conditions an applicant must meet to obtain a conditional use permit and that reasonable persons would accept in support of a conclusion." Section 59.69(5e)(a)2 Wis. Stats.

Mobile Tower Siting Regulations: Section 66.0404 of state statutes – *Mobile Tower Siting Regulations* – places certain requirements and limitations on local regulation of the siting of "mobile service support structures" (cell towers). Regulation can only be done under a community's zoning authority, which must prescribe the application process. Applicants must provide certain information and materials as part of the application process for a new tower, including a sworn statement indicating why the applicant did not choose collocation on an existing tower structure, per section 66.0404(2)(b)6 of Wisconsin Statutes:

6. *If an application is to construct a new mobile service support structure, an explanation as to why the applicant chose the proposed location and why the applicant did not choose collocation, including a sworn statement from an individual who has responsibility over the placement of the mobile service support structure attesting that collocation within the applicant's search ring would not result in the same mobile service functionality, coverage, and capacity; is technically infeasible; or is economically burdensome to the mobile service provider.*

As indicated in the sworn statement and elsewhere in the application materials, AT&T Mobility claims that the existing lease arrangement with SBA Communications is "economically burdensome". Additional claims are made regarding the need for a tower over 195' in height. See the attached RF Engineering report and staff analysis section, below, for more information.

3rd PARTY ENGINEERING REVIEW: The county relies on a 3rd party consultant to provide an independent technical review so that county officials have an unbiased perspective to rely upon when considering requests for approval of a Conditional Use Permit for a new communication tower. As with all applications for a new communications tower, the current proposal has been reviewed by the county's 3rd party Radio Frequency (RF) engineer, CityScape Consultants. CityScape has identified numerous concerns with the proposal and finds that it does not meet the county ordinance requirements, nor do they find any merit to the height variance request or claim of economic burden (see attached report). The CityScape report conclusion states:

"The Applicant did not provide the necessary NEPA and SHPO approvals required to construct the proposed Facility. The Applicant's statement of justification for a tower height that is 38% higher than permitted by the County Code fails to meet the threshold requirements of said Code. The Applicant's justification for exceeding the elevation limitation is not unique in any way, and is rebutted by the coverage maps attached that show the Applicant's current facility already provides virtually the same coverage. Furthermore, the Applicant has not provided adequate justification for a new support structure in the same general area, given that the Applicant has an existing facility within 405 feet of the proposed Facility and the Applicant has "of right" alternatives to increase their antenna height at their current facility. In our opinion, Applicant has failed to meet the variance requirements to justify a new two hundred sixty-nine (269) foot lattice support structure or any new support structure in the general area..."

The CityScape report includes a cautionary note regarding this application: "Should the County approve a permit for the Applicant's proposed new wireless tower on the basis of a claim that the existing collocation lease costs constitute an "economic burden", any and all future mobile communications service provider applicants wishing to cut their lease costs would also have to be granted the same consideration under the state economic burden provision in order to comply with the non-discrimination provision of the federal Telecommunications Act." (CityScape Report, page 7)

STAFF ANALYSIS

Collocation Preferred Siting Option in County Ordinance and State Statute: This is the first time the county has received an application for a Conditional Use Permit for a new communication tower within extremely close proximity to an existing tower that the applicant is currently located on due to a claim of “economic burden”. Since county adoption of a tower ordinance in 1997, the primary objective of the ordinance has been to provide for a robust wireless infrastructure while minimizing the number of tower facilities needed by encouraging the joint use of facilities (collocation) as a preferred siting option. This type of application is, by its very nature, counter to the purpose and objectives of the county’s tower ordinance.

Collocation is also addressed in state law (section 66.0404). The relevant statute includes provisions designed to facilitate collocation by limiting local regulation of collocation proposals – for example, the county is barred from requiring any permits be obtained for a collocation proposal unless it involves a substantial modification to the existing tower facility. The statute requires that applicants explain why a new facility is needed and why an applicant “did not choose collocation”. In addition, the statute indicates that refusing to evaluate the feasibility of collocation can be grounds for denying an application for a new tower facility. See Mobile Tower Siting Regulations section, above.



Existing SBA Tower near CTH A & I-39/90

Applicant’s Claim of Economic Burden: The applicant’s sworn statement of need for the new tower is premised on a claim that it is economically burdensome for AT&T Mobility to remain collocated on the existing SBA tower. The sworn statement provided with the application was made by Tim Brenner, who manages AT&T’s “high-rent relocation program”, whereby AT&T “...identifies high-cost or economically burdensome antenna site leases... and relocates its communications equipment onto lower-cost alternative antenna site lease locations.”

The applicable state statute does not define the term “economically burdensome”. Similarly, there was no information provided in the sworn statement or other application materials indicating the basis upon which AT&T identifies “economically burdensome antenna site leases”.

Definition of burdensome

: imposing or constituting a [burden](#) : [OPPRESSIVE](#)
// burdensome restrictions

From Merriam-Webster.com

In the absence of any context for such a claim of economic burden, it is helpful to look at available definitions and corollaries. Merriam-Webster provides the following definition of burdensome: “*imposing or constituting a burden : oppressive.*”

What may be reasonably considered to constitute an economic burden will vary depending on the relative income or economic health of an individual, household, or corporation compared with costs for various necessities. Consider that the federal government defines a “cost-burdened” household as one that spends more than 30% of household income on rent, and that such cost-burdened households may have difficulty affording other necessities such as food, clothing, transportation, and/or medical care.

Notwithstanding the claim made in the sworn statement that the site is high cost relative to other existing sites in AT&T’s portfolio, no context is provided that would demonstrate an economic burden. While the county is not responsible for determining what may constitute an economic burden, it is not difficult to identify the types of information that could serve as the basis for establishing that a particular lease is economically burdensome. For example, what is the average and/or median monthly or annual lease cost for AT&T to site on other towers in the same market area? What is the average and/or median monthly or annual costs for AT&T’s long term lease sites in the same market area? What percentage of AT&T Mobility’s net annual income is spent on tower lease sites? In short, what metrics does AT&T Mobility apply to arrive at a determination that this, or any other identified “high cost” site,

constitutes an economic burden? These are just a few of the types of questions that a reasonable analysis should address and which would allow for validation of the claims being made.

Pursuant to state law and county ordinance, conditional uses must be supported by substantial evidence. Staff has reviewed the sworn statement provided by the applicant and found it to be absent any substantial evidence in support of its claim of economic burden. There are no facts and information provided pertaining to the requirements of the ordinance that reasonable persons could accept in support of a conclusion.

Staff has provided a detailed review of the main assertions contained in the sworn statement submitted with the application.

- *“The SBA Tower has become a high-cost antenna site structure for AT&T.”* (Statement 4)

Staff: No substantial evidence has been provided by the applicant to define what constitutes a “high-cost antenna site structure”. The sworn statement was made by the manager of AT&T’s “high-rent relocation program”, yet no documentation is provided that would support the assertion that the existing SBA Tower is a high-cost site for the company. While the sworn statement later asserts that the site is high cost relative to other existing sites in AT&T’s portfolio (statement 10), there is no evidence provided to substantiate that statement. Neither copies of lease agreements or summary information was provided.

- The SBA Tower is, *“...economically burdensome for AT&T and would not result in the same cost-effective operation as compared to what AT&T could achieve if it relocated its Wireless Facilities to the Tillman Tower.”* (Statement 5)

Staff: Again, no substantial evidence has been provided by the applicant to define an economic burden for the company. It’s worth noting that there are other carriers currently located on the SBA tower that have not alleged a cost-burden in their lease agreements with SBA. As indicated elsewhere in the sworn statement, AT&T has entered into a nationwide agreement with Tillman to build new towers (statement 11). The purpose of the joint effort to lower costs for AT&T and leverage its position against incumbent tower owners is well documented in statements from company officials and in industry press accounts. Such an effort to achieve “cost effective” operation does not necessarily constitute an economic burden.

- *“AT&T anticipates future rent increases and costs from SBA if it remains co-located at the SBA Tower.”* (Statement 6)
- *“The current rent charged by SBA to co-locate on the SBA Tower is over three (3) what (sic) Tillman will charge AT&T to co-locate on the Tillman Tower... annual rent increases are less that (sic) the annual rent increases charged by SBA. At the current rate of rent increases, over the next twenty (20) years, the difference in rent paid by AT&T to remain on the SBA Tower versus relocated on the Tillman Tower is well over four million dollars (\$4,000,000).”* (Statement 7)

Staff: The above two statements are based on flawed assumptions that current rents and annual increases on the SBA tower will continue over the next 20 years without change. The statements are further premised on an assumption that the entire joint Tillman / AT&T effort to achieve rent reductions at existing sites will fail – an assumption directly contradicted by the evidence provided in statement #8 which claims that competition in the tower marketplace has led to, *“more competitive economic terms from other tower companies.”* Indeed, the Tillman / AT&T effort to leverage their bargaining position has already produced results since an SBA representative stated at the town of Albion public hearing on November 5, 2019 that the company was willing to offer rent reductions. There’s also the as-yet unpursued remedy available through potential enforcement of the existing SBA conditional use permit condition requiring that collocation spots be made available *“...upon contractual provisions which are standard in the industry and at prevailing market rates...”*.





- *“Since AT&T located on the SBA Tower in 2001, rent and escalators have become more competitive in the tower marketplace. New tower companies have entered the marketplace since 2001, which has also led to more competitive economic terms from other tower companies. Considering these competitive economic terms from other tower companies, AT&T has requested tower rent reductions from SBA. Unlike other tower companies, SBA has resisted an economically sustainable cost structure with its existing AT&T co-location leases, such that many of these leases have become economically burdensome for AT&T.” (Statement 8)*

Staff: As noted in this statement, changes have indeed occurred in the tower marketplace as the result of new competition. This includes the coordinated effort by Tillman/AT&T/Verizon to construct new towers and reduce lease costs and to leverage the potential of new tower construction to negotiate lease reductions at existing sites, particularly in rural areas of the country. However, this does not provide substantial evidence of an economic burden for the company.

The statement demonstrates that AT&T is conflating what AT&T considers an “economically sustainable cost structure” for its tower lease sites with a bona fide economic burden.

The statement mirrors quotes from AT&T officials that the joint Tillman/AT&T/Verizon effort is intended to remake the tower marketplace in a more carrier-friendly fashion.

DALLAS, December 17, 2018

share    

New sites built within the first year of agreement, with hundreds more underway

After signing an agreement with AT&T* last year, Tillman Infrastructure, a rapidly growing builder and operator of cellular towers and small cells, has built hundreds of new macro cell towers for lease to AT&T. In addition, hundreds of tower builds nationwide are underway, completing on a monthly basis.

Over the past year, AT&T executed a plan, improved operations, and created new initiatives with Tillman to improve service while driving lower costs.

“Our work with Tillman Infrastructure exemplifies our future model for the cell tower industry,” said Susan Johnson, executive vice president— Global Connections and Supply Chain, AT&T. “We’re committed to working with vendors who offer a sustainable cost model while also delivering best in class cycle times and tower construction.”

AT&T News 12/17/18 – “AT&T and Tillman Build Hundreds of Cell Towers” https://about.att.com/story/2018/hundreds_of_cell_towers.html

- *“Decommissioning an existing Wireless Facility in favor of moving to an alternate tower location is something AT&T will only do in limited circumstances. AT&T will bear a significant capital cost in decommissioning its Wireless Facilities installation on the SBA Tower and relocating to the Tillman Tower. Despite these relocation costs, the Tillman Tower remains a better co-location option for AT&T.” (Statement 9)*
- *“AT&T has made this determination because the current rents and other charges to co-locate on the SBA Tower have been categorized as high-cost compared to other existing sites in AT&T’s portfolio and the rents charged by other tower companies, such as Tillman.” (Statement 10)*
- *“AT&T has entered into a nationwide development and master lease agreements with Tillman... AT&T does not bear any costs for the construction of a tower owned by Tillman.” (Statement 11)*
- *“The economic terms imposed upon AT&T by SBA to remain co-located on the SBA Tower are not cost-effective and are economically burdensome for AT&T especially when the nearby Tillman Tower presents a more competitive and flexible co-location option.” (Statement 14)*

Staff: There is, again, no evidence to substantiate the claim that AT&T will only decommission an existing facility, “...in limited circumstances.” In fact, the opposite appears to be the case. As noted in statement #11, company press releases and officials’ statements, and as reported in industry press accounts, AT&T has established a joint agreement with Tillman to build hundreds of new towers for the express purpose of lowering costs. Similarly, there is no substantial evidence provided to suggest that the existing collocation agreement with SBA will remain unchanged in the future. There is a difference between engaging in an effort to lower costs and such costs being “economically burdensome”.

Statement #10 further acknowledges that the entire argument of economic burden is premised on an assumption that “current” rents and other charges will remain unchanged into the future without consideration for the broader joint effort being made, nor the potential remedy available under the county ordinance. In addition, the above statements posit that it’s fair to compare lease rates across the company’s entire portfolio, as opposed to comparisons with other comparable facilities – e.g., towers located within the same region / market, of similar age / construction / height, and owned by independent tower companies that have not established exclusive build to suit agreements with the company.

While there is no statutory definition of what constitutes an “economic burden”, the concept is one that can be easily comprehended by anyone with a basic understanding of household economics. It is not difficult to identify the types of information and evidence that should be provided in support of such a claim. The applicant claims that remaining collocated on the existing SBA tower will cost over \$4 million more than siting on the proposed Tillman tower over a 20 year timeframe. As detailed above, the claim is not supported by substantial evidence and is based on a set of assumptions that are contradicted by information provided elsewhere in the sworn statement and public comments by an SBA representative indicating their willingness to renegotiate the existing lease. The claim also ignores the existing potential remedies that have not been pursued. Based on the information submitted, the claims being made would be more accurately be described as a measure to improve cost savings and profitability.

County ordinance provision regarding economic burden

The current county ordinance includes a provision which states that, “*economically burdensome means the cost of collocation exceeds the cost of construction of a new tower by 25% or more*”. This provision is slated to be changed under proposed Ordinance Amendment (OA) #20, for several reasons. First and foremost, as referenced in the CityScape report, the county is in no position to determine what constitutes an economic burden for a telecommunications company. It is the responsibility of the applicant to provide substantial evidence to support a claim of economic burden. In addition, the current provision represents a misapplication of a similar provision from the county’s previous ordinance which applied to technical or physical impediments to collocation. That is, collocation on a tower located within an applicant’s search ring was impeded due to deficient height, structural capacity, or would result in electromagnetic interference and such impediments to collocation would result in costs that would exceed by 25% the cost of constructing a new tower. Finally, it is untenable to compare the long term lease costs of collocation (many of which are unknown due to confidentiality provisions), with the one-time cost of constructing a new tower (which can vary widely as noted in the CityScape report).

Because of the problematic issues inherent in defining “economically burdensome”, the revisions proposed to the relevant section of the county’s tower ordinance under OA #20 would instead establish what does not constitute an economic burden. The revised provision is proposed to read:

“For the purposes of this ordinance, cost savings or increased profitability shall not be considered an economic burden.”

The proposed changes under OA #20 will also include provisions that address potential legitimate technical or physical impediments to collocation which may serve as the basis for approval of a new tower in lieu of collocation.

It's important to acknowledge that this application is being made by Tillman Infrastructure – a tower company with a vested interest in building new tower facilities. Since Tillman is not a licensed wireless service provider, it cannot reasonably claim that collocation is an economic burden. Furthermore, it is unclear if the provision in the state law regarding economic burden can reasonably be invoked by a wireless services provider currently collocated on an existing tower. The statute indicates that an application for a new tower must include an explanation as to, “...why the applicant did not choose collocation”. AT&T is already collocated on an existing tower and remedies exist to address the claim of burdensome lease costs or terms as noted throughout this report.

As well documented in statements from Tillman and AT&T officials appearing in press releases and industry publications, the joint agreement between the companies to construct new towers across the country is intended as a cost-savings measure and to upset existing tower lease models. The results of that effort can be seen in rural communities around the country – multiple towers located in close proximity to one another, many with just a single anchor tenant.



long included a standard condition on tower conditional use permits requiring that collocation spots be made available “...upon contractual provisions which are standard in the industry and at prevailing market rates...”. The purpose of the condition is to ensure that carriers are not prevented from collocation on a tower with available space. Violation of the condition could be potential grounds for revocation of the permit.

Staff have informed the applicant's agents, representatives of AT&T, and SBA representatives of this condition, but no formal complaint has been submitted alleging a violation.

“We need more alternatives to the traditional tower leasing model with the large incumbents. It's not cost-effective or sustainable. We're creating a diverse community of suppliers and tower companies who will help increase market competition while reducing our overhead,” said Susan Johnson, SVP of Global Supply Chain, AT&T. “We look forward to working with Verizon as we establish site locations and sign new lease agreements with additional suppliers in the coming years.”

“AT&T and Verizon threaten the big three towercos with a new Tillman 200 tower scheme” Wireless Estimator, Featured News November 13, 2017 <http://wirelessestimator.com/articles/2017/att-and-verizon-threaten-the-big-three-towercos-with-a-new-tillman-200-tower-scheme/>

CityScape's report raises a valid question: if this request were to be approved, what happens if, in another 20 years, AT&T deems the lease terms with Tillman “economically burdensome”? Will the county and town be asked to approve a 3rd tower at this location? What if other wireless service providers strike similar agreements with other tower companies?

Also as noted in CityScape's report, there have been anecdotal complaints made against SBA, the current owner of the existing nearby tower, by other wireless service providers regarding difficulties dealing with SBA and fees charged for collocation.

Again, as documented elsewhere in this report, the county has

Consistency with adopted town / county comprehensive plan: To be approved, a proposed conditional use must be found to meet the standards in section 10.101(7)(d)1. This includes a finding that the proposed conditional use is consistent with the adopted town and county comprehensive plans. Town / county plan goals, objectives, and policies emphasize the preservation of farmland and rural character while also calling for robust wireless communication services. As noted in the sections above, staff is concerned that the present proposal violates the county tower ordinance. Converting land from agricultural use for the purpose of erecting a 260' lighted communication tower with ancillary facilities for a carrier currently collocated on an existing communication tower is in direct conflict with plan policies which emphasize preservation of farmland and rural character.

As required by the Federal Aviation Administration, tower structures exceeding 200 feet in height must have lighting. Tower lighting has been noted as a significant issue of concern for rural Dane County residents in the siting of telecommunication towers in the past. Rural residents have expressed concern that towers in general, but lighted towers in particular, negatively impact the use, value, and enjoyment of their properties. Staff conducted a GIS-based viewshed analysis using available digital elevation modeling to determine which nearby residences would likely be able to see the required lighting atop the proposed 260' tower (see attached map). There are 64 residences located within a mile of the tower, all of which would be within the viewshed of the tower lighting.

Town / county plan policies seek to avoid the siting of incompatible land uses in close proximity to one another. The town plan lists communication towers as one of the nonfarm land uses that require the use of a "split" or development right. Based on current ownership of less than 35 acres from the original farm unit, the owner is ineligible for a split on the property. In addition, the town plan requires that all tower applications must comply with the county's tower ordinance.

Staff believes the proposal is not consistent with the adopted town and county comprehensive plans.

7. **Use of Splits.** The density policy also applies to certain other forms of development and land divisions. The following developments and land divisions shall be counted against the density policy of #1 above:
 - A) Communication towers created after the date of adoption of this plan amendment shall count against the density policy.
 - B) CSM lots (land divisions) for commercial uses created after the date of adoption of this plan amendment shall count against the density policy. (Zoning lots, not separate parcels, created for commercial used shall **not** count against the density policy. **Note that all residential lots and dwellings created after June 29, 1979 count against the density policy and must be created by certified survey on separate parcels.**)
 - C) Land sales and divisions or easements granted to public entities (e.g., Dane County Parks, US Fish & Wildlife, WIDNR) shall count against policy unless sufficient evidence is provided documenting that the sale, division or easement did not involve a density unit.

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Telecommunications

Policies and 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.

Dane County Comprehensive Plan Telecommunications Policies

STAFF RECOMMENDATIONS: Under the applicable provisions of the county code and state statutes, an applicant for a conditional use permit must provide substantial evidence demonstrating, *“...that the application and all requirements and conditions established by the county relating to the conditional use are or shall be satisfied, both of which must be supported by substantial evidence.”*

This application for a new communication tower on property zoned FP-1 (Farmland Preservation) must meet the requirements established in the county tower ordinance (section 10.103(9)), and must satisfy the Conditional Use Permit standards found in section 10.101(7)(d) and 10.220(1).

As detailed in the various sections of the staff report, and the attached CityScape engineering report, the application submittal fails to provide substantial evidence that the proposal meets all applicable requirements found in the aforementioned sections of the Dane County code.

Staff recommends denial of the Conditional Use Permit. Below is a detailed listing of findings and substantial evidence in support of the recommendation to deny. A summary of the recommendation can be found at the end of this report.

1. As detailed in the attached engineering report, the applicant has failed to substantiate justification for the proposed new tower based on the requirements of the county ordinance and state statutes.
2. As detailed in the attached engineering report, the applicant has failed to substantiate the need for a tower exceeding 195' in height.
3. The applicant has not provided substantial evidence demonstrating that the proposed conditional use satisfies all requirements and conditions required by county ordinance.
4. The applicant is currently collocated on an existing tower approved under Conditional Use Permit #1683 and has refused to evaluate the feasibility of continued collocation on the existing communication tower located within the applicant's search ring. This includes refusal to pursue offers made by the current tower owner (SBA) to renegotiate the lease terms, as well as remedies available under the county code to ascertain compliance and, if necessary, enforce the conditions applicable to the existing tower permitted under Conditional Use Permit #1683.
5. The applicant's claim of economic burden is not supported by substantial evidence and based on assumptions contradicted by information provided in the sworn statement. The provided sworn statement includes references to the SBA tower lease being, "high cost" and, "not cost-effective", and to SBA resisting an "economically sustainable cost structure". The sworn statement also acknowledges that AT&T and Tillman have entered into, "nationwide development and master lease agreements", and that the arrangement, "benefits AT&T because it increases the speed of deploying Wireless Facilities and gives AT&T greater flexibility...". While the applicant may desire to relocate onto the proposed tower due to cost savings and flexibility that may be achieved, such savings and flexibility do not constitute an economic burden.
6. The proposed installation of a 260' lighted communication tower in lieu of continued collocation on the existing tower would be inconsistent with town/county comprehensive plan policies. Plan policies encourage maximizing coordination of communication infrastructure (collocation) and place an emphasis on protecting agricultural land and rural character. The proposed use would convert agricultural land to a nonagricultural use and the required lighting on the tower would negatively impact the rural character of the town. The town of Albion requires the use of a nonfarm development right to establish a communication tower on the property as detailed in the town/county comprehensive plan. The property does not appear to be eligible for an additional development right. The tower is proposed in designated farmland preservation area. As noted above, options for collocation exist, are currently being exercised, and there are remedies available to enforce applicable conditions on the existing tower permit. The proposed conditional use is neither reasonable nor appropriate considering alternative locations are available.

Below are the detailed findings from 3rd party engineering report:

The Applicant did not provide the necessary NEPA and SHPO approvals required to construct the proposed Facility. The Applicant's statement of justification for a tower height that is 38% higher than permitted by the County Code fails to meet the threshold requirements of said Code. The Applicant's justification for exceeding the elevation limitation is not unique in any way, and is rebutted by the coverage maps attached that show the Applicant's current facility already provides virtually the same coverage. Furthermore, the Applicant has not provided adequate justification for a new support structure in the same general area, given that the Applicant has an existing facility within 405 feet of the proposed Facility and the Applicant has "of right" alternatives to increase their antenna height at their current facility. In our opinion, Applicant has failed to meet the variance requirements to justify a new two hundred sixty-nine (269) foot lattice support structure or any new support structure in the general area for the following reasons:

1. The Applicant between June 28, 2018 and June 28, 2019 had apparently accepted the working relationship with SBA Towers by signing an amendment with the Tower owner for upcoming modifications of their existing equipment; and,
2. In late 2017 it was announced that this Applicant, AT&T and another personal wireless service provider, Verizon, had concluded arrangements with Tillman Structures to "build to suit" new support structures adjacent to existing support structures where either provider believed they could leverage advantageous lease rates; and,
3. Should the County grant a permit for the proposed tower based on the Applicant's claim that its current lease rates with SBA on the existing nearby tower constitute an "economic burden", every future wireless service provider that makes the same claim under identical circumstances must be allowed to build a "replacement tower" in the same vicinity under the non-discrimination provision of the Telecommunications Act of 1996. This could lead to tower proliferation, as escalating lease rates induce carriers to engage a wireless infrastructure company to build them a tower that offers more favorable lease rates, thereby annulling the County's stated purpose of its Tower Ordinance, that of "respect[ing] the rights and interests of towns, neighboring property owners, and existing land uses on adjoining properties in the decision making process" and "minimiz[ing] the number of transmission towers throughout the County" (Section 10.103 of the County Zoning Ordinance, (9)(a)2 and (9)(a)5 respectively); and
4. The Applicant provided a sworn statement from Tim Brenner primarily regarding the rental costs associated with the SBA tower. The comments regarding current and on-going costs are standard with all major infrastructure developers. It is unknown if Tillman will continue such practices consistent with other tower companies. Regardless, the County justification clearly states there must be a showing of need, and since AT&T has operated from the SBA facility and recently signed a lease amendment to make modifications at the existing facility, is a reasonable assumption the Applicant was satisfied with the working arrangement, thus the Applicant's economic claims to justify exceptions to the County tower height limit are without merit. If the Applicant desires greater antenna elevation, it has the right to automatically increase the height of the existing SBA tower (where they are currently operating) under federal law and obtain such greater elevation. The Applicant should design their network under the same rules as all other personal wireless providers and not be afforded unlawful special exceptions; and,
5. The requested variance for a tower height above one hundred ninety-five (195) feet fails to provide any reasonable uniqueness that would separate AT&T's needs from any other personal wireless service provider. To state the necessity to obtain "the best possible coverage" via an increase in antenna height is common to every other entity that operates radio frequency spectrum and thus is not unique. Should the height be approved at this elevation for that reason, every future personal wireless service provider must be allowed to choose their own preferred tower height, thus abrogating in its entirety the elevation limitations of the Dane Ordinance.

The application submittal failed to provide substantial evidence demonstrating that the proposal satisfies standards b, c, f, and g for approval of a Conditional Use Permit found in section 10.101(7)(d)1:

- b. 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. *Installation of a 260' lighted communication tower in close proximity to an existing tower where collocation is available will substantially impair and diminish the uses, values and enjoyment of neighboring properties for residential, and other uses, already permitted.*
- c. 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. *Installation of a 260' lighted communication tower in close proximity to an existing tower where collocation is available will impede the ability of surrounding properties in the exercise of their available nonfarm density units / development rights.*
- f. That the conditional use shall conform to all applicable regulations of the district in which it is located. *The request does not conform to standard #2 (listed below) for conditional uses in the certified farmland preservation zoning district (FP-1).*
- g. That the conditional use is consistent with the adopted town and county comprehensive plans. *The proposed conditional use is not consistent with the town or county comprehensive plans. As detailed in other sections of this report, town/county comprehensive plan policies place an emphasis on the preservation of farmland and rural character. Policies also support robust wireless communication services, with collocation the preferred siting option when feasible. The town/county density policy that applies to the designated agricultural preservation area requires availability and use of a density unit / development right for new nonfarm development, including communication towers. The subject property is not eligible for a density unit.*

The application submittal failed to provide substantial evidence demonstrating that the proposal meets standard 2 under section 10.220(1)(a) for conditional uses in the FP-1 Farmland Preservation zoning district:

- 2. The use and its location in the Farmland Preservation Zoning district are reasonable and appropriate, considering alternative locations, or are specifically approved under state or federal law. *The subject property is comprised of 100% Class II prime farmland soils, is actively farmed and located within a designated farmland preservation area. The proposed anchor tenant has failed to evaluate the feasibility of continued collocation on the existing SBA communication tower. Development of the new tower site would unnecessarily convert land from agricultural use given that an existing, alternative location is available.*

TOWN ACTION: The town of Albion has forwarded the application to Dane County with no recommendation. The town Plan Commission and Board considered the CUP application at consecutive meetings held on Tuesday, November 5, 2019. Staff was in attendance, as were representatives for Tillman/AT&T/Verizon, and SBA Communications.

Below is a summary of what transpired at the town meetings.

Concerns were expressed regarding a lack of communication between SBA and AT&T representatives: Tillman/AT&T provided a copy of a May 1, 2018 letter to SBA indicating an interest in negotiating a new lease arrangement for SBA's Knickmeier Farms tower. SBA's representative at the meeting referenced a June 2019 offer to AT&T to renegotiate the lease agreement. Both parties claimed that neither responded to the other's request.

A significant amount of new information was presented to the town at the meeting, including the letter referenced above, oral rebuttal to some of the findings in the CityScape report, as well as a statement that Verizon was now a co-

applicant on this petition. The chair of the town plan commission acknowledged the fact that new information was being provided and it appeared the consensus of the commission was that they would need additional time to consider all of the information before taking action on the proposal. Staff brought up the issue of the state mandated 90 day “shot clock” / deadline for action, and that a written agreement would be needed to extend the timeframe beyond December 3, 2019 in order for the town to be able to take up the petition again at its next meeting. Staff explained that the December 3rd timeframe was 90 days from 9/4/19 – the county’s date of receipt of a complete signed application.

Mr. Rod Carter, Tillman/Verizon legal counsel, indicated that Tillman was willing to agree to a “stay”, but unwilling to agree in writing to an extension of the timeframe. Mr. Carter made a further statement to the effect that it was his opinion that the 90 day timeframe had already been surpassed. It’s unclear on what basis the claim was made, or if the statement signaled the applicant’s belief that they are not required to obtain a conditional use permit to construct the proposed tower. In discussing the matter with the county zoning administrator, Roger Lane, he confirmed that the date of application was 9/4/19, consistent with receipt of the complete signed application for Conditional Use Permit petition #2481.

There were many references made to state statute 66.0404 at the town meeting. As a result, it appeared that town officials felt as though they were being told they have little say in the decision to construct a new communication tower in their community. Several town officials expressed frustration with the situation and commented that they felt they were being intimidated and threatened by the applicant.

Given insufficient time to consider the additional information and testimony presented at the town hearing or the arguments over whether the proposal satisfied applicable requirements, and with no agreement to extend the timeframe for action, the town plan commission and board voted to forward the petition to the county with no recommendation.

SUMMARY STAFF RECOMMENDATION:

Staff recommends denial of the proposed conditional use permit based on the following:

1. The applicant is currently collocated on an existing tower within the search ring and the applicant has refused to evaluate the feasibility of continued collocation.
2. The applicant’s claim of economic burden is not supported by substantial evidence.
3. The applicant has failed to provide substantial evidence to document that the proposed conditional use satisfies the following standards for approval of a Conditional Use Permit found in section 10.101(7)(d)1.
 - 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.
 - 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.
 - That the conditional use shall conform to all applicable regulations of the district in which it is located.
 - That the conditional use is consistent with the adopted town and county comprehensive plans.
4. The proposed conditional use does not satisfy standard the following standard under section 10.220(1)(a) for conditional uses in the Farmland Preservation zoning district:
 - The use and its location in the Farmland Preservation Zoning district are reasonable and appropriate, considering alternative locations, or are specifically approved under state or federal law.