

MEMO

To: Zoning & Land Regulation Committee (ZLR)
From: Majid Allan, Senior Planner
Date: August 3, 2023
Subject: Staff update and recommendations on Conditional Use Permit #2583

Application summary: Request is for a Conditional Use Permit to allow installation of a 174' communications tower on the 2 acre RR-2 zoned property at 3486 County Highway MN in the Town of Dunn

Property owners: Arif Khan and Sadia Arif

Applicants: Iron Mountain Towers, LLC ("TowerKing") and DISH Wireless LLC

Agents for Applicants: Derek McGrew (Cellulsite); Jake Remington (Husch Blackwell LLP)

Background

Conditional Use Permit application #2583 for a 174' communications tower at 3486 CTH MN was first heard by the ZLR Committee at a public hearing on February 28, 2023. The committee postponed action at that meeting due to public opposition from neighboring residents and the Village of McFarland, and no town action. Both the county staff and 3rd party Radio Frequency engineering reports for the petition noted concerns with siting such a large structure on a small parcel of land surrounded by existing and planned residential development and located 35' from the rear and side lot lines. The applicant requested several extensions of the 90-day statutory "shot clock" for action on the petition to consider options to address the concerns.

The applicant submitted revised plans in an attempt to resolve concerns with the petition. These primarily include a lower tower height (145' with lightning rod), and relocation of the tower approximately 100' from the rear and side lot lines, along with "flush mount" cellular arrays, and additional fencing/landscaping. However, as explained and depicted in the image below, the proposal to relocate the tower would violate the signed lease agreement between the landowner and applicants. Even if the tower could be relocated as proposed, it would exacerbate concerns raised by the closest neighbors and negatively impact the uses and enjoyment of the subject property.

Misrepresented lease area

It has come to staff's attention that the application materials included a critical, material misrepresentation. The initially submitted site plan, as well as the revised proposal, depict a 100'x100', 10,000 square foot lease area in the northeasterly corner of the property within which the tower would be sited. However, the [signed lease agreement between the owner and applicant](#) is for an area *less than half that size* - a 70'x70', 4,900 square foot area. The signed lease agreement indicates that the tower would be located "in the center" of the 70'x70' lease area.



In a July 31 letter to Iron Mountain Towers, the property owner's attorney indicated that the owner does not consent to any modification of the lease agreement. This revelation effectively renders the revised proposal moot since that

proposal would place the tower well outside the lease area.

Materials submitted since 2/28/23 ZLR public hearing

In the 5 months since the public hearing, staff has received a number of written submittals from the applicant and other interested parties. A list of the items is provided, below, and digital copies were shared with committee members by email on Thursday, August 3. Per the ZLR Committee's rules and procedures, the committee would need to approve a motion to accept those items into the record for the CUP since they were submitted after the February 28 public hearing.

List of submittals received since February 28, 2023 ZLR Hearing:

-  CUP 2583 - Applicant additional prop value study May 31, 2023
-  CUP 2583 - Applicant email correspondence with DC munis on prop values
-  CUP 2583 - Applicant email responding to town questions about property value info 031023
-  CUP 2583 - Applicant letter to Town of Dunn responding to McFarland concerns 030923
-  CUP 2583 - Applicant msg to Dunn re Revised Tower Height & Location 060223
-  CUP 2583 - Applicant Revised Property Value Study - McFarland - Greendale
-  CUP 2583 - Applicant revised site and construction plans 060223
-  CUP 2583 - Applicant updated photosimulations for revised proposal 060223
-  CUP 2583 - Opposition Riecks 030623
-  CUP 2583 - Opposition Riecks 030723 (Clarification)
-  CUP 2583 - Opposition Village of McFarland Ltr_03.21.23
-  CUP 2583 - Opposition Yszenga 071323
-  CUP 2583 - Subject Property Owner Khan atty letter to Iron Mountain Tower re lease agmt 073123

Should the committee move to accept additional materials into the record, staff recommends that only a subset of the submitted information be accepted (see staff recommendations on page 3, below).

Town of Dunn (no action taken): The Town of Dunn postponed taking action on the petition at its [hearing](#) on February 13, 2023. Town staff and officials acknowledged that the proposal would have a greater impact on the Village of McFarland and its residents than the town since the property is surrounded by the village and the adjoining area is slated to become part of the village under an intergovernmental agreement. In light of this, the town wanted to hear the village's position on the proposal before taking any action. Subsequent to the town's February 13 meeting, the village submitted two letters in opposition to the petition noting a long list of concerns, including inconsistency with the village's plans to for residential development on adjoining land. The town held a [special meeting](#) on March 27th to consider the petition, but the applicant requested cancellation hours before the meeting was to start. Following the county signing an agreement to extend the timeframe for action until August 8, 2023, and in consultation with county staff and the applicant's agents, the town scheduled the petition for its meeting on July 18th. The applicant did not appear at the meeting and so the town again took no action.

In light of the issues surrounding the lease area rendering the revised proposal moot, Town staff provided a [letter dated August 1](#) indicating that the Town Board Chair has no objection to the ZLR Committee considering the petition without a formal town recommendation. Per the zoning code, the Committee may take action on a CUP application if the town has not acted within 60 days of the public hearing. 161 days have elapsed between the 2/28 hearing and 8/8 ZLR work meeting.

Staff Recommendation – Items for Official Record

If the ZLR Committee chooses to accept additional items into the record, staff recommends accepting only the following materials submitted after the February 28, 2023 public hearing:

-  CUP 2583 - Applicant email correspondence with DC munis on prop values
-  CUP 2583 - Applicant email responding to town questions about property value info 031023
-  CUP 2583 - Applicant letter to Town of Dunn responding to McFarland concerns 030923
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Other items submitted by the applicant relate to the revised proposal premised on the misrepresented lease area as well as a property value study dated May 31, 2023. Regarding the property value study, no other interested parties have had an opportunity to review that information. Staff did review the material and do not find it any more compelling than the original property value information submitted by the applicant. The study, like the other less formal information submitted by the applicant, attempts to compare apples and oranges and draw conclusions that are not supported by substantial evidence.

Staff Recommendation on CUP application – Deny

Based upon the information and evidence in the record for CUP 2583, including testimony at the February 28, 2023 ZLR Committee public hearing, staff believes that the proposal does not meet the [standards for approval of a conditional use permit](#). See below for recommended findings and conclusions that the committee may wish to adopt.

Decisions to approve or deny a conditional use permit must be supported by “substantial evidence”. 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.”

Staff believes that the [testimony](#) and [evidence](#) provided by neighbors prior to and at the public hearing, and by the [Village of McFarland](#), represent substantial evidence that the proposal fails to satisfy the standards for approval of a conditional use permit. Similarly, the applicant has failed to provide substantial evidence that the proposal meets the standards.

Reasonable persons can anticipate negative impacts to the uses, values, and enjoyment of abutting residential properties arising from the proposal to site a 174’ tall communication tower on a residentially zoned parcel adjacent to a residential subdivision and in an area slated for extension of public infrastructure and additional future residential development. The height of the structure exceeds the height limitation for residential structures in the RR-2 zone by roughly 400% and would be located 15’ closer (35’) to the rear property boundary than a primary residential structure would be permitted. Staff is unaware of any similar circumstance in Dane County where a tower of this size was erected in such close proximity to both existing and planned future residential development.

County Staff has prepared for consideration and possible adoption by the ZLR Committee the following findings of fact and conclusions for denial of CUP 2583.

Findings of fact

Application summary, property and neighborhood characteristics

1. [Proposed Conditional Use Permit #2583](#) seeks to site a 170' (174' with lightning rod) monopole communication on a 2 acre RR-2 (Rural Residential) zoned parcel of land located at 3486 County Highway (CTH) MN in the township of Dunn. The [property](#) contains the owner's existing single family residence and outbuilding.
2. The [site plan](#) submitted with the application shows the proposed tower to be located within a 100' x 100', 10,000 square foot "lease area" and 35' from both the rear and eastern side lot line.
3. The signed lease agreement between the applicant and property owner clearly designates a 70' x 70', 4,900 square foot "lease area".
4. The property at 3486 CTH MN abuts existing residential development - McFarland's Prairie Place subdivision, and 2 residential lots in the town of Dunn. The Village of McFarland surrounds the property on 3 sides.
5. There are 63 residences within 1,000 feet of the tower site, and 14 within 500' of the site (including the owners' residence). 59 of the 63 residences are in the Village of McFarland.
6. Given the [lack of topography and vegetative or other screening](#), the tower would be visible from the adjoining residential area.
7. The CUP application materials included a [search ring map](#), as required by state law and county ordinance, and referenced in the Dish Wireless sworn statement.
8. The selected tower site is located outside of the designated search ring as depicted on the submitted search ring map.
9. In light of the proposed tower's proximity to existing residential development, the CityScape Consultants recommended the applicant validate the need for the requested height of the tower of 170' (174' with lightning rod) by providing additional technical documentation and analysis showing predicted coverage at lower heights, including 140'. That [analysis](#) resulted in a finding by CityScape that, *"The predicted coverage at 140 feet of antenna height as compared to 160 feet results in a small, almost imperceptible, amount of coverage loss."* This finding undermines the applicant's request for a tower of 174'.

Zoning ordinance requirements for issuance of a Conditional Use Permit (CUP)

10. [Section 10.101\(7\)\(a\)](#) of the Dane County Code of Ordinances establishes the following purpose for Conditional Use Permits:
 - (a) Purpose. The development and execution of this ordinance is based upon the division of the county into districts, within which districts the use of land and buildings, and bulk and location of buildings and structures in relation to the land are mutually compatible and substantially uniform. Certain uses, because of their unusual nature and potential for impacts on neighboring lands, public facilities, the environment or general welfare, warrant special consideration and review. With appropriate limitations on siting, development and operation, such uses may be compatible with other uses in a particular zoning district. Such uses are classified as conditional uses and are subject to the following provisions.
11. Section [10.101\(7\)\(d\)](#) of the Dane County Code of Ordinances specifies the requirements for approval of a Conditional Use Permit. For a Conditional Use Permit to be approved, the zoning committee must find that all of the following conditions are met:
 - 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,

- 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.

12. In addition to the review procedures and standards for all Conditional Use permits, communication tower applications are subject to the provisions of section [10.103\(9\)](#). The purpose of the ordinance is to ensure that facilities are sited in a manner that:

- 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;
- Respects the rights and interests of towns, neighboring property owners, and existing land uses on adjoining properties in the decision making process;
- 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;
- 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;
- Minimizes the number of transmission towers throughout the County;
- Encourages the joint use of new and existing telecommunication facilities as a preferred siting option;
- 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;
- Avoids potential damage to adjacent properties from tower failure or ice falls through sound engineering and careful siting of structures; and
- Provides a public forum to assure a balance between public concerns and private interests in establishing commercial telecommunications and related facilities.

Dane County Comprehensive Plan

13. The property is designated as “Agricultural Transition” in the town of Dunn Comprehensive Plan, which is a component of the Dane County Comprehensive Plan, and the area is subject to an [inter-municipal agreement](#) with McFarland. The purpose statement for the [Agricultural Transition](#) area states:

Provide for the orderly transition of agricultural land into the Village of McFarland in the area that is identified in the McFarland/Dunn Inter-municipal Cooperation Agreement for eventual urban expansion.

14. The Village of McFarland Comprehensive Plan, which is also [part](#) of the Dane County Comprehensive Plan, designates the property as “Neighborhood”. The purpose statement for the [Neighborhood](#) planning designation states:

In areas on [Map 6](#) that are planned for “Neighborhood” development, a range of housing choices compatible with the Village’s current and desired character are permitted, along with parks and smaller-scale institutional uses like senior housing and churches...

Public Hearing Testimony & Evidence

15. The Village of McFarland submitted a [letter in opposition to CUP 2583](#), indicating that the proposal is inconsistent with the village's comprehensive plan and would impede the normal and orderly development of the surrounding property including the extension of the Meadowsweet Trail and associated pattern of residential development as called for in the plan.
16. At the February 28, 2023 ZLR Committee Public Hearing on the proposal testimony was provided in opposition to the proposed conditional use from 3 adjoining neighbors who expressed concerns about aesthetics, negative impacts to the uses, values, and enjoyment of their properties, health and safety concerns due to ice fall and unsettled science on the impacts of human exposure to electromagnetic radiation, and conflicts with development plans currently in process.

Conclusions

1. The applicant materially misrepresented its leasehold interest in the subject property, indicating in its initial application submittal, and subsequent proposed revisions, that it had a 100' by 100', 10,000 square foot lease area. The signed lease agreement is for an area less than half that size, 70' by 70', 4,900 square feet. The landowner's attorney has provided a letter indicating they do not consent to any changes to the lease area. From the public hearing on February 28, 2023 until August 8, 2023, all interested parties, including decision makers and members of the public, were reviewing inaccurate information. A revised proposal circulated by the applicant contained the same misrepresentation.
2. Siting a 174' tower on a 2 acre parcel in residential use 35' from property boundaries in a residential area is inherently at odds with the basic purposes of the county's statutorily authorized [planning and zoning authority](#), which include separation incompatible uses, protection of property values, and ensuring the orderly development of land.
3. The proposal is contrary to the following purposes of the county's zoning regulations for communication towers:
 - *Respects the rights and interests of towns, neighboring property owners, and existing land uses on adjoining properties in the decision making process*
 - *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;*
 - *Avoids potential damage to adjacent properties from tower failure or ice falls through sound engineering and careful siting of structures*

The proposed tower site has not been carefully sited but is instead located outside of the applicant's designated search ring on a residential parcel adjoining other residences and land planned for future residential uses. Siting a 174' tower in the location would disrespect the rights and interests of surrounding residents by placing a structure far out of scale with the current and planned pattern of development in the neighborhood. The structure would be just 35' from property boundaries presenting an ice fall risk to surrounding properties.

4. The applicant failed to provide substantial evidence demonstrating that the proposal satisfies standards [10.101\(7\)\(d\)1a, b, c, and g](#) for approval of a Conditional Use Permit.

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

The proposed 174' tower would be located 35' from the rear and easterly lot line. Ice fall and wind-driven

ice drift from towers is a known issue, and the proposed [construction drawings](#) depict installation of an “ice bridge” to protect cabling associated with the tower. The tower would be in close proximity to existing structures, as well as the planned extension of Meadowsweet Trail and associated sidewalk, presenting a safety hazard from ice fall / drift.

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 174’ communication tower will substantially impair and diminish the uses, values, and enjoyment of the adjoining residential uses already existing in close proximity to the tower site. The tower will be within approximately 160’ of the property owners’ residence and within 250’ of the two closest residences at 6138 and 6139 Meadowsweet Trail. The owners of those two properties, as well as the owner of the currently vacant parcel abutting the proposed CUP site, testified at the February 28, 2023 hearing as to the impairment of their properties both in terms of existing uses, values, and enjoyment, and residential uses currently being planned for.

The applicant provided property value information in advance of the ZLR Public Hearing. In both documents provided by the applicant, the information references property tax assessments by the respective municipalities (Waukesha and Greendale) for properties in proximity to the towers and falls short of substantial evidence showing towers have no impact on property values for a number of reasons. In the case of the Waukesha example, the tower predated the surrounding development and the information provided did not analyze or control for the myriad factors that make up a property’s value, such as size/age/condition of the home, size of the parcel, locational and other comparative amenities – such as the fact that the development abuts a golf course. A more useful analysis for the Waukesha example would have been to compare the market value of neighboring lots sold prior to their development, but this information was not provided.

In the Greendale example, the primary land use of the 3 acre host property is institutional (church) which is surrounded by a large 22 acre publicly owned open space property. In addition, the tower is only 100’ tall, concealed by trees, and located across a street from the closest residential development.

The information regarding towers having no negative impact on property values submitted by the applicant in advance of the February 28, 2023 ZLR Public Hearing does not constitute substantial evidence that property values will not be negatively impacted.

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 174’ communication tower 35’ from the property line will impede the normal and orderly development and improvement of the surrounding property. The Village of McFarland comprehensive plan calls for extension of Meadowsweet Trail and associated curb/gutter/sidewalk, and continuation of the pattern of medium density residential development. In two separate written submittals from the Village of McFarland, as well as testimony provided at the ZLR public hearing, the village expressed concerns that the proposal conflicts with their plans for residential development on both the subject property and neighboring properties. In addition, erecting a tower in the proposed location would impede additional development of the subject property.

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. The proposal

would site a 174' tall telecommunications structure on an occupied residential parcel, adjoining existing homes, and in an area slated for further medium density residential development (~5 dwelling units / acre).

The property is within a designated agricultural transition area in the Town of Dunn Comprehensive Plan. This planning designation applies to areas east of the Village of McFarland's planned future growth area, and reflects the [inter-governmental agreement \(IGA\)](#) between the town and village. The purpose statement for the [Agricultural Transition](#) area states:

Provide for the orderly transition of agricultural land into the Village of McFarland in the area that is identified in the McFarland/Dunn Inter-municipal Cooperation Agreement for eventual urban expansion.

The Village of McFarland surrounds the subject property on 3 sides and the village's adopted comprehensive plan, which is a component of the county comprehensive plan as required by state law under [s. 59.69\(3\)\(b\)](#), has designated the subject property and adjoining lands as future "Neighborhood".

The purpose statement for the [Neighborhood](#) planning designation states:

In areas on [Map 6](#) that are planned for "Neighborhood" development, a range of housing choices compatible with the Village's current and desired character are permitted, along with parks and smaller-scale institutional uses like senior housing and churches...

The applicant failed to perform due diligence in selecting a site, and did not consult with the Village of McFarland, the municipality most directly affected both in terms of siting the facility and the services the facility would ostensibly provide to nearby residents. Siting such facilities should be done in a more thoughtful manner that respects the rights and interests of neighboring property owners, as well as the lawful exercise of county and municipal planning and zoning authority.