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December 26, 2019

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DANE COUNTY CLERK

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VIA HAND DELIVERY

DEC 27 2019

Dane County Board of Adjustment
City County Building, Room 106
210 Martin Luther King Jr. Boulevard
Madison, Wisconsin 53703

DANE COUNTY PLANNING & DEVELOPMENT

Re: PETITION: CUP 02481
APPLICANT(S): Tillman Infrastructure, LLC / AT&T Mobility
APPEAL OF DENIAL OF CONDITIONAL USE PERMIT

Dear Sir/Madam:

We represent Tillman Infrastructure, LLC ("Tillman"), in coordination with AT&T Mobility ("AT&T") (collectively, the "Applicants"), and appeal, on their behalf, the decision of the Dane County Zoning & Land Regulation Committee (the "Committee") denying CUP 02481 (the "CUP") on November 26, 2019. This Appeal of the Committee's decision is made under Wis. Stat. § 59.694(4) and Sections 10.101(7)(c)4. and 15.14(6), Dane County Ordinances.

ZONING HISTORY

On June 11, 2019, the Applicants applied for the CUP (the "Application"). The Application seeks to construct a 260' self-support telecommunications tower with a 9' lightning rod at approximately 400' north of 869 County Highway A in the Town of Albion. The proposed location is part of a vacant 25-acre agricultural parcel zoned FP-1 (Small Lot Farmland Preservation). The proposed tower is approximately 400' from an existing 160' telecommunications tower owned and operated by SBA Communications (the "SBA Tower"). AT&T, with Cellco Partnership d/b/a Verizon Wireless ("Verizon"), are collocated on the SBA Tower. Both Verizon and T-Mobile USA, Inc. ("T-Mobile") submitted materials to the Committee to support the Application and have indicated a desire to relocate from the SBA Tower to the proposed Tillman tower.

Dane County Planning & Development Staff confirmed receipt and notified the Applicants that the Applicant was incomplete, requesting several additional items. On August 27, 2019, Staff notified the Applicants that the Application was complete and, without input

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from the Applicants, scheduled the matter for consideration by the Committee on November 26, 2019. The Town of Albion considered the Application at meetings before its plan commission and board on November 5, 2019 and forwarded the matter on to the County with no recommendation.

On November 26, 2019, the Committee met and by a vote of four to zero (4-0) denied the Application based on:

1. As detailed in the engineering report attached to Staff's report, the Applicants have 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 engineering report attached to Staff's report, the Applicants have failed to substantiate the need for a tower exceeding 195' in height.
3. The Applicants failed to provide substantial evidence demonstrating that the proposed conditional use satisfies all requirements and conditions required by county ordinance.
4. The Applicants (AT&T) 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 Applicants' (AT&T) search ring.
5. The Applicants 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., Dane County Ordinances, and further detailed in Staff's report:
 - 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.
 - f. That the conditional use shall conform to all applicable regulations of the district in which it is located.

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- g. That the conditional use is consistent with the adopted town and county comprehensive plans.
- 6. The Applicants failed to provide substantial evidence demonstrating that the proposal meets standard 2 under Section 10.220(1)(a), Dane County Ordinances, 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 Committee's decision to deny the CUP was contrary to law; was arbitrary, oppressive or unreasonable and represented the Committee's will and not its judgment; and was not supported by substantial evidence.

ARGUMENT

The basis for the Committee's decision is effectively two-pronged. The first prong relates to the general use at issue – a telecommunications tower. The second relates to the Applicants' (AT&T) decision not to collocate on the SBA Tower and proceed with the Application – an issue governed by Wis. Stat. § 66.0404.

First, the Committee's decision to deny the Application based on its use was not based on substantial evidence and was instead arbitrary and represented its will rather than its judgment. The Applicants agreed to accept, as a condition of approval, a tower height of under 200' to address any night time lighting concerns and would also accept all of the conditions imposed on the SBA Tower (CUP #1683). Only 400' apart, nothing in CUP #1683 differed from the Application, and denial of the Application on grounds not at issue with the other indistinguishable use is grounds for reversal.

Second, the Committee's decision to deny the CUP based on the Applicant's purported refusal to evaluate the feasibility of continued collocation is likewise not supported by substantial evidence and the Committee's action was contrary to law – specifically Wis. Stat. § 66.0404. Section 66.0404 provides that an applicant does not have to collocate on an existing structure if it provides “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 ... is economically burdensome to the mobile service provider.” Wis. Stat. § 66.0404(2)(b)6. The Applicants provided a sworn statement from AT&T showing costs to AT&T of \$4 million over the next 20 years. Section 10.103(9)(b)1.b.(ii), Dany County Ordinances, establishes the basis for economically burdensome as: “[t]he cost of eliminating impediments to collocation shall be deemed reasonable if it does not exceed by 25 percent the cost of constructing a new tower on which to mount applicant's equipment.” The \$4 million in

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costs cited by AT&T exceeds 25% of the cost of a new tower, which per AT&T is between \$180,000 for monopole to \$275,000 for self-support tower. Verizon also submitted evidence showing an economic burden of \$1.18 million over a 20 plus year period. Applicants also submitted substantial evidence to show it had attempted, but failed, to obtain relief from the economic burden imposed by collocation on the SBA Tower.

Finally, Staff's position that the Applicants' (AT&T) failed to exhaust all avenues of relief before submitting the Application by filing a complaint with the County alleging SBA Communications was violating the terms of CUP #1683 is inconsistent with Wis. Stat. § 66.0404 and cannot be utilized as a basis to deny the Application. *See* Wis. Stat. § 66.0404(2)(i).

For these reasons, the Committee improperly denied the CUP, its decision should be reversed, and the Board of Adjustment should enter an Order granting the CUP.

Please note that nothing in this letter is intended as a waiver of any other rights, claims or defenses available to Tillman and/or AT&T, all of which are expressly reserved. Tillman and AT&T further reserves the right to supplement this Appeal and to make arguments in addition to, or alternative to, those made in this letter.

Respectfully submitted,

HUSCH BLACKWELL



James C. (Jake) Remington

JCR

cc: Roger Lane, Dane County Zoning Administrator (via hand delivery)