



OFFICE OF THE CORPORATION COUNSEL

Carlos Pabellón, Corporation Counsel

Eve M. Dorman, Legal Director of Permanency Planning
Vue Yang, Legal Director of the Child Support Agency

March 13, 2023

VIA EMAIL

Mr. Roger Lane
Dane County Zoning Administrator
Room 116, City-County Building
Madison, WI 53703
lane.roger@countyofdane.com

RE: ZLR Reconsideration of CUP # 2578

Dear Mr. Lane:

You have requested an opinion as to whether the Zoning and Land Regulation Committee (ZLR) has authority to reconsider a grant of conditional use permit (CUP) #2578. In my opinion it does. The Wisconsin Court of Appeals has held that a zoning committee may reconsider a decision made in its quasi-judicial capacity when the initial decision is based on a mistake of fact or law. Additionally, it is my opinion that the county is not preempted by state statute from requiring a CUP applicant to notify nearby airports.

CUP #2578 was granted on December 13, 2022 for a self-support communication tower. Condition #16 of the CUP stated that the tower shall not be lighted. Dane County Ordinance (DCO) § 10.103(9)(b)1 sets forth the “application process” for a CUP for a communication tower. Subsection h requires “Notification to Nearby Airports,” and states, “The applicant shall provide written notice to all operators and owners of airports located within 5 miles of the proposed site.” Subsequent to the grant of CUP #2578 it was determined that the applicant did not give notice to an airport located within approximately one mile of the proposed tower site. It is my understanding that CUP#2578 is on ZLR’s agenda for discussion of a possible motion to reconsider the grant of the permit.

It is first important to note the procedural nature of what is on ZLR’s agenda. This is not an “appeal” filed by an aggrieved party. Were that the case, an appeal within 30 days of the grant of the permit to the Board of Adjustment would have been the appropriate remedy. Rather than an appeal by an aggrieved party, this matter is on the committee’s agenda on its own motion to discuss a potential motion for reconsideration. One issue to consider is whether the ability of the owner of the adjacent airport to file a timely appeal was prejudiced by the applicant’s failure to give notice.

It should be noted that reconsideration of a quasi-judicial decision to grant a CUP is the exception rather than the rule. The Wisconsin Court of Appeals has held that “the general rule is that reconsideration falls outside the scope of a zoning board’s authority, reconsideration is nonetheless justified when the initial decision is based on a mistake of fact or law.” *NextMedia Outdoor, Inc. v. Village of Howard*, 15 WI App 43, ¶ 23, 362 Wis. 2d 539, citing *Goldberg v. City of Milwaukee Board of Zoning Appeals*, 115 Wis. 2d 517, 521-22, 340 N.W.2d 558 (Ct. App. 1983). Also citing *Goldberg*,

Assistant Corporation Counsels

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the court has held “the authority to reconsider a decision based on error is implicit in such grant of authority to a quasi-judicial body.” *Schoen v. Board of Fire and Police Commissioners of the City of Milwaukee*, 2015 WI App 95, ¶ 19, 366 Wis. 2d 279. Therefore, the ZLR has authority to reconsider the grant of CUP #2578 if it determines there is good cause as a result of a mistake of law. Although the committee must determine whether failure to give notice to the airport constitutes good cause, it certainly qualifies as a mistake or error that could justify reconsideration.

The Applicant claims that the Mobile Tower Siting Law precludes the County from requiring notification to nearby airports and precludes the committee from reconsidering the grant of this CUP. I disagree. Wisconsin Stat. § 66.0404(2) applies to the siting and construction of a new mobile service support structures and facilities. Section 66.0404(2)(b) has two parts. First, it authorizes the County to “prescribe the application *process*.” (emphasis added) Second, Subs. 1-6 it sets forth the information that must be contained in the application process. The airport notification requirement in DCO § 10.103(9)(b)1h is part of the “process,” it is not part of the substance of the application governed by Wis. Stat. § 66.0404(2)(b)1-6. It simply requires notice to owners or operators of airports within five (5) miles of the proposed site so that they can make an informed decision on whether to participate in the CUP process. Furthermore, Wis. Stat. § 66.0404(4) expressly lists several limitations or actions that the County may not require. There is no limitation on notice requirements.

Likewise, the Mobile Tower Siting Law does not prohibit ZLR reconsideration under these circumstances. Wisconsin Stat. § 66.0404(2)(c) states that if an applicant submits an application containing all of the information contained in Sub.(b)1-6, the application shall be considered complete. If the County does not believe the application is complete it must notify the applicant in writing within 10 days. But, as stated above, the airport notification requirement is not the substance of the application regulated by Wis. Stat. § 66.0404(2)(b)1-6. It is a notice provision that is part of the “process” the County is authorized to regulate. There was no requirement to notify the applicant of their failure to notify this airport, as the County had no knowledge of this deficiency.

Finally, the notice provision of DCO § 10.103(9)(b)1h is not preempted by federal or state law. That section does not regulate navigable airspace, aviation, or tall structures. It simply requires an applicant give written notice of their application for a communication tower CUP to owners or operators of airports within five (5) miles. It is intended simply to put the owner or operator on notice of the application so they can make an informed decision whether they should participate in the permitting process. The Wisconsin Supreme Court has established four factors to analyze whether county action is preempted: “(1) whether the legislature has expressly withdrawn the power of municipalities to act; (2) whether the ordinance logically conflicts with the state legislation; (3) whether the ordinance defeats the purpose of the state legislation; or (4) whether the ordinance goes against the spirit of the state legislation.” *Jackson County v. DNR*, 2006 WI 96, ¶ 20, 293 Wis. 2d 497. None of the preemption principles set forth in *Jackson County* are implicated by the airport notification requirement.

Please contact me if I can provide additional assistance regarding this matter.

Sincerely,

David R. Gault

David R. Gault
Interim Deputy Corporation Counsel