



Reinhart Boerner Van Deuren s.c.
P.O. Box 2018
Madison, WI 53701-2018

22 East Mifflin Street
Suite 600
Madison, WI 53703

Telephone: 608-229-2200
Fax: 608-229-2100
Toll Free: 800-728-6239
reinhartlaw.com

June 9, 2014

Jessica Hutson Polakowski
Direct Dial: 608-229-2219
jpolakowski@reinhartlaw.com

SENT VIA E-MAIL

Dale Beske
Town of Rutland, Board
4177 Old Stage Road
Brooklyn, WI 53521

Jeanette Walker
Town of Rutland, Board
4177 Old Stage Road
Brooklyn, WI 53521

James Lunde
Town of Rutland, Board
4177 Old Stage Road
Brooklyn, WI 53521

Milt Sperle
Town of Rutland, Board
4177 Old Stage Road
Brooklyn, WI 53521

Dawn George
Town of Rutland, Board
4177 Old Stage Road
Brooklyn, WI 53521

Kim Sime
Town of Rutland, Board
4177 Old Stage Road
Brooklyn, WI 53521

Shawn Hillestad
Town of Rutland, Board
4177 Old Stage Road
Brooklyn, WI 53521

Timothy Wood
Town of Rutland, Board
4177 Old Stage Road
Brooklyn, WI 53521

Steve Kittelson
Town of Rutland, Board
4177 Old Stage Road
Brooklyn, WI 53521

Dear Board Members:

Re: Magnum Communications Memorandum
dated May 22, 2014

My husband and I own the parcel of land adjacent to the parcel on which Magnum Communications ("Magnum") proposes to build a 500' radio tower. We, along with our counsel, have had an opportunity to review the memorandum submitted by Magnum on May 22, 2014. We submit this letter in response thereto.

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Magnum argues that, because of the passage of Wis. Stat. § 66.0406, radio towers are no longer required to comply with zoning codes. As an initial matter, this is absurd. Taking this interpretation to its logical conclusion, anyone could build a radio tower anywhere, whether it be in a school zone, downtown Madison, in the middle of a subdivision, or on top of a farm. This cannot be what the legislature intended. This section applies, as Magnum points out, not to 100 foot cell towers, but to towers like the one Magnum here proposes: 500 foot monstrosities that dwarf even the state capitol building. This proposed interpretation is facially absurd.

Moreover, it must be noted that Wis. Stat. § 66.0406 does not purport to trump or override any state *Statute*. Wis. Stat. § 91.48 is not an "ordinance or resolution." It is a State Statute. And, it specifically states that a political subdivision may rezone land out of A1-Ex *only if* the political subdivision finds all of the following: 1) the land is better suited for use not allowed in the farmland preservation zoning district; 2) the rezoning is consistent with any applicable comprehensive plan; 3) the rezoning is substantially consistent with the county certified farmland preservation plan; and 4) the rezone will not substantially impair or limit current or future agricultural use of surrounding parcels of land that are zoned for or legally restricted to agricultural use. The Town and County have each, independently, already determined that these prerequisites have not been met.

Thus, even if the Board determines that Dane County Zoning Ordinances do not apply, Wis. Stat. § 91.48 is still a valid law, and must be followed. As explained in my April 25, 2014 letter, the only way to read Wis. Stat. §91.48 and Wis. Stat. §66.0406 to give both statutes effect is to read them as suggested herein.

Finally, Magnum's argument that he need not comply with applicable zoning codes, is not supported by the language of the statute itself. Parsing the language of § 66.0406, it is clear that the legislature did not intend to preempt all applicable zoning codes of local authorities (had it so intended, it could have simply stated as such). Instead, the language indicates that if a political subdivision has in effect an ordinance that is inconsistent with the requirements of §66.0406(2), the existing ordinance does not apply. Dane County's zoning code is not "inconsistent" with the requirements of (2).

Wis. Stat. § 66.0406(2) requires that:

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

The Dane County Zoning Codes have the clear purpose of protecting the public health and safety of its residents. Thus, the Zoning Code meets the requirement of Wis. Stat. §66.0406(2)(a). And, looking specifically at the ordinance at issue, the purpose of the A-1 Exclusive Agriculture District is specifically set forth at Dane County Ordinance § 10.123(1), and clearly includes important health and safety objectives:

1. Provide for a wide range of agricultural accessory uses, at various scales. The A-1(EX) district accommodates as permitted uses all activities typically associated with the primary production and harvesting of crops, livestock, animal products or plant materials. **Such uses may involve noise, dust, odors, heavy equipment, use of chemicals and long hours of operation.**
2. Allow for incidental processing, packaging, storage, transportation, distribution or other activities intended to add value to agricultural products produced on the premises or to ready such products for market. **Such uses are conditional as they may have the potential to pose conflicts with agricultural use due to: volumes or speed of vehicular traffic; residential density; proximity to incompatible uses; environmental impacts; or consumption of agriculturally productive lands.**
3. Allow for other incidental activities, compatible with agricultural use, to **supplement farm family income and support the agricultural community.**
4. **Preserve productive agricultural land for food and fiber production.**
5. **Preserve productive farms by preventing land use conflicts between incompatible uses.**
6. Maintain a viable agricultural base to support agricultural processing and service industries.
7. Reduce costs for providing services to scattered non-farm uses.
8. Pace and shape urban growth.
9. Meet the criteria for certification as a Farmland Preservation Zoning District under s. 91.38, Wis. Stats.

Thus, Dane County Ordinance §10.123 meets the first requirement of Wis. Stat. §66.0406(2).

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And, § 66.0406(2)2. states that an ordinance must "reasonably accommodate radio broadcast **services**" and "does not prohibit, or have the effect of prohibiting, the provision of such **services** in the political subdivision." This next point is crucial: Wis. Stat. § 66.0406(1) defined "Radio broadcast **services**" separate from "Radio broadcast service **facilities**."

"Radio broadcast **services**" is defined at Wis. Stat. § 66.0406(1)(b) as "the regular provision of a commercial or noncommercial service involving the transmission, emission, or reception of radio waves for the transmission of sound or images in which the transmissions are intended for direct reception by the general public."

"Radio broadcast service **facilities**" is defined at Wis. Stat. § 66.0406(1)(c) as "commercial or noncommercial facilities, including antennas and antenna support structures, intended for the provision of radio broadcast services."

As a proud resident of Dane County and the Town of Rutland, I can tell you that there is no shortage in the provision of radio services in our community. And, it cannot be said that the Dane County Zoning Code has the impact of prohibiting the regular provision of such services; radio seems to be booming in Dane County (likely why Magnum seeks to locate here). Finally, there has been discussion of whether Magnum could collocate on another tower. This is certainly an option for Magnum, though it seems to be one that has not been fully explored. Thus, the existing Dane County Zoning code meets the requirements of Wis. Stat. §66.0406(2) and therefore cannot be "bypassed."

Magnum's interpretation of Wis. Stat. § 66.0406(2)(b) conflates Radio broadcast **services** (which cannot be prohibited under the statute) with Radio broadcast service **facilities** (which is clearly defined to include structures such as the tower Magnum seeks to construct). Under Wis. Stat. §66.0406, an existing ordinance cannot have the impact of prohibiting **services**, but the statute says nothing about prohibiting the construction of **facilities**. This makes sense. But for this distinction, a tower such as the tower currently proposed could be placed on top of wetlands, next to schools, on farms, etc. But, the legislature drew a firm line between prohibition of provision of services, and prohibition of the construction of facilities. The Dane County Ordinance must be applied.

The reason Magnum seeks so desperately to avoid the application of the Dane County Ordinance is because its application necessitates the denial of Magnum's request. As discussed above, the Town and County have each, independently, already determined that the prerequisites set forth in Dane County Ordinance §10.123 and Wis. Stat. §91.48 have not been met.


Magnum may argue that, if the Board adopts the above-referenced reading of the statute, § 66.0406(4), which specifically states that denial of placement, construction, or modification of radio broadcast service facilities must be for health and safety reasons alone,

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is null and void. This is not the case. As in my letter dated April 25, 2014, Magnum's request has two components: a request to rezone, and a petition for a conditional use permit. The request to "construct" the tower is part of the request for a conditional use permit. The rezone stands separate from that request, and for the reasons discussed above, must comply with Dane County Ordinance § 10.123(12) and Wis. Stat. § 91.48.

Because Magnum's request is not in compliance with Dane County Ordinance §10.123(12), Town of Rutland's Ordinance No. 12.5, and Wis. Stat. § 91.48, we respectfully request that the Town deny Magnum's request.

Very truly yours,



Handwritten signature of Jessica Hutson Polakowski in black ink, featuring a large, stylized initial 'J' and a long horizontal flourish extending to the right.

Jessica Hutson Polakowski

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