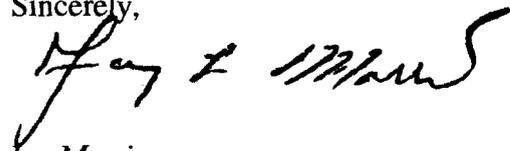


The NAAA appreciates the opportunity to comment on proposed rule FCC 97-296 and believes final promulgation of the rule limiting local government's review periods for broadcast tower construction will jeopardize aviation safety and potentially inhibit tools American farmers use in producing an abundant, affordable and safe supply of food and fiber to the nation and the world.

Sincerely,

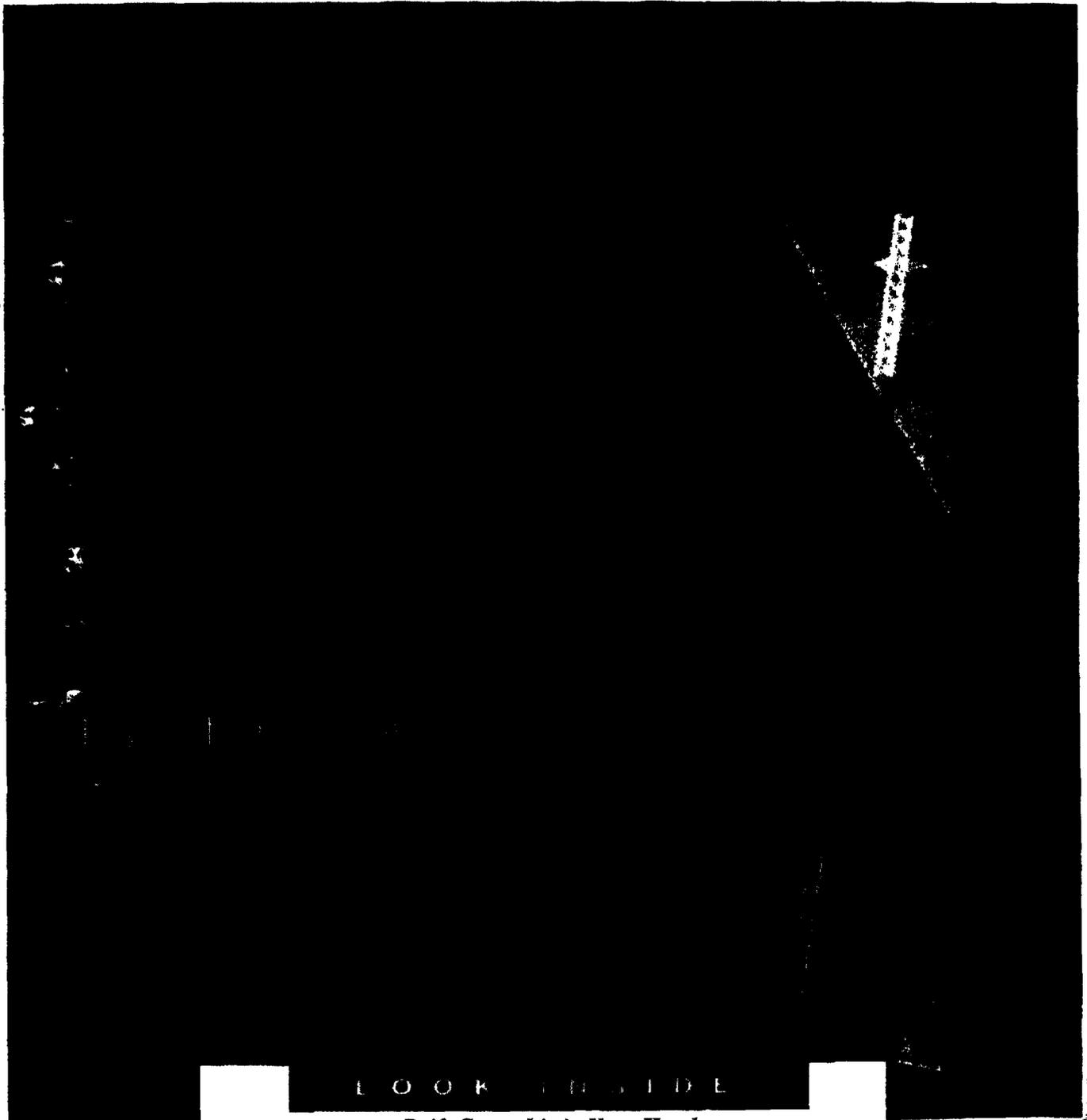
A handwritten signature in black ink, appearing to read "Jay Morris". The signature is written in a cursive style with a large, sweeping initial "J" and a long, horizontal flourish extending to the right.

Jay Morris  
President

Enclosure

# ***Agricultural*** ***Aviation***

*Official Publication of the National Agricultural Aviation Association • Volume 22, No. 6 • August/September 1995*



LOOK INSIDE

- *Drift Control is in Your Hands*
- *Ag-Cat's Back*
- *1995 Convention & Exposition Preview*

#### ABOUT THE COVER

This 250-foot communications tower was constructed on private property in the turning pattern off Stan Ferguson's satellite strip in Des Arc, Arkansas. While the FAA is not required to notify private airstrip owners of nearby tower construction, some ag aviators are learning how to protect their airspace. Photo by: Stan Ferguson



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# LETTER

Official Publication of the National Agricultural Aviation Association

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# ERS

In the new world of  
communications, they're  
popping up everywhere.

The next could be off  
your runway.

Protect your interests.

**By Rick Reed**

# TOWER

**Y**ou are a responsible, professional aerial applicator and have just built a state-of-the-art airport facility, complete with a half-mile long asphalt runway, hangar, and approved loading containment systems. The personal and financial commitments were substantial but the price is worth the improved public image and safe working conditions.

Then you find out that a 625-foot communications tower is to be built virtually right off the end of your runway.

This is exactly the situation facing Roger and Karen Muckel of Grand Island, Nebraska. The Muckels, who own Muckel's Aerial, Inc., received a letter from the Nebraska Department of Aeronautics informing them of the proposed tower. Enclosed with the notice were two copies of FAA form 7460-1 (Notice of Proposed Construction or Alteration), which detailed coordinates for two possible locations. Neither location posed a threat to safe operation of the Muckel strip so no objection was filed. Unbeknownst to the Muckels, a third location also was under consideration: the one near the end of their runway. This was the location selected by the communications company.

Most of the new towers going up today are needed for cellular telephone service. According to figures supplied by the Cellular Communications Industry Association, a total of 17,927 cellular towers are standing in the United States (including Puerto Rico) as of January 1, 1995. With 5,103 of those towers erected in 1994 alone, it doesn't take a crystal ball to realize that this is a growing problem and not one to be ignored.

Also on the horizon is the growing industry of Personal Communications Systems — PCS — which will include a range of devices and services from paging to wireless computer links. A representative of the Personal Communications Industry Association says they expect a 21 percent increase in the number of antennae/transmitter sites in the next 10 years. That would mean another 100,000 sites, but some of the transmitter units will be very small and piggy-back on existing towers, telephone poles and building tops.

When a communications company decides to build a tower, it must apply to the Federal Communications Commission. The

applications also are routinely reviewed by the Federal Aviation Administration to determine potential flight hazard. The FAA's authority to protect public-use airports is provided by FAR Part 77 (Objects Affecting Navigable Airspace.) If the proposed tower site is found not to be a factor in aviation safety, a "no hazard determination" is released. Such was the finding on the Nebraska tower.

What the Muckels learned the hard way is that private airport owners are not even considered interested parties by the FAA when reviewing proposed tower construction. Karen Muckel reports she was told that, according to their rules, "only known affected aviation interests and non-aeronautical interests that may be affected are notified of the proposal." In other words, only public-use airports, mayor's offices and state divisions of aeronautics are given notification.

As Stan Ferguson knows well.

Stan and Sue Ferguson own and operate Southern Aire, Inc. in Cotton Plant, Ark. Stan was not aware of any proposed new towers until he noticed a work crew 1,600 feet off the end of his satellite strip near Des Arc. A quick call to his attorney and subsequent investigation uncovered the fact that a 320-foot communications tower was under construction. Though the Muckels were at least given perfunctory notification by the Nebraska Department of Aeronautics, Ferguson was caught totally unaware.

Ferguson contacted the Arkansas Agricultural Aviation Association and Executive Director Ron Harrod joined the battle to persuade the communications company that the tower location was a dangerous obstacle affecting the use of the airport. With substantial money already invested in construction, the communications company not only refused to reconsider, they threatened litigation if attempts were made to prevent the installation.

During a conference call with the company, Harrod and Ferguson were told that the proposed tower was not an airspace consideration since it would only stand 320 feet high — 180 feet below minimum ferry flight required by the FARs. The obvious answer to this argument is that, considering the proximity of the tower to the runway, ferry flight is not

*(Continued on page 11)*

*Photo right: A Southern Aire plane negotiates the new 250-foot tower just off the end of Stan Ferguson's runway at Des Arc, Arkansas. The tower owner's concession to Ferguson was to lower its proposed height nearly 100 feet and to paint and light it — but that doesn't change the fact that it stands in the turning pattern. (Photo by Barbara Reynolds)*

## TOWERS

(Continued from page 7)

the concern; it's departure and approach to landing maneuvers that are greatly affected.

The company's compromise was to lower the tower to 250 feet, light it and paint it. But there's no getting around the fact that it stands directly in the turning pattern off the end of Stan's runway. And the guy wires securing the tower occupy six acres at the base.

The fact that your airport is certified by the appropriate state agency, registered with the FAA, and depicted on current sectionals does not mean it is protected or even considered an aviation interest when new tower sites are reviewed. If it is not a public-use airport, it is a non-entity.

It would be a problem for any airport. But it's even moreso for ag aviators who are working long hours, coming and going all day at lower altitudes than the average passenger plane, half the time with heavy loads.

"It's like putting a stop sign on a street that's been a through street for years," says Karen. "And there's the fatigue factor in the busy season ... the National Transportation Safety Board has statistics showing that accidents happen even when the pilot knows the tower is there."

Stan agrees. "You've got 15,000 things on your mind and you're coming and going all day. You're distracted. And then you remember there's a tower.

"It doesn't take but one lapse of memory."

So what course of action is needed to prevent encroachment into the airspace critical for safe operation from your airstrip? Your local zoning committee has the sole authority to protect your airspace through local zoning laws. The Muckels encourage you to immediately contact your appropriate zoning authority (city or county) and ask for notification whenever new towers are proposed. Educating them beforehand regarding the potential danger to life and property may save you the consternation faced by Ferguson and Muckel.

It is also advisable for your state association to communicate this valid safety concern to the state aeronautical authorities and request a forewarning whenever they receive notification of proposed construction. This option is particularly important for those areas not governed by a zoning authority. Being included in the review will not ensure success

in preventing a potential hazard, but it gives you a fighting chance.

If faced with impending construction, a point to remember is that FCC approval is site-specific. However, site-specific actually allows that the location may be shifted for up to a mile. If construction has not already started, you have a better chance of convincing the communications company to locate outside your immediate airspace. If properly approached, it is likely they will concur that we have a shared responsibility for the safety of pilots.

Considering the reality that private airports are rarely considered a factor in selecting a tower site, it is conceivable that one day you might find a tower being built literally two feet from the end of your runway. Roger and Karen have suggested that we need federal legislation which would require the FAA to consider private-use airports as well as public-use airports when making a hazard/no-hazard determination. Interestingly, the PCS Industry Association's Director of Regulatory Relations, Rob Hoggarth, said it might be of mutual interest for the NAAA and his organization to work toward requiring FAA notification to private airstrips.

Until that option is pursued and won, protect yourself by opening lines of communication with your local zoning authority and the appropriate state aeronautics agency.

As for the Muckels, the tower issue has been nothing less than a mission. They've been working through their state association to inform other private airstrip owners of the issue ... they've attended planning meetings flanked by a dozen pilots ... they've written to the likes of U.S. Secretary of Transportation Federico Pena ...

There have been moments, Karen says, that she has felt like "an insignificant person out there with no political savvy." But has she been effective? Judge for yourself: So far, no tower.

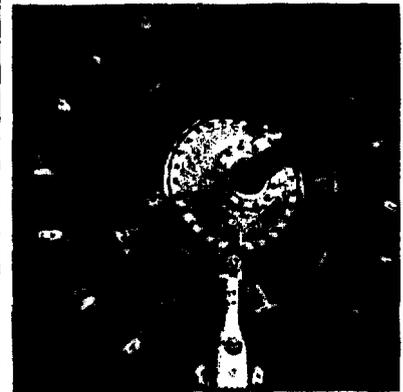
"Nothing's happened yet," says Karen. "We have our fingers crossed." ☺

*Editor's note: If you have had to accept construction of a tower in the immediate vicinity of your airport, please send the particulars to the NAAA, Attn: Part 137/Safety Committee.*

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FAA and JAA Approved

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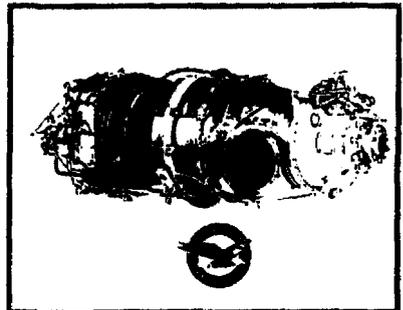
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# COMMONWEALTH of VIRGINIA

KENNETH F. WIEGAND  
Director

**Department of Aviation**  
5702 Gulfstream Road  
Richmond International Airport, Virginia 23250-2422

V/TDD - (804) 236-3624  
FAX - (804) 236-3635

October 29, 1997

RECEIVED  
OCT 30 1997  
FEDERAL COMMUNICATIONS COMMISSION

The Honorable William F. Caton  
Federal Communications Commission  
1919 M Street, NW  
Second Floor, Room 222  
Washington, D.C. 20554

Re: NPRM Docket No. 97-182

Dear Mr. Secretary:

The Commonwealth of Virginia, Department of Aviation has reviewed the Notice of Proposed Rule Making No 97-182 (NPRM), which addresses the communication industry's petition for rapid deployment of Digital Television (DTV) nationwide as authorized by the Federal Communications Commission (FCC) in MM Docket No. 87-268.

The Department of Aviation strongly objects to this new attempt to preempt the proprietary rights of the Commonwealth, and its 325 local governing bodies, to control the use of land within our respective boundaries. The communications industry is seeking the preemptive authority for the FCC through the rulemaking process it was denied by the Congress with the passage of the Telecommunications Act of 1996. As the Congress was not sympathetic to the desire of the industry to provide a preemption of local and state laws that determine the use of property within the states in an effort to further competition in the industry, the FCC has no reason or authority to do so in this manner. The NPRM gives the appearance that the FCC is attempting to administratively take what it did not receive from the Congress of the United States. In this regard this constitutes a circumvention of the democratic process. If the FCC seeks to allow any private entities to erect broadcast transmission facilities (BTF) or other communication facilities, without local, state or federal recourse, a constitutional question is raised.

The proposed "reasonable periods of time" specified in the petition are not realistic for localities and states to consider and make an informed decision regarding the location and impact of BTFs. The 21-day and 30-day periods are entirely unreasonable for localities. Local government in Virginia, especially at the land use planning and administrative approval level, is provided on a part-time basis, usually without compensation. It is unrealistic to place these time

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The Honorable William F. Caton  
October 29, 1997  
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constraints on the local governing process.

In the past, the FCC and the Federal Aviation Administration (FAA) have respected the constitutional rights of the various states and localities to govern the use of land as it related to communications structures and their impact on navigable airspace, and importantly, have never dictated the issues that could be considered at the local or state level. It is our strong opinion that this practice must continue. The granting of this petition would be a dangerous precedent to set. Special interests must not have the ability to gain control through federal agencies, of such matters over the objections of other federal agencies, the various states, local governments, and the citizens in general.

In 1987, the Virginia General Assembly enacted Title 15.491.02 and revised Title 5.1-25 of the Code of Virginia, to provide that:

1. Virginia localities enact local Airport Safety Zoning ordinances, with specific provisions, to protect local, public-use airports from encroachment by any natural or manmade obstructions to navigable airspace; and
2. Absent a locally adopted Airport Safety Zoning ordinance, the Virginia Aviation Board was given permitting authority over the same obstructions to navigable airspace.

This action was taken in 1987 when the General Assembly created one of the most farsighted airport planning and development programs in the country as a result of its understanding that economic development can only take place where there is a mature and safe transportation infrastructure to move people and goods. It was the position of the Commonwealth that the FAA was not protecting the airspace adjacent to the state's airports as it should, so the General Assembly provided specific legislation to protect the State's interest in air transportation safety and capital investment. Today, this investment amounts to more than \$16 million annually in Commonwealth Transportation Trust Funds, irrespective of local and federal funding amounting to more than \$50 million annually.

Virginia values its air transportation system and it has taken the appropriate steps to ensure its future. As a result of its foresight in developing and protecting its air transportation infrastructure, Virginia is one of the most successful states in attracting industry and commerce to provide jobs and to improve earning potential for its citizens. Granting of the industry's petition would, in effect, dismantle this protection and put Virginia's financial investment in its airport infrastructure and the safety of air passengers at unreasonable and unacceptable risk.

Since the FCC did not administratively impose similar requirements on state and local governments when addressing wireless communications issues, it should exercise the same restraint with Digital T.V. and any other segment of the communications industry.

The Honorable William F. Caton

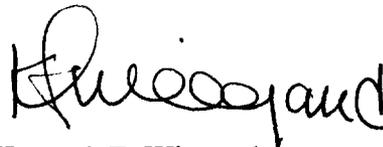
October 29, 1997

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In summary, the proposed preemption rule is intrusive and threatens the rights of Virginia localities and the Commonwealth as a whole to effectively, fairly, and reasonably manage the use of our land in our own best interest. The proposal as drafted is a blatant example of federal government intrusion. This proposal removes authority from state and local governments that clearly needs to remain with them. Furthermore, it will create significant safety problems for the flying public and have a negative impact on the national air transportation system. **I urge the FCC not to adopt the proposed rule. We fail to recognize a single item or element of the proposal that should become part of federal regulations.**

Thank you for the opportunity to provide these comments.

Respectfully submitted,



Kenneth F. Wiegand  
Director

C: Virginia Congressional Delegation  
The Honorable Robert E. Martínez, Secretary of Transportation  
Mr. James Campbell, Virginia Association of Counties, Cities and Towns  
Mr. Michael Amyx, Virginia Municipal League



**Boardman, Suhr, Curry & Field**

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October 29, 1997

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OCT 30 1997

Via Federal Express

Office of the Secretary  
Federal Communications Commission  
Washington, D.C. 20554

**Re: In the Matter of Pre-emption of State and Local Zoning  
and Land Use Restrictions on the Siting, Placement and  
Construction of Broadcast Station Transmission Facilities  
MM Docket No. 97-182**

Ladies and Gentlemen:

We represent a town government in a rural area in the State of Wisconsin. Within a totally rural part of this town, at a site located approximately 40 miles from the edge of a medium size metropolitan area and 60 to 100 miles from the end of other larger medium size metropolitan areas (see attached diagram), a private company proposed to locate a 1,706 foot tall broadcast television tower. To the knowledge of the town government, this tower was totally unrelated to the issue of DTV construction or radio transmission facility relocations resulting from DTV construction.

After extensive public hearings at which the tower sponsors were represented by legal counsel assisted by various technical experts, the application for zoning changes necessary to construct the tower was denied. The process of application, review, public hearings and decision was handled in approximately six months and the applicant offered no serious complaint at the time of the proceedings before the town or within subsequent proceedings in court with respect to the speed of decision making.

Richard A. Lehmann  
10/30/97

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Federal Communications Commission

October 29, 1997

Page 2

The denial of approval of the 1,706 foot tall broadcast tower was based on a variety of factors, considerations and findings. One significant finding was that the town had a land use plan and a land use pattern established through longstanding zoning. The principal use of the area was exclusively agricultural. The town board determined and the court subsequently endorsed the determination that a broadcast tower of this magnitude was fundamentally inconsistent with agricultural land use.

The town made a finding that the tower would have an adverse effect on property values based upon expert testimony. Property value protection is a legitimate consideration for zoning decisions in Wisconsin. In part, the town decision denying the tower was based upon aesthetics and the vast area that would see the tower given its height and the relatively flat terrain.

The town board found virtually no positive advantages to the town and contrasted this with several negative impacts, including property values, aesthetics and concern about safety dealing with falling ice and debris and car accidents caused by drivers that might be distracted by the height of the tower.

The denial by the town board was immediately challenged in the circuit court. Following a reasonably expedited briefing schedule, the circuit court upheld the decision of the town board. The tower applicants then appealed to the intermediate appellate court of Wisconsin. On September 4, 1997, the Wisconsin Court of Appeals upheld that the circuit court decision, which had upheld the town zoning decision. (Copy of this decision attached hereto.)

The population in the host town was approximately 1,000 persons. Obviously, a 1,706 foot television broadcast tower was not being built to serve the broadcast needs of that small number of immediate neighbors. The object of the developer was to penetrate at least the edge of metropolitan markets located several counties away. The hundreds of thousands of residents living in the target metropolitan markets may well receive some degree of benefit from a new broadcast operation (which this was proposed to be). However, neither the beneficiaries of the broadcast service nor the broadcast company itself should be allowed to dump the problems associated with a tower on the host municipality without that host municipality having some say in the matter.



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Federal Communications Commission  
October 29, 1997  
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The proposed preemption rule pending before the FCC would limit municipal say to health and safety considerations, but most of these have also been preempted by this proposed order or other orders.

The concept of "reciprocity of burden and benefit" plays a central role in land use regulation. That principle is not allowed to function where a proposed broadcaster establishes a huge broadcast tower far, far away from the targeted market/beneficiaries.

In the Town of Elba situation, both the town officials and the two levels of courts that heard the case clearly considered the fact that there is public benefit in broadcast television, as well as the necessity of towers to facilitate those broadcasts. However, this was the wrong location and the wrong size tower, when the adverse impacts on the town were weighed and balanced against the public benefits of broadcast television.

The notice of proposed rulemaking notes that approximately 1,500 television station licenses exist, all or most having broadcast tower facilities, indicating that state and local regulation has likely not been an insuperable obstacle to the activities for which the licenses were issued.

The Town of Elba denial of the 1,706 foot tower proposed by Skycom, Inc. is a limited exception, apparently. However, we feel that it deserves to have been an exception since the proposed site and magnitude of the facility would have been seriously disruptive of the local health, safety and welfare of the community. The process of town-level review occupied approximately six months. Litigation brought by the applicant added another two years and three months up to and through the date of the Court of Appeals decision last September. We believe that the time necessary for a town to process this application, given the fact that the town has no full-time staff and the fact that the application came in during spring planting season and the board members are farmers, was reasonable. The courts found the process of town review to be reasonable and rational.



Boardman, Suhr, Curry & Field

Federal Communications Commission

October 29, 1997

Page 4

In light of the story portrayed above, we strongly urge the FCC to limit any preemption to strictly those towers that are implicated by the DTV mandate.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'RAL', written over a horizontal line.

Richard A. Lehmann  
Special Counsel, Town of Elba

RAL/mr

Enclosure

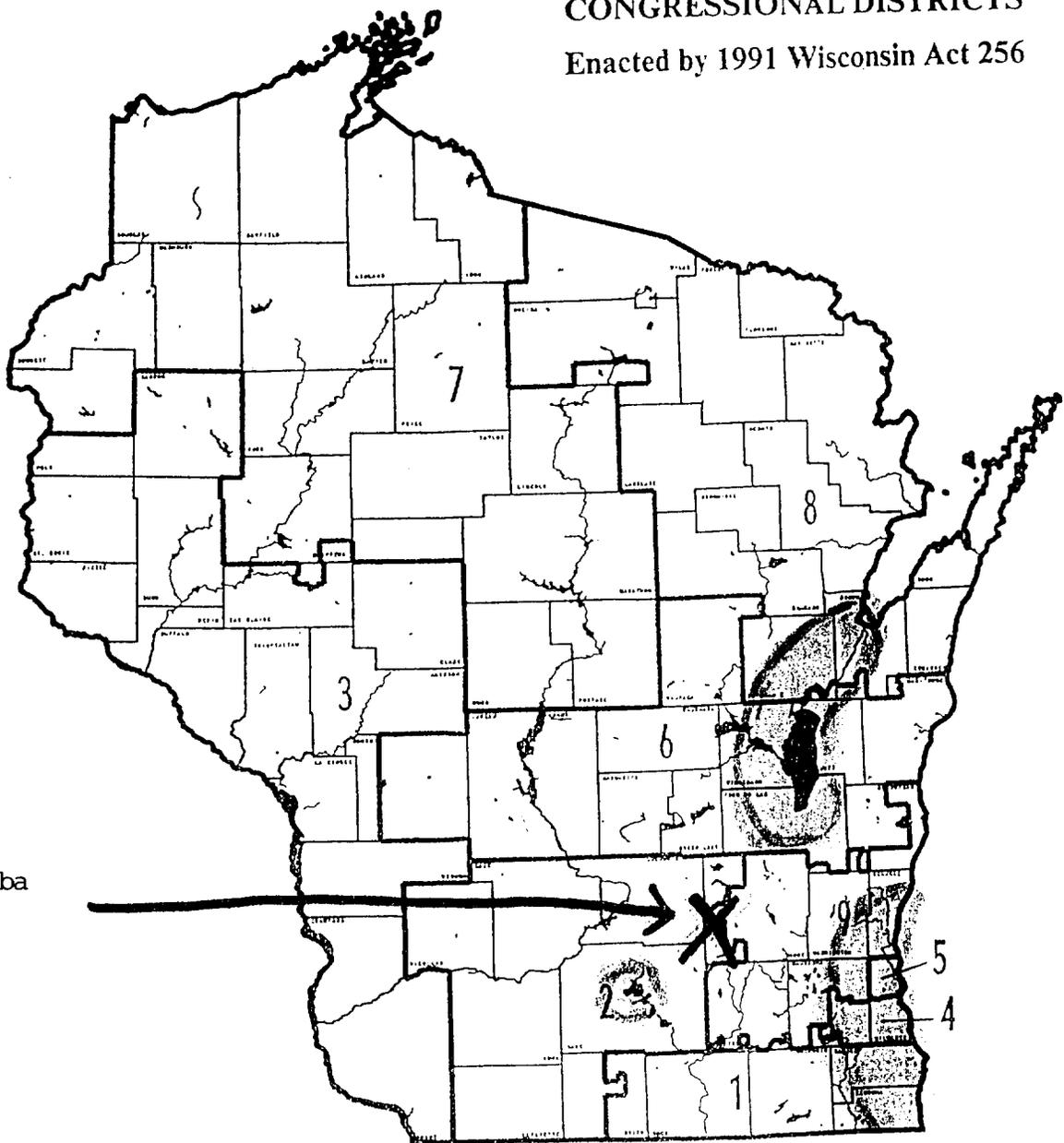
cc: Wisconsin Congressional Delegation  
Town of Elba, Chairman Russell Farr  
(c/o Town Attorney Randall Lueders)  
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WISCONSIN BLUE BOOK 1993-1994

CONGRESSIONAL DISTRICTS

Enacted by 1991 Wisconsin Act 256



Proposed Elba  
Town Site

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

September 4, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

FILED

SEP 4 1997

CLERK OF COURT OF APPEALS  
OF WISCONSIN

NOTICE

RECEIVED  
SEP 30 1997

No. 96-1597

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT IV

---

**THOMAS KONKEL, DONNA KONKEL, HAROLD R.,  
ANDREW C., DAVID A., KENNETH E., ARTHUR W.,  
AND JEAN R. BRISKY, AND SKYCOM, INC.,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**TOWN OF ELBA TOWN BOARD,**

**DEFENDANT-RESPONDENT.**

---

APPEAL from a judgment of the circuit court for Dodge County:  
JOHN R. STORCK, Judge. *Affirmed.*

Before Eich, C.J., Roggensack and Deininger, JJ.

PER CURIAM. Skycom, Inc., and several Town of Elba landowners (appellants), appeal a judgment affirming a zoning decision of the Elba Town Board. The appellants petitioned the board to rezone two hundred

acres of farmland from exclusive agriculture (A-1) to extended commercial (EC). The board referred the petition to the Town of Elba Plan Commission, which recommended denial. The board adopted the commission's recommendation and findings, and the appellants commenced this review proceeding. They contend that the Elba Town Board: abused its discretion; exceeded its jurisdiction; denied the petition arbitrarily, oppressively and capriciously; and failed to act according to law. We reject those contentions and affirm.

The landowners sought rezoning as the first step in Skycom's plan to lease two hundred acres from them to build a 1706-foot television tower on the land. Under the applicable town ordinance, the board referred the petition to the plan commission. After hearings, the plan commission recommended denial, based on the following findings:

A. The proposed zoning district change and use will not promote the safety and health of the community because of increased risk of personal injury and property damage from falling ice and debris, aircraft collisions and car accidents caused by distracted drivers.

B. The proposed zoning district change and use will have no effect on population concentration.

C. The proposed zoning district change and use would require increased public services in [the] form of fire protection and road maintenance but would not require additional public facilities.

D. The proposed zoning district change and use will not stabilize and protect property values. The proposed change and use could have an adverse effect on property values.

E. The proposed zoning district change and use could adversely impact natural resources, especially migratory birds.

F. The proposed zoning district change and use will not preserve and promote the beauty of the town. The proposed use would be an "eyesore" and "visual pollution."

G. The proposed zoning district change and use will not further or encourage appropriate use of land. The present A-1 zoning classification encourages the preservation of land used exclusively for agricultural purposes. The proposed zoning district change will jeopardize the use of the land for exclusively agricultural purposes.

H. The proposed zoning district change and use are not consistent with the comprehensive plan of the Town of Elba or Dodge County. Petitioners' land is not an appropriate place for an EC zoning district.

I. The proposed zoning district change and use will not promote or benefit the general welfare of the town. The proposed use would increase the tax base but may or may not decrease the real property tax levy. Construction of the proposed tower would benefit local contractors little, if any. One more television channel is not a benefit to the community; there are enough television channels now. The only parties who will certainly benefit are the petitioners.

The town board allowed interested persons to submit oral and written evidence at a subsequent public hearing. Several days later, the board met publicly to decide the matter. The only speaker, other than board members, was the town attorney, who criticized much of the appellants' written evidence. The board then voted to accept the plan commission's report and recommendation to deny the petition without further explanation of their decision.

We limit review of a zoning board decision to: "(1) whether the board kept within its jurisdiction; (2) whether it proceeded on correct theory of law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question." *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis.2d 468, 475, 247 N.W.2d

98, 102 (1976) (citations omitted). We examine the record *de novo* and do not defer to the trial court's decision. *Boynton Cab Co. v. DILHR*, 96 Wis.2d 396, 405, 291 N.W.2d 850, 855 (1980). We do, however, grant substantial deference to the town board's zoning decision. In *Buhler v. Racine County*, 33 Wis.2d 137, 146 N.W.2d 403 (1966), the court stated:

[S]ince zoning is a legislative function, judicial review is limited and judicial interference restricted to cases of abuse of discretion, excess of power, or error of law. Consequently, although a court may differ with the wisdom, or lack thereof, or the desirability of the zoning, the court, because of the fundamental nature of its power, cannot substitute its judgment for that of the zoning authority in the absence of statutory authorization. This rule applies not only to the necessity and extent of zoning but also to rezoning ....

*Id.* at 146-47, 146 N.W.2d at 408 (citations omitted).

The purpose of A-1 zoning, as defined by Elba town ordinances, is “to promote an area for uses of a generally exclusive agricultural nature on lands of the best agricultural quality.” TOWN OF ELBA, WIS. ZONING ORDINANCE § 3.71 (1992). The purpose of EC zoning is “to promote an area for uses of a commercial nature which are generally found in association with major traffic arteries.” *See id.*, § 3.43. The ordinances allow the town board to change a zoning classification “[w]hensoever the public necessity, convenience, health, safety or general welfare require” it. *See id.*, § 12.1.

The board properly exercised its discretion. The appellants contend that the board erroneously exercised its discretion by failing to articulate the reasons for its decision. However, by approving the plan commission recommendation, the board, in effect, adopted and incorporated the commission

findings into its decision. Those findings present a fully articulated rationale for disapproving the petition.<sup>1</sup>

The town board did not exceed its jurisdiction. The appellants contend that the plan commission's adopted findings address matters outside the town's jurisdiction. Those matters included, according to the appellants, air safety, wildlife protection, and television program content. In each case, according to the appellants, the applicable state or federal regulations would allow the tower, and the town's authority to deny rezoning is therefore preempted. We disagree. State legislation preempts a municipal ordinance if: "(1) the legislature has expressly withdrawn the power of municipalities to act; (2) it logically conflicts with state legislation; (3) it defeats the purpose of state legislation; or (4) it violates the spirit of state legislation." *DeRosso Landfill Co. v. City of Oak Creek*, 200 Wis.2d 642, 651-52, 547 N.W.2d 770, 773 (1996) (footnotes omitted).

The issue here is not preemption of an existing ordinance, but whether state and federal approval of a project compels the town to rezone agricultural land. The appellants advance no authority for the proposition that the preemption doctrine would extend that far. We therefore conclude that the Elba Town Board properly considered air safety, wildlife protection and television program content, despite state and federal regulation of those matters, under its authority to consider "the public necessity, convenience, health, safety, or general welfare," before rezoning farmland. TOWN OF ELBA, WIS. ZONING ORDINANCE § 12.1.

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<sup>1</sup> This court is required by statute to explain its decisions. Section 752.41(1), STATS. We have determined that an appropriate way of doing so is to adopt and incorporate a fully and properly articulated trial court decision, and affirm on the basis of that decision. See WIS. CT. APP. IOP VI(5)(a) (July 15, 1991).

The appellants also contend that the town board's consideration of the program content to be disseminated by the proposed tower somehow implicated Skycom's First Amendment rights. Again, the appellants have confused the issue. Skycom and the other appellants do not have a First Amendment right that compels rezoning of agricultural land.

The board did not act arbitrarily and capriciously by denying the rezoning petition. The appellant contends that the evidence did not support three plan commission findings, those being:

1. The proposed zoning district change and use will not stabilize and protect property values. The proposed change and use could have an adverse effect on property values.

2. The proposed zoning district change and use will not further or encourage appropriate use of land. The present A-1 zoning classification encourages the preservation of land used exclusively for agricultural purposes. The proposed zoning district change will jeopardize the use of the land for exclusively agricultural purposes.

3. The proposed zoning district change and use are not consistent with the comprehensive plan of the Town of Elba or Dodge County. Petitioners' land is not an appropriate place for an EC zoning district.

As to the first finding, the Dodge County Director of Planning testified to the potentially adverse effect on the nearby property values. The plan commission, and the board, could have reasonably considered this witness an expert and reasonably relied on his opinion to resolve that issue, even if the greater weight of the evidence favored the appellants. *See Petersen v. Dane County*, 136 Wis.2d 501, 511, 402 N.W.2d 376, 381 (Ct. App. 1987) (disapproval of a rezoning

petition is not arbitrary and capricious simply because it is contrary to the preponderance of the evidence).

Evidence in the nature of undisputed facts also supported the second of the three challenged findings. A television tower is radically different from and inconsistent with agricultural use. The fact that the tower would only remove one acre from agricultural use and that the town board had rezoned agricultural land in the past is of no consequence. Neither the limited amount of land taken nor the board's action on previous, unrelated petitions deprives it of the right to preserve exclusive agricultural zoning in this case.

As to whether the proposed rezoning was inconsistent with the town's comprehensive plan, the appellants contend that no comprehensive plan actually existed. As the board was advised, however, a comprehensive land use plan can exist within a planning ordinance. *Bell v. City of Elkhorn*, 122 Wis.2d 558, 565-66, 364 N.W.2d 144, 148 (1985). The board could reasonably treat its A-1 zoning as part of a comprehensive town plan to retain certain areas as exclusively agricultural.

The Elba Town Board acted according to law. Appellants contend that it did not because it provided insufficient notice for the series of hearings on the petition, and because the town's attorney advocated against the tower at the board's final hearing in the matter. However, the appellants themselves had adequate notice of all proceedings, as did residents affected by the rezoning. They fail to identify those other persons who did not receive notice, what their interest might have been, and how their attendance at the proceedings would have affected the outcome. As for the town attorney's advocacy, the appellants claim this affected their right to impartial decision-makers. However, the attorney was not

one of the board members ruling on the petition, and the appellants do not explain how his advocacy prejudiced those decision-makers. The record indicates that the appellants were given sufficient opportunity to present their evidence and arguments. The board therefore complied with the necessary ““common law concepts of due process and fair play,”” demanded of administrative proceedings. *See State v. Goulette*, 65 Wis.2d 207, 215, 222 N.W.2d 622, 627 (1974) (quoted source omitted).

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.



**City of Phoenix**  
OFFICE OF THE CITY MANAGER

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Carl Bertelsmann  
Prize



October 20, 1997

Office of the Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

**SUBJECT: MM Docket No. 97-182  
OPPOSE PREEMPTION OF LOCAL ZONING/LAND USE  
RESTRICTIONS ON DIGITAL TV FACILITIES**

Dear Commission Members:

The City of Phoenix opposes the preemption of state and local zoning and land use ordinances associated with the implementation of digital television (DTV) service or other broadcast facilities. Local government should preserve its authority on zoning and land use decisions for public and private property, without federal government restrictions regarding the timing or scope of local decision making. The operational deadlines for digital television facilities do not appear to be so onerous as to require the preemption of a reasonable public hearing and development review process that may on average take one to six months. The City is very willing to work with the broadcasters to help them meet their obligations to install digital television facilities by 1999 or 2006, while remaining within state and local planning and zoning authority.

Oppose Preemption of Local Land Use and Zoning Authority.

Adoption of the proposed FCC rules for digital television would constitute an unprecedented preemption of state and local zoning and land use authority which would have additional implications for other industries.

The proposed rule would establish time limits of 21 to 45 days for a City to complete its decision making process for the siting, construction, alteration and relocation of broadcast transmission towers, antennas and other digital television facilities. If a decision is not reached by that time then the industry would automatically gain permission to install the requested facilities. In addition, state and local governments would generally be prohibited from denying a request to place, construct or modify a broadcast antenna facility unless based upon "a clearly defined and expressly stated health or safety objective."

The proposed rule directly conflicts with the federal Telecommunications Act of 1996, which prevents FCC preemption of local and state land use decisions and preserves state and local

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government authority over most zoning and land use decisions. Local governments are already required to render decisions in a reasonable period of time, according to generally applicable time frames for zoning decisions. Further shortening that time frame through a new FCC rule would cut short citizen input and make it impossible to complete many of the existing City public hearing and decision making processes. The only grounds for denial in the rule are very narrow health or safety objectives, which specifically exclude environmental, compatibility and aesthetic issues which are important to citizens. Current City decision making time frames are as follows:

- New tower facilities - require special permit approval (4 to 5 month public hearing process), with the exception of towers within the A-1 and A-2 districts that do not exceed 100 feet in height, and are not located within 300 feet of an arterial street or land zoned or used for single family residential purposes. Special permits address compatibility and aesthetic issues which are not addressed by the FCC rule, but are a high priority for the City and neighborhoods.
- Changeouts to existing facilities - require varying levels of review depending upon the circumstances.
  - Towers approved under previous special permits may need no further public hearing, but may require modification of the original zoning stipulations through the Planning Hearing Officer (6 to 8 week hearing process).
  - Nonconforming towers may require a use permit to alter or expand a nonconforming use (4 week process).
  - The City owned towers located on South Mountain are covered by a single special permit which would not require further public hearing to add or modify the special permit, however the Phoenix Parks and Recreation Board must complete a hearing and approval process for a construction request, of approximately 52 calendar days.
- Major site plan review - City staff could provide an applicant with first review comments on a preliminary submittal within the proposed FCC time frames, but could not complete final site plan approval or permit issuance. Building safety staff review only the electrical connections for communication tower structures or equipment enclosures, and can complete this work within 21 days. Most of the plans would be reviewed over the counter within 14 days.

The issues raised by the digital television industry seem to mirror comments presented by the wireless communication providers. Any federal attempt to preempt land use standards or processes for the television broadcasters could impact a wireless communications ordinance recently adopted by the Phoenix City Council.

#### Preserve Public and Private Property Rights

While the rule's heading refers to "Local Zoning and Land Use Regulation", its text in Appendix B goes beyond zoning or similar laws affecting land use. It could potentially impact a local government's use of its own property if it requires the City to issue a permit allowing an applicant

to build a facility on City land.

The Federal Telecommunications Act does not restrict a property owner's rights in the otherwise lawful use of his or her property, and any rules adopted by the FCC should be consistent with this stance. Any federal attempt to control property uses in such a way would constitute a governmental taking of property without compensation, in violation of the Constitution. Private broadcasters do not have a right to use someone's property in any way other than as provided by the lease or license document between that broadcaster's user (as a tenant or licensee) and the property owner.

Any rules adopted by the FCC should expressly affirm the City's ability to control the use of its own property for public purposes. Radio transmission facilities have been located in City owned North Mountain Park and South Mountain Park for many years. While the North Mountain Park sites are limited to government users, to date the Phoenix Parks and Recreation Board has issued 97 long term (20 year) licenses for communication sites at South Mountain Park.

With respect to private property, broadcast facilities have been recognized as a unique land use that, due to their potential impacts on adjacent properties, have historically been subject to special permit approval through the public hearing process, except within certain industrial districts. A recent amendment to the City's zoning ordinance emphasized the need to permit development of wireless communication facilities (as well as broadcast towers in industrial districts), but with minimal impact.

#### Preserve Local Ability to Correct Interference and Noise Problems

The proposed rule would restrict the City's ability to limit and control site placement to prevent interference with critical Police, Fire and other Public Safety communications. Local control of siting and tower sharing gives the City the authority to force users to correct interference problems or lose their permission to locate at a given site. While any vendor may be able to demonstrate compliance with all FCC regulations regarding interference, and any single vendor may satisfactorily show that their equipment will not interfere with public safety communications, it becomes more and more difficult to prevent such interference as multiple vendors share the same facility and tower.

Interference caused by the interaction of multiple transmitters is difficult to calculate as more and more users share a site. If this type of interference is detected, it will likely be caused by several users, each of whom can rightly claim that they are operating within acceptable parameters as permitted by the FCC. If this occurs it will be difficult for the City to hold any user accountable to correct the problem.

In closing, the City of Phoenix opposes the preemption of state and local zoning and land use ordinances associated with the implementation of digital television (DTV) service or other broadcast facilities. Local government should preserve its authority on zoning and land use decisions for public and private property, without federal government restrictions regarding the timing or scope of local decision making. The City is very willing to work with the broadcasters