

## MEMORANDUM

**TO:** Town Board of Supervisors, Town of Middleton, WI

**FROM:** Daniel P. Bartholomew, AICP, ACE, A.A.E., Airport Solutions, LLC

**CC:** Attorney Michael J. Lawton, Boardman Clark, LLP

**DATE:** March 3, 2021

**SUBJECT: Possible Federal Funding Issues for Airport Improvements at Middleton Municipal Airport – Morey Field (C29) due to ATC Tower Impacts.**

---

All airport owners operate on the premise that if they receive federal funds, they are obligated by grant assurances to identify and mitigate hazards to navigable airspace at and around their airport facility. Should the City attempt to expand certain facilities at the Middleton Municipal Airport – Morey Field (C29) that would be impacted by the configuration of the ATC towers along the Bronner Road corridor, the FAA may conclude that the City of Middleton failed to uphold Grant Assurance 20 by not providing, at a minimum, timely “written concern” to the FAA about the height and location of the then proposed ATC towers. In addition, the City could have approached ATC and sought to proactively negotiate a compromise as to the location and/or height of the towers. Although the City has claimed that they were not properly notified of the intentions to construct the towers, they did have ample opportunity to obtain notification, provide comment, and quite possibly negotiated the current configuration of the towers.

Airport owners (such as the City of Middleton) have (had) several opportunities, both passive and active, to be notified of a potential hazard to airspace navigation. These include:

- Correspondence from the FAA (typically a postcard) notifying the airport owner that a case has been determined to be either a (1) Hazard to Air Navigation or (2) No Hazard to Air Navigation. City staff stated October 27, 2016, that “The FAA routinely sends the City postcards (which are routed to me) whenever the agency is conducting or has completed an aeronautical study of a proposed structure in the vicinity of the airport. Such was the case with the transmission line towers that were planned, and I’m told are now being installed, west of the airport.”
- Email notification from the FAA that they have received a proposal for the construction of a structure, within a specified radius of the airport facility (This requires the airport owner designee (typically the individual who receives the “postcard” notifications) to sign up for a free on-line account with the FAA Obstruction Evaluation / Airport Airspace Analysis (OEAAA)). Any comments an individual or entity has related to a proposed construction project can be submitted to the FAA via this same account portal. (This portal was established in 2005).
- Actively search the FAA OEAAA website, on a periodic basis, for proposed obstructions that may impact their airport facility. (Many airports perform this search on a periodic (i.e., weekly) basis).

In addition to the three options listed above, the City of Middleton missed two additional opportunities to respond to the FAA and object to the ATC towers:

First, although in error, the initial FAA evaluation of the ATC towers resulted in a Determination of Hazard to Air Navigation. When ATC appealed this ruling, the FAA likely established a 45-day period during which the proposed development was circularized for public and stakeholder comment. It was during this period that the City could have provided information to prevent the original determination (Hazard) from being overturned (No Hazard). The City failed to comment during this period. The City was likely notified of this comment period via a subsequent “post card”. If they established an account with the FAA OEAAA (mentioned above), they would have also received an additional email notification and could have provided rebuttal comments via the portal.

Second, the City had one final opportunity to comment on the FAA’s ultimate Determination of No Hazard to Air Navigation dated November 12, 2015, but again, did nothing. Within 30 days of the issuance of a final determination (Hazard or No Hazard), anyone (public, airport owner, stakeholder, or project sponsor) can petition the FAA for an appeal (also referred to as a “discretionary review”). This appeal can be granted or denied based on the constructive evidence provided by the petitioner. The City of Middleton had a chance of obtaining a Determination of Hazard to Air Navigation, or a revised determination (requiring shorter towers, marking and/or lighting), during this appeal process.

In a January 29, 2015 communication, the City Administrator acknowledged, “...the BOA has always held that it was the City’s obligation to enforce the covenants, not theirs. ...attached are the FAA covenants that I periodically have to sign on behalf of the City when they seek to release federal funds.”

Consistent with the City of Middleton’s commitment to area residents and as stated in City of Middleton Resolution 1998-20, Intent for Morey Airport Property “...restricting the runway length to 4,000 feet”, as stated in an October 16, 2016 communication from the City Administrator, “Our understanding from the FAA/Bureau of Aeronautics is that the ATC pole heights do not conflict with our current flight space. Only if the City were to expand its runway to 5,000 feet from the current 4,000 would that be the case. That is not in the plans currently.”

In October 19, 2016, the City communication regarding this matter indicated that the City did not intend to “spend any more city time or money.”

A December 2, 2016 (slightly over a month after the construction of the towers and slightly over a year after the FAA’s Determination of No Hazard to Air Navigation issuance) email from the City of Middleton Administrator responded to a question asking “Is it possible that the FAA might modify its positions if it knew that the runway was going to be lengthened in the future?” His response stated: “I’d caution on “future airport improvements”. This could be a very hot topic problem politically and even the advocates on the Airport Commission haven’t pushed the Commission to move in that direction.” Although this knowledge may not have altered the FAA’s decision, it would have been required, in this case, for the FAA to even consider responding with an issuance of a Determination of Hazard to Air Navigation, or more likely, a Determination of No Hazard with Conditions (requiring specific marking and lighting for obstacle avoidance). Without the City being forthcoming to the FAA about possible plans for a runway lengthening (that may be impacted by the proposed construction height and location of the ATC towers) there was no reason for the FAA to issue any determination other than that of a Determination of No Hazard to Air Navigation.

As soon as the City became aware, or should have become aware, of the proposed location and height of the ATC towers (via FAA mail notification or the FAA OEAAA web portal), the City could have entered into

negotiations with ATC regarding the towers. (It should be noted that the City was told by the Wisconsin Bureau of Aeronautics in early 2015 that they were “pretty confident” the FAA would reduce the height of the ATC towers to conform with the City height restriction ordinance.) Although the FAA recommends that project sponsors (such as ATC) contact and coordinate with the airport owner, the airport owner is also encouraged to contact and coordinate with the project sponsor as a means to mitigate potential concerns. The City did not appear to discuss meeting formally with ATC regarding safety concerns of the towers until after the FAA issued its determination, and in some cases, not until after construction commenced on the towers. (The Determination of No Hazard to Air Navigation becomes permanent when actual construction begins. Actual construction is defined as the start of the structure itself, i.e., foundations or framing, not site preparation and earthwork.)

As reflected in the City Administrator December 2, 2016 email (mentioned above), all of these actions would have made the knowledge of possible “airport improvements” public. This political decision ultimately prevented any meaningful attempt to inform the FAA as to why the towers may become an obstruction, and is likely why proactive coordination with ATC did not happen. Regardless, it is unlikely that the FAA would have issued anything other than a Determination of No Hazard to Air Navigation without proposed “airport Improvements” being depicted on the approved Airport Layout Plan (ALP) for the City of Middleton Municipal Airport – Morey Field (C29).

In the event that the City attempts to obtain federal grant funding for a 5,000’ runway, or any other project at C29 that may be impacted by the presence of the ATC towers, the FAA may find that the City (as the airport owner) failed to use the opportunities afforded to them to protect the airspace in the vicinity of the airport. It would be prudent for the public to monitor attempts to use federal grant funding to mitigate obstructions of which the City had multiple opportunities to prevent or mitigate.