IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION



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| ORIN SNOOK, | § | |
| | § | |
| Plaintiff, | § | |
| | § | |
| v. | § | CIVIL ACTION NO. H-03-243 |
| | § | |
| CITY OF MISSOURI CITY, TEXAS, | § | |
| | § | |
| Defendant. | § | |

ORDER

Beginning on May 20, 2003, and ending on May 22, 2003, the Court conducted a bench trial in the above-entitled matter at which the parties presented oral argument, evidence, and thereafter submitted briefs. Having considered the argument, testimony, submissions on file, and applicable law, the Court enters the following opinion and order. Any finding of fact that should be construed as a conclusion of law is hereby adopted as such. Any conclusion of law that should be construed as a finding of fact is hereby adopted as such.

INTRODUCTION

This is a suit to determine whether Defendant City of Missouri City's regulation of Plaintiff Orin Snook's amateur radio tower and antenna is preempted under federal law, particularly the FCC's rule PRB-1, 101 F.C.C.2d 952, 50 Fed. Reg. 38,813 (1985). Plaintiff Orin Snook ("Snook") brought suit against Defendant City

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of Missouri City, Texas (the "City") complaining that Ordinance O-01-42, enacted September 4, 2001, is preempted by federal law. Snook's complaint seeks declaratory and injunctive relief allowing Snook to maintain the tower and antenna array, as well as damages. Snook asserts a 42 U.S.C. § 1983 claim premised upon the City's alleged denial of due process rights by engaging in arbitrary and capricious zoning action. Snook seeks damages and attorney's fees under 42 U.S.C. §§ 1983 and 1988; declaratory relief that the City has engaged in bad faith or unwarranted prosecutions; and injunctive relief to prevent the City from enforcing the allegedly invalid ordinance and from continuing prosecution of the municipal violations. Snook asks the Court to declare that the zoning ordinances involve an *ex post facto* application and are thus invalid.

The City claims its regulation of Snook's tower is not preempted. It further denies that Snook had a vested right in his 1999 building permit application; that PRB-1 creates a right, privilege, or immunity cognizable under § 1983; that Snook was immune from prosecution under the *ex post facto* clause; or that the City maliciously prosecuted Snook. Additionally, the City contends that portions of Snook's § 1983 claim are barred by statutes of limitations and the malicious prosecution claim is barred by sovereign immunity.

## FINDINGS OF FACT

**PLAINTIFF ORIN SNOOK**

1. From 1996 through the present, Snook and his family have resided at 3719 Stoney Crest, Missouri City, Texas (the "Property").

2. Snook purchased the unimproved real property (a 0.958 acre-tract) with the intent to build a homestead and to erect an amateur radio antenna array. After surveying various sites that might be amenable to the construction of an amateur radio antenna tower and array, Snook chose this particular location because there were no deed restrictions related to towers.

3. The Property is in the Silver Ridge Subdivision. When Snook purchased the Property, there were no deed restrictions related to towers. In 1999, Snook's neighbors initiated a process to amend their deed restrictions to limit, among other things, antennas and towers. Meanwhile, Snook sought a permit from the City to construct a tower on his Property. After Snook constructed his tower, the neighbors adopted restrictions to prohibit construction of towers. Snook's tower is grandfathered from those deed restrictions because he built his tower prior to adoption of the amendment.

4. Orin Snook and his wife, Angela Snook, have been amateur radio licensees or "ham" radio operators for thirty years. Snook holds, and has held at all

relevant times, the highest federal amateur radio license with the maximum attendant rights. Snook is a regional emergency amateur radio coordinator within the Southern District of Texas, Houston Division.

**DEFENDANT MISSOURI CITY**

5. The City of Missouri City, Texas is a home rule municipality of the State of Texas. The City is governed by a City Council consisting of a Mayor and six council members. The City operates under a city manager form of government.

A) James Thurmond is the City Manager.
B) Wayne Neumann is the Director of Planning and is responsible for the administration of the City's planning, zoning, and building permit functions.
C) Carolyn Kelly is an Assistant City Attorney. She also serves as the City's Municipal Court Prosecutor and is responsible for the prosecution of cases in Municipal Court.
D) Mary Holton is the City Planner.

**SNOOK'S ON-SITE TESTING AND ANALYSIS**

6. Drawing on his experience as an engineer and amateur radio operator, Snook conducted tests from his property site to determine the type of antenna array that would produce a level of effective communications necessary for emergency and amateur radio communications.

7. Snook considered the variables that impact effective emergency or other amateur radio communications and the changes those variables undergo over

the passage of hours or days.

8. In his testing and analysis, Snook considered that effective emergency communications would require an ability to communicate from his antenna with the taller repeater towers in the area, from his antenna to shorter vehicles on the ground in the immediate vicinity, from his antenna to lower antenna arrays if the taller repeater towers crashed or were inaccessible during an emergency, from his antenna to cities throughout Texas, Louisiana, and the United States, and from his antenna to various cities throughout the world as necessary.

9. To conduct effective emergency operations, Snook must be able to achieve at least a 75 to 90 percent successful signal under the changing variables that impact emergency or other amateur radio communications.

10. Snook conducted tests on his real property utilizing various equipment to assess and evaluate the variables that would impact his communications.

11. Between 1996 and 1999, Snook erected a 20-meter antenna, 40-meter antenna, 80-meter loop antenna, and Very High Frequency/Ultra High Frequency ("VHF/UHF") antenna at various heights on his real property. He attempted communications with these arrays at the various heights and used different devices to measure the effectiveness of the attempted communications.

12. Based on his on-site testing, Snook was unable to achieve effective emergency or other communications on any antenna array at 35 feet, 65 feet, or any other height lower than the corresponding heights of the trees on his real property. Snook determined that his antenna array could not work effectively if it were located within the canopy of the trees because, among other factors, the location and concentration of the trees created a false ground effect at the tops of the trees, distorting the required radiation pattern of his radio communications. When Snook's antenna arrays were located lower than the tops of the trees, he could not successfully reach the necessary repeaters or ground level vehicles. Pursuant to his on-site testing, Snook concluded that his antenna arrays required a height of at least 15 to 20 feet above the tops of the trees.

13. Snook determined that his antenna array also requires an area of rotation of 360 degrees for at least one antenna. The tightly bunched trees on his property would provide a visual screen for the antenna support structure, but also precluded 360 degree rotation of any of the antenna array.

14. Snook estimated the height of the trees before he erected the antenna support structure to be between 60 and 80 feet. He subsequently climbed the antenna support structure and found the tree heights to range between 70 and 85 feet.

15. Snook used on-site testing as a starting point to determine the height and array of antennas necessary to produce effective emergency and other communications. Based on his emergency and amateur radio experience, he estimated that an antenna array of 180 to 185 feet high would be optimal.

16. Considering neighborhood aesthetics, Snook computed that a 100-foot support structure (that would also function as part of the antenna array) with an antenna array extending an additional 12 to 15 feet would be an acceptable minimal compromise that would not preclude his effective emergency amateur radio operations. Snook understood that Memorandum and Order PRB-1 issued by the FCC ("PRB-1") required such an analysis. He was familiar with PRB-1 and the federal regulations promulgated by the FCC that expressly governed emergency amateur communications.

17. Snook determined that the trees on the real property screened much of the antenna support structure from the normal eye-level line of sight with a portion of the top of the antenna support structure and antenna array exposed at the 70 to 80-foot line of sight. Snook also determined that the antenna support structure and antenna array would be no more conspicuous than the taller television transmission towers on the same horizon line of sight.

18. In 1999, Snook reviewed the City's ordinances and was unable to locate any

applying directly to his proposed antenna support structure.

19. Snook met with City officials, including Oscar Arevalo, the Chief Building Official, on several occasions regarding construction of the tower and antenna array. When Snook inquired about the type of permit he needed to obtain, the City informed him he should apply for a building permit.

20. Snook was not certain whether Ordinance 15B of the 1999 zoning ordinance, requiring a specific use permit for commercial towers, applied to ham radio antenna. Thus, he consulted the City regarding the proper type of permit.

21. In 1999, the City was uncertain whether Ordinance 15B applied to ham radio antenna. This uncertainty was demonstrated in Snook's conversations with City officials and in the notes of the public zoning hearing regarding amendment to Section 15B of the zoning ordinance, which states: "Mr. Neumann said there was also confusion about towers that required [specific use permits] and those which did not."

**FCC REGULATIONS**

22. The Federal Communications Commission (the "FCC") restricts the bands at which each individual licensee can operate. For emergency communications within the Southern District of Texas, Houston Division, the FCC reserves communications at certain frequencies in the 40 and 80-meter bands for the

exclusive use of individual licensees, such as Snook. The FCC made such reservations under both the 40 and 80-meter bands because emergency communications occur during both the day and night: one band works effectively only during the day and the other band works effectively only at night.

**THE CITY'S REGULATIONS (THE 1981 AND 1999 ORDINANCES)**

23. In 1981, the City adopted a comprehensive zoning ordinance, Ordinance 0-81-1. This Ordinance required a specific use permit for the use of a radio, microwave tower, or transmission site. A specific use permit is a site-specific zoning amendment that can only be granted by the City Council. The 1981 zoning ordinance, however, does not mention amateur radio antennas.

24. The City has adopted comprehensive regulations related to the aesthetics of its community, including height limitations on structures and buildings. The City's height limitations are more stringent than other cities in the Houston Metropolitan Area.

25. Before the City Council grants a specific use permit, the City's Planning and Zoning Commission must conduct a public hearing and submit a report regarding the specific use permit to the City Council.

26. When considering a specific use permit, in accordance with Ordinance 0-81-1

the City Council considers, among other things, the following factors: screening or buffering; landscaping and required yard, and other open space; general compatibility with adjacent properties and other property in the district; and the conformity of the proposed use with the zoning ordinance and comprehensive plan. The City Council has the authority to deny a request for a specific use permit.

27. The City has a zoning board of adjustment and appeals that has the power to hear appeals by a person aggrieved by the action of an administrative official. The City's zoning board of adjustment and appeals does not have the authority to grant a variance for a use not permissible under the terms of the zoning ordinance in the district involved.

28. The 1981 zoning ordinance contained severability provisions providing that if any part of the ordinance is adjudged invalid for any reason, the remainder of the ordinance would not be affected, impaired, or invalidated.

29. In January 1999, the City adopted Ordinance 99-04, amending its 1981 zoning ordinance as it related to the construction and maintenance of towers within the City. The 1999 tower ordinance also contained severability provisions.

30. The City added Section 15B to the 1999 tower ordinance. Section 15B defines a tower as "a structure constructed as a freestanding structure or in association

with a building, other permanent structure or equipment, on which is located one or more antennas intended for transmitting or receiving television, AM/FM radio, digital, microwave, cellular, telephone, or similar forms of electronic communication. The term includes alternative tower structures. The term includes radio and television transmission towers, microwave towers, common carrier towers, and cellular telephone towers. A tower does not include a lightning rod, satellite dish antenna one meter in diameter or less, a receive-only home television antenna, or any satellite dish antenna two meters or less in diameter located in a nonresidential zoning district."

31. The 1999 ordinance required that any tower be located at least 500 feet from any residence.

32. When Snook purchased his property, it was zoned as residential (R-1). The Property is also in an architectural overlay district, which requires specific architectural details, such as exterior surfaces. The general height limitation for all buildings and structures within the R-1 district is 35 feet.

**SNOOK'S FIRST PERMIT APPLICATION**

33. In December 1999, Angela Snook was employed by the City.

34. On December 22, 1999, based on the City's instructions concerning a permit, Snook, through his wife, Angela, submitted a building permit application to

Oscar Arevalo, along with a $15 building permit fee, for the construction of an antenna support erection.

35. Snook, through his wife, submitted supporting documents and drawings to Mr. Arevalo with the permit application. These documents and drawings included a cover letter that began: "Attached, please find the completed Building Permit Application that I am led to believe is necessary to continue placement of a 100-foot amateur radio communications antenna. This is the minimum height required after 3 years of extensive investigations, modeling and RF (radio frequency) engineering. . . ."

36. In accordance with the practice at that time, Mr. Arevalo made a copy of Snook's single page form application. He then created a package containing the copy of the application and the supporting documents, which he forwarded to Mary Holton in the City Planning Department. Mr. Arevalo forwarded the original application to the building clerk. The building clerk issued the permit for an "antenna support erection."

37. Upon filing the application and the supporting documents, the City needed to consider the application, make factual findings, and attempt to negotiate a satisfactory compromise under federal law.

38. At the time that Snook submitted his building permit application to the City,

the City's Planning Director, Wayne Neumann, was not familiar with 47 C.F.R. § 97.15, adopting PRB-1. After reviewing the materials submitted by Snook, Neumann determined that the 500-foot residential setback requirement contained in the City's zoning ordinance was inconsistent with PRB-1. Neumann initiated the process to amend the City's zoning ordinances to comply with PRB-1.

39. On January 19, 2000, James Thurmond, City Manager, confirmed that Snook wanted "to put a 100 foot ham radio operator tower" on his real property.

40. Mr. Arevalo and Mary Holton, the City Planner, reviewed Snook's application. They concluded that Snook had complied with the necessary requirements under the City's ordinances to issue a building permit.

41. Mr. Arevalo and Ms. Holton reviewed the governing federal law for the first time after receipt of Snook's application. They recommended that the City issue Snook whatever permit was necessary under the relevant federal law. The City rejected the recommendation of Mr. Arevalo and Ms. Holton.

42. Early in the process, the City failed to conduct sufficient analysis under the governing federal law. The City did not hire an expert until August 2001, more than one and a half years after Snook's initial request.

43. Snook made himself available for questions and offered to provide more data

and documentation. The City, however, did not request further documents or information at this time.

44. Before conducting the proper analysis under federal law, the City determined it would not approve Snook's application. This decision was based primarily on aesthetics and the general height restrictions for all structures in Snook's district.

ORDINANCE 0-00-24

45. On May 15, 2000, partly in response to the controversy regarding Snook's antenna, the City Council adopted Ordinance 0-00-24, amending its ordinances regulating towers and clarifying that certain portions of Ordinance 15B apply to ham radio antennas. Ordinance 0-00-24 eliminates the earlier prohibition of a tower within 500 feet of a residential structure. It requires an amateur radio operator to apply for a specific use permit if the applicant seeks to erect an antenna support structure or antenna array more than 35 feet high. This amendment corresponds to a general height limitation on all structures of 35 feet.

46. Ordinance 0-00-24 contains severability provisions.

47. During the consideration of the amendment, Mr. Neumann confirmed that prior to the amendment, there was some confusion about which towers required a

specific use permit.

**SNOOK CONSTRUCTS HIS TOWER**

48. On May 16, 2000, Snook constructed a 114-foot antenna support structure and antenna array on his property. Snook erected a 40-meter dipole antenna, a separate 80-meter loop antenna, a separate interleaved series of antennas, and a separate VHF/UHF antenna.

49. On May 17, 2000, the City's amendment to Ordinance 15B became effective.

50. Snook erected his tower in a cluster of trees, in order to provide some screening of the structure. Snook planted additional trees to provide coverage at normal lines-of-sight.

51. On May 30, 2000, Mr. Arevalo advised Snook in writing that (i) the building permit originally requested by Snook for a 100-foot tower "could not be permitted since it violated the existing ordinance," (ii) Snook's tower violated the new ordinance limiting the height of towers to 35 feet, and (iii) Snook should remove the tower (or be subject to municipal court action) and obtain a specific use permit for a tower in excess of the 35-foot height limitation. The letter required Snook to comply with the amended 35-foot standard that was not in effect when Snook submitted his building permit application. During the later prosecution of Snook on municipal citations, it became evident that

the City had in fact issued the building permit in December 1999. In May 2000, however, the City was apparently not aware that it had done so.

52. On June 13, 2000, Snook filed a notice of appeal with Mr. Arevalo and the Zoning Board of Adjustments. The City did not respond to Snook's notice of appeal. The City later argued that it did not allow Snook to appeal because the Zoning Board of Adjustments did not have the authority to consider a variance to allow a use that was not permissible under the terms of the zoning ordinance in the district. Thus, Snook's only available relief was either to apply for a specific use permit or appeal directly to the City Council.

53. On July 31, 2000, Mr. Neumann wrote Snook, asserting that Snook was in violation of the amended 35-foot rule and that he should apply for a specific use permit. He also stated that Snook did not pay the appropriate application fee when he submitted his permit application in December 1999. Mr. Neumann stated that the City would analyze Snook's permit application under the ordinances in existence in 1999 if Snook would pay the application fee of $302.

**SETTLEMENT PROTOCOL**

54. On October 31, 2000, Snook responded and argued that the City had acted arbitrarily and was in violation of federal law.

55. He suggested a settlement protocol to allow the City to comply with federal law. On November 4, 2000, Snook and the City agreed to this protocol.

56. Subject to all rights and remedies, Snook agreed to resubmit the same application documents, but this time with a completed single page form application for a specific use permit.

57. The Court compared the single page specific use permit application form and supporting submissions with the single page building permit application form and supporting submissions. Snook's earlier building permit application contained the information required for the specific use permit application with the exception of the name of Snook's attorneys.

58. Subject to all rights and remedies, Snook and the City agreed that the Planning and Zoning Commission would consider the submitted application and make recommendations to the City Council.

59. When Snook had not applied for a specific use permit by February 23, 2001, a City Code Enforcement Officer prepared complaints to be filed in Municipal Court against Snook regarding the violation of city ordinances.

60. On March 8, 2001, Carolyn Kelly, the City Prosecutor, accepted the charges made against Snook by the City's Code Enforcement Officer for construction of a tower in violation of city ordinances.

61. On March 22, 2001, Snook completed an application form for a specific use permit, paid the application fee for a specific use permit, and provided the City with information regarding his request for a specific use permit.

62. The City states that it accepted Snook's specific use permit application under the 1999 Ordinance, including the application fee set by the 1999 Ordinance (i.e., an additional $285). The City did not, however, attempt to enforce the 500-foot residential setback requirement in the 1999 Ordinance. Snook applied for a specific use permit for a 100-foot amateur radio communications antenna.

63. In Snook's specific use permit application submitted on March 22, 2001, Snook described the trees on his property as 60 and 70 feet tall. The height of the trees on his property and near the antennas is an important factor related to the height of the tower and antennas for both technical and aesthetic reasons. When considering Snook's specific use permit application, the City's Planning Department requested that Snook provide information regarding the approximate height of the mature canopy trees on his property. Snook subsequently hired a tree survey to be completed, and provided a copy to the City. The tree survey, however, did not include the height of the trees. The taller trees on Snook's property are mature such that they no longer appear to

be increasing in height.

64. The City staff's April 11, 2001 report to the Planning and Zoning Commission, prepared by Mr. Neumann, specifically addressed the local government's concern regarding the height of the tower: "Preservation of community character is an additional issue. The [Property] is located within a large-acreage residential neighborhood.... The neighborhood offers a rural setting ... consisting of 122 lots, of which over 50 have been developed to date with custom homes. . . . [T]he visual impact of the telecommunications tower together with its antennas and the guy wires hovering above the applicant's house can be seen from various locations in the neighborhood, appears more appropriate in an Industrial District, and does not complement the character of the community."

65. The April 11, 2001 report to the Planning and Zoning Commission recommended that the natural screen of trees surrounding the tower (of approximately 60 to 80 feet in height) be considered by the Planning and Zoning Commission in developing their recommendation.

66. The Planning and Zoning Commission held a public hearing on Snook's application for a specific use permit on April 18, 2001. After considering Snook's application, the City staff's written report, the Homeowners

Association's written comments, comments of City staff, the applicant and his attorney, and two citizens opposed to the application, the Planning and Zoning Commission adopted a written final report, which it directed to City Council.

67. Neumann and Holton permitted James Siedhoff to argue that Snook's antenna support structure and antenna array violated the applicable deed restrictions. This argument was not relevant, however, as there are no applicable deed restrictions.

68. The Planning and Zoning Commission voted to recommend a specific use permit that limited the height of Snook's antenna support structure and antenna to 35 feet as prescribed by the amendment to Ordinance 15B. The Planning and Zoning Commission's recommendation expressly stated that Snook's application was subject to Ordinance 15B, as amended. The Planning and Zoning Commission, however, did not limit the array of antennas or require that the antenna support structure and antenna array be taken down.

69. Snook asked the Planning and Zoning Commission to make findings of fact, but none were issued.

70. After the decision of the Planning and Zoning Commission, the City requested that Snook provide additional information, including (a) whether Angela Snook, who filed the original application, approved the filing of the

application, (b) whether Snook could provide tax receipts, (c) the location of the power lines in relation to Snook's real property, (d) whether Snook installed a pool, (e) the species and calipers of each tree on Snook's real property, and (f) the scale of Snook's drawings.

71. The City required Snook to obtain a tree survey, at a cost of $3,200. The City has not required any other applicant to secure a tree survey.

72. Snook objected that the City submitted dilatory, pretextual, make-work questions, or questions for which the City's "comprehensive planning" department should already have had the answer.

73. In response to further requests from the City, Snook submitted a report that his antenna and support structure exceeded all code requirements.

74. Snook also supplied the City with the expert report of Kent Marshall, P.E., a professional engineer and experienced amateur radio operator. Mr. Marshall's report supported Snook's application.

75. Snook provided the City with additional data and information that supported his computations.

**CITY CITES SNOOK**

76. On March 31, 2001, after Snook resubmitted his application, the City issued the first four of twenty-seven citations to Snook.

77. Snook had complied with the settlement protocol when the City presented the citations to the court to sign and issue. The City did not pull the citations even though Snook was in full compliance with the settlement protocol.

78. The City later stated in argument at trial that it issued the citations because Snook did not provide the height of his trees. However, the City did not request the height of the trees until April 2001.

79. The City cited Snook for not having a building permit and for having an antenna in excess of the 35-foot limit under the amended ordinance without a specific use permit.

80. Carolyn Kelly, the prosecuting attorney, testified that she reviewed and approved each citation and found that there was a reasonable basis for each. The City decided to issue weekly citations, or daily citations if it determined there was a lack of good faith compliance on Snook's part.

81. On July 5, 2001, City Prosecutor Kelly tried three cases against Snook. At the bench trial, the Municipal Court Judge found Snook guilty of two violations: construction of a tower without a specific use permit and construction of a tower more than 35 feet tall. The Judge dismissed the third violation (which cited Snook for not having a building permit).

82. By August 15, 2001, the City had received one letter of support, eight letters

of non-opposition, two letters asserting a violation of deed restrictions (which are not applicable to Snook's tower), and one letter of opposition with no specified basis. Furthermore, no residents had sought to lower the valuation of their real property because of Snook's antenna support structure, or complained that they had to lower the selling price of their property because of the antenna support structure and array.

**CITY EMPLOYS DR. LONG**

83. In August 2001, the City employed Dr. Stuart Long, an expert in antennas and radio communications, to assist in evaluating Snook's specific use permit application. Dr. Long prepared a written report for the City Council, dated August 13, 2001.

84. The City admitted that Dr. Long provided the basis for its understanding of amateur radio communications and controlling federal law.

85. Dr. Long estimated the trees around Snook's antenna to be approximately 60 to 70 feet high.

86. Dr. Long obtained information from Snook regarding band widths of operation, type of communications equipment, including antennas, and proposed geographic areas of communication.

87. After observing Snook's property and antenna from a distance of

approximately 200 feet and reviewing Snook's specific use permit application, Dr. Long concluded that Snook's tower height and antenna placement for the high frequency bands (considering primarily 20 and 40 meter bands) should be about 50 to 60 feet high, and placement for the VHF/UHF antennas should be just above the treetop level.

88. Dr. Long did not go onto Snook's property or closely examine the antenna array, antenna support structure, or amateur radio equipment.

89. Snook uses the 40, 80, and 160-meter bands for communication to Austin and similar surrounding areas. These radio frequencies (10 to 160-meter bands) bounce between the earth and the ionosphere to provide communications. Dr. Long's opinion is that the trees on Snook's property do not substantially impact these bands.

90. Snook also communicates on VHF/UHF bands. These radio frequencies work on a line of sight or point to point, without a bounce. These radio frequencies pass through vegetation, but trees may attenuate the signal. Due to repeaters and the relatively greater height on the towers on which the repeaters are placed (400 feet), Dr. Long's report opines that Snook does not increase his area of communication significantly by increasing the height of his tower over 50 to 60 feet high.

91. According to Dr. Long, for best reception, a VHF/UHF antenna should be above the level of the treetops.

92. Dr. Long states he rendered no opinions on aesthetics.

93. The City did not ask Dr. Long to render an opinion on whether Snook must take down the antenna support structure and antenna array or whether the antenna array should be limited.

94. Dr. Long admits he is unfamiliar with the frequencies of the bands the FCC reserves for emergency communications. He admits he does not know where the repeaters that Snook needs to access during emergency communications are located. He also admits he could not specify the precise paths Snook would use to conduct emergency communications during any particular emergency.

95. Dr. Long did not conduct any tests or computer simulations. Dr. Long did not ask for any data regarding Snook's previous on-site testing.

96. The Court concludes that Dr. Long presents theory without any normative link to the facts of Snook's actual amateur radio equipment or operations.

97. Dr. Long incorrectly assumed that Snook could only communicate at the 20-meter band, but not at the 40 and 80-meter bands that are used for emergency communications. Dr. Long may have incorporated this assumption because his own report appears to support Snook when, as in this case, Snook

communicates at the 40 meter, 80 meter, or VHF/UHF bands. Dr. Long does not appear to be factoring international communications into his analysis and recommendation of a 50 to 60 foot tower. He concluded in part, like Snook, that Snook's antenna support structure had to be between 100 to 110 feet high for the 40-meter band and that Snook could not operate at the UHF/VHF band if the antenna were placed below the tree line.

98. Although Dr. Long did not recommend a 65-foot height, his report mentions a 65-foot height based upon on a statement from an attorney in the comment section of PRB-1. This comment bears no relationship to the details of Snook's amateur radio equipment, antenna array, or communications from that array.

ORDINANCE O-01-42

99. The City Council conducted two public hearings regarding Snook's application for a specific use permit on August 20, 2001 and September 4, 2001.

100. On September 4, 2001, the City Council passed a specific use permit ordinance, Ordinance O-01-42, which pertains to Snook's radio antenna array and support structure.

101. Ordinance O-01-42 lists specifically the array of antennas Snook may maintain on his structure, incidentally eliminating one antenna. Neither Dr. Long nor the Planning and Zoning Commission provided any support for this limitation.

Counsel argued at trial that the City intended to simply insert the list of antennas as provided by Snook. However, by including the list of specific antennas, the face of the ordinance precludes at least one antenna currently on the tower.

102. The list of antennas in Ordinance O-01-42 as written does not allow for the erection of Snook's 80-meter loop antenna. The FCC reserves both the 40 and 80 meter bands for emergency communications because one band operates at night and one operates during the day. Without the 80-meter loop antenna, Snook cannot conduct emergency communications.

103. The Ordinance O-01-42 dictates a height for Snook's antenna support structure and antenna array that meets the City's preordained goal to envelop the antenna support structure and antenna array within the tree canopy. It limits the height of the structure and array to 65 feet or the average height of the surrounding trees within a 20-foot radius. In either instance, Snook's antenna support structure and antenna array must be within the canopy of trees.

104. Dr. Long provides no opinion to support this limitation. Dr. Long concluded that 50 to 60 feet would be satisfactory for the 20-meter band. The report is unclear as to the height requirement for the 40-meter band antenna in relation to Snook's actual antenna operations. Dr. Long also concluded that the

VHF/UHF antenna had to be at or above the tree canopy. Independent of Dr. Long's recommendation, the City has no background or experience in amateur radio communications or the controlling federal law to decide such a limitation. There is no determination as to why this is a minimum regulation necessary to yield the City's aesthetic concerns. There are no fact-findings to support this limitation.

105. The Court concludes that the limitations of Ordinance O-01-42 preclude Snook's effective emergency or other communications under his existing and intended antenna arrays.

106. To comply with the specific use permit ordinance, Snook would need to burrow out an area within the canopy of the trees to permit the 360-degree rotation of one or more of his antenna arrays.

107. Based on practical experience and examination of Snook's structure, Kent Marshall confirms that Snook cannot effectively communicate if he were required to lower his antenna support structure and antenna array within the canopy of the trees. He confirms that an antenna array within the tree canopy, especially in the 20, 40, and 80 meter bands and in the VHF/UHF bands, will have an unrecognizable distorted signal and will not allow for communication to all repeaters and lower surface level vehicles, cannot rotate as necessary, and

will not support the emergency or amateur radio communications Snook needs to utilize.

108. On its face, the specific use permit Ordinance requires Snook to remove the antenna array and support structure and apply for a new permit. There is no determination as to why this is a minimum regulation necessary to yield the City's aesthetic concerns. There are no fact-findings to support this limitation. There is no basis for this limitation. In the course of this litigation, the City claimed, however, that Snook needs only to lower the structure.

109. The Ordinance O-01-42 also requires Snook to reapply, resubmit data, and pay additional fees of up to $1,200 for his existing antenna support structure and array. There is no determination as to why these are minimum regulations necessary to yield the City's aesthetic concerns. There are no fact-findings to support these limitations. Mr. Marshall asserts such limitations are unreasonable and effectively require more stringent regulation than that required by the FCC.

110. Ordinance O-01-42 recites that Snook must comply with Ordinance 15B, without specifying which version of 15B applies.

111. No residents appeared before either of the two City Council meetings to complain or voice concern regarding Snook's antenna structure and array.

112. Snook objected to the specific use permit Ordinance and requested findings of fact by the City Council pertaining to its determination. None were provided.

113. The City failed to respond to Snook's objections and prosecuted twenty-one of the twenty-seven citations against Snook. The City secured a conviction for Snook's violation of the 35-foot height limit and for violations of the specific use permit ordinance.

114. In each trial, the City failed to bring forth evidence of its compliance with Local Government Code § 250.002 which requires compliance with federal law.

## CONCLUSIONS OF LAW

### JURISDICTION AND VENUE

1. The Court has jurisdiction over the parties. The Court has subject matter jurisdiction.

2. Venue is proper in the Southern District of Texas, Houston Division.

### SNOOK'S CLAIMS

3. Snook seeks a declaration from the Court that the height restrictions, antenna array restrictions, and structure removal requirement in Ordinance O-01-42 are preempted, void, and unenforceable because they preclude Snook's amateur radio communications or, alternatively, because they do not represent the

minimum regulation that reasonably accommodates Snook's amateur radio communications and achieves a legitimate city purpose.

4. Snook seeks a declaration that the May 2000 amendment to Ordinance 15B is preempted, void, and unenforceable because its enactment did not comply with the governing federal law for amateur radio communications.

5. Pursuant to 42 U.S.C. §§ 1983 and 1988, Snook seeks: (1) a declaration that the City violated Snook's rights by denying his federal rights as a licensed emergency amateur radio operator; (2) a declaration that the City violated Snook's due process and federal rights by enacting and seeking to enforce the May 2000 amendment to Ordinance 15B without complying with the federal law governing amateur radio communications and in an *ex post facto* manner; (3) a declaration that the City violated Snook's due process rights by engaging in arbitrary, capricious, unreasonable, and egregious zoning actions that bore no reasonable relationship to any actual or conceivable legitimate purpose; (4) a declaration that the City violated Snook's due process rights by denying him the required permit to erect Snook's antenna array and antenna support structure in December 1999 when the City determined that Snook had complied with all of the requirements for the necessary permit, but then did not complete the administrative steps to issue the necessary permit; (5) a

declaration that the City violated Snook's due process rights by engaging in bad faith prosecutions; and (6) recovery of damages, attorney's fees, and expert fees.

6. Snook seeks permanent injunctive relief that: (1) restrains the City from enforcing the specific use permit Ordinance, or alternatively any portion of the specific use permit Ordinance, that is preempted, void, and unenforceable; (2) restrains the City from enforcing the May 2000 amendment to Ordinance 15B, or alternatively any portion of the May 2000 amendment to Ordinance 15B, that is preempted, void, and unenforceable; and (3) restrains the City from continuing with its criminal prosecutions of Snook.

A CASE OF FIRST IMPRESSION

7. Neither the Fifth Circuit Court of Appeals nor any federal district court within Texas, Louisiana, or Mississippi has had to consider the type of relief requested by Snook under the same or similar facts as exist in this case.

THE FCC ACT, ITS REGULATIONS, AND AMATEUR RADIO OPERATIONS

8. The Federal Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* created the FCC and granted the FCC the power to promulgate its implementing regulations, 47 C.F.R. Part 97, that comprehensively regulate all amateur radio operations. *Bodony v. Incorporated Village of Sands Point*, 681 F.Supp. 1009,

1012 (E.D. N.Y. 1987).

9. These regulations have the same preemptive effect as federal statutes. *Id.*

10. 47 C.F.R. § 97.15 codifies two seminal FCC rulings: FCC Memorandum Opinion and Order PRB-1 and Order RM-8763 ("RM-8763").

11. "Undeniable tension exists between amateur radio operators' interests in erecting a radio antenna high enough to ensure successful communications, and local municipalities' interests in regulating the size and placement of amateur radio antennas. Choosing between the two, the federal government aligned its interests with those of the amateurs because 'amateur radio volunteers afford reliable emergency preparedness, national security, and disaster relief communications,' and because a direct correlation exists between antenna heights and amateurs' ability to successfully transmit and receive radio signals. Accordingly, 'federal interests are furthered when local regulations do not unduly restrict the erection of amateur antennas." *Palmer v. City of Saratoga Springs*, 180 F.Supp.2d 379, 383 (N.D. N.Y. 2001) (quoting *Pentel v. City of Mendota*, 13 F.3d 1261, 1263 (8th Cir. 1994)).

12. On September 19, 1985, the FCC issued *In re Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities*, 101 F.C.C.2d 952, 50 Fed. Reg. 38,813 (1985) (codified at 47 C.F.R. § 97.15(e)). This ruling is

referred to as PRB-1.

13. "Weighing the various local, federal and amateur interests, the FCC issued PRB-1 in an attempt to 'referee' the tension between the competing interests and 'strike a balance between the federal interest in promoting amateur communications and the legitimate interests of local governments in regulating local zoning matters.'" *Palmer*, 180 F.Supp.2d at 384 (quoting PRB-1 ¶¶ 22, 24).

14. Section 97.15 (b) of 47 C.F.R. provides in part that: Except as otherwise provided herein, a station antenna structure may be erected at heights and dimensions sufficient to accommodate amateur services communications. (State and local regulation of a station antenna structure must not preclude amateur service communications). Rather, it must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose. *See* PRB-1, 101 FCC 2d 952 (1985).

15. PRB-1 considered many different positions, PRB-1 at pp. 1-7, but then focused on the amateur radio operator's rights under the comprehensive regulation and the need for an existing infrastructure of emergency amateur radio communications:

> [T]here is also a strong federal interest in promoting amateur communications. Evidence of this interest may be found in the comprehensive set of rules that [the FCC] has adopted to regulate the amateur service. Those rules set forth procedures for the licensing of stations and operators, frequency allocations, technical standards which amateur radio equipment must meet and operating practices which amateur radio operators must follow. We recognize the amateur radio service as a voluntary, noncommercial communication service, particularly with respect to providing emergency communications. Moreover, the amateur radio service provides a reservoir of trained operators, technicians and electronic experts who can be called upon in times of national or local emergencies. . . . Upon weighing these interests, we believe a limited preemption policy is warranted. State and local regulations that operate to preclude amateur communications in their communities are in direct conflict with federal objectives and must be preempted.
>
> Because amateur station communications are only as effective as the antenna employed, antenna height restrictions directly affect the effectiveness of amateur communications. Some amateur configurations require more substantial installations than others if they are to provide the amateur with the communications that he/she desires to engage in. . . . We will not, however, specify any particular height limitation below which a local government may not regulate, nor will we suggest the precise language that must be contained in local ordinances, such as mechanisms for special exceptions, variances, or conditional use permits. Nevertheless, local regulations which involve placement, *screening*, or height of antennas based upon health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose.

PRB-1 at p. 7.

16. PRB-1 requires a site-specific, antenna-specific, array-specific, operations-specific, ordinance-specific, and city action-specific analysis. PRB-1 at p. 7.

17. In November 1999, RM-8763 revisited the scope of the analysis required under PRB-1. RM-8763 at pp. 1-5.

18. In RM-8763, the FCC considers whether the traditional deference afforded a zoning regulation under a balancing of interest test still applied when the zoning regulation did not preclude ham radio operations, but still impinged on the operations. RM-8763 reaffirmed the express formula contained in PRB-1 and amplified that "[g]iven [examination required under PRB-1,] it is clear that a 'balancing of interests' approach is not appropriate." RM-8763 at p. 3.

19. RM-8763 reaffirms that "the very least regulation necessary for the welfare of the community must be the aim of its regulations so that such regulations will not impinge on the needs of the operators to engage in amateur communications."

TEXAS ADOPTS THE FEDERAL LAW OF AMATEUR RADIO OPERATIONS

20. 47 C.F.R. § 97.15, Order PRB-1, and Order RM-8763 provide for limited federal preemption. *Pentel v. City of Mendota*, 13 F.3d 1261, 1263 (8th Cir. 1994).

21. Effective May 1999, the Texas Legislature expressly imposed this federal law on its counties and cities. TEX. LOC. GOVT. CODE §§ 250.002(a) and (b).

22. 47 C.F.R. § 97.15, Order PRB-1, and Order RM-8763 govern both the

enactment and the enforcement of city ordinances relating to the individual amateur radio service. Id.

PREEMPTION

23. The FCC has specifically recognized that cities have authority to regulate the screening and height of antennas based on aesthetic considerations, provided the local regulation "is crafted to accommodate reasonably amateur communications and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose." PRB-1, paragraph 25.

24. 47 C.F.R. § 97.15, PRB-1, and RM-8763 do not define when zoning action precludes amateur radio communications or when a city fails to reasonably accommodate amateur radio communications with the minimally practicable regulation, except to recite that this Court must apply the PRB-1 formula as written and may not simply defer to a city's zoning actions based upon a balancing test.

25. There are several decisions outside the Fifth Circuit that provide guidance in applying 47 C.F.R. § 97.15, PRB-1, and RM-8763.

*Bodony v. Incorporated Village of Sands Point*, 681 F.Supp. 1009 (E.D. N.Y. 1987).

26. A city's zoning action precludes amateur radio operations when that action "seriously interferes with the full enjoyment by [the applicant] of his license

to operate an amateur radio station. *Bodony*, 681 F.Supp. at 1013.

27. In *Bodony*, an amateur radio operator sought to erect an antenna that was 23 feet in its retracted position and 86 feet in its extended position. *Id.* at 1010. Trees were expected to screen the extended antenna. *Id.* The location and height of the trees, their true proximity to the proposed antenna, and the bands at which operations would be conducted, however, are not disclosed. The city's ordinance established a 25-foot height restriction. *Id.* The city denied the operator's request for a building permit and a variance because other amateur radio operators could communicate with an antenna less than 25 feet high and the applicant failed to demonstrate that he could not conduct some amateur radio operations with a 25 feet high or lower antenna. *Id.*

28. The *Bodony* court recognized that the height of an antenna limits the effectiveness of amateur radio communications. *Id.* at 1012-13. It then recognized that hypothetical, non-site specific opinions are irrelevant. The Court relied upon expert testimony which took into account the actual amateur radio equipment, the actual location, and the actual operations. *Id.*

29. The *Bodony* court also did not uncritically defer to the city's recited considerations, such as alleged detriment to the character of the neighborhood or to safety. It required the city to offer evidence of these concerns and to

show that its zoning action was the minimum regulation to address these considerations. *See id.* It further held that the findings of the Zoning Board did not preclude the court's consideration of the zoning action under PRB-1. *Id.* at 1013.

30. *Bodony* predates RM 8763 and 47 C.F.R. 97.15, so it mentions in passing the need to strike a balance between amateur radio operations and local concerns. Id. at 1012-13. At the same time, it demonstrates how PRB-1, and by extension 47 C.F.R. § 97.15, should be applied to prevent serious interference with an amateur radio operator's full rights under the license.

*Pentel v. City of Mendota*, 13 F.3d 1261, 1263 (8th Cir. 1994).

31. *Pentel* provides a framework to determine whether a city's zoning action that does not preclude amateur radio operations nevertheless reasonably accommodates amateur radio communications with the minimum practicable regulation. *See Pentel*, 13 F.3d at 63-64 ("PRB-1 [] preempts a zoning ordinance that a city has not applied in a manner that reasonably accommodates amateur communications").

32. "The federal government's interests are aligned with those of the amateurs, for amateur radio volunteers afford reliable emergency preparedness, national security, and disaster relief communications. Because there is a direct

correlation between an amateur's antenna height and her ability successfully to transmit and receive radio signals, federal interests are furthered when local regulations do not unduly restrict the erection of amateur radio antennas."

33. In *Pentel*, an amateur radio operator sought to erect a steel tower that was 30 feet in its retracted position and 68 feet when fully extended. *Id.* at 1262. The operator had utilized a 56.5 foot high antenna, which yielded some, but inadequate, domestic and international communications. *Id.*

34. In *Pentel*, the city's zoning ordinance limited all structures, including radio antennas to a height limitation of 25 feet. *Id.* The amateur radio operator applied for a variance. *Id.* The city evaluated the operator's application through a planning report, and conducted a planning commission meeting and two city council meetings. *Id.* at 1262. The city denied the application for a 68-feet high structure, but, in recognition of PRB-1, granted the applicant a specific use permit allowing her to maintain the 56.5-feet high antenna. *Id.* at 1262-63.

35. The *Pentel* court found that the city had violated PRB-1 and concluded that "[t]he city's decision to grant a variance that allows Pentel to continue using a wholly inadequate antenna does not constitute an accommodation in any practical sense." *Id.* at 1265.

36. The *Pentel* court rejected the approach which simply considers whether the city "properly balanced its interests against the federal government's interests in promoting amateur radio communications." *Id.* at 1264.

37. Instead, the *Pentel* court read PRB-1 "as requiring municipalities to do more -- PRB-1 specifically requires the city to accommodate reasonably amateur communications. This distinction is important, because a standard that requires a city to accommodate amateur communications in a reasonable fashion is certainly more rigorous than one that simply requires a city to balance local and federal interest when deciding whether to permit a radio antenna." *Id.* (citations omitted).

38. *Pentel* predated RM-8763, but it reached a consistent result.

39. The reasonable accommodation standard requires that a city consider the application, make factual findings, and attempt to negotiate a satisfactory compromise with the applicant. *Id.*

40. The findings of fact should be a documented, enumerated basis for the denial, not merely suggestions of reasons for denial contained in the record. *See id.* at 1264-65.

41. The *Pentel* court required the city's fact-findings to focus on whether the amateur radio operator could successfully complete amateur radio operations

under the site-specific conditions. *See id.* at 1265.

*Marchand v. Town of Hudson*, 788 A.2d 250, 254 (2001).

42. The *Marchand* case affirms the *Pentel* approach. *Marchand v. Town of Hudson*, 788 A.2d 250, 254 (2001). Significantly, it post-dates RM-8763 and notes that RM-8763 mandates the *Pentel* approach and rejects any balancing test approach. *See id.*

43. In *Marchand*, the trial court had reversed the issuance of a building permit to erect three 100-foot antennas based on the conclusion that the antennas upset the balance between local and federal interests. *Id.* at 252. The state supreme court vacated the trial court's decision, examining the "reasonable accommodation" standard in the process.

44. The *Marchand* court adopted the *Pentel* approach and concluded that, after remand, the city should consider "whether the particular height and number of towers are necessary to accommodate the particular ham operator's communication objectives." *Id.* at 255.

*Palmer v. City of Saratoga Springs*, 180 F.Supp.2d 379, 385 (N.D. N.Y. 2001).

45. *Palmer* also adopts the *Pentel* approach. *Palmer v. City of Saratoga Springs*, 180 F.Supp.2d 379, 385 (N.D. N.Y. 2001).

46. Importantly, *Palmer* establishes that a city may not simply state that it

considered the application, hold several hearings, and cite to PRB-1 in order to comply with 47 C.F.R. § 97.15. *See Palmer*, 180 F.Supp.2d at 383-87.

47. In *Palmer*, an amateur radio operator applied for a specific use permit to erect a 47-foot antenna. *Id.* at 380. The city held hearings, denied the application, and made detailed fact-findings. *Id.* at 380-81. After suit was filed, the city negotiated with the applicant and agreed to reconsider the application if the applicant provided additional information. *Id.* at 381. The city conducted additional hearings, but it still denied the application. *Id.* The city entered more detailed fact-findings, including fact-findings that a partially screened antenna was aesthetically unacceptable. *Id.* at 381-83.

48. The *Palmer* court, even with the city's detailed findings, concluded that the city "failed to reasonably accommodate [the applicant's] amateur communication needs in accordance with PRB-1." *Id.* at 380.

49. The *Palmer* court conducted a detailed analysis of the city's actions. *Id.* at 385. It concluded that the city "engaged [the applicant] in a strictly one-sided negotiation consisting of inflexible demands and the construction of hoop after hoop for [the applicant] to jump through." *Id.* at 385.

50. The *Palmer* court found it persuasive that the applicant provided voluminous data, documents, and drawings to support the design and height of the antenna

and that the applicant provided most of what the city requested. *Id.*

51. The *Palmer* court considered which of the municipality's demands were unreasonable, unnecessary, or illusory. *Id.* at 385-86.

52. The *Palmer* court examined the specific bands the applicant sought to use and whether the city's regulation restricted those bands. *Id.* at 385.

53. The *Palmer* court concluded it would be futile for any further proceedings before the city. *Id.* at 386.

54. The *Palmer* court found the city's actions to be preempted and ordered the city to grant the permit the applicant had agreed to and requested. *Id.*

*MacMillan v. City of Rocky River*, 748 F.Supp. 1241, 1248 (N. D. Ohio 1990).

55. *Macmillan* confirms the necessity of a substantive critique of a city's zoning action. *MacMillan v. City of Rocky River*, 748 F.Supp. 1241, 1248 (N.D. Ohio 1990).

56. The *MacMillan* court found the city's denial of a permit to be preempted in part due to the city's limited knowledge and understanding of amateur radio operations or of PRB-1. *Id.*

57. The *MacMillan* court determined that a city cannot comply with PRB-1 if its officials lack an adequate understanding of the federal law and its requirements. *Id.*

58. The *MacMillan* court also was persuaded by evidence in the record that city officials' concerns regarding property values and neighbors' protests dominated over the federal interests in amateur radio operation. *Id.*

*Williams v. City of Columbia*, 906 F.2d 994 (4th Cir. 1990).

59. *Williams* is the principal source for a contrary line of cases to *Pentel* which essentially uncritically defer to a city's zoning action through a balancing test.

60. In *Williams*, an amateur radio licensee twice applied for an exception to a city's 17-foot height restriction for antennas. *Williams v. City of Columbia*, 906 F.2d 994, 995 (4th Cir. 1990). The federal district court had ordered the second request for an exception in an effort to ensure compliance with PRB-1. *Id.* The city denied the application a second time with the basic conclusion that it had complied with PRB-1. *Id.*

61. The *Williams* court erred by first assuming the traditional pre-PRB-1 deference to a city's fact-findings. *See id.* at 996. The court essentially utilized a standard of review for municipal action that had been rejected by PRB-1. *See id.*

62. Proceeding from its incorrect assumption regarding the proper standard, the *Williams* court then quoted excerpts from PRB-1, while erroneously concluding that under PRB-1, "the law requires only that the City balance the

federally recognized interest in amateur radio communications with local zoning concerns." *Id.* at 996-98.

63. Although the conclusion of the *Williams* court is not consistent with the text of PRB-1, it may be explained in part based upon where it arises in the context of the discussion in the opinion. The Court's conclusion that a balancing of interests is the proper test does not appear after a discussion of the text of PRB-1, but as a response to an amicus position of the American Radio Relay League ("ARRL") that an amateur radio operator must be allowed to erect the antenna of choice without any restrictions from a city. *Id.* at 997-98.

64. The *Williams* court, moreover, did not require any real scrutiny of the city's zoning actions, and instead simply reverted to the pre-PRB-1 practice of deferring to a city's zoning action if the city recites that it is in compliance with federal law. *Id.*

65. *Williams*, therefore, turns PRB-1 on its head. The FCC later confirms this when it rejects the *Williams* balancing test as antithetical to the text of PRB-1. RM-8763 at ¶ 7.

66. The *Williams* balancing test resulted in the pre-RM-8763 cases of *Howard* and *Evans* and the post-RM-8763 case of *Algoma*. *Howard v. City of Burlingame*, 937 F.2d 1376, 1380 (9th Cir. 1991); *Evans v. Bd. of County Comm'rs of the*

*County of Boulder, Colorado*, 994 F.2d 755, 762 (10th Cir. 1993); *Bosscher v. Township of Algoma*, 246 F.Supp.2d 791 (W.D. Mich. 2003).

67. Although the county ordinances limited the heights of structures to 35 feet, in *Evans*, an amateur radio licensee applied to erect a 125-foot antenna. *Evans*, 994 F.2d at 757. The county denied the building permit and a variance. *Id.* The county conducted several hearings and received testimony, including expert testimony. *Id.* at 757-59.

68. In *Evans*, the city summarized the process it followed when it recited: "[the Board must] specifically balance the needs of amateur radio proponents against the impacts on the neighborhood. . . . [I]n performing this required balancing, the Board finds that the needs of the Applicant . . . do not outweigh the adverse impacts on the neighborhood." *Id.* at 758.

69. The *Evans* court was faced with a "balancing decision" by the city where aesthetics trumped amateur radio communications. *See id.* at 758-59. The court recognized the improper balancing standard when it commented that "[t]he County interpreted the FCC regulations to mandate a balancing between the needs of the amateur radio proponents and the adverse impacts on the neighborhood. In performing this [balancing] analysis, the County determined Evans' need for a higher tower was outweighed by aesthetic degradation of the

neighborhood and the potential reduction in property value." *Id.* at 762.

70. The *Evans* court then quoted from that portion of *Williams* which rejected the ARRL amicus argument and reaffirmed that the county could regulate the heights of antennas. *Id.*

71. Inexplicably, the *Evans* court relies upon *Williams* even though it subsequently acknowledges that "the balancing approach underrepresents the FCC's goals" and "[t]he Board in drafting its resolution mischaracterized its responsibility to reasonably accommodate as a balancing test." *Id.* at 762-63.

72. The *Evans* court, therefore, admits that the county applied the wrong standard and that the county's findings were derived from the wrong standard. *Id.* Yet, without explanation, it then finds that the county's balancing approach comprises a reasonable accommodation. *Id.*

73. Thus, *Evans* wrongly resurrected the "balancing standard." *Id.*

74. *Algoma* springs from *Williams* and *Evans*.

75. In *Algoma*, an amateur radio licensee applied to erect a 185-foot tall antenna when the city ordinances included a height restriction of 50 feet. *Algoma*, 246 F.Supp.2d at 793-95. The applicant admitted that he could transmit his simplex radio signal in all directions but south toward Grand Rapids, Michigan, due to the existence of trees and some topographical features. *Id.*

The applicant did not conduct emergency communications. *Id.* The city denied the application. *Id.*

76. In *Algoma*, unlike the instant case, the city considered and understood the applicant's amateur radio communication needs and the federal law from the beginning. *Algoma*, 246 F.Supp.2d at 793-802.

77. In *Algoma*, unlike the instant case, the city hired experts who conducted a site-specific analysis. *Id.* at 794-95.

78. The *Algoma* court affirmed the city's decision, citing *Williams* and *Evans*. *Id.* at 800-802. The court cited *Pentel* only for the proposition that an amateur radio operator is not entitled to erect the antenna of choice. *Id.*

79. The *Algoma* court did not mention RM-8763 even though, unlike *Williams*, *Howard,* and *Evans*, it rendered its decision after the enactment of RM-8763.

80. The *Algoma* court found that the city acted in good faith and comprehensively from the beginning. *See id.* It did not reach this conclusion simply because the city hired an expert, but rather because the entire process, including the work of the city-retained expert, was fair and comprehensive based upon an understanding of the applicant's site-specific amateur radio communication needs and the federal law. *See id.*

81. This Court adopts the approach in *Pentel*, *Marchand*, *Palmer*, *Bodony*, and

*MacMillan*.

82. *Pentel*, *Marchand*, *Palmer*, *Bodony*, and *MacMillan* best comply with the text of 47 C.F.R. § 97.15, PRB-1, and RM-8763.

83. *Pentel*, *Marchand*, *Palmer*, *Bodony*, and *MacMillan* provide the standard of review.

84. The reasonable accommodation standard of PRB-1 requires a municipality to (1) consider the application, (2) make factual findings, and (3) attempt to negotiate a satisfactory compromise with the applicant. *Palmer*, 180 F.Supp.2d at 385. Here, the City satisfied the first prong of the reasonable accommodation test: the City received Snook's application for a specific use permit; the planning department prepared a report to the Planning and Zoning Commission; the Planning and Zoning Commission considered the matter and made a recommendation to the City Council; the City Council addressed the matter at two meetings; Snook's counsel engaged in a significant dialogue with City officials; and, the City hired an expert who prepared a report analyzing Snook's application. However, the record demonstrates that the City failed to make factual findings or engage in an attempt to negotiate a satisfactory compromise with Snook.

85. The City argues that its factual findings consist of the final ordinance, granting

Snook the 65- foot tower, and Dr. Long's expert report. The Court rejects this contention, concluding that the record as it exists, even with extensive briefing, argument of counsel, and evidence received during a bench trial, leaves the Court simply guessing at how and why the City arrived at its conclusion. Even counsel in his closing argument conceded, upon direct examination by the Court, that it is unclear exactly how the City Council arrived at the 65-foot requirement.

86. Generally, the City's position is that it relied upon Dr. Long in its determination of tower height. In the conclusion section of his report, Dr. Long recommends a tower height of 50 to 60 feet if the main antenna mounted at the top of the tower is only to be used for the 20 and 10-meter bands (which was not so). The City Council's 65-foot height requirement, then, does not appear to be drawn directly from Dr. Long's report. Such a conclusion by the Court may be incorrect, however, if the Council chose to rely on an isolated reference from page five of Dr. Long's report, which refers to the comment section to PRB-1 and reads as follows:

> Analysis of Exhibit F – Building permit application
>
> In item 15 of this FCC document it states that a tower height of 65 feet ". . . represents a reasonable accommodation of the communications needs of most amateurs and the legitimate

concerns of local zoning authorities."

Use of this incidental reference by the City Council, which in no way relates to Snook's technology or the individuality of his application, would have been improper.

87. Thus, the Court concludes there are no findings of fact in the record that explain the City Council's reasoning, on the face of the record or implicitly through the specific use permit, the expert's report, or other documentation. The City's failure to include findings of fact in the record indicates insufficient effort by the City to reasonably accommodate Snook's specific use permit application.

88. The City failed to make findings that the 65-foot height was the minimum possible regulation to achieve its legitimate purpose.

89. Further, the Court finds that the City failed to attempt to negotiate a satisfactory compromise with Snook. The record demonstrates that throughout the process the City rejected consideration of any height extending above the trees, although Snook and his expert indicated that communications could not be effective with the tower in the trees, and even the City's own expert advised that the VHF/UHF bands would need to operate "above the level of the treetops."

90. The record reflects that the representatives of the City lacked understanding of incorporation of the relevant federal standard into the decision process. The City Council's August 20, 2001 meeting minutes include the following comments with regards to adoption of the 65-foot height requirement:

> Council member Jimerson said he commends Mr. Snook for wanting to be a ham operator, but doesn't think it's right for the City if the subdivision out there doesn't want it. He said there definitely isn't a need for one higher than 65 feet.
>
> Mayor Pro Tem Wyatt said he has mixed feelings about the whole thing, including how it got built in the first place. He said even worse is the fact that we are trying to clean up a mess that the federal government created that prevents anything that we try to do. He said we shouldn't be fooling ourselves to that point and said there are people in Washington D.C. we should be talking to about these problems. He said he would not support this ordinance because he has mixed feelings as to how we got to this point.

91. For the reasons set forth above, the Court determines that the City failed to meet the FCC's requirement of reasonably accommodating Snook's amateur communication needs in accordance with PRB-1 when it limited him to use of a 65-foot structure, limited the antenna array, and required removal of the structure. Accordingly, the Court declares the height restrictions, antenna array restrictions, and structure removal requirement to be preempted, void, and unenforceable. The Court concludes that Ordinance O-01-42 is preempted by

PRB-1.

92. Upon reaching such a determination, some courts have instructed the municipality to reconsider the applicant's request in compliance with PRB-1. *See Marchand*, 788 A.2d at 255. However, because in this instance the City was cognizant of its duties under PRB-1, due to the applicant apprising it of such obligations, and because these parties have a contentious history, the Court concludes that such an order would be ineffective to reach the necessary result. *See* Palmer, 180 F.Supp.2d at 386. Thus, the Court enjoins the City from interfering with Snook's use of his tower and antenna array at its current height, and orders the City Council to grant a specific use permit allowing a tower support structure and antenna array of 114 feet in height, with the condition that Snook maintain the screening of the mature trees surrounding the tower.

93. Based on the evidence presented and the applicable law, the Court denies Snook's request for a declaration that the May 2000 amendment to Ordinance 15B is preempted because its enactment did not comply with federal law. Snook has failed to meet his burden of proof on this issue.

SECTION 1983 CLAIM

94. Snook alleges that the City's denial of his application for a specific use permit

for a 100-foot tower deprived him of his due process rights pursuant to 42 U.S.C. § 1983. Snook further alleges the City violated his due process rights by enacting and seeking to enforce the May 2000 amendment to Ordinance 15B without compliance with PRB-1 and in an *ex post facto* manner, engaging in arbitrary and capricious zoning actions, denying his December 1999 request for a permit, and engaging in bad faith prosecutions.

95. Section 1983 creates a cause of action against any person who, acting under color of state law, abridges "rights, privileges, or immunities secured by the Constitution and laws of the United States." 42 U.S.C. § 1983.

PRB-1 DOES NOT CREATE A COGNIZABLE RIGHT UNDER § 1983

96. Generally, a person may not enforce an agency rule or opinion through a § 1983 action. *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Banks v. Dallas Hous. Auth.*, 271 F.3d 605 (5th Cir. 2001).

97. There is no unrestricted right, enforceable under § 1983, to conduct amateur communications. PRB-1 does not create a private right of action enforceable through the Fourteenth Amendment. *Algoma*, 246 F.Supp.2d at 797-98 (W.D. Mich. 2003) (applying *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Howard, v. City of Burlingame*, 937 F.2d 1376 (9th Cir. 1991); *cf. Palmer*, 180 F.Supp.2d 379, 386 (assuming without deciding that PRB-1 amounts to a

federally protected property interest).

98. In *Gonzaga*, the Supreme Court considered whether the Family Educational Rights and Privacy Act (FERPA) creates a federal right enforceable under § 1983. In determining that it does not, the Court tightened the requirements for finding such a right. The Court rejected "the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." *Gonzaga,* 536 U.S. at 283. The Court noted that "it is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of that section." *Id.* The *Gonzaga* Court further clarified that in § 1983 cases, just as in implied rights of action cases, the initial inquiry is "whether Congress intended to confer individual rights upon a class of beneficiaries." *Id.* at 284-85. "[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action." *Id.* at 286.

99. Having considered the arguments of the parties and the relevant law, this Court concludes that PRB-1 does not create a right enforceable under § 1983 because it was intended to benefit federal interests, not individual interests, and because it created no clear command to local governments. *See Algoma*, 246 F.Supp.2d

791; *Howard v. City of Burlingame*, 937 F.2d 1376 (9th Cir. 1991). In PRB-1, the FCC found that the "strong federal interest in promoting amateur communications" warranted a limited federal preemption policy: ". . . local regulations that operate to preclude amateur communications in their communities are in direct conflict with federal objectives and must be preempted." PRB-1 ¶ 24. Considering the text of PRB-1 as a whole, it does not "unambiguously," with "explicit rights-creating terms," indicate Congress' intent to confer individual rights on amateur radio operators.

100. Moreover, PRB-1 does not create any rights in amateur radio operators. Rather, it directs local governments to "accommodate reasonably" amateur communications.

101. Thus, the Court concludes that a claim premised solely upon preemption is not cognizable under 42 U.S.C. § 1983.

NO OTHER CONSTITUTIONALLY PROTECTED PROPERTY INTEREST

102. Snook also alleges that the City denied him various substantive and procedural due process rights enforceable under § 1983.

103. Substantive due process "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state

interest." *Reno v. Flores*, 507 U.S. 292, 301-02 (1993). Fundamental liberties are those which are "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks and citations omitted); *Johnson v. City of Cincinnati*, 310 F.3d 484, 495 (6th Cir. 2002).

104. "Procedural due process requires notice and hearing before being deprived of a protected interest." *Algoma*, 246 F.Supp.2d at 796.

105. To establish either a substantive or procedural due process violation, Snook must first demonstrate the existence of a constitutionally protected property or liberty interest. *See Washington v. Glucksberg*, 521 U.S. 702, 720-22 (1997). Here Snook alleges the existence of a protected property interest in a permit for the construction of a tower on his property.

106. "Where, as here, the deprivation of a constitutionally-protected property interest is alleged, a plaintiff must show either a 'legitimate claim of entitlement to' or a 'justifiable expectation of' a benefit, not merely 'an abstract need or desire for it.' A showing of entitlement or justification cannot be made, however, when a local government has discretion to deny a permit." *Algoma*, 246 F.Supp.2d at 796 (internal citations omitted).

107. Thus, Snook must show either a "legitimate claim of entitlement to" or a "justifiable expectation of" a benefit. *See Bd. of Regents v. Roth*, 408 U.S. 564, 569-70 (1972); *Algoma*, 246 F.Supp.2d at 796. A showing of entitlement or justification cannot be made, however, when a local government has discretion to deny the permit. *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 203 (6th Cir.), *cert. denied* 116 S.Ct. 70 (1995). Here, the City's ordinances provide that "Specific Use Permits. . . may be issued" by City Council. Ordinance No. 0-81-1, Section 15.3 (1981). Because the City Council has the discretion to deny or modify requests for building permits and specific use permits, Snook has no vested property interest to build an antenna tower of his choosing on his property. Given this discretion, Snook cannot demonstrate the existence of a constitutionally protected property interest, which is a necessary predicate for his substantive and procedural due process claims.

108. Even if Snook had identified a constitutionally protected property or liberty interest, he has not established that the right to a specific use permit or building permit is "implicit in the concept of ordered liberty" and would be subject to the protections of substantive due process. *See Algoma*, 246 F.Supp.2d at 797.

JUDICIAL REVIEW OF DUE PROCESS CLAIMS

109. Assuming Snook had some right, privilege, or interest enforceable under

§ 1983, this Court concludes, based on the relevant evidence and applicable law, that Snook did not suffer any due process deprivations.

PROCEDURAL DUE PROCESS

110. Procedural due process requires an adequately noticed hearing, the opportunity to present evidence, and a meaningful opportunity to be heard. *Cleveland Bd. of Educ. v. Loudermill*, 105 S.Ct. 1487 (1985). Snook's procedural due process rights were satisfied because the City's determination regarding his specific use permit was preceded by notice and hearing, and followed by a written decision. *See Palmer,* 180 F.Supp.2d at 286. Snook received adequate notice, the City Council held two public hearings, Snook and his counsel submitted evidence, documents, and supporting argument, and the City Council made its decision granting a specific use permit in written form.

SUBSTANTIVE DUE PROCESS

111. The Fifth Circuit uses the rational basis test for review of substantive due process claims. *Shelton v. City of College Station*, 780 F.2d 475 (5th Cir. 1986). Having considered Snook's substantive due process claims, the Court finds that Snook has not shown the City's conduct to be outrageously arbitrary.

112. "The power to decide, to be wrong as well as right on contestable issues, is both privilege and curse of democracy." *FM Properties Operating Co. v. City*

*of Austin*, 93 F.3d 167, 174 (5th Cir. 1996) (citations omitted). "[T]he 'true' purpose of the [policy], (i.e., the actual purpose that may have motivated its proponents, assuming this can be known) is irrelevant for rational basis analysis. The question is only whether a rational relationship exists between the [policy] and a *conceivable* legitimate governmental objective." *FM Properties Operating Co. v. City of Austin*, 93 F.3d 167, 174 (5th Cir. 1996) (citations omitted) (emphasis in the original). If the question is at least debatable, there is no substantive due process violation. *Id.* at 174-75.

113. Even though the City's actions did not constitute a reasonable accommodation, the City Council's conduct, in the form of its decision to permit Snook to maintain a tower at 65 feet instead of the 100 feet requested, was not outrageously arbitrary or a gross abuse of governmental authority based upon the record before the City. *See also Palmer*, 180 F.Supp. at 387.

NO EX POST FACTO VIOLATIONS

114. City Ordinance Nos. 0-81-1 and 0-99-04, generally requiring specific use permits from city council for construction or erection of a tower within the City, were enacted prior to Snook's construction of his tower. City Ordinance No. 0-00-24, which deleted the 500-foot residential setback for towers, and Ordinance No. O-01-42, which granted Snook a specific use permit, are not *ex*

*post facto* laws because they did not criminalize Snook's prior actions, but rather permitted him alternative ways to comply with Ordinance Nos. 0-81-1 and 99-04.

OTHER RELIEF

115. The Federal Declaratory Judgment Act, 28 U.S.C. § 2201, confers discretion upon the Court as to whether to allow an action for declaratory judgment. *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 72 S.Ct. 219 (1952).

116. Snook is not entitled to declaratory relief regarding his criminal proceedings, however, because, absent bad faith, federal courts should not generally interfere with pending state court prosecutions. *See Younger v. Harris*, 401 U.S. 37 (1971); *Intl' Soc'y for Krishna Consciousness v. Dallas-Fort Worth Regional Airport Bd.*, 391 F.Supp. 606 (N.D. Tex. 1975); 28 U.S.C. § 2283. The City did not act with malice in prosecuting Snook because the City Prosecutor reasonably believed that Snook had violated provisions of a City ordinance not preempted by PRB-1 when she accepted charges and prosecuted Snook in Municipal Court.

117. Further, the federal anti-injunction statute, 28 U.S.C. § 2283, bars federal courts from staying proceedings in a state court.

MALICIOUS PROSECUTION

118. The City is not liable for a claim of malicious prosecution because such claim is barred by sovereign immunity. TEX. CIV. PRAC. & REM. CODE 101.057(2); *Wells v. Nacogdoches County*, 197 F.Supp.2d 709 (E.D.Tex. 2002).

COSTS

119. Based upon the foregoing, all costs shall be taxed and paid by the City.

Signed at Houston, Texas, on this 26 day of August, 2003.

DAVID HITTNER
United States District Judge