

Exhibit J – Staff Report to County Commission, May 3, 2011



Board of Storey County Commissioners

May 3, 2011

Staff Report

APPLICANT: Thomas Taormina

PROPERTY OWNER: Thomas S. and Midge A. Taormina

APN NUMBER: 003-431-18

ADDRESS OF PROJECT: 370 Panamint Road, Highland Ranches, Storey County, Nevada

REQUEST: Request to obtain special use permit to maintain existing amateur ham radio antenna towers and erect two additional amateur ham radio antenna towers exceeding 45 feet in height.

MEETING LOCATION: Storey County Courthouse, District Courtroom
26 South "B" Street, Virginia City, Nevada

MEETING TIME: 2:00 PM

KEY DEFINITION:

What is amateur radio? The Federal Communications Commission (FCC) defines amateur radio as being a voluntary, non-commercial radio service involving amateur radio operators communicating locally and worldwide using store-bought or homemade radios, computers, satellites, and the internet. Known as "hams", amateur radio operators oftentimes facilitate emergency communicators during the Emergency Operations Command (EOC) during disasters.

I. ADVISORY ACTION TAKEN:

At its March 3, 2011, hearing, the Storey County Planning Commission by a vote of 3 to 1, with one abstaining and two absent, approved an advisory recommendation to the Board of County Commissioners to approve Application No. 2011-010 for the applicant of an existing amateur radio communication facility to maintain four (4) existing amateur ham radio antenna towers in accordance with the limitations set forth by the approved conditions and stipulations and to deny installation of any additional towers on the property located at 370 Panamint Road (APN 003-431-18), Highland Ranches, Storey County, Nevada.

II. BACKGROUND:

The special use permit application, with exhibits provided by the applicant, was submitted pursuant to sections 17.12.044 and 17.62.010 of the Storey County Code and to resolve issues surrounding the several existing and proposed amateur radio antenna support structures located on the applicant's property. Tom and his wife Midge Taormina have been licensed by the

Staff Report – 2011-010

4/27/2011

Federal Communications Commission to operate amateur radios since 1959 and 1991, respectively.

Between 1997 and 2008 the applicant erected seven amateur radio antenna support towers on his ten acre property located in the Highland Ranches. Four of those existing structures are higher than 45' above grade and thus are applicable to this special use permit application. Two of those towers, one 40' and the other 140' above grade, were installed in 1997, two years prior to the County Commission's adoption of Title 17 of the Storey County Code and height limitations included therein (see Exhibit D, pp. 4-7). In 2007 two additional towers up to 140' in height were constructed.

In 2008 the applicant brought to the Storey County Building Department plans to erect two additional antenna support structures, one 120' and the other 195' in height. The applicant was provided a building permit by the building department and construction of foundation pads began. Shortly thereafter, a Stop-Work-Order was issued to the applicant ordering work on both towers to cease. The Order cited non-compliance with the 45' height limitation set forth in 17.12.044 of the County Code and directed the applicant to apply for a special use permit in accordance with Section 17.62.010 of the County Code before resuming work on said towers.

According to documents on file with the building department and a 2010 ruling by the District Court (see *Taormina v. Storey County* in paragraph 6 of this section and in enclosed Exhibit A), the applicant refused several opportunities provided him by Storey County to apply for a special use permit. The applicant argued that federal regulations under the Federal Communications Commission (FCC) (47 CFR 97.15*), also codified in the Nevada State Statute (NRS 278.02085**), preempted local regulations and that his proposal to erect the antenna towers was thereby exempt from the County Code.

The applicant brought the Building Department's direction to apply for a special use permit to the Storey County District Attorney in attempt to gain concurrent legal interpretation of the federal and state regulation. The District Attorney sided with the building department and directed the applicant to follow through with the special use permit application process in accordance with the local ordinance.

* 47 CFR 97.15: Except as otherwise provided herein, a station antenna structure may be erected at heights and dimensions sufficient to accommodate amateur service 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.

** NRS 278.02085: A governing body shall not adopt an ordinance, regulation or plan or take any other action that precludes amateur service communications or that in any other manner does not conform to the provisions of 47 C.F.R. § 97.15 and the limited preemption entitled "Amateur Radio Preemption, 101 F.C.C. 2d 952 (1985)" as issued by the Federal Communications Commission.

4/27/2011

Staff Report – 2011-010

4/27/2011

In 2009, without filing for a special use permit as directed, the applicant filed civil action against the Storey County in the United States District Court for the District of Nevada for Summary Judgment. In *Taormina v. Storey County*, the Plaintiff (applicant) relied on his interpretation of the FCC ruling known as "PRB-1" (Amateur Radio Preemption, 101 F.C.C. 2d. 952 (1985)) in arguing that federal law preempts the relevant Storey County Code provisions. The FCC's ruling in PRB-1 addresses the "conflict between ham [radio] operators' needs for effective antennas and a municipality's enforcement of its local zoning ordinances"***

In 2010 the District Court denied Mr. Taormina's motion for Summary Judgment. The ruling cited that the local ordinance was not preempted by federal or state law, the applicant had not taken advantage of the special use permit process set forth in County Code, and that the applicant "may apply for a special use permit pursuant to section 17.62.010" of the County Code and that the "standard, or test, for whether an applicant may receive a special use permit pursuant to section 17.62.010 is whether the use is 'deemed essential or desirable for the public convenience or welfare.'" Specifically, the ruling against Summary Judgment stated,

To date, the court has not considered the merit of the Plaintiff's contention that, as applied to him, the Storey County regulations violate certain FCC regulations. In its order addressing the motion for summary judgment, the court noted that because the Plaintiff has not applied for a special use permit that would enable him to construct the radio antennas, Storey County has not had the opportunity to apply its zoning regulations to Plaintiff's amateur communications. As a result, the court could not determine whether Storey County has reasonably accommodated Plaintiff. [Hicks, *Taormina v. Storey County*, 2010]

The 2010 District Court ruling against declaratory relief was based on the following findings:

- a. That federal law under PRB-1 only preempts a local ordinance where a local zoning ordinance bans or imposes an unvarying height restriction on amateur radio antennas and where a city [county] has not applied in a manner that reasonably accommodates amateur communication.

***On July 16, 1984, the American Radio Relay League, Inc. (ARRL) filed a Request for Issuance of a Declaratory Ruling asking us to delineate the limitations of local zoning and other local and state regulatory authority over Federally-licensed radio facilities. Specifically, the ARRL wanted an explicit statement that would preempt all local ordinances which provably preclude or significantly inhibit effective, reliable amateur radio communications. The ARRL acknowledges that local authorities can regulate amateur installations to insure the safety and health of persons in the community, but believes that those regulations cannot be so restrictive that they preclude effective amateur communications. Interested parties were advised that they could file comments in the matter. In the view of the Federal Communications Commission, the Petitioner had not demonstrated that the clarifications requested were necessary. Accordingly, it concluded that the public interest would be best served by denying the ARRL request for modification and clarification of Commission policies and procedures concerning the limited preemption of state and local regulations that affect amateur service radio facilities. Accordingly, the petition for ruling was denied. (Federal Communications Commission, 1985, 1999, & 2001)

4/27/2011

Staff Report – 2011-010

4/27/2011

- b. That Section 17.62.010 of the Storey County Code provides for reasonable accommodations for amateur communications in that, “Certain uses may be permitted by the Board of Storey County Commissioners in zones in which they are not permitted by this title where such uses are deemed essential or desirable for the public convenience or welfare.”
- c. That the process for applying for a special use permit in accordance with Section 17.62.010 is similar to the procedure for applying for a Variance as set forth in Chapter 17.60 of the County Code in that, “the procedure for filing of applications, filing fees, public hearings, filing and appeals shall be the same as provided for variances in Chapter 17.60 of this title.”
- d. The local regulations “which involve placement, screening, or height of antennas based on 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,” *Id* In other words, PRB-1 “entitles the operator only to a reasonable accommodation”.
- e. The findings of PRB-1 appear in section 97.15 of Title 47 of the Code of Federal Regulations (C.F.R.), which states in relevant part, “[A] station antenna structure may be erected at heights and dimensions sufficient to accommodate amateur service communications. (State and local regulations 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.
- f. That the Ninth Circuit of Appeals in *Howard v. City of Burlingame* ****, 937 F.2d 1376 (9th Cir. 1991), “does not appear to confer rights upon licensees to anything more than “reasonable accommodation”. Instead, under the rule, as long as a city [county] has considered the application, made factual findings, and attempted to negotiate a compromise with the application, a city [county] may deny the antenna permit”.
- g. That Section 17.12.044, while unclear as to how it applies to the height limitation of towers, may also apply to special use permits for communications towers as “structures or buildings” that would be limited to no higher than “35 feet in height” without an approved special use permit.

****The Ninth Circuit Court of Appeals in *Howard v. City of Burlingame* [California] held that: (1) neither Federal Communications Act, FCC Regulations, nor FCC declaratory ruling created obligation enforceable under § 1983, and (2) city [county] zoning ordinances requiring special permit for antennas of certain height was legitimate.

4/27/2011

Staff Report – 2011-010

4/27/2011

- h. That the issuance of a building permit without first requiring a special use permit did not constitute as a waiver of section 17.12.044's height requirements, and that the county did exercise due diligence in notifying the Plaintiff of its mistake. Further, the Plaintiff had not presented to the Court any evidence suggesting that he reasonably relied on the granting of his building permits to his detriment.
- i. The Plaintiff refused to apply for a special use permit that would enable him to construct the radio antennas and thus the county has not had the opportunity to apply its zoning regulations.

III. ANALYSIS

3.1 Antenna Support Structures: Physical characteristics of the existing and proposed amateur radio antenna support towers are summarized as follows. See illustrations in Figures 1-3 below and further details provided by the applicant in Exhibit E.

Tower 1 (140 feet) - This structure was installed in 1997. It has had successive iterations of antenna arrays installed on it. This tower is guyed in four places to concrete guy anchors. This structure was installed prior to adoption of Title 17 of the Storey County Code; thus this structure should be considered as a "non-conforming use" as defined by Chapter 17.06 of the title. The structure must comply with applicable local building codes, as demonstrated by plans submitted by a Nevada licensed structural engineer.

Tower 2 (85 feet) -This structure was installed in 1998. It has had successive iterations of antenna arrays installed on it. This tower is guyed at four levels to concrete anchors. Similar to Tower 1, this structure was installed prior to adoption of Title 17 of the County Code and needs to be treated in accordance with the "non-conforming use" provisions. The local building code and certificate of engineering will need to apply as well.

Tower 3 and 4 (110 feet and 140 feet, respectively) –Tower 3 is a radiating antenna structure and Tower 4 is similar in design to Tower 1. Both were installed in 2007 and are guyed at three levels to concrete anchors. Tower 3 is proposed to be moved north-east to relieve the close proximity to the parcel's western boundary. In accordance with sections 17.12.044 and 17.62.010 of the County Code the special use permit process will apply to these structures.

Tower 5 & 6 (proposed) – Tower 5 support is scheduled to be 120' in height and to hold four 15 Meter (21 MHz) antennas. Building Permit No. 8354 was issued by Storey County; however, the required special use permit was not applied for and a Stop-Work-Order was issued by Storey County. The tower 6 support is scheduled to be 195' in height and to hold two 80 Meter (3.5 MHz) antennas, four 10 Meter (28 MHz) antennas, and a 440 MHz vertical antenna for an emergency communications repeater. A building permit issued for the proposed 120' tower applied; however, the required special use permit was not applied for and the project was stopped.

4/27/2011

Staff Report – 2011-010

4/27/2011

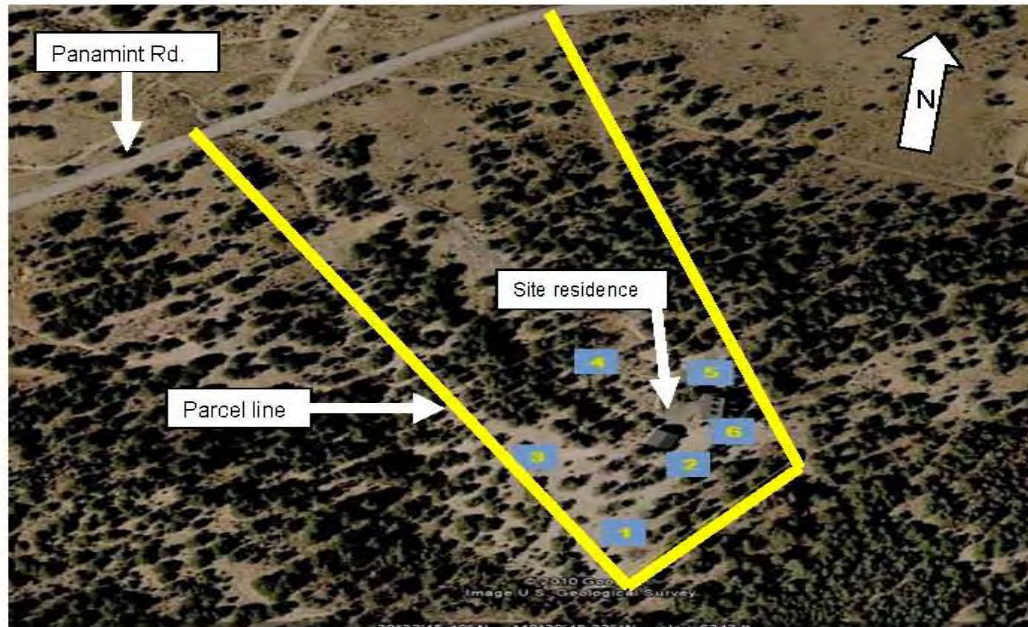


Figure 1: Towers 1 through 4 are existing structures; towers 5 and 6 are proposed. Each number and approximate location corresponds to the images in Figures 2 and 3 below.

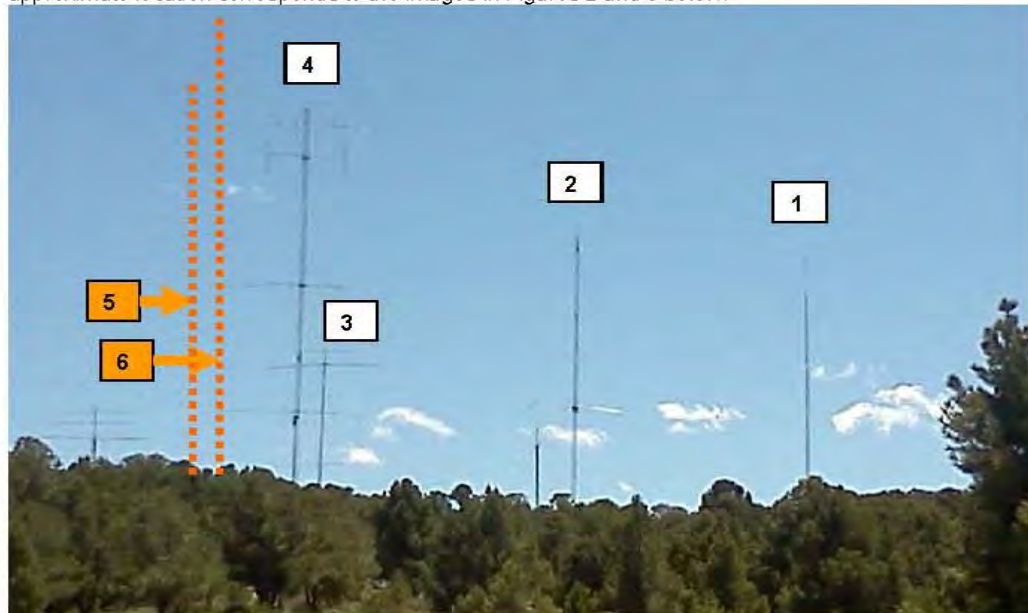


Figure 2: This south facing image (from Panamint Road) corresponds to the above estimated locations of existing towers. 5 and 6 (orange) shows the approximate placement of the proposed monopole structures.

4/27/2011

6 of 20

(Plaintiff's Note – Orange insertions in Figure 2 above, are not to scale and photo taken from 100'+ below grade of antennas)

Staff Report – 2011-010

4/27/2011

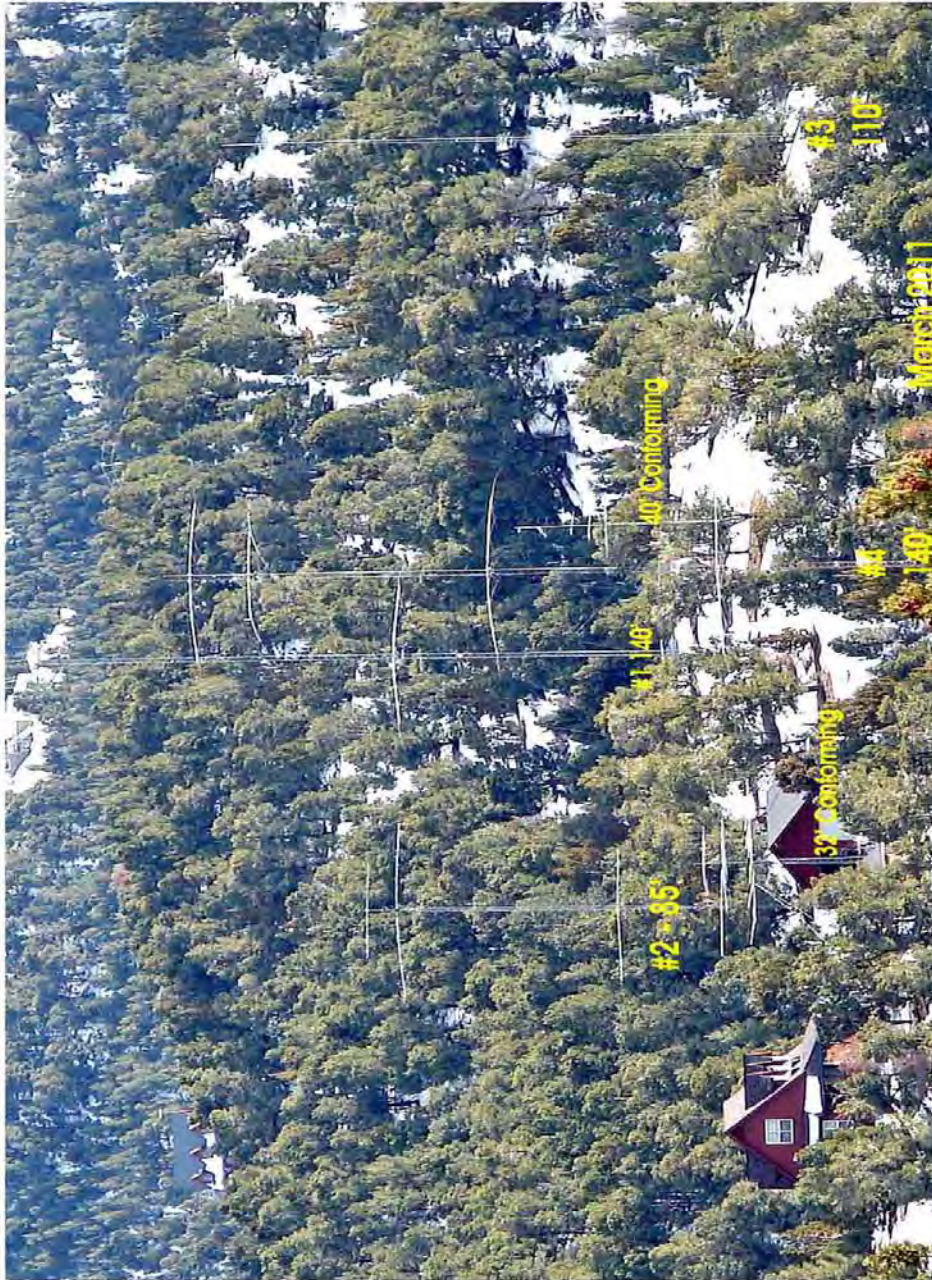


Figure 3: The image provided by the applicant portrays the level of visual impact of the existing facility on the surrounding area. The two proposed monopole structure (see Figures 2 and 6) are not included in this visual representation. The information contained herein should be considered approximate.

3.2 Tower Performance: In Sowing of Need for Height of Amateur Radio Antenna Support

4/27/2011

7 of 20

(Plaintiff's Note: Photo taken using 10X Zoom)

Staff Report – 2011-010

4/27/2011

Structures submitted by the applicant and included as Exhibit F, the applicant argues a need for an antenna system of sufficient height and dimensions to provide reliable High Frequency, or 'shortwave', communications, under the changing variables that impact amateur radio communications. The report considers amateur radio antenna systems on two proposed supporting structures. The studies presented in the provided materials consider antenna heights to compute standard reliability criteria for communications on the 80 and 40-meter Amateur Radio bands for:

- a. A height of 195 feet for the 80-meter band (3.5 to 4.0 MHz) to Asia and Europe
- b. A height of 45 feet, for the 80-meter band (3.5 to 4.0 MHz) to Asia and Europe
- c. A height of 140 feet for the 40-meter band (7.0 to 7.3 MHz) to Asia and Europe
- d. A height of 45 feet for the 40-meter band (7.0 to 7.3 MHz) to Asia and Europe

The applicant has specified that the purpose the High Frequency (1.8 to 30 MHz) antenna systems is intended to serve is to provide effective communications with Europe, Asia, and North America. These three geographic areas are, according the applicant, the most highly populated areas for Amateur Radio operators. North America, basically Canada, the USA and Mexico, is located relatively close to Nevada, while Asia and Europe are far more distant, requiring higher antennas for reliable communications.

It is the conclusion of the applicant's submitted report that the proposed antenna systems at a height of only 45 feet are too low to accomplish the purpose they are intended to serve. He states that the proposed heights under this application for the antennas are barely adequate for the modest needs of these Amateur Radio operators, when measured against commonly used engineering metrics.

3.3 Benefit to Storey County. One standard, or "test", found in *Taormina* for whether an applicant may receive the special use permit is whether the proposed development of amateur radio antenna towers is "deemed essential or desirable for the public convenience or welfare" ("general public, as opposed to any individual operator" cited in *Howard*, p. 4). Section 17.62.010 states similar language in that "certain uses may be permitted by the board of county commissioners in zones in which they are not permitted by this title where such uses are deemed essential or desirable for the public convenience or welfare."

The Communications Act, under which Part 97 of the Federal Communication Commission's rules governing Amateur Radio are promulgated, and states in 47 United States Code § 303 that radio licenses are issued only where the public interest, convenience, or necessity require. The proposal to operate the amateur radio system satisfies both requirements.

Accordingly, as stated in the submitted application, Mr. Taormina serves as the Emergency Coordinator for the local Amateur Radio Emergency Service, a national volunteer organization, and the Radio Amateur Civil Emergency Service, created by the Federal Emergency Management Agency and the Federal Communications Commission. These services are affiliated with the Department of Homeland Security (see Exhibit D, p.5), and the American Red Cross. The applicant also serves as a self-proclaimed volunteer member of the Storey County Local Emergency Planning Committee (LEPC). Storey County, while welcoming Mr.
4/27/2011