Exhibit K - Taormina Submission to County Commission, May 3, 2011

Before the Storey County Commissioners
May 3, 2011
Submitted by Midge and Tom Taormina

Recent History of this Application

This is a Special Use Permit application for four existing lattice ham radio towers greater than 45' in height, and for two new monopole structures for which building permits were granted in 2008. This SUP application results from a Stop Work Order, issued in 2008 at the behest of former Deputy District Attorney Laura Grant. That Stop Work Order effectively revoked ***existing building permits*** for the ***new Monopoles after the foundations had been poured and passed inspections.***

The building permits authorized the construction of those foundations. The Applicants relied on those permits to their detriment to install those expensive foundations, as well as to purchase, refurbish and ship to the site two monopoles, and certain antennas. Though no one wants to return to federal court, if there is an "as applied" phase of this matter, a claim of "vested rights" will be appropriate. As the Staff Report notes, the Court decided only the question of the applicability of the special use process in this case.

In addition, the Stop Work Order also looked backward at existing structures constructed since 1997.

On March 3rd, 2011, the Planning Commission voted to approve the SUP application, with a recommendation to permit only the four existing lattice towers higher than 45'. The Staff Report and recommendations were adopted on April 21st and forwarded to the County Commission for consent agenda approval. The Applicants have asked that the SUP recommendation be removed from the consent agenda for the following reasons:

The County Commissioners Must Negotiate in Good Faith with these Applicants

The Ninth Circuit Court of Appeals, the FCC, and the Storey County Staff Report all point out that the County must "attempt[]to negotiate **a satisfactory compromise with the applicant**." FCC PRB-1 ¶25. As the Applicants pointed out in their letter of February 28, 2011, to the District Attorney and the Planning Office, which may be found **as Exhibit H to the Staff Report**,

> [T]he Court requires a negotiation aimed at a satisfactory compromise WITH THE APPLICANT, not the application, not the public. Thus far, with respect to this application for an SUP, there has been no negotiation with the applicant.

The letter continued,

> Please note that, as the Staff Report correctly notes, the obligation is to negotiate with the Applicant. There is no corollary obligation to negotiate with the public. And, ... "a balancing of interests approach is not appropriate." [Citation omitted.]

Exhibit H to the Staff Report deserves your careful attention.

Photo-simulation Now Available

At the Planning Commission hearing, residents presented false representations of the existing structures, and exaggerated depictions of the proposed monopoles. At the request of Dean Haymore, we now have photographs that fairly represent the present situation, and an accurate photo-simulation of the proposal. The photograph attached was created from a current photo taken from700 Saddleback Road. The majority of residences that have an actual view of the structures are on Saddleback and the north side of Panamint Road. Unlike Figure 2 of the Staff Report, **Exhibit 1** was carefully crafted, and is mathematically correct. It is fair and representative. Views and aesthetics were not included in the issues set forth by the Court for consideration by the Commissioners in this SUP process, but the Applicants respect the concerns of the neighbors and are prepared to discuss the impact of the project – comparing the recommendation of the Planning Commission with the initial request.

The Applicable County Ordinance Should Be Clearly Understood

The U.S. District Court ruled that the applicable law "specifies that an individual seeking to build a radio antenna over forty-five feet may obtain a special use permit [and] may apply for such a permit under section 17.62.010." For the purposes of this application, the Court's ruling settles the matter as to what standard the County must apply to this application.

The test for a Special Use Permit ***in this case***, stated by the Court **five times**, is SCC§ 17.62.010:
"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 only question is whether the proposed amateur radio use is "deemed essential or desirable for the public convenience or welfare."

Despite the Court's detailed examination of the County Code, it did NOT cite § 17.12.014 as relevant. This section requires a finding that the proposed use is "consistent with and compatible to those other uses permitted within the zone." ***That test does not apply.***

Furthermore, and again despite the Court's detailed examination of the County Code, it did NOT cite § 17.12.018. This section requires that the proposed use must be "demonstrated by the applicant to be in the best interest of the general public and would not be incompatible with or detrimental to the surrounding area." ***That test does not apply.***

The Applicants think of the proposed structures as majestic. But majestic or not, compatible or not, in the best interest of the general public or not – none of that is before this Board. It is the USE, not the architecture style, not the material, not the aesthetics, not the color, that is before the County Commissioners.

The Building Department in its Staff Report, and the Planning Commission by its favorable vote, have concluded that granting the SUP ***will be*** "essential or desirable for the public convenience or welfare." The Building Department and Planning Commission have considered every issue raised by the public: aesthetics, property values, hazard to air navigation, impediment to firefighting, RF interference, and so forth. They have recommended the grant of an SUP with four lattice tower structures over 45'.

A variety of issues raised by the public before the Planning Commission are considered and put to rest in the attached exhibits.

The Applicants urge thoughtful approval of an SUP that will end an expensive and time-consuming controversy.

Respectfully Submitted,

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List of Exhibits

Exhibit 1 ***Photo of Existing Structures and Photo-simulation Showing Monopoles***
Exhibit 2 ***Taormina Does Not Maintain a Nuisance***
Exhibit 3 ***Representation by Atty. Hopengarten is Proper***
Exhibit 4 ***The Proposed Antennas are Not Commonly and Universally Found in Factory or Industrial Areas***
Exhibit 5 ***Amateur Radio Antenna Systems that are Ordinary Accessory Uses of a Residence***
Exhibit 6 ***The Installation Will Not Interfere with a Pacemaker or Other Electronic Equipment***
Exhibit 7 ***Monopoles Preferred***

Exhibit 1

Photo of Existing Structures and Photo-simulation Showing Monopoles

Current Configuration

Photo Taken 3/10/11 from 700 Saddleback Rd – Sony DSC-H1 Camera, 5.1MP, No Zoom

Photo-simulation showing monopoles, taken from 700 Saddleback Road (a common view spot). Presented to show that Figure 2 of the Staff Report is not a fair or accurate representation.

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Exhibit 2

Taormina Does Not Maintain a Nuisance

Some claim Mr. Taormina is engaged in maintaining a nuisance. It is not true. The definition of a nuisance in Nevada is found at NRS 40.140:

1. Except as otherwise provided in this section:
a. Anything which is injurious to health, or indecent and offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property;
b. A building or place used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, using or giving away a controlled substance, immediate precursor or controlled substance analog; or
c. A building or place which was used for the purpose of unlawfully manufacturing a controlled substance, immediate precursor or controlled substance analog . . .

Mr. Taormina is not involved with any controlled substances, and no one makes that claim. Parts (b) and (c) are irrelevant.

This leaves us to examine, one at a time, . . .

- **Injury to health.** Claims of interference to pacemakers has been debunked and withdrawn, and the County Attorney has ruled that matters of interference are exclusively federal.

- **Indecent and offensive to the senses.** Here, no one alleges indecent exposure, pornography, nude dancing, or any violation of indeceny. No one claims his amateur radio antennas cause fumes, dust, noise or vibrations that interfere with their ability to use or access their property. *Cf. Palm Springs Transfer and Storage v. City of Reno*(2009) (Reno constructed a shoofly next to the property). The problem for opponents is that even if a bright pink house might offend someone's sense of beauty, it fails the indecent and offensive tests. The statute requires BOTH indecent AND offensive to the senses.

- **Obstruction to the free use of property.** There is no claim that the amateur radio antennas interfere with the use of property, or access to property.

We think the antennas are majestic. Those who think otherwise have a problem with the nuisance statute, because even ugly is not a nuisance under Nevada law.

A claim of nuisance was a subject in *Evans v. Burruss* (MD case), 401 Md.586, 933 A. 2d 872,http://www.courts.state.md.us/opinions/coa/2007/1a07.pdf (MD Court of Appeals, 2007). This case involved four amateur radio towers, each 190 feet in height. The Court wrote:

> Fn 23. At one time in England as a part of nuisance law, the Doctrine of Prior Appropriation and the Doctrine of Ancient Lights applied. The former held that the first user to appropriate a resource had the right to the continued use of the

resource. The latter held that if a "landowner had received sunlight across adjoining property for a specified period of time, the landowner w as entitled to continue to receive unobstructed access to sunlight across the adjoining property." *Prah*, 108 Wis.2d at 233, 321 N.W.2d at 188 (footnote omitted). Even if these doctrines survived in this country, it is doubtful that they would apply to the construction of amateur radio towers, such as these in the case *sub judice.*

In addition, every other litigated claim of nuisance for an amateur radio tower has failed.

Furthermore, see *Oliver v. AT&T Wireless*, 76 Cal. App. 4th 521(1999) [130 foot cell tower]:

> [W]hile we have sympathy for plaintiffs' plight, not all plights give rise to legal rights. We conclude that the mere displeasing appearance in size and shape of a neighboring structure that is otherwise permitted by law, the only admitted effect of which is an alleged diminution in value of the adjacent property, cannot constitute a nuisance or give rise to an inverse condemnation claim. n1 [omitted] Since a landowner has no natural right to an unobstructed view (*Posey v. Leavitt*(1991) 229 Cal. App. 3d 1236, 1250 [280 Cal. Rptr. 568]), the size and shape of an otherwise lawful structure on one side of a boundary cannot be deemed either to damage (for purposes of inverse condemnation) or to interfere with the enjoyment (for purposes of nuisance) of that which is on the other side of the boundary. Otherwise, one person's tastes could form the basis for depriving another person of the right to use his or her property, and nuisance law would be transformed into a license to the courts to set neighborhood aesthetic standards.