Exhibit O – Letter to County *re* Applicable Law, February 28, 2011

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In re: SUP Application for 370 Panamint Road

Gentlemen:

The County Has an Obligation to Negotiate with the Applicant

> The draft Staff Report dated 2/18/2011, at page 4, reads:
>
> 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".

I agree that, substantively, the *Howard* court requires that "a city . . . [must] . . . attempt[] to negotiate a satisfactory compromise with the applicant." However, the quotation is inaccurate and misleading.

> The actual quotation is:
>
> PRB-1, para. 25. Clearly, this does not contemplate the outright invalidation of city zoning authority over backyard antenna height,*fn5 nor does it appear to confer rights upon licensees to anything more than "reasonable accommodation." Instead, the rule leaves a city free to deny an antenna permit as long as it has considered the application,

> made factual findings, and attempted to negotiate **a satisfactory compromise with the applicant**. See, e.g., Williams v. City of Columbia, 906 F.2d 994, 997 (4th Cir. 1990) (affirming second denial of variance for 65-foot antenna after reconsideration in light of PRB-1); MacMillan v. City of Rocky River, 748 F. Supp. 1241, 1248 (N.D. Ohio 1990) (PRB-1 does not mandate that city approve antenna). *(Emphasis added.)*

If you ask "What's the difference?," the answer is that the 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 on the two most critical issues: the number and height of the antenna support structures.

I propose to fly in to Nevada before the hearing presently scheduled for Thursday evening. I request that at least one representative of the county (I would hope more than one) who has authority to negotiate and resolve issues, be available to meet with me on Wednesday or Thursday before the hearing. 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, as you will see below, "a balancing of interests approach is not appropriate."

One Fundamental Element of the Howard Decision is Not Valid

The Staff Report relies on the *Howard* case. But there's a problem. *Howard* was a 1991 case, and, as can be seen in the paragraph quoted above, it relied on *Williams* (1990) and *MacMillan* (1990).

That's the problem. In both *Williams* and *MacMillan*, the Courts were interpreting the FCC's 1985 PRB-1 order (promulgated as 47 CFR §97.15(b)). We'll get to the *MacMillan* case shortly.

The Williams Case is No Longer Good law

The key holding from *Williams* is: "[PRB-1, or 47 C.F.R. § 97.15(b)] requires only that the City balance the federally recognized interest in amateur radio communications with local zoning concerns." 906 F.2d at 998. ***The Williams court got it wrong, and the FCC subsequently had to make sure everyone understood what it meant.***

Subsequent to the *Williams* case, the FCC expressed the full extent of its preemptive intent and explicitly disapproved of the Fourth Circuit's approach in Williams.

> [T]he PRB-1 decision precisely stated the principle of 'reasonable accommodation.' In PRB-1, the Commission stated: 'Nevertheless, 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.' **Given this express Commission language, it is clear that a 'balancing of interests' approach is not appropriate in this context.** Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antennas and Support Structures, 14 F.C.C.R. 19,413 para. 7 (1999), RM-8763 or FCC 99-2569, http://wireless.fcc.gov/services/amateur/prb/prb1999.html (Last visited February 27, 2011) (*Emphasis added).*

As the FCC pointed out nine years after the *Williams* decision, the plain language of PRB-1 imposes the obligation of reasonable accommodation upon a municipality and belies a simple balancing approach. Given this plain and express language, *Williams* was incorrect in its key holding. In the absence of an explicit disapproval of the "balancing of interests" approach by the FCC, the 1990 holding was somewhat understandable, although still incorrect. Given the FCC's explicit disapproval, *Williams* is plainly incorrect today.

Published case law after 1991 has uniformly agreed. *See Evans v. Board of County Commissioners*, 994 F.2d 755, 762-63 (10th Cir. 1993) ("We believe the balancing approach underrepresents the FCC's goals as it specifically selected the 'reasonably accommodate' language."); *Pentel v. City of Mendota Heights*, 13 F.3d 1261, 1264 (8th Cir. 1994) ("[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 interests when deciding whether to permit a radio antenna."); *Marchand v. Town of Hudson*, 788 A.2d 250, 254 (N.H. 2001) (addressing balancing of interests: "[T]he federal directive requires municipalities to do more.").

A particularly good, and more recent, criticism of the *Williams* case may be found in *Snook v. Missouri City, Texas*, No. 03-cv-243, 2003 U.S. Dist. LEXIS 27256, 2003 WL 25258302 (S.D. Tex. Aug. 26, 2003) (the Order, Slip Opinion, 63 pp.), also (the Final Judgment, Slip Opinion, 2 pp.). PACER citation: https://ecf.txsd.uscourts.gov/cgi-bin/login.pl?387442335892775-L_238_0-14:03-cv-00243_Snook v._City_of_Missouri, (S.D. Tex. 2003):

> 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 997-998.

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.

As a result of RM-8763 (FCC 99-2569), KeyCite™ gives *Williams* the flag of "called into doubt by regulation." *Snook* explicitly rejects *Williams*. The Applicant urges the County to adopt the more recent opinions of the several courts cited above, *Evans, Pentel,* and *Marchand,* and to recognize that *Williams* has been implicitly overturned and is no longer good law. A balancing of interests is not a permissible approach. As the United States Supreme Court stated in *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984):

> We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations
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> "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. See, e. g., National Broadcasting Co. v. United States, 319 U.S. 190 ; Labor Board v. Hearst Publications, Inc., 322 U.S. 111 ; Republic Aviation Corp. v. Labor Board, 324 U.S. 793 ; Securities & Exchange Comm'n v. Chenery Corp., 332 U.S. 194 ; Labor Board v. Seven-Up Bottling Co., 344 U.S. 344 .
>
> ". . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." United States v. Shimer, 367 U.S. 374, 382 , 383 (1961).

Accord, Capital Cities Cable, Inc. v. Crisp, ante, at 699-700.

In other words, the FCC knows what it said, knows what it meant, and a court should not try to change what it meant. No balancing of interests is permissible.

MacMillan, Upon Which the 9th Circuit Also Relied, is a Very Interesting Case

The case cited by the 9th Circuit, MacMillan v. City of Rocky River, 748 F. Supp. 1241, 1248 (N.D. Ohio 1990), on the actual page cited (1248) reads:

> The court concludes that § 1333.02 is not facially invalid since it provides a sufficient structure for balancing state and federal interests as required by PRB-1. By its terms **the ordinance provides for a balancing of the effect of an improvement on neighboring property values** against the reasonable need for the improvement to develop the property. As interpreted by Defendant, however, reasonable need in this situation involves reasonable need for the particular antenna to carry on effective communication of the type desired. See Defendant' Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment, at 16. Interpreted as such, the ordinance could be applied to give reasonable consideration to both the city's local interests and Plaintiff's federally protected interest in amateur radio operation.

(Emphasis added.)

Thus, the 9th Circuit's *Howard* case relied on a permitted balancing, especially against property values. Even so, the *MacMillan* court decided AGAINST the city, and in favor of the radio amateur, which leads us to *MacMillan II*, slip opinion at 6 (attached):]

> Plaintiff's claims all involved a challenge to the review process to which he was subjected. The court determined that the process was flawed, but only reached Plaintiff's preemption claim. Plaintiff has, therefore, succeeded in obtaining a new hearing in which the federal interest in amateur radio operation is to be seriously considered. This should lead to a hearing process which is substantially different from Plaintiff's last hearing.
>
> Defendants make the alarming allegation that the new review "is consistent with and is not a material alteration of previous consideration of PRB-1 by ROCKY RIVER." This statement is followed by a citation[] to the transcript of the prior review which indicates that PRB-1 and technical data were submitted for consideration. The Defendants ought not to think that they will comply with this court's order by merely going through the motions of denying Mr. MacMillan another permit. **Any decision to disregard the federal interests raised in PRB-1 must be based upon substantial justification and explained in the record. Defendants should keep in mind that after this litigation it may be more difficult to support a claim for qualified immunity if they once again fail to sufficiently consider the federal interests involved.**
>
> . . .
>
> Plaintiff's motion for § 1988 attorney's fees is GRANTED.

(Emphasis added.)

Conclusion

The *Howard* case, upon which the Staff Report relies, is based on a balancing of local and federal interests, which the court (wrongly) believed was permitted. *An impermissible balancing approach allowed the Howard court to take the position that a permit could be denied.* The FCC has made it plain that balancing is impermissible.

Storey County should make its decision based on the applicable federal law, without balancing, exercising:

- Reasonable accommodation (remember, we're talking about a parcel of 10 acres, out in the highlands), and the
- Least restrictive means.

Just as a reminder, the FCC's PRB-1 found that:

> 25. Because amateur station communications are only as effective as the antennas employed, antenna height restrictions directly affect the effectiveness of amateur communications. Some amateur antenna configurations require more substantial installations than others if they are to provide the amateur operator with the communications that he/she desires to engage in. For example, an antenna array for International amateur communications will differ from an antenna used to contact other amateur operators at shorter distances.

(1985)

And

> 6. . . . Amateur station antenna configurations depend on a variety of parameters, including the types of communications that the amateur operator desires to engage in, the intended distance of the communications, and the frequency band. . . . Amateur station antennas, in order to achieve the particular objectives of the amateur radio operator, can be a whip attached to an automobile, mounted on a structure hundreds of feet in height, or a wire hundreds (or even more than a thousand) of feet in length.

(2000)

Request

I request that the staff report be amended to correctly quote the *Howard* case, that the Staff report should make it plain that a balancing of interests approach is impermissible, and that the required negotiations, with a representative of the County who has authority, on the number and heights of the antenna structures should begin. Wednesday would be a good day!

Sincerely,

Fred Hopengarten, Esq.

Attachment: *Macmillan II*
Snook v. Missouri City (attached separately as a PDF)
C: Mr. Taormina
Brian McMahon, Esq.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES D. MacMILLAN,	)	1:87 CV 2820
Plaintiff,	)	
- vs -	)	ORDER
CITY OF ROCKY RIVER, et al.,	)	
Defendants.	)	

Battisti, J.

On September 21, 1990, an order was issued addressing the parties cross motions for summary judgement in the instant case. The court ruled that the Rocky River municipal ordinances in question were facially valid, but as applied were preempted by PRB-1, an FCC regulation. In so ruling, the court declined to reach the constitutional issues raised by the Plaintiff, James D. MacMillan. Plaintiff was left to seek his amateur radio antenna permit under the codified Rocky River procedures, and Defendants were instructed that future decisionmaking in this area must include "a reasonable accommodation of the federal government's interest in amateur radio communications," as expressed in PRB-1.

With the issue of the ordinances' validity addressed, all that remained for consideration was the Plaintiff's request for damages. Accordingly, the parties were requested to brief

any remaining claims for damages.[1]

Since Plaintiff's subsequent brief raised only the issue of attorney's fees under 42 U.S.C. § 1988, the court assumes that this is the only issue remaining for disposition.

Section 1988 states, in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The Plaintiff claims that although the court did not rule on any of his constitutional claims, he is entitled to attorney's fees as discussed in Maher v. Gagne, 448 U.S. 122, 130-32 (1980).

Although Maher explores the intended scope of § 1988, Seaway Drive-In, Inc. v. Township of Clay, 791 F.2d 447 (6th Cir. 1986), cert. denied 479 U.S. 884 (1987), is more relevant to the present inquiry. Seaway Drive-In explains the Sixth Circuit's application of Maher, as well as, the Supreme Court's later holdings in Smith v. Robinson, 468 U.S. 992 (1984), and Hensley v. Eckerhart, 461 U.S. 424 (1983).

In Seaway Drive-In, the plaintiff challenged a town ordinance that regulated drive-ins. 791 F.2d at 449. A preliminary injunction and eventual consent decree were based upon state law claims, obviating the need for the district

[1] The court had held that the Defendants were entitled to qualified immunity with regard to the claims against them in their individual capacity.

court to consider the plaintiff's constitutional challenges. Id. The district court declined to award § 1988 attorney's fees and the court of appeals reversed. Id. at 455. Seaway Drive-In is analogous to the instant case in which the court did not reach the Plaintiff's constitutional challenges due to the presence of a dispositive non-fee claim.

The Seaway Drive-In court began its analysis by citing the following passage from Maher.

> The legislative history [of § 1988] makes it clear that Congress intended fees to be awarded where a pendent constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the Act. The Report of the Committee on the Judiciary of the House of Representatives accompanying H.R. 15460, a bill substantially identical to the Senate bill that was finally enacted, stated:
>
> > To the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding fees. Morales v. Haines, 486 F.2d 880 (7th Cir. 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. Hagens v. Lavine, 415 U.S. 528 [94 S.Ct. 1372, 39 L.Ed.2d 577] (1974). In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, see Hagens v. Lavine, supra; United Mine Workers v. Gibbs, 383 U.S. 715 [86 S.Ct. 1130, 16 L.Ed.2d 218] (1966), attorney's fees may be allowed even though the court declines to enter judgement for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' United Mine Workers v. Gibbs, supra, at 725 [86 S.Ct. at 1138]. H.R.Rep. No. 94-1558, p. 4, n. 7 (1976).

448 U.S. at 132, n. 15 (cited at 791 F.2d at 451).

The court equated the test laid out in the legislative history -- i.e. the requirements that the fee claim be substantial and that the fee and non-fee claims arise out of a common nucleus of operative -- with that used to determine whether a court has pendent jurisdiction over state law claims. Seaway Drive-In, 791 F.2d at 452. In addition, it held that the district court had erred in basing its substantiality determination on whether the fee claims could survive a motion for summary judgement at the time of the consent decree. Id. Under the proper substantiality test, a claim is only "insubstantial if it is 'obviously without merit' or if 'its unsoundness so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.'" Id. (citing Hagans, 415 U.S. at 537).[2]

Based upon the Sixth Circuit's construction of the Maher test, this court finds that Plaintiff's constitutional claims were both substantial and arising out of a nucleus of

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[2] Further the court stated that "[t]he claim must be 'so insubstantial, implausible, foreclosed by prior decisions of-[the Supreme Court] or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits.'" Seaway Drive-In, Inc. v. Township of Clay, 791 F.2d 447, 452 (6th Cir. 1986), cert. denied 479 U.S. 884 (1987), (citing Hagans v. Lavine, 415 U.S. 528, 543 (1974)).

operative fact common to both the fee and non-fee claims.[3]

Finally, the Defendants make the unfounded claim that the Plaintiff is not a prevailing party. The plaintiff is considered to have prevailed if there is "some actual benefit to the plaintiff either in terms of monetary damages, injunctive relief, or a voluntary change in defendant's conduct." Wooldridge v Marlene Industries Corp., 898 F.2d 1169, 1174 (6th Cir. 1990).

Plaintiff's claims all involved a challenge to the review process to which he was subjected. The court determined that the process was flawed, but only reached

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[3] The Defendants raise Smith v. Robinson, 468 U.S. 992 (1984), as a basis for denying attorney's fees. The Sixth Circuit addressed both Smith and Hensley v. Eckerhart, 461 U.S. 424 (1983), in Seaway Drive-In, Inc. v. Township of Clay, 791 F.2d 447, 453-55 (6th Cir. 1986), cert. denied 479 U.S. 884 (1987).

Smith involved plaintiff seeking district court review of an adverse agency ruling on numerous non-fee grounds. The only fee claim was a due process attack on the administrative proceedings themselves. The due process claim sought only to prevent further state hearings under the challenged regulation. The Court's holding, therefore, that a fee award was inappropriate was based on the fact that "the due process claim and the substantive claim on which plaintiffs ultimately prevailed involved entirely separate legal theories and, more important, would have warranted entirely different relief." Smith, 468 U.S. at 1015.

The Sixth Circuit viewed Hensley as reaching a similar holding. "Hensley makes clear that the purpose of the 'relationship between the claims' element of the fees award test is to prevent the award of fees in those cases where the fee and non-fee claims are aimed at achieving different results or where they are based on different facts and different legal theories." Seaway Drive-In, 791 F.2d at 455.

Neither of these cases is analogous to the instant case. The constitutional claims in this case arose from the same local review process. In addition, the relief available in each was substantially similar.

Plaintiff's preemption claim. Plaintiff has, therefore, succeeded in obtaining a new hearing in which the federal interest in amateur radio operation is to be seriously considered. This should lead to a hearing process which is substantially different from Plaintiff's last hearing.

Defendants make the alarming allegation that the new review "is consistent with and is not a material alteration of previous consideration of PRB-1 by ROCKY RIVER." This statement is followed by a citations to the transcript of the prior review which indicates that PRB-1 and technical data were submitted for consideration. The Defendants ought not to think that they will comply with this court's order by merely going through the motions of denying Mr. MacMillan another permit. Any decision to disregard the federal interests raised in PRB-1 must be based upon substantial justification and explained in the record. Defendants should keep in mind that after this litigation it may be more difficult to support a claim for qualified immunity if they once again fail to sufficiently consider the federal interests involved.

Plaintiff's motion for § 1988 attorney's fees is GRANTED. Plaintiff is instructed to submit a reasonable accounting of his fees in this case within thirty days of the issuance of

this order.

IT IS SO ORDERED.

Frank J. Battisti
United States District Judge

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