

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**McMAHON LAW OFFICES, LTD.**  
**BRIAN M. McMAHON, ESQ.**  
Nevada State Bar No.: 00927  
3715 Lakeside Dr. Ste. A  
Reno, Nevada 89501  
(775) 348-2701  
Fax: (775) 348-2702  
email: [Brian@mcmahonlaw.org](mailto:Brian@mcmahonlaw.org)  
Nevada Bar No. 927

**Fred Hopengarten, Esq.**  
Six Willarch Road  
Lincoln, MA 01773  
(781) 259-0088  
Fax: (419) 858-2421  
email: [hopengarten@post.harvard.edu](mailto:hopengarten@post.harvard.edu)  
D.C. Bar No. 114124  
Maine Bar No. 1660

**Attorneys for Plaintiff,**  
**TOM TAORMINA**

*McMahon Law Offices, Ltd.*

3715 Lakeside Dr. Ste. A

Reno, NV 89509

Phone: 775-348-2701 Fax: 775-348-2702

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

**TOM TAORMINA,**

**Plaintiff,**

**vs.**

**Case No.: 3:09-CV-00021-LRH-VPC**

**STOREY COUNTY,**

**Defendants.**

\_\_\_\_\_ /

**MOTION FOR DECLARATORY JUDGMENT; FED R. CIV. P. 57**

Plaintiff, moving party herein, THOMAS S. TAORMINA, hereinafter, TAORMINA, by and through his counsel of record, Brian M. McMahon, of McMahon Law Offices, Ltd., in association with *pro hac vice* counsel, Fred Hopengarten, and hereby motion this Court for its order pursuant to

1 Fed. R. Civ. P. 57, seeking declaratory and injunctive relief. This motion is brought in good faith  
2 based upon all documents and pleadings on file herein, Fed. R. Civ. P. 57, Local Rule 7-2, 7-3 and 7-  
3 4.

4 RESPECTFULLY SUBMITTED.

5 Dated this 19<sup>th</sup> day of October, 2009.

6 McMAHON LAW OFFICES, LTD

7  
8  
9 By: 

Brian M. McMahon, Esq.  
Attorney for Plaintiff,  
TOM TAORMINA

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
*McMahon Law Offices, Ltd.*

3715 Lakeside Dr. Ste. A

Reno, NY 89509

Phone: 775-348-2701 Fax: 775-348-2702

**TABLE OF CONTENTS**

1  
2 1. JURISDICTION AND VENUE

3 2. HISTORY

4 A. The Permitted, Taller Antenna Support Structures

5 B. The Previously Installed Antenna Support Structures Less Than 45' in Height

6 C. The Previously Installed Antenna Support Structures More than 45' in Height

7 D. Exchanges Regarding Applicable Law

8 E. Nuisance Complaint Filed

9 3. PRESENT STATUS – A SUMMARY

10 4. REQUESTED RELIEF

11 5. STANDARD OF REVIEW

12 A. Standard for Granting Summary Judgment/Declaratory Relief

13 B. Three Necessary Steps

14 6. ARGUMENT

15 7. THE RELEVANT LAW HAS BEEN SET FORTH IN THE COMPLAINT AND  
16 HEREIN

17 8. CONCLUSION

18  
19 **EXHIBITS AND CORRESPONDENCE INDEX**  
20  
21  
22  
23  
24  
25  
26  
27  
28

**POINTS AND AUTHORITIES**

**1. JURISDICTION AND VENUE**

1  
2  
3 1. This is an action for declaratory and injunctive relief presenting a federal question arising  
4 under 47 C.F.R. § 97.15(b)(2006), a regulation of the Federal Communications Commission  
5 ("FCC"), and FCC Opinion and Order PRB-1, *Federal Preemption of State and Local Regulations*  
6 *Pertaining to Amateur Radio Facilities*, 101 FCC 2d 952, 50 Fed. Reg. 38813 (September 25, 1985)  
7 ("PRB-1"). The complete Opinion and Order for PRB-1 may be found at:  
8 <http://wireless.fcc.gov/services/index.htm?job=prb-1&id=amateur&page=1>. Complaint at ¶1.

9 2. The FCC was created by, and its regulations and orders are authorized by The  
10 Communications Act, 47 USC §151 *et seq.* Complaint at Exhibit A.2, ¶2.

11 3. The Plaintiff is an FCC-licensed radio amateur. Complaint at a.2, ¶7. He holds an Extra  
12 Class Amateur Radio operator license, call-sign K5RC. Exhibit A (a copy of Plaintiff's FCC  
13 license). The FCC Universal Licensing System database information (an FCC official record) on  
14 this license may be found at <http://wireless2.fcc.gov/UlsApp/UlsSearch/license.jsp?licKey=253169>

15 4. This Court has subject matter jurisdiction over this claim for relief by virtue of 28 USC  
16 §1331 (original jurisdiction for a "federal question"), and §1337 (original jurisdiction "arising under  
17 any act regulating commerce"). Declaratory relief as requested herein is authorized by virtue of 28  
18 USC §2201 (declaring rights "in a case of actual controversy within its jurisdiction") and F.R.Civ.P.  
19 57 - Declaratory Judgments. The Court has supplemental jurisdiction over the Plaintiff's state law  
20 claim arising under NRS 278.02085, by virtue of 28 USC §1367 (supplemental jurisdiction that is  
21 part of the same controversy). Complaint at Exhibit A.2, ¶3.

22 5. Plaintiff is a natural person who resides at 370 Panamint Road, Virginia City Highland  
23 Ranches, Storey County, Nevada. Complaint at Exhibit A.2, ¶6.

24 6. Plaintiff's residence is in the E10-HR Estates Zone of Storey County. Complaint at  
25 Exhibit A.2, ¶9.

26 7. Defendant Storey County is a county and political subdivision existing under the laws of  
27 the State of Nevada, and located in Storey County, Nevada. Admitted in Defendant's "Answer to  
28 Complaint Seeking Declaratory and Injunctive Relief". See Exhibit A.3, P.1, ¶ II.

1 8. Venue lies in this district by virtue of 28 U.S.C. §1391(b)(1) (“where any defendant  
2 resides”) and §1391(b)(2) (“in which a substantial part of the property . . . is situated”), because the  
3 defendants reside or are otherwise located in this judicial district, the property is in Storey County,  
4 and the claims asserted arose here. See Exhibit A.3, P.1, ¶ II.

5 **2. HISTORY**

6 **A. The Permitted, Taller Antenna Support Structures;**

7 9. On June 24, 2008, the Plaintiff requested a building permit to erect two amateur radio  
8 station antenna structures, 120 feet and 195 feet in height above ground respectively. Building  
9 Permit No.8354 was issued on June 27, 2008. See Exhibit A.3, P.1, paragraph II.

10 10. Exhibit B is a true and correct copy of Building Permit No.8354, issued by the Storey  
11 County Building Department (SCBD) on or about June 27, 2008. Admitted in Admissions Under  
12 Rule 36 See Exhibit A.1, P. 2, Response No. 4.

13 11. The County has acknowledged the application of 47 CFR § 97.15 to this set of facts,  
14 describing the Storey County Code as having a “specific height restriction” of 45 feet, and  
15 acknowledges that “it is true that amateur radio operators provide the public with very important  
16 services during emergency situations . . .” Admitted in Admissions, Exhibit A.1, P. 2, Response  
17 No.5.

18 12. On July 3, 2008, Shannon Gardner, Building Inspector, performed an inspection and  
19 issued a Compliance Inspection Report for construction work on existing towers. He reported that  
20 the construction was “as per design” and concluded: “Pass, OK to pour [concrete].” He also checked  
21 the box stating that the construction: “Meets ALL Requirements for this INSPECTION.” His  
22 certification reads: “I certify that I have inspected the above property and have reported herein all  
23 conditions observed at this time and date to be in variance<sup>1</sup> with any Storey County Ordinances, the  
24 U.B.C.<sup>2</sup>, and the approved plans and specs.” Exhibit D is a true and correct copy of that report,  
25 issued by the Storey County Building Department on or about July 3, 2008. Admitted in Exhibit A.1  
26 at P. 2, Response No.6.

27 \_\_\_\_\_  
28 <sup>1</sup> While the printed form says “in variance,” Plaintiff Taormina believes that this is a typographical or scrivener’s error, and that the form was intended to read that all conditions were in “in compliance.” Otherwise, the certification makes no sense.

<sup>2</sup> U.B.C. is an abbreviation for Uniform Building Code.

1 13. On July 8, 2008, Dean Haymore, Building Official, performed inspections and issued a  
2 Compliance Inspection Report for construction work being performed on the two newly permitted  
3 towers. See Answer, A.3 at P. 1, paragraph II.

4 14. The Building Official reported that, with respect to the 195-foot tower, (a) it “Meets ALL  
5 Requirements for this INSPECTION;” (b) it was “OK to pour footing at own risk per waiting for  
6 variance for towers over 45’;” and (c) “I certify that I have inspected the above property and have  
7 reported herein all conditions observed at this time and date to be in variance<sup>1</sup> with any Storey  
8 County Ordinances, the U.B.C.<sup>2</sup>, and the approved plans and specs.” Exhibit E is a true and correct  
9 copy of the Compliance Inspection Report issued by the Storey County Building Department, on or  
10 about July 8, 2008. Admitted in Exhibit A.1, P. 2, Response No.7. No reason is stated in the  
11 document for the change in the County’s opinion between July 3<sup>rd</sup> and July 8<sup>th</sup>, so that on July 8<sup>th</sup>, a  
12 variance was then required.

13 15. On or about July 16, 2008, the Storey County Building Department, by Shannon  
14 Gardner, Building Inspector, issued a Code Compliance Inspection Report which stated that “Storey  
15 County is now of the opinion that a Special Use Permit is required for the construction of towers  
16 over 45’ in height.” Admitted in Exhibit A.3, P. 1, paragraph II. No reason is stated in the document  
17 as to why the County changed its opinion between July 8<sup>th</sup> and July 16<sup>th</sup> so that on July 16<sup>th</sup>, a Special  
18 Use Permit (no longer a variance) was then required. Exhibit F is a true and correct copy of a Code  
19 Compliance Inspection Report issued by the Storey County Building Department on or about July  
20 16, 2008. Admitted in Exhibit A.1, P. 2, Response No.8.

21 16. On or about July 17, 2008, the Building Department, by Dean Haymore, Building  
22 Official, issued a Stop Work Order for all structures. Admitted in Exhibit A.3, P. 1, paragraph II. All  
23 work stopped. No reason is stated in the document as to why the County again changed its opinion  
24 between July 16<sup>th</sup>, and July 17<sup>th</sup>, so that on July 17<sup>th</sup>, a variance (no longer a Special Use Permit) was  
25 then required for structures over 45 feet in height. Exhibit G is a true and correct copy of the Stop  
26 Work Order. Admitted in Exhibit A.1, at P. 2, Response No. 11.

27  
28 

---

<sup>1</sup> See fn 1 above.

<sup>2</sup> See fn 2 above.

1           **B. The Previously Installed Antenna Support Structures Less Than 45' in Height;**

2           17. On or about July 25, 2008, Plaintiff Taormina filed a building permit application for two  
3 antenna support structures, of 32 and 40 feet respectively. Exhibit H is a true and correct copy of  
4 that Building Permit Application. Admitted in Admissions, at 2, Response No.12.

5           18. Exhibit M is a true and correct copy of Building Permit No. 8416 for an antenna support  
6 structure of 32 feet in height, issued by the Storey County Building Department on or about  
7 September 16, 2008. Admitted in Exhibit A.1, P. 3, Response No.14.

8           19. Exhibit N is a true and correct copy of Building Permit No.8417, for an antenna support  
9 structure 40 feet in height, issued by the Storey County Building Department on or about September  
10 16, 2008. Admitted in Exhibit A.1, at P. 3, Response No.15.

11           20. Exhibit O is a true and correct copy of the Completion Report for Building Permit  
12 No.8416, for the antenna support structure 32 feet in height, issued on or about September 24, 2008.  
13 Admitted in Exhibit A.1, at P. 3, Response No.16.

14           21. Exhibit P is a true and correct copy of the Completion Report for Building Permit  
15 No.8417, for the antenna support structure 40 feet in height, issued on or about September 24, 2008.  
16 Admitted in Exhibit A.1, at P. 3, Response No.17.

17           22. There is no controversy between the parties with respect to the 32 and 40 foot antenna  
18 support structures, and the antennas thereon.

19           **C. The Previously Installed Antenna Support Structures More than 45' in Height;**

20           23. Exhibit I is a true and correct copy of Building Permit Applications that were filed, with  
21 supporting documents, at the Storey County Building Department for four existing antenna support  
22 structures of 85, 110, and 140 (two structures) feet in height, on or about August 14, 2008. Admitted  
23 in Exhibit A.1, at P. 2, Response No.13.

24           24. No response to the Applications of August 14, 2008 has been received by Plaintiff  
25 Taormina. Affidavit of Taormina, Exhibit A.4.

26           **D. Exchanges Regarding Applicable Law;**

27           25. Atty. Hopengarten assembled and Plaintiff Taormina hand delivered an Application for  
28 Building Permit, covering the four existing towers greater than 45' in height, with Supplement and

1 Needs Analysis, on or about August 14, 2008. See Exhibit I.

2 26. Citing points and authorities, Atty. Hopengarten responded to concerns of DDA Grant by  
3 letter dated August 25, 2008. Exhibit J.

4 27. DDA Grant took the position that authorities cited by Atty. Hopengarten, Counsel for  
5 Plaintiff Taormina, were not “controlling<sup>1</sup>,” “persuasive,” nor “convincing.” The County’s position,  
6 on that date, was that the County Code provides for Special Permits relating to amateur radio  
7 antenna support structures “over forty-five (45) feet in height.” Exhibit K is a true and correct copy  
8 of a letter from DDA Grant to Atty. McMahon dated August 27, 2008. Admitted in Exhibit A.1, at  
9 P. 3, Response No.20.

10 28. On August 28, 2008, Atty. Fred Hopengarten replied to DDA Grant, Exhibit L. As to  
11 controlling, persuasive and convincing case law, he wrote:

12  
13 First, Nevada’s statute **NRS 278.02085 Amateur radio** specifically  
14 adopts “the provisions of 47 C.F.R. § 97.15 and the limited preemption  
15 entitled “Amateur Radio Preemption, 101 F.C.C. 2d 952 (1985)”<sup>2</sup> as issued by  
16 the Federal Communications Commission.” An ordinance that “does not  
17 conform to the provisions of” those laws is void.

18  
19 Second, Nevada is in the Ninth Federal Circuit, which has written that  
20 “(o)rdinance[s] which establish absolute limitations on antenna height . . . are  
21 . . . facially inconsistent with PRB-1.” *Howard v. City of Burlingame*, 937 F.2d  
22 1376, fn5 (9<sup>th</sup> Cir., 1991).

23 29. In conversation with Plaintiff’s Attorney McMahon, DDA Grant took the  
24 position that SCC §17.40.020 requires a Special Use Permit for accessory structures over 60  
25 feet long, and that this required Plaintiff Taormina to apply for Special use Permits. Learning  
26 of this new posture<sup>3</sup> by the County, by letter dated September 19, 2008, Atty. Hopengarten  
27 wrote to DDA Grant that for seven of the structures “there is no antenna on or proposed . . .  
28 that is greater than 48’ wide and no antenna greater than 60’ long. Permits for those  
structures, with antennas less than 48’x60’, should be a matter of right.” The Hopengarten  
letter also argued that:

28  
1 Note that the County acknowledges the application of 47 CFR §97.15 to this set of facts. See ¶11 above.  
2 This preemption order is widely known as “PRB-1.” [Footnote not in original letter.]  
3 In previous memoranda and letters, DDA Grant had cited only the SCC referring to 45’ height above grade limitations.



1 SCC §17.40.020 uses the concepts of height, width and length.  
2 §17.40.020 A. regulates the **height** of a residence. §17.40.020 B. regulates the  
3 **width** and **length** of an accessory use. With a plain language reading or the  
4 ordinance, there is no basis to believe that dimensions described as “wide” or  
5 “long” refer to height.

6 That letter also argued:

7 In this one special instance of law, the County has an obligation under  
8 both federal and state law to invoke (as per the Federal regulation) “the minimum  
9 practicable regulation,” or (as per Nevada statute) “the minimum level of  
10 regulation practicable,” and not, as presently seems to be the position of the  
11 County, the maximum possible regulation.

12 See Exhibit Q.

13 30. By letter dated September 30, 2008, DDA Grant wrote that “SCC §17.40.020(B)  
14 provides that accessory use structures which are more than sixty (60) feet in length require a special  
15 use permit. Clearly, the Taormina’s antennae [*sic*]are in excess of this limit.” Exhibit U is a true and  
16 correct copy of that letter to Attorney McMahon dated September 30, 2008. Admitted in Exhibit A.1,  
17 at P. 3, Response No.21.

18 **E. Nuisance Complaint Filed**

19 31. Exhibit Y is a true and correct copy of a complaint alleging nuisance, filed with Storey  
20 County by a neighbor, Buddy Morton, dated January 1, 2009. Admitted in Exhibit A.1, at P. 3,  
21 Response No.18.

22 32. Exhibit Z is a true and correct copy of e-mail sent to Plaintiff by the County Manager on  
23 or about January 25, 2009. Admitted in Exhibit A.1 at P. 3, Response No.19.

24 **3. PRESENT STATUS – A SUMMARY**

25 33. The previously erected antenna support structures of 32 and 40 feet have permits, have  
26 been inspected, and do not appear to be a matter of controversy between the parties.

27 34. Building permit applications have been filed for the existing antenna support structures  
28 of 85, 110, and 140 (two structures) feet in height. These applications have neither been accepted nor  
returned.

35. Building permit applications for antenna support structures of 120 feet and 195 feet have  
been filed, and Building Permit No.8354 for those structures was issued by the Storey County  
Building Department (SCBD) on or about June 27, 2008, now under a Stop Work order dated July

1 17, 2008.

2 36. The County has also taken the following positions: (a) no amateur radio antenna support  
3 structure may be erected in Storey County that is to be higher than 45 feet without a variance  
4 (Memorandum from DDA Grant to Building Official Haymore, dated July 1, 2008; Compliance  
5 Inspection report by Building Official Haymore, dated July 8, 2008; Stop Work Order by Building  
6 Official Haymore, dated July 17, 2008 ), (b) a Special Use Permit is required for antennas taller than  
7 45 feet (Code Compliance Inspection Report by Building Inspector Gardner, July 16, 2008), and (c)  
8 a Special Use Permit is required for an accessory use longer than 60 feet (DDA Grant letter of  
9 September 30, 2008).

10 **Table 1 – Chronological Positions Taken by Storey County**

Date (2008)	Document	County's Position
June 27	Building Permit No. 8354	Permit granted for 120 and 195' antenna support structures.
July 1	Memorandum from DDA Grant to Building Official Haymore	"Storey County Code §17.12.044 places a specific height restriction upon the erection of radio towers" of 45 feet.
July 3	Compliance Inspection Report by Building Inspector Gardner	Existing antenna support structures in compliance "with any Storey County Ordinances, the U.B.C., and the approved plans and specs."
July 8	Compliance Inspection Report by Building Official Haymore	"[V]ariance [required] for towers over 45' "
July 16	Code Compliance Inspection Report by Building Inspector Gardner	"Storey County is now of the opinion that a <b>Special Use Permit</b> is required for the construction of towers over 45' in height."
July 17	Stop Work Order by Building Official Haymore	SCC §17.12.044 requires a " <b>variance</b> for the height of the radio tower that exceeds 45 feet."
September 30	Letter from DDA Grant	SCC §17.40.020 requires a <b>Special Use Permit</b> "for any structure over sixty feet (60') long."

23 *Emphasis supplied, See Exhibit A, Building permit history.*

24 37. NRS 278.02327 requires that an application for a building permit be accepted or returned  
25 within three working days.

26 38. More than one year has passed since Building Permit applications were filed on or about  
27 August 14, 2008, with supporting documents, at the Storey County Building Department, for four  
28

1 existing antenna support structures of 85, 110, and 140 (two structures) feet in height. The  
2 applications of August 14, 2008 have neither been accepted nor returned.

3 39. A nuisance complaint under NRS has been filed and scheduled for consideration by the  
4 County.

5 40. Plaintiff Taormina has represented to the county that no antenna, save one, will have a  
6 dimension longer than 60 feet.

7 **4. REQUESTED RELIEF**

8 Taormina requests this Court to grant declaratory relief or in the alternative summary  
9 judgment, finding that a regulation of the Federal Communications Commission, FCC opinion and  
10 order PRB-1, Federal Preemption of State and Local Regulations Pertaining to Amateur Radio  
11 Facilities, 101 FCC 2d. 952, 50 Fed. Reg. 38813, September 25, 1985, also known as PRB-1 applies.  
12 This Court has jurisdiction under 28 USC § 1331, 28 USC § 2201 and Fed. R. Civ. P. 56-57.  
13 Taormina is an FCC amateur radio operator requesting building permits. Taormina's existing  
14 antennas and support more than 45' in height, as well proposed antenna and support structures more  
15 than 45' in height as well as the 120' and 195' antenna/support structures should be allowed.

16 Accordingly, this Court should order that Federal preemption applies, and that Storey County  
17 shall withdraw its stop work order and issue building permits as requested.

18 **5. STANDARD OF REVIEW**

19 **A. Standard for Granting Summary Judgment/Declaratory Relief**

20 Whether by summary judgment under Fed. R. Civ. P. 56 or declaratory judgment, the  
21 standard is clear that material issues of fact that exist will preclude summary judgment.

22 Summary judgment allows courts to avoid unnecessary trials where no material factual  
23 dispute exists. *Northwest Motorcycle Ass'n v. U.S. Department of Agriculture*, 18 F.3d 1468, 1471  
24 (9th Cir. 1994). The court must view the evidence and the inferences arising therefrom in the light  
25 most favorable to the nonmoving party, *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996), and  
26 should award summary judgment where no genuine issues of material fact remain in dispute and the  
27 moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Judgment as a matter  
28 of law is appropriate where there is no legally sufficient evidentiary basis for a reasonable jury to

1 find for the nonmoving party. Fed. R. Civ. P. 50(a). Where reasonable minds could differ on the  
2 material facts at issue, however, summary judgment should not be granted. *Warren v. City of*  
3 *Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 516 U.S. 1171, 116 S. Ct. 1261, 134 L. Ed.  
4 2d 209 (1996).

5 The moving party bears the burden of informing the court of the basis for its motion, together  
6 with evidence demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v.*  
7 *Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Once the moving party has  
8 met its burden, the party opposing the motion may not rest upon mere allegations or denials in the  
9 pleadings, but must set forth specific facts showing that a genuine issue for trial exists. *Anderson v.*  
10 *Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Although the  
11 parties may submit evidence in an inadmissible form--namely, depositions, admissions, interrogatory  
12 answers, and affidavits--only evidence which might be admissible at trial may be considered by a  
13 trial court in ruling on a motion for summary judgment. Fed. R. Civ. P. 56(c); *Beyene v. Coleman*  
14 *Security Services, Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988).

15 In deciding whether to grant summary judgment, a court must take three necessary steps: (1)  
16 it must determine whether a fact is material; (2) it must determine whether there exists a genuine  
17 issue for the trier of fact, as determined by the documents submitted to the court; and (3) it must  
18 consider that evidence in light of the appropriate standard of proof. *Anderson*, 477 U.S. at 248.  
19 Summary judgment is not proper if material factual issues exist for trial. *B.C. v. Plumas Unified Sch.*  
20 *Dist.*, 192 F. 3d 1260, 1264 (9th Cir. 1999). As to materiality, only disputes over facts that might  
21 affect the outcome of the suit under the governing law will properly preclude the entry of summary  
22 judgment. Disputes over irrelevant or unnecessary facts should not be considered. *Id.* Where there  
23 is a complete failure of proof on an essential element of the nonmoving party's case, all other facts  
24 become immaterial, and the moving party is entitled to judgment as a matter of law. *Celotex*, 477  
25 U.S. at 323. Summary judgment is not a disfavored procedural shortcut, but rather an integral part of  
26 the federal rules as a whole. *Id.*

27 ///

28 ///

1 **B. Three Necessary Steps**

2 *First, the Court must determine whether a fact is material;*

3 *Second, it must determine whether there exists a genuine issue for the trier*  
4 *of fact, as determined by the documents submitted to the Court; and*

5 *Third, it must consider the evidence in light of the appropriate standard of*  
6 *proof. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct.*  
7 *2505, 91 L. Ed. 2d 202 (1986).*

8 *Summary judgment is not proper if material factual issues exist for*  
9 *trial. Citation omitted. As to materiality, only disputes over facts that might*  
10 *affect the outcome of the suit under the governing law will properly*  
11 *preclude the entry of summary judgment. Anderson, 477 U.S. at 248.*  
12 *Disputes over irrelevant or unnecessary facts should not be considered. Id.*  
13 *Where there is a complete failure of proof on an essential element of the*  
14 *non-moving party's case, all other facts become immaterial, and the moving*  
15 *party is entitled to judgment as a matter of law. See Celotex at 477 U.S. at*  
16 *P. 323. Summary judgment is not a disfavored procedural shortcut, but*  
17 *rather an integral part of the federal rules as a whole. Id.*

18 *See Allstate Insurance Company v. Burney, 2009 U.S. Dist. Lexis 77401*  
19 *(August 26, 2009).*

20 **6. ARGUMENT**

21 **A. Application of Federal Preemption of State and Local Regulations**

22 PRB-1 is a regulation of the Federal Communications Commission establishing Federal  
23 preemption resulting in a Federal question. 47 CFR § 97.15(b) (2006). Taormina is a licensed radio  
24 amateur. He applied to Defendant, Storey County for building permits. Storey County issued  
25 Building Permit Number 8354 on June 27, 2008, permitting the erection of two amateur radio station  
26 antenna structures of 120' and 195' in height above ground. See Answer at Ex. A 3, P. 1, Paragraph  
27 2. See also Exhibit B. Storey County has taken at three separate positions. First it granted permits  
28 for antenna support structures less than 45 feet in height. See Exhibit M-N, Building Permit 8416,  
29 Exhibit J, Building Permit 8417 for support structure 40' in height, Storey County has not acted on  
30 applications for structures over 45 feet in height. Third, they granted permits for structures of 120  
31 and 195 feet and then issued stop work orders. See Exhibit M, Application for four structures more  
32 than 45' in height.

33 Storey County acknowledges that 47 CFR § 97.15 applies to this dispute. See Answer to  
34 Admissions, A-1 at p. 2, Response Number 5. However, Storey County finds that cases cited to it

1 are not controlling, persuasive, nor convincing. See letter from District Attorney, to Taormina,  
2 dated September 30, 2008, at Exhibit U.

3 Storey County, through its District Attorney's office, issued stop work orders. Exhibit G,  
4 Stop Work Order of July 17, 2008. However, with one exception, Taormina has proposed no  
5 antenna in excess of 48 feet wide and 60' long, nonetheless, it maintains that, SCC § 17.40.020,  
6 requires a special use permit. See Exhibits U and G. Taormina made the demand that no antenna  
7 proposed was in excess of 48' wide and no greater than 60' in length and requested permits for those  
8 structures as a matter of right. See Exhibit T, letter from counsel to District Attorney, dated  
9 September 22, 2008. Storey County has confused height and length. SCC § 17.40.020(A) regulates  
10 the height of a residence. Section 17.40.020(B) regulates the width and length of an accessory use of  
11 that residence. The County seeks to apply SCC 17.40.020(A), as a regulation of height of a  
12 residence and Section (B), regulates width and length of an accessory use not attached to the  
13 residence, and deny Taormina building permits.

14 SCC § 17.12.044 Height of Buildings states the following:

15 *In the R-1, R-2, E, A, PUD and F zones, no building, manufactured*  
16 *building, or manufactured homes shall exceed a height of three*  
17 *stories or 35', whichever is higher accept as may be allowed by*  
18 *special use permit. The requirements of this section shall not apply to*  
19 *church spires, belfries, cupolas, domes, chimneys or flag poles, radio,*  
*television and other communication masts may extend not more than*  
*45' above grade level providing that the same may be safely erected*  
*and maintained at such height and view of surrounding conditions*  
*and circumstances.*

20 The result is a firm, fixed, unvarying, maximum height limit of 45 feet.

21 NRS 278.02085, Amateur Radio Limitations on Restrictions on Amateur Radio Service  
22 Communications states the following:

23 *1. A governing body shall not adopt an ordinance, regulation or*  
24 *plan or take any other action that precludes amateur service*  
25 *communications or that in any other manner does not conform to the*  
26 *provisions of 47 CFR § 97.15 and the limited preemption entitled*  
*Amateur Radio Preemption, 101 FCC 2d. 952 (1985), as issued by*  
*the federal communications commission.*

27 *2. If a governing body adopts an ordinance, regulation or plan or*  
28 *takes any other action that regulates the placement, screening or*  
*height of a station antenna structure based on health, safety or*  
*aesthetic considerations, the ordinance, regulation, plan or action*  
*must:*

McMahon Law Offices, Ltd.

3715 Lakeside Dr. Ste. A

Reno, NY 89509

Phone: 775-348-2701 Fax: 775-348-2702

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

*(a) Reasonably accommodate amateur service communications; and*

***(b) Constitute the minimum level of regulation practicable to carry out the legitimate purpose of the governing body.***

*3. The provisions of this section do not apply to any district organized pursuant to federal, state or local law for the purpose of historic or architectural preservation.*

*4. Any ordinance, regulation or plan adopted by or other action taken by a governing body in violation of the provisions of this section is void.*

*5. As used in this section:*

*(a) "Amateur radio services" has the meaning ascribed to it in 47 C.F.R. § 97.3.*

*(b) "Amateur service communications" means communications carried out by one or more of the amateur radio services.*

*(c) "Amateur station" has the meaning ascribed to it in 47 C.F.R. § 97.3.*

*(d) "Station antenna structure" means the antenna that serves an amateur station, including such appurtenances and other structures as may be necessary to support, stabilize, raise, lower or otherwise adjust the antenna.*

See NRS 278.02085(1-5).

Storey County asserts that SCC § 17.12.044 creates a 45' maximum height, but its assertion fails to comply with NRS 278.02085.

**A FIXED MAXIMUM HEIGHT IS VOID.** NRS 278.02085 restricts limitations that do not comply with 47 CFR § 9715 or PRB-1, 101 FCC 2d 952 (1985). Nonetheless, Storey County, condemns amateur radio antennas over 45' in height citing SCC § 17.12.044. See Exhibit K and Exhibit U.

*Storey County Code 17.12.044 is neither factually preempted nor "as applied" preempted by PRB-1. Provisions are incorporated within this County's code for the application for, and issuance of, special use permits relating to otherwise non-conforming uses, such as amateur radio antenna over forty-five feet (45') in height.*

See Exhibit K, Storey County to Taormina.

1 Despite the fact that permits were issued, Exhibits A through I, the County, now seeks to  
2 invent a special use permit process as an exclusion from Federal preemption.

3 **7. THE RELEVANT LAW HAS BEEN SET FORTH IN THE COMPLAINT AND HEREIN**

4 Taormina asserts rights under PRB-1, 47 CFR 97.15, and NRS 278.02085, which are limited  
5 preemptions of state and local regulation of amateur radio antenna support structures.

6 Storey County asserts its right pursuant to Storey County Code § 17.12.044 that radio and  
7 other communication masts may not extend more than 45' above ground level. Storey County has set  
8 a "not to exceed" limit of 45'. See Exhibits K and U.

9 This court must determine if PRB-1, 47 CFR § 97.15(b) and NRS 278.02085 preempt SCC §  
10 17.12.044. If Storey County asserts a fixed maximum height of 45', it bears the burden of showing  
11 why that height limit is not preempted.

12 The County's argument has changed from a fixed maximum height of 45' to a special use  
13 process, insisting that a linear measurement on the ground, length, is a satisfactory explanation for  
14 its stop work order and failure to grant building permits.

15 **8. CONCLUSION**

16 This Court should enter a declaratory relief order mandating that permits be issued to  
17 Taormina, allowing the construction of his antenna structures as applied for.

18 In the alternative, this Court should enjoin Storey County from enforcing SCC § 17.12.044,  
19 or any other code section that violates PRB 1, 47 CFR § 97.15(b) and NRS 278.02085, and further  
20 direct Storey County to issue building permits for the antenna structures as requested by Taormina.

21 RESPECTFULLY SUBMITTED.

22 Dated this 19th day of October, 2009.

23 McMAHON LAW OFFICES, LTD.

24  
25 By: 

26 Brian M. McMahon, Esq.  
27 Attorney for Plaintiff,  
28 TOM TAORMINA

McMahon Law Offices, Ltd.

3715 Lakeside Dr. Ste. A

Reno, NV 89509

Phone: 775-348-2701 Fax: 775-348-2702



**CERTIFICATE OF SERVICE**

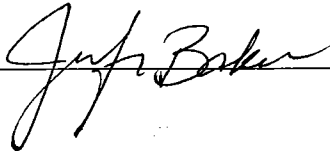
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Pursuant to NRCP 5(b) I hereby certify that I am an employee of McMahon Law Offices, Ltd., and that on the 19<sup>th</sup> day of October, 2009, I served a true and correct copy of the attached foregoing document by:

- Depositing for mailing, in a sealed enveloped, U.S. Postage prepaid, at Reno, Nevada
- Personal Delivery
- Facsimile
- Federal Express/Airborne Express/Other Overnight Delivery
- Reno-Carson Messenger Service

addressed as follows:

Brent T. Kolvet, Esq.  
Thorndal Armstrong Delk Balkenbush & Eisinger  
6590 S. McCarran Boulevard # B  
Reno, Nevada 89059

  
\_\_\_\_\_

*McMahon Law Offices, Ltd.*  
3715 Lakeside Dr. Ste. A  
Reno, NV 89509  
Phone: 775-348-2701 Fax: 775-348-2702