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5
6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA

8 THOMAS S. TAORMINA,
Plaintiff,
9 vs.
10 STOREY COUNTY,
11 Defendant.

CASE NO. 3:09-CV-00021-LRH-VPC
**OPPOSITION TO MOTION FOR
DECLARATORY JUDGMENT; FED R.
CIV. P. 57**

12 COMES NOW Defendant, Storey County, by and through its attorneys, Thorndal,
13 Armstrong, Delk, Balkenbush & Eisinger, and opposes Plaintiff's Motion for Declaratory
14 Judgment pursuant to Fed R. Civ. P. 57. This motion is made and based upon the points and
15 authorities attached hereto and all pleadings and papers on file herein.

16 DATED this 3rd day of December, 2009.

17 THORNDAL, ARMSTRONG,
18 DELK, BALKENBUSH & EISINGER

19 By: /s/ Brent T. Kolvet
20 Brent T. Kolvet, Esq.
State Bar No. 1597
21 6590 S. McCarran Blvd., Suite B
Reno, Nevada 89509
22 Attorneys for Defendant
Storey County

1 **POINTS AND AUTHORITIES**

2 **I. JURISDICTION AND VENUE**

3 Storey County acknowledges that this Court has jurisdiction to hear this matter as the
4 case involves the interpretation of Federal Statutes and Regulations.

5 **II. HISTORY**

6 Storey County would adopt the historical presentation of events as contained in Plaintiff's
7 Motion for Declaratory Relief. The historical factual recitation is accurate for the most part.
8 Storey County would note, however, that Plaintiff contends that some building permit
9 applications were not responded to by the County in a timely fashion. Storey County takes the
10 position, however, that all building permits have been responded to. The latest in time being
11 those which were applied for on or about August 14, 2008. At the time of these applications, the
12 County's concerns over the construction of the subject radio towers had been explained to the
13 Plaintiff. Following that explanation, a series of communications ensued between the parties
14 and the County's specific position regarding the need for a variance and/or special use permit
15 were detailed to Plaintiff. Plaintiff refused to acknowledge that the County had a legitimate right
16 to require Plaintiff to apply for the appropriate permits prior to issuance of any further building
17 permits authorizing the construction of the radio towers.

18 **III. ARGUMENT**

19 Plaintiff has requested that this Court grant declaratory relief declaring that the Federal
20 Regulations governing amateur radio facilities preempts the Storey County Codes. Specifically,
21 this relief would allow the construction of two radio antennas 120 feet and 195 feet in height and
22 permit the continued use and operation of approximately eight (8) existing radio antennas on the
23 property owned by Plaintiff in Storey County. The requested relief, however, ignores the ability
24 of local jurisdictions such as Storey County to reasonably regulate construction within their
25 borders. This would include the operation of Storey County Code provisions which require,
26 prior to construction, that the Plaintiff apply for and obtain a Special Use Permit and/or variance.
27 The minimal requirement of seeking a Special Use Permit from Storey County does not unduly
28 interfere with the ability of Plaintiff to conduct his ham radio operations. What the Storey

1 County regulation of such matter does do is allow for consideration of the safety of the public,
2 consideration of the community wherein the towers are proposed to be constructed and the
3 overall effect on the health, safety and welfare of the inhabitants of the County.

4 The Plaintiff's ability to operate a ham radio from his property is not being contested. In
5 the case at bar, the Plaintiff already has eight (8) existing radio antennas on his property. He now
6 proposes to build additional towers, one of which is almost 200 feet high. The County has not
7 told Plaintiff that he cannot do as he proposes, however, the County requested that he comply
8 with its ordinances in seeking the appropriate approvals for that construction.

9 The relief requested by Plaintiff would take away the County's ability to examine the
10 issues surrounding the construction of these proposed antennas and tie the County's hands with
11 regards to protecting the citizens within its jurisdiction.

12 **A. Standard Preventing Declaratory Relief**

13 The County would agree with the standard of review as set forth in Plaintiff's brief
14 beginning at page 11 and continuing through line 13 on page 13. The application of the Storey
15 County Code regarding the requirements for variances and special use permits does not violate
16 the rules governing ham radio operators.

17 Storey County Code ("SCC") §17.62.020 provides that "the following uses may be
18 permitted only in zones that allow such uses for the granting of a special use permit. This
19 excludes the I-f Special Industrial Zone and the Planned Unit Development subdivision zone;
20 (I) Radio, Television and Other Communication Transmitters and Towers..."

21 SCC 17.62.010 provides "certain uses may be permitted by the Board of County
22 Commissioners in zones in which they are not permitted by this Ordinance when such uses are
23 deemed essential or desirable for the public convenience or welfare. The procedure for filing of
24 applications, filing fees, public hearings, findings, and appeals, shall be the same as provided for
25 in variances in Chapter 17.60 of this Ordinance."

26 Read together, these two sections of the County Code authorize the County Commission
27 to grant a special use permit for the construction of a radio transmitting tower such as that which
28 has been proposed by Plaintiff upon the issuance of a Special Use Permit. The procedure for

1 applying for a Special Use Permit is set forth in SCC 17.60.020. A copy of Chapter 17.60 of the
2 Storey County Code is attached hereto as Exhibit "A" for the Court's convenience. Under the
3 procedures outlined in Chapter 17.60 of the Storey County Code, a variance, and by definition, a
4 Special Use Permit, "may only be granted without substantial detriment to the public good and
5 without actually impairing the intent and purpose of any ordinance or resolution and under such
6 conditions as the Board may deem necessary to ensure that the general purpose and intent of this
7 Ordinance will be observed, public safety and welfare secured and substantial justice done. SCC
8 17.60.010.

9 Under the provisions of the Storey County Code cited above, Storey County has taken the
10 position that in order to construct a radio transmitting tower which exceeds the forty-five (45)
11 foot height limit set forth in SCC 17.12.044, cited by Plaintiff, the Plaintiff must apply for a
12 Special Use Permit and allow a public hearing on the application to take place pursuant to the
13 provisions of SCC 17.60. In short, Storey County has not told the Plaintiff that the antenna
14 which he proposes to construct on his property cannot be built. It has, instead, advised the
15 Plaintiff that he must comply with the provisions of the code which allow for due considerations
16 of the effect the construction may have on the public health, safety and welfare. As Plaintiff
17 concedes in his Motion for Declaratory Judgment, a local jurisdiction such as Storey County can
18 impose reasonable limitations on Plaintiff's ham radio activities. See, NRS 278.02085. See,
19 also, 47 C.F.R. §97.15.

20 During the history of this matter, the Deputy District Attorney for Storey County, Laura
21 Grant, issued a memorandum to Dean Haymore dated July 1, 2008, in which she analyzed the
22 ability of the County to regulate the construction of ham radio antennas. That memorandum is
23 attached hereto as Exhibit "B." In her analysis, Ms. Grant cited to the Federal Communication
24 Commission memorandum and order, FCC85-506. A reading of that memorandum further
25 supports the County's position in this matter. The relevant portion of that opinion and order
26 states as follows:

27 Because amateur station communications are only as effective as
28 the antennas employed, antenna height restrictions directly affect
the effectiveness of amateur communications. Some amateur

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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 differ from an antenna used to contact other amateur operators at shorter distances. *We will not, however, specify any particular height limitation below which a local government may not regulate* nor will we suggest the precise language that should be contained in local ordinances, such as mechanisms for special exceptions, variances or additional use permits. Nevertheless, local regulations which involve placement, screening or height of antennas based on health, safety, or aesthetics, must be crafted to accommodate reasonable amateur communications and to represent the minimal practicable regulation to accomplish the local authority’s legitimate purpose. (emphasis added).

Based on this order, it is clear that the County may impose reasonable height limitations upon a proposed antenna such as that requested by Plaintiff in this case. The extent and limit of the restrictions that may be placed on the antenna would be the subject of the hearing to be held upon application by the Plaintiff for a Special Use Permit. Unless and until such a hearing takes place, there is no way of knowing what conditions, if any, the County may impose. Therefore, a request for declaratory relief at this time is premature and cannot be supported by the facts in this case.

Finally, Plaintiff argues that Storey County’s regulations as they apply to his proposed antenna are void because of Federal Preemption. In support of this contention, the Federal Statutes and State Statutes, NRS 278.02085 have been argued. The language, however, of NRS 278.02085 states that any preemption is “limited.” See, NRS 278.02085(1). Plaintiff has conceded that this statute mirrors the Federal Regulations on this subject. Further, the limited preemption does not preclude the minimum level of regulation practicable to carry out the legitimate purposes of the governing body.” NRS 278.02085(2)(d).

IV. CONCLUSION

Based on the foregoing argument and on all the documents on file herein, Storey County

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THORNDAL, ARMSTRONG,
DELK, BALKENBUSH
& EISINGER
6590 S. McCarran, Suite B
Reno, Nevada 89509
(775) 786-2882

1 respectfully requests that the Plaintiff's Motion for Declaratory Judgment be denied.

2 DATED this 3rd day of December, 2009.

3 THORNDAL, ARMSTRONG,
4 DELK, BALKENBUSH & EISINGER

5 By: /s/ Brent T. Kolvet
6 Brent T. Kolvet, Esq.
7 State Bar No. 1597
8 6590 S. McCarran Blvd., Suite B
9 Reno, Nevada 89509
10 Attorneys for Defendant
11 Storey County
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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of Thorndal, Armstrong, Delk, Balkenbush & Eisinger, and that on this date I caused the foregoing **OPPOSITION TO MOTION FOR DECLARATORY JUDGMENT; FED R. CIV. P. 57** to be served via the United States District Court's CM/ECF Electronic Filing program on all parties to this action, fully addressed as follows:

**Brian M. McMahon, Esq.
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*Attorneys for Plaintiff
Thomas S. Taormina***

DATED this 3rd day of December, 2009

/s/ Mary C. Wilson
An employee of Thorndal, Armstrong,
Delk, Balkenbush & Eisinger

EXHIBIT "A"

EXHIBIT "A"

Chapter 17.60

VARIANCES

Sections:

- 17.60.010 Applicability.
- 17.60.020 Application.
- 17.60.030 Fees.
- 17.60.040 Hearing notification.
- 17.60.050 Advisory action of Planning Commission.
- 17.60.060 Decision by Board of County Commissioners.
- 17.60.070 Appeals procedure.
- 17.60.080 Finality of decision.
- 17.60.090 Time limit for permit.
- 17.60.100 Reapplication.

17.60.010 Applicability. A variance to the provisions of this ordinance may be granted by the Board of County Commissioners in accordance to the provisions of this chapter where by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of enactment of the regulations, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such lot or parcel, the strict application of such regulations enacted under this ordinance would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardships upon, the owner of such property. Such relief from the strict application of the regulations of this ordinance, however, may only be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of any ordinance or resolution and under such conditions as the board may deem necessary to assure that the general purpose and intent of this ordinance will be observed, public safety and welfare secured and substantial justice done.

17.60.020 Application. The application for a variance or a special use permit as provided herein shall be made to the Storey County building department on forms furnished by the Planning Commission. Such applications shall be accompanied by the following data and information:

- (A). Site plan, drawn to scale to include, as appropriate, building dimensions of existing and proposed structures; setback dimensions, yards and open space dimensions; parking spaces and dimensions; location and size of signs; and other such information as may be necessary;
- (B). Floor plan, drawn to scale to indicate size of buildings and total square footage of buildings, if appropriate for the project;
- (C). Rendered elevation to indicate the architectural appearance of proposed buildings, if appropriate for the project.

17.60.030 Fees. The building department, on behalf of the Planning Commission, shall charge and collect fees for the filing of a variance or a special use permit application in keeping with the latest approved "Revised Fee Schedule" posted in the Building Department, the charge being payable at the time of filing.

- (A) There will not be a fee charged to any nonprofit organization or government agency that is the owner of record of the property involved in a special use permit or variance application.
- (B) Fees for renewal of a variance or special use permit shall be one-half the original application fee.

17.60.040 Hearing notification. Upon receipt in proper form of any application, the Planning Commission will hold a public hearing thereon. A notice of the time and place of hearing, a physical description of the property involved, or map, and the purpose of the hearing shall be sent by mail at least ten (10) days before the hearing to:

- (A) The applicant;
- (B) Each owner of real property located within 300 feet of the property in question;
- (C) If a manufactured/mobile home park is located within 300 feet of the property in question, each tenant of that manufactured/mobile home park; and
- (D) Any advisory board which has been established for the affected area by the governing body.

For the purpose of this section, "owner of real property" means that owner shown upon the latest assessment rolls of the county.

17.60.050 Advisory action of the Planning Commission. At the conclusion of the hearing, the Planning Commission shall take such action thereon as it deems warranted under the circumstances and shall announce and record its action by formal resolution and such resolution shall recite the findings of the Planning Commission upon which it bases its decision. Conditions of approval, if any, shall be included in the resolution. The resolution shall be sent to the Board of County Commissioners within twenty-one (21) days of approval of the minutes by the Planning Commission. The decision of the Planning Commission in the legislative matter of granting, granting with conditions, or denying special use permits or variances shall be advisory only to the Board of County Commissioners.

17.60.060 Decision by Board of County Commissioners. The Board of County Commissioners, after receipt of the report and recommendation from the Planning Commission, shall consider the report and recommendation as an action agenda item during a normally scheduled meeting of the board and shall make a decision thereon as it deems warranted. If requested by an appellant pursuant to section 17.60.070, the Board of

County Commissioners shall hold a public hearing before any decision is made. The Board of County Commissioners in granting a special use permit or variance, may establish conditions under which the lot or parcel of land may be used, or a building or structure is constructed or altered or make requirements as to architecture, height of a building or structure, open spaces, parking areas or vehicle storage and conditions of operation of any enterprise, or may make any conditions, requirements or safeguards that the commission may consider necessary to prevent damages or prejudice to adjacent properties or detriment to the county.

17.60.070 Appeal procedures. In the event any person or the applicant is aggrieved by the recommendation of the Planning Commission and desires that the Board of County Commissioners hold a public hearing on the proposal may file a notice of appeal with the county clerk requesting a public hearing. The notice of appeal requesting a public hearing by the Board of County Commissioners shall be accompanied with an administrative fee of one-hundred dollars (\$100.00). Notice of the public hearing shall be as specified in section 17.60.040 of this chapter.

17.60.080 Finality of decision. The decision of the Board of County Commissioners shall not become final and effective until seven (7) days after the decision is entered in the minutes of the Board of County Commissioners. No permits shall be issued concerning the property in question until the decision becomes final.

17.60.090 Time limit for permit. Each special use permit or variance authorized under the provisions of the chapter which is not actually established or the actual construction commenced on the buildings or structures within twelve (12) months from the date of the final decision is null and void. In the event some construction work is involved, it must actually commence within the stated period and be diligently PURSUED to completion. A lapse of work for a period of six (6) months will be sufficient to cause the invalidity of the permit; provided further, when any use of land, building, structure or premises established under the provisions of this chapter has been discontinued for a period of one (1) year, it is unlawful to again use such land or building or premises for such discontinued use unless a subsequent special use permit or variance is authorized and issued therefor. Extensions of time to the provisions of this section may be granted by the Board of County Commissioners, upon recommendation of the Planning Commission, for good cause if requested by the property owner of record not less than fifteen (15) days prior to the expiration date of the special use permit or variance.

17.60.100 Reapplication. No person, including the original applicant, shall reapply for a similar special use permit or variance on the same land, building or structure within a period of one (1) year from the date of the final decision by the Board of County Commissioners of such previous application

EXHIBIT “B”

EXHIBIT “B”

Exhibit D

Letter from DDA Grant to Building Official Haymore

OFFICE OF THE DISTRICT ATTORNEY
STOREY COUNTY, NEVADA

Harold Swafford, District Attorney
Post Office Box 496
Virginia City, Nevada 89440

Telephone: (775) 847-0964
Fax: (775) 847-1007

MEMORANDUM

TO : Dean Haymore, Director, Storey County Planning
FROM : Laura Grant, Deputy District Attorney
DATE : July 1, 2008
SUBJECT : SCC 17.12.044 -- Height of Buildings/Structures

You have asked for my opinion regarding the construction of two (2) new amateur radio antennas in the Virginia City Highlands. It is my understanding, from the documents that you have provided to me,¹ Mr. Taormina has already applied for and received a building permit for the two (2) towers he wishes to construct. At this point in time it appears that the sticking points involve Mr. Taormina's neighbors within the Virginia City Highlands who object to the construction of the new radio antennas. I have not been made privy to their actual concerns, though I would surmise that these concerns center around aesthetics.

Several levels of law apply to this particular situation; federal, state and local authority. On the federal level, the Federal Communications Commission oversees the licensure, etc. of amateur radio operators. 47 C.F.R. §97.15² does not set specific heights for antennae but establishes the need for state and local authority reasonableness in the guidelines and/or regulations regarding such.

¹ Email correspondence from Tom Taormina dated June 27, 2008; Copy of correspondence from Tom Taormina to HRPOA Architectural Committee dated June 26, 2008; Copy of correspondence from Artisan Engineering, LLC. To Paul Nyland of Custom Metalworks dated June 2, 2008; Copies of drawings indicating plans for 2 radio towers (200' and 135'); Email correspondence from Tom Taormina dated June 24, 2008; Memo from HRPOA to Commissioners (undated); Email correspondence from Tom Taormina dated June 30, 2008 and Email correspondence from Tom Taormina dated July 1, 2008.
² §97.15 Station antenna structures.

(a) Owners of certain antenna structures more than 60.96 meters (200 feet) above ground level at the site or located near or at a public use airport must notify the Federal Aviation Administration and register with the Commission as required by part 17 of this chapter.

(b) 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.

[Type text]

Mr. Taormina has repeatedly asserted that Storey County's ordinance is preempted by state law and, therefore, nothing can be done to enforce a height restriction on his towers. NRS 278.02085³ contains language which is essentially identical to that contained within 47 C.F.R. §97.15. Storey County Code §17.12.044⁴ places a specific height restriction upon the erection of radio towers. While the ordinance itself does not address the reasons for the restriction, I must presume that the limit imposed relates to public safety concerns.

Moreover, the properties contained within Virginia City Highlands are further governed by a property owners association (HRPOA) and Conditions, Covenants and Restrictions (CC&Rs). I have reviewed the CC&Rs and Section 3⁵ would indicate that permission of the Architectural Committee is necessary for the antennae. I spoke with Bill Lewis earlier today about that very issue and he assured me that the Committee does not consider that it has authority over radio antennae.

The FCC released a Memorandum Opinion and Order (FCC 85-506) in 1985 regarding the issue of federal preemption of state and local limitations on radio towers of amateur radio operators. The memorandum is referred to as "PRB-1" and has been updated as recently as 2001 wherein the FCC specifically declined to employ federal preemption to control radio tower heights.⁶

In Mr. Taormina's case, your department has apparently already issued building permits for the towers he wishes to build. Presumably, this means plans were submitted describing the proposed height of the towers (200' and 135'). As such, it would appear to me that you have

³ 1. 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.
2. If a governing body adopts an ordinance, regulation or plan or 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:

(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.

⁴ In the R-1, R-2, E, A, PUD, and F zones, no building, manufactured building or manufactured home shall exceed a height of three stories or thirty-five feet, whichever is higher, except as may be allowed by special use permit. The requirements of this section shall not apply to church spires, bellfries, cupolas, domes, chimneys or flagpoles. *Radio, television and other communication masts may extend not more than forty-five feet above grade level, provided that the same may be safely erected and maintained at such height in view of surrounding conditions and circumstances.*

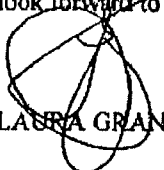
⁵ All plans and specifications for any building or swimming pool, or for any improvements, storage shed, fence, wall or other structure whatsoever to be erected on or moved upon or to any lot, and the proposed location thereof on any lot or lots, the roof's thereof, any later changes or additions thereto after initial approval thereof, and any remodeling, reconstruction, alterations, or additions to any building or other structure on any lot shall be subject to and shall require the approval in writing, before any such work is commenced, of the Architectural Control and Planning Committee (herein called "Committee"), as the same is from time to time composed.

⁶ 2.5. 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. *We will not, however, specify any particular height limitation below which a local government may not regulate, nor will we suggest the precise language that must be contained in local ordinances, such as mechanisms for special exceptions, variances, or conditional use permits. Nevertheless, local regulations which involve placement, screening, or height of antennas based 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.* (1985)

[Type text]

waived the height limitations set out in SCC §17.12.044. Aside from the precedent-setting aspects of such a waiver, it would appear to me that the County is entitled to enforce its height limits as being in full compliance with NRS 278.02085 and 47 C.F.R. §97.15. While it is true that amateur radio operators provide the public with very important services during emergency situations, limiting tower heights does not unreasonably impinge on amateur service communications. I believe that Storey County's regulations fall within the definition of "reasonable accommodation."

Please let me know if this addresses your concerns or if you require further assistance. I look forward to hearing from you.


LAURA GRANT