

1 **McMAHON LAW OFFICES, LTD.**
2 **BRIAN M. McMAHON, ESQ.**
3 **3715 Lakeside Drive, Suite A**
4 **Reno, Nevada 89501**
5 **Telephone: (775) 348-2701**
6 **FAX: (775) 348-2702**
7 **e-mail: BRIAN@MCMAHONLAW.ORG**
8 **Nev. Bar No.: 927**

9 **Fred Hopengarten, Esq.**
10 **Six Willarch Road**
11 **Lincoln, MA 01773**
12 **Telephone: (781) 259-0088**
13 **FAX: (419) 858-2421**
14 **e-mail: hopengarten@post.harvard.edu**
15 **Maine Bar No. 1660**
16 **D.C. Bar No.: 114124**

17 **Attorneys for the Plaintiff,**
18 **THOMAS S. TAORMINA**

19 **UNITED STATES DISTRICT COURT**
20 **DISTRICT OF NEVADA**

21 **THOMAS S. TAORMINA,**

22 **Plaintiff,**

23 **vs.**

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

25 **STOREY COUNTY,**

26 **Defendant**

27 **REPLY BRIEF WITH MEMORANDUM OF POINTS AND AUTHORITIES IN**

28 **SUPPORT OF MOTION FOR DECLARATORY JUDGMENT**

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1 **1. INTRODUCTION**

2 *Close scrutiny of the appellant's opening brief reveals only generalities and*
3 *assertions amounting to mere conclusions of law. Where arguments in a brief*
4 *are unsupported by citations of authorities, this court will not ordinarily*
5 *search out authorities, and will assume that counsel, after diligent search, had*
6 *been unable to find any supporting authority.*

7 *Ala Moana Boat Owners' Association v. State*, 50 Haw. 156, 158, 434 P.2d 516 (1967)
8 (Citing *Malstrom v. Kalland*, 384 P.2d 613 (Wash. 1963); *DeHeer v. Seattle Post-*
9 *Intelligencer*, 372 P.2d 193 (Wash. 1962))

10 Litigation on the subject of amateur radio antenna support structures is common, and
11 a significant body of case law exists on the two principal questions of this case: **1)** Is an
12 amateur radio antenna system an accessory use customarily incidental to the home of a radio
13 amateur? And, **2)** Can a firm, fixed height limitation constitute a reasonable accommodation
14 of the communications that the individual radio amateur desires?

15 The Plaintiff, a radio amateur, has searched in vain to find any case law support for
16 the many and varied positions taken by Storey County. The Court is invited to search all
17 relevant documents from the County's Deputy District Attorney (DDA), and all filings by
18 litigation counsel for the County:

- 19 1. Memorandum from DDA Grant to Director, Storey County Planning, dated July
20 1, 2008. Document 14-2 at 27 (labeled Exhibit D)
- 21 2. Letter from DDA Grant to Atty. McMahon (attorney for Taormina), dated August
22 27, 2008. Document 14-2 at 43 (labeled Exhibit R) or Document 14-4 at 28
23 (labeled Exhibit K).
- 24 3. Letter from DDA Grant to Atty. McMahon (attorney for Taormina), dated
25 September 30, 2008. Document 14-2 at 45 (labeled Exhibit S) or Document 14-5
26 at 26 (labeled Exhibit U).
- 27 4. The Answer of Storey County. Document 7.
- 28 5. The Opposition to the Motion for Declaratory Judgment. Document 17.

29 **No citation to a case will be found.**

30 In contrast, Taormina has set out the case law authority upon which he relies for his
31 claims under 47 CFR §97.15(b) in:

- 32 1. A letter from Atty. Hopengarten (attorney for Taormina) to DDA Grant, dated
33 August 25, 2008. Document 14-4 at 20 (labeled Exhibit J)

- 1 2. A letter from Atty. Hopengarten to DDA Grant, dated August 29, 2008.
Document 14-5 at 2 (labeled Exhibit L)
- 2 3. A letter from Atty. Hopengarten to DDA Grant, dated September 19, 2008.
Document 14-5 at 17 (labeled Exhibit Q).

3
4 Taormina provided the County full text copies of seven relevant cases (three from
5 U.S. District Courts) and a comprehensive law review article on the subject, *Reasonable*
6 *Accommodation of Amateur Radio Communications by Zoning Authorities: The FCC's*
7 *PRB-1 Preemption*, 37 Conn. L.Rev., 321 (2004). Hopengarten letter of August 25, 2008,
8 *supra*.

9
10 Taormina does not ask this Court to make new law. He asks only that this Court read
11 the law as promulgated, and apply it.

12
13 In its Opposition to the Motion for Declaratory Judgment, the County attempted to
14 cite the Storey County Code, state law and federal regulation. But there are problems. The
15 cited law does not state what has been represented to this Court.

16 17 **2. THE COUNTY MISSTATES THE FEDERAL PREEMPTION**

18 In its Opposition, at page 2, line 24-25, the County argues that it may “*reasonably*
19 *regulate* construction within [its] borders.” (Emphasis added.) The problem is that the test is
20 not whether a regulation is a reasonable regulation, but rather whether a regulation, as
21 applied, is a *reasonable accommodation*.

22
23 Here is the full text:

24 Sec. 97.15 Station antenna structures

25 . . .

26 (b) Except as otherwise provided herein, a station antenna structure may be
27 erected at heights and dimensions sufficient to accommodate amateur service
28 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

1 legitimate purpose. See PRB-1, 101 FCC 2d 952 (1985) for details.)
2 (Emphasis added.)

3 47 CFR §97.15(b), [http://frwebgate.access.gpo.gov/cgi-bin/get-](http://frwebgate.access.gpo.gov/cgi-bin/get-cfr.cgi?TITLE=47&PART=97&SECTION=15&YEAR=1999&TYPE=TEXT)
4 [cfr.cgi?TITLE=47&PART=97&SECTION=15&YEAR=1999&TYPE=TEXT](http://frwebgate.access.gpo.gov/cgi-bin/get-cfr.cgi?TITLE=47&PART=97&SECTION=15&YEAR=1999&TYPE=TEXT) (last visited
5 December 9, 2009)

6 In its Opposition, at page 5, line 7, the County quotes FCC Order PRB-1, 101 FCC 2d
7 952, 50 Fed. Reg. 38813 (September 25, 1985), ("PRB-1"), the full text of which may be
8 found at <http://wireless.fcc.gov/services/amateur/prb/index.html>, to say that "local
9 regulations . . . must be crafted to accommodate reasonable amateur communications . . ."
10 The problem is that the test is not whether the communications are reasonable, but rather
11 whether the entity has *reasonably accommodated the "effectiveness of amateur*
12 *communications . . . that he/she desires to engage in.*" (Emphasis added.)

13 Unfortunately, the County also got it wrong again, in the same sentence, when it
14 attempted to quote paragraph 25 of PRB-1. In the County's version, the paragraph reads:
15 " [L]ocal regulations . . . must . . . represent the minimal practicable regulation to accomplish
16 the local authority's legitimate purpose."
17

18
19
20 But that's not what it says. It says, in full:

21 25. Because amateur station communications are only as effective as the
22 antennas employed, antenna height restrictions directly affect the
23 effectiveness of amateur communications. Some amateur antenna
24 configurations require more substantial installations than others if they are to
25 provide the amateur operator with the communications that he/she desires to
26 engage in. For example, an antenna array for International amateur
27 communications will differ from an antenna used to contact other amateur
28 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

1 **be crafted to accommodate reasonably amateur communications, and to**
2 **represent the minimum practicable regulation to accomplish the local**
3 **authority's legitimate purpose.** (Emphasis added.)

4 PRB-1 at ¶25. <http://wireless.fcc.gov/services/amateur/prb/index.html>

5 As the phrase “minimum practicable regulation” has proven to be critical to
6 understanding the Order, the FCC clarified its intent in 1999:

7 7. . . . PRB-1 decision precisely stated the principle of "reasonable
8 accommodation". In PRB-1, the Commission stated: "Nevertheless, local
9 regulations which involve placement, screening, or height of antennas based
10 on health, safety, or aesthetic considerations must be crafted to accommodate
11 reasonably amateur communications, and to represent the minimum
12 practicable regulation to accomplish the local authority's legitimate purpose."
13 **Given this express Commission language, it is clear that a "balancing of
14 interests" approach is not appropriate** in this context.

15
16 9. . . . [W]e believe that PRB-1's guidelines brings (*sic*) to a local zoning
17 board's awareness that **the very least regulation necessary** for the welfare of
18 the community must be the aim of its regulations **so that such regulations
19 will not impinge on the needs of amateur operators** to engage in amateur
20 communications. (Emphasis added.)

21 Modification and Clarification of Policies and Procedures Governing Siting and Maintenance
22 of Amateur Radio Antennas and Support Structures, 14 F.C.C.R. 19,413 para. 7 (1999), RM-
23 8763 or FCC 99-2569, <http://wireless.fcc.gov/services/amateur/prb/prb1999.html>

24 “Minimal” is not the test. “Minimum” or “the very least” is the test. A fixed 45 foot
25 height limitation does not pass the test. **“(O)rdinance[s] which establish absolute
26 limitations on antenna height . . . are . . . facially inconsistent with PRB-1.”** *Howard v.*
27 *City of Burlingame*, 937 F. 2d 1376 at fn 5 (9th Cir., 1991). (Emphasis added.)

28 Finally, in its Opposition at page 5, line 9, the County contends, under PRB-1, “that
the County may *impose reasonable height limitations . . .*” (Emphasis added.) Wrong again.
They can’t just “impose” a height limitation. Where a hearing is required, “[The City must
have] considered the application, made factual findings, and attempted to negotiate a
satisfactory compromise with the applicant.” *Howard, id.*, at 1380. *Accord, Pentel v. City of
Mendota Heights*, 13 F.3d 1261, 1264 (8th Cir. 1994). Here, however, the construction is as

1 of right, after the fixed maximum height limitation is preempted (making the height
2 limitation null and void).

3 **3. THE COUNTY MISSTATES ITS OWN ORDINANCE**

4 In its Opposition at page 3: lines 17-20, the County tells this Court that SCC §
5 17.62.020 reads: “the following uses may be permitted only in zones that allow such uses for
6 the granting of a special permit. This excludes the I-f Special Industrial Zone and the Planned
7 Unit Development subdivision zone; (I) Radio, Television and Other Communication
8 Transmitters and Towers...”

9
10 Taormina asks this Court to read the full text of the section for itself:

11
12 **Chapter 17.62 SPECIAL USES**
13 **Section No (17.62.020)**
14 **Special use permits.**

15 The following uses may be permitted only in zones that allow said usage per
16 the granting of a special use permit. This excludes the I-S special industrial
17 zone and PUD planned unit development or subdivision zone: A. City, county,
18 state and federal enterprises, including buildings, facilities and uses; B.
19 Educational institutions, including elementary, middle and high schools
20 whether public, private or parochial; C. Establishments or enterprises
21 involving large assemblages of people or automobiles, including amusement
22 parks, circuses, carnivals, expositions, fairgrounds, race tracks, recreational
23 and sports centers, whether temporary or permanent; D. Golf courses, golf
24 driving ranges and country clubs; E. Hospitals, sanitariums and rest homes; F.
25 Libraries, museums and private clubs; G. Parks, playgrounds and community
26 facilities; H. Public utility or public service buildings, structures and uses; I.
27 Radio, television and other communication transmitters and towers; J. Sewer
28 plants or sewage disposal facilities; K. Wild animal maintenance.

23 The County reads this section to require a special use permit for a “radio . . .
24 transmitter and tower” use in the E-10 (10 acre-residential) zone. Taormina reads this section
25 as requiring a special use permit for one of the 11 enumerated uses, *but only when a special*
26 *use permit is required for the use in that zone.* The County’s reading has three problems:

27 (1) A use for a radio transmitter and tower is not one of the three uses requiring a
28 special use permit in the E Estates Zone under SCC §17.40.025.

Chapter 17.40 E ESTATES ZONE

Section No (17.40.025)

Uses subject to permit.

The following additional uses may be permitted subject to securing a special use permit [from the BOCC] as provided for in Chapter 17.62 of this title: A. Public buildings, . . . ; B. Licensed child care facilities . . . C. One detached family guest home . . .

(2) In the E zone, “(r)adio, television and other communications masts” are a specifically permitted use (though they suffer an illegal firm, fixed, and maximum height of 45 feet):

Chapter 17.12 GENERAL PROVISIONS

Section No (17.12.044)

Height of buildings.

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, belfries, 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.

(3) Even if communications masts were not specifically mentioned as a use in the E Estates Zone, amateur radio support structures and antennas are always permitted in the E Estates Zone because they are “accessory uses customarily incident to” a single-family dwelling. See SCC ¶17.40.020.

Chapter 17.40 E ESTATES ZONE

Section No (17.40.020)

Permitted uses.

The following uses are permitted in the E estates zone: A. Single-family dwellings which shall be of a permanent nature. No permanent site built structure shall be less than eight hundred square feet for a one bedroom structure, one thousand square feet for a two bedroom structure, or one thousand two hundred square feet for a three bedroom structure. No residence shall be higher than three stories or thirty-five feet in height. B. Accessory uses customarily incident to the above uses and located on the same lot or parcel, including but not limited to, a private garage with a capacity of not more than four automobiles; private stables, garden houses, playhouses, greenhouses, enclosed swimming pools, tool-houses, well-houses, woodsheds, storage sheds and hobby shops. Any accessory use structure over forty-eight feet wide or over sixty feet long shall require a special use permit.

1 None of the antenna support structures involved is more than three feet wide, nor
2 more than three feet long.

3 As to what is an accessory use, see SCC ¶17.10.006:

4 **Chapter 17.10 DEFINITIONS**

5 **Section No (17.10.006)**

6 **Accessory use.**

7 A use customarily incident and accessory to the principal use of the land,
8 building or structure located on the same lot or parcel of land as the accessory
9 use.

10 In the most recent case to thoroughly review the law of amateur radio antenna
11 systems as incidental to a residential use, the Court wrote:

12 {25} Our review of cases from other states supports Plaintiff's belief that
13 amateur radio antennas are generally considered customarily incidental to
14 residential use without adding a reasonableness inquiry. See, e.g., Town of
15 Paradise Valley v. Lindberg, 551 P.2d 60, 61-62 (Ariz. Ct. App. 1976)
16 (holding that the erection of a ninety-foot amateur radio tower in conjunction
17 with a homeowner's hobby as a ham radio operator is a permissible accessory
18 or incidental use); Skinner v. Zoning Bd. of Adjustment, 193 A.2d 861, 863-
19 64 (N.J. Super. Ct. App. Div. 1963) (upholding a 100-foot radio antenna tower
20 used as a hobby as an accessory use customarily incidental to the enjoyment
21 of a residential property); Dettmar v. County Bd. of Zoning Appeals, 273
N.E.2d 921, 922 (Ohio Ct. Com. Pl. 1971) (finding that even an unusual
customarily incidental use is permissible unless specifically excluded by a
zoning restriction). Only two states require an independent inquiry into the
degree of use. See Marchand v. Town of Hudson, 788 A.2d 250, 253 (N.H.
2001) (finding scale relevant in determining that three 100-foot amateur ham
radio antenna towers were not an accessory use¹); Presnell v. Leslie, 144
N.E.2d 381, 383 (N.Y. 1957) (observing that scope of amateur radio
operator's hobby may carry it beyond what is customary or permissible²).

22 *Smith v. Board of County Commr's, Co. of Bernalillo, NM*, 110 P.3d 496, 502 (N.M. 2005)
23 (Finding two 140 foot tall structures on five acres, in the rural residential zone, to be an
24 accessory use.)

25
26
27 ¹ Note by Taormina: Upon remand, the local zoning board found that the three towers were, in fact, an
ordinary accessory use.

28 ² Note by Taormina: Since PRB-1 (1985), *Presnell v. Leslie* has not been followed by New York Courts. See
Bodony, Bodony v. Incorporated Village of Sands Point, 681 F. Supp. 1009 (E.D.N.Y. 1987), and *Palmer v. City of*
Saratoga Springs, 180 F. Supp. 2d 379 (N.D.N.Y. 2001).

1 A common thread in these cases is that neighbors do not determine what is
2 customarily incidental to a particular homeowner's use of his property. *Lindberg*, 551 P.2d
3 at 62; *Dettmar*, 273 N.E.2d at 922 (use customarily incidental "does not limit the use to the
4 incidental activity chosen by the neighbors").

5 Amateur radio antenna systems are customarily incident to a residence. The County
6 recognized this when it granted to Taormina Building Permits Nos. 8416 and 8417, antenna
7 support structures of 32' and 40' respectively, which have been inspected, and for which
8 completion notices have been issued. Storey County's Response to Request for Admissions
9 Under Rule 36, Responses Nos. 15 and 16 (admitting that the permits were true and correct).

10 The County's interpretation of its ordinance "obviously [is] not . . . the least
11 restrictive means available to meet its legitimate zoning purposes." *Pentel*, 13 F.3d at 1265.
12 "When the language of a statute is plain, its intention must be deduced from such language,
13 and the court has no right to go beyond it." *Cirac v. Lander County*, 95 Nev. 723, 729, 602
14 P.2d 1012, 1015 (1979) (quoting *State ex rel. Hess v. Washoe County*, 6 Nev. 104, 107
15 (1870)). See also *School Trustees v. Bray*, 60 Nev. 345, 109 P.2d 274 (1941), and *City of Las*
16 *Vegas v. Macchiaverna*, 661 P.2d 879, 880 (Nev. 1983).

17 **4. THE COUNTY MISSTATES TAORMINA'S CASE**

18 In its Opposition, at page 4: line 17, the County states: "As Plaintiff *concedes* in his
19 Motion for Declaratory Judgment, a local jurisdiction such as Storey County can impose
20 reasonable limitations on Plaintiff's ham radio activities. See NRS 278.02085. See also, 47
21 C.F.R. §97.15." (Emphasis added.)

22 Taormina is shocked to learn that he has *conceded* that a County may impose
23 reasonable limitations on Plaintiff's amateur radio activities. Rather, his position is that 47
24 CFR §97.15(b) and NRS 278.0208 require the County to reasonably accommodate
25 Taormina's need for a more "substantial installation[,] . . . "to provide [him] with the
26 communications that he . . . desires to engage in." PRB-1 at ¶25. It appears to Taormina that
27 the County's error arises out of the misunderstanding and misstatement of the federal and
28 state law preemptions. The County believes, wrongly, that the federal regulation, and the

1 state statute, stand for the proposition that the County may decide what is reasonable and
2 “impose” it. County Brief, page 5, lines 9-13. But this is a firm, fixed maximum height case,
3 requiring preemption. *Howard, supra*, at fn5.

4 **5. THE COUNTY MISSTTES THE FACTS**

5 For whatever reason, the County has repeatedly, throughout this matter, inflated the
6 number of antenna support structures that are in controversy. First, in a letter from DDA
7 Grant, dated August 27, 2008, Document 14-2 at 43, labeled Exhibit R, now, in its
8 Opposition Brief to this Court, at page 2, lines 21-22, the County claims that the Plaintiff
9 seeks to construct two antennas, in addition to an existing eight. The claim is repeated at page
10 3, lines 5-6. Fearing a miscount, Taormina provided a chart of antenna support structures.³
11 Motion for Declaratory Judgment, Document 14-4 at 2 (labeled Exhibit A).

12 The significance of the misstatement is that the County seeks to color the
13 atmospherics of this controversy. The ordinance does not limit the number of radio masts that
14 may be erected in the E-10 Zone.

15 **6. THE COUNTY HAS CONCEEDED THE PLAIN READING OF THE** 16 **ORDINANCE**

17 Exhibit B of the County’s Brief, which is also Exhibit D of Taormina’s Brief, is the
18 Opinion of the County’s Deputy District Attorney assigned to this matter. She wrote: “Storey
19 County Code ¶17.12.044 places a specific height restriction upon the erection of radio
20 towers.” Her footnote to this sentence correctly quotes §17.12.044: “Radio, television and
21 other communication masts may extend not more than forty-five feet above grade level,
22 provided that the same may be safely erected and maintained at such height in view of
23 surrounding conditions and circumstances.”
24

25 This section does not say, nor does she claim, that permission for *more* height may be
26 obtained through a special use permit process.
27

28 ³ Taormina also provided a diagram of Antenna Nomenclature, Document 14-5 at 20 (labeled Exhibit R). The two key terms are: support structure (which may be a pole, mast, or tower) and antenna.

1 Furthermore, her opinion states that “it would appear to me that [the County has]
2 waived the height limitations set out in SCC §17.12.044.” Note that she does not say that the
3 County has waived the special use permit process. She speaks only of the height limitations.

4 With the issuance of two permits, the Assistant District Attorney effectively concedes
5 that the height issue is waived. Memorandum from L. Grant, DDA, Document 14-2 at 29
6 (labeled Exhibit D), also found in the County’s Opposition, Document 17 at 13 (labeled
7 Exhibit B).⁴

8
9 **7. AFTER PREEMPTION, TAORMINA’S ANTENNA SYSTEMS ARE**
10 **PERMITTED AS A MATTER OF RIGHT**

11 After removing the void height limit of SCC §17.12.044, you are left with “Radio,
12 television and other communication masts may extend . . . , provided that the same may be
13 safely erected and maintained at such height . . .” Note that §17.12.044 specifically permits
14 plural “masts.”

15 **8. SOME PERSPECTIVE IS APPROPRIATE**

16 Undeniable tension exists between amateur radio operators' interests in
17 erecting a radio antenna high enough to ensure successful communications,
18 and local municipalities' interests in regulating the size and placement of
19 amateur radio antennas. Choosing between the two, the federal government
20 aligned its interests with those of the amateurs because 'amateur radio
21 volunteers afford reliable emergency preparedness, national security, and
22 disaster relief communications,' and because a direct correlation exists
23 between antenna heights and amateurs' ability to successfully transmit and
24 receive radio signals. Accordingly, 'federal interests are furthered when local
25 regulations do not unduly restrict the erection of amateur antennas.'

26
27 *Palmer v. City of Saratoga Springs*, 180 F.Supp.2d 379, 383-384 (N.D.N.Y. 2001)
28 (quoting *Pentel v. City of Mendota*, 13 F.3d 1261,1263 (8thCir. 1994)).

27 ⁴ Note that no claim of lawyer-client privilege, such as that raised in *Bodony v. Incorporated Village of Sands*
28 *Point*, 681 F. Supp. 1009, 1013 (E.D.N.Y. 1987) has ever been raised, and, as an admission, as well as with its
submission as an exhibit in a pleading, the County concedes that the document is genuine.

1 **9. EVEN IF THE COUNTY NOW READS THE ORDINANCE CORRECTLY, THE**
 2 **COUNTY WILL NOT APPLY THE FEDERAL REGULATION CORRECTLY**

3 Given the wildly varying interpretations of law from the county (see Table 1 below),
 4 a declaratory judgment is necessary to set the County straight. Abstention is not appropriate
 5 in this case. *See Izzo v. River Edge*, 843 F.2d 765 (3d Cir. 1988) (Holding that abstention is
 6 not appropriate in a PRB-1 case). *See also Baskin v. Bath Twp. Bd. of Zoning Appeals*, 15
 7 F.3d 569 (6th Cir. 1994) (Holding abstention not appropriate in a PRB-1 case, despite a
 8 somewhat parallel state court action).

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

10 Date 11 (2008)	Document	County's Position
12 Jun. 27	Building Permit No. 8354	Permit granted for 120 and 195' antenna support structures.
13 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.
14 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."
15 July 8	Compliance Inspection Report by Building Official Haymore	"[V]ariance [required] for towers over 45' "
16 July 16	Code Compliance Inspection Report by Building Inspector Gardner	"Storey County is now of the opinion that a Special Use Permit is required for the construction of towers over 45' in height."
17 July 17	Stop Work Order by Building Official Haymore	SCC §17.12.044 requires a " variance for the height of the radio tower that exceeds 45 feet."
18 Sep. 16	Building Permits Nos. 8416 and 8417	Permits for 32' and 40' antenna support structures. No Special Use Permit required.
19 Sept. 30	Letter from DDA Grant	SCC §17.40.020 requires a Special Use Permit "for any structure over <i>sixty feet (60')</i> long."
20 Dec. 3	Opposition to Motion for Declaratory Judgment	SCC §17.62.020 requires a Special Use Permit for a radio tower over 45'. §17.62.010 allows a special use permit for "certain uses . . . in zones in which they are not permitted by this Ordinance." SCC §17.12.044 is a "forty-five (45) foot height limit." [Note: Comparable to the County's position of July 16.]

1 In nine actions, the County has taken seven different, each obstructive, positions. The
2 Court should consider this as animus sufficient to require a final resolution.

3 **10. THE APPROPRIATE REMEDY IS AN ORDER TO ISSUE ALL NECESSARY**
4 **PERMITS**

5 Dealing with Storey County has its charms. You never know what position they will
6 take. They have taken seven different positions. See Table 1, to which they have added a
7 new "line," and Taormina has now added a new row (the December 3rd row). The County
8 just doesn't understand. They haven't dealt with the facts, nor the law.

9
10 Since the board's order cannot be upheld on the grounds it stated, the question
11 becomes one of what should be the appropriate remedy: remand to the board,
12 or affirmance of the injunction. While we can conceive of circumstances in
13 which a remand may be in order -- for example, an instance of good faith
confusion by a board that has acted quite promptly -- this case is not a
candidate for remand to the board.

14 *National Tower, L.L.C. v. Plainville Zoning Board of Appeals*, 297 F.3d 14, 21 (1st
15 Cir. 2002)

16 The *National Tower* issue is a special problem for the County because there has been
17 no previous mention whatsoever of either §§17.62.020, or 17.62.010, upon both of which the
18 County now relies. County Brief, page 3, lines 17-25. Furthermore, the County had been
19 well and fully informed about its obligations under PRB-1 by Taormina.

20 Upon reaching such a determination, some courts have instructed the
21 municipality to reconsider the applicant's request in compliance with PRB-1.
22 See *Marchand*, 788 A.2d at 255. However, because in this instance the City
23 was cognizant of its duties under PRB-1, due to the applicant apprising it of
24 such obligations, and because these parties have a contentious history, the
Court concludes that such an order would be ineffective to reach the necessary
result. See *Palmer*, 180 F.Supp.2d at 386.

25
26 *Snook v. City of Missouri City, TX*, Slip Copy at ¶92, 2003 U.S. Dist. LEXIS 27256, 2003
27 WL 25258302 (S.D. Tex.)

28

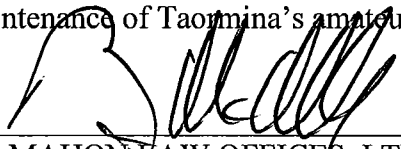
1 **11. NO ORAL ARGUMENT IS NECESSARY**


2 In this U.S. District Court, "(a)ll motions may, in the court's discretion, be considered
3 and decided with or without a hearing." LR 78-2. ORAL ARGUMENT.

4 Amateur radio transmitter and tower use is permitted as an accessory use customarily
5 incident to a home in the E-10 zone (residential, ten acres or more). With 45 feet as a firm
6 height limitation (see Grant letter, Document 14-2 at 28, labeled Exhibit D) preempted by
7 federal law (*Howard, supra*), Taormina urges the Court to decide the case (in his favor!)
8 without a hearing.

9 The proper resolution is to reinstate all building permits that are subject to the Stop
10 Work Order, to grant outstanding building permit applications, and to restrain the County
11 from further interference with the construction and maintenance of Taormina's amateur radio
12 antenna systems.

13 Dated: this 14th day of December, 2009.


McMAHON LAW OFFICES, LTD.
BRIAN M. McMAHON, ESQ.
3715 Lakeside Drive, Suite A
Reno, Nevada 89509
Telephone: (775) 348-2701
FAX: (775) 348-2702
e-mail:
BRIAN@MCMAHONLAW.ORG
Nev. Bar No.: 927


Fred Hopengarten, Esq.
Six Willarch Road
Lincoln, MA 01773
Telephone: (781) 259-0088
FAX: (419) 858-2421
e-mail:
hopengarten@post.harvard.edu
Maine Bar No. 1660
D.C. Bar No.: 114124

CERTIFICATE OF SERVICE

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Pursuant to NRC 5(b) I hereby certify that I am an employee of McMahon Law Offices, Ltd., and that on the 14th day of December, 2009, I served a true and correct copy of the attached foregoing document by:

- Depositing for mailing, in a sealed envelope, 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

