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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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TOM TAORMINA,

Plaintiff,

v.

STOREY COUNTY,

Defendant.

3:09-CV-00021-LRH-VPC

ORDER

Before the court is Plaintiff Tom Taormina’s Motion for Summary Judgment (#14¹).² Defendant Storey County has filed an opposition (#17) to which Plaintiff replied (#18).

I. Facts and Procedural History

This is a declaratory judgment action arising out of Plaintiff’s attempts to build radio antenna towers on his property in the Virginia City Highlands in Storey County, Nevada. Plaintiff is an amateur radio operator licensed by the Federal Communications Commission (“FCC”). On

¹Refers to the court’s docket entry number.

²Although Plaintiff labels his motion a “Motion for Declaratory Relief[,]” through the motion, Plaintiff seeks summary judgment on his claims for declaratory relief. Accordingly, the court will review Plaintiff’s motion as one for summary judgment. See *Kam-Ko Bio-Pharm Trading Co. v. Mayne Parma (USA) Inc.*, 560 F.3d 935, 943 (9th Cir. 2009) (citation omitted) (“[A] party may not make a *motion* for declaratory relief, but rather, the party must bring an *action* for a declaratory judgment. Insofar as plaintiffs seek a motion for a declaratory judgment, plaintiffs’ motion is denied because such a motion is inconsistent with the Federal Rules. The only way plaintiffs’ motion can be construed as being consistent with the Federal Rules is to construe it as a motion for summary judgment on an action for declaratory judgment.”)

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1 June 24, 2008, Plaintiff applied for a building permit to erect two amateur radio station antenna
2 structures of 120 and 195 feet in height. On June 27, 2008, Storey County granted Plaintiff's
3 request and issued a building permit authorizing the construction.

4 On July 3, 2008, a Storey County building inspector reviewed Plaintiff's progress and
5 issued a Compliance Inspection Report. The report noted that the construction met all of the
6 requirements for the inspection and authorized Plaintiff to begin "pour[ing]." (Pl.'s Mot. (#14), Ex.
7 C.)

8 On July 8, 2008, the Storey County Building Department conducted a second inspection of
9 Plaintiff's site. Again, the building inspector issued a Compliance Inspection Report indicating that
10 the construction met all requirements for the inspection. The inspector further noted that Plaintiff
11 could begin to "pour footing at o[w]n risk per waiting for variance for towers over 45 [feet]." (*Id.*,
12 Ex. D.)

13 On July 16, 2008, the Storey County Building Department issued a Code Compliance
14 Inspection Report advising Plaintiff that "Storey County is now of the opinion that a Special Use
15 Permit is required for the construction of towers over 45' in height . . ." (*Id.*, Ex. E.) Because
16 Plaintiff had not applied for a special use permit, the building inspector advised Plaintiff that his
17 continued construction of the towers was "at [his] own risk." (*Id.*)

18 The following day, on July 17, 2008, Storey County issued a stop work order on the
19 construction of the two towers. In relevant part, the stop work order stated that Plaintiff had failed
20 to submit an application for a "variance or received approval for the height of the radio tower that
21 exceeds 45 feet."³ (*Id.*, Ex. G.)

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25 ³Plaintiff also applied for a variety of other building permits related to his amateur radio operations.
26 However, the approval or denial of these permits does not appear to form the basis of the underlying lawsuit.

1 **II. Legal Standard**

2 Summary judgment is appropriate only when “the pleadings, depositions, answers to
3 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
4 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of
5 law.” Fed. R. Civ. P. 56(c). In assessing a motion for summary judgment, the evidence, together
6 with all inferences that can reasonably be drawn therefrom, must be read in the light most favorable
7 to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,
8 587 (1986); *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001).

9 The moving party bears the burden of informing the court of the basis for its motion, along
10 with evidence showing the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*,
11 477 U.S. 317, 323 (1986). On those issues for which it bears the burden of proof, the moving party
12 must make a showing that is “sufficient for the court to hold that no reasonable trier of fact could
13 find other than for the moving party.” *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir.
14 1986); *see also Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1141 (C.D. Cal. 2001).

15 To successfully rebut a motion for summary judgment, the non-moving party must point to
16 facts supported by the record which demonstrate a genuine issue of material fact. *Reese v.*
17 *Jefferson Sch. Dist. No. 14J*, 208 F.3d 736 (9th Cir. 2000). A “material fact” is a fact “that might
18 affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
19 242, 248 (1986). Where reasonable minds could differ on the material facts at issue, summary
20 judgment is not appropriate. *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983). A dispute
21 regarding a material fact is considered genuine “if the evidence is such that a reasonable jury could
22 return a verdict for the nonmoving party.” *Liberty Lobby*, 477 U.S. at 248. The mere existence of a
23 scintilla of evidence in support of the plaintiff’s position will be insufficient to establish a genuine
24 dispute; there must be evidence on which the jury could reasonably find for the plaintiff. *See id.* at
25 252.

1 **III. Discussion**

2 In the complaint, Plaintiff seeks a declaration that various provisions of the Storey County
3 Code are, on their face and as applied to Plaintiff, preempted by federal and state law. Plaintiff
4 further asks that the court withdraw the county's stop work order and order that the county issue the
5 requested building permits.

6 In arguing that federal law preempts the relevant Storey County Code provisions, Plaintiff
7 relies on an FCC ruling known as "PRB-1."⁴ PRB-1 addresses the "conflict between ham [radio]
8 operators' need for effective antennas and a municipality's enforcement of its local zoning
9 ordinances." *Howard v. City of Burlingame*, 937 F.2d 1376 (9th Cir. 1991). While PRB-1
10 recognizes the important interests of both amateur radio operators and municipalities, in the
11 opinion, the FCC declined to "specify any particular height limitation below which a local
12 government may not regulate" PRB-1, ¶ 25. Instead, the FCC concluded, "[L]ocal
13 regulations which involve placement, screening, or height of antennas based on health, safety, or
14 aesthetic considerations must be crafted to accommodate reasonably amateur communications, and
15 to represent the minimum practicable regulation to accomplish the local authority's legitimate
16 purpose." *Id.* In other words, PRB-1 "entitles the operator only to a reasonable accommodation

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18 ⁴The FCC's declaratory ruling at issue is titled "Federal Preemption of State and Local Regulations
19 Pertaining to Amateur Radio Facilities." 101 F.C.C.2D 952, 50 Fed. Reg. 38,813 (1985). The findings of PRB-
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20 [A] station antenna structure may be erected at heights and dimensions sufficient to
21 accommodate amateur service communications. (State and local regulation of a station
22 antenna structure must not preclude amateur service communications. Rather, it must
23 reasonably accommodate such communications and must constitute the minimum practicable
24 regulation to accomplish the state or local authority's legitimate purpose. See PRB-1 for
25 details.)

26 47 C.F.R. § 97.15(b)

Plaintiff also contends that state law preempts the Storey County Code provisions. In particular,
Plaintiff relies on Nevada Revised Statutes section 278.02085. Because that section cites to and mirrors 47
C.F.R. § 97.15 and PRB-1, the following analysis applies equally to Plaintiff's state law preemption claims.

1 between the desired antenna height and the legitimate interest of local governments in regulating
2 local zoning matters, not an absolute preference.” *Howard*, 937 F.2d at 1380 (internal quotation
3 marks and citations omitted).

4 Thus, to the extent that PRB-1 requires local governments to provide reasonable
5 accommodation to amateur radio operators seeking to build antennas of a certain height, PRB-1
6 provides for limited federal preemption. *See Howard*, 937 F.2d at 1380 (“the language of PRB-1
7 itself confers only a limited federal preemption . . . [and the FCC] refused to entirely preempt the
8 field”). As the Ninth Circuit noted in *Howard*, PRB-1 does not “contemplate the outright
9 invalidation of city zoning authority over backyard antenna height, nor does it appear to confer
10 rights upon licensees to anything more than ‘reasonable accommodation.’” *Id.* Instead, under the
11 rule, as long as a city has considered the application, made factual findings, and attempted to
12 negotiate a compromise with the applicant, a city may deny the antenna permit. *Id.* (citations
13 omitted).

14 PRB-1 may preempt a local ordinance in two ways. *See Pentel v. City of Mendota Heights*,
15 13 F.3d 1261, 1263 (8th Cir. 1994) (“Courts applying PRB-1 have discerned two means by which
16 PRB-1 may preempt a local ordinance.”); *Evans v. Bd. of County Commissioners of the County of*
17 *Boulder*, 994 F.2d 755, 761 (10th Cir. 1993) (citing *Bulchis v. City of Edmunds*, 671 F. Supp. 1270,
18 1274 (D. Wash. 1987)) (“In reviewing local land use regulations of amateur radio antenna towers, a
19 reviewing court should apply a two-part analysis.”). First, where a local zoning ordinance bans or
20 imposes an unvarying height restriction on amateur radio antennas, PRB-1 preempts the ordinance
21 on its face. *Pentel*, 13 F.3d at 1263 (citations omitted). Second, “PRB-1 preempts an ordinance
22 that a city has not applied in a manner that reasonably accommodates amateur communications.”
23 *Id.* (citations omitted). The court will consider these two possibilities below.

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1 **A. Facial Validity of the Storey County Ordinances**

2 Plaintiff essentially contends that the Storey County zoning regulations are facially
3 inconsistent with PRB-1 because the regulations (1) require amateur radio operators to obtain a
4 special use permit to construct radio antenna towers and (2) set an absolute height limit on such
5 towers. The court will discuss these arguments in turn.

6 **1. Special Use Permit Requirement**

7 As noted, PBR-1 preempts regulations that entirely prohibit amateur radio antennas. *See*
8 *Pentel*, 13 F.3d at 1263 (citations omitted). Here, the county contends that the Storey County Code
9 does not ban radio antennas and instead provides a means by which a radio amateur may construct
10 an antenna. In so arguing, the County first notes that Storey County Code section 17.62.020
11 generally prohibits the construction of radio towers in the zone where Plaintiff lives. Section
12 17.62.020 provides, “The following uses may be permitted only in zones that allow said usage per
13 the granting of a special use permit . . . I. Radio, television, and other communication transmitters
14 and towers.”

15 The parties agree that Plaintiff’s land is in the E-10 zone (“estates zone”). The Code
16 provision governing special uses in the estates zone does not identify radio transmitters and towers
17 as uses that may be authorized by special use permits. *See* Storey County Code § 17.40.25
18 (identifying government buildings and facilities, child care facilities, and detached family guest
19 homes as uses permitted upon the granting of a special use permit). Because section 17.40.25 does
20 not permit the construction of radio transmitters and towers in the estates zone through the granting
21 of a special use permit, section 17.62.020 prohibits the construction of such towers.⁵

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23 ⁵Plaintiff reads section 17.40.25 to require a special use permit “only when a special use permit is
24 required for the use in that zone[.]” (Pl.’s Reply (#18) 7.) The court disagrees with Plaintiff’s reading of the
25 ordinance. The clear and unambiguous language of the section allows for the construction of radio transmitters
26 and towers only in zones that permit such uses through the granting of a special use permit.

 Plaintiff further argues that under section 17.12.044, “[r]adio, television, and communication masts”
qualify as specifically permitted uses that do not require a special use permit. The court disagrees. Section

1 Nonetheless, section 17.62.010 states, “certain uses may be permitted by the board of
2 county commissioners in zones in which they are not permitted by this ordinance when such uses
3 are deemed essential or desirable for the public convenience or welfare.” The section further
4 provides that the procedures for obtaining such a special use permit are identical to those governing
5 the issuance of variances under chapter 17.60. These procedures provide for the filing of
6 applications, filing fees, public hearings, findings, and appeals.

7 Thus, section 17.62.010 provides a means by which Plaintiff may construct radio towers on
8 his property. Because the regulations do not ban amateur communications, the court finds that, on
9 their face, sections 17.62.010 and 17.62.020 do not violate PRB-1.

10 **2. Height Limitations**

11 Plaintiff next argues that, in violation of PRB-1, the Storey County zoning regulations
12 impose an absolute height restriction on amateur radio antennas. Storey County Code section
13 17.12.044 provides, “In the R-1, R-2, E, A, PUD, and F zones, . . . Radio, television and other
14 communication masts may extend not more than forty-five feet above grade level, provided that the
15 same may be safely erected and maintained at such height in view of surrounding conditions and
16 circumstances.” Because Plaintiff seeks to construct towers that are over one hundred feet tall, as

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19 17.12.044 does not purport to identify permitted uses. Instead, the section governs the height of buildings.

20 Finally, Plaintiff contends that a special use permit is not required for radio antennas because radio
21 antennas are “accessory uses customarily incident” to single-family dwellings. Section 17.40.020 outlines the
22 uses that are permitted in the estates zone. In relevant part, the section authorizes “[a]ccessory uses customarily
incident to [single family dwellings] 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.”

23 The court need not determine at this time whether a radio antenna is an accessory use under section
24 17.40.020. Regardless of whether a radio antenna is such a use, the relevant Storey County Code provisions
25 are not facially inconsistent with PRB-1 because the provisions do not impose a complete ban on radio
26 antennas. For example, if a radio antenna is not an accessory use, Plaintiff may apply for a special use permit
pursuant to section 17.62.010. Likewise, although, if a radio antenna is an accessory use, the antennas must
comply with the height requirements contained in section 17.12.044, as discussed below, the Storey County
Code provides procedures for obtaining permission to exceed these height requirements.

1 proposed, the towers will violate section 17.12.044.⁶

2 Despite Plaintiff's arguments to the contrary, section 17.12.044 does not impose a firm or
3 fixed maximum height requirement. Instead, an individual seeking to build a structure that exceeds
4 the height limits identified in section 17.12.044 may seek a special use permit under chapter 17.62.⁷
5 As discussed above, section 17.62.010 authorizes the board of county commissioners to permit
6 certain uses in zones in which the uses are not otherwise permitted where such uses are "deemed
7 essential or desirable for the public convenience or welfare."

8 Because sections 17.12.044 and 17.62.010 neither ban nor impose an absolute height
9 requirement on amateur radio antennas, the court finds that the provisions are facially consistent
10 with PRB-1.

11 **B. As Applied Challenge to the Storey County Ordinances**

12 Plaintiff also contends that PRB-1 preempts the relevant Storey County ordinances because
13 the city has failed to apply the ordinances in a manner that reasonably accommodates amateur

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15 ⁶Plaintiff argues that by approving his building permit without first requiring a special use permit, the
16 county waived section 17.12.044's height requirement. While it is unfortunate that the county improperly
17 granted the building permit without first requiring Plaintiff to obtain a special use permit, within two weeks
18 of issuing the building permit, the county notified Plaintiff of its mistake. Further, Plaintiff has not presented
19 any evidence suggesting that he reasonably relied on the granting of his building permits to his detriment.

20 Plaintiff also suggests that section 17.40.020(B), rather than section 17.12.044, governs the height of
21 radio antennas. However, while section 17.40.020(B) provides that accessory use structures more than forty-
22 eight feet *wide* or over sixty feet *long* require a special use permit, the section does not address the height of
23 accessory use structures. Instead, the height limitations in section 17.12.044, which apply to the zoning
24 regulations generally, regulate the height of such structures.

25 ⁷Plaintiff argues that he may not obtain an exception to the forty-five foot height requirement because,
26 on its face, section 17.12.044 does not provide for such an exception. The court disagrees. Although section
17.12.044 does not specifically state that an individual seeking to construct a radio tower over forty-five feet
may seek a special use permit, the first sentence of section 17.12.044 provides that if an individual with
property in the specialized zones wishes to construct a building higher than thirty-five feet, the individual must
obtain a special use permit. As the zones specified in the first sentence apply to the sentence governing radio
masts, the provision relating to special use permits can likewise be read to apply to radio masts. Moreover,
chapter 17.62 applies to the zoning provisions in the Storey County Code as a whole. Thus, regardless of
whether section 17.12.044 specifies that an individual seeking to build a radio antenna over forty-five feet may
obtain a special use permit, the individual may apply for such a permit under section 17.62.010.

1 communications. However, despite the county's repeated instructions to the contrary, Plaintiff has
2 refused to apply for a special use permit that would enable him to construct the requested radio
3 antennas. Because the county has not had the opportunity to apply its zoning regulations, the court
4 cannot determine whether the county has reasonably accommodated Plaintiff's amateur
5 communications. Thus, until Plaintiff's applies for a special use permit, and the county has the
6 opportunity to review the request, the court must deny Plaintiff's as applied challenge to the zoning
7 regulations.

8 **IV. Conclusion**

9 The court is sympathetic to Plaintiff's frustration with the county's inconsistent
10 interpretation of its zoning ordinances. Nonetheless, because the ordinances do not ban or impose
11 strict height limitations on amateur radio antennas, the regulations are facially consistent with
12 PRB-1. Further, because Plaintiff has failed to utilize the existing procedures for obtaining an
13 exception to the antenna height limits, the court cannot determine whether the county has applied
14 the ordinances in a manner that violates PRB-1. Under these circumstances, the court must deny
15 the motion for summary judgment.

16 IT IS THEREFORE ORDERED that Plaintiff's Motion for Summary Judgment (#14) is
17 DENIED.

18 Because this order dispositively resolves the issues presented in this case, the Clerk of the
19 Court is directed to enter judgment in favor of Storey County.

20 IT IS SO ORDERED.

21 DATED this 17th day of June, 2010.

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LARRY R. HICKS
UNITED STATES DISTRICT JUDGE