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18 THOMAS S. TAORMINA

19 UNITED STATES DISTRICT COURT
20 DISTRICT OF NEVADA

21 THOMAS S. TAORMINA,

22 Plaintiff,

23 vs.

24 STOREY COUNTY,

25 Defendant

CV 3: 09- CV-21

26 **COMPLAINT SEEKING DECLARATORY AND INJUNCTIVE RELIEF**

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1 Plaintiff, THOMAS S. TAORMINA, by and through his attorneys, Brian M. McMahon,
2 Esq., of McMahon Law Offices, Ltd., and Fred Hopengarten, Esq., of the District of Columbia
3 Bar, hereby complain and allege as follows:

4 **Jurisdiction and Venue**

5 1. This is an action for declaratory and injunctive relief presenting a federal question
6 arising under 47 C.F.R. § 97.15(b)(2006), a regulation of the Federal Communications
7 Commission ("FCC"), and FCC Opinion and Order PRB-1, *Federal Preemption of State and*
8 *Local Regulations Pertaining to Amateur Radio Facilities*, 101 FCC 2d 952, 50 Fed. Reg. 38813
9 (September 25, 1985) ("PRB-1"). PRB-1 may be found at the following URL:

10 <http://wireless.fcc.gov/services/index.htm?job=prb-1&id=amateur&page=1>.

11
12 2. The FCC was created by, and its regulations and orders are authorized by The
13 Communications Act, 47 USC §151 *et seq.* The Plaintiff is an FCC-licensed radio amateur
14 asserting federal preemption of the maximum height for an antenna under the Storey County
15 Code.
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17
18 3. This Court has subject matter jurisdiction over this claim for relief by virtue of 28 USC
19 §§1331 (original jurisdiction for a "federal question"), and 1337 (original jurisdiction "arising
20 under any act regulating commerce"). Declaratory relief as requested herein is authorized by
21 virtue of 28 USC §2201 (declaring rights "in a case of actual controversy within its jurisdiction")
22 and F.R.Civ.P. 57 - Declaratory Judgments. The Court has supplemental jurisdiction over the
23 Plaintiff's state law claim arising under NRS 278.02085, by virtue of 28 USC §1367
24 (supplemental jurisdiction that is part of the same controversy).
25

26 4. Venue lies in this district by virtue of 28 U.S.C. §1391(b)(1) ("where any defendant
27 resides") and (2) ("a substantial part of the property . . . is situated"), because the defendants
28

1 reside or are otherwise located in this judicial district, the property is in Storey County, and the
2 claims asserted arose here

3 **Background**

4 5. Having been told by Storey County authorities since 1997 that no building permits
5 were necessary for amateur radio antenna systems, the Plaintiff constructed, without permits,
6 four antenna structures in excess of 45 feet in height at his home, on more than 10 acres, in
7 Virginia City Highland Ranches. As a result of a Stop Work Order in 2008, Plaintiff applied for
8 buildings permits. Storey County Code ("SCC") §17.12.044, limits accessory structures to
9 "forty-five (45) feet in height." The County has refused to issue a building permit to the Plaintiff
10 for amateur radio station antenna structures exceeding that height. The Plaintiff submits that the
11 ordinance is, on its face, illegal as an unvarying maximum height, inherently incapable of
12 meeting the "reasonable accommodation" and "minimum practicable regulation" requirements of
13 both federal law, 47 CFR § 97.15(b), and state law NRS 278.02085. SCC §17.12.044 is
14 preempted and a building permit should issue.
15
16
17

18 **Parties**

19 6. Plaintiff is natural person who resides at, and owns, with his wife, who is also an
20 amateur radio operator, the property located at 370 Panamint Road, Virginia City Highland
21 Ranches, Storey County, Nevada.
22

23 7. Plaintiff is a non-commercial, FCC- licensed amateur (also known as "ham") radio
24 operator and station owner. He holds an Extra Class Amateur Radio operator license, call-sign
25 K5RC. His wife holds call-sign K7AFO.

26 8. Defendant Storey County is a county and political subdivision existing under the laws
27 of the State of Nevada, and located in Storey County, Nevada.
28

Statement of Facts

1
2 9. Since 1997, when he and his wife purchased the property, Plaintiff has resided in the
3 E10-HR Estates zone of Storey County, on more than 10 acres of land.

4 10. Amateur radio station antenna structures are accessory uses customarily incident to a
5 residence, and permitted in the E10-HR Estates zone.

6
7 11. Among his other uses, Taormina assists Storey County with state, local and federal
8 public service activities, including, but not limited to, the Storey County Local Emergency
9 Planning Committee (LEPC) and Homeland Security functions, as well as Nevada and national
10 emergency communications services, including the Amateur Radio Emergency Service (ARES)
11 and the Radio Amateur Civil Emergency Service (RACES). He is the appointed ARES and
12 RACES Communications Officer for Storey County. Taormina has a fifty-year history of public
13 service in communications to the communities in which he resides.
14

15 12. From approximately June of 1997 through October of 2007, Taormina repeatedly
16 offered to apply for building permits as he erected a series of ham radio station antenna
17 structures. Each time, he was told by the Storey County Building Department (“the Building
18 Department”) that no building permits were required for ham radio towers.
19

20 13. On or about April 25, 2008, Larry Prater, P.E. (Nevada) provided Taormina
21 structural drawings for two towers of 120’ and 195’ in height that were proposed to replace two
22 existing towers of 50’ and 40’ in height. As a courtesy, those drawings were delivered by e-mail
23 to Dean Haymore, Building and Planning Department Manager (“Haymore”). Haymore
24 responded, again by telephone, that building permits were not required.
25

26 14. In a telephone conversation on June 22, 2008, Haymore stated that it would be “a
27 good idea” to apply for building permits to replace two existing towers.
28

1 15. On June 24, 2008, the Plaintiff requested a building permit to erect two amateur
2 radio station antenna structures, 120 feet and 195 feet in height above ground respectively.
3 Building Permit #8354 was issued on June 27, 2008. See Exhibit A.

4 16. On July 3, 2008 and July 16, 2008 Shannon Gardner, Building Inspector, and on July
5 8, 2008, Dean Haymore, Building and Planning Department Manager, performed in-process
6 inspections and issued compliant Interim Inspection Reports for construction work being
7 performed on these two permitted towers and for work being performed on other existing towers.
8 The report of July 16, 2008, stated that "Storey County is now of the opinion that a special use
9 permit is required for the construction of towers over 45' in height." See Exhibit B.

10 17. On or about July 17, 2008, the Building Department issued a Stop Work Order
11 precluding the erection of the two structures and prohibiting further work on other existing
12 station antenna structures. Also included in the Stop Work Order was citation to SCC §
13 15.12.010, and an order requiring Taormina to file retroactive building permit applications for all
14 existing antenna structures. See Exhibit C.

15 18. As a result of the Stop Work Order. Taormina retained counsel to assist him in
16 obtaining all necessary permits for antenna systems at the site.

17 19. On August 14, 2008, Taormina filed a building permit application for four existing
18 towers more than 45 feet in height. See Exhibit D. This application included approximately 101
19 pages of supporting documentation including citations of how the applications did comply with
20 all applicable Storey County Codes, descriptions and engineering for of the antenna systems,
21 compliance documents for all applicable wind loading and environmental issues, visual impact
22 on neighboring homes, justification for quantity and heights of supports and antennas, describing
23 fully the law of the limited federal preemption of the Storey County Codes, support from
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1 neighbors and more than 21 exhibits demonstrating compliance with all applicable law,
2 requesting building permits as a matter of right.

3 20. NRS 278.02327 requires the Building Department, within three working days after
4 receiving an application for a building permit, to accept the application or return the application
5 if it finds that the application is incomplete. Nonetheless, at no time has the Building Department
6 accepted or returned the applications, nor has it granted or denied the building permits requested
7 on August 14, 2008.

8
9 21. Since August 14, 2008, there has been substantial correspondence, exchanging views
10 on the relevant law, between Taormina's counsel and the Office of the Storey County District
11 Attorney, regarding the Building Department's refusal to remove the Stop Work Order and allow
12 the construction of antenna systems to progress. The County has been fully informed of its
13 obligations under Federal and state law, with citations to case law, when considering Taormina's
14 building permit applications.
15

16 22. On August 27, 2008, the Storey County District Attorney wrote that Storey County
17 Code §17.12.044 requires a special use permit for the erection of the proposed antenna systems.
18 The County has acted capriciously and outside the Storey County Codes in demanding that a
19 Special Use Permit is required. Storey County was reminded that Federal Law 47 CFR §
20 97.15(b) requires, in relevant part, that:
21

22 *State and local regulation of a station antenna structure . . . must constitute the*
23 *minimum practical regulation to accomplish the state or local authority's*
24 *legitimate purpose. See PRB-1, 101 FCC 2d. 952 (1985) for additional details.*

25 23. The Nevada Legislature has mandated counties, including Storey County, to comply
26 with 47 CFR § 97.15 and FCC Order PRB-1, 101 FCC 2d. 952:

27 *Amateur Radio. Limitations on restrictions on amateur service communication;*
28 *limitations on regulation of station antennae structures; exception.*

1. *A governing body shall not adopt an ordinance, regulation or plan or take any other action that precludes amateur radio service communication or that in any other manner does not conform to the provisions of 47 CFR § 97.15 and the limited pre-emption entitled "Amateur Radio Pre-emption, 101 FCC 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 antennae structure based on health, safety or a set of considerations, the ordinance, regulation, plan or action must: (a) Reasonably accommodate amateur service communications; and (b) constitute the minimum level of regulation practical to carry out the legitimate purpose of the governing body.*

24. The Storey County Code zoning ordinance, which purports to limit the height of amateur radio structures to an absolute and unvarying maximum height of 45 feet, on its face and as applied by Defendants, prohibits the Plaintiff from erecting various antenna systems necessary for the effective communications he desires.

Relief Sought

WHEREFORE, plaintiff requests relief as follows:

1. That this Court issue a declaratory judgment:
That the zoning ordinance is, on its face and as applied to plaintiff, inconsistent with, and preempted by, federal and state law, and is therefore void, without force or effect; and/or,
2. That this Court preliminarily and permanently enjoin and restrain defendants from further interference with plaintiff's plans to erect and maintain the proposed amateur radio antenna system; and/or
3. That, recognizing the demonstrated hostility to Plaintiffs, and that remand to the County Building Department will be a fruitless exercise, this Court enjoin the County from failing to issue all necessary permits for the

1 construction of the antenna systems sought, or order the issuance of all
2 necessary permits forthwith.

3 4. Such further relief as the Court deems just and proper.
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5

6
7 AFFIRMATION PURSUANT TO NRS 239B.030

8 The undersigned does hereby affirm that the preceding document does not contain the
9 Social Security Number of any person.
10

11 DATED this 15th day of January, 2009.

12 Attorneys for Plaintiff

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