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STOREY COUNTY, NEVADA

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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 of local authority's legitimate purpose.

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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, 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.***

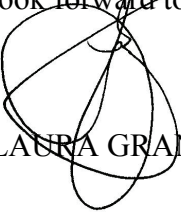
⁵ All plans and specifications for any building or swimming pool, or for any improvements, storage shed, fence, wall or ***other structure whatsoever to be erected on or moved upon or to any lot***, and the proposed location thereof on any lot or lots, the roofs thereof, any later changes or additions 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 25. 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)

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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