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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

THOMAS S. TAORMINA and)

MIDGE A. TAORMINA)

Plaintiffs,)

vs.)

Case No:

STOREY COUNTY, NEVADA, and DOES)

1-10,)

Defendants.)

COMPLAINT SEEKING DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, THOMAS S. TAORMINA, and MIDGE A. TAORMINA, by and through their attorneys, Brian M. McMahon, Esq., of McMahon Law Offices, Ltd., and Fred Hopengarten, Esq., of the District of Columbia Bar, hereby complain and allege as follows:

Jurisdiction and Venue

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

8
9 <http://wireless.fcc.gov/services/index.htm?job=prb-1&id=amateur&page=1>.

10
11 2. This complaint seeks a ruling from this Court that the County failed to fulfill its
12 obligations under 47 CFR §97.15(b), NRS 278.02085, and the requirements set forth by the
13 Ninth Circuit Court of Appeals in *Howard v. Burlingame*, 937 F. 2d 1376, 1380 (9th Cir. 1991).

14
15 3. In addition to other remedies, the Plaintiffs seek to have this Court declare that
16 Building Permit No. 8354 is valid, and that special use permits, as well as building permits, for
17 radio communications masts should be granted in accordance with the original application.

18
19 4. The FCC was created by, and its regulations and orders are authorized by, The
20 Communications Act, 47 USC §151 *et seq.* The Plaintiffs are FCC-licensed radio amateurs
21 asserting federal preemption of the maximum height for an antenna under the Storey County
22 Code.

23
24 5. This Court has subject matter jurisdiction over this claim for relief by virtue of 28
25 USC §§1331 (original jurisdiction for a "federal question"), and 1337 (original jurisdiction
26 "arising under any act regulating commerce"). Declaratory relief as requested herein is authorized
27 by virtue of 28 USC §2201 *et seq.* (declaring rights "in a case of actual controversy within its
28 jurisdiction") and F.R.Civ.P. 57 - Declaratory Judgments.

1 they would have representative capacity over Storey County directly or indirect through building
2 departments, planning commissions or other boards of governance. Accordingly, upon
3 determining the true and accurate designation of said DOE DEFENDANTS, the Plaintiffs will
4 amend to include specific allegations against specific defendants.

5
6 **Background**

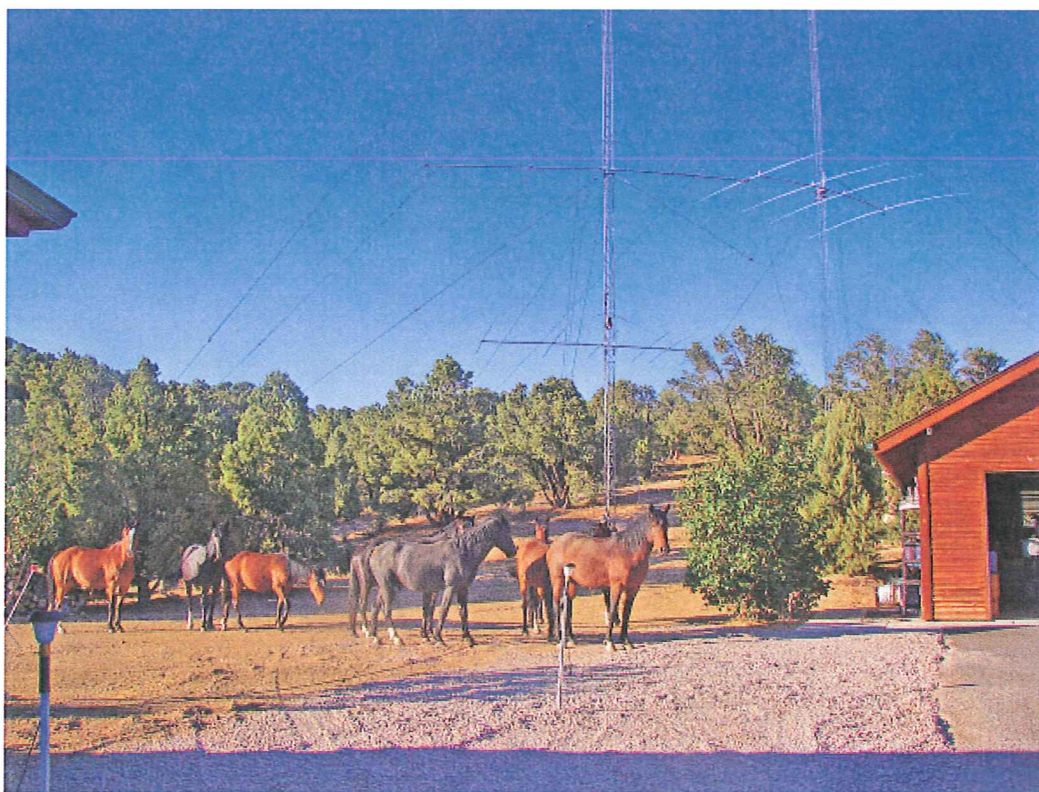
7 12. The dates and events relevant to this action are contained in a timeline presented
8 by County Staff to the County Commissioners at the hearing of June 7, 2011. **Exhibit A**,
9 incorporated herein by reference. Except for its lack of completeness, the County's timeline is
10 otherwise uncontested by the Taorminas.
11

12 13. Tom and Midge Taormina ("Plaintiffs" or "the Taorminas") also submitted a
13 timeline. It displayed more events than the County's. **Exhibit B**, incorporated herein by
14 reference. In an e-mail to the County Commission, dated June 6, 2011 (**Exhibit C**, incorporated
15 herein by reference), the County Manager stated that County staff proposed no challenge to the
16 statements exhibited in applicant's summary timeline, saying: "Staff believes in the strong
17 probability that these events did occur on or about the dates provided by the applicant and
18 recommends you to consider them as factual in order to assess the overall timeline of events."
19
20

21 14. The Taorminas are licensed radio amateurs. From 1997 until June 2008, they
22 erected a variety of radio communications masts on their 10-acre parcel. During that time, the
23 position of the Storey County Building Department was that no building permits were required
24 for such structures.
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1 15. Plaintiffs reside on land designated as “open range” which is defined in NRS
2 568.355, as “unenclosed land outside of cities and towns upon which cattle, sheep or other
3 domestic animals by custom, license, lease or permit are grazed or permitted to roam.”
4

5 16. This is a photograph of wild horses roaming on Plaintiffs’ land:



19 17. This is a photograph looking East across Panamint Road (the street on which
20 Plaintiffs reside) depicting the neighborhood:
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12 The circle calls attention to the Plaintiffs' residence.

13 18. The Covenants, Conditions and Restrictions of the Highlands Ranches
14 subdivision allow radio communications masts and are not an element of this litigation.

15 19. The Taorminas have two radio communications masts less than 45 feet in height
16 for which building permits have been granted and inspections completed, and about which there
17 is no controversy. Those masts were not an element of the Taorminas' special use permit
18 application, described below, and they are not an element of this litigation.

19 20. In May 2008, the Taorminas were notified by the Storey County Building
20 Department that they would be required to file a building permit application for two proposed
21 monopole radio communications masts of 120 feet and 195 feet in height.

22 21. Storey County Building Permit No. 8354 was granted on June 27, 2008 for the two
23 monopole radio communications masts. **Exhibit D**, incorporated herein by reference.

24 22. On receipt of the building permit, work commenced and concrete foundations
25 were poured for the monopole structures. The Storey County Building Department performed
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1 compliance completion inspections and approved the foundation work. The inspector found “all
2 conditions observed at this time and date to be in variance (*sic*) with any Storey County
3 Ordinances...” **Exhibit E**, incorporated herein by reference.

4 23. As the inspection report is a printed form, used for all County inspections, and
5 allows construction to continue, it is self-evident the form is intended to mean that all conditions
6 are in **compliance**, not **variance**. **Exhibit A** at line “7/2008,” item F (in which the Community
7 Development Department described the event as “signed off inspection report”).
8

9 24. The photographs of **Exhibit F**, incorporated herein by reference, depict the
10 foundations with monopole bases installed, as they were at the time of the second compliance
11 inspection, on July 16, 2008.

12 25. Twenty days after the building permit was issued, on July 17, 2008, the County
13 issued a stop work order. Confounded by a stop work order, the Taorminas retained counsel.
14 Over the ensuing months, they exchanged correspondence with the County Deputy District
15 Attorney about the applicable law, especially 47 CFR § 97.15(b) and NRS 278.02085.
16

17 26. After the issuance of the building permit, and before the issuance of the stop work
18 order, the Taorminas incurred significant costs for tower components, antennas, cabling,
19 connectors and other expensive hardware. See **Exhibit G**, incorporated herein by reference.
20

21 27. Having reached an impasse with the County on the law, the Taorminas filed Case
22 No: 3: 09-CV-00021-LRH-VPC in this Court (“*Taormina I*”).
23

24 28. The Taorminas have faced a wide variety of frustrations presented to them by the
25 County. In *Taormina I*, the Taorminas provided to this Court an uncontested list of the
26 inconsistent positions taken by the County during the life of this controversy to that point.
27

28 **Exhibit H**, incorporated herein by reference. Reviewing that history, this Court wrote: “The

1 court is sympathetic to Plaintiff's frustration with the county's inconsistent interpretation of its
2 zoning ordinances." *Taormina I*, Order at 9. Actions by the County since that opinion have only
3 served to exacerbate the Taormina's frustrations. See **Exhibit B**, the timeline of the events since
4 1996 leading up to this litigation.

5
6 29. In its Order of June 17, 2010, the Court ruled:

7 An individual seeking to build a structure that exceeds the height limits identified
8 in section 17.12.044 may seek a special use permit under chapter 17.62. As
9 discussed above, section 17.62.010 authorizes the board of county commissioners
10 to permit certain uses in zones in which the uses are not otherwise permitted
11 where such uses are "deemed essential or desirable for the public convenience or
12 welfare."

13 30. Furthermore, the Court ruled that Plaintiffs' "as applied" claim was not yet ripe for
14 decision:

15 Because the county has not had the opportunity to apply its zoning regulations,
16 the court cannot determine whether the county has reasonably accommodated
17 the Plaintiff's amateur communications. Thus, until Plaintiff[s] appl[y] for a
18 special use permit, and the county has the opportunity to review the request, the
19 court must deny Plaintiff[s'] as applied challenge to the zoning regulations.

20 31. Judgment on the Motion for Summary Judgment was entered on June 21, 2010.

21 32. In accordance with the Court's decision, on December 29, 2010, the Taorminas
22 applied for a special use permit, with voluminous accompanying detail, under Storey County
23 Code § 17.62.010.

24 33. The text of Storey Code § 17.62.010 reads:

25 Certain uses may be permitted by the board of county commissioners in zones in
26 which they are not permitted by this title **where such uses are deemed** essential
27 or **desirable for the public convenience or welfare**. The procedure for filing of
28 applications, filing fees, public hearings, findings and appeals shall be the same as
provided for variances in Chapter 17.60 of this title. (*Emphasis added.*)

34. The text of 47 U.S.C. § 303 reads, in part:

1 [T]he Commission from time to time, as public convenience, interest, or necessity
2 requires, shall . . . (l)(1) Have authority to prescribe the qualifications of station
3 operators, to classify them according to the duties to be performed, to fix the
4 forms of such licenses, and to issue them to persons who are found to be qualified
5 by the Commission . . .

6 35. The text of 47 C.F.R. § 97.1, Basis and purpose, reads:

7 The rules and regulations in this part are designed to provide an amateur radio
8 service having a fundamental purpose as expressed in the following principles:

9 (a) Recognition and enhancement of the value of the amateur service to the
10 public as a voluntary noncommercial communication service, particularly with
11 respect to providing emergency communications.

12 (b) Continuation and extension of the amateur's proven ability to contribute to
13 the advancement of the radio art.

14 (c) Encouragement and improvement of the amateur service through rules
15 which provide for advancing skills in both the communication and technical
16 phases of the art.

17 (d) Expansion of the existing reservoir within the amateur radio service of
18 trained operators, technicians, and electronics experts.

19 (e) Continuation and extension of the amateur's unique ability to enhance
20 international goodwill.

21 36. The text of Public Law 103-408 (J.Res., 103d Congress, 1994) reads:

22 **SECTION 1. FINDINGS AND DECLARATIONS OF CONGRESS.**

23 Congress finds and declares that—

24 (1) radio amateurs are hereby commended for their contributions to technical progress in
25 electronics, and for their emergency radio communications in times of disaster;

26 (2) the Federal Communications Commission is urged to continue and enhance the
27 development of **the amateur radio service as a public benefit** by adopting rules and
28 regulations which encourage the use of new technologies within the amateur radio
service; and

(3) reasonable accommodation should be made for the effective operation of amateur
radio from residences, private vehicles and public areas, and that **regulation at all levels
of government should facilitate and encourage amateur radio operation as a public
benefit.** (*Emphasis added.*)

<http://thomas.loc.gov/cgi-bin/query/D?c103:1:/temp/~c103axha51:> , or
[http://frwebgate.access.gpo.gov/cgi-
bin/getdoc.cgi?dbname=103_cong_bills&docid=f:sj90enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=103_cong_bills&docid=f:sj90enr.txt.pdf).

1
2 Before The Storey County Planning Commission, March 3, 2011

3 37. On February 18, 2011, the County Building Department issued a Staff Report that
4 examined the special use permit application of the Taorminas, reported the Department's
5 findings, and made recommendations for granting of a special use permit. The Department
6 subsequently issued a "Revised List of Recommended Conditions of Approval," dated March 3,
7 2011. **Exhibit I**, incorporated herein by reference. Both were presented to the Storey County
8 Planning Commission at its meeting of March 3, 2011.
9

10
11 38. Aesthetics are not a consideration under Storey County Code § 17.62.010.

12 39. Though distributed in advance, it is the practice of County Staff to issue reports
13 dated the same day as the hearing. In the Staff Report of March 3, the Building Department
14 acknowledged the existence of towers erected prior to 2008. Section 3.3 states that access to the
15 Taorminas' communication system "may prove to be beneficial and desirable for the public
16 convenience and welfare during times of Emergency Operations Command and extended power
17 or emergency communication outages." This statement was later repeated in the Staff Report to
18 the County Commission, dated May 3, 2011, **Exhibit J**, Section 3.3 at 9. The entirety of Exhibit
19 K is incorporated herein by reference.
20
21

22 40. The Staff Report of March 3 also finds that the proposed structures will "impose
23 minimal to no impacts on the surrounding area" (Section 4.4) and will not cause a noise problem
24 (Section 4.5). These findings were later repeated to the County Commission. *Id.*, Section 4.4 at
25
26 13.
27
28

1 41. At Figure 6, in its Staff Report of March 3, the Planning Department finds:
2 “[T]here appears to be adequate travel space for emergency vehicles and other equipment.” This
3 finding was later repeated to the County Commission. *Id.*, Figure 7 at 14.

4 42. In Section V, Land Use Compatibility & Project Alternatives, of the Staff Report
5 of March 3, the Planning Department also finds: “While the existing amateur radio antenna
6 towers are in fact visible to the neighboring areas, they do not appear to cause detriment or
7 otherwise impact the ‘quality of life’ that presently exists in the residential area.” This finding was
8 later repeated to the County Commission. *Id.*, Section V at 14.

9 43. Section V of the Staff Report of March 3 further states that the Planning
10 Department staff “recommends that the applicant is granted a special use permit to operate the
11 amateur radio communications facility.” This finding was later repeated to the County
12 Commission. *Id.*, Section V at 15.

13 44. At Section XI, at page 20 of the Staff Report of March 3, 2011, “[i]n accordance
14 with findings under *Taormina v. Storey County*, federal and state regulations, and those included
15 in this report,” the Planning Department recommended that the Planning Commission approve
16 one of two options, both of which would grant a special permit for four radio communications
17 masts.

18 45. On March 3, 2011, the special use permit application was heard in open session
19 before the Storey County Planning Commission. At that session, the Planning Department
20 recommended the grant of a Special Permit. The planning commissioners voted to recommend
21 approval of a special use permit for four existing radio communications masts. This completed the
22 Planning Commission’s role, and the matter was forwarded to the County Commission for a
23 decision. **Exhibit J**, Section I at 1.

Before the Storey County Commissioners, May 3, 2011

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2
3 46. In preparation for the hearing before the Storey County Commission, the
4 Planning Department issued a Staff Report dated May 3, 2011, which recommended the grant of
5 a special use permit, with conditions, in concurrence with the vote of the Planning Commission.
6

7 Exhibit J, incorporated herein by reference.

8 47. In its Report to the County Commissioners (and as it had reported to the
9 Planning Commission), Staff wrote:
10

11 Mr. Taormina serves as the Emergency Coordinator for the local Amateur Radio
12 Emergency Service, a national volunteer organization, and the Radio Amateur
13 Civil Emergency Service, created by the Federal Emergency Management Agency
14 and the Federal Communications Commission. These services are affiliated with
the Department of Homeland Security [reference to an exhibit omitted], and the
American Red Cross. . . .

15 In accordance with the above, access to the amateur radio communication system
16 by key staff may prove to be beneficial and desirable for the public convenience
17 and welfare during times of Emergency Operations Command and extended
power or emergency communication outages.

18 Exhibit J, Section 3.3 (Benefit to Storey County) at 8-9.

19 48. Though aesthetics are not a consideration for the County Commission under §
20 17.62.010, Staff repeated its previous finding for the Planning Commission, stating: "The lattice
21 framework with its exposed and dulled finish blends relatively well with the sky and surrounding
22 mountain backdrop . . ." *Id.*, Section 4.2 (Visual Impacts (towers)) at 10.
23

24 49. To the County Commission, Staff repeated its previous finding for the Planning
25 Commission, stating: "The existing and proposed amateur radio antenna towers . . . should
26 require no FAA signal lighting or applied coloration." *Id.*, Section 4.3 at 13.
27

28 50. In its Report to the County Commission, Staff found:

1 There has been no reported interference with emergency and non-emergency
2 communications related to existing amateur radio operation. . . . It must be noted,
3 however, that the regulation and enforcement of any form of interference
4 resulting from amateur radio systems is entirely within the jurisdiction of the
5 Federal Communications Commission (FCC). No local jurisdiction may impose or
6 enforce regulations related thereto. All complaints related to alleged interference
7 from the amateur radio system must be submitted directly to the FCC.

8 *Id.*, Section 4.6 (Electromagnetic Interference) at 13.

9 51. Repeating its report to the Planning Commission, Staff also found:

10 While the existing amateur radio antenna towers are in fact visible to the
11 neighboring areas, they do not appear to cause detriment or otherwise impact the
12 “quality of life” that presently exists in the residential area. The two proposed
13 monopole towers, exclusively, in accordance with the recommended conditions of
14 approval, also do not appear to cause substantial aesthetic impacts to the area.

15 *Id.*, Section V. (Land use Compatibility & Project Alternatives) at 14.

16 52. The Staff position from its report to the Planning Commission was repeated:

17 “[S]taff recommends that the applicant is granted a special use permit to operate the amateur
18 radio communications facility . . .” *Id.*, Section V. (Land use Compatibility & Project
19 Alternatives) at 15.

20 53. As it did in its report to the Planning Commission, Staff again found that:

21 The proposal appears to comply with the provisions of the Storey County Master
22 Plan. Emergency communications during times of power failure may be enhanced
23 by the amateur ham radio operation making the proposal consistent with
24 provisions on the Ma[s]ter Plan for Emergency Response and Planning. No
25 provisions of the Master Plan prohibit the use.

26 *Id.*, Section VIII. (Master Plan) at 15.

27 54. The properties to the North, East, South, and West, as well as the subject
28 property, are all 10-acre parcels in the HR-10 (Highland Ranches-10 acre minimum lot size)
zone. *Id.*, Section VIII. (Master Plan) chart at 16.

1 55. Staff provided a copy of *Howard v. Burlingame*, 937 F2d 1376 (9th Cir. 1991), to
2 the County Commission as its Exhibit B to the Staff Report, just as it had provided a copy of that
3 case to the Planning Commission. *Id.*, Enclosed Exhibits, at 20.
4

5 56. In advance of the hearing before the Storey County Commission, the Taorminas
6 provided a supplementary document to the Building Department, the County Manager, the
7 District Attorney, and the County Commission, answering questions that arose at the Planning
8 Commission hearing. **Exhibit K**, incorporated herein by reference.
9

10 57. On May 3, 2011, the special use permit application was heard in open session
11 before the Storey County Commission. The Commission voted to continue action on the
12 application, and requested additional information from staff and the Taorminas on the history of
13 the application, as well as a photo simulation from the Taorminas.
14

15
16 **Before the Storey County Commissioners, June 7, 2011**
17

18 58. Fulfilling the request made by the County Commissioners at the May 3 meeting,
19 on June 6, 2011, the Taorminas submitted to the County Manager a detailed timeline of events
20 from 1997 to date. **Exhibit B**.
21

22 59. Despite repeated requests by the Taorminas, as well as statements by Staff in the
23 Report to the Planning Commission of March 3, as well as in the Staff Report to the County
24 Commission of May 3, that negotiation is *required*, there was no negotiation with the Taorminas
25 on the height or number of radio communications masts – not by the County Manager, the
26 Planning Commission, the Community Development Director, the Senior Planner, the District
27 Attorney (nor any staff member), nor by the County Commission.
28

1 60. From May 15 to June 6, 2011, there was no contact from the County, even
2 though, as the Staff report to the Planning Commission, and the Staff report to the County
3 Commission pointed out, the decision of the Ninth Circuit Court of Appeals in *Howard v.*
4 *Burlingame*, 937 F2d 1376, 1380 (9th Cir. 1991), requires the County to: “consider the
5 application, make factual findings, and attempt to negotiate a satisfactory compromise with the
6 applicant.”
7

8 61. On June 3, 2011, the Taorminas conveyed to the Building Department staff, the
9 County Manager and the District Attorney that even though it was the eve of the planned
10 County Commission meeting, the Taorminas were still prepared to enter into good-faith
11 negotiations with the County Commissioners.
12

13 62. The County Manager’s e-mail to the Commissioners of June 6, 2011 states that
14 the expression that “federal rulings . . . *require* the Governing Board to “attempt to negotiate a
15 compromise with the applicant” in order to “reasonably accommodate amateur radio antenna
16 towers” is consistent with staff’s understanding of PRB-1. (*Emphasis in original.*) **Exhibit L**,
17 incorporated herein by reference.
18

19 63. Through staff, as well as at a meeting on June 6, 2011 with the Building
20 Department, County Manager and County District Attorney, the Taorminas pointed out again
21 that there had never been any negotiations about the number or height of radio communications
22 masts with the County Commission or with any agent for the Commission.
23

24 64. Nonetheless, in a letter dated June 6, 2011, the Taorminas submitted a
25 compromise proposal to Staff and the Commission, known as Motion F, to reduce the number of
26 requested masts from six to five, and reduce the height of the tallest structure proposed from 195
27 feet to 175 feet. See **Exhibit C**, incorporated herein by reference.
28

1 65. Motion F reads:

2 **ALTERNATIVE: MOTION F:** In accordance with the recommendation of the
3 Community Development Department that this use is in accordance with section
4 17.62.010 (see letter of April 28, 2011), to grant a Special Use Permit for Planning
5 Case No. 2011-010, allowing the Applicant to maintain *three existing amateur radio*
6 *antenna lattice towers (not to exceed 140, 140 and 110 feet in height) and to install two*
7 *monopole towers for which building permit # 8354 has previously been granted (not to*
8 *exceed 175 and 140 feet in height). "Existing" contained herein means that each*
9 *permitted tower will remain at or lower than its current height and at or less than*
10 *its structure face. This motion allows the permit holder to move the permitted*
11 *towers around the property, so long as there are no more than five antenna*
12 *support structures greater than 45 feet in height, and each tower remains in*
13 *compliance with the limitations of this Special Use Permit, and the applicable*
14 *Storey County Building Code, including setbacks and noise requirements for the*
15 *use of an emergency power generator. This Special Use Permit shall be valid only*
16 *so long as Mr. or Mrs. Taormina, or a close family member (such as brother, sister,*
17 *son, daughter, niece, nephew) is a resident at the location.*

18 (Emphasis in original.)

19 66. Even though visual impact is not a consideration in the language of Storey
20 County Code § 17.62.010, at the request of County Staff, the Taorminas submitted accurate
21 photo simulation renderings to the County Commission. **Exhibit M**, incorporated herein by
22 reference.

23 67 The continuance of the special use permit application was heard at the County
24 Commissioner's meeting of June 7, 2011. The Taorminas and staff each presented timelines
25 (**Exhibits A and B**). The difference between the two timelines is that the Taormina timeline
26 includes matters which the staff was unable to confirm or deny.

27 68. Senior Planner Osborne confirmed that the Community Development
28 Department had examined the timeline submitted by the Taorminas and, except for events
which the Building Department could not confirm or deny from its own records, the Building

1 Department had no disagreement with any of the items in the Taormina timeline. He also
2 reinforced the Building Department's staff recommendation to approve four existing structures.

3 69. Senior Planner Osborne also read and offered the Taorminas' compromise
4 proposal as Motion F for consideration by the Commission.
5

6 70. In his presentation to the County Commission, counsel for the Taorminas pointed
7 out that there had never been any negotiation on the number or height of radio communications
8 masts, and that a hearing, where the Commission controls the agenda and timing, is no
9 negotiation.
10

11 71. At no time did any member or representative of the County Commission attempt
12 to negotiate the number or height of radio communications masts with the Taorminas.

13 72. At no time did the Commissioners discuss Motion F.

14 73. At the end of the public comments, the County Commission voted. The decision
15 of the County Commission reads, in full:
16

17 **Motion:** Maintain all existing amateur HAM radio towers which have received
18 approved Storey County building permits and deny those which have not been
19 erected with an approved building permit, in no case will any tower exceed 45 feet
20 in height, and to deny SUP 2011-010 and the owner of property should be in
21 compliance with this within 90 days and if the house sells, forecloses or the
22 passing, only towers with permits may stay, **Action:** Approve, **Moved by**
23 **Commissioner Sjovangen, Seconded by Vice-Chairman Hess and Chairman**
24 **Kershaw.**

25 See **Exhibit N**, incorporated herein by reference.

26 74. The decision of the County Commission rejected the recommendations of the
27 County Staff and denied a special use permit for any amateur radio antenna support structures
28 (radio communications masts). This decision contains neither findings nor reasoning for the
denial of the special use permit.

1 75. The minutes of the meeting of the County Commission were approved on July 5,
2 2011, making the decision of the County Commission final. This action is timely filed.

3
4 **The County Did Not Reasonably Accommodate**

5
6 76. Though the Taorminas repeatedly emphasized the Ninth Circuit's requirement for
7 negotiation, and the Staff acknowledged this requirement, both in its report to the Planning
8 Commission and in its report to the County Commission, Staff never made an offer to negotiate,
9 and never did negotiate with the Taorminas on the subjects of the number and heights of radio
10 communications masts, despite repeated requests by the Taorminas to do so.

11
12 77. Through Staff, including the County Manager and the District Attorney, as well
13 as at the meeting of June 6, and the hearing of June 7, the Taorminas pointed out that there had
14 yet never been any negotiations with the County Commission on the subjects of the number and
15 heights of radio communications masts.

16
17 78. At no time did any member of the Storey County Commission negotiate with the
18 Taorminas.

19 79. The Commission never discussed Motion F, the Taorminas' compromise proposal.

20
21 80. The Planning Commission recommendation for a special use permit allowing four
22 radio communication masts was not approved.

23 81. None of the staff recommendations to grant a special use permit was approved.

24
25 82. The decision of the County Commissioners was to deny the special use permit
26 application in its entirety, in any form. See **Exhibit N** at 8.

27
28 83. Inherent in 47 CFR § 97.15(b), and NRS 278.02085 is the concept that radio
amateurs must be allowed antennas adequate for effective communications.

1 84. The FCC has held that antenna height is important to effective radio
2 communications.

3 Because amateur station communications are only as effective as the antennas
4 employed, antenna height restrictions directly affect the effectiveness of amateur
5 communications. Some amateur antenna configurations require more substantial
6 installations than others if they are to provide the amateur operator with the
7 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.

8 Memorandum Opinion and Order (FCC 85-506), **Federal Preemption of State and Local**
9 **Regulations Pertaining to Amateur Radio Facilities**, FCC Order PRB-1 at ¶ 25, 101 FCC 2d
10 952, 50 Fed. Reg. 38813 (September 25, 1985),
11 <http://wireless.fcc.gov/services/amateur/prb/index.html> (last visited August 18, 2011) (the
12 foundation Order for 47 CFR § 97.15(b).

13
14 85. The Taorminas defined and presented their needs for effective communications in
15 a document entitled “Needs Analysis,” provided with their initial building permit application of
16 August 2008. It was prepared by an electrical engineer, using software developed by the US
17 Navy and the Voice of America for short-wave and VHF communications. It was provided to the
18 Planning Commission, and to the County Commission, as Exhibit F to the Planning
19 Department’s staff reports. **Exhibit J** at 20.

20
21 86. The County Commission has failed to reasonably accommodate the needs of the
22 Taorminas for the communications that they desire.

23
24 87 By letter of February 28, 2011, including a copy of the Order from the U.S.
25 District Court that followed *MacMillan v. City of Rocky River*, 748 F. Supp. 1241 (N.D. Ohio),
26 counsel for the Taorminas brought to the attention of the County that municipal immunity can
27
28

1 be removed when a special permit granting authority defies the requirements of the law. **Exhibit**
2 **O**, incorporated herein by reference.

3 88. By email dated June 6, 2011, counsel for the Taorminas again reminded the
4 County of its obligation to engage in good-faith negotiations, and further, that the Taorminas
5 reaffirmed their willingness for a compromise. **Exhibit P**, incorporated herein by reference.
6

7 89. The County Commissioners had full knowledge of the requirements of the law, as
8 the matter had been extensively briefed in the litigation before this Court, was the subject of a
9 staff report to them, and was brought to their personal attention at the two hearings.
10

11 90. As a result of a failure to negotiate, and a failure to reasonably accommodate the
12 Taorminas' demonstrated communications needs, in the face of the requirements of the law,
13 especially 47 CFR § 97.15(b) and NRS 278.02085, and the Ninth Circuit's instructions in
14 *Howard v. Burlingame* (which law was presented to staff well in advance, discussed by this Court
15 in *Taormina I*, and included in the staff reports to both the Planning Commission and the County
16 Commission), as well as discussion at both sessions of the hearing before the County
17 Commission, the County Commission has demonstrated that it has no intention of obeying the
18 requirements of the law.
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DETRIMENTAL RELIANCE AND VESTED RIGHTS

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2 91. In *Taormina I*, this Court wrote: “Plaintiff has not presented any
3 evidence suggesting that he reasonably relied on the granting of his building permits to his
4 detriment.” *Taormina I*, Document 19, Order, at 8, fn 6. The reason that no evidence was
5 initially submitted to the Court was that the only matter for consideration by the Court at the
6 time was whether the ordinance was legal on its face, in light of 47 CFR § 97.15(b) and NRS
7 278.02085.
8

9 92. “Because Plaintiff’s ‘as applied’ claim was not ripe for review at the time of the
10 judgment, its dismissal will not bar Plaintiff from challenging the Storey County regulations as
11 applied to him in the future.” *Taormina I*, Document 24, Order, at 3. As we are now in the “as
12 applied” portion of the litigation, the time has come to consider the Taorminas’ theory of
13 detrimental reliance to affirm the validity of the building permit.
14
15

16 93. The Taorminas relied to their detriment on the grant of the building permit that
17 was later subject to a stop work order. Between the grant of the building permit and the stop
18 work order they met every test under Nevada law for detrimental reliance, spending more than
19 \$65,000 in construction costs. See **Exhibit G** submitted to the County Commission at its hearing
20 of June 17, 2011.
21

22 94. The Supreme Court of Nevada has stated Nevada law on vested rights:

23
24 The general rule is that any substantial change of position, expenditures, or
25 incurrence of obligations under a building permit entitles the permittee to
complete the construction and use the premises for the purpose authorized . . .

26 *Reno v. Nevada First Thrift*, 100 Nev. 483, 487 (1984).
27
28

1 95. The Storey County Deputy District Attorney conceded that the Nevada
2 rule on vested rights applied to this case when she wrote to the Director of the Storey
3 County Planning Department:

4 In Mr. Taormina's case, your department has apparently already issued building
5 permits for the towers he wishes to build. . . . As such, it would appear to me that
6 you have waived the height limitations set out in SCC § 17.12.044.

7 **Exhibit Q**, incorporated herein by reference, at 2-3.

8 96. Under Nevada law, the building permit for the two monopoles was granted, rights
9 have vested, and the stop work order is invalid. See *Reno v. Nevada First Thrift, op.cit.*

10 97. **Exhibit E**, at Figure 5 of the County's Staff Report, shows a photo of the
11 monopoles subject to the Stop Work Order, in sections and on the ground, awaiting erection.

12 98. This Court should rule that the building permits are valid, and enjoin the County
13 from enforcement action to prevent the completion of construction for those two radio
14 communication masts.
15
16

17
18 **REQUEST FOR RELIEF**

19 As a result of the need to return to this Court for this "*as applied*" phase of litigation,
20 Plaintiffs respectfully request that:
21

22 (1) This Court order that Building Permit No. 8354 (for two monopoles) is valid.

23 (2) This Court order the County to revoke its Stop Work Order, and further to order
24 the Commission to grant the special use permit as applied for.
25

26 (3) In the alternative, this Court order the County Commission to adopt Motion F
27 (see **Exhibit P**) and cause the Building Department to issue all appropriate accompanying
28 building permits.

1 (4) For its complete failure to reasonably accommodate the communications needs of
2 the Taorminas, despite requirements of law well known to them, this Court should strip the
3 individual Commissioners of their municipal immunity, and grant a motion to allow for damages
4 to be brought against the individual commissioners, as well as the County, jointly and severally
5 for attorneys' fees and costs incurred in the prosecution of these actions.
6

7 (5) For its complete failure to reasonably accommodate the Taorminas'
8 communications needs, despite requirements of law well known to them, this Court should allow
9 reasonable attorneys' fees.
10

11 (6) This Court should rule that rights under Building Permit No. 8354 for the
12 "Erection of two Ham Radio Towers" (radio communications masts), granted on June 27,
13 2008 (see **Exhibit D**) have matured, due to the doctrine of detrimental reliance.
14

15 (7) This Court should rule that rights to Building Permit No. 8354 have vested, the
16 building permit is valid, and the Stop Work Order, as it applies to this building permit is invalid.
17

18 (8) Such injunctive relief as necessary to mandate the Storey County Commission
19 follow this court's orders and prohibit the Story County Commission from further acts
20 inconsistent with this court's orders prohibiting such acts.
21

22 (9) This Court should order such other and further relief and remedies as justice and
23 equity require.
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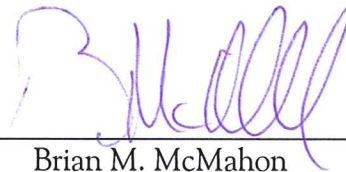
Dated: September ⁶ , 2011.

Respectfully submitted,

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By



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