THE STATE OF NEW HAMPSHIRE
SUPREME COURT

2000 TERM
JULY SESSION

No: 2000-131

Suzanne Marchand, et al

v.

Town of Hudson
(Jeremy Muller, Intervenor)

Intervenor's Brief

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Loughlin, 15 New Hampshire Practice: Land Use Planning and Zoning Sec.9.02.

Frenaye, Amateur Radio at the Bottom of the Earth, QST, April, 1979, at 49…….

129 Cong. Rec. S15216 (Daily Ed., November 2, 1983)…….

Questions Presented for Review

1. Whether the trial court erred, as a matter of law, or whether its decision is otherwise unsupported by the evidence when it failed to uphold the findings of fact made by the Hudson Zoning Board of Adjustment that the three one hundred foot amateur ham radio towers with antennae are lawful, permitted accessory uses under the Hudson Zoning Ordinance?

2. Whether the trial court erred as a matter of law, or whether its decision is otherwise unsupported by the evidence when it found that the size and height of the towers in Hudson upset the balance between the federal interest in providing amateur radio operations and legitimate interest of local governments in regulating zoning matters?

3. Whether the trial court erred as a matter of law, or whether its decision is otherwise unsupported by the evidence when it ordered the removal of all three radio towers, thereby preventing all amateur ham radio operation by Mr. Muller, which fails to preserve the FCC's legitimate interest in promoting amateur radio operations?

Constitutional Provisions, Statutes, Ordinances, Rules, or Regulations Involved

674:16 Grant of Power.

I. For the purpose of promoting the health, safety, or the general welfare of the community, the local legislative body of any city, town, or county in which there are located unincorporated towns or unorganized places is authorized to adopt or amend a zoning ordinance under the ordinance enactment procedures of RSA 675:2-5. The zoning ordinance shall be designed to regulate and restrict:

(a) The height, number of stories and size of buildings and other structures;

(b) Lot sizes, the percentage of a lot that may be occupied, and the size of yards, courts and other open spaces;

(c) The density of population in the municipality; and

(d) The location and use of buildings, structures and land used for business, industrial, residential, or other purposes.

II. The power to adopt a zoning ordinance under this subdivision expressly includes the power to adopt innovative land use controls which may include, but which are not limited to, the methods contained in RSA 674:21.

III. In its exercise of the powers granted under this subdivision, the local legislative body of a city, town, or county in which there are located unincorporated towns or unorganized places may regulate and control the timing of development as provided in RSA 674:22.

IV. Except as provided in RSA 424:5 or RSA 422-B or in any other provision of Title XXXIX, no city, town, or county in which there are located unincorporated towns or unorganized places shall adopt or amend a zoning ordinance or regulation with respect to antennas used exclusively in the amateur radio services that fails to conform to the limited federal preemption entitled Amateur Radio Preemption, 101 FCC 2nd 952 (1985) issued by the Federal Communications Commission.

V. In its exercise of the powers granted under this subdivision, the local legislative body of a city, town, or county in which there are located unincorporated towns or unorganized places may regulate and control accessory uses on private land. Unless specifically proscribed by local land use regulation, aircraft take offs and landings on private land by the owner of such land or by a person who resides on such land shall be considered a valid and permitted accessory use.

Source. 1983, 447:1. 1985, 103:19. 1989, 266:14, 15. 1995, 176:1, eff. Aug. 4, 1995. 1996, 218:1, eff. Aug. 9, 1996.

674:17 Purposes of Zoning Ordinances.

I. Every zoning ordinance shall be adopted in accordance with the requirements of RSA 674:18. Zoning ordinances shall be designed:

(a) To lessen congestion in the streets;

(b) To secure safety from fires, panic and other dangers;

(c) To promote health and the general welfare;

(d) To provide adequate light and air;

(e) To prevent the overcrowding of land;

(f) To avoid undue concentration of population;

(g) To facilitate the adequate provision of transportation, solid waste facilities, water, sewerage, schools, parks, child day care; and

(h) To assure proper use of natural resources and other public requirements.

II. Every zoning ordinance shall be made with reasonable consideration to, among other things, the character of the area involved and its peculiar suitability for particular uses, as well as with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the municipality.

III. Except as provided in RSA 424:5 or RSA 422-B or in any other provision of Title XXXIX, no city, town, or county in which there are located unincorporated towns or unorganized places shall adopt a zoning ordinance or regulation with respect to antennas used exclusively in the amateur radio service that fails to conform to the limited federal preemption entitled Amateur Radio Preemption, 101 FCC 2nd 952 (1985) issued by the Federal Communications Commission.

Source. 1983, 447:1. 1989, 42:2. 1995, 176:2, eff. Aug. 4, 1995.

47 CFR Sec. 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 or local authority's legitimate purpose. See PRB-1, 101 FCC 2d 952 (1985) for details.)[64 FR 53242, Oct. 1, 1999]

PRB-1 (1985)

Before the
Federal Communications Commission FCC 85-506
Washington, D.C. 20554 36149

(In the Matter of)

Federal preemption of state and Local Regulations Pertaining to Amateur Radio Facilities.

MEMORANDUM OPINION AND ORDER

Adopted: September 16, 1985 Released: September 19, 1985

By the Commission: Commissioner Rivera not participating.

Background

1. On July 16, 1984, the American Radio Relay League, Inc. (ARRL) filed a Request for Issuance of a Declaratory Ruling asking us to delineate the limitations of local zoning and other local and state regulatory authority over Federally-licensed radio facilities. Specifically, the ARRL wanted an explicit statement that would preempt all local ordinances which provably preclude or significantly inhibit effective, reliable amateur radio communications. The ARRL acknowledges that local authorities can regulate amateur installations to insure the safety and health of persons in the community, but believes that those regulations cannot be so restrictive that they preclude effective amateur communications.

2. Interested parties were advised that they could file comments in the matter. With extension, comments were due on or before December 26, 1984, with reply comments due on or before January 25, 1985. Over sixteen hundred comments were filed.

Local Ordinances

3. Conflicts between amateur operators regarding radio antennas and local authorities regarding restrictive ordinances are common. The amateur operator is governed by the regulations contained in Part 97 of our rules. Those rules do not limit the height of an amateur antenna but they require, for aviation safety reasons, that certain FAA

notification and FCC approval procedures must be followed for antennas which exceed 200 feet in height above ground level or antennas which are to be erected near airports. Thus, under FCC rules some amateur antenna support structures require obstruction marking and lighting. On the other hand, local municipalities or governing bodies frequently enact regulations limiting antennas and their support structures in height and locations, e.g. to side or rear yards, for health, safety or aesthetic considerations. These limiting regulations can result in conflict because the effectiveness of the communications that emanate from an amateur radio station are directly dependent upon the location and the height of the antenna. Amateur operators maintain that they are precluded from operating in certain bands allocated for their use if the height of their antennas is limited by a local ordinance.

4. Examples of restrictive local ordinances were submitted by several amateur operators in this proceeding. Stanley J. Cichy, San Diego, California, noted that in San Diego amateur radio antennas come under a structures ruling which limits building heights to 30 feet. Thus, antennas there are also limited to 30 feet. Alexander Vrenlos, Mundelein, Illinois wrote that an ordinance of the Village of Mundelein provides that an antenna must be a distance from the property line that is equal to one and one-half times its height. In his case, he is limited to an antenna tower for his amateur station just over 53 feet in height.

5. John C. Chapman, an amateur living in Bloomington, Minnesota, commented that he was not able to obtain a building permit to install an amateur radio antenna exceeding 35 feet in height because the Bloomington city ordinance restricted "structures" heights to 35 feet. Mr. Chapman said that the ordinance, when written, undoubtedly applied to buildings but was now being applied to antennas in the absence of a specific ordinance regulating them. There were two options open to him if he wanted to engage in amateur communications. He could request a variance to the ordinance by way of a hearing before the City Council, or he could obtain affidavits from his neighbors swearing that they had no objection to the proposed antenna installation. He got the building permit after obtaining the cooperation of his neighbors. His concern, however, is that he had to get permission from several people before he could effectively engage in radio communications for which he had a valid FCC amateur license.

6. In addition to height restrictions, other limits are enacted by local jurisdictions -- anti-climb devices on towers or fences around them; minimum distances from high voltage power lines; minimum distances of towers from property lines; and regulations pertaining to the structural soundness of the antenna installation. By and large, amateurs do not find these safety precautions objectionable. What they do object to are the sometime prohibitive, non-refundable application filing fees to obtain a permit to erect an antenna installation and those provisions in ordinances which regulate antennas for purely aesthetic reasons. The amateur contend, almost universally, that "beauty is in the eye of the beholder." They assert that an antenna installation is not more aesthetically displeasing than other objects that people keep on their property, e.g. motor homes, trailers, pick-up trucks, solar collectors and gardening equipment.

Restrictive Covenants

7. Amateur operators also oppose restrictions on their amateur operations which are contained in the deeds for their homes or in their apartment leases. Since these restrictive covenants are contractual agreements between private parties, they are not generally a matter of concern to the Commission. However, since some amateurs who commented in this proceeding provided us with examples of restrictive covenants, they are included for information. Mr. Eugene O. Thomas of Hollister, California included in his comments an extract of the Declaration of Covenants and Restrictions for Ridgemark Estates, County of San Benito, State of California. It provides:

> No antenna for transmission or reception of radio signals shall be erected outdoors for use by any dwelling unit except upon approval of the Directors. No radio or television signals or any other form of electomagnetic radiation shall be permitted to originate from any lot which may unreasonably interfere with the reception of television or radio signals upon any other lot.

Marshall Wilson, Jr. provided a copy of the restrictive covenant contained in deeds for the Bell Martin Addition #2, Irving, Texas. It is binding upon all of the owners or purchasers of the lots in the said addition, his or their heirs, executors, administrators or assigns. It reads:

> No antenna or tower shall be erected upon any lot for the purpose of radio operations.

William J. Hamilton resides in an apartment building in Gladstone, Missouri. He cites a clause in his lease prohibiting the erection of an antenna. He states that he has been forced to give up operating amateur radio equipment except a hand-held 2 meter (144-148 MHz) radio transceiver. He maintains that he should not be penalized just because he lives in an apartment.

Other restrictive covenants are less global in scope than those cited above. For example, Robert Webb purchased a home in Houston, Texas. His deed restriction prohibited "transmitting or receiving antennas extending above the roof line."

8. Amateur operators generally opposes restrictive covenants for several reasons. They maintain that such restrictions limit the places that they can reside if they want to pursue their hobby of amateur radio. Some state that they impinge on First Amendment rights of free speech. Others believe that a constitutional right is being abridged because, in their view, everyone has a right to access the airwaves regardless of where they live.

9. The contrary belief held by housing subdivision communities and condominium or homeowner's associations is that amateur radio installations constitute safety hazards, cause interference to other electronic equipment which may be operated in the home

(televisions, radio, stereos) or are eyesores that detract from the aesthetic and tasteful appearance of the housing development or apartment complex. To counteract these negative consequences, the subdivisions and associations include in their deeds, leases or by -laws restrictions and limitations on the location and height of antennas or, in some cases, prohibit them altogether. The restrictive covenants are contained in the contractual agreement entered into at the time of the sale or lease of the property. Purchasers or lessees are free to choose whether they wish to reside where such restrictions on amateur antennas are in effect or settle elsewhere.

Supporting Comments

10. The Department of Defense (DOD) supported the ARRL and emphasized in its comments that continued success of existing national security and emergency preparedness telecommunications plans involving amateur stations would be severely diminished if state and local ordinances were allowed to prohibit the construction and usage of effective amateur transmission facilities. DOD utilizes volunteers in the Military Affiliate Radio Service (MARS), Civil Air Patrol (CAP) and the Radio Amateur Civil Emergency Service (RACES). It points out that these volunteer communicators are operating radio equipment installed in their homes and that undue restrictions on antennas by local authorities adversely affected their efforts. DOD states that the responsiveness of these volunteer systems would be impaired if local ordinances interfere with the effectiveness of these important national telecommunication resources. DOD favors the issuance of a ruling that would set limits for local and state regulatory bodies when they are dealing with amateur stations.

11. Various chapters of the American Red Cross also came forward to support the ARRL's request for a preemptive ruling. The Red Cross works closely with amateur radio volunteers. It believes that without amateurs' dedicated support, disaster relief operations would significantly suffer and that its ability to serve disaster victims would be hampered. It feels that antenna height limitations that might be imposed by local bodies will negatively affect the service now rendered by the volunteers.

12. Cities and counties from various parts of the United States filed comments in support of the ARRL's request for a Federal preemption ruling. The comments from the Director of Civil Defense, Port Arthur, Texas are representative:

> The Amateur Radio Service plays a vital role with our Civil Defense program here in Port Arthur and the design of these antennas and towers lends greatly to our ability to communicate during times of disaster. We do not believe that there should be any restrictions on the antennas and towers except for reasonable safety precautions. Tropical storms, hurricanes and tornadoes are a way of life here on the Texas Gulf Coast and good communications are absolutely essential when preparing for a hurricane and even more so during recovery operations after the hurricane has past.

13. The Quarter Century Wireless Association took a strong stand in favor of the issuance of a declaratory ruling. It believes that Federal preemption is necessary so that there will be uniformity for all Amateur radio installations on private property throughout the United States.

14. In its comments, the ARRL argued that the Commission has the jurisdiction to preempt certain local land use regulations which frustrate or prohibit amateur communications. It said that the appropriate standard in preemption cases is not the extent of state and local interest in a given regulation, but rather the impact of that regulation on Federal goals. Its position is that Federal preemption is warranted whenever local governmental regulations relate adversely to the operational aspects of amateur communication. The ARRL maintains that localities routinely employ a variety of land use devices to preclude the installation of effective amateur antennas, including height restrictions, conditional use permits, building setbacks and dimensional limitations on antennas. It sees a declaratory ruling of Federal preemption as necessary to cause municipalities to accommodate amateur operator needs in land use planning efforts.

15. James C. O'Connell, an attorney who has represented several amateurs before local zoning authorities, said that requiring amateurs to seek variances or special use approval to erect reasonable antennas unduly restricts the operation of amateur stations. He suggested that the Commission preempt zoning ordinances which impose antenna height limits of less than 65 feet. He said that this height would represent a reasonable accommodation of the communication needs of most amateurs and the legitimate concerns of local zoning authorities.

Opposing Comments

16. The City of La Mesa, California has a zoning regulation which controls amateur antennas. Its comments reflected an attempt to reach a balanced view.

This regulation has neither the intent, nor the effect, of precluding or inhibiting effective and reliable communications. Such antennas may be built as long as their construction does not unreasonably block views or constitute eyesores. The reasonable assumption is that there are always alternatives at a given site for different placement, and/or methods for aesthetic treatment. Thus, both public objectives of controlling land use for the public health, safety, and convenience, and providing an effective communications network, can be satisfied. A blanket ruling to completely set aside local control, or a ruling which recognizes control only for the purpose of safety of antenna construction, would be contrary to . . . legitimate local control.

17. Comments from the County of San Diego state:

While we are aware of the benefits provided by amateur operators, we oppose the issuance of a preemption ruling which would elevate 'antenna effectiveness' to a position above all other considerations. We must, however, argue that the local government must have the ability to place reasonable limitations upon the placement and configuration of

amateur radio transmitting and receiving antennas. Such ability is necessary to assure that the local decision-makers have the authority to protect the public health, safety and welfare of all citizens. In conclusion, I would like to emphasize an important difference between your regulatory powers and that of local governments. Your Commission's approval of the preemptive requests would establish a 'national policy'. However, any regulation adopted by a local jurisdiction could be overturned by your Commission or a court if such regulation was determined to be unreasonable.

18. The City of Anderson, Indiana, summarized some of the problems that face local communities:

I am sympathetic to the concerns of these antenna owners and I understand that to gain the maximum reception from their devices, optimal location is necessary. However, the preservation of residential zoning districts as 'liveable neighborhoods is jeopardized by placing these antennas in front yards of homes. Major problems of public safety have been encountered, particularly vision blockage for auto and pedestrian access. In addition, all communities are faced with various building lot sizes. Many building lots are so small that established setback requirements (in order to preserve adequate air and light) are vulnerable to the unregulated placement of these antennas. . . . the exercise of preemptive authority by the FCC in granting this request would not be in the best interest of the general public.

19. The National Association of Counties (NACO), the American Planning Association (APA) and the National League of Cities (NLC) all opposed the issuance of an antenna preemption ruling. NACO emphasized that federal and state power must be viewed in harmony and warns that Federal intrusion into local concerns of health, safety and welfare could weaken the traditional police power exercised by the state and unduly interfere with the legitimate activities of the states. NLC believed that both Federal and local interests can be accommodated without preempting local authority to regulate the installation of amateur radio antennas. The APA said that the FCC should continue to leave the issue of regulating amateur antennas with the local government and with the state and Federal courts.

Discussion

20. When considering preemption, we must begin with two constitutional provisions. The tenth amendment provides that any powers which the constitution does not delegate to the United States or does not prohibit the states from exercising are reserved to the states. These are the police powers of the states. The Supremacy Clause, however, provides that the constitution and the laws of the United States shall supersede any state law to the contrary. Article III, Section 2. Given these basic premises, state laws may be preempted in three ways: First, Congress may expressly preempt the state law. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Or, Congress may indicate its intent to completely occupy a given field so that any state law encompassed within that field would implicitly be preempted. Such intent to preempt could be found in a congressional regulatory scheme that was so pervasive that it would be reasonable to assume that

Congress did not intend to permit the states to supplement it. *See Fidelity Federal Savings & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 153 (1982). Finally, preemption may be warranted when state law conflicts with federal law. Such conflicts may occur when "compliance with both Federal and state regulations is a physical impossibility," *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142, 143 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). Furthermore, federal regulations have the same preemptive effect as federal statutes. *Fidelity Federal Savings & Loan Association v. de la Cuesta, supra.*

21. The situation before us requires us to determine the extent to which state and local zoning regulations may conflict with federal policies concerning amateur radio operators.

22. Few matters coming before us present such a clear dichotomy of viewpoint as does the instant issue. The cities, counties, and local communities and housing associations see an obligation to all of their citizens and try to address their concerns. This is accomplished through regulations, ordinances or covenants oriented toward the health, safety and general welfare of those they regulate. At the opposite pole are the individual amateur operators and their support groups who are troubled by local regulations which may inhibit the use of amateur stations or, in some instances, totally preclude amateur communications. Aligned with the operators are such entities as the Department of Defense, the American Red Cross and local civil defense and emergency organizations who have found in Amateur Radio a pool of skilled radio operators and a readily available backup network. In this situation, we believe it is appropriate to strike a balance between the federal interest in promoting amateur operations and the legitimate interests of local governments in regulating local zoning matters. The cornerstone on which we will predicate our decision is that a reasonable accommodation may be made between the two sides.

23. Preemption is primarily a function of the extent of the conflict between federal and state and local regulation. Thus, in considering whether our regulations or policies can tolerate a state regulation, we may consider such factors as the severity of the conflict and the reasons underlying the state's regulations. In this regard, we have previously recognized the legitimate and important state interests reflected in local zoning regulations. For example, in *Earth Satellite Communications, Inc., 95 FCC 2d 1223 (1983),* we recognized that . . . countervailing state interests inhere in the present situation . . . For example, we do not wish to preclude a state or locality from exercising jurisdiction over certain elements of an SMATV operation that properly may fall within its authority, such as zoning or public safety and health, provided the regulation in question is not undertaken as a pretext for the actual purpose of frustrating achievement of the preeminent federal objective and so long as the non-federal regulation is applied in a nondiscriminatory manner.

24. Similarly, we recognize here that there are certain general state and local interests which may, in their even-handed application, legitimately affect amateur radio facilities. Nonetheless, there is also a strong federal interest in promoting amateur communications.

Evidence of this interest may be found in the comprehensive set of rules that the Commission has adopted to regulate the amateur service. Those rules set forth procedures for the licensing of stations and operators, frequency allocations, technical standards which amateur radio equipment must meet and operating practices which amateur operators must follow. We recognize the Amateur radio service as a voluntary, noncommercial communication service, particularly with respect to providing emergency communications. Moreover, the amateur radio service provides a reservoir of trained operators, technicians and electronic experts who can be called on in times of national or local emergencies. By its nature, the Amateur Radio Service also provides the opportunity for individual operators to further international goodwill. Upon weighing these interests, we believe a limited preemption policy is warranted. State and local regulations that operate to preclude amateur communications in their communities are in direct conflict with federal objectives and must be preempted.

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.

26. Obviously, we do not have the staff or financial resources to review all state and local laws that affect amateur operations. We are confident, however, that state and local governments will endeavor to legislate in a manner that affords appropriate recognition to the important federal interest at stake here and thereby avoid unnecessary conflict with federal policy, as well as time-consuming and expensive litigation in this area. Amateur operators who believe that local or state governments have been overreaching and thereby have precluded accomplishment of their legitimate communications goals, may, in addition, use this document to bring our policies to the attention of local tribunals and forums.

27. Accordingly, the Request for Declaratory Ruling filed July 16, 1984, by the American Radio Relay League, Inc., IS GRANTED to the extent indicated herein and, in all other respects, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary
1. [0] *Public Notice*, August 30, 1984, Mimeo. No. 6299, 49 F.R. 36113, September 14, 1984.
2. [0] *Public Notice*, December 19, 1984, Mimeo No. 1498.
3. [0] *Order*, November 8, 1984, Mimeo. No. 770.
4. [0] MARS is solely under the auspices of the military which recruits volunteer amateur operators to render assistance to it. The Commission is not involved in the MARS program.
5. [0] 47 CFR Part 97.
6. [0] We reiterate that our ruling herein does not reach restrictive covenants in private contractual agreements. Such agreements are voluntarily entered into by the buyer or tenant when the agreement is executed and do not usually concern this Commission.

Statement of the Case and the Facts

The Intervenor, Jeremy L. Muller, is licensed by the Federal Communications Commission as an amateur radio operator. In order to carry out the amateur radio activities permitted by said license Mr. Muller applied for and received on December 7, 1998 the necessary permits from the Town of Hudson for the erection of three (3) 100 foot towers on his six acre lot. Said lot contains the single family home which is the Muller family residence and is heavily wooded with many trees at or above 80 feet in height.

The Hudson Zoning Board of Adjustment upon hearing the Plaintiffs' appeal of the issuance of the permit determined that the towers were a permitted use and upheld the issuance of the permit.

The Superior Court (Brennan, J.) reversed the ZBA holding that while amateur radio operation is a customary use in the residential districts of Hudson and therefore ordinarily permitted as an accessory use, the scale of the proposed towers and the potential impact on neighboring properties carries outside that category and "the size and height of these towers in this neighborhood would upset the 'balance between the federal interest in promoting amateur operations and the legitimate interest of local governments in regulating local zoning matters." The Court ordered the towers to be removed completely.

Summary of Argument

The Intervenor's argument may be summarized as follows:

A municipality's power to zone property to promote the health, safety, and general welfare of the community is delegated to it by the State, and the municipality must, therefore, exercise this power in conformance with the enabling legislation. Britton v. Town of Chester, 134 N.H. 434,441 (1991), Durant v. Town of Dunbarton, 121 N.H. 352, 354, 430 A.2d 140, 142 (1981). RSA 674:16 grants municipalities the power to enact zoning ordinances but expressly prohibits any such ordinance which fails to conform with Amateur Radio Preemption, 101 FCC 2nd 952 (1985).

Accordingly:

A) the decision of the Hudson ZBA to allow the amateur radio antennas and supports to be erected should be upheld, as this is a permitted use accessory to a residence;

B) the decision of the Superior Court reversing the granting of building permits is contrary to both Federal and New Hampshire law, and must fail because it does not: 1) reasonably accommodate amateur radio; and 2) represent the minimum practicable restriction of it.

C) the decision of the Superior Court to require removal of all antenna structures is contrary to both Federal and New Hampshire law, and must be overturned, because it effectively precludes amateur radio operation.

Argument

I. The Federal Interest in Amateur Radio

The Amateur Radio Service in the United States operates under the detailed rules and regulations of the Federal Communications Commission (the "Commission" or "FCC"), 47 C.F.R. Section 97.1 et seq., enacted pursuant to Article 41 of the Radio Regulations of the International Telecommunications Union (Geneva 1979), to which the United States in a signatory, and the Communications Act of 1934, as amended, 47 U.S.C. Section 151 et seq. As of July 12, 2000, there were more than 675,000 United States amateur radio operators licensed by the FCC. See http://www.arrl.org/fcc/stats.html. Statistics are extracted periodically from the FCC Public Data Store.

An amateur station is, by definition, a radio station operated by a duly authorized person interested in radio technique solely with a personal aim and without pecuniary interest. Communications Act of 1934, as amended, 47 U.S.C. Section 153(q) (1976). See also 47 C.F.R. Section 97.3. The basis and purpose of the Amateur Radio Service as defined by FCC Rules (47 C.F.R. Section 97.1) is as follows:

> Section 97.1 Basis and Purpose.
>
> The rules and regulations in this part are designed to provide an amateur radio service having a fundamental purpose as expressed in the following principles:
>
> (a) Recognition and enhancement of the value of the amateur service to the public as a voluntary non-commercial communication service, particularly with respect to providing emergency communications.
>
> (b) Continuation and extension of the amateur's proven ability to contribute to the advancement of the radio art.

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

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

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

Amateur radio operators are perhaps best known for assisting rescues at sea, for communications with disaster stricken areas when normal channels of communications are cut, and for the handling of messages, especially "phone patches," for families of persons stationed in remote scientific or military outposts. For example, amateur radio serves as the only way for persons stationed at Antarctica to contact their relatives back home for much of the year. See Frenaye, Amateur Radio at the Bottom of the Earth, QST, April, 1979, at 49. During the Gulf War, amateur radio operators handled messages for troops thorough the Military Affiliate Radio System. In fact, much intelligence information was sent from Kuwait in the days preceding the invasion by a hidden Kuwaiti amateur radio station, relayed through European amateur stations to United States amateur stations, and then to the Pentagon.

The Amateur Radio Service consistently fulfills its responsibility to provide public service communications, especially in emergency situations when other forms of communications are overloaded or nonexistent. A commendation for amateur radio operators appears at 129 Cong. Rec. S15216 (Daily Ed., November 2, 1983) in connection with amateurs' efforts during the United States invasion of Grenada. These services are provided locally, nationally and internationally. The services and value of the Amateur Radio Service are also well known to virtually every city, county and state emergency preparedness officer and agency. Amateurs in communications networks coordinate and provide services during bad weather, such as transportation for physicians, search and rescue, and radio/telephone interconnection for fast reporting of individual emergencies.

In recent years, amateur radio operators provided communications between the United States and the Cayman Islands, Jamaica, and the Mexican communities of Cozumel and Cancun following Hurricane Gilbert and the devastating effects it had on these lands and their people. Also, during efforts to fight forest fires throughout California and in Yellowstone National Park, amateur radio volunteers provided communications assistance that helped speed relief to ravaged areas.

Just this year amateur radio volunteers played an important role in providing emergency communications during tornado emergencies in Kentucky (January), Georgia (February), and Texas (March). In May American radio amateurs provided lifesaving communications in a high seas rescue off the Honduran coast in an incident that received front page attention and involved emergency radio communications over thousands of miles. These activities are chronicled in "The ARRL Newsletter", volume 19, issues 1, 7, 13, and 19, published electronically and available on the World Wide Web at http://www.arrl.org/arrlletter. Radio amateurs also contribute to the advancement of the radio art through technical innovation and advancement of communications skills. The radio amateurs' unique ability to enhance good will at home and abroad make them special ambassadors of our country. These goals and duties are achieved by well-organized networks of privately owned, Federally licensed amateur radio stations assembled by those interested in radio as a source of public service and self-training, ithout pecuniary interest. The FCC in late December, 1983, described the Amateur Radio Service as "a service that is a model of public responsiveness in times of emergency and distress and a service that is a model of self-enforcement and volunteerism." Report and Order, FCC Docket 83-28, released December 23, 1983.

The U.S. Congress has repeatedly spoken of the benefits of a healthy, efficient Amateur Radio Service. In 1988 they recognized the assistance and the importance of

the Amateur Radio Service in an amendment to Senate bill S. 1048, the FCC Authorization Act of 1988 (Pub. L. 100-594):

> (a) The Congress finds that:
> (1) more than four hundred and thirty five thousand four hundred radio amateurs in the United States are licensed by the Federal Communications Commission upon examination in radio regulations, technical principles, and the international Morse code;
> (2) by international treaty and the Federal Communications Commission regulation, the amateur is authorized to operate his or her station in a radio service of intercommunications and technical investigations solely with a personal aim and without pecuniary interest;
> (3) among the basic purposes for the Amateur Radio Service is the provision of voluntary, noncommercial radio service, particularly emergency communications; and;
> (4) volunteer amateur radio emergency communications services have consistently and reliably been provided before, during, and after floods, tornadoes, forest fires, earthquakes, blizzards, train wrecks, chemical spills, and other disasters.
> (b) It is the sense of Congress that:--
> (1) it strongly encourages and supports the Amateur Radio Service and its emergency communications efforts; and
> (2) Government agencies shall take into account the valuable contributions made by amateur radio operators when considering actions affecting the Amateur Radio Service.

See also, Conference Report to the Communications Amendments Act of 1982, Pub. Law #97-259 (1982).

From the foregoing emerge three aspects of the Federal interest in amateur radio communications which must be taken into consideration when the ability of an amateur operator is jeopardized by local regulation: (1) the public service provided by amateurs, especially with regard to emergency communications; (2) advancement of the radio art; and (3) the foreign affairs power of the Federal government.

In the realm of public service, amateurs routinely volunteer their services, sometimes risking lives and equipment to provide emergency communications during disasters. To preclude or impair the amateur's ability to communicate by arbitrarily

prohibiting or restricting the location of his or her station and antennas could therefore result in the unnecessary loss of lives or property.

The second area of Federal interest is the advancement of the radio art. An amateur was the first individual to successfully transmit a radio signal overseas. A significant part of the Amateur Radio Service is devoted to state of the art technological research and experimental uses of radio. Unreasonable local restrictions on the placement or height of antennas employed for experimental use will preclude or seriously impair the effectiveness of research regularly carried on by amateurs at their residences.

Finally, amateur radio provides a relatively inexpensive, yet significant conduit for the exchange of ideas and information between citizens of the United States and citizens of foreign countries. The manner in which the Amateur Service has conducted its affairs in this respect has been recognized as a positive reflection upon the United States government. The United States has acknowledged this important contribution by the Amateur Radio Service and consistently fought to ensure that amateurs have sufficient frequencies for worldwide communications. See Schroeder, The Radio Amateur in International Legislation and Administration, 48 AM.J. Int'l L. 421, 421-24 (1954); Zegarac, Local Regulation of Amateur Radio Antennae and the Doctrine of Federal Pre-emption: The Reaches of Federalism, 9 Pacific L.J. 1041 et seq. (1978). By imposing unreasonable limitations on either the existence or nature of the antennas permitted (i.e., restrictions not necessary in order to insure the safety of a proposed antenna installation and which inhibit effective communications), the amateur's ability to communicate with foreign stations is eliminated or impaired.

An antenna is an absolutely essential part of every amateur radio station. Without it, energy from an amateur station cannot be radiated and signals from other station cannot be received. Particularly on the frequency bands used by radio amateurs for interstate and international communications, an outdoor antenna at a height well above roof level is essential.

The determination of the reasonableness of the local regulations goes directly to the degree of impairment. The height at which an antenna is erected and its physical configuration are crucial to the station's ability to maintain reliable radio communications. Two general rules are applicable with respect to antennas operating in the high frequency (HF) bands (extending from 3 to 30 MHz): (1) the size and optimum height of an amateur antenna varies inversely with the operating frequency; and (2) the range and reliability of communication increases as the height of the antenna above ground increases. For communications in the many amateur VHF and UHF bands (from 50 MHz through the upper reaches of the spectrum) line of sight paths are necessary. In both cases height of the antenna is critical to its performance.

II. The FCC has Preempted Certain Local Regulation of Amateur Radio Antennas

1. Development of Preemption

The FCC has declared a limited preemption over the regulation of amateur radio antennas, as it concerns prohibitions or structural limitations imposed by non-federal entities. Amateur Radio Preemption, 101 FCC 2d 952 (1985); codified at 47 C.F.R.

Section 97.15(e). This preemption is complete in some respects, and partial in others. The history of the FCC's preemption order is relevant to the instant proceeding.

In 1985, the United States Court of Appeals for the Tenth Circuit issued a decision in Guschke v. City of Oklahoma City, 763 F. 2d 379 (10th Cir., 1985), dealing with a challenge by a radio amateur to the denial of a conditional use permit for an antenna greater than the 50 feet permitted by a local ordinance. In that case, it was held that the FCC had, to that time, evidenced no intention of preempting local regulation of amateur antennas, and thus local authorities were able to impose limitations upon amateur antennas, even to the extent of prohibiting amateur communications entirely.

Prior to that Court's decision in Guschke, the American Radio Relay League (the "League") had filed with the Commission a request for a declaratory ruling preempting certain non-Federal regulation of amateur radio stations. Then, following a notice and comment proceeding, in September of 1985, Amateur Radio Preemption was issued. In it the FCC stated, in relevant part:

> * * * * *
> Similarly, we recognize here that there are certain general state and local interests which may, in their even-handed applications, legitimately affect amateur radio facilities. Nonetheless, there is also a strong federal interest in promoting amateur communications. Evidence of the interest may be found in the comprehensive set of rules that the Commission has adopted to regulate the amateur service. Those rules set forth procedures for the licensing of stations and operators, frequency allocations, technical standards which amateur radio equipment must meet and operating practices which amateur operators must follow. We recognize the Amateur radio service as a voluntary, noncommercial communication service, particularly with respect to providing emergency communications. Moreover, the amateur radio service provides a reservoir of trained operators, technicians and electronic experts who can be called on in times of national or local emergencies. By its nature, the Amateur Radio Service also provides the opportunity for individual operators to further international goodwill. Upon weighing these interests, we believe a limited preemption policy is warranted. State and local regulations that

> operate to preclude amateur communications in their communities are in direct conflict with federal objectives and must be preempted.
>
> 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 that others if they are to provide the amateur operator with the communications 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...[L]ocal 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.
>
> (Id, at 959-60)(citations omitted; emphasis added)

The FCC had clearly noted the 10th Circuit's assumption in Guschke of an apparent absence of intent on the part of the Federal government to preempt amateur antenna regulation, and consequently clarified its position on the matter. The result was a preemption of local regulation of amateur radio embodied in a three part test:

1) state and local regulations may not preclude amateur radio; and

2) local regulation must reasonably accommodate amateur radio; and

3) regulation, where allowed, must be held to the minimum practicable level.

While this preemption viewed in its entirety is partial, in certain respects it is complete. In particular, regulation which effectively precludes amateur communications is completely swept aside.

2. Authority of the FCC to Preempt Local Regulation

Following the release of Amateur Radio Preemption the question which then faced the courts, as indicated in Guschke, was whether such an action was within the

FCC's authority, and whether it was reasonably exercised. A series of cases following Amateur Radio Preemption have uniformly held that the preemption order was a proper exercise of the Commission's authority.

The first of these cases is Thernes v. City of Lakeside Park, Kentucky, et al., 779 F. 2d 1187, 59 Pike and Fischer Radio Regulation 2nd Series 1306, on remand, 62 Pike and Fischer Radio Regulation 2nd Series 284 (6th Circuit, 1986) (E.D. Kentucky, 1984). In that case, an amateur was denied a building permit for an antenna support structure, although the city agreed to suffer the continuation of a twenty-foot-high wire antenna, erected as a temporary measure by the amateur, and which was clearly inadequate. The amateur had proposed a 73-foot support structure, atop which were to be located eight feet of antennas. As in Guschke, the District Court (E.D. KY) found, (prior to issuance of the Amateur Radio Preemption order), no apparent federal preemption of local regulation of amateur radio antennas. Pending appeal in the Sixth Circuit, however, the FCC issued its preemption order. Upon consideration by the Sixth Circuit Court of Appeals of the FCC's legitimate "exercise of its... preemptive powers," the action by the city was declared unlawful, and the case was remanded to the District Court for action consistent with the FCC's order. On remand, the District Court ruled that:

> ...the defendants shall allow the plaintiff to erect, maintain and use an amateur radio antenna system (at 73 feet as proposed)...unaffected by any present or future ordinances of the city to the contrary, and shall issue to plaintiff all permits therefor.

There have been no cases declaring Amateur Radio Preemption an unlawful use of FCC authority, or which have even questioned the application of the ruling to limit municipal regulation of individual amateur radio stations through police power zoning authority.

3. Reasonable Accommodation

Following Thernes, in Bodony v. Incorporated Village of Sands Point, et al., 681 F. Supp. 1009, 64 Pike and Fischer Radio Regulation 2nd Series 307 (E.D. NY, 1987), the United States District Court for the Eastern District of New York invalidated a 25 foot height limitation in a municipal ordinance, which interfered with the amateur's "right to the full use of his amateur extra class license and the license to use his property as an amateur radio station issued by the FCC." The Court based its ruling on Amateur Radio Preemption.

Immediately after Bodony, another Federal court issued a decision in Bulchis v. City of Edmonds, 671 F. Supp. 1270 (W.D. Wash, 1987), which held that although the City's zoning ordinance governing the height of radio antennas was not invalid on its face, (because it permitted greater antenna height through a conditional use permit process), the application of the ordinance to the amateur's communications needs (i.e., the denial of a conditional use permit) did frustrate federal goals in regulating amateur radio communications. In short, the Court found that, as the ordinance was applied, "it did not provide for the reasonable accommodation of amateur radio communication," as required by Amateur Radio Preemption.

Another case supporting the Amateur Radio Preemption order is Izzo v. Borough of River Edge, et al., 843 F.2d 765 (3d Cir., 1988) which held that the FCC's preemption order "infuses into the proceeding a federal concern, a factor which distinguishes the case from a routine land use dispute having no such dimension." The Court recognized that "(b)ecause the effectiveness of radio communication depends on the height of antennas,

local regulation of those structures could pose a direct conflict with federal objectives." The matter was remanded to the District Court, and subsequently the municipality issued the requested antenna permit.

It is apparent that the essence of the FCC's preemptive intent as expressed in Amateur Radio Preemption was to insure a basic guarantee that each amateur radio operator could install functional antennas at the licensee's residence. This was made clear in September of 1989 when FCC revised its amateur radio rules to codify the essential holding of Amateur Radio Preemption, as follows:

> (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 or local authority's legitimate purpose. See, PRB-1, 101 FCC 2d 952 (1985) for details.]

The FCC has purposely placed few specific restrictions on the height of amateur radio antennas. See 47 C.F.R. 97.15. Only if the radio amateur is near an airport or requires an antenna higher than 200 feet in order to communicate effectively must he or she get special FCC approval. Because of the relationship between antenna height, terrain obstacles, and the susceptibility of home electronic equipment to interference from antennas in the same horizontal plane, the FCC has allowed amateur radio operators virtually unfettered discretion for ascertaining proper antenna height up to 200 feet.

In contrast, the FCC has determined that Citizens Band (CB) antennas, used for communications up to only 150 miles, may be erected at heights up to 60 feet: "to enable licensees to erect antennas above nearby obstacles which may absorb radiated energy and

thus decrease ability to communicate. The Commission believes that the 60-foot maximum proposal of this Notice represents a reasonable antenna height which will accomplish this purpose. Moreover, this increase in permissible height may tend to decrease television interference problems since it will allow increased height differential between (CB) antennas and television antennas." Antenna Height Restrictions, 42 F.C.C. 2d 511, at 513. Because the Citizen's Radio Service operates on a frequency adjacent to the highest HF amateur frequency band, antennas for the Amateur Radio Service must, assuming many other favorable factors and ideal ionospheric conditions, be at least that high in order to be even minimally effective, even on that one band. Antennas for lower frequency bands must be higher still.

The topography of the site, the presence of geographic obstacles such as hills or mountains, the frequency bands used, the eleven-year sunspot cycle, and many other technical factors must all be considered when a radio amateur decides how high to place his or her antenna. Local restrictions on amateur antennas which preclude effective, reliable antenna systems and amateur communications take away this important discretion intentionally given by the FCC to the Amateur Radio Service. As Thernes and Bodony each recognized, without specific and substantiated concerns for public health, safety or other compelling purposes, and except to the extent that amateur radio communications are "reasonably accommodated", prohibitions on antennas, or preclusive limitations violate the FCC's preemption regulation.

It should be noted that the FCC’s intent was not merely that typical amateur radio operation be accommodated, but rather that the specific legitimate desires of the particular radio amateur be considered.

> Some amateur antenna configurations require more substantial installations than others if they are to provide the amateur operator with the communications he/she desires to engage in. (Amateur Radio Preemption, at 960)

Mr. Muller's desire to engage in substantial international communication, and the need for substantial antennas in order to do this, were presented to the Town of Hudson ZBA. The facts that three 100-foot antennas are unusual for most other amateurs, or that Mr. Muller is not an average amateur radio operator, are of little relevance; Amateur Radio Preemption directs that the determination of reasonable accommodation be based on Mr. Muller's situation alone.

4. Balancing of Interests

In the present case, the Superior Court found that the decision of the Town of Hudson would upset the balance between federal and local interests. Some recent cases have held that, where a zoning conditional use permit process exists, local authorities must balance the communications needs against whatever legitimate land use needs exist. The "balancing test" concept is typically attributed to three conditional use permit cases: MacMillan v. City of Rocky River, 748 F. Supp. 1241, 1248 (N.D. Ohio 1990); Williams v. City of Columbia, 906 F.2d 994, 997 (4th Cir. 1990); and Howard v. City of Burlingame, 937 F.2d 1376 (9th Cir. 1991). In MacMillan, the Court stated:

> The court concludes that §1333.02 is not facially invalid since it provides a sufficient structure for balancing state and federal interests as required by PRB-1. By its terms the ordinance provides for a balancing of the effect of an improvement on neighboring property values against the reasonable need for the improvement to develop the property. As interpreted by Defendant, however, reasonable need in this situation involves reasonable need for the particular antenna to carry on effective communication of the type desired (citation omitted). Interpreted as such,

> the ordinance could be applied to give reasonable consideration to both the city's local interests and Plaintiff's federally protected interest in amateur radio operation.

In Williams, the 4th Circuit enunciated the applicable PRB-1 test as follows:

> The law requires only that the City balance the federally recognized interest in amateur radio communications with local zoning concerns. 906 F. 2d at 998.

In Howard, the 9th Circuit parroted the balancing test, stating:

> In enacting PRB-1, the F.C.C. declined to specify absolute height limitations or maximums, and refused to entirely preempt the field. Instead, it established a compromise, stating that:
>
> > local regulations which involved 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.
>
> PRB-1, ¶ 25. Clearly, this does not contemplate the outright invalidation of city zoning authority over backyard antenna height (footnote omitted) nor does it appear to confer rights upon licensees to anything more than "reasonable accommodation." Instead, the rule leaves a city free to deny an antenna permit as long as it has considered the application, made factual findings, and attempted to negotiate a satisfactory compromise with the applicant. See, e.g. Williams v. City of Columbia, 906 F. 2d 994, 997 (4th Cir. 1990) (affirming second denial of variance for 65-foot antenna after reconsideration in light of PRB-1); MacMillan v. City of Rocky River, 748 F. Supp. 1241, 1248 (N.D. Ohio 1990) (PRB-1 does not mandate that city approve antenna).

Notwithstanding these interpretations of the PRB-1 standard, which obviously leave municipalities free to deny permits virtually at will, the "balancing test" was specifically rejected by at least the 8th and 10th Circuits. In Evans v. Board of County Commissioners, 752 F. Supp. 973, 976-77 (D. Colo. 1990), the 10th Circuit held

specifically that the balancing test is an insufficient representation of the FCC's goals in PRB-1:

> The Board in drafting its resolution mischaracterized its responsibility to reasonably accommodate as a balancing test. "(In) performing this required balancing, the Board finds that the needs of the Applicant...do not outweigh the adverse impacts on the neighborhood." This balancing approach was adopted by the Fourth Circuit. "The law requires only that the City balance the federally recognized interest in amateur radio communications with local zoning concerns." Williams, 906 F.2d at 998. We believe the balancing approach underrepresents the FCC's goals as it specifically selected the "reasonably accommodate" language. Nevertheless, despite its mischaracterization, Boulder County made efforts to reasonably accommodate Evans' communication needs. In this case, denial of the permit after evaluating options and thoroughly considering the relevant evidence was a reasonable accommodation.

In Pentel v. City of Mendota Heights, 13 F.3d 1261 (8th Cir. 1994) the 8th Circuit properly noted that it was the FCC itself that did the balancing of interests, as is proper in any Supremacy Clause Federal Preemption action of a Federal agency, and left the municipality the obligation instead to apply the "no prohibition", "reasonable accommodation" and "least practicable restriction" tests of PRB-1 as absolute obligations of the municipality:

> Courts applying PRB-1 have discerned two means by which PRB-1 may preempt a local ordinance. First, the local regulation may be preempted on its face. The city's zoning ordinance does not conflict on its face with PRB-1 because it neither bans nor imposes an unvarying height restriction on amateur radio antennas. (citations omitted).
>
> Second, PRB-1 also preempts a zoning ordinance that a city has not applied in a manner that reasonably accommodates amateur communications. (citations omitted). The FCC refused to specify a height below which local governments could not regulate, and instead declared that "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." PRB-1, par. 25.

> Initially, we must discuss the extent to which this language requires municipalities to yield to amateur interests. Although some courts have evaluated whether the municipality properly balanced its interests against the federal government's interests in promoting amateur communications, See Williams v. City of Columbia, 906 F. 2d 994 (4th Cir. 1990); MacMillan, 748 F. Supp. at 1248, we read PRB-1 as requiring municipalities to do more -- PRB-1 specifically requires the city to accommodate reasonably amateur communications.(footnote discussed infra) See Evans, 994 F. 2d at 762-63. This distinction is important, because a standard that requires a city to accommodate amateur communications in a reasonable fashion is certainly more rigorous than one that simply requires a city to balance local and federal interests when deciding whether to permit a radio antenna.

A footnote to the above paragraph elaborates on the 8th Circuit's holding that the FCC did the balancing and did not intend for a municipality to do the same thing. The balancing test is akin to a fox in the hen house being asked to balance his own hunger against the interest of the hens in their continued existence:

> At various places in PRB-1, the FCC states that, in considering the issue before it, it weighed federal and amateur operator interests against those of local governments. After balancing these interests, the standard that the FCC concluded was appropriate was that a local government must reasonably accommodate amateur radio communications. See, PRB-1 ¶¶ 22, 24.

In February of 1996, the American Radio Relay League, Incorporated filed a petition for rulemaking with the FCC asking for various clarifications of PRB-1, given extensive experience with it, and noting certain abuses and interpretational problems on the part of municipalities in applying the policy. The FCC issued an order addressing that Petition in November of 1999. While the FCC refused to issue most of the requested clarifications, (Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antennas and Support Structures, Order, DA 99-2569, 14 FCC Rcd. 19413, released November 19, 1999; (reconsideration pending), it did address the municipal "balancing test", calling it "not appropriate in this context":

> Petitioner further requests a clarification of PRB-1 that local authorities must not engage in balancing their enactments against the interest that the Federal Government has in amateur radio, but rather must reasonably accommodate amateur communications (footnote omitted). We do not believe a clarification is necessary because the PRB-1 decision precisely stated the principle of "reasonable accommodation". In PRB-1, the Commission stated: "Nevertheless, local regulations which involve placement, screening or height of antennas based on health, safety, or aesthetic consideration must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose." (citation omitted). Given this express Commission language, it is clear that a "balancing of interests" approach is not appropriate in this context.

Given the foregoing, the test articulated in MacMillan, and adopted in Williams and repeated in Howard, but rejected specifically in Evans and Pentel, and specifically rejected by the FCC as not appropriate, should be rejected by this Court. In the present case, the Superior Court specifically applied an incorrect standard in evaluating Mr. Muller's entitlement to a functional amateur radio antenna system. It was inappropriate for the Superior Court to consider the balance between the federal and state interests. The applicable standard is whether the Town of Hudson made reasonable accommodation for the amateur radio facilities, and did so with minimum practicable regulation.

5. Minimum Practicable Restriction

The bulk of cases decided to date have dealt with ordinances and/or procedures that had been alleged to preclude effective amateur radio operation, and have therefore focused on the no preclusion” and "reasonable accommodation" prongs of the test. There is, of course, a third part of the test. Regulation, where allowed, must be of a form that "represents the minimum practicable regulation to accomplish the local authority's legitimate purpose", Amateur Radio Preemption, at 960. In Pentel v. City of Mendota

Heights, 13 F. 3d 1261 (8th Cir. 1994), the applicant sought a variance to erect a 68 foot amateur radio antenna. Her application was denied, although the city council granted her a special use permit for a previously installed 56.5 foot antenna. A grant of summary judgment to the city was reversed, and summary judgment granted to the plaintiff. In concluding its decision, the court focused on the appropriate test.

> "PRB-1 requires the city reasonably to accommodate Pentel's needs as an amateur radio operator; what is allowed is the "minimum practicable regulation [necessary] to accomplish the local authority's legitimate purpose" "

Id. at 126.

III. Application of RSA 674:16 and RSA 674:17

In 1995 New Hampshire amended the zoning enabling statute, adding a section invoking the federal requirements:

> Except as provided in RSA 424:5 or RSA 422-B or in any other provision of Title XXXIX, no city, town, or county in which there are located unincorporated towns or unorganized places shall adopt or amend a zoning ordinance or regulation with respect to antennas used exclusively in the amateur radio services that fails to conform to the limited federal preemption entitled Amateur Radio Preemption, 101 FCC 2d 952 (1985) issues by the Federal Communications Commission. RSA 674:15, IV; also RSA 674:17, III.

In adopting by reference the federal regulations, the statute establishes the three pronged test to be applied when considering the validity of a local regulation of an amateur radio antenna.

It is axiomatic that a zoning ordinance should be construed where possible to be in conformity with the enabling legislation. Since the Hudson Zoning Ordinance makes no express provision for amateur radio towers, it violates the enabling legislation unless

the accessory use doctrine serves to permit such towers in accord with Amateur Radio Preemption, 101 FCC 952 (1985).

IV. Accessory Use and the Application of the Town of Hudson Zoning Ordinance

The Plaintiff contends that the proposed amateur radio antennas are not an accessory use. The Town of Hudson Zoning Ordinance is of the so-called permissive type; it permits only those uses specifically enumerated and whatever is not permitted is prohibited. Accessory uses are permitted by Sec. 34-22, "other customary uses and structures."

As pointed out in the previous sections, amateur radio is a widespread activity engaged in by nearly three quarters of a million Americans. The overwhelming majority of their radio stations are located in homes. This is to be expected. The Federal regulations on amateur radio are unequivocal; amateur radio may not be used for any commercial or business purposes. The FCC Rules (47 C.F.R. 97.113) state:

Section 97.113 Prohibited transmissions

(2) No amateur station shall transmit:

******

(2) Communications for hire or for material compensation, direct or indirect, paid or promised, except as otherwise provided in these rules;
(3) Communications in which the station licensee or control operator has a pecuniary interest, including communications on behalf of an employer. Amateur operators may, however, notify other amateur operators of the availability for sale or trade of apparatus normally used in an amateur station, provided that such activity is not conducted on a regular basis.

*****

> (c) A control operator may accept compensation as an incident of a teaching position during periods when an amateur station is used by that teacher as a part of classroom instruction in an educational institution.
> (d) The control operator of a club station may accept compensation for the periods of time when the station is transmitting telegraphy practice or information bulletins. …

The Hudson Zoning Ordinance, like most in the State of New Hampshire is "permissive." That is it lists the uses which are allowed and prohibits all others. The rule of accessory use is in response to the impossibility of providing expressly by zoning ordinance for every possible lawful use. Loughlin, 15 New Hampshire Practice: Land Use Planning and Zoning Sec.9.02. In Becker v. Town of Hampton Falls, 117 N.H. 437, 440 (1977), this Court determined that a use was not accessory where it had not "commonly, habitually, and by law and practice been established as reasonably associated with the primary residential use in the town. Amateur radio operation is, however, just such a use.

Amateur radio is widely prevalent. There are over 675,000 amateur stations in the United States. Over 4,900 of these are in New Hampshire. There are 106 amateur radio stations licensed just in the Town of Hudson. See http://www.arrl.org/fcc/stats.html. Figures are for July 12, 2000.

In other jurisdictions the great weight of legal authority indicates that amateur radio antennas are reasonable and proper uses normally incident a residence. In Dettmer v. County Board of Zoning Appeals, 28 Ohio Misc. 35, 273 N.E. 2d 921 (1971), it was held that a sixty-four foot high amateur radio antenna in a residential, single family zone was permissible as an accessory use customarily incident to single family dwellings. In Town of Paradise Valley v. Lindberg, 28 Ariz. App. 70, 551 P. 2d 60, 81 A.L.R. 3rd 1080 (1976), a ninety foot high amateur radio antenna was held to be a permitted use

accessory to a single family residence. Village of St. Louis Park v. Casey, 218 Minn. 394, 16 N.W. 2d 459, 155 A.L.R. 1128 (1944) held that a sixty foot high pole and two thirty foot high poles supporting a wire amateur antenna were permitted as an incidental use of residential property. In Skinner v. Zoning Bd. of Adjustment, 80 N.J. Super. 380, 193 A.2d 861 (1963), a one hundred foot high amateur antenna was held to be a permitted accessory use of residential property.

New York is the only state whose highest court has held that an amateur radio antenna is not a use customarily incident to residential property. In Presnell v. Leslie, 3 N.Y.2d 384, 144 N.E.2d 381, 165 N.Y.S.2d 448 (1957) it was held that, in the absence of any evidence as to the extent to which amateur radio is "customary" in the United States, it could not be held that such use is a reasonable ancillary use of residential property. This case is an aberration because of the absence of trial evidence of the "customary" element. Also, in 1957 there were far fewer amateurs than today. Now, there can hardly be found a neighborhood without a licensed amateur. Whereas the total U.S. amateur population in 1957 was approximately 165,000, there are now in excess of 675,000.

Presnell v. Leslie has not been followed in other states. No better explanation can be found than the one in the Presnell dissent:

> Although amateur radio sending and receiving stations are less frequently encountered than television sets, they are also inseparably connected with the home if one is an amateur operator; that is to say, 'ham' radio operators cannot carry on this activity except in conjunction with their homes. Prohibiting the erection and maintenance of suitable aerials outlaws this activity for practical purposes. Id. at 393, 144 N.E.2d at 386 165 N.Y.S.2d at 496 (dissenting).

There is reason to believe that the majority in Presnell was simply wrong on the issue of "customary use." As early as 1944 it was held in Village of St. Louis Park v. Casey, supra, that:

> The use of short-wave amateur sets for both reception and transmission is so common in the United States that the Federal Communications Commission licenses such sets for transmission within certain wave lengths, and there is an American Radio Relay League of the proprietors of amateur stations. That many, if not most, of these amateur stations are operated in connection with residences is too well known a fact to be ignored.
>
> If the proprietor of a radio set is willing to make the necessary investment in a set capable of communicating with other parts of the world, he is still, if licensed to do so, within the legitimate field of amateur radio and within the normal and, so far as amateurs are concerned, within the customary use of residential establishments by such amateurs.

Municipal governments occasionally erroneously rely on Kroeger v. Stahl, 248 F.2d 121 (3rd Cir. 1957) to support the proposition that regulation of antenna structures, even to the extent of prohibiting them through zoning, is a valid exercise of the police power. This case is not applicable or relevant to amateur radio antennas, or the legitimacy of local regulations thereof. Kroeger involved an attempted commercial use of the residential property; a commercial land mobile radio mobile user sought permission to construct a seventy-five foot antenna mast in a residentially zoned area. Amateur radio, on the other hand, is a purely non-commercial activity. Any compensation for use of the station is strictly prohibited by the FCC's rules. See 47 C.F.R. Section 97.113. This section also prohibits business communications.

Amateur radio is a use normally incident to residential property, and antennas essential to effective communication are a necessary part of this permissible and proper residential use.

V. Issues of Interference and Safety

Although not specifically mentioned in the Superior Court decision, concerns by abutters about the safety of radio and about radio interference were raised before the ZBA hearings and answered by Mr. Muller. On the matter of radio interference, federal regulation preempts all state and local action. In Southwestern Bell v. Johnson County Board of County Commissioners, 199 F.3d 1185 (10th Cir. 1999) the court found that FCC regulation completely occupies the field of radio frequency interference (RFI).

> We agree with these courts and the district court in this case that based on statutes and agency regulations and adjudications, Congress intended federal regulation of RFI issues to be so pervasive as to occupy the field. (Id. at 1193).

See also Freeman v. Burlington Broadcasting, Inc., 204 F.3d 311 (2nd Cir. 2000).

On the issue of exposure to radio frequency energy, the FCC has laid down an extensive set of safety standards (47 CFR 1.1307). Radio amateurs and their stations are subject to these standards. They must evaluate their stations and insure at all times that operation does not exceed the proscribed levels. 47 CFR 97.13.

Conclusion

The Amateur Radio Service is composed of individually licensed radio operators and stations. The FCC does not license a "network" of amateurs; each is regulated individually and separately. Land use regulators, be they in the form of zoning boards or neighborhood associations or architectural control boards, in order to comply with the FCC's preemption order, must reasonably accommodate the communications needs of each individual amateur station, and enact the minimum practicable regulations relative thereto.

1. The Superior Court in this case has ordered the removal of the three towers for which the Town of Hudson granted building permits. This leaves the Mr. Muller with no antennas at all. With no antennas there is no radio. Amateur Radio Preemption is clear in this regard; some form of antenna system must be allowed. Thus, the Order of the Superior Court to remove the towers is contrary to both New Hampshire and Federal law, and must be reversed.

2. The Town of Hudson, based on extensive hearings and consideration of evidence, determined that the Mr. Muller's three towers on a six acre lot constitute a permitted accessory use, and approved the granting of building permits. Their decision, based on evidence, should be honored, and the Superior Court reversed.

3. In supporting its building inspector and allowing the Mr. Muller to erect his antenna installation, the Town of Hudson reasonably accommodated amateur radio in general,

and Mr. Muller's use in particular, as required by New Hampshire and Federal law. The Town's decision should be upheld, and the Superior Court reversed.

_____
Date

Respectfully Submitted,
Jeremy L. Muller
By his attorneys

Bolton Law Offices, P.A.

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Steven A. Bolton

and

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Michael N. Raisbeck

CERTIFICATION

I hereby certify that copies of the foregoing brief have been sent by first-class mail to other counsel in this case, Andrew Prolman, Prunier & Leonard, for the Plaintiffs and John J. Ratigan, of Donahue, Tucker & Ciandella, for the Defendant.

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Steven A. Bolton

Oral argument not to exceed 15 minutes is requested to be made by Michael N. Raisbeck if Motion for Admission Pro Hac Vice is granted and otherwise by Steven A. Bolton.