STATE OF NEW HAMPSHIRE

SUPREME COURT

2002 TERM

FEBRUARY SESSION

DOCKET No. 2001-440

KOOR COMMUNICATION, INC.

v.

CITY OF LEBANON

PLAINTIFF'S REPLY BRIEF

Plaintiff's Attorneys:

K. William Clauson, Esq.
Clauson & Atwood
10 Buck Road
Hanover, NH 03755-2700
603/643-2102

Fred Hopengarten, Esq.
Six Willarch Road
Lincoln, MA 01773-5105
781/ 259-0088

TABLE OF AUTHORITIES

NEW HAMPSHIRE CASES

NEW HAMPSHIRE RULES

FEDERAL CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

TREATISES

Summary of Argument

1. Lebanon neither cites nor analyzes the relevant federal regulations for AM broadcasting at 47 C.F.R. §§74.45, 73.189 and 73.190. The City does, however, analyze unrelated preemption cases, in the hope, one supposes, that this Court will be blinded by off-topic discussion.

2. Lebanon's claim that there is no federal preemption, because Koor can comply with both federal and local regulations *by not broadcasting at all*, is astonishing.

3. Lebanon claims the height restriction is not *aimed* at AM broadcast antennas. This is irrelevant, where its effect is to prohibit all AM broadcasting.

4. The denial of Koor's application for a variance has no bearing on this claim of federal preemption. Towers lawfully erected under the *prior* zoning ordinance do not support an argument that prohibition under the *new* zoning ordinance is valid.

5. A zoning ordinance is invalid when the particular use excluded from a municipality is protected by the First Amendment. That was exactly the finding in *Metromedia v. San Diego*, 453 U.S. 490 (1981), which Lebanon chooses to ignore.

Argument

1. Lebanon neither cites nor analyzes the relevant federal regulations at 47 C.F.R. §§73.45, 73.189 and 73.190. The City's claim that there is no preemption for AM broadcast antennas is not supported by its argument.

Lebanon does not address *implied preemption* by specific federal regulation.

Lebanon claims there is *no express preemption* because:

(1) express preemptive regulations were adopted for amateur radio (also earth station receivers and cell phones); and

(2) proposed express preemptive regulations for digital television broadcast towers were not adopted.

Neither argument addresses or even relates to the point of this case. Neither argument refutes the long history of case law that federal preemption does not depend upon *express* preemptive regulation.

Certainly the failure of the FCC to adopt particular express preemptive regulations as to digital television (FCC Docket No. 97-296) is not evidence that its technical regulation of AM broadcast stations is not preemptive.

a. The preemption rule. Lebanon's bylaw limiting tower height is invalid because it is preempted by 47 C.F.R. §§73.45, 73.189 and 73.190 which require, with great exactitude - based on the technical issue of interference - minimum tower height. The federal preemption found in those sections does not require the express use of the word "preemption" -- that is why Koor's claim is one of *implied* preemption.

Koor notes that **Lebanon neither cites nor analyzes the "minimum antenna heights" regulations authorized by 47 U.S.C. §301 and implemented by 47 C.F.R. §§73.45, 73.189 and 73.190[1].**

The preemption for AM broadcast antennas found in §73.189 does not apply to cellular telephone, satellite TV or amateur radio. The FCC mandates AM broadcast antenna height to control the pattern of the transmitted signal and to prevent interference. *This preemption is not broad, it is rule specific.*

Koor makes the narrow claim that 47 C.F.R. §73.189 preempts only for AM broadcast stations, and *only to the height necessary* in accordance with Exhibit 7 of §73.190, which is specifically *in proportion to class of license and frequency*. The FCC assigns the frequency and controls the antenna size.

The Trial Court recognized that the issue is much narrower than Lebanon claims when it wrote:

> [A]ssuming arguendo that all new AM towers are effectively precluded, the City's height restrictions are nevertheless legal and constitutional. [City's Motion, NOP App. at 409].

[1] In Lebanon's Brief, note the Table of Contents: "There is no FCC Preemption of Broadcast Tower Height Zoning." Contrast with Lebanon's Brief text at page 16: "There is No FCC Preemption of Commercial Tower Height."

Lebanon's brief displays that, even at this late date, the City does not understand Koor's position, or misstates it. Koor does not claim preemption of "Broadcast Tower Height"; that claim would be overbroad. It would refer to broadcast television, including digital TV, broadcast FM, STL (Studio to Transmitter Links), weather radar, etc. Nor does Koor claim "Preemption of Commercial Tower Height". That claim would also be overbroad and would refer to two-way radio (such as used by taxis, ambulances, police, fire, etc.); PCS and cellular telephone; microwave links; as well as broadcasting of all sorts such as television and FM.

While Koor asserts that the Trial Court was wrong in its conclusion, at least the Trial Court had the correct question before it.

Koor's argument is that 47 CFR §§73.45, 73.189 and 73.190 mean what they say and preempt the height limitation for the class of antennas to which it applies, *i.e.*, AM broadcast antennas--and only to the extent of height as shown in §73.190, Exhibit 7, by frequency and class of license.

b. The First Amendment. The preemption claim is enhanced by the First Amendment argument because the presence of the First Amendment subjects the zoning bylaw to heightened scrutiny.

c. Lebanon's Citation of Cases. There is no case citation supporting Lebanon's view that federal supremacy must be based on an express ruling of preemption.

Lebanon cites *State of Missouri, ex. Rel., Columbia Tower, Inc. v. Boone County,* 824 S.W.2d 534 (Mo. App. Ct. 1992), for the proposition "that the general rule of non-preemption for **commercial** towers remained" (emphasis added) undisturbed by the issuance of a limited preemption by the FCC for amateur radio in 1985. Yet, Lebanon recites that *Columbia Tower* involved a 620 foot tower for an **FM radio** station; a station clearly not subject to the only FCC source of preemption Koor claims, 47 C.F.R. §73.189. That FCC regulation provides preemption for only **AM broadcast** stations, where the height is required for antenna performance that avoids interference. TV and FM radio have no antenna efficiency requirements (and, consequently, no charted minimum height requirements).

Antenna efficiency requirements (*see* 47 C.F.R. §73.189(a)) exist only for AM broadcast stations, because of nighttime "skip" (signals traveling long distances because they bounce off the ionosphere, called "skywave" in §73.190(b)).

Kroeger v. Stahl, 248 F.2d 121 (3d Cir. 1957), also relied upon by Lebanon, involved a commercial two-way radio tower in a residential zone. It did not involve AM broadcasting, nor was it a community-wide ban.

Furthermore, Lebanon refers this Court (at page 13 of its Brief) to *Schroeder v. Los Angeles* (*sic*), 141 Cal. Rptr. 85 (Cal. App. 1977), an amateur radio case. *Schroeder* should be read for its **support of preemption in the case at bar** when it holds:

> In a pre-emption case the fundamental inquiry is whether local legislation will conflict with national policy; if the activity is of predominantly local interest then state action may be permissible, but if a uniform national rule is necessary then federal pre-emption will be implied. The fundamental rationale for the Communications Act of 1934 is based on the fact that the number of available radio frequencies is finite, and therefore, Congress must exercise its power over interstate commerce to allocate available frequencies and control their use. Unquestionably, federal legislation has pre-empted local regulation of radio communication[2], including assignment of frequencies, interference phenomena, and the content of broadcast material. As stated, existing authority regarding regulation of antenna height has found sufficient local interest to sustain local regulation. Also, the **federal regulation of amateur radio operators (47 C.F.R. §§ 97 et seq.) reveals no detailed regulation of antenna height**, but rather one blanket limitation on height to 200-foot (47 C.F.R. §94.45), plus extensive height regulation in the vicinity of airports. The FCC has not exhibited concern over antenna height where airport safety is not involved. **By contrast, many detailed regulations govern the assignment of frequencies and the prevention of interference phenomena** (*see* e.g., 47 C.F.R. §§97.73, 97.131, 97.133), and there can be **no doubt that federal regulation has pre-empted control in those areas.** [Emphasis added and citations omitted.]

[2]The phrase "radio communication" was "microwave transmission" in the original opinion. However, on October 13, 1977, the Opinion of the Court of Appeal was modified, by changing the word "microwave" to "radio" wherever it appeared in the Opinion and similarly by changing the words "microwave transmission" to "radio communication."

d. Conclusion. Lebanon consistently takes the position that it has no obligation to allow AM broadcast antennas within the City. Lebanon argues that it does not regulate technical matters, it regulates height. *Yet the FCC regulates height because, to the FCC, height is a technical matter*. (See Koor's FCC Application, Appendix at 78-215). When Lebanon limits antenna height, Lebanon is frustrating the FCC's regulation of this technical matter. The FCC found that height controls interference, and instituted minimum height requirements to prevent interference. Interference is a technical matter. The FCC's control of height preempts the City's ordinance.

Koor refers this Court to 47 U.S.C. §301, 47 C.F.R. §§73.45, 73.189, and 73.190 (especially Figure 7), which, together, comprise the implied preemption which is:

- **authorized by Congress,**
- **a detailed regulation of antenna height,**
- **specific to the frequency and class of license assigned,**
- **to prevent interference.**

2. Lebanon's argument that compliance with both the ordinance and FCC regulations is not physically impossible where Koor can choose not to have an AM broadcast station is preemption law upside down.

Incredulously, Lebanon argues:

> "The Plaintiff ***can*** comply with both sets of regulations, simply by not erecting the antennas it desires to erect." (Brief, City of Lebanon, January 29, 2002 at 9).

Koor is reminded that the participants in the Boston Tea Party complained of "taxation without representation." Following the same logic, Lebanon's argument would be: "There is no taxation, if you don't drink tea."

On these grounds, no restrictive ordinance litigation has ever been necessary--as a complainant could always comply with both a restrictive ordinance and the preemptive law (whether it is a state law, federal regulation, or a constitutional right) by simply walking away from the conflict. In *Metromedia v. San Diego*, 453 U.S. 490 (1981), the complainant could have avoided the City's ordinance banning billboards by giving up its desire to erect billboards. The law of preemption does not require such complete and total submission to local authority.

While the City asserts that :

> "No federal law ***requires*** the Plaintiff to erect, in Lebanon, a 720 kHz AM broadcast transmitter at 50 kW power (0.5 kW nighttime). * * * This was simply the Plaintiff's choice, for its own reasons." (Brief, City of Lebanon, January 29, 2002 at 19).

This assertion should be contrasted with the purpose of federal law 47 USC §§301 and 307(b):

> **47 U.S.C. §301;** License for Radio Communication or Transmission of Energy.:
>
> It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, * * * under licenses granted by Federal authority, * * *. No person shall use * * * signals by radio (a) from one place in any State, * * * to another place in the same State * * * or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, * * * except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.
>
> **47 U.S.C. §307(b);** Allocation of Facilities.:
>
> In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, **the Commission shall make**

> **such distribution of licenses, frequencies, hours of operation, and of power among** the several States and **communities** as to provide a fair, efficient, and equitable distribution of radio service to each of the same. (Bold added.)

Thus, decisions about the location, frequency, power, and antennas are all inherently federal, and placed by federal statute with the FCC. Under FCC regulations, there is no permissible AM broadcast station, at any frequency or power, where its antenna system could also meet the height limitation of Lebanon's zoning bylaw.

Congress has decided that the FCC shall determine how broadcast radio is distributed, "so as to provide a fair, efficient, and equitable distribution of radio service. . . ."

The "iota of evidence that the inhabitants of Lebanon, or the Upper Valley region, are not adequately supplied with AM broadcasting services" (Brief, City of Lebanon, January 29, 2002 at 27) demanded by the City is the existence of Koor's FCC construction permit. The FCC has, pursuant to the normal, everyday exercise of its §307(b) obligations, affirmatively determined that the public interest necessitates a new AM broadcast service at Lebanon, specifically to serve the people of the community. Lebanon's bylaw prohibits the initiation of that service and blocks the FCC's ability to effectuate its statutory obligation. Congress has given the question of adequate broadcasting service to the FCC, not to the City of Lebanon or local municipalities.

3. Lebanon's argument that its height restriction is not aimed at radio towers is irrelevant and incorrect.

As Koor explains in its Brief, the 1978 Lebanon Zoning Ordinance permitted radio towers as of right in both the Industrial and Medical Center districts, and by special exception in all other zoning districts. (Koor Brief at page 8).

As a result, Lebanon has many radio towers.

The 1990 Lebanon Zoning Ordinance prohibits new radio towers in all districts, except Rural Lands, and in that district AM broadcast towers are effectively prohibited by the 42 foot height limitation. FCC Regulations 47 C.F.R. §§ 73.45, 73.189, and 73.190, Figure 7 (Appendix at pages 67-77) do not permit AM broadcast towers that short.

There is no explanation in any City record for the 1990 zoning reversal, nor do we know why new AM broadcast towers are banned in the Industrial district and among what the Superior Court found to be the "existing cluster of towers on Crafts Hill." It appears that the change in the ordinance was aimed at radio towers.

The law of preemption forbids Lebanon's obstruction of federal regulation regardless of the "aim" of Lebanon's ordinance.

4. Procedural Issues: Denial of the variance and the Egyptian radio tower.

a. Denial of the variance. In 1998, Koor sought, and was denied, a variance from the height restrictions of the present zoning ordinance. Koor did not appeal the denial of its variance application, because it could not claim to meet the *then* legal requirement to show "unnecessary hardship" arising "from a special condition peculiar to the subject parcel" where a "literal enforcement of the ordinance bars any reasonable use of the land." *See*, 15 P. Loughlin, New Hampshire Practice, Land Use Planning and Zoning §24.13 (3d ed. 2000).

Subsequently, in *Simplex Technologies, Inc. v. Town of Newington*, 145 N.H. 727, (2001), this "restrictive approach" was held to be "inconsistent with our constitutional analysis concerning zoning laws." *Id*. at 731.

As the Superior Court correctly held, the denial of the variance was irrelevant to Koor's claim that this zoning ordinance is unconstitutional in its effective prohibition of AM radio towers. (Appendix to Brief, City of Lebanon, January 29, 2002 at 1).

b. The Egyptian radio tower. Lebanon now claims that this short, perhaps phony, tower design is a "red herring." (Brief, City of Lebanon, at 6). But it is the City's "red herring," not Koor's. It was furnished to the Superior Court by the City as a supposed material dispute of fact in opposition to Koor's motion for partial summary judgment. (Appendix at 385).

5. Lebanon's argument that a zoning ordinance is not invalid merely because a particular use is excluded from a municipality is contradicted by *Metromedia v. San Diego*.

Koor's claim is that given the purpose of the 1934 Federal Communications Act and the FCC regulations governing AM broadcasting, the City cannot exclude AM broadcasting.

The City responds that "there simply is no constitutional principle that every municipality must permit every land use," citing the complete exclusion of bill boards allowed by *Rockingham Hotel v. North Hampton*, 101 N.H. 441 (1958). (Brief, City of Lebanon, at 27).

However, a particular use cannot be excluded from a community when that use is protected by the First Amendment. That was exactly the finding in *Metromedia v. San Diego*, 453 U.S. 490 (1981), which Lebanon chooses to ignore and has not briefed. *Metromedia* found that the zoning ordinance was invalid, because it excluded billboards from the entire municipality, thereby overruling *Rockingham*. Similarly, *Lakewood v. Plain Dealer Publishing*

Co., 486 U.S. 750 (1988), held that newsracks cannot be prohibited from the entire municipality. This constitutional response is allowed by Supreme Court Rule 16(3)(b).

Prayer for Relief

Koor asks that this Court grant the summary judgment declined by Judge Fitzgerald, declaring invalid the Lebanon zoning bylaw effectively prohibiting AM broadcasting within the city.

RESPECTFULLY SUBMITTED,
Koor Communications, Inc.

March 1, 2002 By:

K. William Clauson, Esq.
CLAUSON & ATWOOD
10 Buck Road
Hanover, NH 03755
(603) 643-2102

Fred Hopengarten, Esq.
Six Willarch Road
Lincoln, MA 01773-5105
(781) 259-0088
Maine Bar No. 1660
DC Bar No. 114124

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief were this day mailed, First Class, postage prepaid, to H. Bernard Waugh, Jr., Esq., counsel for Defendant City of Lebanon.

December 10, 2002

K. William Clauson, Esq.