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December 23, 1993

BY FACSIMILE: (202)293-1319
Christopher D. Imlay, Esq.
Booth, Freret & Imlay
1920 N. St., N.W.
Washington, DC 20016

Re: The American Radio Relay League/PRB-1
F. Parker Heinemann v. Town of Lyme, et al.

Dear Attorney Imlay:

When we spoke on the telephone on December 7, 1993, I mentioned that the Town of Lyme had filed a Motion in Limine to preclude expert testimony on the grounds of relevancy. I have enclosed a draft of Plaintiff's Memorandum of Law in Opposition. Any input you may have would be appreciated. The Memorandum will be filed on Monday, December 27, 1993.

Also, in our telephone conversation, you said that you would contact Gerald Hall and ask him to provide expert testimony at the Heinemann trial. Please confirm that you have spoken with Mr. Hall. He is identified as our ARRL expert in the Memorandum.

Thank you for your help. I hope you are enjoying the holiday season.

Sincerely yours,

REID AND RIEGE, P.C.

Jo-Ann L. Bowan

JLB/plp

FLB/14237.00037008

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
at New Haven

F. PARKER HEINEMANN, Plaintiff,	:	CIVIL ACTION 2:91CV00776(PCD)
V.	:	
TOWN OF LYME, ET AL Defendants.	:	December __, 1993

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION IN LIMINE

Pursuant to Local Rule 9(a), Plaintiff, F. Parker Heinemann, submits this memorandum of law in opposition to Defendants' Motion in Limine to Preclude Expert Testimony and Learned Treatise Evidence dated December 23, 1993.

BACKGROUND

The parties have complied with this Court's Trial Preparation Order, and this case is ready for trial. Two claims are to be tried: (1) a Supremacy Clause claim: whether the zoning ordinance, as applied, ignored the dictates of a Federal Communications Commission declaratory ruling ("PRB-1") to reasonably accommodate amateur radio communications and regulate them in the minimum practicable manner; and (2) a First Amendment/42 U.S.C. §1983 claim: inter alia, whether the zoning ordinance was narrowly

tailored to serve a legitimate government interest or rather swept far more broadly than necessary.

In Plaintiff's Compliance with Trial Preparation Order, Section A dated July 30, 1993, Plaintiff identified as exhibits, seven learned treatises and as witnesses, three experts in amateur radio communications.[1] Defendants move to preclude the expert testimony and learned treatise evidence on the grounds of relevancy.

LEGAL ARGUMENT

Federal Rule of Evidence 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

1. Plaintiff's Supremacy Clause Claim

The central issue in Plaintiff's Supremacy Clause claim is whether Defendants reasonably accommodated amateur radio communications. In PRB-1, the FCC announced a limited preemption policy. The FCC mandated that

[1]Defendants' Motion in Limine is directed to two of the three experts identified by Plaintiff, Andrew Bodony and an expert from the American Radio Relay League. In his Compliance with the Trial Preparation Order, Plaintiff identified himself as an expert in amateur radio communications and engineering and disclosed his intention to offer his expert testimony.

> 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.

(App. Q, p. 10)[2]

Since its release in 1985, what PRB-1 requires of local zoning authorities in terms of reasonable accommodation has been well-developed and refined. In Howard v. City of Burlingame, 937 F.2d 1376, 1380 (1991), the court said that PRB-1 required the city to consider the application, make factual findings, and attempt to negotiate a satisfactory compromise. The lower court in Howard found that the city did not meet the requirements of PRB-1 because it "impose[d] antenna height limitations without regard to whether those limitations [were] the minimum practicable ... and because it "failed to explore alternatives to a blanket denial of Howard's application." Howard v. City of Burlingame, No. C-87-5329 EFL, 1988 WL 169074, p. *3 (N.D. Cal. July 29, 1988). The court specifically denounced the City's "either/or" approach to the application and stated that "PRB-1 seems to foreclose" approaching the decision as a grant or deny proposition. Id. at *2.

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[2]The cites in parentheses reference supporting documents in Plaintiff's Appendix to Memorandum in Opposition to Motion for Summary Judgment.

Plaintiff intends to offer expert testimony on the issue of reasonable accommodation. The ultimate legal question as to reasonable accommodation is properly left to this Court, but what reasonable accommodation means, in a factual sense, when applied to amateur radio communications is an area for expert testimony.[3] The federal mandate in PRB-1 of reasonable accommodation and the minimum practicable regulation, can be understood only against the backdrop of the scientific, technical, and other specialized aspects of amateur radio communications. For example, Defendants suggest, and Plaintiff vehemently disputes, that they held out "alternatives such as use of a long wire [or] retractable antennae system ..." (Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment, p. 34) Whether these or other alternatives represent reasonable accommodations of amateur radio communications requires an understanding of, for example, the fundamentals of how amateur radio works; the technical needs of an amateur radio operator; the relationship between the height of a radio antenna and effectivity of amateur radio communications; the

[3]Under Federal Rule of Evidence 702, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

effectivity of a 35 foot high antenna compared to a 78 foot antenna compared to a 100 foot antenna; the network of amateur radio operators; and the uses of amateur radio communications. These are factual issues necessarily a part of any consideration of the issue of reasonable accommodation of amateur radio communications.[4]

Defendants provide no authority for their position that any expert testimony not offered with Plaintiff's application for a special permit is irrelevant. Defendants cite Williams v. City of Columbia, 707 F.Supp. 207, 212 (D. S.C. 1989). Williams applied for a special exception to erect his antenna system before the F.C.C. released PRB-1 and then filed a federal preemption action based on PRB-1. In the 1989 decision cited by Defendants, the court sent Williams back to the zoning authority for a rehearing in view of PRB-1.[5]

Plaintiff is an expert, and he testified at the public hearing on his application for a special permit. His application for a

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[4]Defendants' Motion in Limine is directed at expert testimony as well as learned treatises. Plaintiff's argument as to the relevancy of the expert testimony applies to the learned treatises. Under Federal Rule of Evidence 803(18), learned treatises, a hearsay exception, are statements in published treatises, periodicals, or pamphlets on a subject of science, established as a reliable authority and either brought to the attention of an expert on cross-examination or relied on by an expert in direct examination.

[5]See Williams v. City of Columbia, 906 F.2d 994 (4th Cir. 1990).

special permit contained technical information. (App. E) Plaintiff answered questions of a technical nature throughout the proceedings on his application for a special permit. (App. F, G, J and K) Defendants made their decision on Plaintiff's application for a special permit without soliciting any expert advice other than Plaintiff's, despite suggestions at the public hearing and after the public hearing. (App. J, K, L and M)

In MacMillan v. City of Rocky River, 748 F.Supp. 1241 (1990), the zoning authority claimed that one reason it denied a amateur radio operator's application was failure "to provide certain technical information necessary to reviewing the permit application." The court found that the defendant failed to reasonably accommodate amateur radio communications and blamed, in part, the defendant's lack of understanding of radio communications and the federal interest in amateur radio operation. MacMillan v. City of Rocky River, 748 F.Supp. 1241, 1248 (1990)

Defendants suggest that if Plaintiff wishes to offer additional expert testimony, he should file another application for a special permit so Defendants can make "an informed decision." (Defendants' Motion in Limine, p. 4) That position is contrary to federal law. Defendants were obligated under federal

law to reasonably accommodate amateur radio communications and regulate them in the minimum practicable manner. If Defendants needed additional expert testimony to make "an informed decision," they needed to solicit that input rather than issue a blanket denial of Plaintiff's application.

In discovery, Defendants asked Plaintiff to "[l]ist all facts that you rely upon to support the claim that the 78 foot tower in question constituted the minimum practicable height needed to attain your amateur radio operator's goals." Plaintiff provided Defendants with a narrative, complete with copies of the references, explaining technical reasons for the need for the 78 foot antenna tower. Those references are the seven learned treatises listed in Plaintiff's Compliance with Trial Preparation Order, Section A. That narrative was an elaboration of the technical information in Plaintiff's application for a special permit. (A copy of the narrative is attached to this Memorandum of Law) The first reference on the list is Antenna Height and Communication Effectiveness by Gerald L. Hall, Associate Technical

Editor, American Radio Relay League, Inc. Plaintiff intends to call Mr. Hall as the ARRL expert.[6]

2. Plaintiff's First Amendment Claim

Likewise, the expert testimony is relevant to Plaintiff's First Amendment claim. To be constitutional, a time, place and manner restriction on speech must pass a three-part test. Ward v. Rock Against Racism, 109 S.Ct. 2746, 2753 (1989). The test is as follows:

> the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication on the information."

Ward v. Rock Against Racism, 109 S.Ct. 2746, 2753 (1989), quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069 (1984).

In Ward, the United States Supreme Court addressed the constitutionality of the New York City guidelines which required that the city's sound equipment and sound technician be used for

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[6]Plaintiff is concerned about Mr. Hall's availability to testify at trial. If Mr. Hall is unavailable, Plaintiff reserves the right to call another expert at the ARRL to testify as to the same matters.

all performances at the bandshell in Central Park. On the second prong of the three-part test, that the regulation must be narrowly tailored to serve a significant governmental interest, the Court rejected the plaintiff's claim that the guidelines swept far more broadly than necessary because there was "no material impact on any performer's ability to exercise complete artistic control over sound quality," and there was no interference "with the performer's desired sound mix." Ward v. Rock Against Racism, 109 S.Ct. 2746, 2759-2760 (1989). "If the city's regulatory scheme had a substantial deleterious effect on the ability of Bandshell performers to achieve the quality of sound they desired, respondent's concerns would have considerable force." Id. at 2759.

It is on this point, the narrow tailoring of the regulation, that the constitutional regulation in Ward and the zoning ordinance at issue before this Court diverge. Section 3.2 of the Lyme Zoning Regulations has a substantial deleterious effect on global amateur radio communications. In PRB-1, the FCC specifically noted that "antenna height restrictions affect the effectiveness of amateur communications. Some amateur antenna configurations require more substantial installations ... for

example ... for international amateur communications." (App. Q, p. 10)

The enforcement of the 35 foot height limit denied Plaintiff the ability to establish and maintain dependable global amateur radio communications. The substantial and adverse impact of the zoning regulation on the amateur radio communications is obviously relevant to Plaintiff's First Amendment claim. On this issue, Plaintiff intends to offer expert testimony, testimony based on scientific, technical or otherwise specialized knowledge about, for example,: the fundamentals of how amateur radio works; the technical needs of an amateur radio operator; the relationship between the height of a radio antenna and effective, reliable amateur radio communications; the effectivity of a 35 foot high antenna compared to a 78 foot antenna compared to a 100 foot antenna; the network of amateur radio operators; and the uses of amateur radio communications.

In its Ruling on Motion for Summary Judgment, this Court identified the factual issue: what impact would the Plaintiff's antenna have on the Conservation Zone. This factual issue is directly relevant to this question of narrow tailoring. Plaintiff intends to offer expert testimony on the impact of the zoning ordinance on amateur radio communications as well as the impact

the antenna would have on the Conservation Zone. As disclosed in discovery and in Plaintiff's Compliance with Trial Preparation Order, Section A, Plaintiff is an engineer, and he did an experiment to test how the antenna would visually impact the Conservation Zone. Plaintiff intends to offer testimony, some of it expert in nature, that the antenna would not be visible in any appreciable way.

Plaintiff, F. Parker Heinemann, submits that Defendants' Motion in Limine to Preclude Expert Testimony and Learned Treatise Evidence should be denied.

In the event this Court denies Defendants' Motion in Limine, Defendants request permission to identify their own expert witness and learned treatise evidence within 21 days of this Court's ruling. This request should be denied. In discovery, Plaintiff asked Defendants to identify any expert witnesses they expected to call. Defendants responded "none presently." (Defendants' Responses to Plaintiff's Discovery Requests, No. 20) Plaintiff produced the technical narrative, referred to above, with copies of the references on May 27, 1992. Defendants deposed Plaintiff on May 29,1992. Defendants never disclosed an expert during the discovery period or in Defendants' Compliance with Section B of

Trial Preparation Order. Defendants' Motion in Limine should be denied in its entirety.

PLAINTIFF
F. PARKER HEINEMANN

By _____
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