SB

78

Alaska State Legislature

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Judiciary Committee

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Administrative Regulations
Revenue Committee

Member,
Transportation Committee
Resources Committee

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Senator Robin L. Taylor

SPONSOR STATEMENT
SB 78

SB 78 is a state affirmation of a 1985 rule issued by the Federal Communications Commission entitled PRB-1. As in the federal rule, this bill simply requires that local zoning authorities reasonably accommodate the antenna needs of Amateur Radio operators. This bill is not attempting to blaze new trails. Ten states have already adopted state "PBR's", and others are in the drafting stage now. The language of this bill ensures that the minimal technical requirements to conduct amateur communications are preserved.

Our support of Amateur Radio operators in Alaska is important. Ham radio operators are valuable assets to the community. Historically, the Amateur Radio service has been at the forefront of communication technology. The concept of broadcasting began when listeners overheard amateur stations exchanging weather reports and baseball scores. The first land mobile systems were built by amateurs. Amateurs built the first single-sideband radios and the first handheld radios were built by amateurs. Present day cellular telephone technology had its origins in amateur packet radio. There is an Amateur Radio station on the International Space Station to communicate with school children.

When disaster strikes, Amateur Radio is there to assist with relief operations immediately. On Good Friday in 1954, Amateur Radio operators were there. We must admire the strength of that operator in Valdez, who was able to get on the air with damage reports and calls for aid, 15 minutes after losing his teenage son to the tsunami.

Amateur radio operators continue to practice their craft and directly support emergencies such as the Miller's Reach Fire, the Juneau/Thane Avalanche, and the Turnagain Pass Avalanche. They team with and work side by side with government agencies and officials during mass casualty and other disaster preparedness drills. They donate thousands of hours of support volunteering their time and equipment to provide communications for such public events as the Iditarod, Anchorage Fur Rendezvous, Walk for Hope, the Yukon Quest and countless others.

SB78 would give them the ability to provide emergency and public service communications support to a wide array of customers throughout Alaska, the United States and the world when needed, typically with no notice.

ARRL The national association for AMATEUR RADIO

QST OFFICIAL JOURNAL

Section Manager
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February 15, 2001

Senator John Torgerson
State Capitol, Room 427
Juneau, AK 99801-1182

Dear Senator Torgerson,

We, the members of the Alaska amateur radio community (over 3000 strong), are asking for your support in passing Senate Bill Number 78, entitled, "An Act relating to municipal regulation of radio antennas." This is a state affirmation of a 1985 rule issued by the Federal Communications Commission entitled PRB-1. As the federal rule says, our proposal simply requires that local zoning authorities reasonably accommodate the antenna needs of Amateur Radio operators. We are not attempting to "blaze" new territory. Ten states have already adopted state "PRB's," and others are in the drafting stage now. The language of the bill ensures that the minimal technical requirements to conduct amateur communications are preserved.

Your support of Amateur Radio operators in Alaska is important. Ham radio operators are valuable assets to the community. Historically, the Amateur Radio service has been at the forefront of communication technology. The concept of broadcasting began when listeners overheard amateur stations exchanging weather reports and baseball scores. The first land mobile systems were built by amateurs. Amateurs built the first single-sideband radios and the first handheld radios were built by amateurs. Even present day cellular telephone technology had its origins in amateur packet radio. There is an Amateur Radio station on the International Space Station to communicate with school children.

When a disaster strikes, Amateur Radio is there to assist with relief operations immediately. In 'ALASKA'S DARKEST HOUR' on that Good Friday in 1964, Amateur Radio operators were there and they did their job. We must admire the strength of that operator in Valdez, who was able to get on the air with damage reports and calls for aid, 15 minutes after loosing his teenage son to the tsunami. Please read the account and service of Radio Amateurs in "The Alaska Story" from QST July 1964 attached to this letter. "Ham" Radio is as Alaskan as sourdough.

Amateur radio operators continue to practice their craft and directly support emergencies such as the Miller's Reach Fire, the Juneau Avalanche, and the Turnagain Pass Avalanche. They team with and work side-by-side with government agencies and officials during mass casualty and other disaster preparedness drills. They donate thousands of hours of support volunteering their time and equipment to provide communications for such public events as the Iditarod, Anchorage Fur Rendezvous, Walk for Hope, the Yukon Quest, and countless others.

Your support of this bill is critical to our ability to provide emergency and public service communications support to a wide array of customers throughout Alaska, the United States, and the world when needed – typically with no notice and when least expected.

Respectfully and Most Sincerely,

Larry Kent Petty
Amateur Radio Station KL5T
Alaska Section Manager
American Radio Relay League (ARRL)

ALASKA STATE LEGISLATURE

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SENATE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE

DATE: March 1, 2001

RE: SB 78 – Municipal Regulation of Radio Antennas

FROM: Mary Jackson, CRA Staff

Mr. Dan Squires advised that he had handed out a packet of information to all Senators, from the national Association for Amateur Radio on February 15, 2001as background information on this bill.

Included in your bill packet is his letter of support that was within the informational packet he distributed. I have not copied the materials he handed out for inclusion in your bill packet.

Amateur Radio:

A National Resource

The American Radio Relay League

United States Court of Appeals
FOR THE EIGHTH CIRCUIT
No. 93-1026

Sylvia Pentel, Appellant,	*	Appeal from the United States District Court for the District of Minnesota.
v.	*	
City of Mendota Heights, Appellee.	*	

Submitted: October 13, 1993
Filed: January 18, 1994

Before McMillian, Bowman, and Magill, Circuit Judges.

Bowman, Circuit Judge.

Pursuant to its zoning ordinance, the City of Mendota Heights, Minnesota, denied Sylvia Pentel, an amateur radio operator, permission to erect a 68-foot radio antenna tower in her yard. Pentel then sued the city, claiming that the zoning ordinance was preempted by a Federal Communications Commission ruling known as PRB-1, which requires the city reasonably to accommodate her amateur communications. The District Court granted summary judgment to the city, and Pentel appeals. Because we conclude that the city did not reasonably accommodate Pentel when it limited her to the continuing use of her ineffective 56.5-foot antenna, we reverse and grant summary judgment to Pentel.

I.

Pentel is an amateur radio operator who uses radio communications to serve the public interest. After she was licensed by the FCC in December 1988 to operate an amateur radio and a station from her home, she installed on her roof a vertical radio antenna that reaches a height from the ground of 56.5 feet. Over the next two years, Pentel was unable to establish reliable radio communications with other amateurs across the United States, and she was able to establish only one international contact. Pentel concluded that her existing antenna thus was not adequate for domestic, much less international, communications.

Accordingly, Pentel began preparing to install a more sophisticated antenna. The replacement was to be a retractable steel tower that measured 30 feet when lowered and 68 feet when fully extended. This tower, which Pentel planned to have installed professionally in accordance with its manufacturer's specifications, was to have mounted on its top two directional aluminum antennas.1/

Pentel was unaware when she installed her original antenna that she was violating the city's zoning ordinance, which limits all structures, including radio antennas, to a height of twenty-five feet.2/ While preparing to install her new antenna, Pentel became aware of the city's restrictions, and in January 1991 she filed for a variance pursuant to Mendota Height, Minn., Zoning Ordinance & 5.5 (1981).

The city evaluated Pentel's application through a planning report prepared by a city staff member, and at a planning commission meeting and two city council meetings. The city then sent Pentel a letter in February 1991 telling her that her application had been denied. The letter did not state any factual findings, reasons for the denial, or what Pentel could do to gain the city's approval. In an attempt to offer Pentel a reasonable accommodation, as required by In re Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, 101 F.C.C. 2d 952, 50 Fed. Reg. 38, 813 (1985) (codified at 47 C.F.R. & 97.15 (e) (1992)) [hereinafter PRB-1], the city council granted Pentel a special-use permit that allowed her to continue using her existing antenna, which she had erected in contravention of the city's zoning ordinance.

Pentel then filed suit against the city in the District Court, claiming that the city's ordinance was preempted by PRB-1 in that the city had not reasonably accommodated her. Agreeing that there were no disputed issues of material fact, Pentel and the city both moved for summary judgment. The District Court granted summary judgment in favor of the city on all claims.3/ Pentel appeals.

II.

We review de novo the district court's grant of summary judgment. United States ex rel. Glass v. Medtronic, Inc., 957 F. 2d 605, 607 (8th Cir. 1992). Because the parties agree that no material facts are in dispute, summary judgment is appropriate in favor of the party that is entitled as a matter of law to a judgment in its favor. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 326 (1986).

Cases centering on zoning regulations governing amateur radio antenna towers present a unique tension among the various parties' interests. On the one hand, a local municipality, through the exercise of its traditional police powers, may regulate the height and placement of radio antenna towers erected in residential districts. A municipality's motivations for such regulation include the possibilities that an antenna may block the line of sight of pedestrians or drivers; constitute a prominent eyesore that also may interfere with a scenic view; fall on nearby residences; or decrease property values.

Amateur radio operators, on the other hand, plainly have an interest in maintaining successful amateur communications and in sustaining a strong network of radio amateurs. The federal government's interests are aligned with those of the amateurs, for amateur radio volunteers afford reliable emergency preparedness, national security, and disaster relief communications. Because there is a direct correlation between an amateur's antenna height and her ability successfully to transmit and receive radio signals, federal interests are furthered when local regulations do not unduly restrict the erection of amateur radio antennas.

The FCC was attempting to referee the tension between these interests when it issued PRB-1, in which it attempted "to strike a balance between the federal interest in promoting amateur operations and the legitimate interests of local governments in regulating local zoning matters." PRB-1

para. 22. After weighing local, federal, and amateur interests, the FCC issued a ruling that has a limited preemptive effect on local regulations. See PRB-1 para. 24. ***The federal courts that have addressed this ruling have upheld its preemptive effect.*** See, e.g., Evans v. Board of County Comm'rs, 994 F. 2d 755, 760-61 (10th Cir. 1993); Themes v. City of Lakeside Park, Ky., 779 F. 2d 1187, 1188-89 (6th Cir. 1986) (per curiam).

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. See Evans v. Board of County Comm'rs, 752 F. Supp. 973, 976-77 (D. Colo. 1990); Bulchis v. City of Edmonds, 671 F. Supp. 1270, 1274 (W.D. Wash. 1987).4/

Second, PRB-1 also preempts a zoning ordinance that a city has not applied in a manner that reasonably accommodates amateur communications. See Evans, 994 F. 2d at 761; MacMillan v. City of Rocky River, 748 F. Supp. 1241, 1248 (N.D. Ohio 1990). 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 para. 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, 998 (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.***5/ 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.

Application of this reasonable accommodation standard, however, does not require the city to allow the amateur to erect any antenna she desires. Instead, it requires only that the city "consider the application, make factual findings, and attempt to negotiate a satisfactory compromise with the applicant." Howard v. City of Burlingame, 937 F. 2d 1376, 1380 (9th Cir. 1991); see, e.g., Evans, 994 F. 2d at 762 (stating that the county was willing to permit a crank-up tower, a shorter tower, or a tower located elsewhere); Williams, 906 F. 2d at 997 (stating that the city suggested a limitation on the hours the antenna could be extended, and noting that the amateur could apply for a shorter antenna). Under this approach, a local regulation that impairs amateur radio communications is preempted as applied if the city has not crafted it "to accommodate reasonably amateur communications" while using "the minimum practicable regulation (necessary) to accomplish the local authority's legitimate purpose." (PRB-1 para.25).

The city informed Pentel that her application had been denied via a bare-bones letter that did not list any bases for the denial. Because the city council failed to make any factual findings,6/
see White Bear Rod & Gun Club v. City of Hugo, 388 N.W. 2d 739, 742 (Minn. 1986) (holding in a case reviewing a city council's denial of a special-use permit that a cryptic listing of reasons for the denial did not constitute factual findings); VanLandschoot v. City of Mendota Heights, 336 N.W. 2s 503, 509 n. 7 (Minn. 1983) (stating that variances and special-use permits are treated identically on judicial review), we need not consider whether, if it had, such findings would be afforded preclusive effect here, see University of Tenn. v. Elliott, 478 U.S. 788, 797-99 (1986).

Although the city failed to make any factual findings, the planning report and hearings suggest four potential justifications for the city's denial of Pentel's variance application. We now turn to those justifications. First, the city had no reason to fear that the antenna would interfere with other residents' television and radio reception; the city's planning report states that Pentel was prohibited by the FCC from causing, and that she could lose her license if she failed to correct, such a problem.

Second, the city expressed concerns about the tower's safety in light of the strong winds that frequent the Mississippi River valley. Pentel presented to the city the manufacturer's specifications, which rate the tower secure in eighty-mile-per-hour winds. Although the city generally relies on such specifications produced by manufacturers, it declined to do so in this case. In addition, the tower was retractable, and the city could require Pentel to retract it whenever bad weather threatened. Moreover, the city in 1987 allowed a nearby amateur radio operator to erect a similar tower, and that one was closer to the operator's property line than Pentel's was to be. The record before us thus does not establish a factual basis for the city's safety concerns.

Third, the city claims that it believed it reasonably accommodated Pentel because she already successfully engages in amateur communications. Pentel submitted with her application a letter of commendation for her public services. The city's planning report concluded that this letter demonstrated the adequacy of Pentel's current antenna. Pentel has pointed out, however, that the public services cited in the letter were not related to the amateur communications in which she engaged from her home. In fact, the letter makes it clear that the amateur communications for which Pentel was to be commended were conducted at the Air National Guard base in Minneapolis.

In addition, the mayor and some members of the city council indicated in their depositions that they concluded from Pentel's statements at the hearings that she already was communicating effectively, albeit not to the extent she desired. The hearings' minutes indicate that Pentel stated that she was able to reach only sporadically various places in the United States, and that her current antenna did not allow reliable long-range transmissions. When prompted, her attorney reluctantly attempted to quantify the communications: he characterized Pentel's current chances for making contact at 40 percent, and estimated those chances at 80 to 90 percent with the improved tower. The context of these remarks and Pentel's other statements indicate that these chances of success referred to domestic communications only.

This quantification of Pentel's ability to communicate was thoroughly mischaracterized by the mayor at his deposition, where he stated that Pentel was able to communicate worldwide 60 to 70 percent of the time, but that she wanted to have reliable worldwide communications 100 percent of the time. One city council member understood Pentel's statements regarding her transmission success, but others demonstrated a fuzzy understanding, at best, of Pentel's situation. Although what constitutes "successful" amateur communications is difficult to quantify, the evidence in the record does not justify a finding by the city that Pentel's old antenna enabled her "successfully" to engage in amateur communications, and the city was unreasonable if it so found. On the record before us, the city's first three concerns lack factual support.

The city's last reason for denying Pentel's application, that the antenna tower would be unsightly, rests on subjective considerations and is difficult for a reviewing court to evaluate. This reason is undercut, however, by the city's willingness to allow Pentel to keep her present roof-mounted antenna, which reaches a height only slightly below that of her proposed antenna tower, and by the city's allowance of a similar antenna tower nearby. We acknowledge the possible aesthetic difference between an antenna tower and a roof-mounted antenna, but there is no indication in the record that the city attempted to find any compromise that would have accommodated Pentel's amateur communications.

The city's decision to grant a variance that allows Pentel to continue using a wholly inadequate antenna does not constitute an accommodation in any practical sense. In addition, because the city did not reasonably accommodate Pentel, it obviously did not use the least restrictive means available to meet its legitimate zoning purposes. We therefore hold that the city's zoning ordinance as applied in this case is preempted by PRB-1.

III.

We exhort the parties to work together to arrive at a satisfactory solution to this controversy. 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." (PRB-1 para. 25). The District Court's grant of summary judgment to the city is reversed, and the case is remanded to the District Court for the entry of summary judgment in favor of Pentel. Our decision does not mean that the city necessarily must grant Pentel's application as it now stands, but it does mean that the city must make a reasonable accommodation for her interests.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

FOOTNOTES

1. Pentel's proposed antenna would be more effective than her existing set-up for two reasons. First, Pentel's current vertical antenna dissipates signals in all directions, while her proposed directional antenna would concentrate and collect signals, thus increasing her ability to transmit and receive in a specific direction. Second, an antenna's effectiveness increases with its height. Pentel's existing antenna is blocked by trees. Her taller replacement antenna, when extended, would be at or near the tops of nearby trees, thus improving her signal transmission and reception.

2. The parties failed to furnish this Court a copy of Section 8B.4 (1) of the Mendota Heights zoning ordinance, and the city was unable to furnish a copy when contacted by this Court. We do not pursue the issue, however, because the parties agree, and the District Court found, that this section limits Pentel's radio antenna tower to a maximum height of 25 feet.

3. In addition to her preemption challenge, Pentel raised various other constitutional challenges that are not renewed here.

4. Pentel's argument that the city's ordinance is void for vagueness is without merit. See Kolender v. Lawson, 461 U.S. 352, 357-58 (1983); Williams v. City of Columbia, 906 F. 2d 994, 998 (4th Cir. 1990).

5. 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 paragraph 22, 24.

6. Mendota Heights, Minnesota, Zoning Ordinance Sec. 5.5 (5) (1981) states that the city council's action in denying a variance application "shall constitute a finding and determination by the City Council that the conditions required for approval do not exist." This conclusory language does not provide a court with any documented, enumerated factual findings to review. The city may have made factual findings for its purposes, but it has not for ours.

United States District Court
Eastern District of Kentucky
at Covington

John Thernes, Plaintiff : Case No. 318

vs. :

City of Lakeside Park, Kentucky et al., defendants : Consent Decree, Order, and Final Judgement

This case is before the court on remand from the United States Court of Appeals for the Sixth Circuit (Thernes v. City of Lakeside Park, et al., 779 F.2d 1187, decided January 6, 1986) for consideration of a Federal Communications Commission ("FCC") Order issued during the pendency of the appeal and relating to the preemption of state and local land use regulations of amateur radio antennas, and the application of the FCC order to the ordinances of the defendant City of Lakeside Park, Kentucky ("City").

This matter was before this court on cross-motions for summary judgement which had been set for hearing on February 13, 1987. Following a preliminary decision of this court entered on January 15, 1987, and a settlement conference of the parties with the court on February 12, 1987, the parties hereto have agreed to final disposition of the merits of this action and the adoption of a consent decree in accordance with the provisions set forth below.

Accordingly, it is hereby AGREED by the parties and ORDERED, ADJUDGED and DECREED by the court as follows:

1. The facts of this case are set forth in the Statement of the Facts portion of the decision of this court entered October 10, 1984, the stipulations of the parties entered prior thereto, and the opinion of the Court of Appeals of January 6, 1986.

2. Essentially, the plaintiff, John Thernes, is an amateur radio operator licensed by the FCC who is seeking a permit for the construction at his home in the defendant City of Lakeside Park, Kentucky, an antenna for use in amateur radio communications.

3. In his application for permit, plaintiff sought to erect an amateur radio support tower having two rotatable horizontal antennas of Yagi design mounted thereon, one at the top of the tower specifically designed for use in the 10, 15 and 20 meter amateur radio bands, and a second one above the first at the top of an eight foot mast and specifically designed for use in the 40 meter amateur radio band, the turning radius of the antenna system being approximately 24 feet.

4. The application of plaintiff for a building permit for his antenna system was denied by the defendant zoning administrator for the reason that radio antennas were not permitted in any zone of the City. Plaintiff appealed the denial to the defendant Lakeside Park Board of Adjustments which upheld the denial.

5. Plaintiff brought this suit under 42 U.S.C. Section 1983, on September 29, 1983, against the City, the Board of Adjustments and its members, the zoning administrator, and the Northern Kentucky Area Planning Commission ("NKAPC"). Plaintiff challenged the actions of the defendants on the bases that, as the laws of the City were written and applied, their action was inconsistent with the federal congressional and FCC policy and preempted by federal statute and regulation; that it violated plaintiff's First Amendment rights; that it denied plaintiff equal protection and was arbitrary in that television antennas were permitted in every zone of the City; that it denied plaintiff substantive due process through the exercise of the City's zoning power; that the ordinance unduly burdened interstate commerce; and therefore plaintiff should be entitled to an order permitting the construction of an effective amateur radio antenna system, which the defendants denied.

6. This court granted summary judgement to the defendants by Judgement, Opinion and Order filed October 10, 1984, and plaintiff appealed to the United States Court of Appeals for the Sixth Circuit. On the date of the oral argument on the appeal, the FCC issued an Order declaring a limited preemption over local regulation of amateur radio antenna facilities. (Amateur Radio Preemption, 101 FCC 2d 952 (1985), ("PRB-1").) The order, PRB-1, enunciated a federal regulatory policy in support of effective amateur radio communications, and preempted state and local land use regulations which unduly restrict amateur communications in communities. PRB-1 further declared that local regulations which involve placement, screening or height of antennas based on health, safety or aesthetic considerations must be crafted to accomodate reasonably amateur communications and to represent the minimum practical regulation to accomplish the local authority's legitimate purpose.

7. The Court of Appeals vacated this court's judgement, and remanded the case for further proceedings in light of PRB-1 and its application to the Lakeside Park zoning ordinance. In doing so the Court of Appeals stated that the exercise by the FCC of its preemptive justification strongly suggests that the Lakeside Park ban on amateur radio antennas may violate federal law, but that an accommodation of both amateur radio operation and the legitimate planning needs of communities was possible.

8. Following oral argument in the Court of Appeals, but prior to the decision on appeal, Lakeside Park adopted a new ordinance No. 9-85 regulating radio antennas, which permitted radio antennas limited to a single vertical rod not to exceed 50 feet in height, with horizontal elements not to exceed eight feet in length, and with other restrictions.

9. The antenna proposed by plaintiff would have exceeded the dimensions set forth in the new ordinance 9-85.

10. As set forth by the evidence in the record, which was submitted in part by plaintiff in part by the Amicus Curiae, the American Radio Relay League, plaintiff's interests in engaging in effective national and worldwide amateur radio communications requires antennas supported at a height

of sixty-five (65) feet. No ordinance of the defendants would literally accommodate such requirements.

11. On the motions for summary judgement, this court issued a preliminary order on January 15, 1987, the tentative conclusions of which are incorporated herein.

12. As agreed by the parties and the court in conference on February 12, 1987, the plaintiff shall be permitted to erect a sixty-five (65) foot tower, and to support an antenna for use on the 10, 15 and 20 meter amateur radio bands on the top thereof; and, theincremental aesthetic difference between sixty-five (65) and seventy-three (73) feet being insubstantial, plaintiff shall be permitted to support an antenna for use on the 40 meter amateur radio band on a mast eight feet above the top of the tower at a height of seventy-three (73) feet.

13. Further, the parties agree (1) that the tower supporting the antennas may be erected by the plaintiff in the rear yard of his residence in Lakeside Park; (2) that the tower and the anchors for the guy wires supporting the tower shall be placed (unless the plaintiff and the City zoning administrator otherwise agree) at a distance of at least 15 feet from the side yard lines of the plaintiff and at least 10 feet from the rear yard line on the plaintiff; (3) that no portion of the antennas or supporting structure shall extend beyond the boundaries of plaintiff's property; and (4) that the antennas, tower, and other supporting elements shall conform to or exceed all engineering standards for safety and structural integrity as set forth in plaintiff's original applications for zoning permits which are in the record and incorporated into the stipulations of facts.

14. Accordingly, the defendants shall allow plaintiff to erect, maintain and use an amateur radio antenna system as set forth in the provisions above unaffected by any present or future ordinances of the City to the contrary, and shall issue to plaintiff all permits necessary therefor.

15. **Judgement shall be awarded for the plaintiff and against the defendants in the amount of $13,800.00, and all further claims for compensation as damages, costs or attorneys' fees shall be dismissed.**

Wherefore, final judgement is hereby entered in accordance with the terms of this consent decree as set forth above.
SO ORDERED.

William O. Bertelsman
United States District Judge

K3OK's Tower Talk K3OK's Home Page

ARRL BULLETIN 101 FROM ARRL HEADQUARTERS
NEWINGTON CT DECEMBER 30, 1987
TO ALL RADIO AMATEURS

LAST SEPTEMBER, ANDREW BODONY, K2LE, WON A PORTION OF HIS SUIT IN US DISTRICT COURT AGAINST THE CITY OF SANDS POINT, NEW YORK, THAT VOIDED THAT CITY'S 25 FOOT HEIGHT ORDINANCE WHICH INCLUDED ANTENNA TOWERS. THE REMAINDER OF HIS SUIT WAS AGAINST THE CITY FOR MONETARY DAMAGES FOR VIOLATIONS OF HIS CONSTITUTIONAL RIGHTS. RECENTLY, THE CITY SETTLED OUT OF COURT WITH BODONY, PAYING HIM THE MAJORITY OF HIS ATTORNEY'S FEES, WHICH TOTALED OVER SIXTY THOUSAND DOLLARS.

A Federal judge has relied on PRB-1 to void a local height limitation as applied to an Amateur Radio antenna. Andrew B. Bodony, K2LE, had brought suit in U. S. District Court for the Eastern District of New York to overturn denial by the Village of Sands Point of his application for a building permit for an 86-foot tower, retractable to 23 feet in height. In granting partial summary judgement in Bodony's favor, District Judge Jacob Mishler found PRB-1 to be a proper exercise of FCC authority and found that the Village was precluded from applying its 25 foot height limitation on accessory buildings to Bodony's proposed antenna. This court test of PRB-1 represents the first time a local zoning ordinance as applied to an Amateur Radio antenna has been declared invalid on the basis of PRB-1.

United States District Court
Eastern District of New York

Andrew. B. Bodony,
Plaintiff,

-against-

Incorporated Village of Sands Point, Marjorie Weinstein, Bruce Shroyer, Mario Tribuno, Harry B. Anderson and Albert Shapiro, individually and in their capacities as members of Board of Zoning and Appeals of the Incorporated Village of Sands Point, and Leonard Wurzel, Building Inspector,
Defendants

CV-3967

Memorandum
of
Decision and Order

September 21 1987

Appearances:

Seyfarth, Shaw, Fairweather & Geraldson, Esqs.
Attorneys for Plaintiff
757 Third Ave.
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Timothy J. McInnis, Esq., Of Counsel
Michael L. Hirschfeld, Esq., Of Counsel

Sheft, Wright & Sweeney, Esqs.
Attorneys for Defendants
11 Broadway
New York, NY 10004
Robert P. Siegel, Esq., Of Counsel

Christopher D. Imlay, Esq.
Amicus

Mishler, District Judge

Andrew B. Bodony is an amateur radio operator, licensed by the F.C.C. as an Amateur Extra Class licensee. On October 5, 1984, the F.C.C. granted Bodony an amateur radio station license for Bodony's residence at Cornwells Beach Road, Sands Point, Nassau County, New York. Soon thereafter Bodony began preparation for the erection of a free standing structure for an antenna system, 23 feet in height in its retracted position and 86 feet in height in its extended position. Bodony excavated an area of about 4 1/2 feet square to a depth of about 12 feet and poured concrete into the excavation to serve as an anchor for the antenna. The site of the antenna is a wooded area and it is expected that trees will shield the antenna from public view when it is extended to its maximum height.

The Incorporated Village of Sands Point ("Village") issued a summons charging Bodony with a violation of a village ordinance requiring a building permit for the structure. Bodony applied for a building permit. The Village denied the permit. Leonard Wurzel, building inspector of the Village, is joined as a party defendant.

On January 23, 1986, Bodony appealed to the Zoning Board seeking a variance of section 352.2 of the Building Ordinance of the Village which limits the height of accessory buildings to 25 feet. After conducting a public hearing, the Zoning Board, in a formal decision dated October 27, 1986, denied the application and found:

> Within the Village of Sands Point there are several residents who operate amateur radio stations with towers and antennas which conform to the height restrictions of the Building Zone Ordinance of the Village and communicate at frequent intervals.
>
> The applicant has failed to demonstrate that he cannot operate an amateur radio station with an antenna which conforms to the height restriction in the Building Zone Ordinance and that he has suffered any hardship.
>
> The applicant has failed to prove that the tower and the antenna thereon is (sic) safe.
>
> The proposed construction of the tower and antenna would (a) depreciate the value of the property of the Village; (b) create a hazard to health, safety and general welfare; (c) be detrimental to the character of the neighborhood or to the residents thereof; (d) alter the essential character of the neighborhood, or (e) otherwise be detrimental to the public convenience and welfare.

The Complaint

The complaint alleges eight claims against the Village, members of the Zoning Board and Wurzel as follows:

Count I-Section 352 para. 2 of the Village Building Ordinance is preempted by the Declaratory Ruling of the F.C.C. published September 25, 1985 in the Federal Register, 101 F.C.C. 2d 952, Fed. Reg. 38, 813 (PRB-1), which in pertinent part declared:

> 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.

Count II-The height restriction is unconstitutional in that it constitutes a burden on radio communication and interstate commerce in violation of Article I, Section 8, Clause 3 of the Constitution (power to regulate interstate commerce).

Count III-A violation of First Amendment rights of free speech, assembly, and association.

Count IV-A violation of the Fourteenth Amendment right of equal protection of law in that Section 352, para. 3 provides: "No other buildings shall exceed forty (40) feet in height or three (3) stories and attic. Church spires, belfries, flagstaffs, chimneys, flues and television antennas may extend above said height limitations." ("Other buildings" as used in paragraph 3 are buildings other than principal dwellings and accessory buildings.)

Count V-A violation of the First and Fourteenth Amendments in that it subjects the plaintiff to possible criminal liability and the ordinance is vague and overbroad and fails to inform, guide, instruct or direct the Zoning Board in consideration of plaintiff's application. As applied, the ordinance has a chilling effect on plaintiff's constitutional rights.

Count VI-The height restriction does not bear a reasonable relationship to the state's police power and therefore is unreasonable, arbitrary, discriminatory, oppressive and confiscatory and constitutes an unwarranted interference with substantial property rights.

Count VII-The hearing conducted by the members of the Zoning Board was unfair in that (1) they had arrived at a determination to deny the application prior to the hearing; (2) evidence was introduced of a difficult technical nature without notice or an opportunity to meet it; and (3) they sought advice and counsel from third parties to support their predetermined denial of the application.1/

Motions

Bodony moves pursuant to Fed. R. Civ. P. 56 for partial summary judgement on Counts I, IV and VI seeking a declaratory judgement declaring that the height limitation as applied to him for the purpose of erecting an amateur radio antenna system to a height in excess of 25 feet is invalid. Defendants cross move for summary judgement to dismiss the complaint on the ground that the Zoning Board did not act arbitrarily or unreasonably in denying Bodony's application for a variance.

DISCUSSION

Preemption

PRB-1 states under the caption "Summary"

> This document declares a limited preemption of state and local regulations which preclude amateur communications. The ruling is necessary so that amateurs and local governing bodies alike will be aware of the strong federal interest in promoting amateur communications.

Further, under the caption "Local Ordinances", PRB-1 states:

> 3. Conflicts between amateur operators regarding radio antennas and local authorities are common....These limiting regulations (on height) 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 on certain bands allocated for their use if the height of their antennas is limited by a local ordinance.

Further, under the caption, "Discussion"

> 22. Few matters coming before us present such a clear dichotomy of viewpoint as does the instant issue. The cities, counties, local communities and housing associations see an obligation to all of their citizens and try to address their concerns.... 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.... In this situation, we believe it is appropriate to strike a balance between the federal interest in promoting amateur operations and the legitimate interest 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.
>
> 24. (W)e 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.... We recognize the amateur radio service as a voluntary, noncommercial communication service, particularly with respect to providing emergency communications.... Upon weighing these interests, we believe a limited preemption policy is warranted....
>
> 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.... 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.

Congress created the F.C.C. in the Communications Act of 1934, 47 U.S.C. & 151 et seq. and granted the F.C.C. the power to promulgate regulations "as may be necessary in the execution of its functions...." 47 U.S.C. & 154(c). The F.C.C. was given "broad responsibilities" to regulate all aspects of interstate and foreign radio under &2(a) of the Communications Act of 1934, 47 U.S.C. & 152(a). Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 700, 104 S. Ct. 2694, 2700-01 (1984); see also United States v. Southwestern Cable Co., 392 U.S. 157, 177-78, 88 S. Ct. 1994, 2005 (1968). The regulations have the same preemptive effect as federal statutes. United States v. Shimer, 367 U.S. 374, 383, 81 S. Ct. 1554, 1560 (1961). The F.C.C. decided on a "limited preemption' which requires the Village to vary the

ordinance limiting the height of Bodony's antenna so that he may use the license granted him by the F.C.C. for international communications, and exercise its right to protect the health, safety and general welfare and preserve property values and the general character of the neighborhood by using the least restrictive height to accomplish its "legitimate purpose."

Defendants' Position

Defendants resist Bodony's motion for partial summary judgement and support their own motion by arguing that:

(1) Section 352.2 does not preclude amateur communications but only limits the height of the antenna to 25 feet, thus falling outside the area preempted by PRB-1. (Defendants' memo p. 9).

(2) Bodony failed to demonstrate that he could not operate an amateur radio station within the height restriction of Section 352.2. (3(g) Statement).

(3) The Zoning Board decided that construction of the tower would (a) depreciate the value of the property, (b) endanger the health, safety and welfare of the residents, and (c) be detrimental to the character of the neighborhood or the residents and change the essential character of the neighborhood.

The Height Limitation as Affecting Bodony's Rights as a Licensee

One factor in determining the range and effectiveness of radio communication is the height of the antenna. Measurement from the ground tells us little. A 25 foot antenna in a valley surrounded by hills might be useless, while that equipment on a mountain top might give optimum results. An antenna rising above the obstacles that interfere with radio signals obviously gives a greater range and better reception than an antenna of a lesser height.

The fact that Section 352.2 does not prohibit amateur communications is not the answer to a claim of preemption. An absolute limitation of height affects Bodony'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 F.C.C.. The Zoning Board did not consider a height above 25 feet that would at the same time "accomplish the local authority's legitimate purpose". The F.C.C., in asserting a limited preemption, placed upon the Zoning Board the duty of striking "a balance between the federal interest in promoting amateur operations and the legitimate interests of local governments in regulating local zoning matters." The recital by the defendants of the findings of the Zoning Board in arguing its opposition to Bodony's motion does not preclude litigation of the validity of Section 352.2 as it affects Bodony. See University of Tennessee v. Elliot, 478 U.S.___, 106 S Ct. 3220, 3225 (1986).

It is clear from the record of the hearing before the Zoning Board that a limit of 25 feet of antenna height seriously interferes with the full enjoyment by Bodony of his license to operate an amateur radio station.2/

The record fails to show that the erection of the proposed antenna will endanger the health, safety and general welfare of the residents or be detrimental to the character of the neighborhood or to the residents. The Zoning Board did not determine the height above which the antenna would endanger the health, safety and general welfare of the residents. It is uncertain how the erection of the proposed antenna system will affect the outward appearance or aesthetic harmony of the neighborhood, given the proposed shielding of the system by trees. The action of the Zoning Board is devoid of any effort to make "a reasonable accommodation...between the two sides."

We find that Section 352.2 of the Building Ordinance is invalid as it applies to the plaintiff Andrew B. Bodony as an amateur extra class operator at the site licensed by the F.C.C. as an amateur radio station. Our discussion on the height of amateur radio station antennas is not intended to suggest an appropriate height. We base our ruling on PRB-1, in preempting the right of the Zoning Board to arbitrarily fix a limitation on the height of an antenna to 25 feet.3/

Defendants' Motion for Summary Judgement

Bodony opposes defendants' motion for summary judgement on the ground that he has not had the opportunity to discover materials in the exclusive possession of the defendants that would probably result in evidence showing the existence of material issues of fact. Schering v. Home Ins. Co., 712 F. 2d 4, 10 (2d Cir. 1983), Fed. R. Civ. Pg. 56 (f). We believe that Bodony has offered evidence that presents material issues of fact, and there is no reason to delay decision on the motion.

We turn to defendants' argument that the Zoning Board's decision may not be overturned unless the action is arbitrary and capricious. (Point IV, Defendants' memo).

Count VII alleges a civil rights claim in charging the Zoning Board with (1) having denied Bodony's application before the hearing commenced, and (2) seeking advice and counsel from third parties...as to the best manner in which to deny plaintiff's application..." in violation of his right to due process. The court having directed production of document No. 7 in a memorandum of decision dated this day, and defendants having consented to the production of documents numbered 5 and 8, finds fact issues presented on this claim. The court of course does not find that the claim is established.

If Bodony succeeds on this claim, the decision of the Zoning Board must be vacated. We are not bound by the findings of the Zoning Board in such event. See Acorn Ponds v. Incorporated Village of North Hills, 623 F. Supp. 688, 693 (E.D.N.Y. 1985). (The & 1983 claim goes beyond a claim of error in the application of the zoning laws and charges members of the Zoning Board with an abuse of power that violated plaintiff's right to due process). The issues presented in the claim were not before the Zoning Board.

Enough has been offered in the record of the hearings to establish material fact issues for trial. Summary judgement is denied.

We note in passing that abstention in a case involving claims of violation of constitutional rights is inappropriate.

ORDER

The motion of plaintiff Andrew B. Bodony for partial summary judgement is granted to the extent of declaring the 25 foot height limitation contained in section 352, para. 1 on the antenna system (an "accessory building") proposed by Bodony as void as it affects Bodony as an amateur

extra class licensee for the licensed premises. Summary judgement on the issue of liability on Count I of the complaint is granted. See Lytle v. Freedom International Carriers, 519 F. 2d 129, 133 (6th Cir. 1975); Leasing Service Corp. v. Graham, 646 F. Supp. 1410, 1414 (S.D.N.Y. 1986); Fed. R. Civ. P. 56 (a); Wright, Miller & Kane, Federal Practice and Procedure 2s section 2737 at 446-53.

Defendants' motion for summary judgement is in all respects denied, and it is

SO ORDERED.

signed, Mishler.....U.S.D.J.

FOOTNOTES

1/ Plaintiff seeks to impose liability upon the members of the Zoning Board individually and as members of the Zoning Board.

2/ Testimony of experts indicates that a height of 60 to 70 feet is necessary for good reception under ideal atmospheric conditions. One Carl Silar, an amateur radio operator, stated that he received communications worldwide using ar antenna which was less than 25 feet. He conceded 50 feet, 60 feet or 70 feet would achieve a better result. The F.C.C. permits operators of Citizen Band (CB) radio transmitters to use an antenna 60 feet in height holding "the primary purpose of permitting such an increase in height is to enable licensees to erect antennas above nearby obstacles which may absorb radiated energy and thus decrease ability to communicate." 42 F.C.C. 2d 511, 513 (1973). In Oelkers v. City of Placentia, No. CV 78-1301-RMT (C.D. Cal. 1979) (unreported decision) holding a 15 foot limitation on the height of an antenna unconstitutional as it affected the plaintiff amateur radio operator and found that the plaintiff was deprived "of some radio frequencies" at an increased height of 50 feet (as ordered by the court).

3/ We find it unnecessary to discuss the other grounds for the relief requested, i.e., Count IV (equal protection of law), and Count VI (section 353.2 unconstitutionally vague).

Plaintiff Andrew B. Bodony object to the Order of Magistrate David F. Jordan dated July 6, 1987 to the extent that it denies discovery of documents 1, 2, 3, 4, 6, 7, 14, 15, 16, 17 and 23 on a list described as "Privilege List" pursuant to Fed. R. Civ. P. 72 (a).

Defendants claim error in the finding of waiver based on their failure to respond to plaintiff's request for production of documents under Rule 34 and further object to the production of numbers 10 and 11 on the ground of privilege.

We have examined the Privilege List in camera.

We find that document No. 7 is not a request for legal advice but rather one for the recommendation of an expert. A request to name a witness who will supply technical advice to the Zoning Board is the type of request that is generally made of non-lawyers, and is not privileged. First Wisconsin Mortgage Trust v. First Wisconsin Corp., 86 F.R.D. 160, 174 (E.D. Wis. 1980), 8 Wigmore, Evidence, & 2296. The document also contains a statement of information received by Ms. Weinstein that is not part of the record, which she indicates will be considered in arriving at a decision. Though ex parte communications do not void an agency's decision, Southwest Sunsites, Inc. V. F.T.C., 785 F. 2d 1431, 1436 (9th Cir.), cert. denied, 107 S. Ct. 109 (1986), the consideration of evidence outside the record will invite an attack of such decision on due process grounds. Simpson v. Wolansky, 38 N.Y. 2d, 391, 396, 380 N.Y.S. 2d 630, 634 (1975). The plaintiff makes the argument in this case. Document No. 7 is producable.1/

We agree with defendants that the Magistrate was in error in directing production of documents numbered 10 and 11. Document 10 seeks legal advice of counsel and document 11 gives legal advice.

We have reviewed the circumstances under which the defendants failed to comply with Standing Discovery Order No. 21 of this court (requiring assertion of privilege) and failing to move timely under Fed. R. Civ. P. 26 (c). The defendants' attorney's conduct was not in bad faith or for the purpose of delay. We find that the magistrate's finding of waiver based on the violations of the rule and order to be error. The expense of the motion to compel production may nevertheless be recovered.

ORDER

Defendants are directed to produce documents No. 5 and No. 8 (by consent of defendants) and document No. 7. Documents numbered 10 and 11 are privileged and need not be produced.

The motions by plaintiff and defendants are granted to the extent indicated and are in all other respects denied, and it is

SO ORDERED.

signed.....Judge Mishler, U.S.D.J.

FOOTNOTE

1/ Defendants consented to the production of document No. 8. Document No. 8 is a response to the request by Ms. Weinstein in document No. 7.

Memorandum Opinion and Order in PRB-1

Before the
Federal Communications Commission
Washington, DC 20554

FCC 85-506
36149

In the Matter of	)	
	)	
Federal preemption of state and	)	**PRB-1**
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.[1] With extension, comments were due on or before December 26, 1984,[2] with reply comments due on or before January 25, 1985.[3] 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 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 location, 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 Vrenios, 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 sometimes 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 amateurs 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 electromagnetic 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 purposes 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 oppose 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 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 (television, 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),[4] 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 affect 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 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 radio 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 the regulation on Federal goals. Its position is that Federal preemption is warranted whenever local government 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 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 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 either 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 & 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 statues, 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 view point as does the instant issue. The cities, countries, 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. [5] 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.[6]

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 conflicts 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

Footnotes

[1]Public Notice, August 30, 1984, Mimeo. No. 6299, 49 F.R. 36113, September 14, 1984.

[2]Public Notice, December 19,1984, Mimeo. No. 1498.

[3]Order, November 8, 1984, Mimeo, No. 770.

[4]MARS is solely under the auspices of the military which recruits volunteer amateur operators to render assistance to it. The Comission is not involved in the MARS program.

[5]47 CFR Part 97.

[6]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.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5523

ANTHONY IZZO,

Appellant

v.

BOROUGH OF RIVER EDGE; PLANNING BOARD OF THE BOROUGH OF RIVER EDGE; RICHARD FITZGERALD; MEL WINGE; WILLIAM GILLEN; PHYLLIS SKAE; SCOTT CISTERNINO; THOMAS CRIMMINS; ARNOLD OSMUNDSEN; BARBARA GRAZIANO; MAYOR EDWARD RAFFO; MARY DONOHUE; JOSEPH SYNOL; ESTELLE GASS; AND STEPHEN NEGRI

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 87-1653)

Argued January 20, 1988

Before: GIBBONS, *Chief Judge*,
WEIS and GREENBERG, *Circuit Judges*

Filed April 7, 1988

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Attorney for Appellee

OPINION OF THE COURT

WEIS, *Circuit Judge.*[1]

A local zoning board refused to allow an amateur radio operator to extend the height of his transmission tower. He filed suit in the district court alleging both preemption by a Federal Communication Commission ruling and infringements of his constitutional rights. Citing state concerns in land use regulation, the district court abstained. We will remand for further proceedings because the presence of a federal interest requires the district court to adjudicate the case.

Plaintiff is an amateur radio operator licensed by the Federal Communications Commission. To increase the range of his broadcasts, he planned to install a forty-foot transmission tower in his backyard in the Borough of River Edge, New Jersey. Plaintiff applied to the borough planning board for a variance because the local zoning ordinance limits non-residential structures in the area to a height of thirty-five feet.

After hearing testimony, the board denied the variance, finding that the tower would diminish the privacy of neighboring residential properties and would increase the transmission range to only a

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1. At the time of oral argument on this appeal, Honorable Joseph F. Weis, Jr. was an active circuit judge. Judge Weis has since taken senior status.

limited extent. In addition, the plaintiff's evasiveness and failure to provide specific details about the structure led the board to doubt his credibility.

Plaintiff then filed a complaint in the district court, alleging constitutional violations and an invalid exercise of the borough's police powers. He sought injunctive relief, declaratory judgment, and damages. The suit named as defendants the Borough, its zoning officer, and twelve members of the planning board. Defendants moved to dismiss. Concerned about its jurisdiction, the court requested the parties to brief applicability of the abstention doctrine to the case.

After consideration of the submissions, the district court construed *Burford v. Sun Oil Co.*, 319 U.S. 312 (1943), to require abstention by federal courts when a suit constitutes an attack on comprehensive state regulatory or administrative systems. Following *Burford*, federal courts abstained in other cases challenging purely local land use planning ordinances. In the district court's view the controversy "involves no more than a dispute over local application of a local ordinance," and scrutiny by the federal courts "would result in needless federal-state friction."

Rejecting the plaintiff's contention that a 1985 memorandum opinion and order of the Federal Communications Commission was controlling, the court concluded "the FCC specifically did not preempt local regulations such as those at issue in this case." Accordingly, the defendant's motion to dismiss was granted.

On appeal, plaintiff presents three arguments -- the FCC has preempted local regulation of the height of antennas; the municipality unlawfully burdens interstate commerce; and, the ordinance deprives the amateur operator of his freedom of speech. We consider only the first ground.

I.

In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), the State of Texas had established a complex regulatory system for the drilling of wells in the East Texas oil fields. Under that scheme, administrative action was reviewable in the state courts of only one county in an effort to maintain uniformity of decision. Similar challenges also were filed in the federal district courts. After a period of years, it became clear that the regulatory system withstood federal constitutional scrutiny. *See id.* at 328-29 & n.24. Diversity jurisdiction being present, the federal courts were nonetheless called upon to pass on Texas law as interpreted by the state's own administrative agency. This dual jurisdiction produced inconsistent federal and state court constructions of the Texas scheme, at times serious enough to require special legislative sessions.

In those instances, the Supreme Court concluded that the "equitable discretion of the federal courts should be exercised to give the Texas courts the first opportunity to consider" the basic problems of that state's policy. *Id.* at 332. "Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand." *Id.* at 334.[2]

In a later case attacking a less complex regulatory scheme, the Court applied *Burford* abstention despite a railroad's assertion of a federal constitutional claim. *See Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341 (1951). Resolution of the issue there depended "upon the predominantly local factor of public need for the service rendered." *Id.* at 347.

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2. An interesting vignette on the disagreement between Justices Black and Frankfurter about the *Burford* decision appears in the Diaries of Felix Frankfurter 226-28 (Lash ed. 1975).

Not long after *Alabama Pub. Serv. Comm'n* was decided, limitations on the abstention doctrine surfaced. *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959), held that a federal court should not refuse to decide a factual question determining whether a county properly could exercise the powers of eminent domain over specific property. Duly noting the teachings of *Burford*, the Court found "no hazard of disrupting federal-state relations." *Id.* at 189-90. The respondents did not ask the district court to apply "paramount federal law to prohibit state officials from carrying out state domestic policies, nor [did] they seek the obvious irritant to state-federal relations of an injunction against state officials." *Id.* However, in a condemnation case decided that same day, where state law assertedly was unsettled, the Court approved abstention. *Louisiana Power and Light Company v. Thibodaux*, 360 U.S. 25 (1959).

The Court revisited the abstention problem in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). Discussing *Burford*, the Court said: "The reasonableness of the [drilling] permit in that case was not of transcendent importance, but review of reasonableness by the federal courts in that and future cases, where the State had established its own elaborate review system for dealing with the geological complexities of oil and gas fields, would have had an impermissibly disruptive effect on state policy for the management of those fields." *Id.* at 815.

As *Colorado River* makes clear, abstention is the exception, not the rule, and is justified only in the exceptional circumstance where the order guiding the parties to the state court "would clearly serve an important countervailing interest." *Id.* at 813 (quoting *Mashuda*, 360 U.S. at 188-89). *See also Heritage Farms, Inc. v. Solebury Township*, 671 F.2d 743, 746 (3d Cir. 1982) (State policy on local land use regulation

not based on uniformity; consequently, *Burford* abstention inappropriate).

Moving from this cursory review of *Burford* complexities, we turn to the FCC order on which plaintiff here relies. To first put the regulation in perspective, we observe that "[f]ederal regulations have no less pre-emptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily. . . . A preemptive regulation's force does not depend on express congressional authorization to displace state law . . .." *Fidelity Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-54 (1982). *See also United States v. Shimer*, 367 U.S. 374, 381-83 (1961).

The Federal Communications Act provides that the Commission "may . . . make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). At the instance of the American Radio Relay League, after notice and comment procedures, the FCC issued a declaratory ruling on September 25, 1985. 50 Fed. Reg. 38813. The Commission recognized the strong federal interest in promoting amateur radio operations, particularly with respect to providing emergency communications. At the same time, the FCC acknowledged the important state interest reflected in local zoning ordinances, and concluded that "a limited preemption policy is warranted." *Id.* at 38816.

Because 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 Commission did not "specify any particular minimum height limitation below which a local government may not regulate." *Id.*

Nevertheless, the FCC said that ordinances "must be crafted to accommodate reasonably amateur communications" and to "represent the minimum practicable regulation to accomplish the local authority's legitimate purpose." *Id.* This balancing would include consideration of such matters as health, safety and aesthetics.

The Commission's order indicates an intent to apply a limited, rather than a total preemption. However, the order infuses into the proceedings a federal concern, a factor which distinguishes the case from a routine land use dispute having no such dimension. *See Themes v. City of Lakeside Park*, 779 F.2d 1187 (6th Cir. 1986). *Cf. Guschke v. City of Oklahoma City*, 763 F.2d 379 (10th Cir. 1985) (pre-FCC declaratory ruling on preemption); *Kroeger v. Stahl*, 248 F.2d 121 (3d Cir. 1957) (same).

The presence of a constitutional or other federal interest, however, is not necessarily dispositive in resolving a *Burford* abstention problem. For example, in *Alabama Pub. Serv. Comm'n* a constitutional issue was pressed and found not determinative of federal jurisdiction. We also recognize that in *Burford*, the alleged constitutional issue simply rehashed an argument already rejected by the federal courts on numerous occasions. From that standpoint, *Burford* was just a typical diversity case but one in which strong state policies were critical to the outcome.

It is fair to say, however, that in the years since *Burford* the presence of a federal issue has become a significant element in deciding whether a court should abstain. In *Colorado River Water Conservation Dist.*, the Court, referring to *Burford*, noted that "the presence of a federal basis for jurisdiction may raise the level of justification needed for abstention." 424 U.S. at 815 n.21. In discussing the relevance of state interests, the Court said: "The potential conflict here,

involving state claims and federal claims, would not be such as to impair impermissibly the State's effort to effect its policy respecting the allocation of state waters." *Id.* at 816.

The relatively minor nature of the state's concern was a factor in *Zablocki v. Redhail*, 434 U.S. 374 (1978), where the Court commented, "[u]nlike *Burford*, however, this case does not involve complex issues of state law, resolution of which would be 'disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.' . . . And there is of course no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy." *Id.* at 380 n.5 (citation omitted).

If only state law applies, *Burford* abstention carries more weight than when federal interests require evaluation as well. One commentator suggests that, before a district court invokes *Burford* abstention in a case containing a federal issue, three conditions should be present: (1) the subject of the regulation be of significant and special concern to the state; (2) the state regulatory scheme be detailed and complex; (3) the federal issues be unresolvable without requiring the district court to immerse itself in the technicalities of the state's scheme. M. Redish, *Federal Jurisdiction: Tension in the Allocation of Judicial Power* 246 (1980). Although not dominant in *Alabama Pub. Serv. Comm'n* and *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593 (1968), two cases where abstention was directed, those criteria reflect current philosophy in this developing area and provide a useful framework for analysis.

Concededly, a system of land use regulation may be of special interest to a state and a municipality; however, the scheme at hand does not approach the complexity of the one under scrutiny in *Burford*. The

issue here is not so technical that it requires the district court to become enmeshed in a highly specialized area inconsistent with resolution of a relatively minor federal concern. Nor will the federal court's decision have a potentially far-reaching effect in the area of land use regulation. In contrast, the federal intrusion is very limited and unlikely to nullify any substantial portion of the regulatory program.

It has been proposed that *Burford* be restricted to state, rather than merely local, regulatory matters. But we see no need to explore this assertion now because other, more basic, considerations militate against abstention here. *Cf. Heritage Farms*, 671 F.2d at 743; Note, *Land Use Regulation, the Federal Courts and the Abstention Doctrine*, 89 Yale L.J. 1134 (1980).

In this case an express, narrow, and quite specific federal provision threatens, at most, only a minimal disruption of a broad state policy. The rationale of *Burford* is not apposite, and the general obligation of federal courts to retain jurisdiction of matters entrusted to them, particularly on matters of federal law, predominates.

We share the district court's sensitivity to the federal judiciary's traditional respect for local administration and control of land use regulation. Federal courts have expressly disavowed any desire to sit as a statewide board of zoning appeals hearing challenges to actions of municipalities. *See Heritage Farms*, 671 F.2d at 748.

Land use policy customarily has been considered a feature of local government and an area in which the tenets of federalism are particularly strong. *See Fralin & Waldron v. City of Martinsville*, 493 F.2d 481 (4th Cir. 1974) (Clark, J.); *Kent Island Joint Venture v. Smith*, 452 F. Supp. 455 (D. Md. 1978). Nevertheless, as we decided in *Heritage Farms*, the mere existence of land use regulation will not automatically mandate

federal court abstention. The special circumstances here require that the district court retain jurisdiction and adjudicate this dispute. We express no view, of course, on the proper resolution of the controversy.

The order of the district court will be vacated, and the case will be remanded for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

ARRL The national association for AMATEUR RADIO

QST OFFICIAL JOURNAL

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February 15, 2001

Senator John Torgerson
State Capitol, Room 427
Juneau, AK 99801-1182

Dear Senator Torgerson,

We, the members of the Alaska amateur radio community (over 3000 strong), are asking for your support in passing Senate Bill Number 78, entitled, "An Act relating to municipal regulation of radio antennas." This is a state affirmation of a 1985 rule issued by the Federal Communications Commission entitled PRB-1. As the federal rule says, our proposal simply requires that local zoning authorities reasonably accommodate the antenna needs of Amateur Radio operators. We are not attempting to "blaze" new territory. Ten states have already adopted state "PRB's," and others are in the drafting stage now. The language of the bill ensures that the minimal technical requirements to conduct amateur communications are preserved.

Your support of Amateur Radio operators in Alaska is important. Ham radio operators are valuable assets to the community. Historically, the Amateur Radio service has been at the forefront of communication technology. The concept of broadcasting began when listeners overheard amateur stations exchanging weather reports and baseball scores. The first land mobile systems were built by amateurs. Amateurs built the first single-sideband radios and the first handheld radios were built by amateurs. Even present day cellular telephone technology had its origins in amateur packet radio. There is an Amateur Radio station on the International Space Station to communicate with school children.

When a disaster strikes, Amateur Radio is there to assist with relief operations immediately. In 'ALASKA'S DARKEST HOUR' on that Good Friday in 1964, Amateur Radio operators were there and they did their job. We must admire the strength of that operator in Valdez, who was able to get on the air with damage reports and calls for aid, 15 minutes after loosing his teenage son to the tsunami. Please read the account and service of Radio Amateurs in "The Alaska Story" from QST July 1964 attached to this letter. "Ham" Radio is as Alaskan as sourdough.

Amateur radio operators continue to practice their craft and directly support emergencies such as the Miller's Reach Fire, the Juneau/Thane Avalanche, and the Turnagain Pass Avalanche. They team with and work side-by-side with government agencies and officials during mass casualty and other disaster preparedness drills. They donate thousands of hours of support volunteering their time and equipment to provide communications for such public events as the Iditarod, Anchorage Fur Rendezvous, Walk for Hope, the Yukon Quest, and countless others.

Your support of this bill is critical to our ability to provide emergency and public service communications support to a wide array of customers throughout Alaska, the United States, and the world when needed – typically with no notice and when least expected.

Respectfully and Most Sincerely,

Larry Kent Petty
Amateur Radio Station KL5T
Alaska Section Manager
American Radio Relay League (ARRL)

Here is what a corner of KL7DQL's shack looked like after the earthquake.

And yet, in this emergency which affected communications in the entire United States and Canada, the KL7s showed up in droves. True, some of them were ill-prepared, both in equipment and skill, to handle the tremendous volume of traffic which descended on them. Despite this and other drawbacks, the nation's presses and other news media, as well as officialdom, have been ringing with praises of the amateurs' performance during the aftermath of the earthquake.

This writeup is more concerned with what *was* done than with what *should* have been done. One could write a book on the latter, because hindsight is always better than foresight. Our analysis of reports received (48 from KL7s, hundreds from others) shows a grand total of 314 Alaskan amateurs participating in the emergency operation in one way or another. Considering the potential total, this is a whale of a lot of hams. (There are about 1200 licensed amateurs in Alaska.) Reports from the other 49 states show a total of over 1600 amateurs taking

The Alaska Story

A Summary of Reports of Outstanding Amateur Performance in the Earthquake Emergency

BY GEORGE HART,* WINJM

ALASKA is a big place. It sprawls over four time zones — as many as the entire remaining continental U.S. — and in most of its area there are few if any roads, population is sparse or nonexistent and communication is limited. An earthquake of whatever severity in some parts of the state could have gone almost without notice. But the one that occurred on Good Friday, 1964, took place in one of Alaska's few population centers and struck its largest city, Anchorage. Had the same thing happened in the San Francisco or Los Angeles area (which it *could* have!), deaths would have mounted into the thousands; for this was the strongest earthquake ever recorded in the northern hemisphere.

Earthquakes are almost entirely unpredictable. That is, we know they are more apt to occur at one place than another, in a general way, but usually they come on completely without warning. When it happens, everybody is caught by surprise. In an organizational sense, Alaska was not "ready" for a communications emergency. Some good c.d. organization exists in Anchorage, but otherwise it couldn't have happened in a worse place.

This emergency station at the Anchorage International Airport was operated continuously for 144 hours following the 'quake. That's KL7BLL at the controls. Other operators were KL7s AUV CLY (who owns the 2-meter rig) and DQL.

* National Emergency Coordinator, ARRL.

part in the Alaskan traffic-handling in one way or another. Any way you look at it, it was a *big* operation. Personal inquiry traffic got so thick on the networks that it had to be piled up on the west coast, awaiting outlets, as the traffic flowed *from* Alaska in a steady stream. National Traffic System nets were unable even to begin to handle the load. No communications system could have done it. Western Union, the Bell System, the military and all others were hopelessly bogged down. Only when the outgoing traffic slowed down was it possible to take care of the personal inquiries, most of them by that time obviated. Red Cross estimates that something like 70,000 such messages were stacked up at one time, awaiting an outlet into Alaska.

Disaster Area Reports

Of the 48 reports received from Alaska, 28 came from stations in what can be considered the disaster area — from Anchorage southward over the Kenai Peninsula. Kodiak Island was also affected, but we have no direct reports from there. It is impossible, from the mass of reports received, to get up a concise, chronological story of the development of amateur emergency communication. We'll just have to take the reports as they come, Anchorage area first, then other Alaska reports, then reports of other U. S. stations who contacted Alaska, then all remaining reports. Some will have to be omitted entirely; some will be cut to the bone. Most critical comments will have to be omitted, so we can concentrate on the facts.

KL7ERL set up gear at St. Mary's Rest Home in Anchorage, where emergency power was available. First call on 14,100 kc, was answered by W7CSW. Traffic was handled with W7CSW, K7JHA and W6MVL, mostly with K7JHA, who "is a real traffic man" (he is manager of RN7, NTS). While handling this traffic into and out of Anchorage, about 2100 GMT Mar. 28, the traffic was interrupted by a second earth shock, but no damage.

KL7ESR operated for 72 hours after the 'quake, on 80- and 20-meter sideband. Traffic was handled with KH6USA and then with KL7FBA at Elmendorf Air Force Base, who relayed all traffic into a net which he had set up. KL7FBA was operated by W7BDJ. All traffic was press releases and priority messages to Governor Eagan in Juneau.

KL7EJM at Soldatna put in 27 hours on 75 and 2 meters, part of which was spent in preparing messages for transmission and copying incoming messages. Contact was made with *KL7s* EAN EOU WAF EKO APH EKS EPL EOA and CHL.

KL7AUV and *KL7BLL*, a husband-and-wife team in Anchorage, spent from 20 to 28 hours on 75 and 2 meters on emergency power on the state c.d. net handling traffic for c.d., State Dept. of Aviation, FAA, various air lines, police and fire departments, Salvation Army and the armed services.

"To our knowledge," says Jack (or maybe it was Margie), "the amateur . . . carried at least 80% of *all* communications the first two days."

KL7DVT reports he operated 20 hours on two meters, relaying messages from the Alaska Native Hospital to c.d. headquarters in Anchorage.

KL7EAN operated 75 hours on 75 and 2 meters in the Sourdough Net, handled about 300 messages, mostly originals to the "outside."

KL7CPO in Spenard used his 3-kw. emergency generator to good effect on 20 meter sideband, also spent some time at KL7USA, Fort Richardson, repairing their gear. KL7USA was operated 24 hours a day for a full week. Much traffic was handled with W5PAA in Oklahoma.

One of the best NTS liaison stations was *KL7PI*, whose report mentions only that he spent 36 hours on 40 and 20 meter c.w., handling traffic for civil defense. With whom? With *KL7s* ENC BR ESA. W5IGW, *W6s* ASH CIS, K7JHA, *W7s* DZX JHR DIS and VE7BDJ.

KL7COI runs an FAA radio station at Eklutna, not far from Anchorage, and was all set up with emergency power. He operated about 29 hours on 20-meter c.w., handling traffic with W7AMZ and K6RAU. VK3DQ and ZL3GA assisted in "establishing and clarifying" traffic when frequency got congested.

KL7ENC and *KL7BAP* in Homer, another married team, spent some 38 hours on 75-meter phone and 20-meter phone and c.w. Local telephone service was almost completely disrupted and there was no long distance service because of destruction of the toll center in Anchorage. According to Ed, KL7ENC, c.w. and s.s.b. did the biggest job in bridging the gap. He appends a long list of stations with whom traffic was handled — *too* long to include here.

KL7ARY, Spenard, says that the power failed with the first shock and he was off the air until a neighbor set up a generator for him. Meanwhile, he assisted at KL7CKQ and KL7ENT. All traffic from KL7ARY was outgoing to the "lower 48." All messages carried instructions to be delivered by collect telephone. Senders were asked to request recipients in the "lower 48" to notify others so that only one message per person was filed. Some 300 messages were handled in this manner.

KL7EOU, KL7EJM and KL7EAN set up equipment at a bowling alley in Soldatna, on the Kenai Peninsula south of Anchorage, because emergency power was available there. At first KL7EAN's rig was used, then KL7EJM's rig was installed using the call KL7EOU and KL7EAN got on from his home. VE6NH/KL7 was the principal operator from KL7EOU. Contact was maintained with KL7WAF on two meters. Fifty hours of concentrated operation in the Sourdough and other nets resulted in a good job being done from KL7EOU.

Operation continued around the clock at W6CXO, American Red Cross Western Area headquarters in San Francisco. Shown above during a tense moment are (at left, front to back) W6GHI, W6GGC, K6QKY; at right, WA6TXY (on telephone) and W6JWF.

KL7EIP operated from Juneau, handling health and welfare traffic both into and out of the disaster zone.

A very interesting report from KL7BZO and XYL KL7CZU tells of some of the important kinds of traffic handled. One concerned a patient at Providence Hospital with gas gangrene, for whom a special piece of equipment was needed. W7AY, with whom contact was made, did the "leg" work and finally located the necessary gear at a hospital in Seattle, and arrangements (all by amateur radio) were made to fly the patient from Anchorage to Seattle.

Civil defense originated some messages going to the "lower 48" detailing some of the damage done and requesting supplies. Owners and operators of large industries originated messages with similar information and requests. Messages were received from officials of undamaged cities offering assistance, and Fairbanks sent 700 loaves of bread. The Salvation Army helped set up an amateur message center, where messages to the other states were filed, messages from the other states received and delivered by teen-age messengers. A good job by Ken and Edith Koestler, KL7BZO/CZU.

KL7FBA, at Elmendorf AFB, handled some 1500 messages of a military, civilian and personal nature, during the emergency. The commander of the unit responsible for the operation sent a letter of congratulations for the job done by the amateur service, to ARRL President Hoover.

KL7ALA in Spenard operated 48 hours from his home and 98 hours at c.d. headquarters, handling traffic for c.d. and the Salvation Army.

KL7EMP reports he wasn't able to do much, but that KL7EKB working as civil defense net control, did a great deal from his home in Spenard and also from c.d. headquarters in Anchorage, handling hundreds of health and welfare messages to the lower 48.

KL7MF, FCC Engineer in Charge for District #23, spent some time on 40 and 20 meters, phone and c.w., and says the cooperation from the rest of the states was wonderful.

KL7BR operated eight to ten hours on 40- and 20-meter c.w. and handled over 200 messages, most of them *incoming* health and welfare inquiries. Propagation conditions prohibited more extensive operations.

KL7ESW in Cape Yakataga tells us about KL7EPL in Valdez, who lost his home and a son in the disaster but was on the air less than five minutes afterward trying to contact Anchorage civil defense. "All our communications are out here," he told KL7ESW. "Buildings are falling in, water and sewer lines are broken and everything is coming apart." KL7EPL remained in town after it was evacuated, including his family, for over 70 hours, handling crucial communications without regard to his personal welfare or suffering.

KL7DRW, RACES officer for Anchorage, forwards a fine, detailed report of what went on from his vantage point, indicating that in Anchorage itself amateur (RACES) communication was far from disorganized. As soon as the ground had stopped heaving, he tells us, amateurs started gathering their equipment together and putting it into operating condition. Mobiles proceeded to points within and outside the city as directed by a mobile at c.d. headquarters on two meters, to such places as hospitals, Public Works, Defense Communications Agency, military installations, radio stations and other strategic points. Within ten minutes after the initial shock, some of these stations were activated.

But night was approaching, it started to snow, travel was already hazardous because of broken pavement, gas and water lines and fallen buildings. The entire city was without electricity and only one telephone in four was operative. A high-frequency station was activated at c.d. headquarters, operating on emergency power, and contact made with OCD in Everett, Wash., the nearest federal office. Meanwhile, other Anchorage stations started to get on the air and call in to ask for information and instructions. The commander at Elmendorf AFB maintained contact with c.d. by an amateur two-meter circuit.

The remainder of the night was pretty much a nightmare, the report goes on, as tidal wave warnings were being given to other cities, often in the blind. By daylight, amateur radio communication was becoming more and more dependable and was being more and more depended upon, and new operators started to come on to relieve those who had stayed at their jobs all night. The operation settled down, and the days that followed saw many vital messages passed, such as requests and orders for medical supplies, flight information for the Civil Air Patrol, and thousands of messages for individuals notifying loved ones elsewhere in Alaska and the other states of their situation. Amateurs served continuously for a week, then gradually as normal services were restored the nets began to secure and operators returned to their normal duties, subject to immediate recall should more severe tremors occur.

KL7DRW's report lists many amateurs in Anchorage and vicinity who assisted in the over-all operation.[1] He fears that many were inadvertently omitted, but perhaps other reports will pick them up.

KL7EKO in Kenai put in about 35 hours of actual operation on 20- and 80-meter phone, passing 65 messages out of the area to the other states. He was on the air an hour after the earthquake, meanwhile driving through town to assess the damage.

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[1] Omitting all stations already mentioned above: *KL7s* ZF HMD/mm ELG EKS APH/mobile EKO EDK ETZ BZB ENV EKU ETD AN IS PJ ZR AIR AHH AKC AKW APV AQU BCH BDG BIM BJD BJW BTP BXK CAH CCL CDG CUK CHO CHV CMQ DDM DDQ DFE DGA CLY DLA DQL DQD DVE DVH DGO EOJ ECW EMG EMY ENQ ERY EVD EQO EQQ ERH ERU EDU TDZ CII, W6VKB/KL7, K7KIU/KL7, WA6MSO/KL7, K5GUG/KL7.

His telephone, one of the few working, averaged a call every six minutes the first three days.

KL7ZF was at his job in the railroad depot in Seward when the 'quake struck. He set up his amateur gear at the General Hospital, where emergency power was available. First contact was KL7PI in Fairbanks, who relayed a message to civil defense via KL7CAH in Anchorage. From that time on for three days, he and KL7CJD were on a 24-hour basis, operating in the Alaska Sourdough Net. When electric power was restored, they returned to the regular KL7ZF location and were soon back on again, although there was no water or heat. There was also no means of communication with the outside world except their amateur station, and they were kept mighty busy for six days. On the sixth day they got some relief assistance from KL7EBK/KL7 in Douglas, and finally succeeded in clearing the hook just a few hours short of a week from the disaster. KL7ZF has special words of commendation for KL7CAH in Anchorage and the following stations outside Alaska: K6HLO, W7CSW, W9JNX, W6GHG, W7DIS, "and many others."

KL7DQL in Spenard operated mostly in the 2-meter RACES net, but did spend some time from his mobile on 75 meters. Travel was very difficult, with wide cracks in the streets making them impassable in some places.

KL7DZE operated for seven days after the disaster on 20 and 75 meters, mostly the former, on a.m. phone, putting in about 30 hours all told. His principal activity was sending out messages for the Red Cross and Salvation Army. Messages were sent to him by auto, because no communications were available in Anchorage. His report, like so many others, says little about what he did, much about the other amateurs who were active.

An interesting report and batch of clippings from *KL7EKZ* tell us that power in Anchorage was restored within 24 hours, water and sewage within a week except for the heavily-damaged Turnagain and downtown area. A city policeman with a multitude of duties, he was not able to participate much as an amateur.

Other Alaska Reports

Although the earthquake was felt within about a 300-mile radius of the assumed epicenter in Prince William Sound south of Anchorage, in many places the tremors caused little or no damage. Many amateurs in Alaska not affected by the earthquake responded to our request for reports and information.

KL7DG, who lives in Anchorage, was on business in Juneau when the earthquake occurred. Naturally, he was concerned with what was going on, and listened at a receiver in his hotel, without being able to transmit. He tells an interesting story:

"It was less than an hour after quake time in Anchorage. KL7ENV of Juneau was directing emergency traffic on the Sourdough Net (3892 kc.), under control of KL7CAH. KL7EBK of Juneau was also handling emergency matters. KL7DRZ had established contact with W7UMU in Seattle and was also working W7UEM. The only station in Anchorage immediately at quake time was KL7ESR, who was caught in his automobile north of Anchorage. Heard from W7UIA that Public Health Services not needed in Anchorage at present time. A relayed message from W7UMX to KL7ENV in Juneau. A message from KL7APH of Kodiak relaying a message from town of Kodiak to the Navy Station 7 miles away via KL7ENV in Juneau, who sent it back to the Navy Station by teletype. KL7DB of Juneau offered assistance, as did KL7RU in Ketchikan and KL7CQF of Haines."

A report from the Communications Officer at Galena Air Force Station mentions that many of the "remote site" stations fanned out on each side of a net on 14,285 kc. handling outbound traffic and accepting incoming traffic. About 168 of these were airlifted to Elmendorf by jet fighters to be delivered in Anchorage.

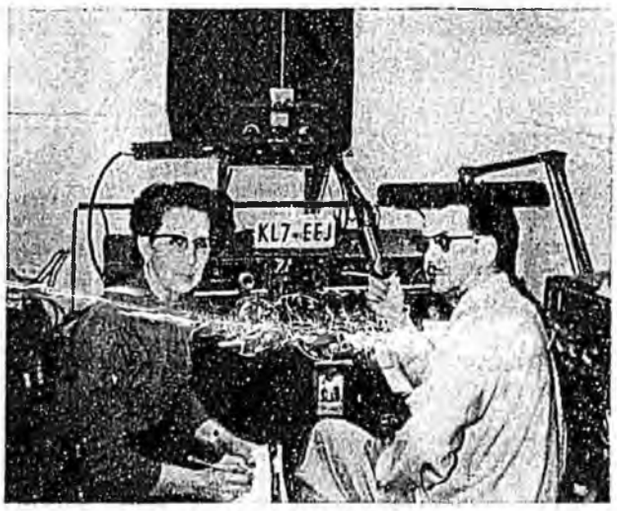
KL7CVB was at an FAA installation in Northway, near the Canadian Border, when the quake occurred. Little damage was sustained there, but communication was disrupted. Unable to get information regarding the airstrip at Valdez over normal circuits, the ham rig was fired up and the required info was obtained from an emergency net NCSd by KL7ENV in Juneau.

KL7EQH at Yakutat handled a few messages for that town and gave some outgoing ones to the Southeast Alaska Net.

One of the more active stations in Juneau was *KL7ELM*. On the air at 2010 PST March 27, this station remained active almost continuously until April 1, acting as a relay station for traffic in and out of several points in Alaska, including Anchorage and other points in the disaster area. A total of 537 messages were handled while all other means of communication, except official military, were cut off.

KL7TEK reports from Fairbanks, which was not damaged by the earthquake, that he handled considerable personal welfare traffic into Anchorage from Fairbanks and other states. Much of this traffic was undeliverable; KL7CNX tried to deliver some of it in person in the stricken Turnagain area of Anchorage, but was prevented by police from going in.

KL7EFN is the station of a military radio club at Shemya Island, far out on the Aleutian chain, farther from Anchorage than many points in the other states. First alerted on Friday, Mar. 27, minutes after the earthquake, initial contact was established with K7DKD. The station originated more than a hundred messages from personnel at the 79th A.S.A. assuring relatives on the mainland that they were safe, and accepting messages from the "lower 49." These messages were put on the mail plane for Anchorage the next day. WA6BTK was the operator at KL7EFN.



KL7EEJ put in 53 hours handling health & welfare traffic with the assistance of his XYL (at left). This station is located at Galena, 400 miles north of Anchorage on the Yukon River.

Operating at *KL7DNE* on St. Paul Island, one of the Pribiloff group west of the Alaskan mainland, K0ASL spent eleven hours handling direct and written traffic for personnel at the Loran station there, although the Pribiloffs suffered no damage from the earthquake. Incoming messages for the mainland were accepted only when no delivery date was specified.

KL7DTR at Ketchikan operated long hours relaying messages to the disaster area but has no idea how many of them were delivered.

The report from *KL7AZJ*, Fairbanks area, on behalf of her OM, KL7AEQ (he would never get around to it, she says) is almost worthy of a feature article alone. This is true of so many of the reports received! Although Fairbanks was not damaged and did not lose power, Flo tells us that the power in Anchorage went off after the first tremor because of an automatic device in the electric generators which cuts off all power in such a contingency. It's

hard to say who was first on the air thereafter, as stations started getting back on with emergency power. KL7ENV in Juneau assumed control and did an extremely capable job of handling early disaster reports, particularly tidal wave reports which were promptly handed over to the Coast Guard. In Fairbanks, C.D. Communications Officer KL7BET and KL7DIY assigned monitoring frequencies, particularly 3850, 3892 and 3866 kc., known Alaska net frequencies. KL7ENV was assisted by KL7DTH during the first 12 hours as disaster reports poured in. The first call for help from Anchorage came from KL7CQS/mobile, for medical aid and supplies. KL7CQO and K5GEG, both mobile in Anchorage, were on describing damage and destruction until their gasoline supplies ran low. KL7BFB on Fire Island relayed a few important messages into Anchorage on a landline still available. KL7EPL in Valdez was back on the air 30 minutes after the disaster, although he had just lost his 15-year-old son when the entire city waterfront disappeared in a huge submarine landslide. KL7ELS at Hinchenbrook Island served as liaison to Valdez that first night. KL7EKU in Cordova told of a collapsed radio tower, damage to the waterfront and roads; KL7EAN reported from the Kenai-Soldatna area. KL7APH/mobile gave an eye-witness account of the arrival of the huge seismic tidal wave that all but destroyed Kodiak. KL7AEQ (including KL7DCF and KL7AZJ as operators) was assigned as Fairbanks representative in the 75-meter c.d. net. This group stood by all night, passing any information received directly to c.d. headquarters on two meters, whence it was relayed to news media in Fairbanks, thence to the wire services for dissemination worldwide.

By morning, disaster reports from the major towns were in. KL7CAH, NCS of the Sourdough Net, was back on the air and, assisted by XYL KL7BJD worked superhuman hours for a solid week, relieved from time to time by *KL7s* BJW AN and ZR. Reports on the condition of roads, railroads, warehouses and dock facilities were gathered, data on the status of state and federal property were collected, backup communications for military operators were provided and messages from mayors, other city officials, the governor and even the Secretary of the Interior were relayed.

By Saturday night it became necessary to relieve KL7EPL in Valdez, the only active ham in the town. KL7EMH offered her mobile and, loaded with equipment and supplies, an expedition consisting of *KL7s*, EMH, DEJ and DIA made the 12-hour drive over damaged roads and bridges to Valdez. They remained for three days. KL7DIA not only stood regular watches but also repaired most of the radio equipment in town.

KL7ZF at Seward was on the air from time to time, as power obtained from city hospital would permit. This town had just about been wiped out.

The c.d. net carried no "health and welfare" messages in the early stages. Amateurs not otherwise occupied buckled down to taking care of thousands of outgoing messages, and as local telephone systems were restored incoming messages were accepted. Military stations KL7WAH and KL7FAF were active in this phase. *KL7s* AC DJI PE and DUW were participants in Fairbanks, but this is only a partial list. The 75-meter band remained open for the first 24-hours after the earthquake, which was a great and unexpected blessing. When the band deteriorated later, traffic between Fairbanks and Anchorage was relayed by KL7IS-DDB at Lake Minchumina and KL7ECO-ENO in Fairbanks. KL7DIS at Galena also assisted, being able to bounce two-meter signals off Mt. McKinley and contact both Fairbanks and Anchorage on two meters.

Two complete teletype stations were set up in Fairbanks, one at c.d. headquarters and another at the home of KL7ENZ. A crew of electronics technicians, consisting of *KL7s* EUN EVV ETR EVX and DNW, drove to Anchorage to set up a similar station there. One of the stations in Fairbanks used equipment borrowed from KL7CNC and the Engineering Dept. of the University of Alaska, operating 24 hours a day with the call KL7KC, taking some of the burden off KL7AEQ. This was set up and operated by *KL7s* CUS BIL AND and EUY. Many other amateurs served through the small hours on the demanding shifts at c.d. headquarters.

Reports from the "Lower 48"

Where to begin? Response to the ARRL Bulletin over the OBS system has been so overwhelming that it just isn't possible to summarize all reports received. We have gone through the stack and taken out certain reports which seem inconsequential, then gone through them again, and again. This section of the Alaska story is devoted to what was left after the third or fourth culling. We regret having had to leave *anybody* out. It was absolutely necessary.

One of the biggest operations outside of Alaska itself was at the Aeronautical Center Amateur Radio Club, W5PAA, in Oklahoma City. Sponsored by the Federal Aviation Agency, this station was alerted early in the game to the need for establishing contact with the FAA's regional office in Anchorage. Unlike many amateur stations, who seemed to think that the best way to do this was to get on the air and call "CQ Alaska," W5EHC, an old hand at this sort of thing, monitored the 80, 40 and 20 meter bands for several hours to determine if such contact was feasible; by 0230 CST Mar. 28, the monitoring watch was discontinued. A few hours later, W5EHC organized an emergency communications team at W5PAA. There was no shortage of manpower at W5PAA, but contact with Alaska was not easy. Once it was established, first official agency traffic was cleared, then about 40 semi-official messages and about 220 welfare messages were handled before operation was suspended at midnight Mar. 28. From that time on, W5PAA operated strictly with volunteer operators, and before the station secured on April 1, a total of 2942 messages had been handled. All these messages had been carefully screened; there was no "junk" among them. W5EHC mentions a number of amateurs for their outstanding contribution to the operation at W5PAA, and others for their assistance from their home stations.[2]

We find ourselves in the position of giving a thumbnail sketch of a thumbnail sketch of the operation of K6BPC, a station built and equipped by the city of Paramount, Calif., and operated as c.d. and AREC headquarters in the area. The station was activated by SEC K6YCX at 0530Z on Mar. 28, but it was soon determined that Alaskan stations were not yet organized to handle traffic and the station was secured at 0930Z. Activating again at 1700Z, operations began in earnest as the switchboard was flooded with calls. Contacts were established in Alaska, with W5PAA, and schedules set up for handling the traffic through the various nets of the National Traffic System. Operation continued on all bands and all modes, including RTTY, until April 6. A quick tot of the messages handled by K6BPC comes to 4013. Following were the staff at K6BPC: *K6s* TFM JQB LDM YUL HIT GYF, *W6s* FNE QAE LVQ LQZ NSH, *WA6s* DJB AJT TWS GAG KVS ROF CDV, *WB6s* BYL IEK.

W6AM says his 25 acres of rhombic antennas oriented for coverage on 16 directions got a workout during the emergency. For over five hours an RTTY sked between K6BPC and KH6USA was relayed over W6AM with hardly a break or repeat.

K6GHU and K6KCI were in contact with Alaska every day for a week after the earthquake and handled quite a few messages. A Santa Barbara resident supplied an Anchorage telephone directory, which was quite useful.

One station who did a lot of work was W6ASH, Wally Reid of Los Altos, Calif. Wally started operating Friday evening, strictly on the c.w. bands. At first he handled only a few messages going to Alaska, via KL7ERL/KL7, then a newspaper article mentioned he was in contact with Alaska and his telephone started ringing. *K6s* YOL EJF, *W6s* KIN JQE and WA6TOG were enlisted to assist; but by Saturday the traffic *from* Alaska was so heavy that most of his originations had to be shelved. Much of the traffic received was telephoned long distance collect, but there was too much of it to deliver it all this way. No one objected to the collect call. Altogether, W6ASH spent a total of 124 man hours and handled a thousand messages during the emergency.

W7CSW also handled quite a bit of traffic on 20-meter c.w. First contact was with KL7ERL/-KL7, who appears to have been one of the first KL7s on c.w., then KL7EUB, KL7ZF/KL7, KL7EBJ/KL7, and KL7MF. W7CSW received many letters of thanks and one of commendation from the mayor of Spokane which he values highly.

Two independent networks which were active during most of the emergency were the Transcontinental Relay Net (TCRN) and the Weather Amateur Radio Net (WARN), ramrodded by W3CVE and W4BVE respectively. Both managed to give a good account of themselves. W3CVE reports a total of 270 messages handled.

W7DIS of Portland, Ore., said he found the phone bands jammed with confusion on Friday night so he concentrated on c.w. First contact was with KL7PI. In no time, word got around and W7DIS's telephone began to ring. Although he discouraged originations and finally accepted some only with the understanding that they might be delayed, he wound up on April 13 having handled 1371 third party Alaska messages, all on c.w.

There was quite a bit of activity in the Milwaukee area, as reported to us by EC K9KJT. From March 28 thru April 2, 42 amateurs of the Milwaukee AREC were involved in the handling of message traffic concerning the Alaskan tragedy. W9GPI handled some "high priority" messages originating at Elmendorf AFB via W7BA to W5PAA before contact was established between KL7FAM and W5PAA. W9EKW, the Red Cross sponsored amateur station, was active throughout the period and handled many messages.

W6MLZ reports handling official traffic only for the first 24 hours, then coordinating net operation for the next day. He was instrumental in getting much good public relations for the amateur.

W7QLC says that a tape recorder is an extremely useful device in such an emergency. He taped all information received over the air about the 'quake,

W9AB, club station of the Michiana Amateur Radio Club of South Bend, Ind., handled some 300 messages to and from KL7s during the emergency. That's WA9HEC operating, K9DVZ at left and an SWL assistant.
South Bend Tribune Photo.

[2] At W5PAA, not already mentioned in the cut caption and elsewhere, were *K6s* YEM UIM OCX, *W5s* NQF HXL HXT TMY JES AA BUX, WN5HWH. Other assisting amateur stations: K3DKH, *K6s* BPC NCT, WA6MOV, *K7s* FCB FER, *W7s* AG LDR, K8DYX, K1QHM/KL7, K8BJF/KL7, KL7DQC, K5VRF/KL7, KL7USA.

noting on the counter the location of information about each locality; then when someone inquiring called, he simply played it back to them on the telephone.

Many individual reports have been omitted entirely, but we hope we have picked up the calls of every participant reported to us, for listing at the end of this article. If not — well, we're human!

National Traffic System

Not much has been said above about the part played by NTS during the emergency. Actually, the system was very much in operation, although Alaska has not previously been noted for its representation in the Seventh Region Net (RN7), of which it is a part. Nevertheless, RN7 went on continuous operation and contact was made with Alaskan stations as possible. At first some traffic for Alaska was handled, but as the situation developed it became necessary to stack such traffic in order to take care of traffic coming down.

Although NTS emergency procedures had not at this time been specifically delineated, the system in general swung into action to support the situation. The Pacific Area Net and nets were activated as the traffic situation required, and NTS nets elsewhere in the country went on extra or special sessions as seemed required by their respective managers. However, the extent and quantity of traffic being originated was such that it was just not possible for any one system to handle it all. Special schedules were made with "iron men" and club stations and Alaska stations to take care of much of the overload. RN7 Manager K7JHA states that their participation added to the confusion, but it was an organized kind of confusion, the aim being to handle as much as possible without hope of being able to handle it all.

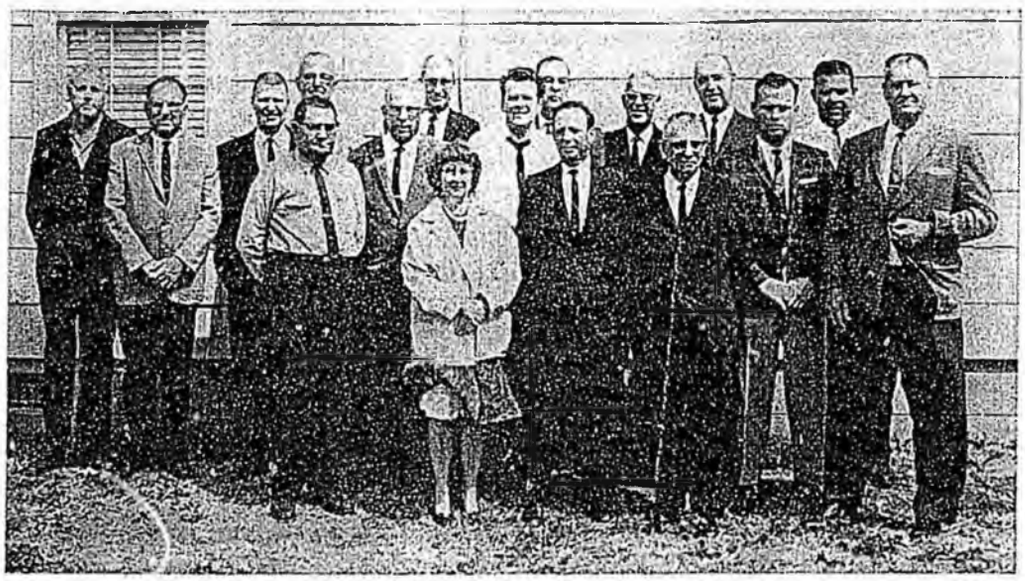
Whatever else can be said, it is definitely a truism that March traffic on NTS ended with a bang! NTS has nothing to be ashamed of, despite the groaning of some of its leaders, for its performance in this emergency. For the most part, it just continued to operate, tried to handle the big traffic load in its stride and discovered that this was impossible. With some pre-planning, much more could have been accomplished, and if we are permitted to do the necessary planning we'll be better prepared next time; not perfect, but better.

Publicity

More than any emergency in many years, the Alaska earthquake has afforded the amateur good favorable publicity. This emergency was tailor made for the purpose, and, tragic as it was, it came at an opportune time, when the status of amateur radio is under scrutiny, both by us amateurs and by our government and foreign governments. The front cover of this month's *QST* contains a montage of just a few of the newspaper clippings received, and those received were just a few of the ones which actually appeared. In addition, good coverage was afforded on radio, TV and other media. There are only about 250,000 people in all of Alaska, but it seemed that everyone in the "lower" 48 states had a relative or friend up there that he was concerned about. We amateurs served many of these people, and they won't soon forget it. This is something we can be proud of; at the same time we bear in mind that what we did is only a small fraction of our real potential with some real dedication, effort and preparedness.

Miscellany

As we write the conclusion of this article, we are conscious that many details of this operation have been completely omitted. Some of this is understandable, because we cannot write about that which we have not heard. Some of it just had to be blue-pencilled on an arbitrary



This is part of the crew at W5PAA, station of the Aeronautical Center A.R.C., where an outstanding job was done handling Alaska traffic for the FAA and others. From left to right are W5NQF, W5AZO, W5EUL, WA5FFL (rear), W5EMP (front), W5UYQ, K5YTB, K5PBE, KL7EUM, W5EHC, K5LIL, W5LOW, W5JES, K5YEM, KL7DRG, W5UZX. *Official FAA Photo.*

decision of triviality. Some, indeed, that we have already written will have to be cut to fit the space available. If the precious detailed report you submitted has seemed to have met this fate, while others you feel are not so important as yours were included, please bear with us. It isn't easy to compile this kind of a report. Meanwhile, here are the call letters of the remaining stations known to have had a part in the Alaskan emergency that were reported to us but have not previously been mentioned.

KL7s AFR AIZ AKB AKO ALJ AM AMH AMS ANT AOJ ASR AVD AVT AVX AWR AZN BAR BCS BF BFD BJC BJI BJV BLZ BNL BNY BP BPL BRX BT BUS BVY BW BX BYA CCI CDE CDH CDJ CEV CEW CGE CGF CHG CHQ CHT CJD CJF CKC CMQ CNQ CNW CNX CRR CSF CSR CUY CVX CWO CYD CYL CYU DA DBT DEX DGZ DIR DJE DJX DJZ DKS DL DMQ DNE DOB DPJ DQW DR DRU DT DTJ DTK DTO DUE DUF DUJ DUW DWE DX DXZ DYK DZF DZH DZI EAO EBH EDC EDH EEL EEO EEY EFG EFH EIS EJL EKQ ELF ELS EMA EMQ EMT END ENE EOB EOT EPS EQP EQV ERD ERG ERI ESA ESC ESF EST EUA EUW EUX EVT EWG FAI FAR FB FBD FBI FBK KBU FDA FW IR JHA JL KC KNE KRE LM MU PE PKS RMT SC SR SVO TE TGA TGN THD UW VJD WAI WAS YO.

Stations operating portable KL7: K1AII K3BIZ K4AWR *W4s* LKC QBN *W5s* CDB OEG K5VR W6DQ WA6OTB *W7s* HAH HMD LAN SFX *K7s* KYA RAR *K8s* DJF VJF W9YXY.

Stations who were reported as having been in direct contact with Alaska: *W1s* FAI KUX/6 KWX VP, *WA2s* JBR RAU, WB2AIZ, *W3s* BFF CUL ELI GNQ URS WEU, K3QMF, *W4s* KEN/6 RBZ SIY/5, *K4s* AKP/6 BDF FZJ HYL ICA IGN KYU LAN NRZ SMB SOM UMD VFY, *WA4s* ECY EPF HCI HCL IJH IRR KLT MBZ OQG RCL, *W5s* AIR DNE DRW EY/6 FJG FRW/5 KC VW ZPD, *K5s* CRM GGG HXR HZR ILL JLI PEV UOD *WA5s* ABA BSB BSD BUC BUV FVH, *W6s* AUQ AUT AYN BF BN EUK HLH HLM JF JJP JKJ JNX JTA JXY KLG KOB LED LIP LNH LYC MSW NAZ NCP OFS OJW OYJ OYV PHT PLS PWG QOE QR QUC QVO RKP RVN TMX UNF VNM VOZ VRC VTF WRJ WTV WXG YCX YGJ YH YJT ZZC, *K6s* ALL BFX BYS CBZ CCY CRZ CYG DH DVD DZV EOO EQP FDG GEF HGF HVP KCH LIT LFH LS LWE NCG OBA OJJ OSG OZV PRT QIB QJM QQE QWO RBO RIR RMT RUA UGW USN UTO ZZB, *WA6s* EDI EUZ FCR FEF FFS GFY HFU HSQ HUF IPG ITI JUL KDZ LMF OBC OET OJY PIR PKF QPM RCY RTF SDS SMT SYS TEV URZ WAS YAL YNL YPV ZVR, *WB6s* CIN CGA FBN FJA/KH6 FQO FUI FVZ GGS GLD IEA, *W7s* AC ADS AEC AEP AIB AQB AUB AV AVT BEW BFI BGH BRG BOZ CBB CMO CUL CWC CZY DEJ DJA DKD DON DQM DXN DXV DXX EFF EFJ EHW FCH FCU GC GGV GHD GKG GOU GPM GWA HCO HGJ HJU IBQ IDI IG IKG JAY JEN JHA JUT JWJ KCZ KWX LEB LIO MBO NAF NJF NPM OEB OES OFK OOF/6 PHG PHO PJO POH PSD PZO RNK RXM SFF SXP TLB TPG UGO UIT UL UWT UX VAS VDR VET VNI VRO VWO WBC WHX WNH WOK YH ZGC ZOH ZT, *K7s* AM ASV AV AYQ BAZ BVM BYH CAZ CHG CZM DAH

WA5AOO and WA5AXS operate Galveston County AREC station W5MTI, sponsored by Galveston County (Tex.) Red Cross.

DTR DWT EGJ EGX EXT FCU FDB FER GJN HNT HSF HRW HWW INQ ISW JBZ JUT KAK KWO LOQ LWY MAS ML MLO MSL MZC NDY NHV NKK NTG NTS NZO OGF OKL ONZ OQF PKV PMM PQM PTK PXA PXD QBR QEO RJV RMT ROE ROH SWL TBR TCL THD TNE TNP TSD TTW UHR UNO UXF VCK VGW VJJ VON WBC WFL WTN ZED ZIK ZQA ZRF ZUW, W8WA, *K8s* HPO KWB/KH6, *W9s* BJH BUQ FST GDM PXX SWD ZIB, *K9s* ASL BCQ EBA FXV JXE, *WA9s* BVL CHY DTV FEQ GQT GWZ HCI, *WØs* BDY EQ KCK NWX PQ SIN TSN WWU, *KØs* MBU PQW, *WAØs* BES CRQ/7 EBH FAS FIN HTZ, *KH6s* AX DDS DJI GF, KR6MB, KC4USX, KA2HQ, *VE3s* CTJ EO NG UR, *VE4s* UK UM, *VE5s* GO GU, VE6VG *VE7s* AZ BDF QN, *VE8s* AO and EW.

The following stations were also reported as being active during the emergency: *W1s* AVY DEO ESG FYE IMY JGR LES MBL NF NFK OKG OTG PEX SA WI YNE ZLX, *K1s* EIC EIR JMV KSG NKV OKG OYP QAH SDX SSH WJL WKH WXN YDY, *W2s* CZR EW HYM ICZ KYA NW POC QHH QWS RUF, *K2s* EBX HAN/4 MCE MGR MHX QNX SBV/Ø SJN UBG UHD, *WA2s* ALF BIT DHF FYE GPT JZE LQO MHY OOO OCA QEG RGR TAQ UOO VKK VYS YBL ZAK, *WB2s* CSS DEP FXB, *W3s* BHK ECP GJD JSA MVB QV VAM/6 VAN/6 VR WV, *K3s* BGX CVG DKH DFS HNP KZB/6 MQE NPV OHR PIE QDD QJJ QNT QOK RGB SGD SGE SMT TDR UFY WEV YPL, WA3ACN, *W4s* ACY AKC BEW BKC BMC BUZ CJD/7 CPI DLE FP FQP HBQ IHY IKM IYT JD KIS KXM MLH MXU MZK NLT NML OVO PIM PLL PNM PQL RHZ RQP SEH UTW VFY VWW WKP WNC WXB YER YJM ZBA/6 ZBU ZCU ZIR, *K4s* ANJ BSK CRU CWZ GHS GHX IAG INC JVV KRG KJD MSM MSS NAA NSU PVZ QCI QMT RHL THT TNS UIZ ULT VIJ WOP ZTT ZXS, *WA4s* ALB AVM AWG BAW BRW BSO CJV DAD EUL EXA EXC FXE HCW HEN HFE HGN IHJ IUM KDE PDS PFQ, *W5s* AFL AKR AP BAR CRA DRZ EHC ERY EUV FQG FWZ GZU IGW IWG JA JCY JMY JVJ KFI KJH LCI MGA MOY NUQ OMS PDO QVE

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