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1-31-2010

In Re Village of Baldwin, Illinois
Special Use Permit Application of Mark Theobald

Memorandum in Support of Theobald Application

Short Facts:

On October 25, 2010, the owner of the property at 412 N. 5th Street, Baldwin, Illinois was notified by the Zoning Administrator of the Village of Baldwin, Illinois, Brad Denney, of a violation of a zoning ordinance (exh. ___). The alleged violation was that an amateur radio tower located at that address was in excess of a 25 feet maximum height, as per Section 40-3-16 (A) of the Village's Zoning Code.

On November 4, 2010, Kevin C. Kaufhold, attorney for Mark Theobald, the amateur radio operator living at the above said address sent a letter to Mr. Denney informing him that amateur radios towers possess a limited preemption municipal regulation per federal regulations (exh. __). Notwithstanding the argument of preemption, and not waiving said argument, Theobald is willing to process a special use permit with the Village, so that evidence on the need for reasonable accommodation could be introduced into a record of the case. On or about Dec. 1, 2010, Theobald applied for a special use permit (exh. ___). On January 15, 2011, a public hearing on the application was issued with hearing date of January 31, 2011 (exh. ___).

Theobald is the valid holder of amateur radio license, KB9KUF (exh. ___), and thus comes within the regulatory jurisdiction and authority of the Federal Communication Commission governing amateur radio stations, transmissions, and towers. FCC regulations allow amateurs up to 200 feet in tower height before special authorization is needed from the FCC. See, 47 CFR 97.15 (a).

Argument 1 – Television Interference (TVI) complaints are preempted by federal law.

While the application for a special use permit involving tower height, certain individual residents of the Village may be attempting to use the application and hearing process to complain about alleged television interference (TVI) from purported amateur radio transmissions.

Theobald strongly objects to the introduction of any evidence by any individuals complaining about alleged TVI. Such complaints are completely and totally preempted pursuant to federal law. The Federal Communications Commission (FCC) has exclusive federal jurisdiction over resolution of radio frequency interference matters. See, *Still v. Michaels*, 166 Ariz. 403, 803 P.2d 124 (Az, App. Div. 1990). States are precluded from remedying alleged private nuisance caused by interference resulting from operation of "ham" radio. See also, Communication Act of 1934, Sec. 302, 47 USCA, Sec. 302a. The FCC did not allow state regulation of radio frequency interference when it adopted proposed rule indicated that it would not regulate radio frequency matters related to health. *Freeman v. Burlington Broadcasters*, Inc., 204 F.3d 311 (2000), *cert den.* 121 S.Ct 276, 531 U.S. 91; See also, 47 CRF Sec. 1.1; 15.1, e*t seq*. The reason for preemption is quite simple – since the airwaves knows no geographic boundaries, it would be ineffectual to have 50 separate laws governing radio transmissions. Instead, Congress ensured that only one federal regulatory agency (FCC) had jurisdiction over any amateur or commercial radio transmission occurring within the United States. As such, the sole and exclusive entity to complain about TVI is the FCC, and not the Village of Baldwin, Illinois. All radio interference complaints sent to the Village should be redirected to the FCC.

In spite of the complete preemption under federal law regarding TVI complaints and radio transmissions, amateur radio operators are quite receptive in voluntarily addressing and correcting interference problems. Often, the difficulties arise at the TV or end-user level, as many commercial radio appliances are relatively poor in their capacity to filter out legitimate signals. In some instances, the interference is not even emanating form the amateur radio station, as many other commercial business type of radio transmissions are commonly in use and may be causing the problems. Many times, the amateur operator will volunteer at his or her own cost to install additional filters or grounding devices at the residence in order to eliminate the problem. This is especially the case where the amateur station itself is built from commercial equipment that complies with all FCC spectral purity transmission regulations.

In this case, Theobald has only had one TVI complaint addressed directly to him. Several months ago, Theobald was informed of a TVI complaint by a neighboring resident, and he assisted that neighbor in resolving the interference. He did so by grounding the TV at the residence in question. Theobald is willing to take care of handle any other individual complaints in a similar manner. Theorbald only wishes that nearby residents had come to him with the complaints before approaching Village officials.

Argument 2 – Amateur radio tower height issues has a limited preemption pursuant to federal law.

As far back as 1985, the FCC gave amateur radio stations limited preemption from tower height restrictions. In Private Radio Bureau – 1 (PRB-1), (exh. ___) the FCC declared a limited preemption of state and local regulations governing amateur radio stations, including antenna and supporting structures. The Commission determined that there was a strong federal interest in promoting the amateur radio service, and that federal and state regulations precluding or restricting amateur radio activities are in direct violation and conflict with federal objectives and must be preempted. The Commission further held that a local ordinance or zoning regulation must make reasonable accommodation for amateur communications and must constitute the minimum practicable regulation to accomplish the local authority's purpose. PRB-1 was codified as 47 CFR 97.15 (b) of the FCC's regulatory authority, cited below:

> (b) Except as otherwise provided herein, a station antenna structure may be erected at heights and dimensions sufficient to accommodate amateur service communications. (State and local regulation of a station antenna structure must not preclude amateur service communications. Rather, it must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose. *See* PRB–1, 101 FCC 2d 952 (1985) for details.)

It is therefore clear that the Village has the burden of proof to show that it is reasonably accommodating amateur radio communication. The Village must also demonstrate that its local regulation constitutes the minimum practicable regulation to accomplish the local authority's legitimate purpose.

In this case, the Village has not shown reasonable accommodation nor has shown the minimum practicable regulation. The Village has merely attempted to impose a city-wide blanker prohibition on towers in excess of 25 feet. A blanket prohibition is simply untenable, as applied to amateur radio stations, as there is no attempt at any accommodation.

In this matter, several other towers and facilities exist in the Village having the same or taller height than applicant's tower. Approximately 800 feet away from the applicant's residence is a commercial tower over 200 feet in height (exh. ___). As can be seen in one of the photos of the applicant's tower (exh. ___), the cell tower is plainly visible from the applicant's residence. Two grain silos over 100 feet high exist some five blocks from Applicant's tower (exh. ___). The local Fire District has a 40 foot tower some 6 blocks away (exh. ___). Hartman Farm Supply has a 40 foot tower with a 20 foot antenna above that (exh. ___). And another amateur radio tower some 90 foot high also is in existence within the Village (exh. ___). No zoning violation has been cited on this location, to applicant's knowledge. Since this amateur radio operator is now deceased and the residence has no active transmission emanating there from, the implication in this matter is that the Village may indeed be more concerned about possible TVI complaints than the actual tower heights.

With several other installations within the Village at similar heights, and with some of them within residential zones or in close proximity to such zones, the Village is not reasonably accommodating nor is engaged in the minimum regulation practicable should it impose the 25 foot restriction on applicant.

While there has been now demonstration as to the validity of the 25 foot tower height restriction, the applicant has clearly shown a reasonable need for going beyond 25 feet in height. Applicant is engaged in emergency communications support for Baldwin and Randolph County. He engages in emergency management, skywarn severe weather observations and reports, Region 4 EMS and hospital disaster communications preparedness, and public service support activities (exh. ___). More details on the Amateur Radio Emergency service (ARES) and the Amateur radio Skywarn program are contained in exh. ___.

As part of Theobald's emergency management activities, he is capable of transmitting even when electricity is unavailable in severe weather, since applicant maintains a portable generator. In emergency conditions, an amateur radio (ARES) net is activated at the St. Clair County 911 Emergency Operations Center (EOC) in Belleville, Illinois. A further advantage of this location is that it is also the location of the St. Clair County 911 Center. In dire emergencies, 911 matters, Red Cross, and emergency response would be coordinated from this center. The ARES net is a regional activity that provides vital information and communication through the St. Louis metro and Southwestern Illinois areas.

As testimony will be deduced, Theobald needs between 50 and 75 feet of tower height in order to communicate effectively with the ARES net in Belleville, Illinois. He is applying for tower separate towers, one of which are already built, and the other will be in a side lot at the same location which would be in the general range of 70 feet. Both towers are necessary for effective communication, as often times, Theobald listens to other amateurs in remote locations who provide Theobald with emergency-related information. Thus, the ability to have antennas pointed in different directions is vital to the success of applicant's emergency activities.

Instead of applying a blanket height prohibition to Theobald merely because of arbitrary height is found in the local zoning code, the Village should be encouraging applicant in his emergency endeavors. Pursuant to federal regulations, application could go as high as 200 feet per amateur radio tower. His intention of building two towers to an approximate height of 50 to 75 feet is eminently reasonable and should be accommodated by the Village. Anything less on the part of the Village would constitute a violation of PRB-1 and would not be the minimum practicable regulation in the circumstances.

Kevin C. Kaufhold
Attorney for Mark Theobald