

LOCAL ZONING PERMITS AND HAM RADIO ANTENNAS FEDERAL GUIDELINES

This area of zoning is one in which municipalities must take both federal and local regulations into account before issuing a permit. Municipal zoning power over ham radio antennas is partially pre-empted by the Federal Communications Commission (FCC), which licenses ham radio operators. In a 1985 ruling (PRB-1, Federal Register 38, 813-16, September 25, 1985), the FCC attempted to explain its role in the regulatory scheme:

“Few matters coming before us present such a clear dichotomy of viewpoint The cities, counties, 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 towards the health, safety and general welfare of those they regulate. At the opposite poles 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.” (PRB-1, 50 Federal Register 38,815, September 25, 1985).

However, the FCC declined to totally preempt local authority, and instead opted to balance the two interests: *“The cornerstone on which we will predicate our decision is that a reasonable accommodation may be made between the two sides.”* (PRB-1, 50 Federal Register 38,815, September 25, 1985).

The local zoning issue that most often tests this “reasonable accommodation” requirement is the height of a proposed antenna. If the antenna is not high enough, the amateur radio operator is effectively prevented from operating under the FCC license. But, in PRB-1, the FCC declined to specify a specific height which municipalities must permit. Instead, it issued only general guidelines for municipalities:

... local regulations which involve the placement, screening or height of antennas based on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur radio communications, and to represent the minimum practicable regulation to accomplish the local authority’s legitimate purpose.” (PRB-1, 50 Federal Register 38,816, September 25, 1985).

JUDICIAL GUIDELINES

A review of court decisions provides additional guidance to what will be the “minimum practicable regulation to accomplish the local authority’s purpose.” Some ordinances, on the surface, are unacceptable. First, it is clear that an outright ban on antennas will not be upheld because it prevents any operation of a ham radio station. Secondly, a specific height limitation also will not be upheld, because it contains no provision for balancing the legitimate interests of the ham radio operator and local zoning and, in light of technical requirements, has the same effect as an outright ban. *Bodony v. Incorporated Village of Sands Point*, 681 F. Supp. 1009 (E.D. N.Y.1987), *Evans v. County Commissioners of Boulder, Colorado*, 752 F. Supp. 973 (D. Colo. 1990).

However, a zoning bylaw that contains a procedure for a ham radio operator to seek a special exception, variance, or conditional use permit will be upheld, if it *“provides a sufficient structure for balancing state and federal interests as required by PRB-1.”* *MacMillan v. City of Rocky River*, 748 F. Supp. 1241, 1248 (N.D. Ohio 1990). The zoning bylaw need not establish a special procedure for ham radio antennas, but a general procedure for obtaining an exception to height limits or permitted uses by applying for a variance or conditional use permit. *Id.*

The crucial step for the municipality is that it actually follows PRB-1 when considering a specific application to construct an antenna. Courts have overturned permit denials when there was evidence of the zoning authority’s *“obvious lack of understanding of radio communications”* and the lack of anything *“in the record to indicate that federal interests in amateur radio operation were sufficiently considered.”* *MacMillan v. City of Rocky River*, 748 F. Supp. 1241, 1248 (N.D. Ohio 1990)

MUNICIPAL REVIEW

A municipality should request the following information when it receives an application for installation of a ham radio antenna. First, the applicant should provide a copy of their FCC licenses: a station license, required under 47 CFR § 97.5, and the operator license(s) of those who will actually run the station, required under 47 CFR § 97.7. These should describe the intended use of the ham radio station. The municipality should also require the applicant to submit any other documentation that was required by the

FCC. Of special interest to zoning authorities would be an Environmental Assessment. The FCC requires an Environmental Assessment if a facility is located in an officially designated wilderness area or wildlife preserve, is likely to affect an endangered species, or may affect “*districts, sites, buildings, structures or objects significant in American history, architecture, archaeology, engineering or culture, that are listed, or are eligible for listing, on the National Register of Historic Places.*” 47 CFR § 1.1307, as applied to amateur radio stations by 47 CFR § 97.13. The zoning authority should also request technical information on the antenna height required to operate at the licensed frequency at the specific site, and the applicant should note whether a retractable antenna will be used.

ISSUING THE PERMIT

In its deliberations before issuing a permit, the local zoning authority must keep in mind these federal and judicial guidelines, and the requirements of its own bylaw. One court noted that a zoning authority did “*all that PRB-1 requires*” by requiring the applicant to establish the following:

- (A) The technical and practical necessity for the 70-foot retractable tower;
- (B) The minimum height of a structure necessary to provide a technologically practical and feasible facility...
- (C) Alternative measures which the council could adopt to preserve the residential character of the neighborhood and prevent aesthetic blight due to the tower while permitting its installation.” *Bulchis v. City of Edmunds*, 671 F. Supp. 1270, 1274 (1987).

Another court upheld a zoning board of appeal’s denial of an application for special exception when “*the ZBA investigated the possibility of accommodating [the radio operator’s] request while simultaneously preserving the aesthetic beauty and safety of the neighborhood by suggesting a restriction of hours of operation, but these attempts at compromise were rejected by [the radio operator.]*” *Williams v. City of Columbia*, 906 F. 2d 994 (4th Cir. 1990).

More specifically, a municipality can, on a case-by-case basis, limit operating height to the minimum necessary for the use specified in the FCC license. Requiring use of a retractable antenna, especially when combined with restricting hours of use to the nighttime, can greatly reduce the visual impact of the antenna. *Williams v. City of Columbia*, 906 F. 2d 994 (4th Cir. 1990). Retractable antennas also provide greater safety; for example, a seventy-foot high antenna can be retracted to about twenty feet, reducing the damage to neighbors if it is blown over.

If the applicant is unwilling to abide by such conditions, the zoning authority can simply deny the permit. One court upheld such a denial after the applicant refused to compromise by limiting operation to nighttime hours. “*The law requires only that the City balance the federally recognized interest in amateur radio communications with local zoning concerns. The fact that [the radio operator] would only be satisfied if that balance results in the City allowing him to build an antenna of whatever height he chooses does not entitle him to relief.*” *Williams v. City of Columbia*, 906 F. 2d 994 (4th Cir. 1990).

For more information on zoning and telecommunications equipment, please contact the VLCT Municipal Law Center at 800/649-7915, e-mail, info@vlct.org.

(Thank you to Law Center’s law clerk, attorney Gil Whittemore, for writing this article. Gil left the Law Center last month to settle in his new home in Weathersfield. He will continue to practice law part-time in Massachusetts and prepare to take the Vermont bar exam in July. Good luck Gil!)

IN SUMMARY...

1. A zoning ordinance cannot impose a universal height limitation on ham radio antennas, without making provisions for exceptions.
2. A zoning ordinance may impose/apply a height limitation to radio antennas, if a procedure is established for an individual to apply for an exception, variance or conditional permit.
3. When the zoning authority considers such an application, it should attempt to reasonably accommodate the radio operator’s interests with those of zoning. It should also ensure that this consideration is well documented.
4. The zoning authority may attempt an accommodation by requiring retractable antennas, limiting hours of operation, and restricting height to that shown to be technically necessary for the type of amateur radio station licensed by the FCC.
5. If an applicant refuses to compromise with the municipality, the application may be denied. The partial federal preemption does not entitle amateur radio operators to erect whatever antenna they desire.