

City of Portland, Maine – Building or Use Permit Application, 389 Congress Street, 04101, Tel: (207) 874-8703, FAX: 874-8716

Location of Construction: 19 Birchwood Dr		Owner: Ney, John & Maureen		Phone:		Permit No:
Owner Address: SAA Ptld, ME 04102		Lessee/Buyer's Name:		Phone: 772-8418 or 874-8250		
Contractor Name: SAA		Address:		Phone:		Permit Issued: <i>never issued</i>
Past Use: 1-fam		Proposed Use: Same		COST OF WORK: \$ 300.00 PERMIT FEE: \$ 25.00 FIRE DEPT. <input type="checkbox"/> Approved <input type="checkbox"/> Denied INSPECTION: Use Group: Type: Signature: Signature:		
Proposed Project Description: Install XXXX Ham Radio Tower				PEDESTRIAN ACTIVITIES DISTRICT (P.A.D.) Action: Approved <input type="checkbox"/> Approved with Conditions: <input type="checkbox"/> Denied <input type="checkbox"/> Signature: Date:		
Permit Taken By: Mary Gresik		Date Applied For: 07 October 1997				Zoning Appeal <input type="checkbox"/> Variance <input type="checkbox"/> Miscellaneous <input type="checkbox"/> Conditional Use <input type="checkbox"/> Interpretation <input type="checkbox"/> Approved <input type="checkbox"/> Denied Historic Preservation <input checked="" type="checkbox"/> Not in District or Landmark <input checked="" type="checkbox"/> Does Not Require Review <input type="checkbox"/> Requires Review Action: <input type="checkbox"/> Approved <input type="checkbox"/> Approved with Conditions <input type="checkbox"/> Denied Date: <i>10/9/97</i> <i>DM</i>

- This permit application does not preclude the Applicant(s) from meeting applicable State and Federal rules.
- Building permits do not include plumbing, septic or electrical work.
- Building permits are void if work is not started within six (6) months of the date of issuance. False information may invalidate a building permit and stop all work..

Denied

CERTIFICATION

I hereby certify that I am the owner of record of the named property, or that the proposed work is authorized by the owner of record and that I have been authorized by the owner to make this application as his authorized agent and I agree to conform to all applicable laws of this jurisdiction. In addition, if a permit for work described in the application is issued, I certify that the code official's authorized representative shall have the authority to enter all areas covered by such permit at any reasonable hour to enforce the provisions of the code(s) applicable to such permit

SIGNATURE OF APPLICANT <i>John Ney</i> John Ney		ADDRESS:		DATE: 07 October 1997		PHONE:	
RESPONSIBLE PERSON IN CHARGE OF WORK, TITLE						PHONE:	

White-Permit Desk Green-Assessor's Canary-D.P.W. Pink-Public File Ivory Card-Inspector

CEO DISTRICT 4
A. Powers

City of Portland, Maine – Building or Use Permit Application 389 Congress Street, 04101, Tel: (207) 874-8703, FAX: 874-8716

Location of Construction: 19 Birchwood Drive, Portland 04103		Owner: John M. Ney		Phone:		Permit No:	
Owner Address:		Lessee/Buyer's Name:		Phone:		BusinessName:	
Contractor Name:		Address:		Phone:		Permit Issued:	
Past Use:		Proposed Use:		COST OF WORK: \$		PERMIT FEE: \$ 50.00	
				FIRE DEPT. <input type="checkbox"/> Approved <input type="checkbox"/> Denied		INSPECTION: Use Group: Type:	
				Signature:		Signature:	
Proposed Project Description: Interpretation Appeal				PEDESTRIAN ACTIVITIES DISTRICT (P.A.D.) Action: Approved <input type="checkbox"/> Approved with Conditions: <input type="checkbox"/> Denied <input type="checkbox"/> Signature: Date:			
Permit Taken By: Vicki Dover		Date Applied For: 11/14/97					

1. This permit application does not preclude the Applicant(s) from meeting applicable State and Federal rules.
2. Building permits do not include plumbing, septic or electrical work.
3. Building permits are void if work is not started within six (6) months of the date of issuance. False information may invalidate a building permit and stop all work..

POC: Nicholas Bull, Attorney
120 Exchange St
P. O. Box 447
Portland, MAINE 04101

APPEAL DENIED 12/11/97

CERTIFICATION

I hereby certify that I am the owner of record of the named property, or that the proposed work is authorized by the owner of record and that I have been authorized by the owner to make this application as his authorized agent and I agree to conform to all applicable laws of this jurisdiction. In addition, if a permit for work described in the application is issued, I certify that the code official's authorized representative shall have the authority to enter all areas covered by such permit at any reasonable hour to enforce the provisions of the code(s) applicable to such permit

Maria Belousov
SIGNATURE OF APPLICANT

Maria Belousov
for attorney

ADDRESS:

DATE:

PHONE:

RESPONSIBLE PERSON IN CHARGE OF WORK, TITLE

PHONE:

White-Permit Desk Green-Assessor's Canary-D.P.W. Pink-Public File Ivory Card-Inspector

Zone: R-3 CBL: 278-C-1
Zoning Approval:

Special Zone or Reviews:
 Shoreland
 Wetland
 Flood Zone
 Subdivision
 Site Plan maj minor mm

Zoning Appeal
 Variance
 Miscellaneous
 Conditional Use
 Interpretation
 Approved
 Denied

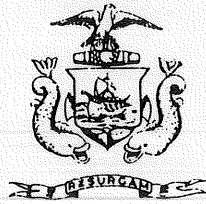
Historic Preservation
 Not in District or Landmark
 Does Not Require Review
 Requires Review

Action:
 Approved
 Approved with Conditions
 Denied

Date: _____

CEO DISTRICT #4
A. Powers

Inspection Services
P. Samuel Hoffses
Chief



Planning and Urban Development
Joseph E. Gray Jr.
Director

CITY OF PORTLAND

John & Maureen Ney
19 Birchwood Drive
Portland, ME 04102

RE: 19 Birchwood Drive - 278A-C-001- R-3 zone

10/15/97

Dear Mr. & Mrs. Ney,

Your application to erect a 45 foot high ham radio tower at the above location has been reviewed and a permit denied because of the following:

1. You are showing a structural height of 45 feet instead of the maximum 18 feet required for a detached accessory structure by the Land Use Ordinance (Sec. 14-90(7)) for this R-3 zone.
2. You are showing a rear setback of 13 feet instead of the 25 feet required by the Land Use Ordinance (Sec. 14-90(4)b) for this R-3 zone.
3. You are showing a side setback of 12 feet instead of the 16 feet required by the Land Use Ordinance (Sec. 14-90(4)c).

You do have the right of appeal to file within 30 days of my decision. I have enclosed all appeal information that you will need for this space and bulk variance appeal. As I mentioned to you previously, the Zoning Board must make its decision by using the four criteria which is attached to your appeal application. A variance appeal is not an easy appeal to have granted in your favor. If you have any questions regarding this matter, please do not hesitate to contact this office.

Very Truly Yours,

Marge Schmückal
Zoning Administrator

cc: Joseph Gray, Jr., Dir. of Planning & Urban Dev.
Mark Adelson, Housing & Community Dev.
Amy Powers, Code Enforcement Officer

OCT 15 1997

Applicant: John Ney
Address: 19 Birchwood Dr.

Date: 10/15/97
C-B-L: 278A-C-1

CHECK-LIST AGAINST ZONING ORDINANCE

Date - Existing

Zone Location - R-3

Interior or corner lot of TAFT

Proposed Use/Work - Erect 45' HAM Radio Tower with 20" x 20" PAD

Sewage Disposal -

Lot Street Frontage -

Front Yard - 25' req - 25' shown

14-90(4)b
Rear Yard - 25' req - shows 13'

Side Yard - 16' req (for the ^{max} height) - 12' shown

Projections -

Width of Lot -

14-90(7) Height - MAX Structural Height - 35' - 45' shown

Lot Area -

Lot Coverage/ Impervious Surface -

Area per Family -

Off-street Parking -

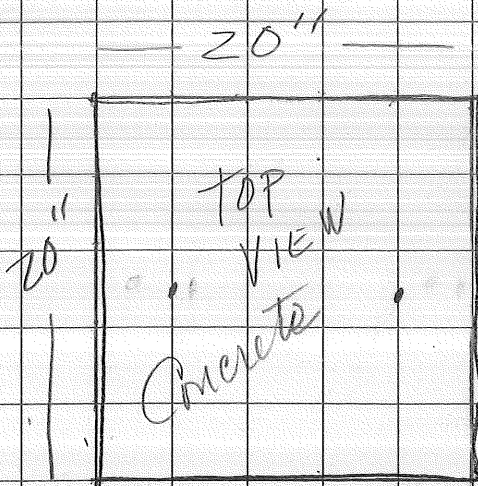
Loading Bays -

Site Plan -

Shoreland Zoning/ Stream Protection -

Flood Plains -

BASE



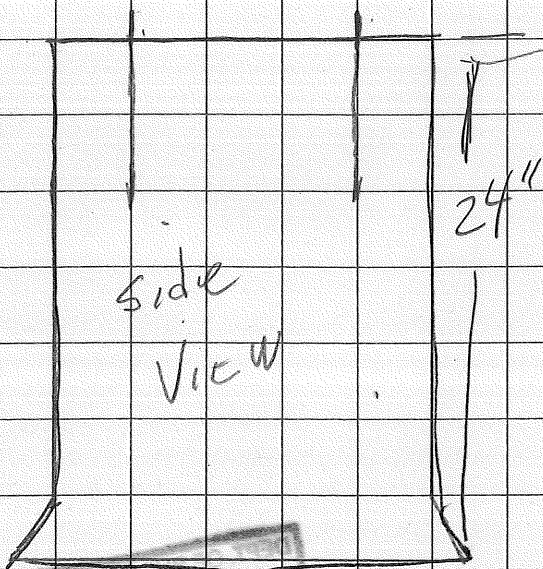
Tower height
45

Tower

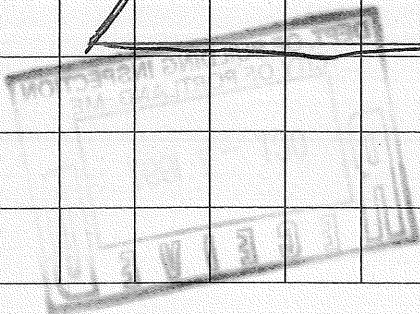


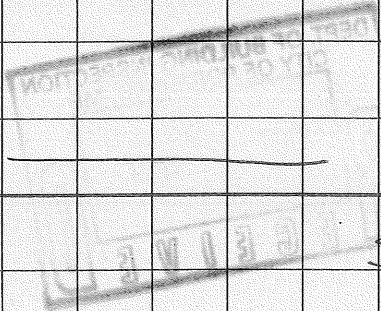
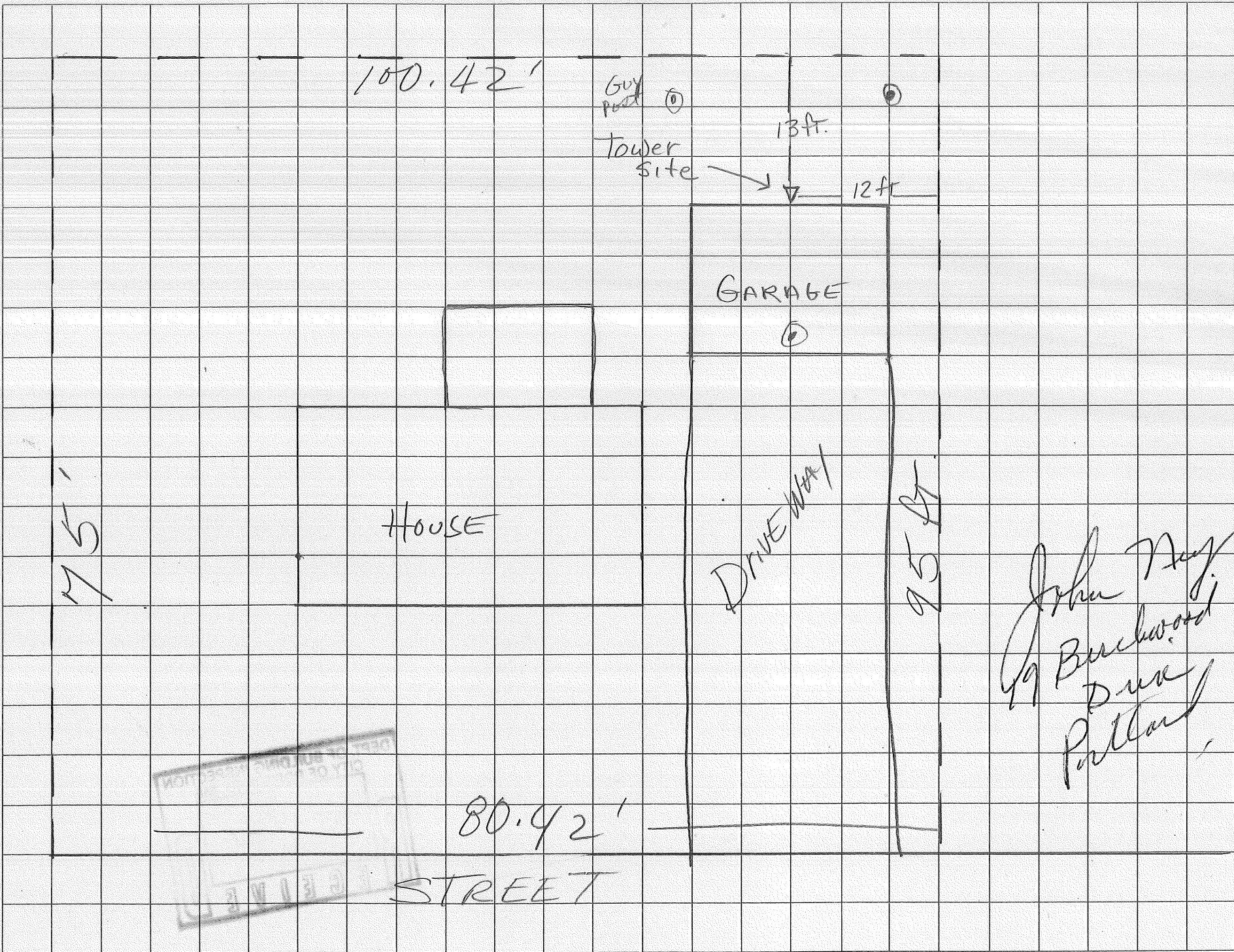
Tower: Rohr 256
STEEL

Below
Ground

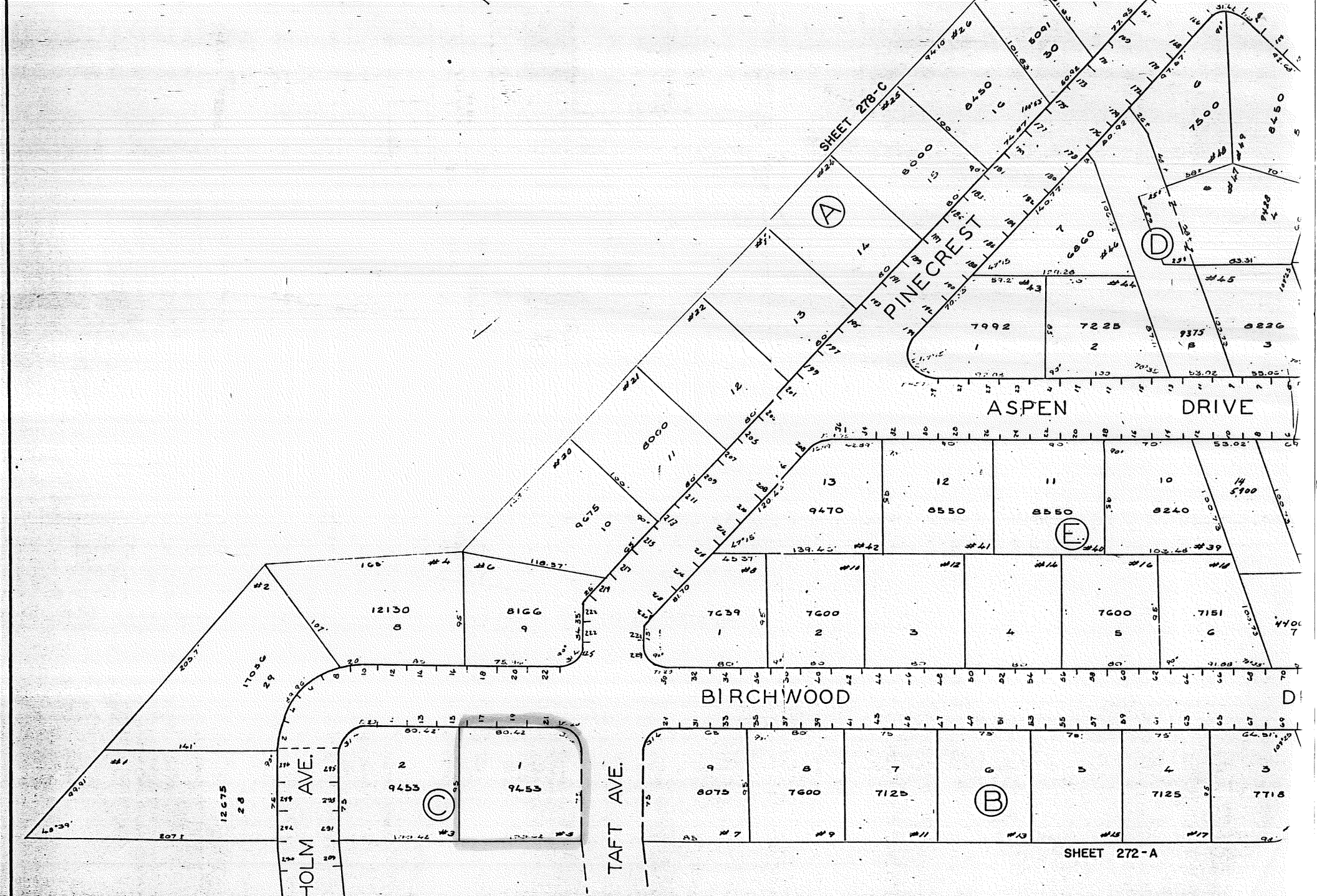


John Neg
19 Birchwood Dr.
Portland, ME





*John May
49 Birchwood
Dun
Pittman*



SHEET 278-C

(A)

PINECREST

(D)

ASPEN DRIVE

(E)

BIRCHWOOD

(B)

TAFT AVE.

HOLM AVE.

(C)

SHEET 272-A

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

25 OCT 1994

IN REPLY REFER TO:

7240-F/1700C1

Board of Zoning Appeals
Town of Hempstead
1 Washington Street
Hempstead, New York 11550-4928

Dear Board Members:

It has come to our attention that the Town of Hempstead's Board of Zoning Appeals (Board) has denied Mr. Hayden M. Nadel's application for a variance permitting him to maintain his amateur radio station's antenna at a height of fifty-five feet (versus the thirty feet permitted by the zoning ordinance). According to the text of the Board's decision (provided by Mr. Nadel), it based its determination largely on its finding that the "proposed and existing antenna height of fifty-five feet" was resulting in interference to the home electronic equipment of Mr. Nadel's neighbors.

Local governments must reasonably accommodate amateur operations in zoning decisions. See PRB-1, 101 FCC 2d 952 (1985) and Section 97.15(e) of the Commission's Rules, 47 C.F.R. § 97.15(e) (copies enclosed). Section 97.15(e) provides that an amateur station antenna structure may be erected at heights and dimensions sufficient to accommodate amateur service communications. Local authorities may adopt regulations pertaining to placement, screening, or height of antennas, if such regulations are based on health, safety, or aesthetic considerations and reasonably accommodate amateur communications. They may not, however, base their regulation of amateur service antenna structures on the causation of interference to home electronic equipment -- an area regulated exclusively by the Commission.

The Commission's jurisdiction over interference matters is set forth in Section 302(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 302(a) (copy enclosed). It is clear from the report of the Joint Committee of Conference, H.R. Report No. 765, 97th Cong., 2nd Sess. (pertinent excerpts enclosed), that the Congress intended that the Commission have exclusive jurisdiction over interference to home electronic equipment.

Board of Zoning Appeals

2.

I would also like to point out that there is no reasonable connection between requiring Mr. Nadel to reduce the height of his antenna and reducing the amount of interference to his neighbors' home electronic equipment. On the contrary, antenna height is inversely related to the strength, in the horizontal plane, of the radio signal that serves as a catalyst for interference in susceptible home electronic equipment. It is a matter of technical fact that the higher an amateur antenna, the less likely it is that radio frequency interference will appear in home electronic equipment.

I hope the information in this letter is helpful.

Sincerely,



Ralph A. Haller
Chief, Private Radio Bureau

Enclosures

RE: Birchwood

10/29/97

Before the
Federal Communications Commission
Washington, D. C. 20554

FCC 85-506
36149

In the Matter of)
Federal preemption of state and)
local regulations pertaining) PRB-1
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.

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.

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 amateur 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 free 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 (televisions, 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

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

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 that regulation on Federal goals. Its position is that Federal preemption is warranted whenever local governmental 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 ruling 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 these 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 statutes. 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 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. 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

⁵ 47 CFR Part 97.

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.

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.

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