IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RITNER NESBITT, and PATRICIA NESBITT,

Plaintiffs,

v.

COBB COUNTY, GEORGIA,

Defendant.

CIVIL ACTION NO.
1:13-CV-881-ODE

ORDER

This suit for declaratory judgment and injunctive relief is before the Court on the parties' affirmative briefs, responses and replies [Docs. 13, 14-2, 18, 20, 21]. For the reasons set forth below, the Court concludes that Official Code of Cobb County § 134-273 is not preempted on its face or in its application to Ritner and Patricia Nesbitt (collectively "Nesbitts" or "Plaintiffs") by 47 C.F.R. § 97.15 and Federal Communications Commission Memorandum Opinion and Order PRB-1, 101 F.C.C. 2d 952 (1985) ("PRB-1").

## I. Background

The parties agree that this case should be decided upon the administrative record [Doc. 13 at 3].[1] Therefore, the Court draws the following facts from the administrative record filed by Cobb County ("the County" or "Defendant").

[1]While this statement is only contained in the County's affirmative brief, Plaintiffs did not object or raise issue with this statement in their response [see Doc. 18].

***A. Cobb County Code***

The Official Code of Cobb County § 134-274 states that "no antenna or satellite television antenna or dish shall be erected, constructed, maintained or operated except in conformance with the following regulations." In relevant part, § 134-274 restricts radio antennas to "35 feet in height without compliance with the standards contained in section 134-273." Official Code of Cobb County § 134-274(3)(b).

Section 134-273 provides that landowners must seek a special land use permit to build antennas in excess of 35 feet in height. Id. § 134-273(2). As part of the special land use permit application, the Code requires the applicant to meet certain set back and safety requirements, to provide evidence of the need for the tower, and address a number of other considerations.[2] Id.

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[2]Applicants must address the following twenty considerations: (1) the proximity of the tower to offsite residential structures and residential areas; (2) the tower's effect on property owners or potential purchasers of nearby or adjacent residentially zoned properties; (3) the height and species of surrounding trees and foliage; (4) the height of existing structures; (5) the aesthetic design of the tower in relation to reducing or eliminating visual obtrusiveness to the surrounding area; (6) the impact of the proposed tower upon the scenic views and visual quality of the area; (7) whether there will be a significant adverse effect on the neighborhood or area in which the proposed use will be located; (8) whether the use is otherwise compatible with the neighborhood; (9) whether the use proposed will result in a nuisance as defined under state law; (10) whether quiet enjoyment of surrounding property will be adversely affected; (11) whether property values of surrounding property will be adversely affected; (12) whether adequate provisions are made for parking and traffic considerations; (13) whether the site or intensity of the use is appropriate; (14) whether special or unique conditions overcome the board of commissioners' general presumption that residential neighborhoods should not allow non-compatible business uses; (15) whether adequate provisions are made regarding hours of

§ 134-273(3). However, the Code exempts from the permit requirement "a single antenna under 70 feet in height owned and operated by a federally licensed amateur radio station operator." Id. § 134-273(6)(a). The Code also clearly contemplates the possible approval of antennas in excess of 70 feet. Id. § 134-273(3)(a)(1) ("All towers and antennas in excess of 70 feet must be set back a distance equal to the full height of the tower from any adjoining residential parcel boundary or as safety concerns may dictate.").

***B. The Nesbitts' Tower & Special Land Use Permit Application***

Patricia Nesbitt ("Patricia") owns an approximately 4.5 acre lot at 4955 Burnt Hickory Road in unincorporated Cobb County on which she and her husband, Ritner Nesbitt ("Ritner"), live [Record ("R.") at 42]. Ritner has been involved in amateur radio for more than fifty years and holds an amateur extra class license from the Federal Communications Commission ("FCC") [Id. at 59-60]. To further Ritner's amateur radio activities, Plaintiffs constructed three radio towers on their property, one at 70 feet high, and two at 25 feet high [Id. at 41].

At some point prior to the summer of 2012, Plaintiffs also constructed a 140 foot high antenna tower on their property, which

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operation; (16) whether adequate controls and limits are placed on commercial and business deliveries; (17) whether adequate landscape plans are incorporated to ensure appropriate transition; (18) whether the public health, safety, welfare or moral concerns of the surrounding neighborhood will be adversely affected; (19) whether the application complies with any applicable specific requirements; (20) whether the applicant has provided sufficient information to allow a full consideration of all relevant factors. Official Code of Cobb County §§ 134-37(e), 134-273(m).

became the subject of a Cobb County Code Enforcement Division action [Id. at 13, 192]. Plaintiffs' property is zoned R-80 [Id. at 42], which does not permit industrial or commercial uses and requires owners to conform with the requirements of § 134-274 of the Official Code of Cobb County [Id. at 173-81].

On July 5, 2012, Ritner filed for a special land use permit seeking permission to construct the 140 foot tower that already existed on his property [Id. at 42]. With his application, Ritner also submitted a report prepared by Dennis G. Egan[3] ("Egan") of Marlborough, Massachusetts [Doc. 1-6 at 1].[4] Egan's report compared the effectiveness of communications to Australia using antenna heights of 35 and 140 feet [Id. at 2]. The report concluded that "the 140-foot structure to support the antenna system marginally meets the need for reliable communications to Australia on 14MHz. . . . Lowering the antenna to 35 feet does not meet Mr. Nesbitt's needs" [Id. at 9]. The report does not analyze the effectiveness of any other height of antenna.

The County staff reviewed Ritner's request and recommended denial of the application as the result of a code enforcement action [Id. at 192-194]. On October 2, 2013, the application was then heard by the Planning Commission [Id. at 197]. At the

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[3]Egan has a bachelor's degree in mathematics and computer science and is a retired United States postal employee [Doc. 1-6 at 3]. Egan has been an amateur radio operator since 1969 and has experience performing antenna system simulations [Id.].

[4]For whatever reason, Egan's report was not included in the Cobb County administrative record. However, both parties agree that Egan's report does constitute part of Ritner's application as it was submitted to the County. Therefore, the Court will consider the report in its analysis.

Planning Commission hearing, Plaintiffs addressed the necessity of the 140 foot tower, stating that the existing 70 foot tower was only usable for frequencies just above the AM commercial radio spectrum [Id. at DVD 1].[5] Plaintiffs further argued that the height was necessary to get near the tree tops to create an effective signal [Id.]. Turning to the alternative of stacking antennas to increase the range of the radio signals, Plaintiffs argued that the current antennas are not structurally rated for such additional weight [Id.]. Plaintiffs also expressed their willingness to accept reasonable screening requirements to avoid neighbors seeing the antenna as an "eyesore" [Id.].

When asked why Plaintiffs had intentionally ignored County law by building the tower without seeking a permit, Plaintiffs responded that they thought their antenna was excepted under the FCC PRB-1 opinion [Id.]. The County Attorney opined that the tower must comply with local ordinances because PRB-1 requires a balancing act between amateur radio needs and local authority [Id.].

Planning Commissioner Hovey expressed concern regarding the effect on nearby and adjacent homeowners who can see the tower from their property [Id.]. Commissioner Hovey also referenced that 70 feet was "the max" for antenna height under the ordinance and that such a height required a special land use permit as well [Id.]. Commissioner Trombetti suggested that Plaintiffs

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[5]Also included in the County's administrative record was a DVD recording of the Planning Commission hearing (DVD I) and of the two Board of Commissioners meetings (DVDs II & III, respectively).

investigate ways to mitigate the visual impact, either through landscaping or possibly lowering the tower [Id.]. Ultimately, Plaintiffs' application was denied unanimously [Id. at 197].

In response to Plaintiffs' raising the issue of PRB-1, the County sought an opinion from CityScape Consultants regarding the preemptive effect of the FCC opinion [Id. at 94]. CityScape Consultants opined that "the limited federal preemption embodied in PRB-1 would not preclude Cobb County from processing this application in accordance with its existing wireless communications regulations" [Id. at 94-97]. To aid the County in its determination, photographs were also taken from the property of the Plaintiffs' southern neighbor, Ms. Siciliano, which showed the size and visual impact of the tower [Id. at 54-55].

The County also retained Richard Edwards[6] ("Edwards") of CityScape Consultants to analyze the Egan report included with Ritner's application [Id. at 1-11]. Edwards stated that Egan's technological conclusions were reasonable [Id. at 3]. Edwards also determined that it would be reasonable for there to be difficulties communicating to such a distant location [Id.]. Edwards noted that Egan failed to analyze alternatives for signal improvement, such as other antenna types, stacking antennas, and higher transmitter power [Id.]. Edwards referenced the PRB-1 Opinion at issue in this lawsuit and opined that the opinion should be integrated into all local zoning ordinances [Id. at 4].

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[6]Edwards has forty-five years' experience in wireless radio frequency engineering and has been the frequency coordinator for the state of Georgia [R. at 11]. Edwards is qualified to practice before the FCC and has designed and constructed radio facilities across the nation [Id.].

However, Edwards opined that the County's regulations were consistent with those developed for other communities in consultation with the national association of amateur radio operators [Id.].

The matter was heard and ultimately decided by the Board of Commissioners on December 18, 2012 [Id. at 200]. Plaintiffs presented much the same argument as they had to the Planning Commission [Id. at DVD 2]. However, Plaintiffs did expand upon their reliance on PRB-1. They argued that PRB-1 requires the "minimum practicable regulation," which the Cobb ordinance was not, and that the County "make a reasonable accommodation," which they argued had not occurred as the County never suggested alternatives aside from removing the tower [Id.]. Plaintiffs also presented evidence of the tower's safety, stating that the tower was more than its height away from the property line and not located near any residences [Id.].

Ms. Siciliano, the Nesbitts' southern neighbor, spoke in opposition to the tower [Id.]. She stated that she and the other neighbor to the south of Petitioner's property objected to the antenna because it was unsightly. She further expressed a concern that, should the tower fall, it may snag a tree and cause the tree to come down on her property [Id.].

Commissioner Goreham then moved to deny the special land use permit application and gave a reasoned explanation for the motion, addressing fifteen of the considerations listed in the County Code [Id.]. During her explanation, Commissioner Goreham stated the maximum height for an amateur radio antenna was 70 feet [Id.]. The Board of Commissioners voted unanimously to deny the special

land use permit and directed the County Attorney to prepare a written decision regarding the denial [Id.].

The County's written decision addressed the same fifteen factors as Commissioner Goreham's motion and concluded that none weighed in favor of approving the special land use permit [Id. at 202-211]. The County determined that the height of the tower would interfere with the viewshed of the adjacent residences and rise to the level of a nuisance [Id. at 206]. The County also found that property values in the area would be negatively affected [Id.]. The County also expressed concerns that the tower may not be structurally safe because it had not been subjected to building inspection [Id. at 208]. The County also found that Plaintiffs had failed to present sufficient evidence as to why a tower of this height is needed [Id. at 209]. The written decision was adopted unanimously by the Board of Commissioners on February 19, 2013 [Id. at 201].

***C. Procedural History***

Plaintiffs initiated the instant suit on March 20, 2013, claiming that the Official Code of Cobb County § 134-273 is preempted by PRB-1 on its face and as applied to Plaintiffs [Complaint, Doc. 1]. Plaintiffs seek declaratory judgment of such preemption, an injunction preventing the enforcement of the County's decision to take down the antenna, and a writ of mandamus requiring the County to issue Plaintiffs the special land use permit [Id. at 12].

On August 20, 2013, a Consent Order was entered requiring the County's administrative record to be filed with this Court and instructing the parties to file affirmative briefs supporting

their arguments [Doc. 9]. The Court now considers Plaintiffs' Affirmative Brief [Doc. 14-2], Cobb County's Affirmative Brief [Doc. 13], Plaintiffs' response in opposition to the County's brief [Doc. 18], Cobb County's reply in support [Doc. 18], and what the Court construes to be Plaintiffs' sur-reply in opposition to the County's brief [Doc. 21].

## II. Subject Matter Jurisdiction

The Court first addresses the issue of subject matter jurisdiction, as this case concerns the decision of a local county board based on local county ordinances.

Ordinarily the defense of federal preemption to a state law claim does not create federal question jurisdiction. Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987). However,

> [a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n.14 (1983). "Parties subject to conflicting state and federal regulatory schemes . . . have a clear interest in sorting out the scope of each government's authority, especially where they face a threat of liability if the application of federal law is not quickly made clear." Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 21 n.23 (1983).

Therefore, because Plaintiffs seek to enjoin the exercise of the County's regulatory authority which Plaintiffs claim is preempted by federal regulation PRB-1, this Court has jurisdiction pursuant to 28 U.S.C. § 1331 to hear this suit.

## III. Discussion

### *A. Standard of Review*

The issue currently before the Court is whether Cobb County's ordinances are preempted by PRB-1 on their face and/or as applied by the County. In their Consent Order requiring the filing of affirmative briefs, the parties failed to specify what standard of review applies to the Court's consideration of these briefs [Docs. 9, 11]. Further, the parties appear now to disagree as to what standard should apply [Doc. 13 at 12 (substantial evidence review applied); Doc. 14-2 at 8 (summary judgment standard applied)].

The Court finds that the summary judgment standard is most appropriate in this instance. Summary judgment is appropriate when there are no disputed questions of fact and a moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The question of whether federal law preempts a local law is a question of law appropriate for resolution by summary judgment. Lacey v. Lorillard Tobacco Co., 956 F. Supp. 956, 958 (N.D. Ala. 1997). No further discovery is needed in this case because the parties have agreed to rely upon the administrative record. Further, due to this reliance on the administrative record, there are no disputed issues of material fact.

### *B. Analysis*

The Supremacy Clause of Article VI of the United States Constitution provides the federal government with the power to preempt state and local laws. La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368 (1986). Preemption is not limited to the acts of Congress; an administrative agency acting within the boundaries of

its authority may displace state and local law. Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985).

PRB-1 imposed a "limited preemption policy" on state and local regulations which adversely affect amateur radio operators. PRB-1, 101 F.C.C. 2d 952, 960 (1985). Speaking directly to antenna height, PRB-1 stated in relevant part:

> 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. . . . 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.

Id. PRB-1 has been codified at 47 C.F.R. § 97.15, which states that "[s]tate and local regulation of a station antenna structure must not preclude amateur service communications." 47 C.F.R. § 97.15(b). The regulation also requires local ordinances to "reasonably accommodate such communications and . . . constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose." Id.

While no court in the United States Court of Appeals for the Eleventh Circuit has yet applied the preemptive force of PRB-1, there are a number of decisions outside our Circuit that provide guidance.

In applying PRB-1, courts have concluded that PRB-1 may preempt a local ordinance in two ways: (1) the local ordinance is preempted on its face, or (2) the local ordinance has not been applied in a manner that reasonably accommodates amateur communications. Pentel v. City of Mendota Heights, 13 F.3d 1261, 1263-64 (8th Cir. 1994).

**1. Preemption on the Face of Official Code of Cobb County § 134-273**

Plaintiffs argue that the County Code imposes an unvarying height restriction of seventy feet for amateur radio antennae and is therefore facially invalid under PRB-1 [Doc. 14-2 at 10-12].

"State and local regulations that operate to preclude amateur communications in their communities are in direct conflict with federal objectives and must be preempted." PRB-1, 101 F.C.C. 2d at 960. Courts have held that regulations which neither ban nor impose an unvarying height restriction on amateur radio antennas are not facially invalid under PRB-1. Pentel, 13 F.3d at 1263; Palmer v. City of Saratoga Springs, 180 F. Supp. 2d 379, 384 (N.D.N.Y. 2001); Evans v. Bd. of Cnty. Comm'rs, 752 F. Supp. 973, 976-77 (D. Colo. 1990) (holding that zoning resolution imposing an unvarying thirty-five foot height limitation was facially invalid), rev'd on other grounds by 994 F.2d 755 (10th Cir. (1993). In both Palmer and Pentel, the court upheld as facially valid ordinances which required operators to seek a special permit for erecting an antenna over a certain height. Pentel, 13 F.3d at 1262-63; Palmer, 180 F. Supp. 2d at 380 n.2, 384.

Under the Court's reading, the ordinance at issue here follows the same structure. While amateur radio operators are

permitted to have any number of structures under 35 feet and one structure up to 70 feet high without seeking a permit, the County Code requires operators to obtain a special land use permit to build any antenna structure over 70 feet. Official Code of Cobb County §§ 134-273(2), 134-273(6)(a). Therefore, because it neither imposes a ban nor an unvarying height restriction, the local ordinance is not facially preempted as a matter of law.

To the extent any County commissioners stated that a 70 foot antenna was the highest permissible under the ordinance even after obtaining a special land use permit, the Court believes such comments to be in error. The Code expressly references the possibility of antenna towers in excess of 70 feet. Id. § 134-273(3)(a)(1).

**2. Preemption As Applied to Plaintiffs**

Plaintiffs also argue that the County has failed to make a reasonable accommodation for Ritner's amateur radio activities as required by PRB-1 and 47 C.F.R. § 97.15 by refusing to engage in negotiations regarding the antenna [Doc. 14-2 at 12-17].

The FCC has provided some further guidance as to what constitutes a "reasonable accommodation." In 1999, the FCC stated that a "balancing of interests" approach is not appropriate in the reasonable accommodation context. Order RM-8763, FCC DA 99-2569, at *4 (1999), available at http://www.fcc.gov/Bureaus/Wireless/Orders/1999/da992569.wp. Rather, PRB-1 "brings to a local zoning board's awareness that the very least regulation necessary for the welfare of the community must be the aim of its regulations so that such regulations will not impinge on the needs of amateur operators." Id. at 6.

In 2000, the FCC further amplified the meaning of "reasonable accommodation," stating in relevant part:

> We do not believe that a zoning regulation that provides extreme or excessive prohibition of amateur communications could be deemed to be a reasonable accommodation. For example, we believe that a regulation that would restrict amateur communications using small dish antennas, antennas that do not present any safety or health hazard, antennas that are similar to those normally permitted for viewing television . . . is not a reasonable accommodation or the minimum practicable regulation. On the other hand, we recognize that a local community that wants to preserve residential areas as livable neighborhoods may adopt zoning regulations that forbid the construction and installation in a residential neighborhood of the type of antenna that is commonly and universally associated with those that one finds in a factory area or an industrialized complex. Although such a regulation could constrain amateur communications, we do not view it as failing to provide reasonable accommodation to amateur communications.

Order on Reconsideration, 15 FCC Rcd. 22151, 22154 (2000).

Following Order RM-8763 and 15 FCC Rcd. 22151 (2000), the reasonable accommodation standard of PRB-1 requires a local regulatory authority "to (1) consider the application, (2) make factual findings, and (3) attempt to negotiate a satisfactory compromise with the applicant." Palmer, 180 F. Supp. 2d at 385; Boyd v. Town of Ransom Canyon, 547 F. Supp. 2d 618, 624 (N.D. Tex. 2008); Snook v. City of Mo. City, No. H-03-243, 2003 WL 25258302, at *21 (S.D. Tex. Aug. 27, 2003) (concluding Palmer standard is appropriate after review of court decisions considering the PRB-1 reasonable accommodation language). As evident from the language of the standard, the burden falls on the local authority to ensure that its actions comply with the above standard.

The Court finds that the County has satisfied the first two prongs of the reasonable accommodation standard. The County

considered Ritner's special land use permit application through its staff recommendation, the Planning Commission hearing, the Board of Commissioners hearing and the hiring of an expert to evaluate Plaintiffs' legal and technological arguments. The County also made findings of fact, such as calculating the distance of the tower from neighboring residences, taking photographs, and interviewing neighbors. The final issue then is whether the County attempted to negotiate a satisfactory compromise with Plaintiffs.

A regulatory authority need only have explored alternatives to its blanket denial of the construction of an antenna. Boyd, 547 F. Supp. 2d at 624. However, the alternatives proposed by the County must be reasonable and in good faith. In Palmer, the court held that the city failed to attempt a compromise with the plaintiff after finding the city's mitigation requests inflexible and unreasonable. Palmer, 180 F. Supp. 2d at 385. The city's mitigation requests included such alternatives as requiring Palmer to only use his antenna at night and spend nearly $5,000 on vegetative screening rather than simple trees. Id. at 385-86. The court also found that the plaintiff was willing to make substantial concessions, such as vary the placement of the antenna, lower the antenna when not in use, lower the height of the antenna, paint the antenna, and install some landscape screening, none of which satisfied the city. Id. at 385. Likewise, the court in Snook found that the municipality failed to attempt a compromise when it refused to consider any antenna height that extended above the tree line. Snook, 2003 WL 25258302, at *22.

However, the Tenth Circuit concluded that a local board had made a sufficient attempt at compromise when it offered alternatives such as a smaller crank-up tower and other possible locations for the antenna. See Evans v. Bd. of County Comm'rs, 994 F.2d 755, 762 (10th Cir. 1993).

In the instant case, while it is the County's burden to attempt a compromise, Plaintiffs' decision to move forward with construction without seeking a permit robbed the County of the opportunity to attempt such a compromise. The County's ability to negotiate a compromise is now significantly hamstrung. Many potential avenues of compromise--such as a lower antenna, a retractable antenna, a different location on the property, etc.--were cut off by Plaintiffs' constructing the tower at the height and location of their choosing.

The FCC regulations have a limited preemptive force on local ordinances that foreclose amateur radio operations, but they are also designed to operate in tandem with local government ordinances. See Order on Reconsideration, 15 FCC Rcd. 22151. Plaintiffs ignored the process established by local ordinance to reconcile the needs of radio operators and the concerns of local government. Plaintiffs are not entitled to any antenna they desire, Pentel, 13 F.3d at 1264, nor are they entitled to ignore the laws set forth by local government.

Because Plaintiffs ignored the County ordinance and constructed the tower without applying for a permit thereby foreclosing many potential areas of compromise, the Court finds that the County met its burden to seek a reasonable accommodation by suggesting some landscaping and/or antenna stacking. The Court

therefore holds that the County's ordinances are not preempted by PRB-1 as applied to the Nesbitts.

## IV. Conclusion

For the reasons stated above, the Court concludes that Official Code of Cobb County § 134-273 is neither facially preempted by PRB-1 nor preempted in its application to Plaintiffs. Therefore, Plaintiffs' request for injunctive and mandamus relief is DENIED. The Clerk is DIRECTED to administratively CLOSE this case.

SO ORDERED, this 9 day of October, 2014.

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE