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**LOS ANGELES
SUPERIOR COURT**

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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **COUNTY OF LOS ANGELES**

10 **UNLIMITED JURISDICTION**

11
12 ALEC ZUBARAU,

13 Petitioner/Plaintiff,

14 vs.

15 CITY OF PALMDALE; DOES 1-50,
16 inclusive,

17
18 Respondents/Defendants.

) CASE NO. BS114330
)

) PETITIONER'S REPLY
) MEMORANDUM OF POINTS AND
) AUTHORITIES IN SUPPORT OF
) PETITION FOR WRIT OF MANDATE
) AND DECLARATORY RELIEF

) TIME: 9:30 A.M.
) DATE: FEBRUARY 6, 2008
) DEPT: 86
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27 PETITIONER'S REPLY MEMORANDUM OF POINTS AND
28 AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF
MANDATE AND DECLARATORY RELIEF

1 **I INTRODUCTION**

2 The City’s Opposition attempts to justify the error of the Planning Commission and City
3 Council in applying a discretionary land use standard to a ministerial grant.. The City’s Opposition
4 further ignores Federal Communications Commission and Federal court opinions invalidating the so
5 called “balance of interests” test announced in earlier cases.
6

7 As will be discussed below, the Planning Commission and the City Council abused their
8 discretion in an attempt to curry favor with a large number of citizens who opposed a single
9 member of the community who happened to be a licensed Amateur Radio Service operator. The
10 record clearly shows that because of the number of neighbors aligned against Petitioner Respondent
11 acted in a biased and improper manner.
12

13 **II FEDERAL AND STATE LAW CLEARLY IMPOSES A DUTY UPON**
14 **RESPONDENT TO CRAFT THEIR LAWS TO ACCOMMODATE REASONABLE**
15 **AMATEUR COMMUNICATION**
16

17 The City contends that it is basically exempt from the partial preemption as set forth in the
18 Federal Communications Commission (FCC) Memorandum Opinion and Order commonly known
19 at PRB-1 so long as it does not *completely preclude* communications. In PRB-1 the FCC stated:

20 “24. Similarly, we recognize here that there are certain general state and local interests
21 which may, in their even-handed application, legitimately affect amateur radio facilities.
22 Nonetheless, there is also a strong federal interest in promoting amateur communications.
23 Evidence of this interest may be found in the comprehensive set of rules that the
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1 Commission has adopted to regulate the amateur service. . . Upon weighing these
2 interests, we believe a limited preemption policy is warranted. *State and local regulations*
3 *that operate to preclude amateur communications in their communities are in direct*
4 *conflict with federal objectives and must be preempted.”* (Emphasis added)
5

6 “25. Because amateur station communications are only as effective as the antennas
7 employed, antenna height restrictions directly affect the effectiveness of amateur
8 communications. . . We will not, however, specify any particular height limitation below
9 which a local government may not regulate, nor will we suggest the precise language that
10 must be contained in local ordinances, such as mechanisms for special exceptions,
11 variances, or conditional use permits. *Nevertheless, local regulations which involve*
12 *placement, screening, or height of antennas based on health, safety, or aesthetic*
13 *considerations must be crafted to accommodate reasonably amateur communications, and*
14 *to represent the minimum practicable regulation to accomplish the local authority’s*
15 *legitimate purpose.”* (Emphasis added)
16
17

18 California Government Code § 65850.3 which supports the partial preemption of PRB-1
19 mandates that any ordinance passed by a local municipality regarding antenna structures “*shall allow*
20 *those structures to be erected at heights and dimensions sufficient to accommodate amateur radio service*
21 *communications ...”* (Emphasis added)
22

23 In support of it’s position the City relies upon three cases that, in one way or another,
24 employ what is referred to as a “balancing of interests” based on an erroneous interpretation of
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Commission has adopted to regulate the amateur service. . . 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.*” (Emphasis added)

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California Government Code § 65850.3 which supports the partial preemption of PRB-1 mandates that any ordinance passed by a local municipality regarding antenna structures “*shall allow those structures to be erected at heights and dimensions sufficient to accommodate amateur radio service communications ...*” (Emphasis added)

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1 95.04 (A.R. 0531) clearly removes those tower and antenna structures allowed by § 95.03 from the
2 definition of “commercial” antennas and structures.

3
4 The City’s lack of good faith is demonstrated by its failure to even acknowledge, let alone
5 consider documents submitted by Petitioner in support of his needs for a specific height and type of
6 antenna. Attorney Fred Hopengarten, in a letter to Assistant City Attorney Skousen, set out the
7 reasons why Respondent’s ordinance was defective. He offered to negotiate with Respondent in
8 order to find a middle ground that would “reasonably accommodate” Petitioner’s needs. (A.R. 0475 -
9 0482) Instead the City offered to facilitate a negotiation between Petitioner and the neighbors which
10 is not the kind of accommodation envisioned by either PRB-1 or California Government Code §
11 65850.3. Petitioner submitted documents that addressed the general issue of the need for antenna
12 height (Antenna Height and Effective Communications [A.R. 0244 - 0257]) and his specific needs
13 based his location and his desire to communicate with his homeland, Belarus (Analysis of Antenna
14 Height [A.R. 0600 - 0611]) Not only did Respondent fail offer anything to counter this evidence, it
15 completely ignored its existence.
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18 **III THE PLANNING COMMISSION AND CITY COUNCIL ABUSED THEIR**
19 **DISCRETION BY APPLYING A DISCRETIONARY LAND USE STANDARD IN**
20 **REVOKING THE MINOR MODIFICATION AND BY DISREGARDING THE**
21 **EVIDENCE BEFORE THEM**
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23 In order to justify its position the City attempts to classify thi matter as a “land use
24 approval” and “zoning clearance.” The City ordinances distinguish between a Zoning Clearance,
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1 Palmdale Municipal Code § 26.03 (A.R. 1199) and a Minor Modification, Palmdale Municipal Code
2 § 26.04 (A.R. 1202) The first allows for a revocation hearing if, in its *discretion*, the Planning
3 Director “determines that the use approved in the Zoning Clearance is not in compliance with the
4 requirements of this Section . . . “ (A.R. 1201) § 26.04 has no such language. If the applicants
5 request for a Minor Modification falls within the criteria set out in § 26.04 it is granted.
6

7 Although it addresses the issue based upon CEQA, *Friends of Westwood, Inc. vs City of*
8 *Los Angeles* 191 Cal. App. 3d 259, 235 Cal. Rptr. 788 presents a well reasoned analysis of the
9 difference between a ministerial act and one that is discretionary. The court, citing California
10 Administrative Code § 15357 defines a discretionary action “as one which "requires the exercise of
11 judgment or deliberation when the public agency or body decides to approve or disapprove a
12 particular activity, as distinguished from situations where the public agency or body merely has to
13 determine whether there has been conformity with applicable statutes, ordinances, or regulations..” (*Friends of Westwood, Inc.* Supra at 270) The court went on to state that “A "ministerial" act
14 meanwhile is further defined in the guidelines as "a governmental decision involving little or no
15 personal judgment by the public official as to the wisdom or manner of carrying out the project. ... A
16 ministerial decision involves only the use of fixed standards or objective measurements, and the
17 public official cannot use personal, subjective judgment in deciding whether or how the project
18 should be carried out..” (*Friends of Westwood, Inc.* Supra at 270) See also *Munis v. Sherman*,
19 (1957) 152 Cal.App.2d 543, 557 [314 P.2d 67 and *Palmer v. Fox* (1953) 118 Cal.App.2d 453, 458
20 [258 P.2d 30].
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1 If we view Palmdale Municipal Code §§ 26.04 (A.R. 1202) and 95.03 (A.R. 1227)
2 together it is clear that the actions of the Planning Director in granting the Minor Modifications and
3 the Building and Safety Department in granting the permits were purely ministerial acts.
4

5 The Planning Commissions (Commission) Resolution No. PC-2007-025 (A.R. 0870-0877)
6 adopted at the hearing on September 20, 2007 relied on findings that were either outside the
7 Commissions jurisdiction, based on insufficient facts, based on a disregard of the facts or based on
8 the application of an impermissible standard.
9

10 The Commission found that the horizontal antenna encroached three feet on the side yard
11 set back even though Petitioner had been ordered to remove it at a prior hearing (A.R. 0366) and had
12 complied with that order. (A.R. 1132)

13 The Commission, basing its finding on anecdotal evidence, determined that the antenna
14 caused interference with neighboring property owners electronic equipment. This was clearly
15 impermissible as the field of radio frequency interference has been fully preempted by the Federal
16 government. It is obvious that by failing to respond with any citations contrary to those submitted by
17 Petitioner, Respondent has conceded the field of radio frequency interference has been completely
18 preempted by the Federal government. That is also made clear by Footnote 5 at pages 9 and 10 of
19 Respondent's Opposition.
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22 The Commission also found that the "active element" of the antennas exceeded 30 feet in
23 height. Neither the ordinance, §95.03 nor any other section of the Palmdale Municipal Code defines
24 "active element" and as such it is impermissibly vague. The Planning Department staff, Mr. Kite,
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1 opined that it included all horizontal antennas. (A.R. 0347) The ordinance which regulates
2 installation of *vertical* antennas makes no mention of horizontal elements. Respondent produced no
3 planning documents to support its position or show that the term had been previously defined to
4 include horizontal antennas. Therefore, there was no standard upon which the Commission could
5 have based its decision.
6

7 The Commission further found the antenna structure a danger in that it might fall during
8 high winds or seismic activity. The only evidence before the Commission consisted of the
9 engineering plans submitted to the Planning Department and the Department of Building and Safety
10 by Petitioner which clearly satisfied all of the structural requirements of the Palmdale Municipal
11 Code. (A.R. 007, 0033, and 0034) Were this not the case the permits would not have been issued.
12

13 Lastly the Commission erred by applying a discretionary land use standard to this
14 ministerial act to determine, after the fact, that the structures were not compatible with the
15 surrounding neighborhood even though the Minor Modifications were granted and the building
16 permits issued because Petitioners application fully complied with the standards annunciated in §
17 95.03 B.
18

19 The City Council further compounded these errors by adopting the findings and the
20 Resolution of the Commission. As can be seen by the discussion after public comment, regarding
21 the term “compatible” between members of the City Counsel and Assistant City Attorney Skousen.,
22 there was no standard that could be used to determine “compatible” other than whether the neighbors
23 did or did not approve. (A.R. 1129) Clearly, by letting the surrounding neighbors determine what is
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1 or is not allowable, the City Council abused its discretion, ignored both state and federal law and
2 abandoned its duties to follow its own ordinances.

3
4 An analysis of Palmdale Municipal Code §§ 95.03 A and B show the extent to which the
5 Commission and City Council abused their discretion in this matter. § 95.03 A (A.R. 1227) clearly
6 sets forth the purpose and intent of the ordinance. It is to set the standards that if complied with will
7 result in the applicant being allowed to construct a tower or vertical antenna. § 95.03 B (A.R. 1227)
8 is entitled “Development standards for residential zones” and goes on to state the height allowed, the
9 set backs that must be adhered to, the fact that no antenna may be placed in the front yard and other
10 specific requirements. There is no further language allowing for discretion to impose other
11 requirements.
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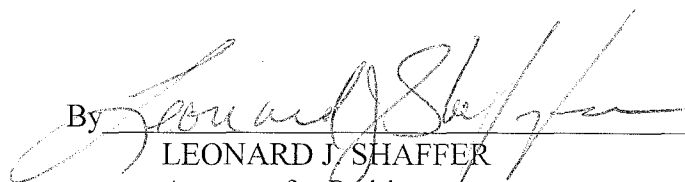
13 **IV CONCLUSION**

14 By adopting resolutions revoking Minor Modification 05-134 the Commission and City
15 Council abused their discretion by applying discretionary land use standards to a ministerial grant.
16 Further, they disregarded both state and federal law by failing to allow Petitioner’s antenna structure
17 “to be erected at heights and dimensions sufficient to accommodate amateur radio service
18 communications” and to consider that they should have crafted their order “to accommodate
19 reasonably amateur communications, and to represent the minimum practicable regulation to
20 accomplish the local authority’s legitimate purpose.” Instead, both the Commission and City
21 Council accommodated the sixty plus neighbors who signed a petition demanding they force
22 Petitioner to remove his lawfully installed vertical tower. If this action is allowed to stand then what
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1 happens to the Amateur Radio Operator who puts up his antenna or the individual who constructs
2 another type of auxiliary structure when, one, five or even ten years later, the neighbors decide it is
3 no longer "compatible" with the neighborhood? When this scenario was raised by Councilmember
4 Hofbauer, Mayor Ledford said this was different because it was just an antenna. (A.R. 1151) That
5 attitude is exemplified by an ordinance now pending before this same City Council that, if adopted,
6 would seek to invalidate any ruling this court might make favoring the Petitioner.
7

8 For the reasons set forth above, the Court should issue the Writ of Mandate directing the
9 City Council to set aside the Resolution of the Planning Commission and reinstate Minor
10 Modification 05-134; and further to grant the Petition for Declaratory Relief.
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12 DATED: January 29, 2009

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15 By  _____
16 LEONARD J. SHAFFER
17 Attorney for Petitioner
18 ALEC ZUBARAU
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