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**ATTORNEY CLIENT PRIVILEGED DOCUMENT**

November 8, 2012

Township of Morris  
50 Woodland Avenue  
PO Box 7603  
Convent Station, New Jersey 07961-7603  
Attention: Board of Adjustment  
Sonia Santiago, Secretary

**Re: Ira J. Saber  
Amateur Radio Facility  
10 Winding Way  
Application Number BA-09-12**

Dear Members of the Board of Adjustment:

The applicant, Dr. Ira Saber, has filed an application challenging the zoning officer's non-issuance of a building permit. The applicant seeks to erect and maintain an amateur radio antenna system attached to his house by an ice bridge. The antenna will be approximately 96' in height when in use and will be retractable to 36'. It is proposed to be located directly behind the middle of his house and within all required setbacks.

The FCC, in a decision which has become known as PRB-1, declared a limited preemption of state and local regulations governing amateur station facilities, including antennas and support structures. The Commission determined that there was a strong Federal interest in promoting amateur service communications, and that state and local regulations that preclude amateur service communications are in direct conflict with Federal objectives and must be preempted.

The Commission specifically held that "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." PRB-1, 101 FCC 2d 960, paragraph 25 (1984).

Accordingly, the PRB-1 decision originated the principle of "reasonable accommodation" with respect to placement and height of amateur radio antennas. Given the express Commission language, it is clear that a "balancing of interests" approach, which the Board of Adjustment is more accustomed to, is not appropriate in this context.

PRB-1 did not specify a particular height limitation below which a local government may not regulate; nor did the Commission mandate specific provisions that a local authority must include in a zoning ordinance. As indicated previously, the Commission established the "reasonable accommodation" and "minimum practicable regulation" standard. So a municipality may regulate the location, screening, or height of amateur radio antennas based upon health, safety, or aesthetic considerations, but only with minimal intrusion to the radio operator to accomplish the municipality's purpose.

In New Jersey it has been held that an amateur radio tower exceeding the height limits of the zoning ordinance is permitted as a reasonable accessory structure so long as the hobby is not conducted on a scale which is not customary for a "ham" radio operator. Wright v. Vogt, 7 N.J. 1 (1951); Skinner v. Zoning Bd of Adj., Cherry Hill Tp., 80 N.J. Super. 380, 388 (App. Div. 1963). Similarly, in Izzo v. Borough of River Edge, 843 F.2d 765 (3d Cir. 1988), the court recognized that "[b]ecause the effectiveness of radio communication depends on the height of antennas, local regulation of those structures could pose a direct conflict with federal objectives." That matter was ultimately remanded to the district court and subsequently the municipality issued the requested antenna permit. Several federal cases have held that local restrictions on amateur antennas that constitute effective prohibitions on communications or which involve fixed maximum height limitation are facially void as preempted. See, e.g., MacMillian v. City of Rocky River, 748 F. Supp. 1241 (N.D. Ohio, 1990).

It is apparent that the essence of the FCC's preemptive intent as expressed in PRB-1 was to guarantee that each amateur radio operator could install functional antennas for all amateur frequency bands, at the licensee's residence. It was made clear in September of 1989, when FCC revised its amateur radio rules to codify [at 47 C.F.R. 97.15(b)] the essential holding of PRB-1, as follows:

(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 regulations 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. Citation omitted.]

The only height restriction placed by the FCC on amateur radio antennas is if the radio amateur is near an airport or requires an antenna higher than 200 feet in order to communicate effectively, in which case he or she must get special FCC approval. Because of the relationship

between antenna height, terrain obstacles, and the susceptibility of home electronic equipment to interference from antennas in the same horizontal plane, the FCC has allowed amateur radio operators virtually unfettered discretion for ascertaining proper antenna height up to 200 feet. The topography of the site, the presence of geographic obstacles such as hills, mountains or trees, the frequency bands used, and many other technical factors must all be considered when a radio amateur decides how high to place his or her antenna. Arbitrarily fixed, unreasonably low maximum height limits, or preclusive ordinance interpretations contained in ordinances preclude effective, reliable antenna systems and amateur communications, and take away discretion intentionally given by the FCC to the amateur radio service. Thus, without specific and substantiated concerns for public health, safety or other compelling purposes (and except to the extent that amateur radio communications are "reasonably accommodated"), prohibitions on antennas, or preclusive limitations, violate the FCC's preemption regulation.

Furthermore, it appears that the Morris Township height ordinance specifically excludes private radio antenna from its height limitations. Ordinance section 95-30(B)(1) states:

Height limitations stipulated elsewhere in this ordinance shall not apply to ... private radio and telephone antennas... all attached to the principal structure... All freestanding exceptions shall be considered as accessory structures.

Dr. Saber's antenna structure will be permanently attached to the principal residential structure by cables and an ice bridge. Accordingly, it appears Dr. Saber's antenna is exempt from the Township's height ordinance.

#### Conclusion

PRB-1 and subsequent federal rules and regulations have made the following points clear:

- (1) There is a complete preemption of local regulation that precludes amateur service communications;
- (2) There is a requirement that local regulations that involve placement, screening, or height of private radio antennas must be crafted to "reasonably accommodate" amateur communications (i.e.: local regulation may require the structure to be within all setback lines for safety reasons, especially in a densely populated area); and
- (3) Local law must be the "minimum practicable regulation". The federal courts have recognized this "minimum practicable regulation" test to be a form of "least restrictive means" test. Pentel v. City of Mendota Heights, 13 F.3d 1265 (8<sup>th</sup> Cir. 1994).

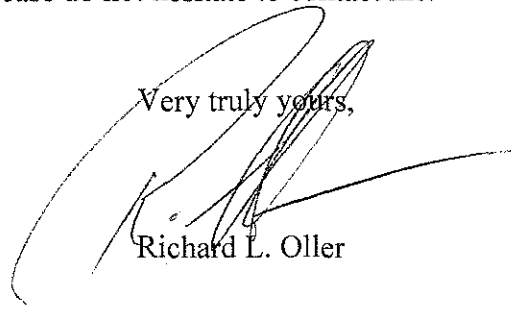
Dr. Saber's antenna location is within the applicable setbacks for his property. The Board must be careful to accommodate Dr. Saber's antenna with minimal restrictions. Additionally, since the ordinance excludes private radio antennas from the height regulations, the height of the

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antenna is not an issue for the Board of Adjustment to decide and, therefore, it would appear that the permit should be issued.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to be 'Richard L. Oller', written over the typed name.

Richard L. Oller

RLO/me