

Applicant's Responses to Staff Report

Board Meeting Date: January 9, 2018

Relevant Code Sections

Section 110.324.20 Private Communication Antennas: General. Private communication antennas, including antenna support structures, are allowed as accessory uses in all regulatory zones pursuant to the provisions of this article.

(a) Height. The **retractable height** of a private communication antenna is limited to the height limitation of a main structure allowed in the regulatory zone in which the antenna is erected with a bonus of up to ten (10) feet.

Section 110.324.30 Private Communication Antennas: Additional Height. A private communication antenna support structure may **exceed the height restrictions within this article** if an administrative permit is obtained pursuant to Article 808, Administrative Permits, and in accordance with the provisions of this section.

The Application

Applicant has applied for a private communications antenna that is retractable to less than 45 feet (in this case, 23 feet). It can be extended to a height greater than 45 feet (in this case, 75 feet).

Staff Contentions

Staff Contends (Strategic Objective): The Washoe County Strategic Objective supported by this item is "Stewardship of our communities." Staff Report at page 1.

Applicant's Response: What staff is really attempting to do is to balance the concept of stewardship with the needs of the radio amateur. This is forbidden by Nevada and federal law, as the FCC has already done the balancing.¹ By contrast, Staff fails to cite another Strategic Objective, which is: "Safe, secure and healthy communities" – "Enhance community safety through investing in critical infrastructure for current and future needs."

¹ The FCC ruling may be found at <https://www.fcc.gov/wireless/bureau-divisions/mobility-division/amateur-radio-service/prb-1-1999#block-menu-block-4>

7. . . . PRB-1 decision precisely stated the principle of "reasonable accommodation". In PRB-1, the Commission stated: "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." Given this express Commission language, it is clear that a "balancing of interests" approach is not appropriate in this context.

an objective well served by the presence of the emergency communications capability created by the Applicant, a member of the Washoe County Amateur Radio Emergency Services (WCARES). Federal regulation, 47 CFR § 97.1, holds that the very basis and purpose of the amateur radio service is to serve “the public as a voluntary noncommercial communication service, particularly with respect to providing emergency communications.”

Staff Contends (Requirement for Administrative Permit): “The code allows private antennas to exceed 45 feet in height with the approval of an administrative permit.” Staff Report at page 2.

Applicant’s Response: This contention assumes that the word retractable has no meaning, and that all antennas exceeding 45 feet in height require an administrative permit. On the other hand, as the Code limits retractable antennas to a maximum height of 45 feet, then that is the only height restriction found in Article 324. Applicant has also filed for a non-retractable private communications antenna to which Section 110.324.30 does not apply. No administrative permit is required for this fixed height antenna, as it does not “exceed the height restrictions within this article” (as the only height restriction within Article 324 is on “retractable” antennas).

Staff Contends (NRS 278.02085 and PRB-1): “Local authorities may still “zone for height, safety, and aesthetics concerns.”” Staff Report at page 2.

Applicant’s Response: Staff seriously understates the County’s obligation to the radio amateur by failing to inform the Board that Nevada and federal law further state that “PRB-1’s guidelines bring[] 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** to engage in amateur communications.” (emphasis added)²

The FCC’s PRB-1 Order holds: “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.” PRB-1 at ¶ 25. This is a subjective test. The question is: What communications does the radio amateur desire to engage in? The height regulation must not “impinge on the needs of amateur operators.” If it does, *it is preempted*.

Furthermore, PRB-1 and NRS 278.02085 “impose[] limitations on the ability to regulate amateur radio communications towers.” Any regulation of amateur radio antenna structures, *even in the interest of safety and aesthetics*, must be “the minimum level of practicable regulation.” NRS 278.02085.2(b). If it is not the “minimum level of practicable regulation,” *it is preempted*.

² Modification and Clarification of Policies and Procedures Governing Siting and Maintenance RM-8763 of Amateur Radio Antennas and Support Structures, and Amendment of Section 97.15 of the Commission’s Rules Governing the Amateur Radio Service at ¶ 9. <https://www.fcc.gov/wireless/bureau-divisions/mobility-division/amateur-radio-service/prb-1-1999#block-menu-block-4>

Mr. Stone's position is that the complex Administrative Permit process of §§ 110.324.30(b) (1) and (2), plus §§ 110.808.05, 110.808.10, 110.808.25 (a), (b), (c), (d), and (e), plus § 110.808.30 (a) and (b), as well as § 110.808.35 (a) and (b) is very far from the minimum practicable regulation. The plain language of Section 110.324.20(a), requiring only a building permit, is the "minimum practicable regulation," as required by Nevada law, should be applied here. The Application for an Administrative Permit alone (see https://www.washoecounty.us/csd/planning_and_development/applications/files-planning-development/application_files/applications_only/ap_app_2017.pdf) is 23 pages long. As a courtesy, Trevor Lloyd, Director of Planning, has conceded that only seven pages are relevant. But that's still a seven page application. And then there are the costs. Even with the partial waiver of fees offered, the Applicant will still be required to pay \$822 in County fees, plus the cost of a title report (Applicant's guess: \$1,000), plus any miscellaneous additional costs, for a total likely to exceed \$2,000. And after all that, the outcome is unknown. For example, Staff has expressed an intention to require lowering the tower every hundred hours, which would not be required of a building permit. In addition, conditions which may be attached by other county departments, and their costs, cannot be predicted.

Staff Contends (Wording of the Code): An Administrative Permit is required for a private communication antenna that is taller than 45 feet, though it may be retractable to less than 45 feet. Staff Report at page 3. Atty. Edwards has written: "[T]he "retractable height" is limited to 45 feet. This means that the maximum height that is "able to be drawn back or back in," to borrow your definition, is 45 feet. A simpler way to say it is that the height that is "capable of being retracted" is 45 feet. In this case, the 45 foot antenna is the base height---in other words, the "retracted" height, not the height that is "capable of being retracted." Therefore 45 feet is the maximum."

Applicant's Response: Applicant contends that, in the English language, there is a difference between retractable height and maximum height, and that Staff interprets the Code to mean that the word "retractable" is irrelevant. Applicant has applied for an antenna that is retractable to less than 45 feet, an application that falls four-square within the plain meaning of the Code § 110.324.20(a), and a building permit can, and should be, granted.

Staff Contends (Consistency): "Mr. Stone also contends that the code has not been interpreted consistently and that other retractable towers have been permitted taller than 45 feet tall." Staff Report at page 3.

Applicant's Response: To be clear, the Applicant contends that the Code, enacted in 2004, has been interpreted consistently since that time. He has provided copies of the only three permits ever granted under the "retractable" wording, and they are all consistent in expressing that the permit complies with the Code. The Applicant asks: Why, after 13 years, is Planning trying to reinterpret the code?

Staff Contends (Erection Without a Building Permit): “Building staff discovered that Mr. Stone had not only constructed the footing, but also had erected the antenna. This erection is directly contrary to the allowance granted by the Director and was done without an issued building permit.”

Applicant’s Response: Applicant rejects the contention that he constructed the footing and mounted the tower without Building Department permission. The permit for the foundation was issued June 28, 2017. The foundation was poured in early August. Later in the summer, fearing that the appeals process might prevent further construction as winter was foreseeable, he asked Stephanie Racy-McIntyre, Permit Services Coordinator, if he might put his tower on the already permitted foundation, if he agreed that it would not be raised above 45 feet in height. As no appeal or administrative permit is required for a tower of this type at 45 feet, she agreed. A note was thereupon made on the papers on file in the office. Mr. Stone has taken no short-cuts, and the tower has never been higher than 45 feet.

Staff Contends (Unable to Find Previous Comparable Permits): “It is possible that Washoe County may have approved retractable antennas that extend beyond 45 feet tall without an administrative permit in the past; however, staff was unable to find any such recent permits.”

Applicant’s Response: This is really odd. Applicant cited three building permits for heights greater than 45 feet, but retractable to 45 feet or less, and provided copies, in his appeal dated October 27, 2017. Each of those three prior permits for amateur radio antenna systems is “retractable” to less than 45 feet. Permit No. 04-1828 was for “a self-supporting crank up support that nests at a height of 24’-6” when not in use and extends to an operating height of 70’-0”.” Applicant does not know the name of any planner involved in the 2004 permits, but in 2014, and consistent with the 2004 permits, Grace Sannazzaro, Planner, approved two private communication antennas “at 25 feet high retracted” for Permit No. 15-0512. Though claiming that Staff was unable to find the permits, each is cited by the Staff Report at page 4. They are Permits No. 15-0512, 04-1828 and 04-3872.

The Staff Report Permit, at page 4, misstates permit 04-3872. Stated as “3 . . . towers at 20 feet tall,” the actual permit is for three towers that retract to 21 feet, 21 feet and 22 feet, and extend to 72 feet, 72 feet and 89 feet, respectively, plus antennas.

Summary:

The Applicant, a radio amateur, has applied for a building permit for his private communications antenna retractable to less than 45 feet, extendable to 75 feet. He has also applied for a non-retractable height of 75 feet. Every neighbor has signed a letter of no objection, copies of which have been provided to Staff. Staff contends that the word “retractable” has no operative meaning, as the height limit applies to both retractable and non-retractable antennas. The Applicant contends that the word has meaning. The Board may directly grant the building permit, without further proceedings. § 110.912.20 (b)(6) (iv).

Applicant’s Request:

The Applicant requests a favorable on this possible motion (the **change** from Staff's possible motion **appears in bold**):

"Move to reverse the decision of the Board of Adjustment and approve the appeal of the Planning and Building Division Director's decision to deny Building Permit number WBLD17-101171. This reversal of the Board of Adjustment's decision is based on the Board's review of the written materials provided for this item, as well as the oral testimony at the public hearing. **In accordance with § 110.912.20(b)(6)(iv), the building permit is granted.**"

Respectfully submitted,

Richard Stone, KD6BQ
Applicant