

**BRUCE R. ALTSCHULER &**  
**RUTH P. ALTSCHULER** : BEFORE THE  
Appellants : HOWARD COUNTY  
v. : BOARD OF APPEALS  
**HOWARD COUNTY PLANNING BOARD** : HEARING EXAMINER  
Appellee : BA Case No. 724-D

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**DECISION AND ORDER**

On May 2 and June 27, 2016, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, conducted a hearing on the administrative appeal of Bruce R. Altschuler and Ruth P. Altschuler (Appellants). Appellants are appealing the Howard County Planning Board's letter decision of February 4, 2016 denying their application for Amended Site Development Plan approval to allow a 33-foot amateur radio antenna mounted on a pole mast in the rear yard of 7308 Silent Bird Court (the Property) and located 14 feet from the eastern rear property line.

Appellants were not represented by counsel. Bruce Altschuler and Ruth Altschuler appeared at the hearing in support of the administrative appeal. Bruce Altschuler testified. Andrew Campbell, Susan Campbell and Vernon Stark appeared at the hearing and testified in opposition to the request. Eric Daniels appeared for the May 5 hearing and cross-examined Mr. Altschuler. Richard Firestone, Mark Wise, Darrell Mattheis and David Prestel appeared for the May 2, 2016 hearing, but did not testify. By long-standing policy, the Planning Board does not participate in de novo administrative appeals of its site development plan decisions.

Appellants introduced into evidence the exhibits as follows.

1. Federal Communications Commission Report, DA 12-1342, adopted August 16, 2012
- 2.1-10 Photographs, previous antennas and current antenna, various dates

Opponents introduced into evidence the exhibits as follows.

1. Antennas on Appellants' Property
2. Screen shots of antenna designs
3. Amateur radio license with amateur extra operator privileges, call sign KC3HCV, issued to Vernon Stark, May 16, 2016
4. Hy-gain AV-640 Patriot HF vertical antenna info, company web site, site visited June 16, 2016
5. Board of Appeals Case No. 707-D, decided February 9, 2014
6. Letter to William Blotzer, Department of Inspections, Licenses and Permits Building Inspector from Bruce Altschuler and Ruth Altschuler re: Notice of Violation CB140795, July 24, 2014
7. Department of Planning and Zoning Code Enforcement, Case Field Report. Code Enforcement Case No. 14-91.
8. Photographs of two antennas on Appellants' Property
9. Photograph of existing antenna on Appellants' Property

### Definitions

The Howard County Zoning Regulations (HCZR) § 103.0 defines "antenna" as "[a] device used to collect or radiate electromagnetic waves, including both directional antennas, such as panels and microwave dishes, and omnidirectional antennas, such as whips and satellite dishes." HCZR § 128.0.E.5 regulates "Amateur Radio Communication Towers" and requires them to meet certain setbacks. An amateur radio communication "tower" comprises the antenna and the support structure, which in this case is a "pole mast."

### I. STATEMENT OF THE CASE

Appellants Bruce Altschuler and Ruth Altschuler are the property owners of 7308 Silent Bird Court (the Property) and amateur radio emergency communications operators. The Property is zoned NT-SFMD (New Town - Single Family Medium Density) and is part of the Village of King's

Contrivance, Section 2, Area 3, Phase 2 and subject to Final Development Plan (FDP) FDP-178-A-4, Part 2. Appellants are seeking retroactive Amended Site Development Plan (ASDP) approval to retain the existing, 33-foot high amateur radio antenna tower located in the rear of their yard and 14 feet from the eastern rear property line. Opponents Vernon Stark, Susan Campbell and Andrew Campbell are adjoining property owners who object to the height and appearance of the tower in its current location. Nota Bene: The ASDP application also describes the tower antenna height as almost 34 feet in height, which explains the request for a 14-foot setback. For consistency, the 33-foot height is used herein.

On February 4, 2016, the Planning Board held a public meeting on Appellants' ASDP-83-93 application, to accommodate, retroactively, the 33-foot amateur radio communication tower on their Property. The Planning Board technical staff report (PBTSR) evaluated Appellants' ASDP application for compliance with HCZR §§ 125.0.G.4.d & .e and concluded:

The purpose of the existing accessory structure is for a federally licensed amateur radio antenna for emergency communication. The requested setback adjustment should not be detrimental to the public welfare. An existing amateur radio antenna has existed at this approximate location on Lot 252 since 1991. Therefore, the requested adjustment will not alter the essential character of the neighborhood or substantially impair the appropriate use or development of the surrounding properties. The existing radio antenna is in compliance with all applicable setback and height requirements in accordance with FDP-178-A-4, Part 2 which requires a minimum setback of 7.5 feet from all property lines not adjacent to a public road and a 34 foot structure height requirement. On July 24, 2014, the Village of King's Contrivance (VKC) Community Association, Inc. Architectural Committee reviewed and approved the application for the subject radio antenna (see attached). *The setback adjustment for the existing radio antenna, if granted is the minimum necessary to afford relief to the petitioner.*

The petitioner received all required building permits from the Howard County Department of Inspections, Licenses and Permits and VKC Community Association approvals for the location of the existing radio antenna. The antenna was originally installed in 1991 by a previous property owner and was replaced by the current property owner in its present location on the subject lot in 2014.

The practical difficulties or hardships were not created by the property owner, as the property was purchased by the current owner with two existing radio antennas located in the rear yard at the approximate location of the present antenna. As a result of unique physical conditions affecting the subject property, including narrowness of the lot and the existing house placement, extraordinary hardships and practical difficulties result from strict compliance with the setback regulations restricting the location of the radio antenna in the rear yard of Lot 252. (Emphasis added.)

The PBTSR recommended approval subject to three conditions.

1. The existing radio antenna and pole mast shall be reduced in height from 33 feet to 30 feet, which was the height of the existing original antenna located on the subject property when the property was purchased by the petitioners in 1997.
2. The petitioner shall provide additional landscape plants along the eastern rear fence line of the property to supplement existing landscaping to provide sufficient screening to the adjacent property. The plantings should consist of at least one (1) evergreen tree with a minimum height of 5 to 6 feet and six (6) evergreen shrubs with a minimum size of 2 to 3 feet in height, spaced appropriately to provide adequate screening for the existing radio antenna.
3. Subject to compliance with the Village of King's Contrivance Community Association, Inc. resident architectural committee application approval conditions as indicated in their approval letter dated July 24, 2014.

The Planning Board denied the requested revision in a 4-0 vote. On February 29, 2016, Appellants filed a timely appeal from the denial decision letter.

## II. BACKGROUND

As found in BOA Case No. 707-D (Opponents Exhibit 5), Andrew Campbell on August 19, 2014 filed a zoning violation complaint with DPZ, averring the 7308 Silent Bird Court property owner, Bruce Altschuler, had applied for a residential antenna permit to paint a mast and replace an existing antenna "*in-kind*," when in fact he had "constructed a communications tower with a tower height (including antenna) measured from ground level, that is significantly higher than the previous antenna" (emphasis added). The complaint stated the mast/amateur radio antenna was located within setbacks at a residential property with NT (New Town) zoning in violation of HCZR § 128.0.E.2.a. DPZ opened a code enforcement case on August 21, 2014. Enforcement

Inspector Tamara Frank and Enforcement Supervisor Anthony LaRose investigated the complaint, after which Inspector Frank determined the complaint was unfounded and closed the case.

Mr. Campbell timely filed an administrative appeal from this "close-out" letter on October 10, 2014. In that appeal, Board of Appeal Case No. 707-D, Mr. Campbell alleged the close out letter decision was based on inadequate factual support and error in legal conclusion, as the amateur radio communication tower clearly violated setback requirements. The February 9, 2014 BA 707-D decision and order concluded the amateur radio communication tower was not a "replacement-in-kind" structure qualifying as a noncomplying structure but a new amateur radio communication tower and ordered as follows.

1. That the appeals of Susan Campbell, Vernon and Wenona Stark and Patricia Banks are dismissed.
2. It is **FURTHER ORDERED** that the Department of Planning and Zoning shall reopen CE 14-091.
3. It is **FURTHER ORDERED** that the Department shall measure the height of the Replacement Tower from ground level to the top of the Tower, including the mast, with a laser measuring tool.
4. It is **FURTHER ORDERED** that the Department shall measure the distance from the base of the Replacement Tower to the closest adjoining property line with a laser measuring tool.
5. It is **FURTHER ORDERED** that the Department shall map the location of the Replacement Antenna, indicate its distance from the closest property line and add a note indicating its height on a copy of the KCRAC plot plan introduced as AE1.25 or on a similar map. The map shall also include a note indicating the date when these measurements were made and that DPZ took these measurements. This map shall be included in the CE 14-091 case file.
6. If, based on the height and location of the Replacement Tower, DPZ determines the Replacement Tower is in violation of the applicable setback requirements, it is **FURTHER ORDERED** that the Department shall issue the Property Owners of 7308 Silent Bird Court a Notice of Violation and instruct them to abate the violation or seek variance approval.
7. The Hearing Examiner recommends that the Department measure the height and location of any other Tower or mast at 7308 Silent Bird Court to establish base line information about the structures/uses and map this on a second map.

On DPZ's reconsideration request for more flexibility in how it measured the amateur radio antenna tower's height and its location relative to the adjacent property line, the Hearing Examiner revised order paragraphs 3 and 4 as follows on March 27, 2015.

3. It is **FURTHER ORDERED** that the Department shall measure the height of the Replacement Tower from ground level to the top of the Tower, including the mast, with the appropriate measuring devices available to it and/or utilizing the Tower (antenna) specifications provided to the Department by the Property owner/s of 7308 Silent Bird Court.
4. It is **FURTHER ORDERED** that the Department shall measure the distance from the base of the Replacement Tower to the closest adjoining property line with the appropriate measuring devices available to it.

DPZ subsequently determined the amateur radio communication tower was 33 feet in height and located 14 feet from the rear Property line. On May 5, 2015, DPZ Zoning Inspector Tamara Frank issued Notice of Violation (NOV) CE 14-091(a) to Appellant Bruce Altschuler. The NOV informed him a February 18, 2015 inspection found the following violations of HCZR § 125.0.A.7 & 128.0.E.5: "Antenna (33 feet in height from ground) does not meet the required setbacks from lot lines (minimum distance equal to the tower height, including antennas, measured from ground level) on NT (New Town) zoned property." The action required to abate the violation was "[r]educe the height of the antenna or apply and receive amendment to the Site Development Plan SDP-83-093." Appellants on July 8, 2015 submitted variance petition BA 15-028V to cure the violation. When the Hearing Examiner resolved the Planning Board should take jurisdiction over the requested relief, the Property being zoned New Town, Appellants withdrew the variance petition and submitted to the Planning Board an amended site development plan revision application, ASDP-83-93, which the Board denied.

#### **Earlier History**

BA 707-D describes the earlier history of this case and is repeated here (without reference to the supporting exhibits).

12.07.91 Former property owner of 7308 Silent Bird Court files an application with the Kings Contrivance Resident Architectural Committee (KCRAC) for "unobtrusive vertical antennas mounted on side of deck."

Note on application: Antenna must @ (?) 30' high [--] above roofline and "antennas are near air conditioning unit and radon pump – absolutely least obtrusive location." KCRAC Recommended Action: We felt the color of antennas matched siding and had sufficient screening.

1.16.92 letter to Rabbi Kenneth Cohen (former property owner) from Stephanie Moore, Covenant Advisor, KCRAC, approving antenna exterior alteration with the following provisions: 1) The antennas must be relocated to the rear of the house at approximately the location marked with X on plot plan OR 2) If antennas remain in current position, plant a six foot high white pine tree to screen the current location from street and adjacent neighbor's view.

9.25.13 letter to Bruce & Ruth Altschuler, 7308 Silent Bird Court, from Laura Parish, Covenant Advisor, Kings Contrivance Community Association, informing the Altschulers that the Resident Architectural Committee reviewed/approved "Antenna—KCRAC #2789—12/11/1991"

July 24, 2014 response letter from Bruce Altschuler to William Blotzer, Building Inspector, Department of Inspections, Licenses and Permits (DILP) re: Notice of Violation, CB140795, Communications Tower. The letter states the "communications tower mentioned in your violation letter is a 7 foot mast for a removable amateur radio antenna." Mr. Altschuler relates the early history of the antenna and describes the construction of a mast, including a galvanized vertical pipe 4 feet above ground. The antenna was attached with two U bolts in accordance with manufacturer's direction. This antenna was in place on the existing mast until the end of June 2014 when it was removed. The letter also states the prior property owner "verbally claimed to me that he had received necessary approvals from Howard County at the time of location." Modifications: As of the end of June 2014, I made the following modifications to the mast:

- 1) I painted it with Rustoleum primer brown paint.
- 2) I placed a new copper ground rod into the ground nearby the mast.
- 3) I connected the new copper ground rod to the mast/antenna with new thick copper wire.
- 4) I placed a new antenna of similar size and composition on the mast . . .

7.31.14. DILP Permit Application No. B14002741 stamped N.O.V. (notice of violation). Description of work box states: "replace removable antenna with new removable antenna. Paint mast. Antenna is in kind."

8.29.14 email to Don Trent, SDAT (State Department of Assessments and Taxation) from Tammy Frank, following up to see if he had any luck finding any information about the Property. 9.3.14 response email to Tammy Frank from Don Trent re: Property Information Request, re: Tax ID 16-164941 stating ". . . [o]ur record do not show anything concerning an antenna on this or neighboring properties."

8.19.14 letter to Tamara Frank from Dr. Bruce Altschuler and Mrs. Ruth Altschuler, putting into writing their discussions with Inspector Frank during her inspection of the amateur radio antenna at their residence stating in pertinent part, [a]fter 20 years, we have replaced the antenna, in kind, with a new antenna of same length and configuration on a repainted mast . . . We understand that Howard County records for the approval permits from [the original approval period] were discarded by the county, rather than being transferred to computer.

8.21.14 CE 14-091 Case Field Report. Open Violation --- setback violation added, assigned to Tamara Frank

8.25.14 Note (Tamara Frank). Owners just recently replaced the antenna in kind with a newer update version. "They say they are approved by the fire department as a location that will help in the case of a disaster . . .

9.9.14 Note (Antony LaRose). Spoke to complainant. Advised him we are awaiting a response to the question of whether the antenna can be considered noncomplying or not. Told him if we determine the antenna is noncomplying we will close case and he can appeal that. If we determine the antenna is in violation, a notice will be sent and a variance will be required.

9.11.14: Note (Tamara Frank). Case status changed to Closed: Unfounded

9.11.14: Note (Tamara Frank). This was replaced in-kind

### III. THE ISSUES IN THIS APPEAL

In the section of the administrative appeal petition providing for a brief description of error, fact, or law presented by the appeal, Appellants allege the Planning Board erred in failing to consider Final Development Plan FDP-178-A-4, part 2, PRB-1, FCC Part 97, the Village of Kings Contrivance Homeowners Association approval/landscaping, the Howard County building permit, the small yard and the emergency communications needs of the community and nation.

FDP-178-A-4, Part 2, note 6A, pg. 1 (included with the petition) imposes a minimum setback of 7.5 feet from all property lines not adjacent to a public road and a 34 foot structure height requirement (for all structures, no height limit for accessory structures). The administrative appeal petition supplement in pertinent part states the 33-foot height of the vertical antenna/mast ensemble is used for emergency communications and public service events. A "variance" of 20 feet is requested in accordance with FCC PRB-1. "The 1985 PRB-1 clearly rejects esthetics as a reason to ban a licensed amateur radio station antenna. No provision is made for PRB-1 reasonable accommodation."

**IV. THE FEDERAL COMMUNICATIONS COMMISSION'S REGULATION  
OF AMATEUR RADIO FACILITIES:  
PRB-1 (1985), PRB-1 FIRST CLARIFICATION (1999) & PRB-1 SECOND CLARIFICATION (2000)**

The Federal Communications Commission (FCC) regulates domestic amateur radio operators and related wireless communications programs and policies. Amateur radio operators are governed by the FCC rules contained in the Federal Code of Regulations (C.F.R.), specifically 47 C.F.R. § 97. Part 97.15 regulates amateur radio facilities and applies in pertinent part to local zoning authority over "federally licensed antenna structures."

**PRB-1 (1985)**

In 1984, the American Radio Relay League (ARRL) petitioned the FCC for a declaratory ruling (a formal administrative interpretation of a federal regulation) that 47 C.F.R. § 97.15 preempts state and local zoning and regulatory boards and agency authority, including local ordinance regulation of amateur radio antennas and antenna structures, over federally licensed radio facilities. ARRL asserted these authorities and regulations precluded or significantly inhibited effective, reliable amateur radio communication.

The 1985 FCC ruling, captioned "In the Matter of Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities – PRB-1," (101 F.C.C.2d 952, 1985 WL 260421 (F.C.C. 1985) (PRB-1), declined to preempt all local ordinances inhibiting effective amateur radio communications or to specify a height below which a municipality could not regulate. After summarizing some 1600 favorable and unfavorable comments—representing what the FCC identified as a "clear dichotomy of viewpoint" between local governments and individual amateur radio operators over tower height ordinances—the FCC stated it believed the

appropriate ruling was one that would "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." PRB-1, para. 22. It explained:

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.

PRB-1, para. 23. The FCC ruling hence effected a limited preemption of such state and location regulation under this flexible standard.

[L]ocal 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, para. 25.

**PRB-1 First Clarification (1999): Rejecting All Balancing of Interests Tests**

ARRL sought further clarifications to the preemptive effect of PRB-1 in 1996, petitioning the FCC to expand the PRB-1 limited preemption to restrictive local zoning ordinances through five declaratory rulings:

- (a) that local governments must make a reasonable accommodation for amateur radio antennas, rather than balancing their own local interests against the Federal interest in amateur radio
- (b) that local governments could not specify a lower height maximum than sixty to seventy feet for an amateur radio antenna structure
- (c) that overly burdensome conditions in land use authorizations or imposition of excessive costs is preempted
- (d) that denial of a particular use permit or special exception does not relieve a local government from having to make a reasonable accommodation for amateur communication
- (e) that conditional use permit procedures can be used to regulate amateur radio antennas, but only as an adjunct to a reasonable height restriction; and,

(f) that land use restrictions pertaining to safety that limit the overall height of an amateur radio antenna structure, or restrict installation of an antenna altogether, are invalid unless there is no other alternative available that is less burdensome and still accomplishes the same purpose.

Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antennas and Support Structures, and Amendment of Section 97.15 of the Commission's Rules Governing the Amateur Radio Service, FCC 99-2569, 14 FCC Rcd. 19413 (1999) (PRB-1 First Clarification), para. 4. The FCC denied all but one of the six requests, stating in para. 9:

[T]he standards of "reasonable accommodation" and "minimum practicable regulation" are sufficiently efficacious as guideposts for state, local and municipal authorities. We believe that the effectiveness of these guidelines or standards can be gauged by the fact that a local zoning authority would recognize at the outset, when crafting zoning regulations, the potential impact that high antenna towers in heavily-populated urban or suburban locales could have and, thus, would draft their regulations accordingly. In addition, we believe that PRB-1's guidelines 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 to engage in amateur communications.

On the requested clarification that local governments must make a reasonable accommodation for amateur radio antennas, rather than balancing their own local interests against the Federal interest in amateur radio, the FCC stated in para. 7:

Petitioner further requests a clarification of PRB-1 that local authorities must not engage in balancing their enactments against the interest that the Federal Government has in amateur radio, but rather must reasonably accommodate amateur communications. We do not believe a clarification is necessary because the 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.

In short, FCC had already performed a "balancing of interests" review in PRB-1 1985 when it

weighed 1600 comments supporting or opposing ARRL's request for clarification. As an amateur radio operator and law student wrote in 2004, PRB-1 First Clarification marked the first step away from expansion of the "balancing of interests" doctrine for gauging reasonable accommodation in the controlling Fourth Circuit case, *Williams v. City of Columbia*, 906 F.2d 994 (4th Cir. 1990) to other federal circuits. (See Part VII below.) Brennan T. Price, Note, Reasonable Accommodation of Amateur Radio Communication by Zoning Authorities: The FCC's PRB-1 Preemption, 37 Conn L. Rev. 321, 331-332, 335-336 (2004).

#### **PRB-1 Second Clarification (2000): Antenna Types and Residential Neighborhoods**

ARRL petitioned the FCC in 1999 to reconsider its third denial to extend PRB-1 to covenants and contracts. While the FCC dismissed the reconsideration review, it revisited 47.C.F.R. § 97.15's "reasonable accommodation" provisions to distinguish between reasonable accommodation in the zoning regulation of compatible amateur station antenna configurations in residential neighborhoods and inappropriately high antennas or tower-type antenna structure designs that are incompatible within a residential neighborhood.

We take this opportunity to amplify upon the meaning of "reasonable accommodation" of amateur communications in the context of local land use and zoning regulations. The Commission adopted a limited preemption policy for amateur communications because there is a strong federal interest in promoting amateur communications. 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, or antennas that are similar to those normally permitted for viewing television, either locally or by satellite, 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.

Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antennas and Support Structures, and Amendment of Section 97.15 of the Commission's Rules Governing the Amateur Radio Service, 15 F.C.C.R. 22151, 22154 (2000) Order on Reconsideration (RM 8763)(PRB-1 Second Clarification), para. 8.

#### **PRB-1 Codified**

PRB-1 was codified in 1989 in what is now 47 CFR § 97.15(b) when the FCC revised and recodified Part 97, including Part 97.15, which regulates federally licensed antenna structures:

(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 regulation 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.) See PRB-1, 101 FCC 2d 952 (1985) for details.<sup>1</sup>

### **V. THE MAY 2, 2016 HEARING: FINDINGS OF FACT**

#### **Direct Testimony of Bruce Altschuler**

1. Appellant Bruce Altschuler testified at the May 2, 2016 hearing that PRB-1 (1985) (submitted with the petition) preempted the county's zoning regulation of amateur radio antenna towers. It was his further testimony that PRB-1 barred the Hearing Examiner from denying the requested ASDP application based on aesthetic considerations. He additionally testified to the Planning Board not considering PRB-1 when denying the ASDP request.

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<sup>1</sup> Reorganization and Reregulation of Part 97 Rules Governing the Amateur Radio Service, 54 Fed. Reg. 117, (June 20, 1989) pp. 25857-25875.

2. Appellees are amateur radio operators with amateur extra operator privileges (Extra Class rated). Bruce Altschuler is a volunteer for the Howard County Radio Amateur Civil Emergency Service (RACES). He is a dentist, and a retired colonel in the United States Air Force Dental Corps.

3. Mr. Altschuler testified he could not saw off the actual antenna to meet the PBTSR's recommendation that the amateur radio antenna structure be reduced in height to 30 feet, as it would violate FCC regulations. It was also his opinion that the placement of the current structure was in a "sweet spot." It was Mr. Altschuler's further testimony that amateur radio operators like him play a vital role in emergency communications and he presented broad testimony about the increasing importance of these operators during local and national emergencies, as reflected in multiple homeland security national directives. In his view, the benefit to Howard County from amateur radio operators like him far outweighs any setback requirements.

4. The Appellant similarly testified to the importance of amateur radio operators like him as vital to emergency and disaster relief planning on a first-responder basis, no matter what the environment. As set forth in the petition supplement, Mr. and Mrs. Altschuler's licensed station includes apparatus for transmitting and receiving amateur radio wavelengths authorized under Part 97. The licensed station includes antennas specifically designed to operate on federally approved wavelengths or "amateur bands" and these antennas are manufactured and designed by commercial vendors to meet strict FCC transmission requirements.

5. Mr. Altschuler also testified to replacing two antennas a previous property owner and amateur radio operator had erected with the current amateur radio antenna tower. These

antennas were replaced due to storm damage. He could not replace "a 1991 truck with a 1991 truck." Rather the antenna had to be with a stronger, superior one with more bands. He also testified to the general matter of how radio transmissions operate, discussing UHF/VHF line of sight bands/frequencies and HF bands/frequencies, which bounce off the atmosphere.

6. Ms. Campbell questioned Mr. Altschuler about the necessity of this particular amateur radio antenna structure being located at this particular location of the mast in concrete. He replied it was not located in a different location on a new mast because the previous owner had placed posts in several locations. According to Mr. Altschuler, PRB-1 allows us (Appellants) to put an antenna anywhere on their property, regardless of county setback regulations.

7. Vernon Stark and Andrew Campbell questioned Mr. Altschuler about alternative antennas and/or locations that would still permit him to accomplish his objectives. Mr. Altschuler responded the antenna at issue is the closest functional alternative to the old antenna, based on his impression that it was an "in-kind replacement." When crossed by Mr. Campbell about multiple potential options other than cutting the antenna to reduce its height, Mr. Altschuler testified the only other alternative was to take the amateur radio communication tower down.

**The Hearing Examiner's Response to Mr. Altschuler's Direct Testimony  
& the May 18, 2016 "Reasonable Accommodation" Letter**

Upon close of Mr. Altschuler's direct testimony and cross-examination, the Hearing Examiner read into the record several PRB-1 paragraphs, which the Hearing Examiner explained contradicted Appellants' claims to PRB-1 being an absolute preemption of the HCZR. Because Appellants misapplied PRB-1, they presented no evidence allowing the Hearing Examiner to

consider the Planning Board decision and the ASDP application in conformance with PRB-1's mandated reasonable accommodation review. I also informed Appellants that in consideration *Williams v. City of Columbia*, PRB-1 required me to evaluate Appellants *specific* emergency amateur radio antenna needs and the ways in which they would use the amateur radio antenna tower. The Hearing Examiner so asked Mr. Altschuler if a retracting antenna would meet his emergency communication needs. He stated it could, but may be uglier to neighbors. Being unable to conduct the requisite PRB-1 review, I resolved that PRB-1 (being the only PRB-1 ruling relied on by Appellants) obliged me to continue the hearing to permit Appellants to better press their case, although they had concluded their case in chief. By letter of May 18, 2016 to the parties, I reiterated the reason for the continuation hearing: to give Appellant a second go at presenting evidence relevant to their appeal, having misapplied PRB-1 (1985).

The continuation hearing comports with the Hearing Examiner's PRB-1 obligation to seek a satisfactory compromise with Appellants in a good faith effort to "reasonably accommodate" their interests as amateur radio antenna operators. At the continuation hearing, Appellants and Protestants may present evidence about the existing antenna or the type of antenna that would reasonably accommodate Appellants' communication needs. To assist Appellants and Protestants and provide some guidance, I have posted several cases where courts have applied PRB-1's "reasonable accommodation" principle in challenges to local authority decisions to grant or deny an amateur radio antenna. These PRB-1 compliance cases focus in pertinent part on whether the evidence of record, particularly the evidentiary submissions of the radio operator applicant, demonstrates that local authorities applied their regulations to reasonably accommodate the communication needs of the affected amateur radio operator. Nota Bene: These cases are provided only to illustrate the nature and scope of the antenna-specific and site-specific evidence applicable to amateur radio antenna petitions when local authorities evaluate antenna options under PRB-1's reasonable accommodation standard. They are not to be construed at this juncture as controlling law. These cases are posted on the Howard County Council website at <http://cc.howardcountymd.gov/Calendar>. Scroll to the June 27, 2016 continuation hearing date and click.

Also posted on the June 27, 2016 continuation hearing calendar are the 1999 and 2000, PRB-1 Memorandum and Opinion Orders clarifying the 1985 PRB-1 limited preemption, "reasonable

accommodation" principle. Appellants did not include these later Orders with their administrative appeal petition. These two clarifications provide further guidance.

## VI. THE JUNE 27, 2016 CONTINUATION HEARING: FINDINGS OF FACT

### Direct Testimony of Bruce Altschuler

8. At the outset of the June 27, 2016 continuation hearing, Mr. Altschuler again began to present broad testimony about the importance of emergency amateur radio operators and to contest any objection or denial of the ASDP for aesthetic reasons. To this end, Mr. Altschuler introduced into evidence Appellants' Exhibit 1 during his rebuttal testimony. Exhibit 1 is the FCC's 2012 Report to Congress on its findings about Uses and Capabilities of Amateur Radio Service Communications in Emergencies and Disaster Relief. (DA 12-1342, In the Matter of Uses and Capabilities of Amateur Radio Service Communications in Emergencies and Disaster Relief: Report to Congress Pursuant to Section 6414 of the Middle Class Tax Relief and Job Creation Act of 2012, Released August 20, 2012, GN Docket No. 12-1342.) The Hearing Examiner interjected here in the interest of quasi-judicial efficiency, engaging Mr. Altschuler in a colloquy about the purpose of the continuation hearing and to again provide him with an opportunity to present fact-specific, site-specific evidence about his emergency amateur radio operator needs. I formally took notice that Appellants serve an important function in emergency response situations. Mindful of my PRB-1 obligation to evaluate the requested ASDP application pursuant to PRB-1's "reasonable accommodation" analysis, and the FCC's clarifications thereof, I queried Mr. Altschuler as to whether he would like to continue the hearing to a later date, which would allow him to present the necessary evidence to support the ADSP request. He declined the offer,

believing he could present the necessary evidence. With Mr. Altschuler's consent, I read into the record case law excerpts describing the technical information amateur radio operators had submitted for specific approvals (including the cases posted on the County Council website) to guide him. These and other cases are discussed below in Part VII.

9. When Mr. Altschuler resumed his testimony, he testified generally to there being two kinds of communication in amateur radio. The first is local /line of sight and operates on UHF (ultra-high frequency) and VHF (very high frequency) bands. (A band or frequency band is a specific range in the spectrum of radio communication frequencies.) This type of communication uses a fairly small, innocuous antenna and Appellants use these frequencies primarily for communication in Howard County. Howard County amateur radio operators also use four repeaters to assist their communications. (A repeater "repeats" a signal to make it go further/cover more land.) The HF (high frequency) band, depending on the frequency, atmospheric conditions and other circumstances, allows radio signals/beams to bounce off upper layers of the atmosphere. Depending on the frequency, various bands will work at various times of day. This means you want to have about every band you can have if you want to be fairly sure you can get through.

10. The amateur radio communication tower at issue is only "6 40" It is a vertical multi-band antenna designed to tune various frequencies from 6 bands to 40 bands, which are emergency communication bands. Mr. Altschuler further testified the amateur radio communication tower is vital should he need to communicate through a network of operators for emergencies. Appellants erected the amateur radio communication tower because it is a

replacement for the previous antenna. It is as close to the height and size and configuration as the old antenna. An antenna for the 80 band would be taller. Mr. Altschuler believed the replacement antenna with the same capabilities as the old antenna was grandfathered. It wasn't the ideal antenna, but it was an innocuous antenna replacement and actually replaced two antennas. Appellants did not make an effort to find another "sweet spot." A "sweet spot" is a location that maximizes reception and transmission- the ability to transmit and receive signals. This spot had been located by the previous owner. The antenna could not be placed too close to the aluminum siding on the house, which can cause interference with radio propagation. A stick antenna is the most innocuous that Appellants could put together. It is also very light so the existing mast will support it.

11. The antenna is constructed like a tuning fork. The antenna manufacturer designed the antenna to have the best frequencies and tuning for multiple bands. The Hy-gain antenna Model 640 is set/tuned and is the minimum length or height for the 6 and 40 bands. It can be easily removed and will withstand an 80MPH wind and not bend over. It will not come down. It cannot be cut without damaging tuning and in violation of FCC Part 97. The air radials on the antenna must be 8 feet off the ground, which prevents him from lowering the height of the antenna. A beam antenna would have to be rotated.

12. He will not cut down his maple tree and he will not cut down his bushes. A new crab apple tree will provide screening when it grows. He has done some landscaping of bushes around the antenna mast. The application supplement, pages 21 and 22, depict this landscaping. There is a two-tier deck in the rear yard, which also limits the location of an antenna on the small lot.

He cannot put an antenna under a tree because radio signals must bounce off the upper layers of the atmosphere for communication. Other kinds of antennas are not possible because of the lot size and configuration. Other antenna configurations would be more obtrusive.

13. Vernon Stark cross-examined Mr. Altschuler about his testimony about tree attenuation; Mr. Altschuler testified that a tree interferes with a vertical antenna propagating into the atmosphere. When questioned if trees effect any transmissions to the effect that he could not operate, Mr. Altschuler responded that any radio frequency would be attenuated where there are trees. When questioned as to whether the maple tree's growth would render the antenna ineffective, Mr. Altschuler testified that it would not because the antenna is omnidirectional, but that it is more difficult to go in some directions.

14. Susan Campbell cross-examined Mr. Altschuler as to whether he had looked for another location other than the "sweet spot." He responded that he had it easy because the previous property owner was an amateur radio operator and had apparently done tests. There are places where it cannot be placed, like next to the house or under the trees, so there are few spaces where it can be located. It is next to the deck, which minimizes its visual impact. He feels his radio operation contributes to amateur radio service, which is good for the neighborhood. Ms. Campbell crossed Mr. Altschuler about why the two old antennas were effective at one time but not now. He replied that the current antenna has different capabilities for new frequencies and bands.

15. Mr. Campbell crossed Mr. Altschuler about whether he could communicate locally on 2 meters with the antenna at issue. He responded that he has an HF antenna, which the

Hearing Examiner understood to be the amateur radio antenna for which he seeks ASDP approval. He has another antenna on the house roof, a small, innocuous VHF/UHF antenna. He has at least one mobile antenna and about three mobile antennas for Appellants' cars and three mobile antennas for hand-held talkies.

16. Mr. Campbell introduced Opponents Exhibit 1, a photograph of two antennas on the Altschuler Property. When questioned about the capability of the roof antenna, Mr. Altschuler testified to it being VHF/UHF running from 2 meters (144 megahertz) (MHz) up to 220 and 420 MHz. It is a complementary antenna but not the same as the antenna for which he seeks approval. The roof antenna is one option for local emergency communications, the HF antenna being the other option. HF is being tested for use in regional hospital distributed evacuations and Howard County has an HF antenna. The roof antenna has been there since 2014.

17. Concerning the air radials on the amateur radial antenna structure, Mr. Altschuler testified that they are part of the antenna tuning system. Air radials work better than ground antennas. An air radial works with the entire antenna circuit as it is tuned. The manufacturer recommends that they be located 8 feet above the ground. The two old antennas that he replaced may have had ground radials, which can leach.

#### **Hearing Examiner Questions**

18. The Hearing Examiner asked Mr. Altschuler if he could accomplish or meet his amateur radio antenna needs with a roof antenna rather than the antenna tower for which he seeks approval. He responded he could if he could relocate the (Hy-gain 640) antenna there because it has air radials. He does not know if the HOA would approve and does not believe

Howard County would approve it. When asked if there is an alternative antenna of lesser height that would meet his amateur radio communications needs, Mr. Altschuler testified that he could not answer yes or no. There are all kinds of antennas. Appellants chose the vertical antenna because it is very robust, requires almost no maintenance, has no rotators and is safe (would bend in winds, not fall down). In short, Appellants are very happy with the Hy-gain 640 antenna.

**Direct Testimony of Vernon Stark**

19. Vernon Stark testified to being an adjoining property owner whose back yard adjoins the Altschulers. He is strongly opposed to the ASDP application. He holds the same class amateur radio license as Appellants, as evidenced by Opposition Exhibit 3, his FCC Amateur Extra license FRN 0025559402, for call sign no. KC3HCV, granted May 16, 2016. In his opinion, the issue is not a choice between aesthetics and communication. A sufficiently motivated amateur radio enthusiast can achieve both. In his view, the issue is whether the amateur radio communication tower represents reasonable accommodation, noting that at the May 2, 2016 hearing, Mr. Altschuler testified to a previous owner active in amateur radio using a different antenna at a different location, which means there are alternatives to the amateur radio antenna structure for which he seeks ASDP approval. In his view, reasonable accommodation would allow a reasonable antenna to be located in a functional location, not just the "sweet spot."

20. Mr. Stark further testified that shorter antennas are practical and possible. Antennas of a lesser height can be electrically lengthened through a loading coil. Coverage over 40 meters can be accomplished with hidden antennas. He introduced into evidence Opposition Exhibit 2, which contains images of antennas pulled during the last month. Mr. Altschuler objected to the

exhibit coming into evidence because every radio operator has the ability to choose the antenna they want—a Chevy or a Ford—and the Hy-gain 640 is the antenna he wants. Opponent Exhibit 2.1 is a screen shot from a You Tube video by an amateur radio operator who installed attic antennas to comply with local covenants. The antennas allow him to use the 40 and 20-meter bands. Opponent Exhibit 2.2 is a screen shot of a 12-foot high vertical antenna 6 band (2, 6, 10, 15, 20, 40 meters) noting it is appropriate for a small lot. Exhibit 2.3 is a screen shot of a birdhouse stealth antenna with an attachable 6-foot whip that works on 40-15 meters. Exhibit 2.4 is a 7-foot high antenna for all bands 40-10 meters HF, and 6m/4m/2meters/70 cm WHF & UHF. Exhibit 2.5 is an extract from the book "Stealth Antennas, by Steve Nichols discussing a small, 2-meter high, compact antenna (W5ALT) that might fit in an attic and tunes on all bands from 6-40 meters. Exhibit 2.6 is an image of this book cover and publishing information. Exhibit 2.7 is a screen shot of MFJ-1788, a small loop antenna operating with 15-40 meter bands. Mr. Stark explained they may perform slightly differently at different locations, but are designed for use on HF bands. These are viable options for emergency communications on small lots.

21. On Mr. Altschuler's cross-examination about HF frequencies presenting health and fire hazards, Mr. Stark responded that there are standards for maintaining distance. He does not know about fire hazards. Concerning the loop antenna on Opponent Exhibit 2.7 and any problems, Mr. Stark testified to not having personal experience with it.

#### **Direct Testimony of Susan Campbell**

22. Ms. Campbell testified to be an adjoining property owner whose back yard abuts Appellants' Property. She moved to her home in 1991. At that time, there was no antenna or

mast at the present location of the amateur radio antenna structure. The then current adjoining Property owner, Rabbi Cohen, had a small antenna that looked like a fishing pole. The Rabbi kept it bent over until he used it and it was on the side of the deck. A second antenna later appeared next to the deck. When the Rabbi received HOA approval in 1991, he was required to plant a 6-foot pine tree in addition to a large row of existing pines. The Altschulers removed these pine trees before erecting the amateur radio antenna tower. After these trees were removed, a new antenna went up in a new location. The current location has a 6-foot elevation on the Property, which makes the antenna more "looming."

23. On cross-examination, Mr. Altschuler asked Ms. Campbell if aesthetics is more important than lifesaving amateur radio emergency operations.

**Direct Testimony of Andrew Campbell**

24. Andrew Campbell testified to being an adjoining property owner whose back yard abuts Appellants' Property. In his view, the application can be denied perforce of PRB-1's reasonable accommodation standard as applied to the requested ASDP based on Mr. Altschuler's testimony to there being millions of options that could meet his communication needs. He further opined that the facts of this appeal are consonant with the amateur radio operator's circumstances in *Williams*: the Appellants "want the antenna there because they want the antenna there."

25. Mr. Campbell introduced into evidence Opponent Exhibit 4, a screen shot of Appellants' Hy-gain AV-640 amateur radio antenna, and which states that "no ground or radials" are needed, that it can be "installed on decks, roofs and patios" and has a "sleek and low profile."

This information indicates to Mr. Campbell that the Hy-gain AV-640 could be mounted on the deck, noting Mrs. Altschuler stated at the Planning Board meeting that she moves it all the time, or in a different location. A second option would be to move the antenna back where it was. Here he referred to the location analysis established in BA 707-D, which he introduced into evidence as Opposition Exhibit 5. He also introduced Opponent Exhibit 6, which describes the mast location.

26. Mr. Campbell also introduced into evidence Opponents' Exhibit 8 and 9. Exhibit 8 is a photograph of Rabbi Cohen's two antennas taken in August 2014. Exhibit 9 is a photograph of the amateur radio communication tower taken in December 2014. Reviewing them together, he testified that the 7-foot mast and the older smaller mast behind it are visible. As Mr. Campbell interpreted this evidence, it is simply not true that the Altschulers simply replaced the new antenna on a mast in the existing location. Mr. Campbell would like to see the amateur radio communication tower moved to the deck or in the old antenna location. Additionally, manufacturers have responded to the radio community with technology to meets their needs in a variety of locations.

27. Mr. Altschuler cross-examined Mr. Campbell about the viability of another location, with Mr. Campbell responding that this burden fell to Appellants.

#### **Rebuttal Testimony of Bruce Altschuler**

28. On rebuttal, Mr. Altschuler introduced Appellants Exhibit 2. Exhibits 2.1-.2, taken June 26, 2014, appear to depict three antennas with masts. Exhibits 2.3-.4, taken July 11, 2014, depict the location of the amateur radio antenna tower. Exhibits 2.5-.6 (no date) depict the

amateur radio antenna tower's location in relation to trees on the Property in fall foliage. Exhibits 2.7-.10 depicts the amateur radio antenna tower, two additional masts and their location relative to pruned evergreens.

## VI. BURDEN OF PROOF

In accordance with Hearing Examiner Rule of Procedure 10.2.(c), in the appeal of an administrative agency decision, the petitioner must show by substantial evidence the action taken by the administrative agency was clearly erroneous, arbitrary and capricious, or contrary to law.

## VII. DISCUSSION AND ANALYSIS

*You can't always get what you want  
But if you try sometimes you just might find  
You get what you need*

The Rolling Stones

*Amateurs and their counsel must demonstrate that the system they desire is necessary to reasonably accommodate their communications, while realizing that a municipality is not always required to grant their dream antenna system in order to achieve that goal.*

Brennan T. Price, Note, Reasonable Accommodation,  
37 Conn L. Rev. 321, 323

*We [the county] don't want you to have a sports car; we want you to have a truck.  
We [Appellants] chose the best antenna to provide emergency services.  
PRB-1 allows us to put an antenna anywhere on their property, regardless of county setback regulations.*

Bruce Altschuler, testimony  
May 5 and June 27, 2016

Appellants' ASDP application for an amateur radio communications tower within platted and regulated setbacks presents Howard County with a case of first impression on multiple levels. The Planning Board meeting was the Board's first review of an ASDP application for an amateur

radio communications tower, and consequently, the first appeal review before the Hearing Authority (the Hearing Examiner and the Board of Appeals.) The Hearing Authority has never considered a variance petition for an amateur radio antenna structure since the HCZR were amended in 1996 through ZRA-01 (Council Bill 19-1996) to amend and add new communication tower and antenna regulations for the purpose of promoting the public health, safety and welfare of Howard County and its residents. The bill added the current definition of "antenna," and in pertinent part a new subsection, now HCZR § 128.0.E.5, regulating communication towers and antennas, both subject to the existing one-to-one foot setback. The Hearing Examiner takes notice here these regulations were effective when Appellants purchased 7308 Silent Bird Court in 1997. As such, Howard County Code § 17.502(a) required their contract of sale to have included as an addendum or as a separate section of the contract notice of county land use laws.

#### **A. The Law of PRB-1: Making Reasonable Accommodation**

In *Williams*, the Fourth Circuit affirmed the district court's decision upholding the Columbia, South Carolina Zoning Board of Appeals' (ZBA) second denial of a variance for a 65-foot antenna after consideration of PRB-1. Focusing on the "strike a balance" language in PRB-1, the Fourth Circuit held in part that antenna reviewing authorities and courts in PRB-1 challenges correctly apply PRB-1's reasonable accommodation mandate if they analyze the requested antenna system in a "balancing of interests" test weighing municipal zoning objectives and the amateur radio operator's communications needs. "[A]bsent a full federal preemption in this area, the law cannot be that municipalities have no power to restrict antennas to heights below that desired by radio licensees. The law requires only that the City balance the federally recognized

interest in amateur radio communications with local zoning concerns." Other federal circuit courts have adopted the *Williams* PRB-1 "balancing of interests" PRB-1 doctrine, but more have fashioned reasonable accommodation standards directly rejecting the Fourth Circuit's *Williams* "balancing of interests" doctrine in light of 1999 PRB-1 First Clarification.<sup>2</sup>

In the Hearing Examiner's view, the prudent course in this discussion and analysis is not to disavow the *Williams* balancing test but rather, to focus on the judicial review of how local governments procedurally make reasonable accommodation through application of their local laws. Of key import to the adequacy of the procedural reviews considered in *Williams* and later case law is the evidence of record going to the amateur radio operator's "specific needs and the way in which he would use his antenna." *Williams*, 906 F.2d at 998.

In the first PRB-1 judicial review of the Mr. Williams' effort to build an amateur radio antenna, *Williams v City of Columbia*, 707 F. Supp. 207, (D. SC 1989) (*Williams I*), the federal district court remanded on finding the ZBA did not make factual findings when it denied his special exception petition. The court looked unfavorably on the record absence of Mr. Williams' specific communications needs, the amateur radio operator having failed to present testimony at the ZBA hearing on the need for an antenna exceeding the zoning ordinance maximum 17-foot

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<sup>2</sup> *Thernes v. City of Lakeside Park, Kentucky, et al.*, 779 F.2d 1187 (6th Cir. 1986); *Bodony v. Incorporated Village of Sands Point*, 681 F. Supp. 1009 (E.D.N.Y. 1987); *Howard v. City of Burlingame*, 726 F. Supp. 770 (N.D. Cal. 1989), *aff'd*, 937 F. 2d 1376 (9th Cir. 1991); *Evans v. County of Boulder*, 994 F.2d 755 (10th Cir. 1993); *Marchand v. Town of Hudson*, 788 A.2d 250, 147 N.H. 380 (2001); *Chedester v. Town of Whately*, 279 F.Supp.2d 53 (D. Mass., 2003); *Bosscher v. Township of Algoma*, 246 F.Supp.2d 791 (W.D. Mich., 2003); *Snook v. City of Missouri City, Texas*, C.A. No. 03-CV-243, 2003 (S.D. Tex., 2003); *Smith v. Board of County Comrs.*, 110 P.3d 496, 137 N.M. 280, (N.M., 2005); *Boyd v. Town of Ransom Canyon, Tex.*, 547 F.Supp.2d 618 (N.D. Tex., 2008) and; *Nesbitt v. Cobb County*, C.A. No. 1:13-CV-881-ODE, (N.D. Ga., 2014).

antenna height and asserting simply that he had finished building his garage and knew where he wanted to place the antenna. *Williams I*, 707 F. Supp. at 208-209.

[T]he present record does not contain any transcript of the proceeding before the ZBA. Rather, the minutes of the hearing reveal that neither party to this suit was apparently aware of PRB-1. As a result, the board did not technically tailor its analysis along the lines suggested in PRB-1. [] On the other hand, plaintiff gave no justification for an antenna in excess of 17 feet (the limit by ordinance absent a special exception) other than that he had finished building his garage and now knew where he wanted to place the antenna. Consequently, although the Board may have been perfectly justified, based upon the record before it, in denying plaintiff's request for a special exception, it was also at fault for failing to perform, on its own initiative, the reasonable accommodation analysis required by PRB-1. Because PRB-1 preempts local zoning ordinances (and decisions based upon such provisions) that fail to consider the federal interest in maintaining a strong pool of amateur radio operators capable of assisting in national and local emergencies, the procedure used to deny plaintiff's request for a special exception to the 17 feet height limitation found in § 6-3099 cannot stand.

*Id.* at 210-211.

On final appeal from the ZBA's remand denial the *Williams* court affirmed the district court's holding that PRB-1 did not invalidate the local zoning ordinance. The record showed the ZBA had "investigated the possibility of accommodating Mr. Williams' request while simultaneously preserving the aesthetic beauty and safety of the neighborhood by suggesting a restriction of hours of operation, but these attempts at compromise were rejected by Williams." "The law cannot be that municipalities have no power to restrict antennas to heights below that desired by radio licensees." *Williams*, 906 F.2d at 997. "The fact that Williams would only be satisfied if that balance results in the City allowing him to build an antenna of whatever height he chooses does not entitle him to relief." *Id.* at 998.

The court in *Pentel v. City of Mendota Heights*, 13 F.3d 1261, 1264-1265 (8<sup>th</sup> Cir., 1994), invalidated the city's variance zoning as preempted by PRB-1 because the city did not make

reasonable accommodation in any practical sense, having granted a variance allowing the radio operator to continue using a wholly inadequate antenna, an ineffective 56.5-foot antenna, not the 30-foot high retractable steel tower measuring 30 feet when lowered and 68 feet when fully extended, for which she sought approval. The court criticized the city for its faulty procedures. These errors included a "bare-bone" decision letter with no factual findings; relying in part on a planning staff report evaluation concluding the operator's current antenna was adequate for her communications needs; the city's belief that the antenna tower would be unsightly (although it would reach a height only slightly below the proposed tower); disregarding the operator's demonstrations that the existing antenna did not allow reliable long-range transmissions and; for the city's failure to seek a compromise that would have accommodated her amateur communications.

Two later cases address how a municipality may make reasonable accommodation in consideration of PRB-1 Second Clarification (2000), which recognizes zoning regulations are not invalid as an unreasonable accommodation if they forbid certain types of antennas as incompatible for legitimate reasons. In *Zubarau v. City of Palmdale*, 192 Cal. App. 4th 289, 303, 304 (Cal. App. 2d Dist. 2011), the court held the city order revoking zoning approvals for multiple antennas be removed was not unreasonable accommodation, where the city applied the PRB-1 Second Clarification to its review under the zoning ordinance, stating in pertinent part:

[B]ecause the tower antenna was not compatible with the surrounding neighborhood; the tower antenna greatly exceeded the height of all residential buildings and accessory structures in the area and created an adverse visual impact on the neighborhood, especially when the tower antenna was raised to its full height with the horizontal antenna array; the tower antenna posed a safety hazard because it could fall in high winds or during seismic activity; the horizontal antenna array extended

about three feet into the required 10 foot side yard setback in violation of City Zoning Ordinance section 95.03 B.2.b [and the height of the active array on the tower antenna exceeded 30 feet. Thus, the City's action in ordering removal of the tower antenna cannot reasonably be viewed as "extreme or excessive prohibition of amateur communications." By its resolution, the City Council did not bar all antennae on Zubarau's property. Instead, the City Council found that the particular 55 foot tower antenna at issue was incompatible with the neighborhood based in part on safety and aesthetic concerns.

In the recent *DePolo v. Board of Sup'rs of Tredyffrin Tp.*, 105 F.Supp.3d 484 (E.D. Pa., 2015), the district court concluded a "municipality reasonably accommodates a ham radio operator when it considers his application, holds public hearings, makes factual findings and seeks a compromise." *DePolo*, 105 F.Supp.3d at 496. The *DePolo* decision approvingly outlined the zoning board process through which it sought to make reasonable accommodation, discussing the operator's proposed 180-foot tower, which the board found to be incompatible with the surrounding residential neighborhood, and which would create an adverse visual impact. The court also positively reviewed the board's reasonable accommodation offer to allow him to build a 65-foot tower, based on factual findings that this compromise would permit him to communicate at VHF, UHF and microwave frequencies with two existing 17-foot antennas (one of which was mounted on a 10-foot basketball stand). *Id.* at 489.

#### **B. PRB-1's Reasonable Accommodation Requirements as Applied to the Planning Board Denial of the ASDP Application**

A first consideration in this appeal is whether the Planning Board hearing process and through which the Board took zoning action to deny the requested ASDP to permit Appellants' amateur radio communications tower—represented an effort to reasonably accommodate the two radio operators' interest in amateur radio emergency communications, as mandated by PRB-

1. The review is hampered because the public meeting procedures governing the Planning Board's consideration of the ASDP pursuant to its administrative decision-making authority, Planning Board Rule of Procedure § 1.106 (for non-quasi-judicial proceedings) and HCZR § 125.0.G.4, do not require written factual findings.<sup>3</sup> The Hearing Examiner generally discussed this issue with the parties, who testified to the Board legal counsel's efforts to apprise the Board of its PRB-1 obligations. Still, in the absence of a statutory mandate to make a record of the hearing, through written findings, minutes or official transcript, the Hearing Examiner is compelled to conclude the Planning Board's ASDP denial was arbitrary and capricious, as a matter of law, under PRB-1 mandates. The Board failed to make reasonable accommodation.

Additionally, DPZ's written PBTSR recommendation that the ASDP application be approved subject in pertinent part that the existing grade antenna and pole must be reduced in

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<sup>3</sup> § 125.0.G.4. Adjustments to Bulk Regulations for Individual Lots

Upon the request of the owner of a particular lot, the Planning Board may approve parking, setback, height, lot coverage, or other bulk requirements for such lot or parcel which differ from those required by the applicable Final Development Plan, in accordance with the following procedures:

- a. A public meeting shall be held on the Site Development Plan requiring the adjustment. If no Site Development Plan is available, an accurate plot plan drawn to scale shall be submitted for Planning Board review at the public meeting.
- b. A Site Development Plan or plot plan submitted for review shall clearly indicate the requirement from which relief is sought and the requested relief, and shall be accompanied by a written statement explaining the reasons for the requested adjustment.
- c. In addition to the notice for public meetings required by the Planning Board's Rules of Procedure, the property that is the subject of the application shall be posted with the date, time, and place of the meeting for at least 15 days immediately before the public meeting.
- d. The requested adjustment to the parking or bulk requirements shall be granted if the Planning Board finds that:
  - (1) The adjustment will not alter the character of the neighborhood or area in which the property is located, will not impair the appropriate use or development of adjacent property, and will not be detrimental to the public welfare; and
  - (2) The adjustment a) is needed due to practical difficulties or unnecessary hardships which arise in complying strictly with the Final Development Plan; and/or b) results in better design than would be allowed by strict compliance with the development criteria.
- e. The Planning Board may approve, approve with conditions, or deny a requested adjustment.

height from 33 feet to 30 feet, does not signal reasonable accommodation. There is no evidence that lessening the antenna's height—which according to Mr. Altschuler is a mechanical impossibility—would permit Appellants to engage in their emergency amateur radio communications of choice. Even more, the "record" does contain any factual finding that the lesser height recommendation was the least restrictive means available to meet the applicable HCZR objectives necessary for the welfare of the community, where the Board did not negotiate or seek a compromise with Appellants.

### **C. The Hearing Examiner's Consideration of the ASDP Application**

In accordance with Hearing Examiner Rule of Procedure 10.5, the Hearing Examiner may grant or deny a petition, grant a petition with modifications or conditions, or, in the case of an administrative appeal, remand the case to the agency for further proceedings. In this case, these provisions mean, having found the Planning Board's decision to deny the ASDP application to be in error, the de novo appellate hearing permits me to hear new testimony and evidence and to correct any error by granting the application, upon making the requisite findings and conclusions. Any remand to the Planning Board for further proceedings would be futile, considering the Board makes no written findings for an ASDP application. Accordingly, this Part C reviews the evidence of record under the HCZR standards to adjudge the necessity of Appellants' ASDP application for a 33-foot high amateur radio communication tower located 14 feet from a property line, as a reasonable accommodation of the amateur radio operators' emergency radio communication needs, while still accomplishing the county's objectives, in line with PRB-1, codified as 47 C.F.R. § 97.15(b) and as later clarified.

1. The Applicable Zoning Regulations

"Amateur Radio Communication Towers" are regulated under HCZR § 128.0.E.5, which permits "communication towers for amateur (ham) radio" as permitted accessory uses in residential districts subject to all requirements of §§ 128.0.E.2 and 128.0.E.3. The HCZR §103.0 definition of "Residential Zoning District" includes the residential land use areas of the NT zoning district as indicated by approved comprehensive sketch plans or, for areas where there is no approved comprehensive sketch plan, by the preliminary development plan. Of import to this appeal is HCZR § 128.0.E.2.a.1, which compels amateur radio antenna towers in residential districts to be set back a "minimum distance equal to the tower height (including antennas) measured from ground level." Section 128.0.E.3.a requires them to be "gray or a similar color that minimizes visibility," unless otherwise required by the FCC or the Federal Aviation Commission. HCZR §§ 125.0.G.4.d & .4.e contain the standards by which a requested adjustment to the FDP-imposed bulk regulations for an individual New Town zoned lot compliance is reviewed.

- (1) The adjustment will not alter the character of the neighborhood or area in which the property is located, will not impair the appropriate use or development of adjacent property, and will not be detrimental to the public welfare; and
- (2) The adjustment a) is needed due to practical difficulties or unnecessary hardships which arise in complying strictly with the Final Development Plan; and/or b) results in better design than would be allowed by strict compliance with the development criteria.

Per § 125.0.G.4.e, I may approve, approve with conditions, or deny a requested adjustment. (New Town zoned property is not subject to the Hearing Authority variance petition procedure regulated under HCZR § 131.0.B.2.) Hearing Examiner Rule of Procedure 10.6 obliges the hearing

examiner to issue a final decision in writing. The decision must contain findings of fact, conclusions of law, and an appropriate order, and be signed. In applying these standards to the ASDP application, the Hearing Examiner recognizes any decision on the application must account for Appellants' communication needs by constituting the minimum practicable restriction on these needs.

By operation of PRB-1, the Hearing Examiner must first determine if the 33-foot amateur radio communications tower is permitted under the applicable laws. If they are not, I am obliged to consider how the zoning regulations are to be applied to make reasonable accommodation of Appellants' amateur radio communications needs. The gravamen of any such consideration is whether the amateur radio communication tower's height and location is necessary to accommodate the particular ham operator's communication objectives within county zoning objectives. *Palmer v. City of Saratoga Springs*, 180 F. Supp. 2d 379, 384 (N.D.N.Y. 2001) (internal citations and quotation marks omitted.) With respect to the first hurdle, the Hearing Examiner finds the 33-foot amateur radio communications tower in its present location is not permitted as a matter of right under the applicable laws, exceeding as it does the one-to-one foot setback requirement. We tackle the second hurdle in the next section.

## 2. PRB-1 Applied to the Hearing Examiner's Consideration of the ASDP Application

Amateur radio communications towers are permitted accessory uses in all zoning districts. No maximum height restriction is imposed; instead, all such towers are subject to the one-to-one foot setback imposed by HCZR § 128.0.E.2.a.(1) and the grey or similar minimizing visibility standard of § 128.0.E.3.a. Relief from these standards is obtainable in the New Town

residential zoning district through HCZR §§ 125.0.G.4.d & .4.e. In the Hearing Examiner's view, these HCZR provisions do not have preclusive effect. Section 125.0.G.4.d(2) allows for adjustments "due to practical difficulties or unnecessary hardships" in strictly complying with an FDP setback [and since 1996, the one-to-one setback], which the Hearing Examiner reads as a minimally practicable regulation capable of accommodating an amateur radio operator's specific communications needs and the way the operators would use their antenna. Section 125.0.G.4.d(1) expresses a legitimate zoning objective: that any adjustment to an FDP setback will not alter the character of the neighborhood or area, will not impair the appropriate use or development of adjacent property and will not be detrimental to the public welfare.

The second hurdle, considering how the zoning regulations are to be applied to make reasonable accommodation of Appellants' amateur radio communications needs, cannot be cleared, even with the Hearing Examiner's coaching. Appellants have already erected the amateur radio communication tower of their choosing in the general location of a prior owner's antennas on the misbelief that PRB-1 allows them to put an antenna anywhere on their property, regardless of county setback regulations: under PRB-1 "every radio operator chooses the antenna they want—a Chevy or a Ford." Appellants erected a vertical antenna "that is [] very robust, requires almost no maintenance, has no rotators and is safe (would bend in winds, not fall down)" in a previously determined sweet spot. Critically, Appellants performed no site-specific investigation of their amateur radio operator emergency communications needs culminating in the selection of the appropriate amateur radio communication tower in a functional location. This being so, they had no technical information to present to the Planning Board and to this

Hearing Examiner on appeal. Both zoning authorities lacked the requisite knowledge of the operators' specific needs and the way in which they would use the antenna. As a result, Appellants have not demonstrated "practical difficulty or unnecessary hardship."

In the Hearing Examiner's view, the facts of this case, which opponent Andrew Campbell characterized as Appellants "wanting the antenna there because they want the antenna there" are analogous to the amateur radio operator's circumstances in *Williams*. The Hearing Examiner agrees. In this appeal, as detailed above, the Hearing Examiner presented Appellants with multiple opportunities to offer evidence enabling me to review the ASDP application and fashion a remedy that would accommodate their emergency communication needs. At the June 27, 2016 hearing, the Hearing Examiner particularly described to Appellants, the type and scope of technical information amateur radio operators presented to local authorities to obtain antenna/antenna structure approval in PRB-1 case law. Appellants produced no such evidence, barring all Hearing Examiner efforts to negotiate with them toward a reasonable accommodation compromise.

Appellants have not proven the height of the amateur radio communication tower at the existing location to be necessary. The supplement states only that a "variance" of 20 feet is requested in accordance with FCC PRB-1. "The 1985 PRB-1 clearly rejects esthetics as a reason to ban a licensed amateur radio station antenna. No provision is made for PRB-1 reasonable accommodation." Mr. Altschuler testified the antenna at issue is the closest functional alternative to the old antenna, which based on his impression that it was an "in-kind replacement" and that the amateur radio communication tower is as close to the height and size

and configuration as the old antenna, an antenna for the 80 band being taller. He also testified he could relocate the (Hy-gain 640) antenna on the roof because it has air radials. He performed his own *Williams* "balancing of interests" review, claiming the benefit to Howard County from amateur radio operators like him far outweighs any setback requirements, that this same interest outweighs any aesthetic concerns.

Appellants' position on PRB-1 so precludes the Hearing Examiner from approving *any* amateur radio communication tower of any height at any location to make reasonable accommodation or to make any determination on whether the roof antenna alone would meet Appellants' communications needs, there being nothing in evidence from which reasonable accommodation could be crafted through the application of the HCZR. The Hearing Examiner is thus compelled to deny the ASDP application.

### **VIII. The Underlying Notice of Violation**

The parties in this appeal entreat the Hearing Examiner to take action on the underlying Notice of Violation. Appellants petition the Hearing Examiner to nullify the Notice as a violation of federal law. Opponents ask that the tower be relocated or removed.

The Hearing Examiner may not order any "violation" remedy in this decision and order. Appellants filed the ASDP application to gain retroactive approval for the existing amateur radio communications tower, which had it been granted would have abated the violation. Except for public health or safety reasons, the County may take no further enforcement action until Appellants have exhausted their administrative remedies. The County may also invoke its royal prerogative and decline to prosecute Appellants for the violation once all appeals are final.

ORDER

Based upon the foregoing, it is this **1<sup>st</sup> Day of August 2016** by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the appeal of Ruth Altschuler and Bruce Altschuler for Amended Site Development Plan approval to allow a 33-foot amateur radio antenna mounted on a pole mast in the rear yard of 7308 Silent Bird Court (the Property) and located 14 feet from the eastern rear property line is **DENIED**.

HOWARD COUNTY BOARD OF APPEALS  
HEARING EXAMINER



\_\_\_\_\_  
Michele L. LeFavre

Date Mailed: \_\_\_\_\_

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 calendar days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard de novo by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.