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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

THOMAS S. TAORMINA, Plaintiff, vs. STOREY COUNTY, Defendant.	CASE NO. 3:09-CV-00021-LRH-VPC **DEFENDANT'S OPPOSITION TO PLAINTIFF'S NOTICE OF MOTION AND MOTION TO VACATE, ALTER OR AMEND JUDGMENT**

COMES NOW Defendant, Storey County, by and through its attorneys, Thorndal, Armstrong, Delk, Balkenbush & Eisinger, and hereby submits its opposition to Plaintiff's Motion to Vacate, Alter or Amend the judgment entered by the Court in this matter on June 17, 2010. As shall be discussed herein, no grounds exist under either Rule 59(e) or 60 of the Federal Rules of Civil Procedure for the relief sought by Plaintiff. As such, his motion should be dismissed and the judgment entered by the Court left undisturbed.

I

INTRODUCTION

As the Court is aware, the instant lawsuit is a declaratory judgment action arising out of Plaintiff Tom Taormina's attempts to build radio antenna towers on his property in the Virginia City Highlands in Storey County, Nevada. The primary issue in the case is Plaintiff's contention that certain provisions of the Storey County Code pertaining to the requirements for variances and special use permits are preempted by federal law, and, more specifically, by certain regulations of the Federal Communications Commission. This dispute revolves around Plaintiff's desire to construct a radio antenna or antennas with a height in excess of 45 feet.

On October 19, 2009, Plaintiff filed a motion which he styled a motion for declaratory relief, construed by this Court as a motion for summary judgment (Doc. #14). After the motion

was fully briefed, the Court issued an order dismissing Plaintiff's complaint and entering judgment in favor of Storey County as a matter of law (Doc. #19). In so doing, the Court found that, because the ordinances in question do not ban or impose strict height limitations on amateur radio antennas, the regulations are facially consistent with federal law. In addition, as to Plaintiff's contention that the Storey County ordinances were applied to him in such a manner as to violate FCC regulations, the Court held that the issue was not ripe for review because Plaintiff has refused to apply for a special use permit that would enable him to construct the requested radio antennas. In this regard, the Court noted that, because the County has not had the opportunity to apply its zoning regulations under the circumstances, the Court could not determine whether Storey County had reasonably accommodated Plaintiff's amateur radio communications. In the opinion of the Court, until such time as Plaintiff applies for a special use permit and the County has had the opportunity to review the request, the Court was obliged to deny Plaintiff's as applied challenge to the zoning regulations.

On July 13, 2010, Plaintiff filed a motion premised on Federal Rules of Civil Procedure 59(e) and 60. In his motion, Plaintiff has asked that the Court vacate the judgment entered in favor of Storey County on June 21, 2010, and to enter a stay in this matter pending Plaintiff's application for a special use permit and/or until the outcome of any proceedings related to Plaintiff's application for a special use permit. The sole basis upon which Plaintiff seeks this novel relief is Plaintiff's claim that ***he may*** be barred by the doctrine of res judicata from proceeding with an as applied challenge to the regulations if the Court's order and judgment in favor of the County are not vacated. Plaintiff's contention in this regard is simply contrary to the law and provides no basis for the judgment in question to be altered, amended or vacated.

II

LEGAL ANALYSIS

I. A CLAIM FOR RELIEF DISMISSED FOR LACK OF SUBJECT MATTER IS NOT BARRED BY THE PRECLUSION DOCTRINES FROM FUTURE LITIGATION IN THE EVENT SUCH CLAIMS BECOME RIPE.

As was noted above, Plaintiff brings the instant motion alternatively under Fed. R. Civ. P. 59(e) and 60. As noted by the Ninth Circuit Court of Appeals, "[a] motion under Fed. R. Civ. P.

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59(e) 'should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or there is an intervening change in the controlling law.[1]'" *Herbst v. Cook*, 260 F.3d 1039, 1044 (9th Cir. 2001); *citing, McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999). The denial of a motion for reconsideration under this rule is reviewed only for abuse of discretion. *Herbst*, *supra*.

In the instant case, Plaintiff's motion implicates ***none*** of the factors which constitute grounds to vacate a judgment under Fed. R. Civ. P. 59(e) or 60. Plaintiff has not presented the Court with newly discovered evidence. Plaintiff has not argued that the Court committed clear error in granting judgment in favor of the County as to Plaintiff's facial challenge to the regulations in question. Plaintiff has not alleged any intervening change in the controlling law since entry of the Court's order on June 21, 2010, to the present. Nor, in fact, does Plaintiff allege that the Court somehow misapprehended the law in dismissing Plaintiff's as applied challenge to the ordinance as not yet ripe for review.

Rather, Plaintiff requests that this Court vacate the judgment in favor of the County and stay this matter pending Plaintiff's application for a special use permit to construct an antenna with a height in excess of 45 feet. In so doing, Plaintiff states his concern that the County might later argue successfully that Plaintiff is barred from pursuing an as applied challenge to the regulation on grounds that the same is barred by res judicata or the doctrines of claim and/or issue preclusion. This is simply not the law and this argument provides no basis for the relief sought by Plaintiff under the procedural rules cited in his motion.

Article III of the United States Constitution requires that the federal courts decide only cases or controversies. *See, Valley Foreg Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). The Ninth Circuit Court of Appeals has

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[1]The same general considerations apply to a motion for relief from a final judgment under Fed. R. Civ. P. 60(b). *See*, Fed. R. Civ. P. 60(b)(1)-(6). With respect to Rule 60, Plaintiff relies on subpart one of same in his motion which allows relief from a judgment on grounds of mistake, inadvertence, surprise or excusable neglect. Respectfully, as with his reference to Fed. R. Civ. P. 59(e), Plaintiff has raised no arguments which would justify vacating or amending the judgment in question on any such grounds.

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held that, whenever a plaintiff seeks declaratory and injunctive relief, there must be a substantial controversy of sufficient immediacy and reality to warrant injunctive relief. *See, Ross v. Alaska*, 189 F.3d 1107, 1114 (9th Cir. 1999). "These justiciability limitations are reflected in the doctrines of standing, mootness, and ripeness." *Lee v. State of Oregon*, 107 F.3d 1382, 1387 (9th Cir. 1997).

Ripeness is a question of timing designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000). As the Ninth Circuit has stated, the court's "role is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." *Id*. The United States Supreme Court has stated that the ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction. *See*, *Reno Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 (1993).

With respect to challenges to government decisions pertaining to the regulation of land use, in the absence of a final decision by the government entity charged with implementing regulations governing property use, a plaintiff's "as applied" constitutional challenge is not ripe for consideration. *See, Vacation Village, Inc. v. Clark County,* 497 F.3d 902, 912 (9th Cir. 2007). A dismissal for lack of the existence of a justiciable case or controversy is jurisdictional, *not* an adjudication on the merits. *See, St. Pierre v. Dyer*, 208 F.3d 394, 399-400 (2nd Cir. 2000)(dismissal for lack of subject matter jurisdiction is not an adjudication on the merits and, as such, has no res judicata effect). As such, the dismissal of a claim for relief on the grounds that it is not yet ripe for review does not bar future litigation of such a claim in the event that the same becomes ripe for review at a later time. *Id*; *see also*, *Katt v. Dykhouse*, 983 F.2d 690, 694 (6th Cir. 1992)(district court erred in dismissing plaintiff's First Amendment as-applied challenge to Florida's anti-rebating statute on res judicata grounds where claim was not ripe for review at time of prior proceeding).

This Court dismissed Plaintiff's as applied challenge to the Storey County regulations in

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question on jurisdictional grounds, finding that the same was not ripe for review. This holding cannot bar Plaintiff from bringing an as applied challenge should his claim become ripe in the future depending upon the outcome of any proceeding related to Plaintiff's application for a special use permit. The relief requested by Plaintiff in the instant motion, that the Court vacate the judgment in favor of the County and enter a stay in this matter pending possible future action on an application for a special use permit, is not warranted under Fed. R. Civ. P. 59(e) or 60(b). As such, Plaintiff's motion should be denied.

III

CONCLUSION

Based upon all of the foregoing, Storey County respectfully requests that Plaintiff's motion to vacate, alter or amend the judgment entered by this Court on June 21, 2010, be denied.

DATED this 26th day of July, 2010.

THORNDAL, ARMSTRONG,
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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of Thorndal, Armstrong, Delk, Balkenbush & Eisinger, and that on this date I caused the foregoing **DEFENDANT'S OPPOSITION TO PLAINTIFF'S NOTICE OF MOTION AND MOTION TO VACATE, ALTER OR AMEND JUDGMENT** to be served via the United States District Court's CM/ECF Electronic Filing program on all parties to this action at the e-mail addresses listed below or by placing an original or true copy thereof in a sealed, postage prepaid, envelope in the United States mail at Reno, Nevada, fully addressed as follows:

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DATED this 26th day of July, 2010.

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