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18 **Tom Taormina**

19 **UNITED STATES DISTRICT COURT**
20 **DISTRICT OF NEVADA**

21 **THOMAS S. TAORMINA,**

22 **Plaintiff,**

23 **vs.**

24 **STOREY COUNTY,**

25 **Defendant**

26 **Case No: 3: 09-CV-00021-LRH-VPC**

27 **REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO VACATE,**
28 **ALTER OR AMEND THE JUDGMENT IN THIS ACTION**

Plaintiff Thomas S. Taormina, by and through his attorneys, submits this Reply Memorandum in support of his Motion to Vacate, Alter or Amend the judgment entered by the Court in this matter on June 17, 2010. This Court should vacate the judgment and enter instead an order of partial summary judgment under Rule 56(d) stating that the "as applied

1 claim” is dismissed without prejudice. This is the proper course because the controversy is
2 not over, because it is in the interests of judicial economy to retain jurisdiction, and because
3 the County needs the continuing supervision of this Court.

4 **The Controversy Persists**

5 To imply that there is no case or controversy between Taormina and Storey County,
6 as does the County in its Opposition at 3, strains credulity. Even after this Court’s ruling that
7 Taormina should apply for a special use permit, the County has again taken the position that
8 a variance is required. Continuing supervision of this matter is required to avoid unnecessary
9 and repeated lawsuits.
10

11 ***Res Judicata***

12 The County has characterized Taormina’s concern about the doctrine of *res judicata*
13 as “novel,” and “contrary to the law.” Opposition at 2. Yet this concern is founded in very
14 old law.
15

16 [A] judgment estops not only as to every ground of recovery or
17 defence actually presented in the action, but also as to every ground
18 which might have been presented, is strictly accurate, when applied to
19 the demand or claim in controversy. Such demand or claim, having
20 passed into judgment, cannot again be brought into litigation between
the parties in proceedings at law upon any ground whatever.
Cromwell v. County of Sac, 94 U. S. 351, 353 (1876).

21 Though the County appears to concede that *res judicata* with respect to as yet
22 untested “as applied” issues in this case does not apply, the problem is that under the doctrine
23 of *res judicata*, a final judgment on the merits of an action precludes the parties or their
24 privies from relitigating issues that were **or could have been raised in that action.**
25
26
27
28

1 Taormina is concerned that even a concession by the County cannot bind this Court
2 from later finding that Taormina is barred from further claims not yet made or briefed on the
3 subject of the “as applied” portion of Plaintiff’s Complaint.

4 **Judicial Economy Favors Continuing Jurisdiction**

5 Leaving the judgment entered will result in an appeal now (of the “on its face” issue)
6 and perhaps an appeal later, once the special use permit proceedings are completed (of the
7 “as applied” issue), *i.e.*, multiple appeals. Vacating the judgment may result in no appeals if
8 the County acts reasonably, or if settlement becomes possible. Moreover, the County is not
9 harmed. Rather than a judgment, the Court, having treated the earlier motion as one for
10 summary judgment, can simply enter an order under Rule 56(d), and no further court action
11 or appeal will be necessary, if required at all, until after the conclusion of the special use
12 permit process.
13
14

15 **Continuing Supervision of the Court is Required**

16 This Court has decided that:

17 [S]ection 17.12.044 does not impose a firm or fixed maximum height
18 requirement. Instead, an individual seeking to build a structure that
19 exceeds the height limits identified in section 17.12.044 may seek a
20 special use permit under chapter 17.62

21 Order at 8.

22 For additional clarification, the Court has written:

23 Although [Storey County Code] section 17.12.044 does not
24 specifically state that an individual seeking to construct a radio tower
25 over forty-five feet may seek a special use permit . . . an individual
26 seeking to build a structure that exceeds the height limits identified in
section 17.12.044 may seek a special use permit under chapter 17.62.

27 Order at 8, fn7.
28

1 As a result of this Court's June 17, 2010 order, Taormina wrote to the Director of the
2 Storey County Planning Office and several of his associates on July 18, 2010, requesting
3 *inter alia* "Special Use Permit Request forms and any associated instructions." Reply Exhibit
4 1. The County, however, on July 27 returned a variance application, insisting: "[W]e are
5 pleased to provide you the **required application for your requested Variance.**" (Emphasis
6 added.) Reply Exhibit 2. As the Court will see from the County's reply, there is no hint that
7 the County understands, or will follow, the Court's instruction.¹
8

9 In addition, we are several years into this process and the County has not yet told
10 Taormina if this application will be treated as "Minor," "Routine," or "Major." These are
11 categories that, to Taormina's knowledge and belief, did not exist when the process began.
12 At the very least, prior correspondence from the County never mentioned them. It makes a
13 difference – as the fee could be \$250, \$450, or \$750.
14

15 The Court has written that "the procedures for obtaining such a special use permit
16 [are found in] chapter 17.60. These procedures provide for the filing of applications, filing
17 fees, public hearings, findings and appeals." Yet none of these categories of special permit
18 are described in the County ordinance at chapter 17.60. To Taormina it appears that the
19 County is engaged in "the construction of hoop after hoop for [the applicant] to jump
20 through." *Palmer v. City of Saratoga Springs*, 180 F. Supp. 2d 379, 385 (N.D.N.Y, 2001).
21

22 This Court has written: "The court is sympathetic to Plaintiff's frustration with the
23 county's inconsistent interpretation of its zoning ordinances." Order at 9. In spite of this
24 Court's clarification, and specific instruction that a special use permit process is the proper
25

26
27 ¹ For purposes of judicial economy, this issue is discussed here. If the Court so wishes,
28 Taormina would be happy to file a separate Motion requesting review of the County's latest
position that a variance is required.

1 route for this controversy, the County's continues to exhibit difficult behavior, behavior
2 inconsistent with the Court's Order. Though "time goes by so slowly," the county continues
3 to sing "an unchained melody." Music by Alex North, lyrics by Hy Zaret (1955), popularized
4 by The Righteous Brothers (1965).

5 This Court should vacate the judgment so as to retain jurisdiction, in the hope that
6 under continuing jurisdiction, the County will stop behaving badly, start interpreting its
7 zoning ordinances consistently, and follow this Court's order. To Taormina, it would appear
8 that without the continuous supervision of this Court, the process prescribed by the Court
9 will be futile, resulting only in further litigation. Vacating the judgment may result in no
10 appeals if the County acts reasonably. Moreover, the County suffers no harm under
11 continuing supervision of the Court, which can simply enter an order under Rule 56(d)
12 summarizing the conclusions reached in its June 17 Order.

13
14
15 **Conclusion**

16 For all of the above reasons, Plaintiff Taormina requests that this Court vacate its
17 Judgment in the interests of judicial economy – an especially important consideration given
18 the crowding of this Court's calendar – and make it clear to the County that the special use
19 permit process must be respected.
20

21 Respectfully submitted.

22 Dated: August 5, 2010.

23 McMAHON LAW OFFICES, LTD.
24 FRED HOPENGARTEN

25
26 By  _____

27 Brian M. McMahon
28 Attorneys for Plaintiff
Tom Taormina

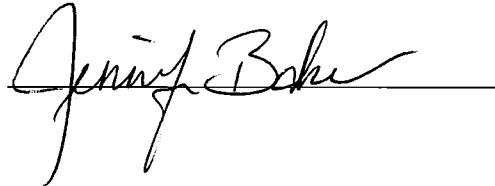
CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) I hereby certify that I am an employee of McMahon Law Offices, Ltd., and that on the 5th day of August, 2010, I served a true and correct copy of the attached foregoing document by:

- Depositing for mailing, in a sealed envelope, U.S. Postage prepaid, at Reno, Nevada
- Personal Delivery
- Facsimile
- Federal Express/Airborne Express/Other Overnight Delivery
- Reno-Carson Messenger Service

addressed as follows:

Brent T. Kolvet, Esq.
Thorndal Armstrong Delk Balkenbush & Eisinger
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A handwritten signature in cursive script, appearing to read "Jennifer Baker", is written over a horizontal line.