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PAUL E. McDONALD

IN THE COURT OF COMMON PLEAS OF FULTON COUNTY, OHIO

Gary Wodtke, *
Plaintiff, * Case No. 09CV000322
vs. *
Village of Swanton, *
Defendant. * **JUDGMENT ENTRY**

* * * * *

Coming on before the Court is Plaintiff's Complaint, filed September 14, 2009, and his Amended Complaint, filed January 22, 2010, both being couched in terms of an "Appeal of a Decision of the Swanton Village Planning Commission," demanding Relief in the nature of a "Declaratory Judgment," and for an award of "Attorney Fees" (pursuant to the provisions of Federal Statute, 42 U.S.C. Sec. 1983). The Defendant Village of Swanton filed its Motion to Dismiss on October 14, 2009, and its Answer on February 18, 2010. Plaintiff filed his Answer Brief on July 1, 2011. Defendant Village filed its Reply Brief on August 8, 2011. The Defendant's Motion to Dismiss, filed October 14, 2009, remains pending.

STATEMENT OF THE CASE

On September 29, 2011, Plaintiff filed his Amended Complaint requesting a, "Determination of the Constitutionality of the (Village's) Zoning Ordinance as it Pertains to Antenna Height and

Placement.” On June 8, 2012 Plaintiff followed up the Complaint by filing an Information indicating that newly enacted H.B. 158 had been signed into Legislation by Governor Kasich, with an effective date of August 15, 2012, claiming the new legislation was a clarification of existing law, and asserting that it was dispositive of the instant case.

Defendant Village filed its Amended Answer and Counterclaim for Declaratory Judgment on August 9, 2012. The Ohio Attorney General filed his Notice of Reservation of Rights and Appearance on September 28, 2012, but he has not otherwise participated in the development of this case.

The Parties represented to the Court, at a Pretrial Conference held March 18, 2013, that in lieu of a Trial, the Parties could and would enter into a “Stipulation of Facts,” indicating therein that there were, “no factual disputes,” that all matters at issue involved matters of law, not fact, and that each Party would waive his or its right of trial, agreeing to submit the relevant issues upon the, “Pleadings, Stipulations, Briefs, and Citation of Authority.” The Court concurred.

Defendant’s Brief, with Citations of Authority was filed on May 14, 2013. The “Stipulation of Facts,” with accompanying Documentation, was filed on May 14, 2013. Plaintiff’s Reply Brief was filed June 18, 2013, and his Supplemental Brief was filed August 1, 2013. Defendant Village was granted Leave to file its Sur-Reply Brief by July 14, 2013, after having been granted an extension, and it did file its Supplemental Reply Brief, belatedly, but with the Court’s permission, on August 16, 2013. The matter is now decisional.

FACTS

Plaintiff is a citizen who resides within the limits of the Village of Swanton, at 214 Cypress Drive, Swanton, Ohio 43558. Plaintiff currently holds an “Extra Class Amateur Radio License,” and

he has been continually licensed as an amateur Ham radio operator since 1979. He operates his Amateur Radio Station out of his home, under the call sign of, "WW8N."

Plaintiff purchased his residential real estate on or about September 15, 2005. The lot is approximately 70'x127' in size, and contains .2041 acres. The deed of conveyance has no restrictions nor restraints. Plaintiff's neighbors have indicated they are not offended by the idea of a higher tower being erected in the area, and they have consented to the construction. There are higher towers erected in the Village, to include those which are located at the Village's Police and Fire Stations.

Section 150.070 of the Swanton Municipal Code allows for an individual to place an antenna for wireless telecommunication not more than "twenty feet" above the roof of an existing residential structure. However Section 150.071 does allow for an exception, and for the erection of wireless communication towers at a greater height, in residential areas, where the lot is at least five acres, and certain other requirements (not pertinent here) are met.

Plaintiff submitted his request for a "variance" to the Swanton Planning Commission, pursuant to Section 150.071 of Swanton Municipal Code, along with plans and specs, praying for a ruling that would allow him to erect a "sixty foot Rohn 55 G Tower" on his lot, thereby expecting to improve the reception for his ham radio operation. Plaintiff currently does have an antenna in place for his ham radio reception and transmission operation, but the placement of a higher tower on the premises would improve reception and transmission to a significant degree.

On July 14, 2009 the Defendant Village held its regularly scheduled Planning Commission Meeting, to consider Plaintiff's request.

Following the Hearing, the Planning Commission "denied" Plaintiff's request to erect his contemplated ham radio tower, having determined it not to be in conformity with applicable Village

of Swanton zoning ordinances.

Following the "denial," Plaintiff appealed the Planning Commission's Decision to the Swanton Village Council. The Appeal was "denied." Plaintiff now seeks recourse in the Courts.

ISSUES

Plaintiff claims there should be no restrictions had on his intended use and installation of a ham radio tower in a residential area, based upon his reading and application of O.R.C. Sec. 5502.031.

Defendant Village argues that under the auspices of "Home Rule" legislation, and its attendant status, it has sufficient authority to regulate Plaintiff's activities, and that Plaintiff's Complaint must be denied.

Defendant Village further argues that O.R.C. Sec. 5502.031 is "unconstitutional" in that it is in conflict with Defendant Village's preemptive Rights and Authorizations, that its provisions must be declared null and void, and that they must be disregarded in this case.

ARGUMENT

Plaintiff's Claims are all related to the denial of an appeal Plaintiff submitted to the Village of Swanton Zoning Appeals Board. Plaintiff applied for the right to erect a sixty foot high antenna structure in a residential district. Plaintiff claims that the Village of Swanton is prohibited and precluded from regulating this structure, due to the applicability of Federal Regulation, and its "preemption" of the requisite area through the applicability of Federal Regulation No. "PRB-1," all as set forth in the Plaintiff's Complaint, and as further specified by State legislation in O.R.C. Sec. 5502.031, and case law precedent.

Defendant Village submits that within the parameters of the exercise of its "police powers,"

its right to regulate in the subject area, has been enhanced under the provisions of its "Home Rule Charter," that it is not "Preempted," and that O.R.C. Sec. 5502.031 is "unconstitutional." Defendant submits that the State of Ohio's passage of R.C. 5502.031 unconstitutionally limits its home rule rights and authority, and that an acceptance of Plaintiff's interpretation would unlawfully restrict the Village's power to properly and fairly zone residential and commercial properties, for the benefit of all of its citizens.

The Court is faced with the task of attempting to reconcile two statutory schemes, one Federal, and one Local, which appear to be contradictory in their application.

Swanton asserts that under the provisions of Ohio's Constitutional Home Rule Amendment, Article 18, Sec. 3, it has the right to exercise "self government," through the reasonable exercise of its "local police power," provided such exercise does not conflict with any of Ohio's "general" laws. Swanton asserts O.R.C. Sec. 5502.031 is not a valid, state wide, "general" law, that it is not "uniform," in State wide application, and as such, it cannot override Swanton's Local Ordinances (Zoning Regulations Nos. 150.070 and 150.071, et seq). Moreover Swanton asserts that since O.R.C. Sec. 5502.031 does not, "address a statewide concern," the matter at issue is strictly one of "local self-government" concern. For these reasons Swanton argues that O.R.C. Sec. 5502.031, in its applicability to the Village of Swanton, is "unconstitutional." Lastly, Swanton argues that Federal Regulations in this area, by their own definition, have not precluded nor "preempted" Swanton from asserting its limited right to legislate in this area. Swanton asserts the impact of its legislation is within the parameters and areas of flexibility allowed by the FCC Ruling PRB-1, under its "limited preemption policy" provision.

Plaintiff Wodtke argues the State statute at issue, "is uniform in the Home Rule context."

Thus he asserts the State law does not treat “municipalities,” nor its “citizens,” in an unlawful nor arbitrary manner.

Plaintiff Wodtke further argues that the subject matter at issue is of “State” and “National” concern, and it is more than merely a “Local” concern. Plaintiff points out that the “purpose” of the statute is to conform to and comply with the aims and purposes of Federal restrictions and regulations in the area. In support of his position, Plaintiff cites the Court to the provisional language used by the Federal Government in its FCC Ruling PRB-1, wherein it states:

“Local regulations which involve . . . height of antennas . . . must be crafted to accommodate reasonable amateur communications.”

Plaintiff Wodtke claims that his proposed erection of the sixty foot tower is within the “presumed reasonable” provisions of the State Statutes, and thus within the provisions of the Federal Regulation.

Defendant Village retorts that its rules and regulations in this area are reasonable and necessary to safeguard the rights of all of its citizens, positing a chaotic situation where numerous individuals could raise numerous antennae, at various heights, thereby infringing upon the rights and reception abilities of numerous neighbors and citizens, all to their detriment.

The Court is aware of the most recent pronouncement of the Ohio Supreme Court in this area, that being its Decision in City of Cleveland v. State of Ohio (2013-Ohio-1186), wherein the Court clearly delineated the distinctions to be observed between a “general law” of the State, and the “local ordinance,” passed by the City in the exercise of its “police powers,” as a contiguous part of the city’s Home Rule authority. A “general law” will preempt a “local ordinance,” where the Statute is designed to address matters of, “statewide and comprehensive” interest. We have that here.

Statutes enacted by the State Legislature are presumed to be "Constitutional." Ohioans for Concealed Carry, Inc. V. City of Clyde (2007), 120 O.St. 3d 96. The Village of Swanton carries the "burden of proving" that the facts and circumstances of this case should and do overcome this presumption. The Village has not done so. The Court notes that O.R.C. Sec. 5502.031(B)(1) provides that, "an antenna structure height of up to seventy-five feet shall be presumed reasonable." Defendant has provided no evidence that would overcome this presumption. As a parenthetical, the lower Courts are, for good reason, reluctant to pass upon the constitutionality of duly enacted legislation. The law and the equities favor the Plaintiff in this case, and a higher Court than this one will have to be the one to pronounce on the "constitutionality" of the Statute.

FINDINGS

Defendant Village's Motion to Dismiss, should and ought to be overruled.

O.R.C. Sec. 5502.031, is a "General Statute," duly enacted by the Legislature, and it should not be declared to be "unconstitutional" by this Court.

Swanton Zoning Ordinances No. 150.070 and 150.071, et seq., as applicable to the facts and circumstances of the present case, have been "preempted" by Federal and State legislation, and as such, the provisions thereof should not and cannot be enforced against Plaintiff in this instance.

Swanton's Decision denying Plaintiff the right to erect his contemplated tower should be and hereby is reversed, and it should be, and hereby is declared to be not enforceable, so as to prevent Plaintiff from erecting his tower, all as presented in his plans and specs presented to the Planning Commission and Village Counsel.

RULING

The Court ADOPTS its FINDINGS as its JUDGMENT.

Plaintiff's Complaint for Declaratory Judgment is found to be in the interest of justice, and it is hereby SUSTAINED.

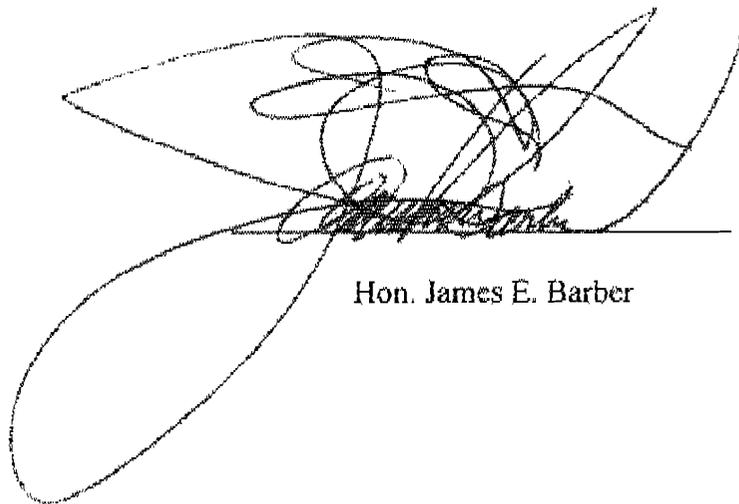
Defendant's Counter Complaint for Declaratory Judgment is found not to be in the interest of justice, and it is hereby DENIED.

The Decisions of the Swanton Planning Committee, as upheld by the Swanton Village Counsel, are REVERSED.

IT IS SO ORDERED.

Hearing on the issue of Attorney Fees is scheduled for September 30, 2013 at 3:00 p.m.

IT IS SO ORDERED.



Hon. James E. Barber

cc: Chris Dreyer, Esq.
Alan Lehenbauer, Esq.