IN THE COUNTY COURT OF ALLEGHENY COUNTY, PENNSYLVANIA

IN RE:	)	
	)	
APPEAL OF JOSEPH J. SLEMENDA AND ESTHER C. SLEMENDA, HIS WIFE, FROM THE DECISION OF THE BOARD OF ADJUSTMENT OF THE BOROUGH OF WHITEHALL.	)	NO. A 698 of 1966

FINDINGS OF FACT, ETC.

LENCHER, P.J.

The County Court of Allegheny County has exclusive jurisdiction here in the Fifth Judicial District of the Commonwealth in all cases of appeal from Zoning Boards of Appeal and/or Adjustment or the Boards of Appeals under all the Zoning Codes and/or Ordinances or regulations in all the municipalities within Allegheny County where such appeals had been provided to our Courts here of Common Pleas. 17 PS., Courts, 626, page 357. Wherefore, on the appeal of the applicants now at bar from refusal of the Zoning Board of the Borough named, to grant them permission to construct an amateur radio tower in an R-1 Residential District of the Borough, we receive the entire record of the Board and then took, heard and considered additional testimony. Clearly, we are empowered, under the pertinent enactments, to make our independent determination Schaub's Appeal, 118A. 2d 292, 180 Pa. Superior Court 105. We are to make such decision as, under the evidence and applicable principles of law, is just and proper to consider and dispose of the matter on the merits.

After a careful consideration of the total record, including all of the evidence before us de novo, we are constrained to make and do make the following:-

(1) Joseph J. Slemenda and Esther C. Slemenda, his wife, reside at 4971 Parkvue Drive, Whitehall Borough, Allegheny County, Pennsylvania, and are the owners of the following described property:

> All that lot or certain piece of ground situated in the Borough of Whttehall, Allegheny County, Pennsylvania, being Lot. No. 232 in the South Hills Country Club Estates Plan No. 2, as recorded in the Recorder's Offices of Allegheny County, Pennsylvania, in Plan

Book Volume 67, pages 162 to 164. Block No. 315-H, Lot No. 96.

(2) The Borough of Whitehall is a municipality in Allegheny County, Commonwealth of Pennsylvania.

(3) Joseph J. Slemenda, one of the appellants, is a regularly licensed amateur radio operator by the Federal Communications Commission and has been so licensed for over 12 years. In addition, Joseph J. Slemenda has been and is presently licensed by the Federal Communications Commission as an amateur radio operator in the Military Affiliate Radio Service, commonly known as MARS, and is actively engaged in various United States of America military communication networks and systems.

(4) Joseph J. Slemenda is employed by Westinghouse Electric Corporation as a Senior Engineer at Bottis Atomic Plant Division.

(5) In addition to his amateur radio operator's license, the said Joseph J. Slemenda has been issued a station license for his residence at 4971 Parkvue Drive, Whitehall Borough, Allegheny County, Pennsylvania, by the Federal Communications Commission.

(6) As a licensed amateur radio operator, Joseph J. Slemenda operates and maintains radio receiving and transmitting equipment in his residence 4971 Parkvue Drive, Whitehall, Allegheny County, Pennsylvania, which equipment is used to communicate with other amateur radio operators and with other radio operators in the Military Affiliate Radio Service.

(7) Amateur radio operators, including Joseph J. Slemenda, one of the appellants, engage in communication with each other in order to provide development of the art, communications service in cases of local, state or national emergencies, such as fire, flood and earthquake. They also participate in and provide civilian defense communications, medical information, assistance for marooned and isolated persons and telephone communications for missionaries, armed forces and other isolated persons. These public services are all voluntary, personal and do not involve any fees, profit, nor is there any commercial or business operation connected with their activities.

(8) In order to effectively receive and transmit radio waves and to communicate with other amateurs, it is necessary to utilize an antenna which must be elevated at least 40 to 50 feet above the ground level.

(9) There are, at the present time 13 licensed radio amateurs in Whitehall Borough who have erected masts and towers, ranging from 35' to 40' in height.

(10) There are 1,360 telephone poles owned by Bell Telephone Company and Duquesne Light Company, located in Whitehall Borough ranging in height from 35' to 65', for none of which has the Borough of Whitehall requested a building permit application nor has a building permit been issued.

(11) There are 8 high tension transmission towers located in Whitehall Borough, owned by Duquesne Light Company, which are 65' in height for none of which has the Borough of Whitehall requested a building permit application nor has a building permit been granted.

(12) There are 15 flag poles in Whitehall Borough ranging in height from 25' to 60'.

(13) On February 14, 1966, Joseph J. Slemenda filed an application for a building permit to place a 40 foot tower in his back yard or side yard, upon which he desired to place his amateur receiving and transmitting antenna to be used in connection with his receiver and transmitter located in his residence. His application for permit was refused and Slemenda filed an appeal to the Board of Adjustment of Whitehall Borough.

(14) The property of Appellants is located in a "R 1" district, as described in the Whitehall Borough Zoning Ordinance No. 369 of 1962, Article III, Section 301, and classified as "Residence District R 1."

(15) Article XX General Height and Area Regulations, Section 2001 of Ordinance No. 369 limits the height of single family dwellings to two and one-half stories, or 30 feet.

(16) A "story" is defined by Ordinance No. 369, Article II, Section 201-51 as;

> ". . . that part of any building between any floor or roof next above, except that the first story of any building is the lowest story for which at least seventy-five (75%) percentum of the area of its outside walls are above the average level of the ground adjacent to such outside walls."

(17) The amateur radio tower proposed to be erected by Joseph J. Slemenda, one of the appellants, is not permanently affixed to the realty and is physically connected to the receiver and transmitter of appellant, which is located within his home. Said tower is manufactured by E-Z Way Towers, Inc. and consists of two sections of triangular telescoping welded piping, 10" x 10" x 10" on each side. The tower is so constructed that it may readily be raised or lowered from a minimum height of 25 feet, to a maximum height of 41 feet. The proposed tower is fastened by three bolts to a small footer, or foundation, and can be placed in a vertical position or removed entirely in ten minutes. It could be placed in a vertical position without the use of any footer or foundation whatever by standing it on the ground or on a freestanding platform or base of wood or steel.

(18) The proposed tower was used by appellant at his former residence in Newport News, Virginia and brought with him to his present residence in Whitehall Borough.

(19) Said amateur radio tower is considered and treated as personal property by appellant and has been moved and would be moved by him as part of his household furniture, equipment and belongings.

(20) The height of a radio amateur antenna governs the ability of the amateur operator to transmit and receive to farther points and distances. The angle of radiation transmitted from an antenna is governed primarily by the height of the antenna above the actual surface of the ground. A height of approximately 40 feet would permit communication with South America, all of the United States, Africa and Europe.

(21) An amateur radio antenna less than 40 feet in height reduces the ability to communicate except within a short radius of the antenna.

(22) There is no interference to radio receivers or television receivers caused by the amateur radio operations of the appellant. He owns a television receiver, a broadcast band receiver, an electric organ, a high fidelity stereo AM-FM amplifier, all located in his own home and during his periods of transmitting, there is no interference whatsoever.

(23) Use of the radio spectrum is regulated by international treaty of which the United States of America is a signatory.

(24) The United States of America by various acts of Congress has created by Federal Communications Commission and delegated to it the regulation and control of the use of the radio spectrum by all persons and corporations over which it has jurisdiction.

(25) Regulation 97.73 of the Federal Communications Commission "Purity and Stability of Emissions" provides: -

> "Spurious radiation from an amateur station being operated with a carrier frequency below 144 megacycles shall be reduced or eliminated in accordance with good engineering practice. This spurious radiation shall not be of sufficient intensity to cause interference in receiving equipment of good engineering design including adequate selectivity characteristics, which is tuned to a frequency or frequencies outside the frequency band of emission normally required for the type of emission being employed by the amateur station. ."

(26) In case of future interference to television receivers or radio receivers, it is possible and under the rules and regulations of the Federal Communications Commission it is necessary that an inexpensive filter be installed on the radio or television receiver. Television interference, if any, can definitely be eliminated if it is caused by an amateur radio station. It is electrically impossible for an amateur radio station or any other electrical device utilizing the radio spectrum, properly designed in accordance with good engineering practices and in good working order, to interfere with any television set if the television set, or device, is in proper working condition, properly aligned, properly designed in accordance with good engineering practices, and equipped with suitable filters.

(27) Ordinance No. 10, the Building Ordinance of Whitehall Borough in Section 11 provides inter alia, as follows:

> "No permit shall be required for repairs or alterations costing less than $500.00 when such work does not involve any change in exits, in character of occupancy, or alterations to structural members."

(28) The tower proposed to be erected by appellant Slemenda is valued at $100.00 and the cost of the proposed footer would be negligible.

(29) The Borough of Whitehall has not by Ordinance set any standards, tests or requirements whatever for towers, the construction, erection or use of antennas, supporting towers of any kind, be they radio (including amateur) or television.

CONCLUSION OF LAW

(1) The appellants are residents and property owners in the Borough of Whitehall, Allegheny County, Pennsylvania, and reside at 4971 Parkvue Drive.

(2) One of the appellants, Joseph J. Slemenda, is a properly licensed radio amateur operator by the Federal Communications Commission and in addition thereto, he is the holder of a station license for his residence, which has been issued and authorized by the Federal Communications Commission.

(3) Under the Zoning Ordinance of the Borough of Whitehall, the residence of the appellant is classified as "R 1" which permits single family dwellings, two and one-half stories, or 30 feet in height.

(4) The Zoning Ordinance of the Borough of Whitehall, in Article XX General Height and Area Regulations, Section 2001-1 and 4, is inconsistent as applied to buildings and/or structures.

(5) Article II Definitions of Ordinance No. 169, Sections 201-61, defines an accessory use as:

> ". . . a subordinate use which is clearly incidental and related to that of a main structure or main use of the land."

(6) The construction of an antenna mast, not permanently affixed to the realty, to be placed in the back yard and used for radio amateur communication, is a permitted accessory use of residential property.

(7) To apply the 30' height limitation to an amateur radio mast would prevent appellant from communicating with other radio amateurs at distant places, would destroy its effectiveness and would deprive the homeowner of the right to use his property as he wishes and would constitute an unlawful taking of the appellant's property, without compensation.

(8) Whitehall Borough Zoning Ordinance in Section 2001-1 and Section 2001-4 is inconsistent, vague and indefinite as applied to a "structure" other than a single family dwelling or building.

(9) As applied to an amateur radio mast or a television antenna mast which requires heights above 30' to be effective, the ordinance of the Borough of Whitehall limiting the height of buildings to 30' interferes with the inalienable right of a property owner to use his property as he wishes, without any national relation to public safety, health, morals or general welfare and is not a legitimate exercise of the police power.

(10) The effective transmission and reception of radio waves, amateur radio waves and commercial television signals is dependent upon height above ground of the antenna in relation to the frequency of the transmitted and received signals. The Ordinance of the Borough of Whitehall is vague and indefinite as to radio and television antennas in that it provides no standards bearing any relation to public health, safety, morals or general welfare.

(11) The Borough of Whitehall contains many, many appurtenances other than residential buildings, as there are 1,360 telephone poles in the Borough, ranging in height from 35' to 65'; 8 high tension transmission towers in the Borough, 65' in height; 15 flag poles in the Borough, varying from 25' to 60' in height, and a minimum of 13 amateur radio masts, or towers, in excess of 35' in height.

(12) An amateur radio tower, not permanently connected to the realty and not intended to be permanently connected to the realty, used by a duly Federal Communications Commission licensed radio operator in connection with amateur radio transmitting and receiving equipment, is not, under the facts and surrounding circumstances before us, a "structure" within the meaning of the Zoning Ordinance of the Borough of Whitehall and is not realty, but is personal property, employed and used in connection with and as a constitutional, legal and proper use of residential property.

(13) The Zoning Ordinance of the Borough of Whitehall fails to set any standards for the location, height or construction of radio receiving or transmitting masts or antennas; it is inconsistent, incomplete, conflicting and is invalid insofar as it prevents a homeowner from his constitutional right to use his property in any way he desires, provided that he does not violate any provisions of the Federal or State Constitu-

tions, create a nuisance, violate any covenant, restriction or easement, or violate any laws or zoning or police regulations which are constitutional.

(14) There is no evidence that the erection of an amateur radio tower by appellant would violate any provisions of the Federal or State Constitution, create a nuisance, violate any covenant, restriction or easement, or violate any laws or zoning or police regulations which are constitutional.

(15) The reception and transmission of radio and television waves is the inalienable, constitutional right of all homeowners, which cannot be curtailed or controlled, either directly or indirectly, by a Zoning Ordinance which arbitrarily limits the height of the antenna which is electrically necessary for the proper reception or transmission of radio waves. A municipality may not under the guise of its police power, directly regulate, curtail or control the transmission and reception of radio signals, nor can a municipality indirectly by limitation of the height of the receiving and transmitting antenna, curtail, regulate or control the transmission and reception of radio signals; on the assumption that what the municipality here has in mind and has legally attempted is not in conflict with the situation created by Federal regulations, the language of our Supreme Court constrains Courts below to restrain such zoning activity as is here attempted.

(16) In the legal and factual situation before us, the Zoning Ordinance of the Borough of Whitehall, insofar as it attempts to limit the height of the receiving or transmitting antenna, without any standards and without any relation to the frequency in megacycles of a transmitted or received radio signal, is not necessary for the preservation of public health, safety, morals or general welfare and is unjustly discriminatory, arbitrary, unreasonable and confiscatory in its application to the property of the appellant.

(17) The appeal of Joseph J. Slemenda and Esther C. Slemenda, his wife, should be sustained and the Building Inspector of the Borough of Whitehall should be ordered to issue the building permit applied for.

We believe too lengthy a discussion here may be avoided by reference to the ruling of the Supreme Court of Pennsylvania in Lord's Appeal, 81 A. 2d 533, 368 Pa. 121, which this Court has followed in several cases, including Schmeigel's Appeal, 114 Pgh. L. J. 117, and we find it difficult to make the distinction between the situation at bar and the background and facts in Lord's Appeal as argued by appellee's counsel. The

magnificent discussion of the background to zoning given by our Supreme Court at page 125 et seq. of Lord's Appeal, points far beyond any policy or principle that could arise out of the facts at bar. Lord's Appeal, arose in Munhall Borough in our own County here. It concerned an owner of property in a B-Residential District of the Borough, who was a licensed radio amateur operator, had applied for a permit to erect a radio tower in the rear of his home; that no other such tower had been erected anywhere in the metropolitan area except for commercial use; that the permit was refused by the inspector and by the board of adjustment, but that on appeal the Court of Common Pleas reversed the decision of the Board; the Supreme Court held that it was error to hold that the aerial was not an accessory or customary use of dwelling premises; it was error to underscore, over and above the basic constitutional right involved, provisions aiming to the conservation of the value of the building in the Borough; the matter of depreciation of property values was not controlling; that a finding and holding that the antenna there was not an accessory use was implicit in the Board's finding of a violation, was incorrect.

The Supreme Court's general and basic observations have not been modified so far as we know, nor do we find any change in the Supreme Court's attitude repeatedly indicating what we deem here significant:- "In equity, the court will regard such ordinances in the nature of a fact found or an expression of municipal thought and opinion. Such ordinance may thus aid courts in determining the substantive question involved, but they are not conclusive where the question is one of nuisance. In Walker v. Delaware Trust, et al., 314 Pa. 257, 261, 171 A. 458, we said: 'Acts of municipal officers under zoning legislation permitting the use of property for what is or may be a nuisance, do not oust the jurisdiction of equity to determine whether a nuisance in fact exists and should be restrained . . .' And in White v. Old York Road Country Club, 322 Pa. 147, 152, 185 A. 316, we said: 'The zoning ordinance and the issuance of a permit to operate the proposed filling station sanctioned this use. Such ordinances and the action of the authorities thereunder, are not controlling in cases involving nuisances, . . .' See also: McDonald v. West View, et al, 98 P.L.J. 191, 193."

In White, supra, another equity case, the Supreme Court had said:- "Zoning ordinances and the action of the authorities thereunder, while not controlling, in cases involving nuisances, must be given due weight in determining the questions involved and, in doubtful cases, should have the greatest weight." We are referring, of course, to the other structures, poles and the like, abundant in the Borough.

The operation here to be involved is no more a nuisance than the automobile junk yards which the Supreme Court refused to declare a nuisance per se in Com. v. Hauslik, 161 A. 2d 340, 400 Pa. 134. Aesthetic reasons are not in themselves sufficient to support the conclusion that the operation "and maintenance of certain businesses would be contrary to the best interest of the community" - Medinger Appeal, 104 A. 2d 118, 377 Pa. 217, holding, inter alia, that "neither aesthetic reasons nor the conservation of property values, nor the stabilization of economic values, are sufficient alone or combined to promote the health, or morals or safety or general welfare of the inhabitants or property owners." The "additional" testimony before us need not have been as voluminous as it is:- Rogalski v. Upper Chichester Twp., 178 A. 2d 712, 406 Pa. 550. We will not exercise our discretion properly if we consider the number of objectors, however sincere; we are to consider the legal nature and quality of their objections - Lindquist Appeal, 73 A. 2d 378, 364 Pa. 561.

The Supreme Court said (page 573 of Neidorn Appeal, 195 A. 2d 349, 412 Pa. 570) that:-

> "'Laches however may be inputed to a municipality that has stood by and permitted large expenditures to be made upon the faith of an irregular order of court, or of municipal consent informally or tacitly given, where formal consent would have been effective.' (Pgh. v. P. & L. E., 263 Pa. 294). Stahl v. First Pennsylvania Banking and Trust Company, 411 Pa. 121."

A course of conduct may indicate that the "structure" objected to in a specific case is like unto similar ones never challenged by the municipality: See, Nasage v. Phila., et al., 202 A. 2d 61, 415 Pa. 31.

The basic constitutional postulates in Lord's Appeal, 868 Pa. 121, clearly remain in the late cases. Parker v. Hough, 215 A. 2d 667, 420 Pa. 7; Cleaver v. Board of Adjustment, 200 A. 2d 408, 414 Pa. 367.

It will be well to underscore that part of the record in which the appellant testified that his proposed tower was personal property (T. 19), could be leaned against the house (T. 18), could be stood on the ground and guyed (T. 18), or could be put on a wooden base. The appellant further testified:-

"A. I had this erected. This is part of my own personal property. It never is part of the real estate. Wherever I move, it goes along with me. I take it down and ship it along. I used it in Newport News from the time I lived there until when I was transferred back to the Pittsburgh area by Westinghouse." (T. 19-20).

The Borough Building Inspector concurred. (T. 51).

Specifically, we point to the difficulties created by the language of the ordinance itself thus: "Article XX General Height and Area Regulations, Section 2001-1 limits dwellings to two and one-half stories or 30 feet. In Section 2001-4, no "buildings or structures" of any type shall be erected . . . to a height of more than two stories." What is the permitted height of a building? Is two and one-half stories as called for in Section 2001-1; or is it two stories as called for in Section 2001-4; or is it 30 feet as set out in 2001-1? What is the height limitation on a "structure," assuming that this radio mast is a "structure"? Section 2001-4 says that a building or structure of any type shall not be erected to a height of more than two stories. What is a "story"? We turn to Definitions, Section 201-51 and find that it is "that part of any building between any floor or roof next above . . ."

As to all such cognate matters, we may not overlook the appellate court language:-

"As stated by Justice Murmanno in Gilden Appeal, 406 Pa. 484, at page 492: 'In the absence of any definition to the contrary in the zoning ordinance, the term 'educational institution' as used in the Ordinance must be presumed to have been employed in its broadest sense, while the word 'sanitarium', being a prohibited use, must be strictly construed, since restrictions on a property owner's right to free use of his property must be strictly construed and all doubts resolved in his favor.' In like vein, Justice Eagon set forth the rule in Fidler v. Zoning Board of Adjustment, 408 Pa. 260, at page 265: "It is fundamental that restrictions imposed by zoning ordinances are in derogation of the common law and must be strictly construed: Rolling Green Golf Case, 374 Pa. 450; Lord Appeal, 368 Pa. 121; and Medinger Appeal, 377 Pa. 217 . . . Such restrictions must not be so construed as to fetter the use of the land by implication. The permissive widest use of land is the rule and not the exception, unless specifically restrained in a valid and reasonable exercise of police power.' At page 264, Justice Eagon further states:- 'Since the Town-

ship ordinance failed to define 'agriculture' or 'agricultural', the term must be interpreted and applied in accordance with its usual and generally accepted meaning: Statutory Construction Act of May 28, 1937, P. L. 1019, Sec. 33, 46 PS Section 533; Commonwealth Tr. Co. Mtg. Invest. Fund Case, 357 Pa. 349, 54 A. 2d 649.' Again, in Patterson v. Zoning Board of Adjustment, 412 Pa. 582, at page 585, Justice Musnanno states the rule of construction as applied to zoning ordinances: 'In addition, zoning regulations must be construed strictly, since they impose restrictions on the free use of property . . .'"

In Colligan Zoning Case, 162 A. 2d 652, 401 Pa. 125, the Supreme Court speaking of the municipal interpretation of its ordinance provisions made the following statements we believe here applicable: "If the Borough's interpretation of this frontage provision is correct it would have no clear or reasonably necessary relation to safety, health or morals; it would be an arbitrary, unreasonable and unjustifiable intermeddling with private ownership of property, and consequently unconstitutional. Lord's Appeal, 368 Pa. 121, 81 A. 2d 533; O'Hara's Appeal, 389 Pa. 35, 131 A. 2d 587.

"The obvious purpose of the zoning ordinance was twofold, to restrict properties to residential uses, and to give proper fire and police protection, garbage and rubbish collection, and sewage disposals -- in other words, to protect the public health, safety and morals of the community. Unless the ordinance can be justified under this general welfare principle, it is unconstitutional; and even if constitutional, it may under the facts and circumstances of a particular case be unconstitutional when applied to a particular owner's property.

These basic principles are pointed to in the language and decision of our Supreme Court in Glorioso Appeal, 196 A. 2d 668, 413 Pa. 194, where a new zoning ordinance purported to create a special district as to three properties, two of which were manifestly not concerned; as to the one remaining land that was concerned, it was clearly discriminatory, unreasonable and arbitrary. Discrimination, even when inadvertently resulting and even out of the commendable motives of a municipality, will not be permitted; so at bar to single out this piece of subject land here for treatment wholly different from that accorded the literally hundreds of poles, installations and the like, to subject constructions only to the appellants' use wholly different from that accorded reasonably similar installations in the same area and to accord these appellants different treatment from that accorded similar land indistinguishable in character with the result described by the Supreme Court of Pennsylvania in Lord's Appeal, cannot be sustained as proper zoning.

ORDER OF COURT

AND NOW, to-wit, this 30th day of October, 1966, after a careful consideration of the entire record the appeal is sustained and the building and zoning officers of the Borough are ordered and directed to issue the permit as applied for; exception noted and bill sealed.

BY THE COURT

s_____ P.J.
Lencher

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