NO. 27477

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

DAVID A. BAYSINGER, WILLIAM A. BAILEY, JR., JAMES L. DOWD, KEITH FARRIS, MELVIN M. RENSBERGER, STEVEN RAPP, DARLA P. RICHARDSON, DAVID W. RICHARDSON, MARVIN L. RICHARDSON, COLORADO COUNCIL OF AMATEUR RADIO CLUBS, a non-profit corporation, on behalf of themselves and all others similarly situate,	)	
Plaintiffs,	)	APPEAL FROM THE DISTRICT COURT OF ADAMS COUNTY COLORADO HONORABLE CLIFFORD J. GOBBLE JUDGE
vs.	)	
CITY OF NORTHGLENN, a municipal corporation,	)	
Defendant.	)	

OPENING BRIEF OF APPELLANT

May 25, 1977

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	)	
Plaintiffs and Appellants,	)	
	)	
vs.	)	
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CITY OF NORTHGLENN,	)	
	)	
Defendant and Appellee.	)	

2. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Can the City of Northglenn enact a valid zoning ordinance requiring a special use permit for all radio towers and antennas?

B. Can a valid zoning ordinance require a special use permit for all radio antennas, which by definition includes rabbit ears on television sets and an internal part of pocket-transistor radios?

C. Can the City of Northglenn enact a valid zoning ordinance requiring a special use permit without establishing or setting forth any standards or criteria for determining whether or not such permit should be granted upon hearing?

D. Can there be added to a zoning ordinance a special use category pertaining to activities of a commercial nature, the (by definition) hobby, public service, and normally accessory use of amateur radio?

E. Can the City of Northglenn validly attempt to regulate, by zoning ordinance, construction of amateur radio towers and radio antennas where there is no evidence whatever that such regulation is in any way related to the health, safety, welfare or morals of the citizens?

F. Can the City of Northglenn enact a valid zoning ordinance that would prevent a federally licensed amateur radio operator from exercising his license fully, where the Federal Communications Commission under federal law, U.S. Constitution, and international treaty has passed controlling rules and regulations and has issued such licenses?

G. Where the Federal Communications Commission and Federal Aviation Administration have made rules and regulations governing antennas and tower structures, has the field been pre-empted to invalidate a zoning ordinance passed by the City of Northglenn to limit and to restrict such activity by individuals who comply with federal rules?

3. STATEMENT OF THE CASE

Northglenn City Council passed an ordinance that became effective October 27, 1975, whereby a special use zoning became required

for "radio towers and antennas". Under the ordinance (folio 21) maximum height of tower or antenna or combination was fixed at 60 feet; a professional engineer's design and seal was required for tower, base and anchors; apparatus confined to owner's premises without written consent; permit to expire when house was transferred; one time fee; and requirement of removal upon vacation of premises.

Theretofore, amateur radio operators had been allowed to erect towers pursuant to building permit as an accessory use to the home. The new ordinance is in a section requiring a hearing prior to issuance of special permit.

Plaintiff David Baysinger applied for building permit to erect tower prior to the effective date of the new ordinance and was denied on the grounds of the not yet effective new ordinance. The first claim for relief was to have building permit ordered issued for Baysinger's home.

The plaintiffs comprise a group of individual, federally licensed amateur radio operators, residents of Northglenn and the Colorado Council of Amateur Radio Clubs, a non-profit corporation composed of most amateur radio organizations in the State of Colorado which acts in cases of individual and community amateur radio problems.

Action was filed November 14, 1975, seeking declaratory judgement, declaring the ordinance to be unconstitutional and void; for preliminary and permanent injunctions enjoining the enforcement of the ordinance; mandatory injunction ordering issuance of building permit to Plaintiff Baysinger; and relief in the nature of certiorari ordering certified up to the District Court the records of the proceedings before the Northglenn City Council to determine whether that body had exceeded its jurisdiction and abused its discretion.

Although a citation was issued in the nature of a writ of certiorari, Counsel met with the Court in a brief hearing February 5, 1976, and it was determined by agreement and order that the action sounded in declaratory judgement and injunction rather than in the nature of certiorari (ff 71, 81-2) -- although the times and procedures required by rules and cases had been followed. The Colorado Attorney General was served (f 28) but declined to appear.

Hearing was had to the Court June 17, 1976; memorandum briefs were ordered and the case taken under advisement. Briefs were completed September 13, 1976. Trial Court made findings of fact, conclusions of law and judgement (ff 41-59) September 30, 1976, issued October 1, 1976 (f 60). Motion for new trial or amended judgement was filed October 12, 1976, (ff 61-7); argued and denied (f 72) November 3, 1976.

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Trial Court held in the judgement; regulation of amateur radio towers is not an unreasonable exercise of the police power (f 49), and although there was no affirmative statement of the relationship between radio towers and public health, safety and welfare which would justify exercise of police power, statements of several witnesses could have justified the regulation (ff 49-50); while admittedly a section setting forth criteria for hearing to reach a decision would have been desirable, the absence of such standards does not make the ordinance constitutionally infirm (f 52); the purposes in the state statutes granting the power to cities to zone provide a standard that saves the ordinance from being unconstitutional for failing to include standards (ff 53-55); Plaintiff Baysinger cannot be granted a building permit because a newly adopted zoning ordinance can be applied retroactively before it becomes effective (ff 56-7).

Trial Court denied all relief sought and upheld the ordinance, (f 59). Motion for new trial asserted the following issues: (1) the Trial Court failed to consider the fact that the ordinance required a hearing when there were no questions to be decided, no facts to be found and no question of law (f 62); (2) the Court failed to assess the vagueness of the ordinance without standards or criteria (ff 62-3); (3) While the city building code, which is totally independent of zoning, sets criteria for safety of construction, the code is unrelated to the ordinance, the ordinance itself makes no effort to deal with construction standards, and there is no contention the ordinance

would provide any measure of safety (f 63); (4) the Court failed to consider that all evidence in the case indicated a higher tower avoids interference to neighbors' home entertainment and that the City has no jurisdiction to deal with interference (f 64); (5) the Trial Court in ruling that hearings would promote harmony and provide understanding volunteered something not in the ordinance and something that does not substitute for standards governing such hearings (f 65); (6) cases cited by the Court are not applicable and hold contrary to the Court's holding (f 66); (7) the ordinance is inadequate (f 66); (8) the Court failed to consider the effect of requiring a special permit for every antenna in Northglenn on each television, home radio, car radio, and hand transistor set (f 67); (9) and other errors in law in specific rulings on objections and motions (f 67).

On trial the following facts were established:

Plaintiff Baysinger was denied a building permit before the effective date of the new ordinance although he had fully complied with the then existing requirements. Such refusal was solely because of the newly passed ordinance, (ff 88-90). Under Federal Regulations, he had a right to establish his station and operated it from his home address (ff 94-5).

All radios must have antennas (ff 98, 103, 107, 318-9, 350, 389). Radio includes electromagnetic spectrum from less than 500,000 hertz (cycles per second) to 200,000,000,000 hertz (ff 100-2). All radio and television is

included in this range (ff 102). A tower usually is used to elevate an antenna (ff 214, 309), and the higher the antenna the better the communication (ff 108 309-10, 389) and the less the interference to surrounding home entertainment devices, (ff 181, 310, 390).

It is necessary to have elevated antennas in Northglenn as well in Denver and other areas because the electromagnetic conditions that affect reception are constantly changing and at times a signal can be heard in Northglenn and not Denver, and vice versa (ff 110,).

Al Knott, an expert in structural engineering testified that the uniform building code in effect in Northglenn provides adequate protection to the safety and health of the inhabitants (f 159). The ordinance does not add to the safety; it would cost $800 to $1,500 to obtain an engineer's seal to a commercially produced tower when the building code adequately protects inhabitants, their health and welfare (ff 158-165).

Robert M. Booth, Jr., testified as an expert witness - registered professional electrical engineer in communication electronics; lawyer specializing in communications before the FCC and federal courts; general counsel of the American Radio Relay League, a national organization of radio amateur operators; expert witness in courts and administrative agencies with regard to radio engineering and communication law (ff 295-9).

Booth testified that a building permit is intended to insure that whatever is erected is done so in a safe manner. It is normally granted by the building department of a city. A zoning ordinance has to do with overall use of property and planning. It is distinct from building permits (ff 312-3). The one is mechanics, the other is policy.

According to Booth no law anywhere in the country provides for licensing of antennas (f 316). Radio antennas include means of getting a picture on a tube and sound in the speaker. It includes anything which requires the use or employs electromagnetic radiation irrespective of frequency, (ff 318-20).

Booth is concerned and the American Radio Relay League is concerned with the Northglenn ordinance because it will require amateur radio operators to get a special permit or license in addition to the federal one granted by the FCC, (f 332). The federal government has pre-empted the field in radio communication -- a local government's effort to regulate federally licensed activity is invalid in his opinion, (f 332). He feels the FCC has no objection to certain local regulations, e.g. tower height, so long as such regulation does not prohibit or unreasonably impair or impede operation of the service or the station license, (f 357).

Darla Richardson and James White testified they had attended meetings of the zoning authority and City Council, that even at a meeting advertised by

Council to urge attendance of persons opposed to towers, there was no citizen who appeared in opposition to the amateur radio operators or in favor of special permits for radio towers (ff 115-8, 268-270).

The Court took judicial notice that "amateur radio is incidental to normal living and is a matter of use of right", (f 207). "That can be assumed just like use of a television in a normal use by people in their respective homes", (f 207). It was not necessary to prove the activity of amateur radio operators in emergencies and disasters, (ff 206, 228). And the Court did not need to hear from a PhD in sociology and communication concerning such radio as a normal incident in homes and part of normal living, (f 288).

A survey had been made of Northglenn following recognized statistical procedures (f 199) whereby it was learned that there were at that time between 3,665 and 5,787 utility poles in the City of Northglenn from 35 to 90 feet high (ff 196-7) and between 1,202 and 2,450 outside television antennas above roof level (ff 198, 239-40). Apparently, utility poles are less durable than radio towers (f 376) and, apparently, do not require building permit or special use permit.

Together with 25 exhibits showing poles, towers, and utility structures, the presence of 4,000 utility poles negates any argument about esthetics

(ff 138-49). No argument about esthetic considerations was advanced and such testimony was limited by the Court.

Expert witnesses Robert Booth, Howard Eldridge, Vir James and Don Holaday each testified that amateur radio towers presented no threat to the health, safety and welfare of citizens of the community. Al Knott testifed towers could be constructed with complete safety to any desired parameters of weather, earthquake, etc., (ff 159-164). In the Denver area, building codes are geared to winds of up to 118 miles per hour (f 161).

The zoning ordinances of the home rule City of Northglenn were admitted into evidence.

The radio tower and antenna ordinance requires a permit for "special use" under Article 31. Referring to Article 30, "permitted uses", the ordinance adopts authority in the Zoning Commission "to approve or deny requests" for permits.

Article 41 establishes a "special permit procedure", for applications seeking "special uses" and others. This article requires a public hearing with notice given by publication at least 15 days before such hearing. Although required hearing provisions are established, there is nothing required to be heard, and there are no standards set forth in any part of the ordinance.

"Special use" is defined in Article 5 of the Zoning Ordinance as, "A use approved by the Commission and granted for a period of time determined by the Commission within limitations provided by ordinance, for the purposes provided by and pursuant to the requirements of Article 31 of this Chapter."

Radio towers and antennas were added to the existing "special use" category. Other previously listed "special uses" include: "group quarters," "Day care centers", "class instruction such as dancing, handicrafts, art, and music", beauty shops and "the storage of antique cars, racing cars . . . or junk cars."

Under Article 30, dealing with permitted uses, the zoning ordinance establishes criteria, e.g. compatibility with the surrounding area, harmony with the character of the neighborhood, need for the use, etc. There are no criteria established or referred to in the special uses or under the radio tower and antenna ordinance.

Permitted uses include electric substations, gas regulator stations, fire stations, churches, police stations and hospitals.

Accessory uses, Article 32, of the ordinance allows fences, hedges, walls, signs, trash containers, pets, private swimming pools, carports and garages, storage buildings, greenhouses and fallout shelters. These do not

require any permit beyond the regular building permit. It was under Accessory uses amateur towers had been permitted prior to the ordinance here involved.

4. ARGUMENT

A. Summary of Argument

(1). The Northglenn Radio Tower and Antenna ordinance is an unlawful interference with normal activities of citizens and is not related to the legitimate exercise of the police power.

(2). The Northglenn ordinance is unconstitutionally vague without any standards or criteria.

(3). The Northglenn ordinance is unreasonable in that it requires a special permit for every television, radio and hi fi set in the City.

(4). The Ordinance intrudes into a field of exclusive federal regulation.

B. Body of Argument

(1). The Ordinance is not a valid exercise of the police power.

The prime incentive to property ownership is that people may make any desired use of their property. The right is guaranteed by Federal and State Constitutions. Limitation on the right is imposed under the police power, provided: First, such regulation is reasonable; and Second, the restrictions have a substantial relation to the public health, safety or welfare. Jones v. Board of Adjustment, 119 Colo 420, 204 P2d 560: Western Income Properties, Inc., , v. City and County of Denver 174 Colo 533, 485 P2d 120; Willison v. Cooke, 54 Colo 320, 130 Pac 828; Village of Belle Terre v. Boraas 416 U.S. 1, 94 S.CT. 1536, cited in Stroud v. Aspen, _____Colo _____532 P2d 720.

There is clear legal precedent that one attacking a zoning ordinance has a burden of providing the ordinance invalid beyond a reasonable doubt, Board v. Thompson, 177 Colo 277, 493 P2d 1358; Board v. Simmons, 177 Colo 347, 494 P2d 85.

It is clear in the instant case, such proof beyond a reasonable doubt has been elicited. The ordinance in light of all cases violates substantially every criterion for lawful zoning regulation.

According to Ford Leasing Development Co. v. Board,_____Colo _____, 528 P2d 237, " . . . to establish that a zoning ordinance is unconstitutional. . . it may be shown it is not substantially related to the public

health, safety or welfare -- Euclid v. Ambler Realty, 272 U.S. 365, 47 SCT 114; Englewood v. Apostolic Church, 146 Colo 374, 362 P2d 172".

In the instant case, there has been positive evidence that towers and antennas present no threat of any sort to the health, safety and welfare of the public. There has been no effort on the part of Appellee to offer proof or claim the police power is so required. The only relationship to safety is totally satisfied by the requisite standards of the building code -- which is unrelated to the zoning ordinance or any requirements thereunder.

(2). The ordinance is unconstitutionally vague without standards or criteria.

There is no provision in the radio tower and antenna section or any other section of any Northglenn ordinance indicating on what basis a special use permit shall be granted or denied -- including what, if any, determination should be made by the Commission. Thus, an applicant appearing before the Commission has no notice as to the criteria on which his application for a "special use" antenna or tower will be granted or denied.

In the article on permitted uses are set forth some criteria. But there are no criteria in regard to the special uses. Trial Court referred to the statute empowering cities to zone wherein it is set forth the general purpose of "promo-

ting health, safety, morals or the general welfare of the community . . . " and directs that the zoning be made with reasonable consideration "as to the character of the district and its peculiar suitability for particular uses . . . ".

These are not the standards and criteria against which an administrative body can hear and determine particular cases for particular uses. Nor can the empowering statute make up for the constitutional deficiencies of the ordinance.

A legislative enactment granting discretionary authority to an administrative agency must set forth standards for exercise of such discretion or the act is invalid and void because of vagueness. Those who come under the reach of an ordinance must be given adequate prior knowledge as to the standards by which their acts or conduct will be judged. It should not be necessary to cite cases for this proposition but recently there has been some judicial soul-searching concerning standards with regard to obscenity. The need for standards was underscored by Mr. Justice Erickson in People v. Tabron, _____Colo _____, 544 P2d 372. Even though such standards may well be impossible to establish, such an attempt must, nevertheless, be made. Fortunately, zoning is not so amorphous as obscentiy. But, there still must be standards. In their absence, courts will and should not correct legislation by judicial re-writing, People v. Tabron, supra;

" . . . as tempting as it sometimes may be, a Court is without power to substitute its zoning philosophy for that of the zoning body; and this is so for practical as well as legal reasons," Nopro v. Cherry Hills Village, 180 Colo 217, 504 P2d 344.

A further vagueness intrudes upon the presumed constitutionality of this ordinance: By its terms, a tower or antenna or both must be not higher than 60 feet, cannot intrude upon the neighbors' lands without permission, must be designed by an engineer, requires a one-time fee, and requires removal upon vacation or sale of the property. These are not discretionary matters; they are unqualified and clear. There is nothing to be determined and no question left open. Either a person complies with the provisions or he does not.

The time period is set and there is not even a requirement of renewal.

The use is not similar to the other listed special uses in that they represent some variation -- the number in the group quarters, the population of a day care center, the number if not the size of classes, and the variety of beauty shop operation, and what constitutes an antique, racing or junk car. Towers and antennas present no determinable facts or questions.

If there are no facts to be determined, what then can be done at a hearing? Could the Zoning Commission turn down an application that fully complied with the specific requirements set forth in the ordinance? The ordinance provides the Commission shall grant or deny, but for what reason could they deny? And if they cannot deny, is not the ordinance actually one that provides for an accessory use with requirements more stringent than previously? If so, the City Clerk should not be setting for hearing that which cannot be determined.

(3). The ordinance is unreasonable in that it requires a special permit for every television, radio and hi fi set in the City.

All evidence in the case is clear and uncontroverted that every radio receiver including all television sets have some sort of antenna or they do not receive any signal. Vir James stated, "an antenna is a metallic circuit element the function of which is to receive or transmit electromagnetic waves" (f 387). Robert Booth testified, "an antenna includes the metallic elements from which a signal is either radiated or receives electromagnetic waves . . . " (ff 316-7).

The ordinance as written requires every person in Northglenn having a television, am radio, fm radio, citizen band radio, join with radio amateurs in individually paying $75, confining the apparatus to the owner's property without written permission, and attending an advertised hearing of his or her

friends and neighbors for some undfined purpose to have the permit granted or denied.

Such result is absurd. Every home in Northglenn would have one or more permit applications and consequent problems. All this would come about without any showing of a threat to the health, welfare, safety and morals by allowing such antennas to remain untaxed.

Taking television away from mid-twentieth century Americans might prove more dangerous than depriving Bostonians of tea two hundred odd years earlier.

(4). The Northglenn ordinance intrudes into a field of exclusive federal regulation.

Federal control over amateur radio was established by judicial finding in 1927 as federally controlled interstate commerce, and not to be taxed or regulated locally, Whitehurst v. Grimes, 21 F2s 787.

Although, since that time the Federal Communications Commission has been created and the entire body of rules and regulations comprising 47 Code of Federal Regulations has come into being, the basic law in unchanged as recently enunciated in U.S. v. Southwestern Cable Co., 88 S. Ct. 1994, 392 U.S. 157, in which the broad powers of regulation granted to the F.C.C. in regulation of communication are greater even than claimed by the Commission.

Since Whitehurst v. Grimes, state courts have dealt with radio questions only in the questions of regulation of tower height. There has been no direct confrontation about jurisdiction because only New York and the State of Washington have permitted local regulation of towers.

In every other case, the ruling has been substantially that radio antenna towers erected to serve amateur radio stations are uses customarily accessory in residential districts, St. Louis Park v. Casey, 218 Minn 394, 16 N.W. 2d 459, Lord's Appeal, 368 Pa. 121, 81 A.2d 533, (Sup. Ct.); Village of St. Louis Park v. Thomas J. Casey 16 N. W. 2d 459, 218 Minn 394, (Sup. Ct. 1944); Rolling Green Golf Case, 374 Pa. 450; Gilden Appeal, 406 Pa. 484; Fidler v. Zoning Board of Adjustment, 403 Pa. 260; Medinger Appeal, 377 Pa. 217; O'Hara's Appeal, 389 Pa. 35, 131 A.2d 587; Wakfield v. Kraft (96 atl. 2d 29), and Chayte v. Maryland Jockey Club, (179) Md. 390).

Efforts of cities to limit the height of towers has likewise been uniformly rejected by courts. While the federal government through both the FCC and the FAA (Federal Aviation Authority) have imposed rules and regulations binding upon amateurs, local governments have been denied the right on the grounds that such limitation of a normal home accessory use is unreasonable. The implication in these cases is that safety can be adequately guarded by building code. Height of tower with safety so guarded is another consideration of amateur radio activity that is properly accessory to normal use of real estate.

There is no other reason for a municipality to interfere with the use. Wright v. Vogt, 7, M.J. 1, 80 A2d 108; Skinner v. Zoning Board, 193 A2d 861, 80 NJSu 380; Zoning Board v. Marshall, Tex Civ , 389 SW2d 714.

The Arizona Court of Appeals last June decided a tower regulation case in an extremely well reasoned opinion, Town of Paradise Valley v. Lindberg, 551 P2d 60, _____Ariz_____. The Court in that case states:

"Generally, zoning ordinances which provide for specific uses to which property may be put (single family residences here) also provide for additional uses which are usually denominated as "accessory" or "incidental" to the expressly permitted use. The word "customarily" (Section 201 (68), supra) is commonly used in regulations permitting or defining accessory usages and the courts have sought to determine, in the case of each allegedly accessory or incidental usage, whether it is customary to maintain it in conjunction with the specifically permitted use of the land, here single family dwelling. See generally: 1 Anderson, American Law of Zoning, 631-632 8.26."

"While there is a paucity of cases in Arizona on this question, nine decisions from other jurisdictions involve the erection of a radio tower on land zoned for residential purposes. Five of these decisions upheld the use as proper. Village of St. Louis Park v. Casey, 218 Minn. 394, 16 N.W. 2d 459 (1944); Wright v. Vogt, 7 N. J. 1, 80 a.2d 108 (1951); Appeal of Lord, 368 Pa.

121, 81 A.2d 533 (1951); Skinner v. Zoning Board of Adjustment, 80 N.J. Super. 380, 193 A.2d 861 (1963); Dettmar v. County Board of Zoning Appeals, 28 Ohio Misc. 35, 273 N.E. 2d 921 (1971). Four decisions found that the erection of the radio tower was an impermissible use. Presnell v. Leslie, 3 N.Y. 2d 384, 165 N.Y.S. 2d 488, 144 N.E. 2d 381 (1957); Kroeger v. Stahl, 248 F. 2d 121 (3rd Cir. 1957); Hohmann v. Thomsen, 32 A.D. 2d 669, 300 N.Y.S. 2d 781 (1969); State ex rel. Carpenter v. City of Everett Board of Adjustment, 7 Wash. App. 930, 503 P.2d 1141 (1972).

"Of the four decisions opposing the use, two (Hohmann and Kroeger) involve the use of the amateur radio tower in a business or commercial enterprise. The Washington decision (Carpenter), in what we view as a rather strained construction of the facts, found the tower to be a "building" and thus governed by a 35 foot height limitation."

"The only decision which actually holds that the erection of a ham radio tower is not an accessory use to a single family residence is Presnell V. Leslie, supra. In that decision, Judge Van Voorhis filed a dissent indicating that in light of the fact that there were 146,000 ham operators in 1957, it was unreasonable to hold that such a use was not an incidental or accessory use. While there are no figures in the record here, it is safe to assume that the number of amateur radio operators in the United States has grown tremendously in the almost 20 years since Judge Van Voorhis' observation.

In any event, even if all four opposing decisions had been exactly in point, we are convinced that the reasoning found in the decisions allowing such a use is more persuasive. In Dettmar, supra, there was a general height limitation regarding church spires, chimneys, flagpoles, cooling towers, etc., such as we have here (Section 1003, supra), as well as a section regarding accessory use. In reversing the County Board of Zoning Appeals' denial of an application to construct a 64 foot tower, the court's language is representative of the rationale of the other courts similarly ruling, supra, and is the view we adopt:

> "Appellant is an amateur radio operator. This is a hobby through which the 'ham' operator gains skill in science, electronics and radio technique. It is carried on purely for the development of the individual and not for any financial gain. Family hobbies, recreation and education are without question accessory uses customarily incident to single family dwellings. The words 'uses customarily incident to single family dwellings' mean the class of activity a family customarily does in or about their home. It does not limit the use to the identical activity chosen by the neighbors. As long as the activity is a form of family hobby, recreation or education, it is permissible even though it may be unusual unless it is specifically excluded by a zoning restriction. The fact that not many people have amateur radio antenna no more precludes this use than the fact that not many people have tennis courts precludes their use (in Arizona, we could also add swimming pools)." Dettmar v. County Board of Zoning Appeals, supra, 273 N.E. 2d at 922.

5. CONCLUSION

The use of amateur radio antennas and towers is, according to established case law and judicial notice by trial court herein, accessory to normal occupancy and enjoyment of property. Accessory uses are subject only to building permit according to Northglenn zoning as well as all cases on the subject.

A zoning ordinance is in derogation of a property owner's constitutional and common law right to make use of his property as he sees fit. Such ordinance is proper only under the police power to protect health, safety and welfare. There is no such protection required, sought or offered here. The safety is protected by the building code which has never been in question or under challenge in this case. There has been no suggestion of threat to health or welfare presented by amateur radio towers and antennas.

The exercise is so broad that every person owning a television receiver or broadcast receiver would have to obtain a special permit. Every television set that actually receives any signal has a radio antenna of some sort. The ordinance requires a special use permit for radio antennas in residential zones. Such legislation is not only unenforceable, it is silly.

There are no standards set by ordinance or otherwise pursuant to which the Planning Commission can exercise any consistent discretion in

granting or denying permits. The ordinance should thus fail on vagueness and due process grounds.

The section of the ordinance regarding "special use" permits deals with commercial matters in residential zones. There is no relationship between the uses regulated and the use of amateur radio towers and antennas.

The ordinance purporting to regulate radio towers and antennas in residential and commercial zones of Northglenn is invalid. It is an unlawful interference not related to the legitimate exercise of the police power. It is unreasonable. It is vague. It contains no standards for exercise of discretion. It probably intrudes into a field of exclusive Federal regulation.

Appellants have proved beyond a reasonable doubt the ordinance in question is invalid. The Court should declare the rights of the Appellants to have their towers and antennas under the building code by obtaining a regular building permit; the Court should enjoin interference by Appellee City in the accessory use enjoyment of Appellants' property rights; the Court should order a building permit issued to Appellant Baysinger.

Respectfully submitted:

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