STATE OF MICHIGAN
DISTRICT COURT FOR 35TH JUDICIAL DISTRICT

PEOPLE OF CANTON TOWNSHIP,

vs. No. 85 CT 3551

ANTOINETTE BENNER,

Defendant.

O P I N I O N

BACKGROUND

Antöinette Benner (Defendant) is an owner of a corner residential lot facing Morrison Road bounded by Gordon Avenue on the side property line in Canton Township, Michigan.

On March 25, 1985, Defendant was cited for violation of Section 30.01 of the Canton Township Zoning Ordinance. The citation states that Defendant "did fail to maintain the required yard space adjacent to Gordon Avenue." The residential lot at issue is bordered along its Gordon Avenue boundary by a 6 foot hedge. A satellite dish extends some 6 feet above and about 15 feet behind the hedge.

LAW AND DISCUSSION

Canton Township admits that its ordinance does not expressly regulate the installation of satellite dish antennas. It does contend that the definition of a "structure", read in conjunction with Section 30.01, clearly gives notice of its intent to regulate the subject matter of this dispute and that the Defendant knowingly and with intent did violate a zoning ordinance. Further, that Canton Township in this enforcement action has acted reasonably in the exercise of its police powers.

Defendant believes that the Court should find her not guilty for essentially two reasons. First, the Plaintiff does not have a specific enforceable ordinance regulating the installation of satellite dish antennas. Second, the Plaintiff is barred from enforcing the current ordinance because it has arbitrarily and capriciously singled out Defendant for selective and discriminatory treatment.

As a preliminary matter the Court takes judicial notice of the special technical characteristics of parabolic antennas popularly called "satellite dishes." The antennas are designed to receive a low energy radio signal from an earth satellite, and reflect it to a focal point a few feet in front of the dish. The signal is collected and transmitted to a receiver. Unlike television and radio signals, which can bend somewhat over the horizon, a dish must have an unobstructed "line of sight" to the transmitting satellite. A building or even a tree can block out reception. Earth stations transmitting microwaves may distort the transmissions and require expensive filters to screen out the undesirable signal. These filters are not in all situations effective. The imposition of highly restrictive zoning regulations may so restrict the placement of TV dishes as to effectively preclude their use on residential lots.

The Township asserts that, as a political subdivision of the State of Michigan, it has authority under its "police powers" to regulate the private use of land. Indeed, in most instances a zoning ordinance is presumed to be valid and the attacking party has the burden of proving its enforcement unreasonable and arbitrary. Brae Burn, Inc. v Bloomfield Hills, 350 Mich. 425, 432 (1957). This authority is exercised so routinely that the fundamental fact that it is a

constitutionally limited power is frequently overlooked. All persons under the authority of the Federal Constitution are guaranteed the lawful use of their property. Limitations on this use may not be imposed by any level of government unless such action is substantially related to public health,safety and general welfare. If a zoning ordinance or building code is "clearly arbitrary and unreasonable" it is invalid and a violation of the due process clause of the Fourteenth Amendment. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Sun Oil Co. v. City of Madison Heights, 41 Mich App. 47, 51 (1972). If such an ordinance "does not substantially advance state interests," or if it "denies an owner economically viable use of his land", its effect is to deprive the owner of property rights in violation of the Fifth and Fourteenth Amendments.Penn Central Transp. Co. v New York City, 438 U.S. 104 (1978).

A further limitation upon the exercise of zoning ordinances police powers is that such imposition may not be done in a manner that is discriminatory. Kropf v City of Sterling Heights, 391 Mich. 139 (1974). Where an ordinance gives administrative officers or boards authority to permit or refuse a particular land use, it must prescribe standards for the grant or refusal of permission. Ordinances broader than reasonably necessary to advance legitimate public interests will not be upheld by the Courts.Homrich v. Storrs, 372 Mich 532 (1964). In Westervelt v. National Resources Comm'n, 402 Mich. 412, 443 (1978), the Michigan Supreme Court stated that a delegation of legislative powers to an administrative agency is constitutionally valid when:

> The legislation...expressly or by reference includes standards...as reasonably precise as the subject matter ...requires or permits... Thereby assuring that the public will be protected against potential abuse of discretion at the hands of administrative officials...

Consistent with the above position is the following statement by the U.S. Supreme Court: The Court recognizes the need under certain circumstances for a necessarily wide grant of discretionary authority. National Maritime Union v Norfolk, 202 Va. 672, 119 S.E. 2d 307, 313.

In Canton Township's ordinance a "building" is defined as:

> Any structure, either temporary or permanent, having a roof or other covering and used or built for the shelter or enclosure of persons, animals, chattels, or property of any kind. This shall include tents, awnings, semitrailers, or vehicles situated on private property and used for purposes of a building. A building shall not include such structures as signs or fences, or structures with interior areas not normally accessible for human use such as tanks, smokestacks, grain elevators, coal bunkers, oil cracking towers, or similar structures.

See Canton Township Zoning Ordinance, at p.5.

In the same ordinance, "a structure," is defined in the following words:

> That which is built, produced or constructed, or an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in any manner.

ID. at p.20.

Canton Township urges the Court to interpret its ordinance according to its "intent and literal meaning." Canton Township in its Brief at p. 5 states:

> In the interpretation of statutory terms, the doctrine of construction, noscitur a sociis, prevails. That is, the meaning of particular terms in the statute may be ascertained by reference to words associated with them in the statute. It is also a familiar policy in the construction of terms of a statute to take into consideration the meaning naturally attaching to them, from the context...

The Township would have the Court find a clear and unambiguous meaning in the above quoted ordinance. In this definition of building the word "structure" appears twice. First, as an apparent synonym for "building." Second, in a series of examples of buildings/structures specifically

excluded from the ordinance. A plain reading of this definition compels the conclusion that the Township's intent is to regulate only structures used as enclosures. Satellite dishes would reasonably appear by this definition to be "more closely associated" to fences and signs than to enclosures. (Emphasis supplied)

The Township's definition of a "structure" does not help to clarify the "plain meaning" of the ordinance. The ordinance informs us that a structure is something "which is built", "an edifice or building of any kind," or something "artificially built up or composed of parts." The Township states that flag poles, basketball back- boards, and television dishes would be structures by this definition.

Reference to the definition of "yard" and "front yard" offered as explanation in Plaintiff's brief does not assist to clarify the meaning of the ordinance with reference to the charged violation. Section 30.01 of the Zoning Ordinance states as follows:

> Yard: The open space on the same lot with a principal building, unoccupied and unobstructed from the ground upward except as otherwise provided in this Ordinance, and as defined herein:
>
> A. Front Yard An open space extending the full width of the lot, the depth of which is the minimum horizontal distance between the front lot line and the nearest point of the building line. There shall be maintained a front yard on each street side of a corner lot.
>
> Side Yard: An open space between the principal building and the side lot line, extending from the front yard to the rear yard, the width of which is the horizontal distance from the nearest point of the side lot line to the nearest point of the main building.

Canton Township Zoning Ordinance, at p.20.

Township states in further argument that a yard bordering a side street must maintain a 25 foot set back in open space. "Obstruct" is stated to mean "...to interpose obstacles, render impassible or to fill with barriers or

impediments." The Court is asked to accept Plaintiff's interpretation that a 6-8 foot privet hedge bordering the sidewalk is not an obstruction, but that a satellite dish on a 10-12 post is.

In City of Bloomfield Hills v Zielgelman, 110 Mich. App. 530, 538 rev'd 413 Mich 911 (1982). The Plaintiff was cited for violating the City's set back ordinance by constructing an asphalt tennis court with fence back stops. This ordinance defined a building as a shelter for persons or animals and for storage of goods and chattels. A "structure" was defined as "anything constructed or erected, the use of which requires location on the ground or attachment to something having location on the ground." Walks, terraces and similar structures were specifically excluded. The lower courts in finding for the City agreed that it had a reasonable basis for excluding tennis courts by implication from the set back area. These valid reasons included privacy, control of noise levels and water runoff affecting the adjoining property owners. In its reversal the Michigan Supreme Court held the City's ordinance clearly did not include a tennis court. The Michigan Supreme Court has reemphasized in Zielgelman that a municipality zoning authority is a constitutionally limited power. Municipalities must expressly state those specific uses that are to be excluded or restricted by their ordinance. This requirement will especially be imposed in those instances wherein a projected use is reasonably to be expected to be asserted by property owners.

Setback ordinances have been upheld in Michigan. Regulation of yard areas, courts and other open spaces is largely intended to provide for adequate light and ventilation between structures and also serves to promote such interests as traffic safety, fire protection, property

values and aesthetics. Gordon v City of Warren Planning and Urban Renewal Commission, 388 Mich 82, (1971). The advancement of the happiness and comfort of citizens, the promotion of the permanency of desirable home surroundings, and the stablization of property values, are all considerations which relate to and promote the general welfare. Township of West Bloomfield v Chapman, 351 Mich 606, (1958).

In Ottawa County Farms v Twp. of Polkton, 131 Mich App. 222, 229 (1984) the township established a setback requirement that had the effect of totally excluding a proposed use as a sanitary landfill. As part of its reason for opposing the proposed use the Township raised the objection that the use would depress the value of surrounding land. The Appellate Court concurred, with the lower court, that this testimony was speculative and unconvincing. It continued on to state with reference to aesthetics that:

> Aesthetics is a valid part of the general welfare concept, however, it may not serve as the sole reason for excluding a legitimate use of property. ...Since defendant's only remaining justification is one of aesthetics, it alone does not establish as reasonable the exclusion of plaintiff's proposed landfill. The circuit court properly found that defendant's aesthetic objection did not save the ordinance from invalidity.

In contrast to the above case the municipality in Sun Oil Co. supra at 52-3, was able to demonstrate that its ordinance sought to promote a legitimate safety interest in addition to aesthetics. The Defendant had appealed a lower court ruling holding that a refusal to grant a variance to its sign height ordinance to permit a high-rise sign to be erected by the Plaintiff at a freeway exit was an unreasonable exercise of its zoning authority. The ordinance at issue specifically limited the height of signs in a commercial area to 20 feet. In holding for the defendant's authority to reasonably regulate the height and size of

signs the Appeals Court stated:

> While safety of the roads is primarily a police responsibility, the creation of a traffic hazard is a valid consideration on which to base certain parts of a zoning ordinance... To prevent such a hazard, a municipality may limit a sign's dimensions along its thoroughfares in exercising its police powers. In addition, it may prevent the placing of signs which obstruct light, air, rainful or the use of the streets...

Continuing the Court commented on the issue of aesthetics. Observing as noted in Ottawa County Farms, supra, this Court stated that:

> ...While it may not be the sole force, aesthetics can be incidental to the valid exercise of police power...

The weakness of the Township's argument in the instant case is that it has attempted to rest its entire case upon a vague ordinance that does not address clearly the basis of its contention that the TV dish is aesthetically detrimental. It would permit the same dish on a much higher pipe mounting to be erected behind the set back line. Township has not met its burden of proof to establish that such a result would be aesthetically more acceptable. This obstruction is de minimus in comparison to the privet hedge adjacent to the sidewalk concerning whose placement the Township has not complained. The Township's action herein has the effect of excluding construction of any TV dish by adding significantly to its cost and forcing the use of a location in which interference by microwaves may occur.

The Court does not conclude that the Township is precluded from the proper regulation of satellite dishes. The Township may not, however, restrict the right of a private citizen to use her property with a vague and implied ordinance when the subject matter is conducive to regulation through a clear and precise standard as has been done in the Cities of Plymouth and Livonia.

Zoning ordinances normally are presumed to be valid. The burden is on the attacking party to prove affirmatively that an ordinance is an arbitrary and unreasonable restriction upon the owner's use of his property. Brae Burn, Inc., supra at 432. This burden shifts to the municipality, when, as in the instant case, its action seeks to limit First and Fourteenth Amendment rights.

The Township has not presented proofs that it has by ordinance restricted the installation of other types of television or radio antennas within residential areas. In a recent case a Dade County Circuit Court ruled an ordinance excluding satellite dish antennas in residential areas to be unconstitutional under the Fourteenth Amendment because the city could not articulate, and the court could not find, any rational basis for distinguishing satellite dish antennas from other types of radio and television antennas which were permitted in residential areas:

> ...The Court finds the only legitimate municipally permissible objective sought to be regulated by the City of Coral Gables when it enacted the ordinance was aesthetics.
>
> ...The Court finds no debatable aesthetic or other distinction between the allowable antennas and the satellite dish antennas.
>
> ...the ordinance banning only satellite television antennas bears no substantial relationship to the public health, safety, morals or general welfare of the residents of the City of Coral Gables and its objective as the ordinance is unreasonable, arbitrary, capricious and discriminatory against owners or satellite television antennas.
>
> ...The court finds, for the above set forth reasons, that the ordinance is unconstitutional.

Morgan and Brockway v. City of Coral Gables, Cas. Nos. 83-42793 CA 22, et al. (Eleventh Judicial Circuit for Dade County, Florida, June 18, 1984.)

Regulation of satellite dish antennas also involves First Amendment rights that typically are not a consideration in determining the validity of zoning ordinances. As a

consequence the Court has the duty to strictly scrutinize to insure that the asserted state interest is achieved by the least restrictive means.

The United States Congress has repeatedly declared its public policy to encourage efficient and open communication of ideas within the United States. In establishing the Federal Communications Commission Congress stated as its purpose "to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide and worldwide wire and radio communication service with adequate facilities at reasonabe charges." In 1983 this mandate was expanded to encourage the development of new technologies and services:

> It shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted undert this Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest.

47 U.S.C. Sec. 157 (a).

The FCC acting on this mandate has moved to preempt local zoning regulation to a significant extent in the area of satellite dish antennas. When faced with state efforts to restrict satellite transmissions directly to multiunit dwelling the Commission stated in Earth Satellite Communications that it did:

> ...not wish to preclude a state or locality from exercising jurisdiction over certain elements...that properly may fall within its authority, such as zoning or public safety and health, provided the regulation in question is not undertaken as a pretext for the actual purpose of frustrating achievement of the preeminent federal objective and so long as the nonfederal regulation is applied in a nondiscriminatory manner.

The Commission continues on to emphasize that:

> Local authority...must be exercised so that a local jurisdiction in fact does not inhibit or interfere with the delivery of interstate signals through the exercise of its authority.

In RE Earth Satellite Communications, Inc. 95 F.C.C. 2d 1223 (1983); rec. denied___F.C.C. 2d_____, F.C.C. 84-206 (1984)

The right of consumers to have access to the wide variety of television programming offered by communications satellites is protected by the First Amendment. As the Supreme Court stated in Red Lion Broadcasting Co. v F.C.C., 395 U.S. 367, 390 (1969);

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail...It is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged.

Although courts typically afford local communities some latitude in enacting reasonable land use restrictions, the Supreme Court has stated that:

> the presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any weight, where the zoning regulation trenches on rights of expression protected under the First Amendment.

Shad v. Borough of Mt. Ephriam, 452 U.S. 61, (1981).

Such an ordinance must be narrowly drawn and must have further compelling governmental interests. In Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980), the Court noted:

> The (government) may serve its legitimate interest, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone..." (Citations omitted)

Because satellite dish antennas provide users with the unique ability to receive scores of programming services, some of which are not available through any other means, an ordinance severely restricting or effectively banning dish antennas would leave consumers without adequate alternative means of receiving these services. In this context, an argument that consumers could have access to some of these

services by subscribing to cable television companies will not justify the restriction. In Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 757 n. 15 (1976) the Supreme Court stated:

> We are aware of no general principal that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is. Nor have we recognized any such limitation on the independent right of the listener to receive the information...

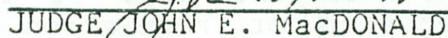
See also Schneider v. State, 308 U.S. 147, 163 (1949).

Under traditional principles of law, the interests served by a zoning ordinance restricting First Amendment rights must be substantial. The Supreme Court has employed a variety of descriptive terms to characterize the quality of the governmental interest necessary to support such a restriction: compelling; substantial; subordinating; paramount; cogent; strong. United States v. O'Brien, 391 U.S. 367, 376-77 (1967). Distinguishing lesser concerns, it stated in Schneider v. State, supra at 161:

> Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities but be insufficient to justify such as diminishes the exercise of (First Amendment) rights so vital to the maintenance of democratic institutions.

HOLDING

Accordingly for the above stated reasons the Complaint against the Defendant is dismissed.



JUDGE JOHN E. MacDONALD

35th District Court
Plymouth, Michigan
September 26, 1985