

IN THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI
SEVENTH JUDICIAL CIRCUIT OF MISSOURI
LIBERTY, MISSOURI

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

1. The Court adopts as findings of fact that stipulation entered into by and between the parties to this action which was filed of record on the 4th day of August, 1982. Said stipulation is incorporated herein by reference as if fully set forth.

4. That plaintiff filed an application for a special use permit on the 24th day of November, 1980, for construction of five radio towers of 150 feet, 138 feet, 118 feet, 75 feet, and 40 feet. Said special use permit application was filed pursuant to Section 18 of the Clay County Zoning Regulations as revised on July 8, 1977, and pursuant to the requirements of Sections 11 and 22 of said Regulations. Plaintiff made his application for special use permit but protested at every stage of the proceedings the constitutionality of Sections 11, 18 and 22 of said Regulations, which require a special use permit and mandate antenna height restrictions. Plaintiff also objected to the procedure under which said hearings were conducted as being pursuant to an unconstitutional ordinance. The County Court of Clay County, Missouri, after conducting various hearings, ultimately passed a resolution on the 20th day of March, 1981, which denied plaintiff's application for the special use permit.

5. Said resolution makes no specific findings of fact or conclusions of law, but simply denies the requested special use permit. Section 18 of the Clay County Zoning Regulations, "EXCEPTIONS BY SPECIAL USE PERMITS", Section D, No. 2, states: "If the action is to deny the application, it shall be sufficient to so state."

6. On March 30, 1981, plaintiff filed a Notice of Appeal pursuant to R.S.MO 49.230. Subsequently the County Court certified to this court all documents and papers on file in the matter, together with the available record in this cause.

7. On April 20, 1981, plaintiff filed its petition in this court. The 1st, 2nd and 3rd paragraphs of plaintiff's petition are admitted by defendant. This court adopts said allegations as additional findings of fact as if fully set forth herein.

8. The Court takes judicial notice that on the 26th day of February, 1982, plaintiff, by deed of conveyance, became the fee simple owner of the subject real estate and retains that ownership interest as of this

date. Plaintiff has resided on the subject tract as his homestead continuously since his purchase of the land in July 1978 from Mr. and Mrs. Larkin. Plaintiff apparently became involved with the Universal Life Church of the Revelation and became a minister thereof. He conveyed the land to the church by Warranty Deed dated February 22, 1979, and was at all times its duly authorized agent and so represented it before the various administrative bodies of Clay County, Missouri from which this appeal arose. As stated, on the 26th day of February, 1982, plaintiff again took title to this property as its full fee simple owner in his own name by deed recorded in Book 1454, Volume 826 in the office of the Recorder of Deeds of Clay County, Missouri.

9. Plaintiff apparently became embroiled in a controversy with the zoning officials of Clay County, Missouri, primarily Mr. Wilford Winholtz, as to what requirements had to be met before he could erect his ham radio towers and antennae. Plaintiff initially erected (without benefit of special use permit or building permit) one 140-foot self-supporting windmill tower upon which he constructed a full-size 40-meter quad antenna. Plaintiff applied for a special use permit retroactively for the construction of this tower. The special use permit was granted for this 140-foot tower. No building permit, however, was ever issued for this tower, although plaintiff submitted certain documents necessary for the issuance of said permit.

10. Subsequently, plaintiff erected four other communications towers at heights between 40 feet and 150 feet. On these towers he placed various single-frequency antennas, all of which were frequencies upon which he was licensed to transmit and receive radio communications by the Federal Communications Commission. After the initial hearing of this matter in August, 1982, plaintiff erected an additional 160-meter antenna the height of which was not in excess of 45 feet. The only special use permit that was ever issued for any of these towers was for the initial 140-foot tower. The Court finds that the initial special use permit

for the 140-foot tower was approved on October 10, 1978, for a three-year period. On or about April 30, 1980, the zoning enforcement officer of Clay County issued a "STOP ORDER" directing plaintiff to "stop the operations of your private amateur radio tower 140 feet high for use in conjunction with your hobby . . ." Ultimately the special use permit that was originally granted on October 10, 1978, for the 140-foot tower was revoked by resolution of the Clay County Court on the 29th day of December, 1980. This revocation was not appealed.

Subsequent to this action, plaintiff, on advice of counsel, although maintaining his objection to the procedure and constitutionality of the subject ordinances, reapplied for a special use permit for all of his towers including the 140-foot tower for which the special use permit had been revoked. As previously indicated, this application was denied, from which denial this appeal was taken.

11. From an examination of the transcript of the hearing before the Clay County Court of February 23, 1981, it appears that none of the testimony at said hearing was taken under oath.

CONCLUSIONS OF LAW AND JUDGMENT ENTRY

1. Section 18 of the Clay County Zoning Ordinance is unconstitutional. This Section is unconstitutionally vague and ambiguous, and incapable of any reasonable or concise understanding by men of common intelligence. Section 18 is so unspecific in its language that it is impossible to tell whether the uses specified do or do not require special use permits. The particular defective language is as follows, to wit:

"Such uses may include the following and similar uses:..."
(Emphasis added.)

Inasmuch as the Clay County Zoning Ordinance is a penal ordinance under which criminal penalties may be imposed, this court must strictly construe its language. In doing so, it is not clear ^{from its language} whether the uses, which include radio, television and microwave towers, do or do not require a special

use permit. The County enforces the ordinance as if special use permits were mandatory. However, the ordinance does not support this enforcement. Nowhere in the ordinance does it specifically state that such use shall require a special use permit.

2. Section 18 is unconstitutionally vague and ambiguous both on its face and as enforced, for the reason that it is enforced as if special use permits are mandatory but only for antennae above 45 feet. However, nowhere in the ordinance is there any exception to the special use permit requirement for antennae (whether radio, television or microwave), based on their being over or under a specified height. This enforcement of Section 18, by the defendant, is arbitrary and capricious, and denies plaintiff and others similarly situated due process and equal protection of the law.

3. The Court finds that Section 18 is unconstitutional because it lacks standards sufficient to assure that the discretionary power of the County to issue special use permits will be exercised in a reasonable and non-arbitrary manner. There are no standards set forth in the ordinance to determine when special use permits should be granted or denied in the case of any of the "suggested" uses for which they arguably could apply. Lacking this definite standard or rule, there is no guard against the arbitrary and uncontrolled exercise of the discretion of the defendant.

4. Section 18 is unconstitutional for the reason that, due to the complete absence of said standard for the granting or denial of special use permits for radio, television or microwave towers, there is no basis for a uniformity of application. Uniformity of application is absolutely necessary and can be achieved only with the adoption of some standard contained within the ordinance itself. Even if defendant had an express power to enact such an ordinance, such ordinance must provide a uniform rule of action. It must contain permanent legal provisions operating generally and impartially so that its enforcement cannot be left to the will or unregulated discretion of county authorities or to any officer

of the county. The Court holds that Section 18 is unconstitutional due to this lack of standards and constitutes an unreasonable exercise of police power. The Missouri courts have uniformly held that the police power be reasonably exercised; that it be certain; that it have uniformity of application in the courts with some standard contained within the ordinance itself, placed there by the legislative body of the county. Without a uniform rule, test or set of standards to satisfy the demands of the law in the above-noted respect, the ordinance fails to pass constitutional requirements.

5. The Court further finds that, when an ordinance or section thereof is adjudged unconstitutional, it is as if it had never been; rights cannot be built up under it; contracts which depend upon that for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. What is true of an act void en toto is true as to any part of an act which is found to be unconstitutional, in which consequently it is to be regarded as having never, at any time, possessed any legal force.

6. The Court specifically finds that the defendant in denying plaintiff's application for a special use permit violated the provisions of Section 536.090 (R.S.MO 1978). Section 18(D.2.) states that:

"If the action is to deny the application, it shall be sufficient to so state."

The actual resolution passed by the defendant denying plaintiff's application for a special use permit complied with Section 18(D.2.) in that it stated no findings of fact or conclusions of law from which this Court may draw any conclusions on review as to the propriety of the decision reached. Therefore, this section on its face, as well as applied, violates the requirements of Section 536.090 (R.S.MO 1978)), because said statute requires that the administrative procedure handled by a court or administrative body exercising quasi-judicial authority include or be accompanied by findings of fact and conclusions of law. However, because of the

Court's determination of the unconstitutionality of the subject section, this finding is not dispositive of the case. Were the statute not found to be unconstitutional, it would be necessary for this Court to otherwise order the remand of the matter for rehearing in accordance with the cited statute.

7. The Court further finds that Sections 11, 18 and 22 of the Clay County Zoning Ordinance are unconstitutional because, as they restrict the height of amateur radio antennae, said sections violate the supremacy of international treaties, Federal statutes and regulations regarding plaintiff's Federally-granted radio privileges which supersede county ordinance providing for blanket height restrictions over instrumentalities of plaintiff's exercise of those privileges, namely his antennae and supporting structures.

8. The Court finds that the Federal Government has acted to preempt and preclude state regulation of radio and its instrumentalities. The Federal Communications Commission, under the authority of the Communications Act of 1934, is the exclusive Federal agency regarding radio and wire communication and their instrumentalities.

9. The Federal Communications Commission, pursuant to the Communications Act of 1934, has promulgated specific height limitations for amateur radio stations, which supersede local restrictions on height. Although local interest dictates that cities may regulate matters related to their interests and health, safety, morals and general welfare, they may not regulate matters that impinge upon Federal interests.

10. The Federal Government has preempted the field of radio and wire communications to provide uniform regulation of interstate and foreign communications by wire and radio, so as to make available to all the people of the United States a rapid, efficient, nationwide and worldwide wire and radio communications service with adequate facilities for the purpose of national defense, promoting safety of life and property and to centralize authority with respect to interstate and foreign commerce.

11. The Federal Communications Commission is authorized to make such distribution of licenses, frequencies, hours of operation and power among the several states and communities as to provide a fair, efficient and equitable distribution of radio service to each of them.

12. The doctrine of Federal preemption is predicated upon either a finding that: (1) the nature of the subject matter regulated and the pervasiveness of the Federal statutory scheme indicates a congressional intent to occupy the entire field; (2) non-Federal regulations impair or impede the execution and accomplishments of the full objectives of Congress; (3) a dominant Federal interest is present. If any of these three tests are answered in the affirmative, the local regulation is preempted.

13. Federal interests involved in amateur radio include: (1) emergency communications; (2) advancement of the radio art; (3) international communications and foreign relations; and (4) FCC policy and procedures.

14. Defendant's height limitation on antennae impinges on each of the Federal interests in that height, based upon plaintiff's unrefuted testimony, is related to reliability and effectiveness of communication. Hence, defendant's ordinance directly affects the effectiveness of communication which, in turn, impinges upon the ability of the amateur radio operator to achieve Federal objectives.

15. Although defendant might properly promulgate the regulations insofar as height is concerned, there is no direct correlation between height and safety or aesthetics. The Court finds that defendant's regulation of height in Sections 11 and 22, and as/Section 18 is without any substantial relationship to the protection of the public health, safety and welfare, lacks any discernable standard by which said height limitations are imposed. Further, it is overly broad in its application and attempts to regulate in a field pervasively legislated by Congress, impairs Federal objectives, and attempts to limit the matter of dominant Federal interest. Therefore, the Court finds that, in order to achieve full accomplishment of Federal objectives regarding amateur radio service,

said service must be assured of having means of achieving reliable efficient and rapid methods of communication as mandated by the Communications Act of 1934. Where said purpose is impeded by local regulations as to height, which are without substantial relationship to the protection of the health, safety and welfare of the community or without sufficient standards in their application, said regulations must fall. The Court finds that Sections 11, 22 and 18 are unconstitutional for these reasons.

16. Sections 11, 18, and 22 of the Clay County Zoning Ordinance are unconstitutional where they provide for blanket height restrictions of amateur antennae because these regulations are overly burdensome on interstate commerce and violate the commerce clause of the United States Constitution.

17. Amateur radio transmissions and receptions are interstate commerce within the meaning of Article I, Section 8 of the Constitution of the United States, providing for the power of Congress to regulate commerce among the several states.

18. Defendant's blanket height restrictions impose limitations on radio transmissions and reception so as to burden their use in interstate commerce in that there is a direct correlation between height and reliability and range of transmission, according to plaintiff's testimony which was unrefuted by defendant. Such blanket height restrictions frustrate Federal purposes in matters regarding amateur radio.

19. Blanket height restrictions unduly burden the reliability and efficiency of communications by restricting the amateur radio operator's ability to communicate. As a result, the Court finds that these height restrictions, as set forth in Sections 11, 18 and 22, purportedly either require that all amateur radio towers shall require a special use permit, regardless of height, or that they are acceptable up to 45 feet, but after that require a special use permit. In either case, both the enforcement and language of the ordinance are unconstitutionally vague and ambiguous. In any case, such blanket height restrictions are, as written, without rational basis, or discriminatory, or overly broad in scope. Clearly the

defendant can protect its interest by a lesser restrictive alternative.

20. Defendant's height restrictions, as written, that permit antenna height only with special use permit or arguably, antennae heights up to 45 feet, place the defendant in a position of being able to arbitrarily enforce the provisions of Sections 11, 18 and 22, such that it either can authorize antennae up to 45 feet, wherein the blanket height restriction applied or, in the alternative, it can preclude all antenna of any sort without the issuance of a special use permit. The Court has previously noted the lack of standards for the granting or denial of the special use permit for amateur radio antennae,^{and} finds that these height limitations, special use requirements of Sections 11, 18 and 22 unduly limit the plaintiff's ability to rapidly, reliably and efficiently communicate, or could, in fact, preclude his ability to communicate, should a special use permit be denied, all of which infringe upon the plaintiff's right of free speech. This impingement upon plaintiff's right of free speech mandates a constitutional presumption against the validity of this "prior restraint. This presumption of invalidity has not been overcome by the defendant. Therefore, the Court finds that Sections 11, 18 and 22 are unconstitutional as a violation of plaintiff's right of free speech, as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

21. The Court finds that free speech is related to the communicative aspects and non-communicative aspects of plaintiff's speech instrumentality (his towers and antennae) and the extent to which the defendant has imposed height restriction and special use permit requirements impinges upon the noncommunicative aspects of plaintiff's right of free speech. Plaintiff's speech carried on in the privacy of this home, is pure non-commercial private speech, which is constitutionally entitled to more protection than commercial speech. It is obvious, from a review of the Clay County Zoning Ordinance, that defendant permits higher antennae heights on commercial property than on non-commercial property. As such, commercial speech is apparently afforded more protection under the defendant's regulatory scheme.

than the plaintiff's private non-commercial speech. Such a permissive attitude toward commercial speech is unconstitutional, in that non-commercial speech constitutionally is afforded more protection than commercial speech. As such, defendant's ordinance is unconstitutional due to the failure to afford equal protection of plaintiff's non-commercial speech without rational justification or standard.

22. It is expressly found that defendant has, at its disposal, lesser restrictive alternatives with which to accomplish any legitimate purposes that it may ultimately have in regulating tower or antenna height which would not work an unconstitutional burden on plaintiff's use of his amateur radio station, and do not unconstitutionally impinge on his rights of free speech.

23. The Court finds that the plaintiff should be entitled to a permanent injunction against the defendant and that the defendant, by said injunction, should be enjoined from the enforcement of Sections 11, 18 and 22 of the Clay County Zoning Ordinance.

24. Plaintiff has proper standing to bring this action and did not violate the provisions of the Clay County Zoning Ordinance in filing his application for special use permit. The Court finds that the defendants at no time during the administrative procedure objected to plaintiff's standing to file the application for special use permit. At all stages of the proceeding, the plaintiff continuously objected to the constitutionality of the subject sections of the ordinance, while seeking approval of the special use permit application. It is clear from the transcript that the County Court was well aware of the fact that plaintiff was acting as a duly authorized agent of the fee simple owners of the subject property and that the application was made for or on behalf of that owner, which was, in fact, the alter ego of plaintiff. Even, assuming arguendo, that plaintiff's application did not comply with the strict technical provisions of the terms of the ordinance, such objections were waived as a result of the defendant's failure to raise those objections in a proper manner at

the earlier stages of this proceeding. It is obvious that the county counselors were present during the conduct of the hearing before the County Court and that the transcript thoroughly reflected that the judges were aware that the land in question was titled in the name of the Universal Life Church of the Revelation and that plaintiff was making the application as their authorized agent. Thus, the court finds that plaintiff's standing before this court and throughout the administrative procedures below, was proper and that any objection thereto has been waived by the defendant.

25. The Court further finds that the defendant's motion that plaintiff's appeal be dismissed on the basis of the plaintiff's unclean hands should be denied. The Court finds that at no time did the defendant ever request a temporary restraining order or temporary injunction or other provisional remedy which would have precluded the plaintiff, if granted, from erecting any other antennae on his property. Through undisputed testimony of the plaintiff, the antennae which he erected were for 160 meters, frequencies upon which he was Federally licensed to operate his amateur radio station and for frequencies which he did not otherwise have an antenna; that the antennae erected were not in excess of 45 feet; that, at his reading of the ordinance, which, at best, is confusing, antennae over 45 feet did not require a special use permit and that he intentionally kept them below 45 feet. For this reason, the Court can find no unclean hands on the part of plaintiff in erecting these antennae. The Court further finds that as to any other matters relating to the erection of this antenna it is without jurisdiction for the reason that defendant has not exercised appropriate administrative remedies which it has available to it relative to the propriety of plaintiff's erection of this most recent antenna on his property. Those would be handled through the procedures outlined under the Clay County Zoning Ordinance and Regulations. However, due to the Court's findings in this case as to the unconstitutionality of Sections 11, 18 and 22, the problem of this antenna would appear now to be moot.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of plaintiff and against defendant and that plaintiff is granted a permanent injunction against the defendant, which injunction shall bar defendant from enforcing the provisions of Sections 11, 18 and 22 of the Clay County Zoning Ordinance for the reasons specified herein, and that court costs shall be taxed against the defendants.



JUDGE, DIVISION TWO

Dated this 25 day of

February, 1983.

ATTEST A TRUE COPY:

JACK H. BIRD, CLERK
CLAY COUNTY CIRCUIT COURT

By Jeanette H. Johnson Deputy