IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

THOMAS BURRUSS, et al.	:	PLEASE DATE, STAMP, AND RETURN
Plaintiffs,	:	
v.	:	**CIVIL ACTION NO. 254316**
JOHN V. EVANS, et al.	:	
Defendants.	:	

STATEMENT OF GROUNDS AND AUTHORITIES IN SUPPORT OF DEFENDANT EVANS' MOTION FOR SUMMARY JUDGMENT

Rule 2-501(a) of the Maryland Rules provides that "[a]ny party may make a motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law."

The "Statement of Material Facts as to which There is No Genuine Dispute" (attached) contains the facts to which this Motion applies. The application of the facts to the law reveals:

The amateur radio towers (antenna support structures) do not meet the legal standard of nuisance.

A. Defendant's conduct is not unreasonable.

To constitute a nuisance, the conduct at issue must be "unreasonable" and it must cause "real, substantial and unreasonable damage to or interference with another person's ordinary use and enjoyment" of property. Maryland Pattern Jury Instructions (MPJI), Civil, 20:1.

Conduct is unreasonable if:

(1) it is motivated by spite or malice; or
(2) it is for the purpose of interfering with the other person's use and enjoyment of his or her land; or
(3) it is prohibited by law or violated regulations which were adopted to control the use of property; or
(4) it is the type of conduct which is unusually hazardous or dangerous; or
(5) it is not suitable for the nature of the area and the use being made of other property in the area; or

(6) it causes interference with the other person's use and enjoyment and the interference could have been reduced or eliminated without too much hardship or too much expense.

MPJI-Cv, 20:2; *See also Herrilla v. Baltimore,* 37 Md. App. 481, 378 A.2d 162 (1977) (city erroneously removed chattels from Plaintiff's dwelling following partial land grant for road widening, interfering with use and enjoyment). There is no evidence to support claims under causes 1, 2, 3 or 4 listed above. We now discuss causes 5 and 6 above.

1. Defendant's conduct is suitable for the nature of the area and the use being made of other property in the area.

The Plaintiffs must establish that the antenna support structures are not suitable for the nature of the area and the use being made of other property in the area. MPJI-Cv, 20:2. But when the land use standard of rural Poolesville, in Montgomery County, limits use to one family dwelling unit per 25 acres (this parcel is 44 acres), the area is ideally suited for antenna support structures. Indeed, the Defendant specifically purchased this parcel for its suitability for amateur radio towers. Plus, the local government already approved the Defendant's towers over Plaintiff's objections. Defendant's Statement of Material Facts ¶ ¶ 1,2, 6, 7.

The Maryland legislature has also stated that numerous structures can be built in the RDT zone (where all parties' land exists) as of right. Defendant's Statement of Material Facts ¶ 3. Ambulance stations, rescue squad buildings, fire stations, churches, adult foster care homes, group day care homes, railroad tracks, and electric power transmission and distribution lines are all structures the legislature has determined to be in the best interests of the public. Montgomery County Zoning Ordinance, Section 59-C-9.3. Land Uses.

2. Defendant's conduct does not cause interference with the Plaintiffs use and enjoyment of their properties.

The only possible argument Plaintiffs may advance is that Evans' antenna support structures cause interference with the use and enjoyment of their property. Yet, the structures do not in any way touch or concern the Plaintiffs' real property. They are located entirely on Defendant's land, do not extend into the airspace of Plaintiffs' land, do not pose any danger of contacting Plaintiffs' land, and do not physically interfere with Plaintiffs' land. Also, given the thin face of Defendant's structures and their overall skeletal nature, Plaintiff's cannot seriously advance a theory that the structures interfere with light.

3. Conduct considered reasonable in other cases.

In numerous cases, varying conduct which could annoy an adjoining property owner has not been considered a nuisance. *See Feldstein v. Kammauf,* 209 Md. 479, 121 A.2d 716 (1956) (junk yard); *Leatherbury v. Gaylord Fuel Corp.,* 276 Md. 367, 347 A.2d

826 (1975) (limestone quarry); *Melnick v. C.S.X. Corp.*, 68 Md. App. 107, 510 A.2d 592 (1986), *aff'd*, 312 Md. 511, 540 A.2d 1133 (1988) (overhanging tree branches); *Slaird v. Klewers*, 260 Md. 2, 271 A.2d 345, 49 A.L.R. 3d 538 (1970) (swimming pool); *Aravanis v. Eisenberg*, 237 Md. 242, 206 A.2d 148 (1965) (storage of flammable liquids).

Defendant's structures do not contain the potential for danger of flammable liquids, the potential for noise of a limestone quarry, or the actual interference of overhanging tree branches.

4. Conduct considered unreasonable in other cases.

An unlawful business may be a nuisance despite a neighbor's legal ability to complain of a criminal act. *Whitaker v. Prince George's County*, 307 Md. 368, 514 A.2d 4 (1986) (house of prostitution is a per se nuisance). Yet Evans received full permission from local authorities prior to construction. The towers are not criminal and were not constructed for any business purpose, nor for profit.

Loud noise that continues beyond a reasonable time can be a nuisance. *See Meadowbrook Swimming Club, Inc. v. Albert*, 173 Md. 641, 197 A. 146 (1938); *see also Gorman v. Sabo*, 210 Md. 155, 122 A.2d 475 (1956) (loud radio played deliberately); *Air Lift, Ltd. v. Board of County Comm'rs*, 262 Md. 368, 278 A.2d 244 (1971) (music festival and large crowds). Evans' structures make no noise audible on Plaintiffs' property.

The emission of any gas or particulate matter that could potentially be hazardous to a neighbor's health has been held to be a nuisance. *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 20 A. 900 (1890) (fertilizer fumes). But Evans' structures do not emit fumes or gases, nor have they ever in the past, nor will they ever in the future. They are made of galvanized steel and do not require ventilation of any kind.

An offensive or malodorous smell can be considered a nuisance. *See Bishop Processing Co. v. Davis*, 213 Md. 465, 132 A.2d 445 (1957) (slaughterhouse odor). These (and all) antenna support structures are odorless.

Any activity that contaminates groundwater is a nuisance. *Exxon Corp. v. Yarema*, 69 Md. App. 124, 516 A.2d 990 (1986), *cert. denied*, 309 Md. 47, 522 A.2d 392 (1987) (gasoline leaking into groundwater). The structures are not connected to underground piping, nor do they have any potential to leak or leach any substance.

No Maryland case has ever held that structures anything like the Defendant's amateur radio towers are a nuisance.

B. There is no real, no substantial, and no unreasonable, damage or interference with Plaintiffs ordinary use and enjoyment of property.

No case can be found to the contrary. MPJI-Cv, 20:3 defines substantial interference as that which "would cause an ordinary person physical injury, mental

discomfort or sickness, or if it would materially lessen the value of or cause damage to the property." *See also Fantasy Valley Resort, Inc. v. Gaylord Fuel Corp.*, 92 Md. App. 267, 607 A.2d 584, *cert. denied*, 328 Md. 237, 614 A.2d 83 (1992) (a nuisance must materially diminish the property's value and seriously interfere with ordinary comfort and enjoyment).

1. Aesthetic disagreement does not create a nuisance.

The only conceivable interference with ordinary use and enjoyment would be the mere visibility of the Evans antenna support structures.

A complaint for nuisance may not be based upon aesthetic displeasure of a plaintiff over the use by a neighbor of the neighbor's own property. If otherwise, the courts would be deluged with the personal complaints of property owners that their neighbor's use of property offends them. *Bostick v. Smoot Sand & Gravel Corp.*, 154 F.Supp. 744, *761-762 (D.C. Md. 1957) (aesthetic aversion does not create a nuisance) is dispositive. The *Bostick* court wrote:

> Plaintiffs complain ... of ... the [a]esthetic displeasure at the physical appearance of defendant's equipment ....**The [a]esthetic aspects, even although viewed sympathetically by the court certainly do not rise to the point of actionable nuisance in this case[ ], even if they might ever do so, as to which there is considerable doubt.** (Emphasis added.)

Bostick, 154 F.Supp. at 762.

Maryland precedent demonstrates that nuisance claims on purely aesthetic grounds should not be permitted for sound public policy reasons. There is no Maryland case that supports such a cause of action. Rather, the nuisance law of Maryland requires such a level of disturbance that it will:

> naturally cause actual physical discomfort to persons of ordinary sensibilities, tastes, and habits, such as in view of the circumstances of the case is unreasonable and in derogation of the rights of the party (citations omitted) subject to the qualification that it is not every inconvenience that will call forth the restraining power of a court.

Bostick at 762; *see also Meadowbrook Swimming Club*, 173 Md. at 645 (playing of loud music). The injury must be of such a character as to diminish materially the value of the property as a dwelling and seriously interfere with the ordinary comfort and enjoyment of it. *Bostick* at 762.

The Defendant contends that the towers are majestic. The Plaintiffs have a different view. Plaintiffs' argument is simply that when they look in the direction of the Evans property, they do not like to see the structures. This claim is analogous to a complaint over the color of a house painted purple. Plaintiffs' view does not create a

cause of action. Permitting a nuisance claim in these circumstances would turn courts into style review boards.

2. Material devaluation of Plaintiffs' property.

Interference is substantial if it would...materially lessen the value or cause damage to the property. MPJI-Cv, 20:3. There has been no evidence presented, nor can there be any valid evidence presented, that the structures have materially diminished the value of the Plaintiff's property. The Complaint makes a slight reference to such a devaluing, but offers nothing further than an allusion to "irreparable injury." Complaint ¶ 29.

3. No proof of wrongful act.

Proof of damage, loss or inconvenience alone does not establish a nuisance as there must also be evidence of a wrongful act. *Toy v. Atlantic, Gulf & Pacific Co.*, 176 Md. 197, 4 A.2d 757 (1939), *Aravanis v. Eisenberg*, 237 Md. 242, 206 A.2d 148 (1965). Ballentine's defines *wrongful act* as "[a]ny act which in the ordinary course will infringe upon the rights of another to his damage, unless it is done in the exercise of an equal or superior right." Ballentine's Law Dictionary (3d ed. 1969). The construction of the amateur radio towers has been conclusively established as legal. It is far from a wrongful act.

C. Federal law supports the public function of amateur radio.

Amateur radio towers serve the public interest, including a national security function. Regulations of the Federal Communications Commission (FCC) concerning amateur radio towers provide that "a local ordinance or zoning regulation must make reasonable accommodation for amateur communications and must constitute the minimum practicable regulation to accomplish the local authority's legitimate purpose." 47 C.F.R. §97.15(b).

The regulation cites FCC Order PRB-1, 101 FCC 2d 952 (1985) for details. PRB-1 (Memorandum Opinion and Order) was issued in response to a request by the American Radio Relay League, Inc. (ARRL) asking the FCC to explicitly preempt all local ordinances that preclude or significantly inhibit effective and reliable amateur radio communications. While the FCC declined to explicitly preempt all state and local regulations, it stated that "local regulations which involve placement, screening, or height of antennas based on health, safety or aesthetic consideration must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose."

In the Memorandum Opinion and Order (hereinafter "FCC Order") the reasons for the FCC regulation become apparent. The Department of Defense (Paragraph 10) emphasized "that continued success of existing national security and emergency preparedness telecommunications plans involving amateur stations would be severely

diminished if state and local ordinances were allowed to prohibit the construction and usage of effective amateur transmission facilities."

The American Red Cross (Paragraph 11) "believes that without amateurs' dedicated support, disaster relief operations would significantly suffer and that its ability to serve disaster victims would be hampered."

The FCC concludes (Paragraph 24) that "the amateur radio service provides a reservoir of trained operators, technicians and electronic experts who can be called on in times of national or local emergencies." Further, "the Amateur Radio Service also provides the opportunity for individual operators to further international goodwill." Therefore, the FCC finds that "State and local regulations that operate to preclude amateur communications in their communities are in direct conflict with federal objectives and must be preempted."

D. Conclusion.

Maryland, case law supports the notion that a nuisance must cause actual interference with one's use and enjoyment of land. A nuisance can be proven by a finding that one's conduct is unreasonable, or that a real, substantial, and unreasonable damage or interference with another's property occurs due to one's conduct. Aesthetic disagreement does not create a nuisance.

Montgomery County zoning ordinances support the Defendant's use of land. Federal authority not only supports the Defendant's use of land, but also goes so far as to mandate that local government must make reasonable accommodations to allow for the Defendant's radio towers.

The idea of personal freedom existed long before the formation of the United States. Man has always found that what one person considers to be art, another considers drivel; what one calls majestic, another calls a nuisance. David Hume's *Essays, Moral and Political,* 1742, include this wisdom: "Beauty in things exists merely in the mind which contemplates them."

This is the lesson at hand. Hume's words are oft repeated because they ring as true in 2008 as they did hundreds of years ago. People will always disagree over what others should do with their property and their lives. But our nation was founded on equality in all things: equality of people, equality of justice, and equality of tolerance. No one ever said that a person must tolerate that which harms him; but to allege harm where none exists simply because of intolerance for another's tastes and affections defies the philosophies that this state and this country hold to be true.