MARY BAY *v.* ZONING BOARD OF APPEALS OF THE TOWN OF NEW CANAAN

D.B. CV91 0113778 S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF STAMFORD – NORWALK, AT STAMFORD

August 31, 1993, Decided

September 9, 1993, Filed

MEMORANDUM OF DECISION

The plaintiff, Mary Bay, appeals the decision of the defendant Zoning Board of Appeals of the Town of New Canaan [the "ZBA"], which denied her appeal from a decision of the New Canaan Planning and Zoning Commission [the "Commission"] in denying the plaintiff's application for a zoning permit for two non-commercial transmitting and receiving amateur radio antennas.

The instant action involves an appeal, pursuant to General Statutes § 8-8, from a decision of the ZBA denying the plaintiff's request for the installation of two non-commercial radio antennas. On June 22, 1990, the plaintiff applied to the Commission for a zoning permit for the installation of two non-commercial amateur radio transmitting antennas. (Return of Record [hereinafter "R.O.R."], Exhibits 8, 9). The plaintiff proposed to add one additional antenna to an existing antenna support structure [the "additional antenna"][1], and to install a new 57-foot high vertical antenna on [*2] the ground [the "vertical antenna"]. (R.O.R., Exhibit 9).

A public hearing before the Commission concerning the application was opened on July 24, 1990, and closed that same evening. (R.O.R., Exhibit 12). At a public hearing on September 25, 1990, the Commission agreed to vote separately on the request for the additional antenna and the request for the vertical antenna. (R.O.R., Exhibit 22). The Commission voted five to three (5-3) against the request for the additional antenna and six to two (6-2) against the vertical antenna. (R.O.R., Exhibit 22).

On October 1, 1990, the plaintiff appealed the Commission's decision to the ZBA. (R.O.R., Exhibit 24). A public hearing concerning the appeal was held on November 5, 1990. (R.O.R., Exhibit 29). The hearing [*3] was continued to December 3, 1990. (R.O.R., Exhibits 29, 31). At the December 3, 1990 public hearing, a vote was taken, four to one (4-1), to deny the appeal; (R.O.R., Exhibits 31, 32); "as the Commissions Action had been procedurally proper

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[1] On February 7, 1989, the Commission approved the plaintiff's application for the existing support structure. (R.O.R., Exhibit 2, Paragraph 1). The antenna support structure, a 72-foot retractable tower, currently supports one antenna. (R.O.R., Exhibit 9).

and the board was unwilling to substitute its judgement [sic] for that of the Commission in a matter where reasonable men might differ." (R.O.R., Exhibit 31).

The plaintiff instituted the instant appeal on December 21, 1990. The complaint alleged:

> The denial of the Plaintiffs' appeal was illegal, arbitrary and an abuse of discretion and in violation of the Boards authority and duties in that:
>
> (a) The Defendant Board failed to state upon its records the reasons for its denial of Plaintiff's application.
>
> (b) The Defendant Board was required to reverse the action of the Planning and Zoning Commission denying a Zoning permit to Plaintiff because the Planning and Zoning Commission had no power to decide that non-commercial amateur radio transmitting and receiving antennas are not an accessory use to a one family residence under the New Canaan Zoning Regulations.
>
> (c) The Defendant Board acted in contravention of federal law [*4] which prohibits local authorities from precluding amateur radio communications and which requires such officials to use the minimum practical regulation of such antennas.
>
> (d) The Defendant Board was required to reverse the action of the Planning and Zoning Commission denying a Zoning permit to Plaintiff because the Planning and Zoning Commission acted improperly and erroneously.

(Plaintiff's Complaint, Para. 9; Plaintiff's Amended Complaint, Para. 9).

On September 18, 1992, the plaintiff filed an amended complaint alleging three additional grounds for appeal. (Plaintiff's Amended Complaint, Para. 9(d), (e) and (f)). On September 23, 1992, the defendant filed a motion to strike the three additional grounds, which was granted by the court, Lewis, J., on November 30, 1992. Thus, the only remaining grounds for appeal are those alleged in the original complaint.

Jurisdiction

It is well established that "a statutory right of appeal from a decision of an administrative agency may be taken advantage of only by strict compliance with the statutory provisions by which it is created." Simko *v.* Zoning Board of Appeals, 206 Conn. 374, 377, 538 A.2d 202 (1988) (Simko [*5] II), quoting Simko *v.* Zoning Board of Appeals, 205 Conn. 413, 419, 533 A.2d 879 (1987) (Simko I). "[Such] provisions are mandatory and jurisdictional in nature, and, if not complied with, the appeal is subject to dismissal." *Id.* General Statutes § 8-8 provides, in pertinent part, that "any person aggrieved by any decision of a board may take an appeal to the superior court…" General Statutes § 8-8(b).

Aggrievement

Aggrievement is a jurisdictional question and a prerequisite to maintaining an appeal. Winchester Woods Associates *v.* Planning and Zoning Commission, 219 Conn. 303, 307, 592

A.2d 953 (1991). The test for aggrievement is two-fold:

> "First, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in the subject matter of the decision, as distinguished from a general interest, such as the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the decision."

Nader *v.* Altermatt, 166 Conn. 43, 51, 347 A.2d 89 (1974). *Id.*, [*6] 07-08, quoting Connecticut Business and Industry Assn., Inc. *v.* Commission on Hospitals and Health Care, 214 Conn. 726, 730, 573 A .2d 736 (1990); State Medical Society *v.* Board of Examiners in Podiatry, 203 Conn. 295, 299-300, 524 A.2d 636 (1987).

> "Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest… has been adversely affected."

Hall *v.* Planning and Zoning Commission, 181 Conn. 442, 445, 435 A.2d 975 (1980). An owner of the subject property is aggrieved and entitled to bring an appeal. Winchester Woods Associates, supra, 308.

The court concludes that the plaintiff is aggrieved. The record establishes that the plaintiff is the owner of the subject property. (See, R.O.R., Plaintiff's Exhibit A dated April 22, 1992). In addition, at a hearing before the court, the court, Sylvester, J., found that the plaintiff as owner of the subject property was aggrieved. Therefore, the court finds that the plaintiff is aggrieved.

Timeliness

Persons aggrieved may appeal from an action or decision of a zoning board of appeals "within fifteen days from the date the notice of the decision was [*7] published." General Statutes § 8-8(b). This court finds that the ZBA's decision was published on December 6, 1990. (Supplemental Stipulation dated July 1, 1993). The New Canaan Town Clerk and Edward Deadrick, the Chairman of the ZBA, were both served on December 20, 1990, within the fifteen day appeal period. Therefore, the court concludes that the appeal is timely.

Scope of Review

The trial court "may grant relief on appeal only where the local authority has acted illegally or arbitrarily or has abused its discretion." Raybestos-Manhattan, Inc. *v.* Planning and Zoning Commission, 186 Conn. 466, 470, 442 A.2d 65 (1982). "It is not the function of the court to retry the case. Conclusions reached by the commission must be upheld by the trial court if they are reasonably supported by the record." Primerica *v.* Planning and Zoning Commission, 211 Conn. 85, 96, 558 A.2d 646 (1989). "The question is not whether the trial court would have reached the same conclusion but whether the record before the agency supports the decision reached." *Id.*, citing Calandro *v.* Zoning Commission, 176 Conn. 439, 440, 408 A.2d 229 (1979).

Where the zoning authority has stated the reasons [*8] for its decision, the court is not at liberty to probe beyond them. (Citations omitted.) Central Bank for Savings *v.* Planning and Zoning Commission, 13 Conn. App. 448, 457, 537 A.2d 510 (1988). "The action of the

commission should be sustained if even one of the stated reasons is sufficient to support it." Primerica, supra, 96. "The burden of proof is on the plaintiff to demonstrate that the board acted improperly." Spero *v.* Zoning Board of Appeals, 217 Conn. 435, 440, 586 A.2d 590 (1991), citing Adolphson *v.* Zoning Board of Appeals, 205 Conn. 703, 707, 535, 535 A.2d 799, A.2d 799 (1988). Although raised in the complaint, issues which are not briefed are considered abandoned. State *v.* Ramsundar, 204 Conn. 4, 16, 526 A.2d 1311 (1987); DeMilo v West Haven, 189 Conn. 671, 681-82 n.8, 458 A.2d 362 (1983).

Discussion

Plaintiff's Argument that the ZBA Was Required to Reach the Merits of the Plaintiff's Appeal

The plaintiff asserts that the ZBA's decision to limit its review to the procedural correctness of the Commission's decision was illegal and arbitrary because it denied the plaintiff the full administrative relief afforded the plaintiff [*9] under the General Statutes and the New Canaan Zoning Regulations. General Statutes § 8-6 provides, in pertinent part, that:

> the zoning board of appeals shall have the following powers and duties: (1) To hear and decide appeals where it is alleged that there is an error in any order, requirement or decision made by the official charged with the enforcement of this chapter or any bylaw, ordinance or regulation adopted under the provisions of this chapter…

General Statutes § 8-6(1). General Statutes § 8-7 provides, in pertinent part, that:

> an appeal may be taken to the zoning board of appeals by any person aggrieved… Such board shall… hear such appeal and give due notice thereof to the parties… Such board may reverse or affirm wholly or partly or may modify any order, requirement or decision, appealed from and shall make such order, requirement or decision as in its decision shall be made in the premises and shall have all the powers of the officer from whom the appeal has been taken…

General Statutes § 8-7. Section 60-23.3 of the New Canaan Zoning

Regulations tracks the statutory language of §§ 8-6 and 8-7 and provides, [*10] in relevant part:

> The Board shall have and exercise the following powers:
>
> A. The Board shall hear and decide appeals from, and may review, modify or reverse any order, requirement or decision made by an administrative officer charged with the enforcement of any of these regulations…
>
> B. The Board may reverse or affirm, wholly or partly, or may modify the requirement of any decision appealed from as in its opinion should be made in the premises, and shall have all the powers of the officer from whom the appeal shall have been taken.

(R.O.R., Exhibit 55, New Canaan Zoning Regulations § 60-23.3 (A), (C)).

"The power of the [ZBA] is defined and limited by the law from which it derives its origin and by the ordinances enacted pursuant to that law." Celentano, Inc. *v.* Board of Zoning Appeals, 149 Conn. 671, 67, 184 A.2d 49 (1962); see also Farnsworth *v.* Windsor, 150 Conn. 484, 487 190 A.2d 915 (1963). "The board has no power to enlarge or limit the scope of the authority granted it. Any attempt on its part to establish standards to be applied in cases before it could have no legal force or effect." *Id.* "The board is charged with the obligation [*11] of performing its functions and responsibilities in accordance with, and subject to, the conditions and limitations imposed by the source from which it derives its authority." *Id.*

Although the ZBA stated that:

> The Board requested an opinion from the Town Attorney as to whether it could consider this appeal from the procedural aspects as opposed to the merits of the Commission's decision, and had been advised that they could. … It was then voted to deny the appeal, as the Commission's Action had been procedurally proper…;

(R.O.R., Exhibit 31); the ZBA also stated that:

> It was the feeling of the Board that the Commission had appropriately considered the facts including Sections 60-4.1.A through HH in reaching its decision to deny the application "…for the reason that the addition of a second radio tower, and the extension of the existing tower by a third, ten foot tower, is not a use customarily or reasonably incident to the uses set forth in subsections A through HH of Section 60-4.1 of the Zoning Regulations. The additional height was not proven to be necessary."… and the Board was unwilling to substitute its judgement [*12] [sic] for that of the Commission in a matter where reasonable men might differ.

(Emphasis in original.) (R.O.R., Exhibit 31). Although the ZBA stated that it was limiting its review to the procedural aspects of the Commission's actions, the ZBA went on to adopt the Commission's decision that amateur radio antennas are not accessory uses to the uses set forth in subsections A through HH of § 60-4.1. Accordingly, its is obvious to the court that the ZBA did consider the merits of the plaintiff's application.

Plaintiff's Argument that Amateur Radio Antennas Are Accessory Uses

The plaintiff asserts that an amateur radio antenna is an accessory use and, therefore, permitted under the New Canaan Zoning Regulations. Section 60-4.1 of the New Canaan Zoning Regulations provides, in relevant part:

> In a Residence Zone… no building, land or premises shall be used and no building shall be erected or altered which is arranged, maintained or designated to be used except for a single-family dwelling or one (1) or more of the following uses:
>
> …
>
> AA. Accessory building… and uses customarily or reasonably incident to the uses set forth in Subsections A [*13] through HH of this section. (Note: Permitted accessory uses, subject to zoning permit.) …

(Emphasis added.) (R.O.R., Exhibit 55, New Canaan Zoning Regulations § 60-4.1.AA). The ZBA and the Commission found that the proposed amateur radio antennas were not uses "customarily or reasonably incident to the uses set forth in Subsections A through HH…" (Emphasis added.) (R.O.R., Exhibit 31).

Subsections A through HH provide for the following uses:

(1) Professional offices or home occupations;
(2) Greenhouses;
(3) Nurseries;
(4) Farming;
(5) Churches and parish houses;
(6) Convents and monasteries;
(7) Social, cultural and recreational uses serving the community need;
(8) Clubs, philanthropic or eleemosynary institutions;
(9) Boarding houses;
(10) Two-family houses;
(11) Caretaker or guest house;
(12) Private schools, colleges and universities;
(13) Nursery schools;
(14) Family daycare homes;
(15) Wildlife sanctuaries and conservation areas;
(16) Certain public utility uses;
(17) Governmental buildings;
(18) Railways;
(19) Accessory buildings;[2]
(20) Off-street parking;
(21) Signs;
(22) Recreational vehicles;
(23) Tennis courts and other outdoor recreational uses; [*14]
(24) Windmills; and
(25) Satellite dishes.

(R.O.R., Exhibit 55, New Canaan Zoning Regulations § 60-4.1.A - HH). Clearly, an amateur radio antenna is not customarily or reasonably incident to any of the aforementioned uses.

The plaintiff, however, is not arguing that an amateur radio antenna is an accessory use to any of the enumerated uses, but rather claims that an amateur radio antenna is a permitted accessory use to a single-family residence. The New Canaan Zoning Regulations define "accessory use" as "a use which is customarily incidental and subordinate to the principal use of a lot or a [*15] building and located on the same lot therewith." (R.O.R., Exhibit 55, New Canaan Zoning Regulations § 60-25.1).

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[2] The zoning regulations define "accessory building" as "a building the use of which is customarily incidental to that of the, principal building on the same lot." (R.O.R., Exhibit 55, New Canaan Zoning Regulations § 60-25.1). "Building" is defined as "each of the independent units into which a structure is divided by party walls, or otherwise…" (R.O.R., Exhibit 55, New Canaan Zoning Regulations § 60-25.1).

“ ‘Incidental’… incorporates two concepts. It means that the use must not be the primary use of the property but rather one which is subordinate and minor in significance… It must also be attendant or concomitant [to the property].” Lawrence *v.* Zoning Board of Appeals, 158 Conn. 509, 512, 264 A.2d 552 (1969). A customary use is one which “has commonly, habitually and by long practice been established as reasonably associated with the primary use.” *Id.*, 512-13. “Some of the factors which should be taken into consideration are the size of the lot in question, the nature of the primary use, the use made of the adjacent lots by neighbors and the economic structure of the area.” *Id.*, 513. “Although [customarily] is used… as a modifier of ‘incidental’ it should be applied as a separate and distinct test [from incidental].” *Id.*, 512.

In general, “whether a particular use qualifies as an accessory use is ordinarily a question of fact for the zoning authority, to be determined by it ‘with a liberal discretion’.” Upjohn Co. *v.* Planning & Zoning Commission, [*16] 224 Conn. 82, 89, 616 A.2d 786 (1992), citing Lawrence, supra, 513-14. “The sufficiency of the evidence to support a finding, however, clearly presents a question of law.” Zachs *v.* Zoning Board of Appeals, 218 Conn. 324, 331, 589 A.2d 351 (1991).

The court concludes that the record does not support a finding that an amateur radio antenna is not an accessory use as defined under the New Canaan Zoning Regulations. There was evidence introduced at the public hearing that there are over 500,000 amateur radio operators in the United States. (R.O.R., Exhibits 46, 53; Reconstructed Transcript dated May 22, 1992 [hereinafter “reconstructed Transcript”], p. 57). There are 42 amateur radio operators in New Canaan, many of whom have more than one antenna or antennas of equal or greater height. (R.O.R., Exhibits 46, 47, 48 53; Reconstructed Transcript, p. 49). In addition, evidence was before the ZBA that the Commission had previously approved the existing antenna and support structure. (R.O.R., Exhibits 2, 9). The evidence supports the finding that an amateur radio antenna is an accessory use as defined under the New Canaan Zoning Regulations.

Furthermore, the plaintiff presented [*17] case law from other jurisdictions holding that amateur radio antennas are valid accessory uses customarily and reasonably incident to a single-family residence. (R.O.R., Exhibit 25; Reconstructed Transcript, p. 50). The majority of courts hold that an amateur radio antenna is an accessory use to a single-family residence. Town of Paradise Valley *v.* Lindberg, 27 Ariz. App. 70, 551 P.2d 60 (1976); Wright *v.* Vogt, 7 N.J. 1, 80 A.2d 108 (1951); Skinner *v.* Zoning Board of Adjustment, 80 N.J. Super. 380, 193 A.2d 861 (1963); Village of St. Louis Park *v.* Casey, 218 Minn. 394, 16 N.W.2d 459 (Minn. 1944); Dettmar *v.* County Board of Zoning Appeals, 28 Ohio Misc. 35, 273 N.E.2d 921 (1971); Appeal of Lord, 368 Pa. 121, 81 A.2d 533 (1951). Extensive, research has found only one court which has held that an amateur radio tower was not an accessory use. Presnell *v.* Leslie, 3 N.Y.2d 384, 144 N.E.2d 381, 165 N.Y.S.2d 488 (1957). The court concludes however, that Presnell is distinguishable from the instant action.

In Presnell *v.* Leslie, supra, the court held that a 44-foot radio tower was not an accessory use customarily incidental to residential use. The [*18] court based its decision on the fact that there was no evidence that such a structure had ever existed in the community or any of the neighboring suburbs. *Id.*, 382-83. The court also based its decision, to some extent, on the probability that it would be a hazard to children and an eyesore in an exclusively residential community. *Id.*, 383-84. In the instant action, there was a showing that amateur radio

antennas existed in New Canaan. (R.O.R., Exhibits 46, 47, 48, 53; Reconstructed Transcript, p. 49). In addition, there was no evidence that the existing antenna tower or the proposed additional antennas would be either an eyesore or a hazard to children. Although various neighbors had stated that the additional antennas may be a hazard to neighborhood children and that the existing antenna was an eyesore, there was not evidence submitted other than their bare allegations of such. In fact, evidence presented established that the existing antenna was almost invisible from the roadway and that the present tower was surrounded by a 6-foot chain link fence. (R.O.R., Exhibits 2, 54; Reconstructed Transcript, pp. 98, 103-04, 109).

In support of its decision the ZBA argues that multiple antennas [*19] are not customarily or reasonably incident to a single-family residence. However, there was evidence before the ZBA showing that a number of the 42 amateur radio operators in New Canaan have multiple antennas. (Plaintiff's Consolidated Supplemental Brief, Exhibit 6, Hearing Transcript dated November 5, 1990, pp. 18-19; Reconstructed Transcript, pp. 49, 69; R.O.R., Exhibit 48). The court concludes that the ZBA's finding that amateur radio antennas, or multiple antennas are not an accessory use to a single-family residence is not supported by the record.

Plaintiff's Argument that the Height Was Necessary

The plaintiff argues that the evidence presented before the ZBA established that the height of the proposed antennas were proven to be necessary. Section 60-14.11 of the New Canaan Zoning Regulations provides, in pertinent part, that "the height limitations of these regulations shall not apply to… noncommercial transmitting or receiving antennas… Such [antennas], however, shall be erected only to such heights as are necessary to accomplish the purpose they are intended to serve…" (R.O.R., Exhibit 55, New Canaan Zoning Regulations § 60-14.11). The record [*20] establishes that the plaintiff presented sufficient evidence to prove that the proposed heights were necessary. (Reconstructed Transcript, pp. 66-76). The plaintiff submitted documentation, with respect to the additional antenna, to the ZBA showing that the frequencies of the existing antenna; (R.O.R., Exhibit 19); and, therefore, the height required is the same as that of the existing antenna. (Reconstructed Transcript, pp. 66-68). The plaintiff explained to the ZBA that there were only two options available. (Reconstructed Transcript, p. 66).

The plaintiff stated that one option was to erect a second tower to hold the additional antenna, and the second option was to place it above the existing antenna. (Reconstructed Transcript, p. 66-67). The plaintiff further explained that in order to place it above the existing antenna, the antennas would have to be separated by at least nine (9) feet or else the antennas would interact with each other. (R.O.R., Exhibits 19, 20; Reconstructed Transcript, pp. 71-72, 76). In addition, those in opposition submitted no evidence that the height was not necessary. The court concludes that the evidence presented established that the proposed height [*21] of the additional antenna, ten (10) feet above the existing antenna, was necessary to accomplish the intended purpose of the antenna.

In addition, the plaintiff submitted evidence that a full-size vertical antenna would require a height ranging from 63 to 123 feet. (R.O.R., Exhibit 21; Reconstructed Transcript, p. 74). The plaintiff further submitted documentation that the proposed vertical antenna is the first, and only, compact three-band antenna on the market. (R.O.R., Exhibit 19; Reconstructed

Transcript, p. 76). The court concludes that the plaintiff submitted sufficient evidence to show that the proposed height of the vertical antenna was necessary. There was no evidence submitted which showed that the height of the vertical antenna was not necessary. Accordingly, the court concludes that the ZBA's denial of the plaintiff's appeal on the ground that the height was not proven to be necessary is not supported by the record.

The court concludes that neither of the ZBA's grounds for denying the plaintiff's appeal is supported by the record. Since the court finds that the ZBA's denial of the plaintiff's appeal is not supported by the record, the court need not address the plaintiff's [*22] other grounds for appeal. Accordingly, the plaintiff's appeal is sustained.

LEONARD M. COCCO, JUDGE

Note: Case may also be found at 1993 Conn. Super. LEXIS 2345.