IN THE PARMA MUNICIPAL COURT

CUYAHOGA COUNTY, OHIO

CITY OF PARMA HEIGHTS	)	CASE NO. 90-CR-B-01904
	)	
Plaintiff	)	
	)	
-vs-	)	JUDGMENT
	)	
STANLEY HAASE	)	WITH
	)	
Defendant	)	OPINION

Defendant has been charged by the City of Parma Heights with violation of C.O. 1171.01, entitled "Zoning Use Districts-Class Districts."He is also charged with a violation of C.O. 634.01, entitled "Public Nuisance."

Ordinance 1171.01 restricts property within the Class A district to residential use and permits customary uses incidental to residential purposes.

Ordinance 634.01 was enacted for the purpose of abating public nuisances deemed to exist when: a).

i). there is allowed or caused any loud, unnecessary or unusual noise which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of others."

Since the commencement of the action the proceedings have been continued, by the mutual agreement of both parties, while attempts to resolve the matter were undertaken. These attempts failed.

Succinctly stated, the Defendant is an amateur radio operator. The operation of Defendant's transmitter often causes radio frequency interference (RFI). RFI arises when the signal radiated by the transmitter is picked up by an electronic device (radio, television, telephone, etc.) in such a manner that it prevents the clear reception of other desired signals or causes malfunction of such other electronic devices. RFI problems are very often associated with amateur stations in residential areas.

The facts in this case are not in dispute and are set forth in the 15 stipulations approved by the City and Defendant and set forth in the record of this case. In summary they establish that the Defendant holds a valid amateur radio license issued by the Federal Communications Commission which authorizes Defendant to engage in the activities complained of. Pursuant to an application filed by the Defendant a building permit was issued by the City of Parma Heights, allowing installation of a 20' radio transmitter which can be raised to a height exceeding 50 feet. The Defendant has been operating his station since 1986. In 1988 neighbors in the area petitioned to the City to prohibit Defendant's radio transmission citing severe and frequent RFI to their television, radio, stereo, telephone and other equipment and appliances. Since that time, substantial time, effort and funds have been expended in attempts to relieve the problem. Studies were

undertaken, recommendations made, and remedial measures implemented, all without avail. Additionally, action from the FCC was sought and received. Defendant was placed on "quiet hours" between 6:00P.M. and Midnight and asked to reduce the power transmitting his signal. All restrictions were lifted however, on November 30, 1989.

The question before the Court is: The guilt or innocence of a defendant charged with misdemeanor offenses in violation of a). the zoning code, and b). maintaining a nuisance.

Addressing the alleged zoning violation first, we find that the litigation of record, in other jurisdictions, on similar cases arises through attempted enforcement of zoning laws by declaratory judgment, permit denial, and injunctive relief. All civil proceedings distinctly apart from the criminal action herein pursued. Criminal ordinances must be strictly construed in favor of the Defendant. The penal provisions of a zoning ordinance must be strictly construed in favor of an accused violator. Lima v. Hempker, 118 O App 321, 25 OOp 2d 186. In view of the approval of Defendant's application to operate an amatuer radio station by the City and the F.C.C. the Court cannot conclude that Defendants use of his property violates the zoning ordinance of the City of Parma Heights. Dettmar v. County Board of Zoning, Appeals 28 Ohio Misc. 25, 273 N.E. 2d 921 (1971).

The City contends that the operation of Defendant's transmitter causes interference with electronic equipment of Defendant's neighbors and annoys, disturbs their repose, health and peace causing distress, discomfort, incovenience and annoyance. The City prosecutes Defendant on the theory that the RFI constitutes an actionable public nuisance.

The FCC has permitted and encouraged the amateur radio service to be self-regulated and is urging a legislative policy of self policing and discipline. At the same time the FCC acknowledges that the number of complaints of RFI has grown tremendously. Notwithstanding these opposing factors, the FCC contends that "this increasing problem, which plagues so many of the nations consumers," (RFI incidents) is within the exclusive jurisdiction of the FCC and state and local regulation of such phenomena is pre-empted. 47 U.S.C. 152(a), 301, 303 (c)(d)(e)(f). See Communications Amendments Act (P.L. 97-259) House Conference Report No 97-765, Pages 2266-67. R.E. Spring v. Adolph Coors Co., 37 CAL App. 3rd 643.

> "It is clear that, in the conduct of a hobby the scale of its proportion may well carry it beyond what is customary or reasonable." Presnell v. Leslie 3 NY 2d 384, 144 NE 2d 381 (1957) at page 383.
>
> "...(many hobbies are proper in residential areas), but when a hobby reaches the proportion of destruction of the neighborhood..." Knoxville v. Brown, 260 SW 2d 264 (Tenn. 1953).

The evidence is clear that the City of Parma Heights encouraged and received the cooperation of the complaining neighbors in attempts to resolve the RFI problem. Many remedial steps were taken. See Stip. No. 6, 7. The Defendant however, only limited his offensive activity as a result of a "quiet hours" restriction imposed by the FCC. Further, Defendant and the FCC adopt the position that the victims can eliminate their injury by replacing electronic equipment at their own expense. However, it is beyond debate that

such replacement equipment may not be RFI resistant. Clearly, the problem and the cure are deemed the exclusive concern of the victims, even though the evidence proves that the interference to the television, telephone, radio and stereo reception of adjacent parties is solely caused by Defendant's transmission. The Court recognizes that these instruments are a primary and continuing source of entertainment, information, including emergency warnings and instructions, and enjoyment to their owners. The disruption of these services, some of which are received only after voluntary payment of substantial fees, should be avoided.

The interference with telephone communication, the principal method of interaction between individuals, particularly families, businesses, service providers, friends, etc. is clearly an annoyance and disturbs and endangers the comfort, health and safety of others. The neighborhood includes persons with serious illness; interference with the telephone, the primary resource for assistance, unduly raises apprehensions and increases health problems. The acts complained of should be abated. This Court therefore must address achieving said abatement legitimately. The power of this Court to abate the nuisance through criminal prosecution is severely constrained. Herein the Defendant's amatuer radio station; 1. has been approved by the city's zoning and building department (Stip. No. 3), 2. is duly licensed by the Federal Communications Commission, 3. the application to increase the height of the transmission tower was approved by the local authorities, 4. the power used to transmit Defendant's radio signal has been authorized up to 1,000 watts by the FCC. Substantial legal authority supports Defendant's position that the FCC is the sole and exclusive authority with jurisdiction over Defendant's station. Motorola Communications v. Mississippi Public Services Commission, 55 F. Supp. 793, (1979). Blackburn v. Doubleday Broadcasting Co. Inc., 353 N. W. 2d 550, (1984).

The Court finds therefore that the Defendant's operation of an amatuer radio station does not constitute a public nuisance. It does not wrongfully invade the use and enjoyment of property and personal rights and privileges of the general community. Thom J. Casey v. Rowill Investment Co., 64 002d 227, (1972). The nuisance herein results from methods authorized by legislative grant. The Defendant's exercise of that grant does not constitute criminal conduct.

In so ruling the Court does not condone Defendant's actions nor does it believe that Defendant is free to pursue his hobby to the distress and annoyance of the community. The fact that although, upon the evidence presented herein, a criminal violation has not occurred does not preclude the pursuit of other avenues of legal redress by those adversely affected.

The Judgment in this case is limited to the facts presented and the law applicable thereto.

Defendant found Not Guilty of the violations alleged and is discharged.

JOURNALIZED
FILED
PARMA MUNICIPAL COURT

9/16/92
DATE

J Walter A Savage
JUDGE WALTER A. SAVAGE

Order See Journal Vo. 84 Page 41331