UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RANDALL J. PALMER,

Plaintiff,

vs.

CITY OF SARATOGA SPRINGS and CITY OF SARATOGA SPRINGS PLANNING BOARD,

Defendants.

COMPLAINT

Civil Action No.:

Plaintiff, Randall J. Palmer, by his attorneys, Hinman, Howard & Kattell, LLP, complaining of defendants, alleges as follows:

1. This is an action for declaratory and injunctive relief arising under the Communications Act of 1934 as amended, 47 U.S.C. §§151 *et seq*., and the rules and regulations of the Federal Communications Commission ("FCC") promulgated thereunder, 47 C.F.R. Part 97; under Article I, section 8 and Article IV, section 2 of, and the First and Fourteenth Amendments to, the United States Constitution; under Title 42, U.S.C. §§1983 and 1988; and under Article 78 of the New York Civil Practice Law and Rules.

2. This Court has subject matter jurisdiction over plaintiff's first through seventh claims for relief by virtue of 28 U.S.C. §§1331, 1337 and 1343. Declaratory relief as requested herein is authorized by virtue of 28 U.S.C. §2201 and Rule 57 of the Federal Rules of Civil Procedure. The Court has supplemental jurisdiction over plaintiff's state law eighth claim for relief by virtue of 28 U.S.C. §1367.

3. Venue lies in this district by virtue of 28 U.S.C. §1391(b)(1) and (2) because the claims asserted herein arose in and defendants reside in this judicial district.

4. Plaintiff resides at, and is a lessee, of property located at 38 Trottingham Road in said City of Saratoga Springs.

5. Plaintiff is a federally-licensed amateur radio operator and private, non-commercial, amateur (also known as "ham") radio station owner, holding an Advanced Class Amateur Radio Operator License, and the Amateur Radio Station License with the call letters N2NVH, both issued by the FCC.

6. Defendant City of Saratoga Springs is a municipal corporation existing under the laws of the State of New York located in Saratoga County, New York.

7. Upon information and belief, Defendant City of Saratoga Springs Planning Board (hereinafter "Planning Board" or "Board") is a duly constituted board of the City of Saratoga Springs created pursuant to section 27 of the New York General City Law.

8. Section 240-12.15 of the City Zoning Ordinance permits the installation of antennas in any zoning district pursuant to the provisions thereof. Under section 240-12.15(A), antenna installations which do not exceed twenty (20) feet in height, width or

length are allowed as a matter of course, subject to the restrictions set forth therein. Under section 240-12.15(B), a special use permit issued by the City Planning Board is required for antenna installations exceeding twenty (20) feet in height, width or length.

9. Plaintiff is an active amateur radio operator, and has invested several thousand dollars in amateur radio equipment, including a Kenwood 140 single sideband and continuous wave transceiver designed for use on those frequencies allocated to amateur radio operators having wavelengths generally between 80 and 10 meters. The wavelengths or "bands" upon which plaintiff operates are known as the 20, 17, 15, 12, and 10 meter bands, and are generally considered to be within the "high frequency" spectrum.

10. Utilizing his amateur radio license, plaintiff engages in communications for pleasure with other amateur radio operators, as well as a variety of public service activities. Plaintiff often attempts to facilitate "telephone patches" for military and civilian personnel overseas or on ships at sea. Plaintiff is also a member of the American Radio Emergency Services ("ARES"); the Saratoga County Amateur Civil Emergency Service ("SCACES"); the Saratoga Amateur Radio Association, and the American Radio Relay League. Plaintiff is certified to administer amateur radio examinations.

11. As is described in more detail below, the Zoning Law on its face and as applied by defendants, prohibits plaintiff from erecting a tower commonly used and necessary for the erection of a rotatable multi-band Yagi or "beam" antenna.

12. As is more particularly alleged below, the Zoning Law and its application

by defendants is unreasonable and arbitrary in so restricting plaintiff's ability to receive and transmit radio communications within the terms of his federally-granted amateur radio license as to constitute a denial thereof, as well as a denial of plaintiff's constitutional rights of free speech, assembly and association.

13. At all relevant times and in all respects alleged herein, defendants were acting under color of state law, depriving plaintiff of rights and privileges secured to him by the First and Fourteenth Amendments of the United States Constitution.

14. The effective exercise of plaintiff's amateur radio licenses requires that plaintiff have access to an appropriate antenna. Plaintiff desires to erect upon his premises a radio antenna system of sufficient height and nature to enable him to regularly and effectively receive and transmit radio signals world-wide, pursuant to his federally granted license, at the amateur radio station which he maintains at his residence.

15. Prior to moving to the City of Saratoga Springs, plaintiff resided in Ballston Spa, New York. At his former residence in Ballston Spa, plaintiff utilized two "yagi" antennas, mounted upon a guyed tower, for communication upon the 20, 17, 15, 12, and 10 meter amateur radio bands. The yagi antennas owned and utilized by plaintiff are very common, effective, and unobtrusive antennas used by countless amateur radio operators throughout the country for communications on the high frequency bands. It is very common to locate such antennas upon antenna towers of varying heights. Plaintiff operated at the Ballston Spa location utilizing that antenna configuration for approximately five years, without complaints from neighbors, the public, or the

municipality as to the appearance or safety of the tower and antenna structure, and without complaints as to interference with other communication services.

16. Plaintiff moved to the City of Saratoga Springs in 1998. On or about January 4, 1999, with the written consent of the owner of 38 Trottingham Road, plaintiff applied to defendants for a special use permit pursuant to section 240-12.15(B) of its zoning ordinance for permission to erect a new U.S. Towers antenna tower model TMM-54ISS and install his two antennas atop the tower. The tower would be a freestanding crank-up type. The maximum height to the top of the antennas would be forty-seven feet, and the minimum height to the top of the antennas would be twenty feet. Such an antenna structure would be of average height and size when compared to other antenna installations used upon the twenty through ten meter bands. The antenna would have had a substantial and more than adequate setback from any property line. In addition, plaintiff's lot is heavily wooded, and the antenna structure would have been largely screened from public view.

17. Plaintiff's application was very routine in nature, and should have been promptly granted as a matter of course. However, rather than quickly acting on the application and applying its zoning ordinance in a straight-forward, reasonable and responsible fashion, the Planning Board made unreasonable requests of plaintiff, required plaintiff to make voluminous submissions in response to its requests, and gave undue and unwarranted attention and credence to the complaints and unfounded contentions of a few neighbors in opposition to the application.

18. Upon information and belief, the application was initially considered by the

Planning Board without action at its February 3, 1999 meeting. At that meeting, the chairperson of the Planning Board, Lorraine Tharpe, demonstrated her bias against such antenna configurations by commenting that they looked like "spaceships". At its next meeting on March 3, 1999, Ms. Tharpe demanded the preparation of a visual impact study, so the Board could "see what the antennas would look like". At the same meeting, another Planning Board member, Mr. McTygue, told plaintiff that he "should not waste a lot of money" on such a study, because the Board "was not going to approve it the way it was". The City took no formal action at that meeting. On or about March 10, 1999, the City Planner requested that plaintiff provide five categories of information to the Planning Board, some of which were completely unreasonable and would have required great expense on the part of plaintiff.

19. Upon information and belief, the Planning Board again met on April 7, 1999, but did not act on plaintiff's application. Instead, it scheduled a public hearing for May 19, 1999. Plaintiff submitted additional voluminous documentation in advance of the public hearing.

20. On or about May 9, 1999, in addition to other information previously submitted to defendants, plaintiff provided a large volume of documentation and commentary in response to defendants' March 10, 1999 request. Plaintiff's submittals more than adequately addressed such concerns of the Board as were valid and relevant.

21. The public hearing was held on May 19, 1999. Based on comments from members of the Planning Board, it was evident that the Board had no intention of granting plaintiff's application, and that it was guided not by a sense of responsibility or

commitment to valid legal requirements and considerations, but rather by its subjective aesthetic sense and by undue deference to opponents of the application.

22. Upon information and belief, the Planning Board met again on June 2, 1999, and again failed to act on plaintiff's application. Instead, the Planning Board sent plaintiff a fax advising that the Board had been "too busy" to draft its decision with respect to plaintiff's application.

23. Finally, on June 16, 1999, the Board issued its resolution denying plaintiff's application, purportedly upon the basis that plaintiff had failed to satisfy the conditions in the zoning ordinance for issuance of a special use permit and that he had failed to submit certain information requested by the Board. The reasons set forth in the resolution were inaccurate, unreasonable, and overstated, and upon information and belief were nothing more than a pretext for the true reason for the Planning Board's decision, namely, that the proposed structure offended its subjective aesthetic sense.

24. Plaintiff now institutes this action to declare the determination of the Planning Board to be invalid and void under federal and state law.

25. Plaintiff has no adequate remedy at law.

AS AND FOR A FIRST CLAIM FOR RELIEF

26. Plaintiff repeats and realleges the allegations in paragraphs 1 through 26.

27. Amateur radio operators provide an invaluable public service to the local, national and international communities in terms of, *inter alia*, national and civil defense, emergency communications assistance and international relations. The FCC, which is charged with the overall responsibility to regulate interstate and foreign commerce in

communication by radio and wire, has expressly recognized, in its rules and regulations, the need to encourage amateur radio communications and guarantee the amateur radio operator sufficient radio frequencies for overseas, emergency, and experimental communications.

28. There is a direct correlation between the height of an antenna radio system and the range and effectiveness of amateur radio communications. Effective domestic and international communications are not possible if antenna towers are prohibited.

29. On September 19, 1985, the FCC issued a Memorandum Opinion and Order, constituting a declaratory ruling having the force of law, entitled "Amateur Radio Preemption", 101 F.C.C.2d 952, 50 Fed. Reg. 38, 813 (hereinafter "PRB-1"). The ruling addressed, among other things, the inhibitory effect which local antenna height restrictions have on amateur radio communications. The FCC ruled in PRB-1 that "[s]tate and local regulations that operate to preclude amateur communications in their communities are in direct conflict with federal objectives and must be preempted". The FCC further ruled that "local regulations which involve placement, screening, or height of antennas based on health, safety or aesthetic considerations must be crafted to accommodate reasonable amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose".

30. The provisions of the zoning ordinance, and its application by defendants in denying plaintiff's request for a special use permit to construct the proposed antenna system, effectively preclude and frustrate amateur radio communications by plaintiff,

and are in direct contravention of the federal policies articulated in PRB-1.

31. By virtue of the explicit exercise by the FCC of its preemptive statutory powers in PRB-1, as set forth above, the zoning ordinance is in direct contravention of federal law in violation of Article VI, section 2 of the United States Constitution, and must be preempted, and declared to be of no force and effect.

AS AND FOR A SECOND CLAIM FOR RELIEF

32. Plaintiff repeats and realleges the allegations in paragraphs 1 through 25.

33. The zoning ordinance is unconstitutional on its face and as applied insofar as it constitutes an unreasonable burden upon radio communications and interstate commerce, in violation of Article I, section 8 of the United States Constitution.

AS AND FOR A THIRD CLAIM FOR RELIEF

34. Plaintiff repeats and realleges the allegations in paragraphs 1 through 26.

35. The zoning ordinance, and defendants' actions in furtherance thereof, are void and unconstitutional because they deprive plaintiff of the full and unfettered enjoyment of his First Amendment rights of free speech, assembly and associations through unreasonable prohibitions and limitations on the instrumentalities used by him to exercise those rights. The enjoyment of said rights is guaranteed by the Fourteenth Amendment to the United States Constitution.

AS AND FOR A FOURTH CLAIM FOR RELIEF

36. Plaintiff repeats and realleges the allegations in paragraphs 1 through 25.

37. Upon information and belief, defendants' extended delay in the determination of plaintiff's application, and defendants' unreasonable requirements as

to submittals by plaintiff in furtherance thereof, were atypical of the Planning Board's treatment of other applications for special use permits of comparable magnitude.

38. Upon information and belief, there was no rational basis for defendants' treatment of plaintiff's application compared to its treatment of applications for special use permits of comparable magnitude. Rather, upon information and belief, defendants treated plaintiff's application as they did for the express purpose of creating a false record for the denial thereof due to improper considerations on the part of Planning Board members.

39. By virtue of the foregoing, the zoning ordinance is void and unconstitutional as applied to plaintiff, insofar as it deprives plaintiff of equal protection of the law in the exercise of his constitutional and other rights as guaranteed by the Fourteenth Amendment to the United States Constitutional.

AS AND FOR A FIFTH CLAIM FOR RELIEF

40. Plaintiff repeats and realleges the allegations in paragraphs 1 through 25, 37 and 38.

41. By virtue of the foregoing, the zoning ordinance is void and unconstitutional as applied to plaintiff, insofar as it deprives plaintiff of life and liberty without due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitutional.

AS AND FOR A SIXTH CLAIM FOR RELIEF

42. Plaintiff repeats and realleges the allegations in paragraphs 1 through 25, 37 and 38.

43. The zoning ordinance is void and unconstitutional on its face and as applied to plaintiff, insofar as it constitutes an invalid exercise of the police power by defendants. The zoning ordinance as it relates to plaintiff's application for a special use permit bears no reasonable relationship to the public safety, health, morals or general welfare, and application thereof is unreasonable, arbitrary, discriminatory, oppressive, and confiscatory and constitutes an unwarranted interference with substantial property rights.

AS AND FOR A SEVENTH CLAIM FOR RELIEF

44. Plaintiff repeats and realleges the allegations in paragraphs 1 through 25, 27 through 31, 33, 35, 37 through 39, 41 and 43.

45. The actions of defendants as aforesaid did, under color of state law, deny plaintiff his constitutional rights to free speech, due process, and equal protection secured to him by the First and Fourteenth Amendments to the United States Constitutional and by statute.

46. By virtue of the foregoing, defendants are liable to the plaintiff, under 42 U.S.C. §1983, for the damages plaintiff has incurred and, under 42 U.S.C. §1988, for the attorneys' fees and expenses incurred by plaintiff in connection with this action.

AS AND FOR AN EIGHTH CLAIM FOR RELIEF

47. Plaintiff repeats and realleges the allegations in paragraphs 1 through 25, 27 through 31, 33, 35, 37 through 39, 41 and 43.

48. The determination of defendants as aforesaid was made in violation of lawful procedure, was affected by an error of law, and was arbitrary and capricious and an abuse of discretion, in that, among other things:

a. The determination was in violation of plaintiff's constitutional and statutory rights as aforesaid.

b. Defendants placed an improper, unreasonable, and impossible burden upon plaintiff, both in terms of the submittals required, and also in terms of the burden placed upon plaintiff to "prove a negative", that is, that "the antenna and tower system would not have an adverse impact on surrounding properties".

c. The record before the Planning Board demonstrated that plaintiff was entitled to the approval of the application.

d. The reasons stated by the Planning Board in denying the application were false and erroneous, or were insufficient or improper reasons for denial of the application.

e. Upon information and belief, the Planning Board entered into its deliberations with the preconceived intention of denying plaintiff's application, and it neglected to reasonably and rationally consider the evidence before it.

f. The Planning Board gave undue deference and consideration to unsupported, irrelevant, and erroneous arguments on the part of opponents of the application.

49. The determination of the defendant City of Saratoga Springs Planning Board should be annulled pursuant to Article 78 of the New York Civil Practice Law and Rules.

WHEREFORE, plaintiff demands relief as follows:

1. That this Court issue a declaratory judgment:

    a. That the zoning ordinance is, on its face and as applied to plaintiff, inconsistent with, and preempted by, federal law, and is therefore without force or effect; and/or,

    b. That the zoning ordinance is null and void on its face and as applied to plaintiff as violative of the Unites States Constitution.

2. That this Court preliminarily and permanently enjoin and restrain defendants from further interference with plaintiff's plans to erect and maintain the proposed amateur radio antenna system.

3. That plaintiff receive an award of damages against defendants, in an amount not presently determined, together with the costs and disbursements of this action, including reasonable attorneys' fees, and whatever other relief the Court deems just and proper.

Dated: Binghamton, New York
July 15, 1999

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