UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

F. PARKER HEINEMANN :

-vs- : Civil No. 2:91cv00776 (PCD)

TOWN OF LYME, et al. :

RULING ON MOTION FOR SUMMARY JUDGMENT

Plaintiff alleges that denial by the Town of Lyme Planning and Zoning Commission ("Commission") of his request for special permit under § 3.2 of the Lyme Zoning Regulations violates the supremacy clause (Counts I and II) and the due process clause (Counts III and IV), and entitles him to relief under 42 U.S.C. § 1983 (Count VI).[1] The § 1983 action is predicated upon alleged violations of plaintiff's rights under the United States Constitution, the Communications Act of 1934, 47 U.S.C. § 151 et seq. ("FCA"), the Federal Communications Commission ("FCC") regulation governing station antenna structures (47 C.F.R. § 97.15), and the FCC declaratory ruling (PRB-1) regarding Federal preemption of state and local regulation pertaining to amateur radio facilities (101 F.C.C.2d 952). Defendants move for summary judgment.

[1]Plaintiff withdrew his equal protection claim (Count V) based on the results of discovery.

I. Background

Plaintiff is a licensed amateur radio operator. Plaintiff wishes to install a 78-foot antenna on his property in Lyme, Connecticut, which is in the lower Connecticut River Conservation Zone.[2] Lyme's Zoning Enforcement Officer (Mr. Skwarek) advised plaintiff that he needed the Commission's permission to install the antenna, and recommended that plaintiff write to the Commission.

Plaintiff requested a special permit under § 3.2 of the Lyme Zoning Regulations on March 7, 1991.[3] He noted his intention to engage in "handling routine messages to and from armed service personnel stationed overseas in conjunction with the Military Amateur Radio Service Mars (MARS), relaying international distress and disaster traffic for the Red Cross, promotion of international goodwill, and personal enjoyment." He explained the technical considerations involved in the antenna height, which he called a "compromise situation." [Document 73, E]

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[2]Conn. Gen. Stat. § 25-102c defines the Connecticut River Conservation Zone geographically. Conn. Gen. Stat. § 25-102a discusses the "public interest in [the] lower Connecticut River" which stems from its "unique scenic, ecological, scientific and historic value."

[3]Lyme Zoning Regulation Section 3.2 provides in part: "No building or other structure shall be constructed ... in such a manner as to exceed a height of thirty-five feet ... except .. upon the granting of a special permit therefore by the Lyme Planning & Zoning Commission following a public hearing."

On March 11, 1991, the Commission considered plaintiff's application informally. As presented by plaintiff, the Commission did not "see any particular problem with it" [Document 73, G at 10], *scheduled a public hearing, and referred the* application to the Connecticut River Gateway Commission (Gateway) for an advisory opinion.[4] Mr. Skwarek informed Gateway that the proposed tower was at an "optimum location" and "well screened." [Document 73, H] Gateway recommended rejection as § 3.2's 3 foot maximum was "the minimum practicable regulation needed to accomplish its legitimate purpose." [Document 73, I] Plaintiff was neither present nor made aware of how Gateway conducted its inquiry.

At the public hearing, on April 8, 1991, numerous citizens testified, letters of others were read into the record, and petitions were submitted all in opposition to the application. Gateway's recommendation was then announced. After the hearing, the Commission convened for a regular meeting and denied the application based on Gateway's recommendation, the neighbors' opposition, Lyme Zoning Regulation § 3.2, and the presence of the proposed tower within the Conservation Zone. [Document 73, M, at 5]

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[4]Conn. Gen. Stat. § 25-102d establishes the Connecticut River Gateway Commission.

II. Discussion

A. Summary Judgment Standard

Summary judgment is appropriate only if the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. "[I]n determining whether a genuine issue has been raised, a court must resolve all ambiguities and draw all reasonable inferences against the moving party." Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54, 57 (2d Cir. 1987). The moving party bears the initial burden of demonstrating that no factual issues exist. Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2556 (1986) (Brennan, J. dissenting). Once that burden is met, the opposing party must demonstrate that genuine issues of fact exist. Anderson v. Liberty Lobby, 106 S.Ct. 2505, 2511 (1986).

B. 42 U.S.C. § 1983

Section 1983 provides a federal remedy for official violations of federal rights both constitutional and statutory. While not all federal laws create rights enforceable under § 1983, "coverage of the statute must be broadly construed." Golden State Transit Corp. v. Los Angeles, 493 U.S. 103 (1989).

> In deciding whether a federal right has been violated, we have considered [1] whether the provision in question creates obligations binding on the governmental unit or rather 'does no more than express a congressional preference for certain kinds of treatment.' [2] The interest the plaintiff asserts must not be 'too vague and amorphous' to be 'beyond the competence of the judiciary to enforce.' [3]

> We have also asked whether the provision in question was 'intend[ed] to benefit' the putative plaintiff.

Howard v. Burlingame, 937 F.2d 1376, 1378 (9th Cir. 1991), citing Golden State, 493 U.S. at 106.[5]

Recently, the courts have applied those standards to discern whether an administrative regulation or declaratory ruling confers a right cognizable under § 1983. Definitive judicial guidance for assessing the relationship between these potential bases for statutorily-related rights is lacking.

1. Communications Act of 1934, 47 U.S.C. § 151

The Communications Act (FCA) does not confer statutory rights for § 1983 purposes. Howard, 937 F.2d at 1379. (§ 1983 claim rejected applying the Golden State tripartite analysis). Plaintiff merely reiterates his unsubstantiated legal conclusion that the FCA creates statutory rights without differentiating Howard.

Summary judgment is, therefore, granted on Count VI to the extent that it asserts violations of 47 U.S.C. § 151 et seq.

2. FCC Regulation, 47 CFR § 97.15(e) and FCC Declaratory Ruling, PRB-1

Neither party analyses the enabling statute, the FCA, in relation to the FCC regulation or ruling in question. "There is,

[5]"Even when the plaintiff has asserted a federal right, the defendant may show that Congress 'specifically foreclosed a remedy under 1983,' by providing a 'comprehensive enforcement mechanis[m] for protection of a federal right." Golden State, 493 U.S. at 106. There are no such allegations in the instant case.

however, some question as to whether they may create rights not already implied by the enabling statute." Howard, 937 F.2d at 1380 n.4, citing Wright v. Roanoke Redevelopment and Housing, 479 U.S. 418, 437-38 (1987) (O'Connor, J., dissenting).[6] The Supreme Court has not ruled on this issue. However, "[a]n administrative regulation ... cannot create an enforceable § 1983 interest not already implicit in the enforcing statute." Smith v. Kirk, 821 F.2d. 980, 984 (4th Cir. 1987).

In § 1983 cases, the existence of a federal right under the enabling statute is requisite to any analysis of the rules and regulations stemming therefrom. Central to identifying such federal rights is congressional intent.[7] The first element in the Golden State analysis is whether Congress expressed a "preference" or created a binding "obligation." Golden State, 493 U.S. at 106. Basic administrative law principles are clear:

> the fact is that the Board [administrative agency] is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress said it can do. This proposition becomes clear beyond question when it is noted that Congress has been anything but inattentive to this issue in the acts governing the various administrative agencies.

Civil Aeronautics Board v. Delta Air Lines, Inc., 81 S.Ct. 1611, 1617 (1961) (citations omitted). Thus "where determination of § 1983 rights has been unleashed from any connection to

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[6]The majority found that the legislative act conferred the rights in question.

[7]Schwartz & Kirklin, Section 1983 Litigation, vol. 1 at 224 (1991).

congressional intent is troubling indeed." Wright, 479 U.S. at 438 (O'Connor, J.).

Plaintiff analogizes his situation to federal regulation of satellite dishes. Plaintiff identifies four district courts which have found 47 CFR § 25.104 to "create a federal right cognizable in a § 1983 action." [Document 71 at 14.] Plaintiff's reliance is inapposite.

Van Meter v. Maplewood, 696 F. Supp. 1024 (D.N.J. 1988) stands for the uncontested proposition that an FCC regulation can preempt local regulations. Though the court describes the legislative act (47 U.S.C. § 605(6)) upon which the regulation (47 CFR § 25.104) is based, it does not decide the act itself confers rights. Cawley v. Port Jervis, 753 F. Supp. 128 (S.D.N.Y. 1990), purportedly relying upon Van Meter, asserts that "any person whose rights under FCC regulations have been denied by a local governmental body has a cause of action under 42 U.S.C. § 1983." Id. at 131. In so doing, Cawley extends the rights-conferring mechanism implied in Van Meter. Cawley implies, with no cited authority, that FCC regulations independently confer rights. Ermler v. Brookhaven, 780 F. Supp. 120 (E.D.N.Y. 1992), cites Samuels v. District of Columbia, 770 F.2d. 184, 199 (D.C. Cir. 1985) for the proposition, "federal regulations issued under Congress' mandate constitute 'laws' within the meaning of section 1983." Ermler, 780 F. Supp. at 122. In Samuels, however, "Congress' mandate" is not interpreted

to mean any act Congress passes. Rather, it designates those areas where "Congress directs regulatory action." Samuels, 770 F.2d at 199. Such "direction" is characterized by explicit congressional direction to an agency to issue regulations designed to ensure compliance with a detailed federal law. Id. In Kessler v. Niskayuna, 1991 WL 278788 (N.D.N.Y.), the link between a "federal law creating obligations" (id. at 2) and congressional intent is even more attenuated. Golden State was applied directly to the administrative regulation without consideration of the underlying federal law.

Summary judgment is, therefore, granted on Count VI to the extent that it is predicated upon alleged violations of 47 C.F.R. § 97.15(e) and PRB-1.

3. First Amendment, Free Speech

"A federal court does not sit as a 'super zoning board' to review the correctness of a zoning decision ... or even its legality under state law. Absent allegations that the ordinance impinges upon a constitutionally suspect classification or fundamental constitutional right ... 'the only question which federal district courts may consider is whether the action of the zoning commission is arbitrary and capricious'..." Sixth Camden Corp. v. Evesham, 420 F. Supp. 709, 723 (D.N.J. 1976). When a constitutional right is implicated, however, "a stricter standard of review would be applied." Id. at note 11.

The regulation in question is a content-neutral time, place, manner restriction.[8] "'Content-neutral' speech regulations ... are justified without reference to the content of the regulated speech." Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986). Plaintiff notes that "whether Defendant's conduct was motivated by content-neutral interests is a question of fact." [Document 71, at 17] "Although the burden on the nonmoving party is not great, it is still 'required to show specific facts, as opposed to general allegations, that present a genuine issue worthy of trial.' " Palestine Information Office v. Shultz, 853 F.2d 932, 944 (D.C. Cir. 1988)(quoting 10A Wright & Miller, Federal Practice and Procedure 2727 (2d ed. 1983)). Plaintiff declined to challenge defendants' characterization of the regulation as content-neutral. No information in the record contradicts said characterization.

The "time, place, and manner" of a zoning regulation which adversely impacts speech must be "reasonable" in order to pass constitutional muster. Schad v. Mount Ephraim, 452 U.S. 61 (1981). "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." Id. at 2186. Connecticut's characterization of the Conservation Zone as possessing "unique scenic, ecological, scientific and historical

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[8]Davis, Administrative Law Treatise, vol 5 at 329.

value" suggests the parameters along which "compatibility" is assessed.[9]

Aesthetic considerations can, as in the instant case, dominate a community's assessment of that compatibility.[10] Factual issues remain as to virtually all constituent aspects of how the tower would visually impact the Conservation Zone.[11] Plaintiff contends that the tower would not be "visible in any appreciable way from the river, the cove, or any other point within the conservation zone." [Document 72 at 3] A neighbor, who opposes plaintiff's request for a special permit, submitted two letters addressing the issues of tree height, foliage density, and life expectancy. A licensed arborist assessed most of the trees in the immediate vicinity at 60 feet. As such, the arborist concluded, "any structure higher than 60 or 70 feet will be easily visible to recreational boaters in Hamburg Cove." [Document 68, 8 at I] A landscape designer assessed the majority of trees surrounding the proposed site to be 80 feet, but noted

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[9] Conn. Gen. Stat. § 25-102a.

[10] Though plaintiff criticizes the subjectivity of aesthetic standards in testimony before the Commission, he does not legally challenge their prominence in the evaluation of his application.

[11] At the hearing, neighbors expressed concern and questioned plaintiff about several other issues including the potential adverse impact upon the environment, particularly birds and potential interference with televisions. Plaintiff felt both concerns were unfounded. He stated that his modern radio equipment will not emit interfering energy and that the antenna moves slowly posing little threat to birds.

that they are thin and dying and, therefore, "provide no screening potential whatsoever." [Document 68, 8 at J] Skwarek testified, "I don't think you will see it from the Cove and I think only one house will have a view of it, that's the one by the driveway." [Document 68, 7 at 8] He further testified that this will be true even "with the leaves down." Plaintiff maintains the tower will be camouflaged by "some" trees at 100 feet and others at 70 feet. [Document 73, K at 18] He also maintains that "the foliation is very much in tact on my [his] hemlocks" and that he has sprayed his trees. [Document 73, K at 11-12] Commission member Gerber evaluated the proposed site personally. He concluded, "Looking in that direction [the proposed site] ... from any area ... basically you see a lot of trees... I would have had a difficult time trying to flag whether or nor I could see it from out there." [Document 68, 17 at 4]

The tower is twice the height above which formal permission is necessary. However, "no matter how unlikely it may seem that plaintiff will prove its entitlement to relief, federal policy favors dispositions on the proofs rather than on the pleadings." Sixth Camden, 420 F. Supp. at 720. In particular, "constitutional issues should not be decided on less than a full record." Id. at 732.

Defendants cite circuit cases in which a special exception for a radio tower of increased height was denied. In each case,

entry of summary judgment against the respective plaintiffs was sustained. The distinct factual pattern here militates against a similar ruling.

"[T]he zoning ordinance is a content-neutral time, place and manner restriction, and therefore is not an unconstitutional infringement of the right to free speech." Williams v. City of Columbia, 906 F.2d 994, 999 (4th Cir. 1990). The "therefore" is misleading as it suggests that any content-neutral time, place, and manner restriction is per se constitutional with respect to free speech. As Schad v. Mount Ephraim, supra, indicated, an independent evaluation of those dimensions is warranted. Such evaluations are implicit in Guschke v. City of Oklahoma City, 763 F.2d 379, 385 (10th Cir. 1985) and Howard v. City of Burlingame, 937 F.2d 1376, 1381 (9th Cir. 1991) which characterized comparable ordinances as "reasonable" and "legitimate" respectively. The courts have consistently upheld as constitutional restrictions without absolute prohibitions which set a reasonable limit upon antenna height. Evans v. Bd. of County Comm'rs, 752 F. Supp. 973, 977 (D.Colo. 1990).

The distinction between defendants' citations and the case here is the presence of alleged mitigating circumstances. In preservation of the scenic view, structures up to 35 feet require no special permit. In theory, it would be "unreasonable" and "illegitimate" to prohibit a otherwise reasonably located tower

in excess of 35 feet when it was hidden in a densely wooded area. Such allegedly is the instant case.

Summary judgment is, therefore, denied on Count VI to the extent it is predicated upon alleged First Amendment violations.

4. Fourteenth Amendment, Due Process

Plaintiff also predicates his § 1983 claim on the due process clause. Plaintiff alleges that neither Conn. Gen. Stat. §§ 8-22 and 25-102h applies to provide a basis for referring his application to Gateway. [Document 71, at 19] Defendants were not required to submit the application to Gateway. Conn. Gen. Stat § 25-102h, which mandates such submission, applies to zoning boards of appeals. Conn. Gen. Stat. § 8-22 allows planning and zoning boards to "contract with professional consultants." Neither party explicitly discussed the "consultant" proviso as related to the role of Gateway.

"This court's scrutiny of the process due the plaintiffs is limited to an inquiry of whether federal notions of due process have been violated, and does not extend to an examination of whether state laws have been violated." Heffington v. Saline, (D.C. Mich. 1987) slip opinion, LEXIS 15663. Accord, Sixth Camden at 723. Plaintiff fails to address, nor is any information present which illuminates, how the absence of a state statutory basis implicates federal due process concerns.

In addition to challenging the propriety of soliciting Gateway's opinion, plaintiff challenges the manner of Gateway's participation. Plaintiff had neither notice nor the opportunity to be heard during Gateway's evaluation. "'The fundamental requisite of due process of law is the opportunity to be heard.' However, the nature of the hearing 'will depend on appropriate accommodation of the competing interests involved.'" Nash v. Auburn University, 812 F.2d 655, 663 (11th Cir. 1987) (citations omitted). "[W]here basic fairness is preserved," cross-examination of witnesses and a full adversary proceeding are not always required. Id. at 664. More specifically, "... [A] paper hearing procedure conforms with the strictures of the Administrative Procedure Act ... Nothing in § 409 of the Communications Act of 1934, which deals with FCC hearings in general, see 47 U.S.C. 309(e) (1982) ... uses the 'on the record' language necessary to trigger the full panoply of trial-like hearing requirements." Gencom, Inc. v. F.C.C., 832 F.2d 171, 174 n.2 (D.C. Cir. 1987).

Neither the referral to Gateway nor Gateway's evaluation process violated plaintiff's due process rights. Plaintiff has not shown that a genuine issue exists as to whether defendants treated plaintiff's application as a variance rather than as a special permit nor as to whether Lyme Zoning Regulation § 3.2 is unconstitutionally vague. Summary judgment is granted on Count VI to the extent that it alleges violations of due process.

5. Qualified Immunity

The individual defendants argue that they are shielded from § 1983 liability by qualified immunity. Qualified immunity is premised on the objective legal reasonableness of the defendants' actions and is determined by whether reasonable officials in defendants' positions at the time the cause of action arose would have known that the challenged conduct violated a clearly established right. Malley v. Briggs, 475 U.S. 335, 345 (1986). Defendants argue that plaintiff's rights under PRB-1 were unclear and that their actions did not, therefore, violate any clearly established rights. As discussed supra, the § 1983 claim is based on plaintiff's First Amendment right of free speech, not any purported right under the FCA, FCC regulations or the declaratory ruling.

Whether it was reasonable for defendants to think that their actions were lawful in light of plaintiff's first amendment rights depends on the circumstances. As the visual impact of the tower is contested, the court cannot determine that defendants' conduct was objectively reasonable and did not violate clearly established rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Thus, it cannot be said that defendants are entitled to summary judgment based on qualified immunity.

6. Defendants Mazer and Skwarek

Defendants Mazer and Skwarek allege that there is no causal relationship between their conduct and any violation of plaintiff's rights, and hence judgment must enter in their favor on Count VI. Neither Mazer nor Skwarek voted on plaintiff's application. Mazer was a member of the Commission and Lyme's representative to Gateway. He participated in the informal consideration on March 11; he also attended the April 8 hearing and meeting at which the Commission denied plaintiff's application, though he abstained from voting.

Skwarek was the zoning enforcement officer. He reported to the Commission through its chairman. Skwarek told plaintiff he needed a special permit and explained the process. He visited plaintiff's property and expressed his observations at the March 11 meeting. He drafted the letter of referral to Gateway and made copies of PRB-1 available to Commission members.

Plaintiff alleges that summary judgment should be denied as to Mazer because he "sat by as the Commission relied on Gateway's decision" [Document 71 at 21]. As to Skwarek, in addition to the actions described above, plaintiff alleges that he

> consulted no experts or amateur radio operators about Plaintiff's application, prepared no list of standards or factors to guide the Commission in its deliberations, prepared no list of potential compromises or alternatives, and investigated no alternatives or compromises . . .

[Document 71 at 22-23].

These allegations are insufficient bases for § 1983 liability. Plaintiff's reliance on Martinez v. California, 444 U.S. 277 (1980) and Doe v. New York City Dep't of Social Services, 649 F.2d 134 (2d Cir. 1981) is misplaced. In Martinez, plaintiff did not state a claim under § 1983 against public employees who knew or should have known that their action in releasing a parolee created a clear and present danger that he would commit another violent crime. In Doe, the Second Circuit held that a foster placement agency charged by state law with periodically inspecting and recertifying foster homes may be held liable under § 1983 for deliberate indifference that was a substantial factor leading to the denial of the foster child's rights. Here, plaintiff does not allege that either Mazer or Skwarek had any affirmative duty to him. Nor has plaintiff alleged either deliberate indifference or that Mazer and Skwarek's acts or omissions were a substantial factor leading to the deprivation of plaintiff's rights.

Summary judgment is granted to Mazer and Skwarek on Count VI.

C. Due Process

For the reasons set out supra B.4, summary judgment is granted as to Counts III and IV.

D. Supremacy Clause

1. Preemption - As Applied

Plaintiff alleges that § 3.2. of the Lyme Zoning Regulations is invalid as applied because it did not reasonably accommodate amateur radio communications and therefor conflicted with PRB-1. The supremacy clause of Article VI of the U.S. Constitution authorizes federal preemption of state laws. PRB-1 declares a limited preemption of state and local regulations which preclude amateur radio communications. Specifically:

> local regulations which involve placement, screening, or height of antennae based on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose.

PRB-1, ¶ 25. Local zoning boards must strike a balance between the federal interest in promoting amateur operations and the legitimate interests of local governments in regulating local zoning matters. See Bodony v. Sands Point, 681 F. Supp. 1009, 1013 (E.D.N.Y. 1987).

Defendants argue that they reasonably accommodated plaintiff's amateur radio communications. They claim they offered alternatives, which plaintiff refused, such as the use of a long wire, retractable antennae system, and painting the tower a more natural color. Plaintiff disputes defendants' contentions. [Document 67 at 34; Document 71 at 70] Factual

issues exist. Summary judgment is therefore denied as to Count I.

2. Facial Preemption

For § 3.2 to be facially preempted, it must be found that "there is no way in which the ordinance could be applied in conformity with the FCC's PRB-1." Bulchis v. Edmonds, 671 F. Supp. 1270, 1274 (W.D. Wash. 1987). Section 3.2 allows applicants to seek special permits where proposed radio towers exceed 32 feet. Cf. Evans v. Bd. of County Comm'rs, 752 F. Supp. 973, 977 (D. Colo. 1990) (absolute prohibition on amateur radio antennas over 35 feet is preempted by federal law and invalid on its face). Plaintiff has failed to show an issue of fact as to the facial validity of § 3.2. Therefore, summary judgment is granted as to Count II.

III. Conclusion

Accordingly, defendants' motion for summary judgment (document #66) is granted as to Counts II, III, and IV. Summary judgment is also granted as to Count VI, insofar as it asserts a cause of action under § 1983 based on the FCA, the FCC regulation, or the FCC declaratory ruling (PRB-1), and insofar as it applies to defendants Mazer and Skwarek. The motion is denied as to Count I, and as to Count VI insofar as it alleges a § 1983 action based on First Amendment violations.

SO ORDERED.

Dated at New Haven, Connecticut, this 29th day of June, 1993.

Peter C. Dorsey
United States District Judge