FILED AND ENTERED
ON 3/18 1996
WESTCHESTER
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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Application of

J. P. KLEINHAUS and LORRAINE AITORO, a/k/a LORRAINE KLEINHAUS,

Petitioners,

For a Judgment Pursuant to CPLR Article 78

-against-

ZONING BOARD OF APPEALS, TOWN OF CORTLANDT, WESTCHESTER COUNTY, NEW YORK,

Respondents.

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Index No.: 19396/95

DECISION

FILED
MAR 15 1996
LEONARD N. SPANO
COUNTY CLERK
COUNTY OF WESTCHESTER

Lefkowitz, J.

Petitioners contracted to purchase a residence in the Town of Cortlandt in 1993 at a time when the Zoning Code of the Town of Cortland had no height restriction applicable to free standing antennas (former §88-39[B][2]). Prior to consummating the purchase, the Town amended its zoning laws to provide that in an R-40 (residential one acre) zone the maximum height allowed for residences is two and one-half stories or thirty-five feet (§307-17). The Table of Dimensional Regulations (§307-17) provides that the maximum height allowed for a free standing antenna is the same as for a principal structure in any residential zone, i.e., cannot exceed thirty-five feet.

Petitioners have a six foot directional antenna on the roof of their home. Roof antennas may be of any height under the Zoning Code provided they do not cover more than twenty-five percent (25%) of the area of the roof (§307-18[E][2]. Petitioner J. P. Kleinhaus is an amateur radio operator licensed by the Federal Communications Commission

(hereafter "FCC"). Said petitioner applied to the Zoning Board of Appeals (hereafter the "ZBA") for permission to erect a one hundred twenty foot free standing antenna on his property with a wing span of twenty-four feet. The property consists of 58,432 square feet and is heavily wooded.

The respondent held three public meetings on the application at which neighbors spoke; persons who have similar radio towers or antennas also spoke; the petitioners made submissions of documents and members of the ZBA conducted site inspections on the subject property and the surrounding area and also at six other locations where antennas exist in other communities. The ZBA treated the application as one for an area variance, a classification not contested herein by petitioners. On October 19, 1995 the ZBA made findings, set forth reasons and denied the application.

Petitioners thereafter commenced this CPLR Article 78 proceeding to annul the determination. Petitioners contend that the Zoning Code restriction on free standing antenna height is facially invalid, or, alternatively, is invalid as applied and that the determination by the ZBA is arbitrary and capricious and not supported by substantial evidence.

On September 16, 1985, the FCC issued a Declaratory Ruling, known as PRB-1, partially codified at 47 CFR §97.15. The essence of PRB-1 is that amateur radio operators are important to the interests of the nation. Therefore, conflicts between amateur operators using radio antennas and restrictive zoning ordinances are to be avoided. On the other hand, the FCC recognized that local governments must address the

concerns of all its citizens and if their interests are applied in an "even-handed" fashion (PRB-1, para. 24), they may affect amateur radio operators. Consequently, "a limited preemption policy is warranted" (ibid.). Nonetheless, regulations that preclude amateur communications "must be preempted" (ibid). The FCC Ruling went on to state that it would not "specify any particular height limitation below which a local government may not regulate, nor will we suggest the precise mechanisms for special exceptions, variances or conditional use permits. Nevertheless, local regulations which involve ... height of antennas 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" (id., para. 25; 47 CFR §97.15[e]). The FCC authorizes antennas up to two hundred feet in height, with approval necessary for those who wish to exceed that height limit (PRB-1, para. 3; 47 CFR §97.15[a]).

Prior to proclamation of PRB-1, it was held that FCC preemption, such as it existed under former regulations, did not oust local governmental authorities from enforcing height requirements on antennas for amateur radio use. Matter of Presnell v. Leslie, 3 NY2d 384 (1957), rearg. den. 4 NY2d 1046 (1958); Guschke v. City of Oklahoma City, 763 F.2d 379 (9th Cir. 1985).

The regulations of the FCC have the force of statutes. City of New York v. FCC, 486 US 57, 63-64 (1988). As such, the FCC regulations preempt local zoning laws to the limited extent provided in the regulations. Pentel v. City of Mendola Heights, 13 F.3rd 1261 (8th

Cir. 1994); Bodony v. Incorporated Village of Sands Point, 681 F.Supp. 1009 (ED NY 1987); People v. Krimko, 145 Misc. 2d 822 (Just. Ct. Nassau 1989); see Matter of Marino v. Town of Ramapo, 68 Misc. 2d 44, 57-58 (Supreme Ct. Rockland 1971).

In Pentel, supra, the Court summarized the statements of the FCC, the types of arguments advanced by petitioners in various cases and the applicable requirements concerning height of amateur radio antennas (pp. 1263-64):

> "The FCC was attempting to referee the tension between these interests when it issued PRB-1, in which it attempted 'to strike a balance between the federal interest in promoting amateur operations and the legitimate interests of local governments in regulating local zoning matters.' PRB-1 ¶22. After weighing local, federal, and amateur interests, the FCC issued a ruling that has a limited preemptive effect on local regulations. *See* PRB-1 ¶24. The federal courts that have addressed this ruling have upheld its preemptive effect. *See, e.g., Evans v. Board of County Comm'rs*, 994 F.2d 755, 760-61 (10th Cir.1993); *Thernes v. City of Lakeside Park, Ky.*, 779 F.2d 1187, 1188-89 (6th Cir.1986) (per curiam).
>
> Courts applying PRB-1 have discerned two means by which PRB-1 may preempt a local ordinance. First, the local regulation may be preempted on its face. The city's zoning ordinance does not conflict on its face with PRB-1 because it neither bans nor imposes an unvarying height restriction on amateur radio antennas. *See Evans v. Board of County Comm'rs*, 752 F.Supp. 973, 976-77 (D.Colo.1990); *Bulchis v. City of Edmonds*, 671 F.Supp. 1270, 1274 (W.D.Wash.1987).
>
> Second, PRB-1 also preempts a zoning ordinance that a city has not applied in a manner that reasonably accommodates amateur communications. *See Evans*, 994 F.2d at 761; *MacMillan v. City of Rocky River*, 748 F.Supp. 1241, 1248 (N.D.Ohio 1990). The FCC refused to specify a height below which local governments could not regulate, and instead declared that 'local regulations which involve placement, screening, or height of antennas

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.

Initially, we must discuss the extent to which this language requires municipalities to yield to amateur interests. Although some courts have evaluated whether the municipality properly balanced its interests against the federal government's interests in promoting amateur communications, *see Williams v. City of Columbia*, 906 F.2d 994, 998 (4th Cir.1990); *MacMillan*, 748 F.Supp. at 1248, we read PRB-1 as requiring municipalities to do more - PRB-1 specifically requires the city to accommodate reasonably amateur communications. *See Evans*, 994 F.2d at 762-63. This distinction is important, because a standard that requires a city to accommodate amateur communications in a reasonable fashion is certainly more rigorous than one that simply requires a city to balance local and federal interests when deciding whether to permit a radio antenna.

Application of this reasonable accommodation standard, however, does not require the city to allow the amateur to erect any antenna she desires. Instead, it requires only that the city 'consider[] the application, ma[k]e factual findings, and attempt[] to negotiate a satisfactory compromise with the applicant.' *Howard v. City of Burlingame*, 937 F.2d 1376, 1380 (9th Cir.1991); *see, e.g., Evans*, 994 F.2d at 762 (stating that the county was willing to permit a crank-up tower, a shorter tower, or a tower located elsewhere); *Williams*, 906 F.2d at 997 (stating that the city suggested a limitation on the hours the antenna could be extended, and noting that the amateur could apply for a shorter antenna). Under this approach, a local regulation that impairs amateur radio communications is preempted as applied if the city has not crafted it 'to accommodate reasonably amateur communications while using the minimum practicable regulation [necessary] to accomplish the local authority's legitimate purpose.' PRB-1 ¶25."

In Pentel, the zoning ordinance limited the height of a radio antenna to twenty-five feet. Petitioner was using a 56.5 foot roof

tower antenna but wanted to erect a free standing sixty-eight foot radio antenna. The city council denied her application but permitted her to continue to use the present antenna though it was in violation of the zoning ordinance. The Court held that the ordinance was not facially invalid as it did not ban antennas nor impose an unvarying height requirement (13 F.3rd at 1263). Other courts have held that where the zoning ordinance provides for variance or special use permits and standards exist for the reviewing agency to follow, the zoning ordinance is not facially invalid even though it prohibits antennas beyond a certain height because a reviewable procedure exists. Evans v. Board of County Commr's, 994 F.2d 755 (10th Cir. 1993); Williams v. City of Columbia, 906 F.2d 994 (4th Cir. 1990); Bulchis v. City of Edmonds, 671 F.Supp. 1270 (W.D.Wash.1987); see Matter of Basile v. Town of Brookhaven, 170 AD2d 1043 (4th Dep't 1991); cf. Cawley v. City of Port Jervis, 753 F.Supp. 128 (SDNY 1990); Village of Elm Grove v. PY, 724 F.Supp. 612 (E.D. Wis. 1989); VanMeter v. Township of Maplewood, 696 F.Supp. 1024 (D.N.J. 1988).

At bar, the parties have charted their own procedure with respect to how the matter came before the Zoning Board of Appeals as an apparent original case and not on appeal. Cullen v. Naples, 31 NY2d 818 (1972). Since the application has been treated as one for an area variance and the relevant provisions of the Town Law (Town Law §267-b[3]) were considered by the Zoning Board of Appeals, the only remaining issue is whether application of the variance standards is consistent with PRB-1. Stated differently, is the height restriction on antennas in the Town of Cortland's zoning ordinance invalid as applied?

It seems that application of variance standards can occur consistently with PRB-1's concerns. 1 Anderson, New York Zoning Law & Practice (3rd ed.), §13:38; Matter of Basile v. Town of Brookhaven, supra, 170 AD2d 1043; see, 83 Am. Jur. 2d, Zoning & Planning, §488; 3 American Law of Zoning (3rd ed.), §17.60; Ann. 81 ALR 3rd 1086 (1977) Zoning: Radio & Television Facilities (esp. §8, pp. 1094-96). The standard of review in this CPLR Article 78 proceeding is whether the action of the zoning authorities is illegal, arbitrary and capricious or is not supported by substantial evidence. Rice, Practice Commentaries to Town Law §267-c, p. 122 in 1996 Ann. Supp., McKinney's Consol. Laws of New York, Book 61 (Sections 190 to End). The Court cannot substitute its judgment for that of the zoning board even if compelling inferences to the contrary can be made. Matter of Doyle v. Amster, 79 NY2d 592 (1992). A determination is supported by substantial when the record shows evidence of relevant, probative and material proof that reasonable persons would accept as adequate to support an ultimate fact. People ex rel. Vega v. Smith, 66 NY2d 130, 139 (1985); 300 Gramatan v. Human Rights, 45 NY2d 176, 180 (1978); Matter of Party City v. Bd. of Appeals, 212 AD2d 618 (2d Dep't 1995).

Prior to 1992 there was no general state law that deferred the criteria for review of use or area variances. The applicable statute, §267(5) of the Town Law, required that the ZBA consider "practical difficulties or unnecessary hardships." Case law filled the gaps by defining "practical difficulties" (e.g., Matter of Wilcox v. Zoning Bd. of Appeals, 17 NY2d 249, 255 [1966]) and "unnecessary hardship" (e.g., Matter of Otto v. Steinhilber, 282 NY 71, 76 [1939]). In 1992, the

Legislature specified what factors the ZBA must consider on use and area variance applications. Town Law §267-b (2), (3). As to area variances, the ZBA was instructed (Town Law §267-b[3][b]):

> "In making its determination, the zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall also consider: (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance."

In Matter of Sasso v. Osgood, 86 NY2d 374 (1995) the Court of Appeals held that an application for an area variance need not establish under Town Law §267-b (3) (b) "practical difficulties" as formerly required.

In applying the statutory criteria the ZBA found: (1) an undesirable change in the character of the neighborhood would occur since the antenna would exceed the tree line and can be seen from adjoining properties; (2) the applicant could continue to use his present antenna; (3) the variance requested is too substantial, from thirty-five feet to one hundred and twenty feet; (4) the proposed antenna would have an adverse impact on the environment by reason of its visibility during the six-month period the trees are leafless and would

have an "industrial" look, and (5) the difficulty was self-created since petitioners purchased the premises when the zoning ordinance prohibited free standing antennas to exceed thirty-five feet (unless, of course, a variance was granted).

The Court finds that some of the ZBA's findings are not supported by the evidence. First, as to visibility, one board member observed that the balloon floated over petitioners' property at one hundred and twenty feet during a site inspection was not visible from certain nearby areas. Additionally, next door neighbors did not object to the application and one actually supported it. Second, the fact that Mr. Kleinhaus makes good use of the existing antenna should not prevent him from attempting to maximize his ability to connect with other amateur ham operators throughout the world with whom he is presently unable to communicate with because of the inadequacy of his present antenna and the topography of the property. Pentel v. City of Mendola Heights, supra, 13 F.3rd 1261. Third, while the requested change is substantial it is also relative. We are measuring height. The difference proposed is really forty feet above the tree line. Petitioners could have sought a two hundred foot antenna but realistically proposed a smaller one that suits their purpose. Nevertheless, the change is substantial and the ZBA rightly considered it a factor. Fourth, the alleged environmental impact of visibility during the leafless season, while tied to the first finding, is a factor correctly found by the ZBA to be considered. Fifth, the self-created hardship is benign. Such a finding is not fatal in an area variance application. Perger v. Zoning Bd. of Appeals, 146 AD2d 698 (2d Dep't

1989); Rice, Practice Commentaries to Town Law §267-b, p. 115 in 1996 Ann. Supp., McKinney's Consol. Laws of New York, Book 61 (Sections 190 to End). To the extent that the last finding suggests that petitioners build an antenna closer to their home on higher ground or on their roof, the record shows that neither suggestion is feasible because of the length and type of guy wires that must be used.

Based upon the foregoing, the first finding is not supported by substantial evidence; the second finding is also unsupported by any evidence as the ZBA turned a negative on its head - petitioners established that they cannot communicate by their present radio antenna as they desire and there is no evidence to the contrary; the third finding is correct but begs the question as the deviation only becomes relevant if it relates to an adverse effect in the neighborhood; the fourth finding is credited and supported by common sense and on site inspections; and the fifth finding, while supported, is neutral.

This leaves us with a finding supported by substantial evidence that during part of the year the antenna will be visible to others and may have an "industrial" look. While this finding standing alone might be sufficient in the ordinary zoning case to withstand analysis and support the ZBA determination, it cannot do so in the context of limited FCC preemption. This is so because the application of area variance criteria "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, para. 25; 47 CFR §97.15[e]).

The effect of the ZBA determination is to bar antennas whose

height greatly exceeds thirty-five feet even where such antennas are needed to fulfill the amateur's radio goals. But a delicate balancing process is required on amateur antenna applications. The licensed ham operator would like the ability to the full use of his amateur license (i.e., make contact with the whole world), while the zoning authorities are rightly concerned about visible adverse environmental impacts. This does not mean that the amateur ham operator receives permission to erect the antenna of his choice nor does it necessarily mean that the ZBA can deny the application with impunity.

At bar, neither side really made an effort to accommodate each other's interests. Pentel v. City of Mendola Heights, supra, 13 F.3rd 1261; MacMillan v. City of Rocky River, 748 F.Supp. 1241 (N.D. Ohio 1990). For example, perhaps petitioners could utilize a retractable antenna that would exceed the tree line height only in the evenings and use a wingspan of lesser dimension and apply a color that blends in with the surrounding environment, including buffers to mask the guy wires on the ground.

In view of the foregoing, the determination is annulled as irrational, arbitrary and capricious. However, rather than declare the zoning ordinance invalid as applied, the Court remits the matter to the ZBA for further proceedings to weigh whether it can reasonably accommodate petitioners' request or a modified request, if one is made by petitioners. If the ZBA concludes that it must again deny the application on a new or supplemental record, petitioners must commence a plenary proceeding for review, if review is sought.

Imbued in the findings of the ZBA are matters of personal

knowledge of the board members. Since the facts they presumably relate to are not generally known in the community, the ZBA should set forth precisely what facts were used to reach their conclusions. Matter of Community Synagogue v. Bates, 1 NY2d 445, 454 (1956); cf. Matter of Von Kohorn v. Mornell, 9 NY2d 27, 34 (1961). This is not a situation where the Court is remanding to the ZBA for precise factual support for its findings; rather, since the matter must be returned to the ZBA for further proceedings, the admonition appears appropriate. Matter of New York City Housing Board v. Foley, 23 AD2d 84 (1st Dep't 1965), aff'd, 16 NY2d 1071 (1965).

Submit order on notice.

Meyers Tersigni Feldman & Gray, Esqs.
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DATED: March 15, 1996

ENTERED: Joan B. Lefkowitz
JOAN B. LEFKOWITZ, J.S.C.

STATE OF NEW YORK, COUNTY OF WESTCHESTER SS.:
I, LEONARD N. SPANO, COUNTY CLERK AND CLERK OF THE SUPREME AND COUNTY COURTS, WESTCHESTER COUNTY DO HEREBY CERTIFY THAT I HAVE COMPARED THIS COPY WITH THE ORIGINAL THEREOF FILED IN MY OFFICE ON 3-18-96 AND THAT THE SAME IS A CORRECT TRANSCRIPT THEREFROM AND OF THE WHOLE OF SUCH ORIGINAL.
IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND AFFIXED MY OFFICIAL SEAL
3-15-05
COUNTY CLERK AND CLERK OF THE SUPREME AND COUNTY COURTS, WESTCHESTER COUNTY
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