

FILED

1SHORT FORM ORDER

98 SEP 21 AM 3:38 SUPREME COURT - STATE OF NEW YORK
TRIAL/SPECIAL TERM, PART VII - SUFFOLK COUNTY

EDWARD P. CHAMBERLAIN
CLERK OF

PRESENT: HON. JAMES A. GOWAN,
SUFFOLK COUNTY

JUSTICE.

-----X
IN THE MATTER OF THE APPLICATION OF MOTION DATE: 7/27/98
MICHAEL ANDERSON,

Petitioner, MOTION NO.: 001-MG
CASEDISP

- against -

THE PLANNING BOARD OF THE TOWN OF ISLIP, INDEX #98-04225

Respondent.

-----X
FORCHELLI, SCHWARTZ, MINEO & CARLINO TOWN ATTORNEY
120 Mineola Boulevard Town Hall
Mineola, NY 11501 Islip, NY 11751

Upon the following papers numbered 1 to ___ read on this motion

Notice of Motion/Order to Show Cause and supporting papers
_____; Notice of Cross Motion and supporting papers
_____; Answering Affidavits and supporting
papers _____; Replying Affidavits and supporting papers
_____; Other _____;
(and after hearing counsel in support of and opposed to the motion, it is,

ORDERED that the petition (#001) of MICHAEL ANDERSON
("ANDERSON") for a judgment pursuant to Article 78 annulling and
reversing the decision of respondent PLANNING BOARD OF THE TOWN
OF ISLIP ("PLANNING BOARD") denying petitioner's application for
a special permit to maintain an amateur radio tower is determined
as follows:

On September 20, 1996, ANDERSON, who holds an amateur radio
license issued by the Federal Communications Commission ("FCC"),
filed an application with the PLANNING BOARD pursuant to §68-
420.1(a) of the Code of the Town of Islip (the "Code") for a
special permit for his preexisting amateur radio communications
antenna. The antenna is retractable, and measures approximately
22 feet in height in its retracted position and 85 feet in height
in its extended position. The record reflects that two public
hearings were held in connection with the application, at which a
number of area residents testified both in support of and in
opposition to the application. Numerous other residents
submitted written comments. The PLANNING BOARD also conducted an

inspection of the site. The application was denied by a resolution of the PLANNING BOARD dated January 27, 1998.

At the outset, the Court notes that the field of amateur radio communications is extensively regulated by the FCC pursuant to the authority granted it by the Communications Act of 1934. 47 U.S.C. §151 et seq., 47 CFR §97 et seq. FCC regulations have the same preemptive effect as federal statutes. City of New York v. FCC, 486 U.S. 57 (1988); Bodony v. Incorporated Village of Sands Point, 681 F. Supp. 1009 (E.D.N.Y. 1987). In 1985 the FCC issued a declaratory ruling ("PRB-1") setting forth its intent to partially preempt local regulation of amateur radio operations, and providing that "[l]ocal 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." 101 F.C.C.2d 952 (1985); 47 C.F.R. §97.15(e).

The PLANNING BOARD's denial of ANDERSON's application was predicated upon six factors: First, the PLANNING BOARD found that the location of the antenna tower violated the "policy of the Town which limits tower locating to a place where it would not fall on an adjoining property." The cited "policy" is not reflected in the provision of the Code that governs receiving and/or transmission towers (§68-420.1), and does not appear to have been otherwise codified. The Court finds that the imposition of such a "policy" impermissibly imposes an absolute height limit on antennas in residential areas and unreasonably restricts the ability of amateur radio operators to erect and maintain antenna towers that are effective for their communication purposes. Bodony v. Incorporated Village of Sands Point, *supra*, 681 F. Supp. at 1013. No evidence was presented that the antenna does not comply with Building Division requirements or other pertinent codes, that it is structurally unsound, or that it is unduly susceptible of falling onto adjoining property. Moreover, inasmuch as the antenna is retractable, the Town could have required as a condition of approval that the antenna be lowered during storms and periods of high winds so as to minimize any risk of its falling. In the circumstances, the application of the policy is arbitrary and capricious, and unsupported by any evidence in the record.

Second, the PLANNING BOARD cited "severe interference" with television and telephone reception at adjoining properties allegedly caused by the antenna, which "represents a severe adverse impact on the enjoyment of adjoining properties." There is no evidence in the record to conclusively establish that any such interference is caused by ANDERSON's antenna. In any event, issues regarding radio frequency interference are within the exclusive jurisdiction of the FCC. Matter of Mobilecomm of New

York, Inc., 2 F.C.C.R. 5519 (released August 31, 1987); Matter of 960 Radio, Inc., F.C.C. 85-578 (released November 4, 1985). Accordingly, the PLANNING BOARD may not deny a special permit for an antenna on the ground that it causes interference.

The third ground for the denial of the application cited by the PLANNING BOARD is the visual impact of the transmission tower, which the PLANNING BOARD described as "extreme in terms of its height and width in relation to other towers which had received approval . . . in residential districts." The PLANNING BOARD concluded that "[t]he impact would adversely affect the enjoyment of adjoining properties." PRB-1 specifically provides that in regulating the placement, screening or height of antennas, a local government may consider aesthetic considerations in addition to health and safety factors. However, such regulations must represent "the minimum practicable regulation to accomplish the local authority's legitimate purpose." It appears from the record that in considering the aesthetic impact of an antenna that is "more than twice the maximum height allowed for buildings and is significantly higher than any other tower granted," the PLANNING BOARD failed to consider any alternatives to outright denial that would mitigate the visual impact of the tower. Inasmuch as the PLANNING BOARD is expressly empowered by §68-420.1 of the Code to impose conditions on the granting of an application, denial of the special permit on this ground is arbitrary and capricious.

The fourth ground cited by the PLANNING BOARD was the fact that approval had never been granted previously for an antenna of such dimensions, and that granting the application would set a precedent for similar applications that would be contrary to the Town's Comprehensive Plan which has as a goal the promotion of "attractive environments that enhance the value of life with aesthetically pleasing surroundings." The Court finds that in light of the "strong federal interest in promoting amateur communications" (PRB-1, §24), reluctance to set a precedent is an insufficient ground for denial of the application and is arbitrary and capricious.

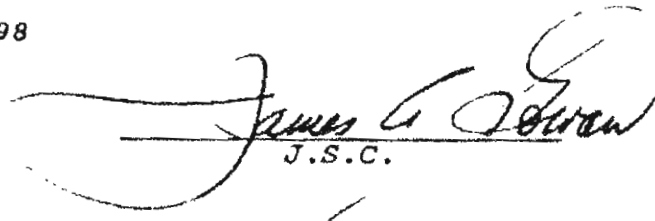
AS to the fifth ground for the denial, there is no evidentiary support in the record for the PLANNING BOARD's assertion that "[i]t is reasonable to conclude that the visual impact of the tower would have an adverse impact on adjoining property values. Due to the proximity of the residence [sic]." Accordingly, denial on this ground is arbitrary and capricious.

The last ground cited is that "the proposed use is counter to the purposes and considerations of the Islip Zoning Ordinance. . ." The Court finds this assertion disingenuous in light of the provision of the Islip Town Code expressly permitting the erection of receiving and/or transmission towers.

The Court finds that the PLANNING BOARD failed to reasonably accommodate petitioner's amateur radio operation as required by PRB-1. The petition is granted and the matter is remanded to the PLANNING BOARD to conduct a new hearing and for findings not inconsistent with the foregoing determination.

Petitioner shall serve a copy of this order, with notice of entry thereof, upon the PLANNING BOARD.

DATED: September 15, 1998


J.S.C.



TOWN OF ISLIP
DEPARTMENT OF PLANNING AND DEVELOPMENT

Pete McGowan, Supervisor
Thomas A. Isles, A.I.C.P. *Commissioner*

December 7, 1999

Mr. Michael Anderson
2 Hother Lane
Bay Shore, New York 11706

Re: **Application for Receiving and/or Transmission Tower**

Dear Mr. Anderson:

Please be advised that on November 19, 1999 the Planning Board of the Town of Islip, pursuant to Section 68-420.1 of the Town Code, granted a Special Permit for the above use at the above address. A copy of the resolution including the restrictions to which the permit is subject, is attached.

Very truly yours,

Eugene J. Murphy
Deputy Commissioner

EJM:jc
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PLANNING BOARD RESOLUTION

Michael Anderson

WHEREAS Petitioner MICHAEL ANDERSON, filed a application for a special permit to legalize an amateur radio tower eighty-five feet (85') high located on the property known as 2 Hother Lane, Bay Shore, New York, and Suffolk County Tax Map No. 0500-417-01-024, and

WHEREAS on January 27, 1998, Respondent denied Petitioner's application, and

WHEREAS on or about February 26, 1998, Petitioner duly instituted the present Article 78 proceeding, and

WHEREAS by Order and Decision dated September 15, 1998, the Supreme Court, Suffolk County (Gowan, J.), granted the Petition and directed the Planning Board to grant the application allowing reasonable mitigation of the impact of the tower.

On a motion by _____ second by _____

BE IT THEREFORE RESOLVED:

A. that the application of Michael Anderson for a Special Permit for a transmission tower is granted subject to the following stipulations:

- 1) The tower must be retracted to its lowest height when not in use, which is \pm thirty-eight feet (38').
- 2) The tower must be removed when either Petitioner relocates from the subject property or if Petitioner ceases to maintain an FCC license for amateur radio communications.
- 3) The extended height of the tower may not exceed sixty-five feet (65').

- 4) Two (2) deciduous trees of a minimum caliber of three inches and a minimum height of fourteen feet (14') shall be planted at a location mutually agreeable to Petitioner and the Planning Department of the Town of Islip, and which is located in the general vicinity cross-hatched on the survey attached hereto.
- 5) The tower shall be painted a shade of blue/gray, the specification for which shall be submitted to the Department of Planning and Development for its approval, which shall not be unreasonably withheld. Nothing in the decision, however, shall require that the antennas be painted or that any other facility located on the tower, such as wiring, be painted.
- 6) If violation of the conditions contained herein occurs, the Planning Board may schedule a hearing upon fifteen (15) days notice to the property owner concerning the revocation of this approval. At the conclusion of the hearing, the Board may impose a fine on the property owner for violations of the Covenants and Restrictions. The fine shall be no more than is allowed for a violation of a provision of the Zoning Code of the town of Islip. If reasonable cause exists that the property owner will not abide by conditions contained herein, the Planning Board may revoke this approval.

B. With regard to Condition Three indicated above, within sixty (60) days of the issuance of the approval by the Planning Board, Petitioner, or his representative, and a representative of the Planning Department shall meet on the subject property and select the location for the planting of the two deciduous trees. With sixty (60) days of the selection of the location, the trees shall be planted by Petitioner. Petitioner agrees to notify the Planning Department once the

trees have been planted. The dates set forth in this paragraph may be extended by mutual agreement between Petitioner and the Planning Department.

Upon a vote being taken the result was: unanimously adopted.