

IN THE COUNTY COURT OF ALLEGHENY COUNTY, PENNSYLVANIA

IN RE:)
)
 APPEAL OF A. G. SCHMIGEL AND)
 MARIE SCHMIGEL, HIS WIFE, FROM)
 THE DECISION OF THE BOARD OF AD-) A-124 of 1965
 JUSTMENT OF THE BOROUGH OF)
 BALDWIN)

FINDINGS OF FACT, ETC.

LENCER, P. J.

Since this Court has exclusive jurisdiction in all appeals from orders of Zoning Boards of Adjustment and/or Appeal here in Allegheny County, the Commonwealth's Fifth Judicial District, in open court we heard the evidence in the appeal noted on the order of the Zoning Board of the Borough supra denying the application discussed in detail. 17 Purdon, Courts 626.

After careful consideration of the evidence, we make the following findings of fact:

A. G. Schmigel and Marie Schmigel, his wife, reside at 5363 Hacienda Drive, Baldwin Borough, Allegheny County, Pennsylvania, and are the owners of the following described property:

ALL that certain lot or piece of ground situate in the Borough of Baldwin, County of Allegheny, Pennsylvania, being Lot. No. 645 in Ranchview Manor Plan No. 6 as recorded in Plan Book Volume 58, Pages 23 to 26, inclusive, bounded and described as follows:

BEGINNING at a point on the Easterly side of Hacienda Drive, 50' wide, on the line dividing lots No. 642 and 645 in said plan; thence along the Easterly side of Hacienda Drive by an arc curving to the Right and having a radius of 250', a distance of 52' to a point on the line dividing Lots Nos. 645 and 646 in said plan; thence along said dividing line South $87^{\circ} 24'$ East, 159' to a point; thence North $12^{\circ} 30'$ East, 85.64' to a point; thence South $80^{\circ} 41'$ West, 164.35' to Hacienda Drive, the place of beginning.

The Borough of Baldwin is a municipality in Allegheny County, Commonwealth of Pennsylvania.

A. G. Schmigel, one of the appellants, is a regularly licensed amateur radio operator by the Federal Communications Commission and has been so licensed for over 28 years. The said A. G. Schmigel is employed by Bell Telephone Company of Pennsylvania as an engineer, and in connection with his employment, is the holder of a first class radiophone commercial license issued by the Federal Communications Commission and has been so licensed for over 15 years.

In addition to his amateur radio operator's license, the said A. G. Schmigel has been issued a station license for his residence at 5363 Hacienda Drive, Baldwin Borough, Allegheny County, Pennsylvania by the Federal Communications Commission.

As a licensed amateur radio operator, A. G. Schmigel operates and maintains radio receiving and transmitting equipment at his residence, which he uses to communicate with other amateur radio operators.

Amateur radio operators, including A. G. Schmigel, one of the appellants, engage in communication with each other in order to provide development of the art, communications service in cases of local, state or national emergencies, such as fire, flood and earthquake. They also participate in and provide civilian defense communications, medical information, assistance for marooned and isolated persons and telephone

communications for missionaries, armed forces and other isolated persons. These public services are all voluntary, personal and do not involve any fees, profit, nor is there any commercial or business operation connected with their activities.

In order to effectively receive and transmit radio waves and to communicate with other amateurs, it is necessary to utilize an antenna which must be elevated at least 50 feet above the ground level.

There are, at the present time, 10 to 15 licensed radio amateurs in Baldwin Borough who have erected masts and towers, ranging from 35' to 65' in height.

There are 2,089 telephone poles owned by Bell Telephone Company and Duquesne Light Company, located in Baldwin Borough, ranging in height from 35' to 65'.

There are 20 high tension transmission towers located in Baldwin Borough, owned by Duquesne Light Company, which are 65' in height.

There are 15 flag poles in Baldwin Borough, ranging in height from 25' to 60'.

A. G. Schmigel, one of the Appellants, when a resident in Baldwin Borough in 1958, had an antenna tower which was 40' in height.

On November 6, 1964, A. G. Schmigel filed an application for a building permit to erect a 50' tower in his back yard, upon which he desired to place his amateur radio receiving and transmitting antenna to be used in connection with his receiver and transmitter located in his residence. On the same date, he was advised by the Baldwin Borough Building Inspector that his application for a building permit would be refused and an Appeal to the Board of Adjustment of the Borough of Baldwin was filed.

At the hearing before the Board of Adjustment of the Borough of Baldwin on December 3, 1964, no stenographic notes were taken of the testimony.

The Board of Adjustment rendered its decision on January 16, 1965, denied the Appeal and affirmed and sustained the decision of the Building Inspector.

A Petition for Appeal from the decision of the Board of Adjustment was filed in the County Court of Allegheny County, Pennsylvania on January 25, 1965, and a Writ of Certiorari was issued on the same date.

The property of Appellants is located in a "R-2 district", as described in the Baldwin Borough Zoning Ordinance of 1958, Article II, Section 200 and classified as a "single family residence district."

Article VI, Supplementary Regulations and Modifications, Section 611, Height Exceptions, Mechanical Appurtenances, provides "where the process requires a greater height may exceed the maximum height limit established by this ordinance provided that any such structure above the limiting height shall not be used for the purpose of providing additional floor space . . .".

The amateur radio tower proposed to be erected by A. G. Schmigel, one of the appellants, is not permanently affixed to the realty. It is fastened by bolts to a footer or foundation and can be erected and removed in one day. The proposed tower is manufactured by Vesto Company and consists of sections of angles bolted at the corners with steel bracing.

Section 109.35, Radio and Television Towers, of the Building Code of Baldwin Borough provides:

Radio and television towers over twelve (12) feet in height shall be constructed of steel or other approved corrosion-resistive noncombustible materials; except that isolated radio towers may be constructed of wood when not more than one hundred (100) feet in height.

The height of a radio amateur antenna governs the ability of the amateur operator to transmit and receive to further points and distances. The angle of radiation transmitted from an antenna is governed primarily

by the height of the antenna above the actual surface of the ground. A height of approximately 50' would permit communication with South America, all of the United States, Africa and Europe.

An amateur radio antenna less than 50' in height reduces the ability to communicate except within a short radius of the antenna.

There is no interference to radio receivers and television receivers caused by the amateur radio operations of the Appellant. He owns two television receivers located in his own home and during his periods of transmitting, there is no interference whatsoever.

In case of future interference to television receivers or radio receivers, it is possible and under the rules and regulations of the Federal Communications Commission, it is necessary that an inexpensive filter be installed on the radio or television receiver. Television interference, if any, can definitely be eliminated if it is caused by an amateur radio station. It is physically impossible for an amateur radio station to interfere with any television set if the television set is in proper working condition, well aligned and equipped with a suitable filter.

Accordingly, the overwhelming weight of the testimony moves us to make and we do make the following conclusions of law:

1. The appellants are residents and property owners in the Borough of Baldwin, Allegheny County, Pennsylvania, and reside at 5363 Hacienda Drive.
2. One of the appellants, A. G. Schmigel, is a properly licensed radio amateur operator by the Federal Communications Commission and in addition thereto, he is the holder of a station license for his residence, which has been issued and authorized by the Federal Communications Commission.
3. Under the Zoning Ordinance of the Borough of Baldwin, the residence of the appellant is classified as "R-2" which permits single family dwellings, two and one-half stories and 35' in height.

4. The Zoning Ordinance of the Borough of Baldwin, in its Supplementary Regulations and Modifications, Section 611, excepts from the height limitations: bulkheads, elevator penthouses, chimneys, ventilators, water towers, cooling towers or other structures where the process requires a greater height and provides that such mechanical appurtenances may exceed the maximum height limit established by the Ordinance.

5. The construction of an antenna mast, not permanently affixed to the realty, to be placed in the back yard and used for radio amateur communication, is a permitted accessory use of residential property.

6. The application of the 35' height limitation as it applies to mechanical appurtenances, is specifically excepted by the Zoning Ordinance of the Borough of Baldwin.

7. To apply the 35' height limitation to an amateur radio mast, would prevent appellant from communicating with other radio amateurs at distant places, would destroy its effectiveness and would deprive the homeowner of the right to use his property as he wishes and would constitute an unlawful taking of the appellant's property, without compensation.

8. As applied to an amateur radio mast or television antenna mast which requires heights above 35' to be effective, the ordinance of the Borough of Baldwin limiting the height of structures to 35', interferes with the inalienable right of a property owner to use his property as he wishes, without any rational relation to public safety, health, morals or general welfare and is not a legitimate exercise of the police power.

9. The effective transmission and reception of radio waves, amateur radio waves, and commercial television signals is dependent upon height above ground of the antenna in relation to the frequency of the transmitted and received signals. The Ordinance of the Borough of Baldwin is vague and indefinite in that it provides no standards bearing any relation to public health, safety, morals or general welfare.

10. The Borough of Baldwin, other than in the instant case, has made no pretense of enforcing the height limitation as it pertains to any appurtenances other than residential buildings, as there are 2,089 telephone poles in the borough, ranging in height from 35' to 65'; 20 high tension transmission towers in the borough, 65' in height; 15 flag poles in the borough, varying from 25' to 60' in height, and a minimum of 10 amateur radio masts, or towers, in excess of 35' in height.

11. An amateur radio tower, not permanently connected to the realty and not intended to be permanently connected to the realty, used by a duly Federal Communications Commission licensed radio operator in connection with amateur radio transmitting and receiving equipment, is not a "structure" within the meaning of the Zoning Ordinance of the Borough of Baldwin.

12. The Zoning Ordinance of the Borough of Baldwin fails to set any meaningful standards for the location, height or construction of radio receiving or transmitting masts or antennas, is inconsistent, incomplete, conflicting and is invalid insofar as it prevents a homeowner from his constitutional right to use his property in any way he desires, provided that he does not violate any provisions of the Federal or State Constitutions, create a nuisance, violate any covenant, restriction or easement, or violate any laws or zoning or police regulations which are constitutional.

13. The reception and transmission of radio and television waves is the inalienable, constitutional right of all homeowners, which cannot be curtailed or controlled, either directly or indirectly, by a Zoning Ordinance which arbitrarily limits the height of the antenna which is electrically necessary for the proper reception or transmission of radio waves. A municipality may not under the guise of its police power, directly regulate, curtail or control the transmission and reception of radio signals, nor can a municipality indirectly by limitation of the height of the receiving and transmitting antenna, curtail, regulate or control the transmission and reception of radio signals.

14. The Zoning Ordinance of the Borough of Baldwin, insofar as it attempts without any standards and without any relation to the frequency in megacycles of a transmitted or received radio signal, to limit the height of the receiving or transmitting antenna, is not necessary for the preservation of public health, safety, morals or general welfare and is unjustly discriminatory, arbitrary, unreasonable and confiscatory in its application to the property of the appellant.

15. The appeal of A. G. Schmigel and Marie Schmigel, his wife, should be sustained and the Building Inspector of the Borough of Baldwin should be ordered to issue the building permit applied for.

DISCUSSION

We believe it desirable to underscore some of the consideration which has moved us to these findings and conclusions.

The appellant has been licensed as an amateur radio operator by the Federal Communications Commission and desires to place a 50' antenna mast in his back yard and to be used with the receiver and transmitter located within his residence.

The appellant's property is zoned "R-2" under the Baldwin Borough Zoning Ordinance.

In Table 68-A attached to the Ordinance, it is provided in an "R-2" area "maximum height of buildings in stories, two and one-half," "maximum height of building in feet, 35 feet."

Section 400 of the Ordinance provides that a permitted accessory use is a related minor use which is (a) necessary to the operation of enjoyment of a lawful principle use, or (b) appropriate, incidental and subordinate to any such use.

Section 611 of the Ordinance specifically excepts from the height limitations certain specified appurtenances "or other structures" where the process requires a greater height.

As a licensed amateur radio operator, the appellant, as a hobby and as a public service in times of emergency, such as floods, earthquake, fire or other disaster, provides communication with other amateurs all over the United States and, in fact, the world.

In order to so communicate, it is necessary that an antenna capable of receiving and transmitting radio waves be employed. The effectiveness of an antenna, either in receiving or transmitting radio signals, is dependent upon a height above the surface of the ground. The antenna and mast proposed to be used in the appellant's back yard is not a permanent structure, is not a building, is not a permanent part of the realty and can be placed or removed by means of bolts which hold the angle pieces together. The Borough, nevertheless, notified appellant to apply for a building permit, refused to grant a building permit and on appeal to the Board of Adjustment, refused his appeal.

The latter fully described his operation as an amateur radio operator, the necessity of an antenna in pursuit of his hobby, the required height of an amateur antenna, the number of telephone poles, high tension transmission lines, flag poles, etc. located in Baldwin Borough.

No testimony was given by the Borough as to the necessity of any restrictions on the construction or height of an amateur radio antenna, nor was there any testimony that the construction of the aforesaid antenna would adversely affect the health, safety and morals of the community, or that the refusal to grant the permit was justified in the public interest.

In the case we deem to be conclusive in our disposition of this appeal, Lord's Appeal, 368 Pa. 121, 81 A. 2d 533, the Supreme Court held that a back yard radio antenna mast, used in connection with a radio receiver and transmitter located within the home, was a permitted accessory use; that a homeowner cannot be deprived by zoning of a right to use his own property as he wishes, merely because a zoning board believes that what he intends to erect is not artistic or aesthetic. In the present case, there was no testimony before the Board of Adjustment nor before this Court, that the proposed tower was not artistic, was not aesthetic or that it would have an unfavorable aesthetic impact on the other residences in the area or neighborhood, or that the proposed tower would adversely affect the health, safety and morals of the community.

Since the decision of Lord's Appeal, 368 Pa. 121, the Supreme Court has in several cases indicated that aesthetic and artistic standards might be the subject of zoning restrictions. See *Austine v. Zoning Board of Adjustment*, 411 Pa. 33, 190 A. 2d 712, 1963; *Rogalski v. Upper Chichester Twp.* 406 Pa. 550, 178 A. 2d 712.

"The absence of any evidence on this record relating to the preservation of aesthetic characteristics, removes this element from our consideration." *Austine v. Zoning Board of Adjustment*, 411 Pa. 33.

We must underscore likewise the fact that the present ordinance, insofar as it pertains to the control of the height of an amateur radio antenna, is not definite, certain nor complete. There are no standards whatsoever, except possibly the overall standard that no building may exceed 35' in height in an "R-2" district.

There is no rational relation to public safety, health, morals or general welfare or the police power in the use of appellant's property as a licensed amateur radio operator and the height of buildings limitation, as contained in the Ordinance.

Assuming for the sake of argument that the construction here proposed could actually be called a structure within the definitions found in the Ordinance -- and section 104 dealing with definitions does not contain the definition of a structure, we cannot avoid the significance, the patent discrimination involved in the fact that the Borough has not invoked the provisions of its Zoning Ordinance insofar as it applies to the 2,089 telephone poles, 20 high tension towers of 65', 15 flag poles and other amateur radio antenna masts and towers located in Baldwin Borough.

We would rather not underscore the possibility of improper discrimination; let us, therefore, declare that a careful reading of the Zoning Ordinance and considering the borough's failure to impose the height restriction on the telephone poles, high tension towers and flag poles, all ranging in height above ground from 35' to 65', and its failure to define "structure", clearly indicates that the ordinance was not intended to apply to anything other than buildings. Indeed, the ordinance in Section 611, specifically recognizes that height limitations do not apply to parts of

buildings, such as chimneys, bulkheads, water towers, etc. where a greater height is required and which do not provide additional floor space or living areas.

Indeed, we cannot escape the facts of life, the literally hundreds of radio and TV facilities everywhere and the legitimate use of the facilities here intended. Accordingly, a careful consideration of the appeal must constrain us to underscore the position of this applicant when he thus testifies:

"If I do not use an antenna, then my chances of getting out are going to be relatively slim. I cannot get out within a few blocks, so the antenna is 95% of getting out." (T. Page 6)

"The height of antenna is important from a standpoint of being able to transmit and receive to a larger distance, a further distance. The low angle (of) radiation transmitted from the antenna is governed, principally, by the height of the antenna above the actual surface of the ground. The height, I believe would be reasonable, would be around 50 feet. This particular height would allow me to communicate with South America, all of the United States and of course Africa and Europe very easily." (T. Page 7)

Accordingly, it seems to us that if we are to abide by Lord's Appeal as we happily abide by all of the appellate court guidance in all cases that come before us, we cannot ignore the conclusions of the applicant in the following request or language:

1. An antenna mast used for amateur radio communication and not for profit or in any commercial sense, is a permitted accessory use in a residential neighborhood.
2. The proposed amateur radio antenna mast is not a "structure" within the meaning of the Baldwin Borough Zoning Ordinance.

3. The proposed amateur radio antenna mast is not permanently attached to the realty, can be readily removed and is not intended to become a part of the realty.

4. If the proposed amateur radio antenna mast is a "structure", the ordinance in Section 611 specifically excepts the same from the height limitation of the ordinance.

5. A physical height of 50' above ground is required for an amateur radio antenna in order to effectively communicate with other radio amateurs in the United States and throughout the world.

6. The Baldwin Borough Zoning Ordinance is vague, uncertain and indefinite insofar as it applies to amateur radio masts, towers and antennas, and sets no standards which are related to or necessary to the preservation of public health, safety, morals, general welfare or the police power.

7. The Borough of Baldwin, when it enacted its Zoning Ordinance, did not intend that its provisions as to height apply to telephone poles, transmission towers, flag poles or amateur radio towers, masts or television or radio antennas.

8. There is not a scintilla of evidence that the erection of the proposed radio antenna mast would "aesthetically" injure the neighborhood.

9. There is no testimony that the proposed use of Appellant's property and that construction of an amateur radio antenna mast would adversely affect the health, safety, and morals of the community. (Good Fellowship Club Appeal, 406 Pa. 465, 178 A. 2d 578)

10. The burden is on the borough to establish by legally sufficient, competent evidence that its refusal to grant the permit for a radio mast and antenna is justified in the public interest.

We would not attribute a charge of improper discrimination to the respected zoning board of this municipality. Looking to the court of the specific structures of a like kind, all of them, of course, within zoning

regulations, that have been permitted -- and conceding that this is not the sole and decisive test -- we prefer to abide by the policy in cognate situations holding that zoning ordinances and the action of the authorities thereunder must be given due weight in determining similar questions and have sometimes even been given the greatest weight. *White, et al. v. Old York, et al.*, 185 A. 316, 322 Pa. 147. Certainly, where zoning provisions sustain an accessory use similar grants -- "are in the nature of expressions of municipal thought and opinion, from those who may be classed as neighbors," express approval by the people in the vicinity: *White, et al. v. Old York, et al.*, supra. While courts are reluctant, and should be, to impose the sanction of laches on governmental divisions, as it is for the chancellor in equity who cannot close his eyes in certain instances, so it may be in a zoning case where there appear such factors as the existence of a use for a long passage of time and seeming permission or at least knowledge of its existence without challenge and the pursuit by the municipal officials of a course of conduct that indicates the use is not objectionable:¹ *Heldron Appeal*, 195 A. 2d 349, 412 Pa. 570, 573; *Hasage v. Phila. Z.B.A.*, 202 A. 2d 61, 415 Pa. 31.

The appeal is sustained; the Zoning Board of Appeals is ordered and directed to grant the application and permit as prayed for; exception noted and bill sealed.

s/Lencher, P. J.

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¹ This with careful consideration given to the discussion by the able counsel for the Zoning Board of the word "structure."

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