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IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA
ZONING APPEAL

JEFFREY J. DEPOLO	:	
Plaintiff	:	Case No. **2016-10648-ZB**
v.	:	
BOARD OF SUPERVISORS OF TREDYFFRIN TOWNSHIP, et al.	:	
Defendants	:	

PLAINTIFF DEPOLO'S RESPONSE TO THE TREDYFFRIN TOWNSHIP ZONING HEARING BOARD'S PRELIMINARY OBJECTIONS

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Summary of Argument and History of the Case

Jeffrey J. DePolo, the Plaintiff, applied for a permit to construct an amateur radio station antenna structure at his home on Horsehoe Trail, in a rural part of Tredyffrin. He lives on a road which can well be characterized as an antenna farm. Along the ridge to his East are two radio towers (90 and 200+ feet tall, with red beacon), as well as two tall water towers with radio antennas. To his West one amateur radio tower with 90 feet tall, with an internal stairway, as well as one massive water tower with antennas. He sought building and zoning permits for an amateur radio "antenna support structure" (to use the wording of 32 Pa CS 302) or "station antenna structure"" (to use the wording of 47 CFR 97.15(b). The permits were denied by the Tredyffrin Township Zoning Hearing Board of Appeals (the "ZHB", but sometimes referred to by the courts as the "ZHBA"). This is an appeal from that denial.

DePolo originally complained to the U.S. District Court, followed by an appeal to the Third Circuit Court of Appeals. The Third Circuit's decision is included in the required transfer documents. DePolo, Applicant before the ZHB, has now transferred this matter to this court as a matter of right under **Pa. 42 C.S. § 5103 (b) Transfer of erroneously filed matters**.

DePolo filed the complaint in federal court within 30 days of an adverse ruling by the ZHB denying him permission to install an amateur radio station antenna structure, citing both federal law and Pa. laws. Details of the underlying conflict are provided below. Opponents claim no permission to transfer from federal court to this court was granted. The U.S. District Court dismissed DePolo's federal claim under FED.R.CIV.P. 12(b)(6), and declined to exercise jurisdiction on the state zoning claims. The U.S.

Court of Appeals ruled it could not consider the merits because DePolo should have first filed his claim in state court. No transfer order was issued, but none is required. Pennsylvania courts are best suited to determine the application of a Pennsylvania statute preserving rights if legal action is timely but erroneously filed in a federal court. This is the essence of the matter before this court.

The U.S. District Court never considered any record except the complaint and its attachments. And the Third Circuit Court of Appeals ruled it could not decide on the merits because DePolo should have filed in this court. The Third Circuit held: "The procedural posture of this case precludes our review of the merits of his [DePolo's] claim." (Third Circuit slip op. at 11). The Circuit Court decided that DePolo should have filed a protective action in the Court of Common Pleas for Chester County, and then stayed that case while the federal court considered his appeal. Importantly, the state law claims of count 2 and count 3 of the present complaint were not considered by the federal courts at all and therefore cannot be considered adjudicated on the merits either. As the District Court explained, "Because we dismiss DePolo's federal claim, we decline to exercise supplemental jurisdiction over his state-law claims." (District Court slip op. at 20).[1] No decision was reached on DePolo's count under ***Pa. 53 C.S. § 302,*** nor on the general Pa. zoning law claims challenging the findings of the ZHB.

Contrary to the assertions of all opponents filing in this matter, neither the U.S. District Court, nor the Third Circuit decided this case on the merits. The District Court dismissed DePolo's federal counts:

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[1] Certified copies of the court opinions are filed in this matter, as required by ***42 C.S. § 5103.***

> We draw our recital of the factual background from the plaintiff's complaint and the factual findings in the Zoning Board's decision denying DePolo's application for what effectively would be a 190-foot tower, but granting him a permit for a 65-foot tower. DePolo appended the Zoning Board decision as an Exhibit to the complaint. (District Court slip op. at 3, ¶1).

No other record facts were considered. The Third Circuit did not affirm the findings of the District Court, but rather affirmed dismissal on other grounds, again without considering the merits. Though DePolo filed a motion with the Circuit Court to release the case, DePolo asserted there:

> [T]he Pennsylvania statute does not require a court order. "Such transfer may be effected by filing a certified transcript of the final judgment of the United States court and the related pleadings in a court . . . of this Commonwealth." **42 Pa. C.S. § 5103 (b)(2)**. DePolo merely filed his Motion to assure all concerned that the matter has reached finality in the Third Circuit. In the past, this court has adopted the concept that "prompt action is required." (Citation omitted). DePolo urges this court, within its supervisory power, to release the matter for immediate transfer. (DePolo's letter brief, see docket attached to transferred complaint.)

Though the Circuit court did not order the matter transferred (indeed a federal court should not make any Pennsylvania state court take a case), it immediately released the case, as DePolo requested, at the same time it presented its opinion as final on October 6, 2016. Once the federal court dismisses a case for lack of jurisdiction, "it is then incumbent upon the litigant to take further action under the statute to move the case to state court." ***Williams v. F.L. Smithe Mach. Co., Inc.,*** 577 A.2d 907, 909 (Pa.Super.1990), appeal denied, 593 A.2d 422 (Pa.1991). When a case was erroneously filed in federal court, the statute requires neither federal court permission, nor a federal court order to transfer.

Why Did DePolo File in Federal Court?

The procedural ruling now prompting transfer deviated from the Third Circuit's

earlier case of ***Izzo v. Borough of River Edge***, 843 F.2d 765 (Third Cir. 1988). There a trip to state court was not required after a zoning hearing board ruled adversely on an amateur radio antenna permit application. The ***Izzo*** court held that there is an overriding federal interest and that the U.S. district court should not abstain.

> The Commission's order indicates an intent to apply a limited, rather than a total preemption. **However, the order infuses into the proceedings a federal concern, a factor which distinguishes the case from a routine land use dispute having no such dimension.** (emphasis added) *id.* at 768.

For the first time, a circuit court now requires an Amateur Radio licensee to file a protective action in a state court to preserve the time deadline (30 days) for appealing a zoning hearing board decision. The opinions of the District Court and the Circuit Court in this matter were included with the required docket filings to this court.[2] *See* **FED. R. CIV. P. 7.**[3] DePolo has not been able to find a decision from any other U.S. Court of Appeals requiring that a PRB-1 appeal must first be filed in state court.[4]

Nevertheless, the Third Circuit has now ruled that a radio amateur seeking relief

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[2] ***42 CS 5103 (b)*** requires only that DePolo file certified copies of the Pleadings from the federal court, along with certified copies of the court docket entries and opinions. The Pleadings are defined by rule of court. By rule, motions and briefs are not defined as Pleadings. The entirety of all filings in the federal courts are immediately available online. There are over one thousand pages of documents and attachments, given the large number of parties and prolix *pro se* filings.

[3] **Rule 7. Pleadings Allowed**; Form of Motions and Other Papers . . .
(a) Pleadings. Only these pleadings are allowed: (1) a complaint; (2) an answer to a complaint; (3) an answer to a counterclaim designated as a counterclaim; (4) an answer to a crossclaim; (5) a third-party complaint; (6) an answer to a third-party complaint; and (7) if the court orders one, a reply to an answer.

[4] For the court's convenience, the leading cases are recited in Exhibit 1 attached.

from a zoning hearing board decision must file a protective action in Pa. state court to preserve rights to federal appeal.[5] The Circuit Court did not consider **Pa. 42 C.S. § 5103** in its opinion, and did not issue a memorandum opinion on DePolo's request to relinquish the case for transfer. With Pennsylvania's "erroneously filed" saving statute, no protective action is necessary when appealing from a decision of an administrative agency.[6]

The Complaint

The plaintiff, Jeffrey J. DePolo, originally filed, as was the case in *Izzo*, in the United States District Court.[7] His appeal was filed less than 30 days from the date of the ZHB decision, attaching that decision. We now know, because of the Third Circuit's new precedential decision, that it was an error to file in federal court without also filing a protective case in state court.

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[5] "We acknowledge that this decision leaves amateur radio enthusiasts with limited avenues into federal court. DePolo could have appealed the ZHBA's decision and stayed the matter in state court, while his federal claims were resolved." Third Circuit slip op. at 11, fn 18.

[6] . . . A matter which is within the exclusive jurisdiction of a court or district justice of this Commonwealth but which is commenced in any other tribunal of this Commonwealth shall be transferred by the other tribunal to the proper court or magisterial district of this Commonwealth where it shall be treated as if originally filed in the transferee court or magisterial district of this Commonwealth on the date when first filed in the other tribunal . . . **Pa. 42 Pa. C.S.A. § 5103(a)**.

. . . As used in this section "tribunal" means a court or magisterial district judge or other judicial officer of this Commonwealth vested with the power to enter an order in a matter, the Board of Claims, the Board of Property, the Office of Administrator for Arbitration Panels for Health Care and any other similar agency. *Id.* at **§ 5103(d)**.

[7] **Izzo v. Borough of River Edge,** 843 F. 2d 765 (3d Cir. 1988).

The complaint had a federal count under **47 CFR § 97.15(b)** – widely known as PRB-1 for its reference to an FCC Report and Order – claiming that the zoning ordinance was invalid under federal law, and claiming that the zoning ordinance was invalid as applied, according to the same **47 CFR § 97.15(b)**, which provides special protections, which may perhaps even be described as privileges, for FCC-licensed radio amateurs.

Counts 2 and 3 of the complaint are Pa. state claims. Count 2 raised **Pa. 53 C.S. § 302**, the Pennsylvania statute providing licensed radio amateurs certain exemptions modeled after the federal law. Count 3 was entitled "RIGHT TO BUILDING PERMIT UNDER PENNSYLVANIA ZONING LAWS GENERALLY." Among other serious errors of law and fact in the ZHB opinion, the ZHB invented new law, holding that it could grant a variance to cure a defective ordinance. In doing so, the ZHB ignored long-standing principles of Pa. zoning law. In addition, they found facts not of record, and facts opposed to uncontroverted facts of record.[8]

The federal complaint included DePolo's building permit and zoning requests, as well as the decision of the ZHB. Although all of the parties permitted to intervene in the ZHB hearing were not parties to the federal case, nevertheless DePolo served them all

[8] While the objecting parties strenuously argue the merits of the underlying case in their present memoranda of law, given the procedural challenge, such issues are not yet ripe for adjudication. If this court finds that **Pa. 42 C.S. § 5103** provides this court with jurisdiction, and DePolo argues it does, the underlying merits should be argued *after* the ZHB record is lodged with this court and a briefing schedule is issued. DePolo will then demonstrate that "facts" assumed as true, or argued as true, in the pending objections are, at best, not fairly supported in the fact record, or, at worst, simply fabricated with no record support. DePolo asks for his day in court to consider the truth of the evidence record created over the five month hearing period this case consumed before the ZHB.

with written notice of the federal suit given the zoning nature of the matter.[9] Those parties were advised to consult counsel even though they were not (yet) parties. Since the matter concerned a zoning decision in which they had participated or otherwise had an interest, justice dictated notice (though not all are necessary parties, especially since the municipality and the Board are well represented).

There Has Been No Decision on the Merits

The Third Circuit wrote: "The District Court granted motions to dismiss by the Township's Board of Supervisors ("BOS") and the ZHB . . ." Circuit Court slip op. at 4. In its pending motion to intervene here, Schuylkill Township asserts that DePolo lost on summary judgment. ***Wrong. There was no motion for summary judgment before, or decided by, the U.S. District Court***. There is a difference between motions under FED.R.CIV.P. 12(b)(6) and 56. As the Third Circuit wrote in the underlying federal case: *"*We have yet to consider the effect of PRB-1 on local land use disputes. We have not decided a PRB-1 preemption claim . . ." Circuit Court slip op. at 10.

Opponents' extensive commentaries on the facts described by the U.S. District Court are not relevant here, on this § 5103 objection. As the Third Circuit wrote: *"*A District Court's dismissal of a complaint under Rule 12(b)(6) is reviewed *de novo."* Circuit Court slip op. at 10. No evidence was taken, received by or properly before either the District Court or the Circuit Court. The Third Circuit affirmed the dismissal *on other grounds* - that it was filed in the wrong court – and wrote: "[T]he procedural posture of this case precludes our review of the merits . . ." Circuit Court slip op. at 11.

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[9] See the original letter of service for the federal complaint to all parties before the ZHB, Exhibit 2.

Understanding full well the Third Circuit's decision, DePolo now follows the procedure laid out by the Third Circuit: "DePolo could have appealed the ZHB's decision and stayed the matter in state court, while his federal claims were resolved." Third Circuit slip op. at fn 18.

He now timely files here in the Court of Common Pleas.

No Transfer Order is Necessary and the Transfer was Timely

While DePolo asked the Third Circuit to transfer the case and relinquish control of the matter[10], the Third Circuit did not *order* the case transferred. However it did, simultaneously and as specifically requested by DePolo, relinquish jurisdiction on October 6th, 2016 (see certified docket).

It is good practice, and in the interest of judicial economy, to wait for a matter to be final in federal court before proceeding under **42 Pa. C.S. § 5103 (b)** (Federal cases). As to the 30-day appeal period, the statute addresses this question:

> In order to preserve a claim under Chapter 55 (relating to limitation of time), a litigant who timely commences an action or proceeding in any United States court for a district embracing any part of this Commonwealth is not required to commence a protective action in a court or before a magisterial district judge of this Commonwealth.

As this case began 28 days from the ZHB opinion, and the transfer (which required

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[10] In moving for transfer, DePolo presented to the federal court, "Moreover, the Pennsylvania statute does not require a court order. "Such transfer may be effected by filing a certified transcript of the final judgment of the United States court and the related pleadings in a court . . . of this Commonwealth." **42 Pa. C.S. § 5103 (b)(2)**. DePolo merely filed his Motion to assure all concerned that the matter has reached finality in the Third Circuit. In the past, this court has adopted the concept that "prompt action is required." (citations omitted). DePolo urges this court, within its supervisory power, to release the matter for immediate transfer. (See Third circuit docket entry September 30, 2016).

certified copies promptly ordered but delivered to counsel on November 3, 2016) was filed on November 10, 2016, the appeal is timely filed. While the present transfer fits the letter and intent of the statute, courts liberally construe the law to provide opportunity to parties to have an adjudication on the merits by a court where the procedural actions by the transferring party otherwise seem reasonable as well.

> While we have in the past permitted transfers which are not specifically allowed by Section 5103, we have done so only where a new procedural rule would unfairly preclude an appeal or action which was correctly instituted in accord with prior procedure. (Internal citations omitted). **Barner v. Bd. of Sup'rs of S. Middleton Twp.**, 113 Pa.Cmwlth. 444, 452, 537 A.2d 922, 926 (1988).

The Third Circuit just created such a new procedural rule in its precedential decision in this matter. No protective state court filing was required in the past. It is now.

Counter-Statement of the History of the Case

Not surprisingly, the parties have strikingly different takes on the history of this matter. Some arguments by opponents in this matter border on deceptive. Even a casual read of the Third Circuit decision shows that the District Court ruled on FED.R.CIV.P. 12(b)(6). The Third Circuit considered only the complaint and attachments to the complaint (the ZHB opinion, and the notice of appeal papers to the zoning hearing board). While the Third Circuit affirmed dismissal (though on different grounds), it did not affirm the findings of the District Court. There are many federal district and circuit court cases around the country with the procedural path DePolo followed after exhausting his local administrative remedies. In fact, the Court of Appeals found:

> . . . This is the first time in the 30 year history of PRB-1 that a district court has dismissed a preemption claim under section 97.15 (b) pursuant to Fed. R. Civ. P. 12 (b) (6). Third Circuit slip op. at 10.

The Circuit Court affirmed dismissal on a particular procedural ground, and not because of the unsupportable findings of the District Court (made without a fact record to rely on). The District Court had no evidentiary record before it (except the pleadings). Going forward, DePolo will rely on the extensive record before the ZHB, but as yet there has been no court review, anywhere, of the facts found or record used in the decision of the township-appointed ZHB. The Circuit Court declined to address the law of PRB-1, solely because DePolo did not file a protective state action and secure a stay.[11] Yet the Pa. Statute, apparently not considered by the Circuit Court before issuing its opinion, does not require DePolo to "commence a protective action in a court or before a magisterial district judge of this Commonwealth." **42 Pa. § 5103.**

DePolo now seeks a first judicial review of the facts and legal conclusions of the ZHB and will happily rest on the existing evidence record which has not been considered by any court thus far. The opinions of both federal courts dismiss DePolo's federal case without review of the evidence. The Third Circuit did not reach review of the applicable PRB-1 law in this matter. This is because, as the federal appellate court concluded by essentially overruling its ***Izzo*** decision, exclusive jurisdiction over zoning appeals lies with this court. This matter is now properly before this court for a decision on the merits.

The court's instruction ("DePolo could have filed the ZHB's decision and stayed the matter in state court") means DePolo erroneously filed. The Pennsylvania statute

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[11] DePolo could have appealed the ZHBA's decision and stayed the matter in state court, while his federal claims were resolved. That would have allowed the District Court to narrowly address the question of preemption. Circuit Court slip op. at 11, fn 18.

was designed to relieve this situation. But the Pennsylvania statute does not require DePolo to walk the path opponents suggest. The interpretation of **42 Pa. C.S. § 5103 (b)(1)** is now before this court. It says:

> [A] litigant who timely commences an action or proceeding in any United States court for a district embracing any part of this Commonwealth **is not required to commence a protective action** in a court or before a magisterial district judge of this Commonwealth . . . *(emphasis added)*.

DEPOLO'S SUBSTANTIVE CASE and FACTS PRESENTED TO THE ZONING HEARING BOARD

DePolo believes that none of the following case discussion is necessary for this court to rule on the **§ 5103** motion. It is presented only because Defendant and Intervenor arguments should not be left alone to prejudice the court. If the court agrees that this section of this brief is unnecessary, there is no need to read on.

THE LAW OF THIS CASE

This case involves **47 C.F.R. §97.15(b)** and **Pa. 53 C.S. § 302*,*** each of which is a limited preemption of municipal and state government regulations affecting amateur radio station antenna structures.

1. **DePolo does not claim he can have any antennas he desires**, a theme chanted continuously throughout papers filed by Defendants and Intervenors.

2. DePolo was never given an opportunity to negotiate with the ZHB or BOS. Though required by most circuit courts of appeal interpreting PRB-1, and despite assertions of the opponents to the contrary, the District Court opinion, though not adopted by the Circuit Court***,*** explained:

> In a somewhat counter-intuitive reversal, the ZHBA reply argues that, because

> Pennsylvania's statutory scheme gives it no authority to engage in negotiations and grants the Board no authority to issue directives to the ZHBA, we should therefore not consider decisions regarding PRB-1 from other Circuit Courts . . . (District Court slip op. at 11).
>
> As to whether the parties engaged in negotiations, DePolo contends that the Township did not offer to negotiate with him (and, he suggests, actively opposed him) and that he requires a 180-foot tower, not a 65-foot one which he claims is a "completely ineffective antenna height." Compl. at ¶ 27. The Township is silent as to any efforts to negotiate. The ZHBA takes pains to point us to Pennsylvania statutes which block a zoning hearing board from initiating or participating in mediation. (District Court slip op. at 19)

The Defendants' chorus of falsity regarding DePolo's supposed "bad attitude" is calculated to inflame rather than inform this court. DePolo never claimed, in any filing or testimony, that he was entitled to whatever he wants, and never claimed the law requires a grant of whatever he wants. It does not. But the majority of court opinions affirm DePolo's position that he may seek height adequate to engage in the communications he desires.[12] Plaintiff asks only for antennas at a height he truly needs to communicate effectively for the communications he desires - such antennas that he proved necessary with competent, substantial and *uncontradicted* scientific evidence.

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[12] PRB-1 reads:

> 25. Because amateur station communications are only as effective as the antennas employed, antenna height restrictions directly affect the effectiveness of amateur communications. Some amateur antenna configurations require more substantial installations than others if they are to provide the amateur operator with the communications that he/she desires to engage in. For example, an antenna array for International amateur communications will differ from an antenna used to contact other amateur operators at shorter distances. . . . 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.

No Defendant or opponent in the ZHB proceeding presented opposing evidence. The ZHB findings are not supportable. The DePolo application complied with all zoning requirements, including set-back, dimensions, safety and use, with the one exception of height.

Plaintiff's application for a permit was in accordance with the majority of opinions of many U.S. district and circuit courts. To DePolo's knowledge, the 2008 Pa. state statute cited by DePolo[13] has never been addressed by any Pennsylvania court. This court's decision will set the law in that regard. There are many hundreds of licensed radio amateurs in this county and tens of thousands in Pennsylvania, most active in emergency service as required by the law creating the Amateur Radio Service. The instant case is of importance to many more than the Plaintiff here.

Since 1985, there has developed considerable case law defining "the minimum practicable regulation" required of municipalities when regulating FCC licensed amateur radio operators. Tredyffrin Township had no compliant regulation in place whatsoever when Plaintiff applied for an antenna permit. Case law defines such lack of a compliant procedure for radio amateurs as a non-starter for towns claiming after-the-fact compliance. Given Pennsylvania's requirements for a variance, requiring Plaintiff to seek a variance fails the statutory requirement for "minimum practicable regulation," which one court has described as a "least restrictive means" test[14].

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[13] ***Pa. 53 C.S. § 302 -*** Restriction on municipal regulation of amateur radio service communications.

[14] [B]ecause the city did not reasonably accommodate Pentel, it obviously did not use the least restrictive means available to meet its legitimate zoning purposes. We therefore hold that the city's zoning ordinance as applied in this case is preempted by

History of the Case and Background Facts

Plaintiff DePolo is an owner of the 2.9 acre lot at 1240 Horseshoe Trail in Tredyffrin Township. He purchased the property on February 14, 2012, intending to build a new home for himself, his wife, and two children. Except for the height restriction, he knew the zoning and the size of the lot that existed would fit his plans. He also knew that both state and federal law preempted the Township's zoning code because it contained a firm, fixed maximum height of 35 feet, making it a nullity, void *ab initio*.[15]

Before marrying, DePolo resided nearby, perhaps 1200 feet West, at 1465 Horseshoe Trail, beginning in 2000. At that address, on the same road, DePolo was earlier granted approval to erect an 170-foot guyed amateur radio station antenna structure.[16] That process went through appeals after the initial grant by Schuylkill Township's ZHB, which delayed the process for some time. Appeals were taken by the township to the Court of Common Pleas and then the Commonwealth Court. Plaintiff was successful after the appellate courts dismissed the township's various appeals on

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PRB-1. *Pentel v. City of Mendota Heights,* 13 F.3d 1261, 1265 (8th Cir. 1994).

[15] The Township code does allow 45 feet of height for certain building roof appurtenances of limited size, such as chimneys, wind vanes and related projections if they do not exceed a certain areas, both exceptions not applicable in this matter for various reasons.

[16] DePolo does not and never had any antennas at the property subject to this litigation, despite ZHB assertions that he "enjoyed his hobby" with a lower antenna. This is one of many instances that the assertions and findings of the ZHB have no relation to any fact record and are simple conjured up. Repeating false information in enough briefs and memos without reference to an evidentiary record yet to be reviewed by any court does not then make it true. DePolo urgently requests a first review of the record. More than two years have passed since the ZHB issued an opinion.

procedural grounds. Before then, his very low VHF/UHF antennas at his earlier home functioned only for very local communications. Longer distance VHF/UHF/SHF[17] communications was impossible.

After long delays created into the process by a state court appeal taken by Schuylkill Township, an intervenor before the ZHB and the federal courts in this matter, Plaintiff did not construct his earlier approved 170-foot tower but he was granted the right to do so by this Chester County Court. During the extended state court appeals process he met and married his wife, and began raising a family. A larger home was necessary. Wishing to stay on the mountain he loves, and remain with the many neighbors on Horseshoe Trail who presented formal, written support for him and his antennas, he decided to delay the construction of his antenna systems until a new home could be located. Plaintiff and his wife began house-hunting, but the crash of 2008 forced them to wait. They later purchased this site nearby and sold the smaller home. The DePolos moved into their new home in November of 2014. Plaintiff has always needed a tall, above the tree-line, station antenna structure to operate in the radio spectrum of his interest. At his former residence nearby, without a tower of sufficient height, trees and terrain blocked any possibility of long-distance VHF/UHF/SHF communication in exactly the same way as they do at his current residence. DePolo would not spend as much effort as has been required by this case if he was able to achieve the communications he desires with a 17-foot temporary antenna – argued as adequate by the moving party and all other opponents. At both his

[17] VHF is Very High Frequency; UHF is Ultra High Frequency; SHF is Super high Frequency.

former home and his present home, the ridge and tall trees block radio signals for VHF, UHF, and SHF, making communications and experimentation virtually impossible.

The Neighborhood. Horseshoe Trail is a private road which connects the Plaintiff and some of the moving parties on the opposite side of the road. A satellite view of the neighborhood, shows that it is an antenna farm, with three tall towers and three large water tanks with antennas. The aerial photograph, and distances to Intervenors' homes, was admitted as evidence by the ZHB. ZHB exhibits A-11 and A-26.

DePolo's History in the Neighborhood. Before moving to Horseshoe Trail neighborhood about 16 years ago, DePolo attended the University of Pennsylvania ("Penn"), studying both electrical engineering and computer science. During this time, he became an amateur radio operator licensed by the Federal Communications Commission (FCC), holding the highest class license possible in amateur radio, issued only after multiple written examinations. While at Penn, Plaintiff was the trustee of the University of Pennsylvania Amateur Radio Club and remained trustee for about 10 years. That club, from the 1980's until about the year 1999, maintained a significant amateur radio facility with at least one 100-foot amateur radio antenna tower (with another 20 feet of antenna on top) directly across the road from his current residence on what is now the *pro se* Adack's property.

The Plaintiff, as the Penn club's trustee, maintained those amateur radio facilities until the property was sold to a developer who constructed homes on the approximately 14-acre Penn lot. Prior to use as the University of Pennsylvania's Research Center, it was a Nike Anti-Aircraft missile defense system radar and communications base

beginning after World War II until it was given to Penn. About 1967, Penn began using it for an electronic and radio ionospheric research center. The large radar domes and towers remained there until about the year 2000. ZHB Hearing exhibits A-53 and A-54. Horseshoe Trail, including the area immediately in the vicinity of DePolo's property, has a long, and continuing history as an antenna farm, for radio communications with antennas, radar dish radomes and antenna support structures, some of which are still there. One site, just down the road has a massive structure over 200 feet tall with numerous microwave dishes and antennas, lighted with a red beacon.

The Application in this Case. In November 2013, DePolo filed a request with Tredyffrin Township for both a zoning and building permit to construct a 180-foot amateur radio antenna support structure designed, and to be installed, under professional engineering supervision. DePolo's well-planned station antenna structure is designed to hold various amateur radio antennas, which antennas may be changed from time to time (in accord with the experimental nature of the amateur radio service), around the side and on top of the structure for his personal, non-profit amateur radio use from his new residence. Amateur radio antennas are long established as an authorized accessory use for a residence in Pennsylvania.[18]

The zoning officer denied Mr. DePolo's antenna support structure application by letter dated January 7, 2014. The denial was based solely on the 35-foot height restriction, which applies to all structures in the same residential zoning district throughout the township. Nothing else was cited, or could be used, as a basis for

[18] ***Appeal of Lord,*** 368 Pa. 121, 81 A.2d 533 (1951).

denial. Except height, all other parameters including the intended use, construction and engineering documents, set back, required yard, building and construction design complied with building and zoning codes.

There was No Negotiation. Though DePolo and his counsel were anxious and well prepared to explain what the Plaintiff needed to do and why, the township was not interested in discussing anything. Without inviting DePolo to discuss the matter with township legal counsel, or asking for any discussion of what this matter was all about, the township Board of Supervisors, in public session, passed a resolution prejudging the application, and condemning amateur radio antennas in the township, directing the ZHB to use any means available to prevent the antennas from being allowed. The original draft revealing the intent of at least some members the Board of Supervisors was read into the hearing record by the leading opponent of the application.[19] The text of the final resolution opposing the antenna structure passed, modified from the original text proposed by counsel, is provided *infra*, but had the same sentiment of total opposition before any substantive hearings began. The well was poisoned for DePolo even before any hearings on his application began. The township appeared to recognize their ordinance's lack of compliance with state and federal regulations as they urged the ZHB

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[19] "Now, therefore, be it resolved and adopted by the Board of Supervisors of Tredyffrin Township, Chester County as follows: The Board of Supervisors of Tredyffrin Township, Chester County, hereby authorizes the Township Solicitor to enter his appearance on behalf of Tredyffrin Township in Appeal 03-14 and oppose the DePolo application for the installation of 180-foot radio antenna located at 1240 Horseshoe Trail, Tredyffrin township, Chester County, Pennsylvania **and to take all steps necessary or advisable in the opposition to this appeal**. (emphasis added) Duly resolved and adopted this 21st day of April, 2014."

"So that was from the Board of Supervisors." ZHB Transcript of June 26, 2014, Page 55, Line 7.

to apply local laws, not state or federal laws. The township was just not interested in understanding DePolo's need.

DePolo analyzed everything about his proposed antenna system, including the vertical aperture required to mount various antennas, and determined the minimum usable height required. He concluded that a 180-foot tall antenna support structure was needed for the communications he intends on amateur bands at VHF, UHF and microwave frequencies. Anything lower would prevent communications on these bands to many of the locations with which he desires to communicate on those bands. Especially at UHF and microwave frequencies, the radio spectrum of DePolo's principal experimental and operating interest, trees and terrain in the local surrounding area will block signals, preventing communications.

The Appeal to the ZHB. DePolo appealed the Building Inspector's original permit denial to the Zoning Board by Notice of Appeal dated February 4, 2014. That is part of the complaint now before this court. A series of hearings were held from March through July 2014, with approximately 15 hours of examination and testimony, resulting in about 490 pages of transcripts, with a total of 99 exhibits. With exception of the *pro se* opponents themselves, all witnesses in the case, were presented by DePolo. Almost all of the documentary evidence, including technical studies and local area terrain surveys, were provided by DePolo.

The Plaintiff demonstrated, through witnesses and documentary evidence, why he is entitled to the proposed structure under federal and state law applying specifically to amateur radio antennas. *The moving parties assert before this court and all earlier forums that DePolo claims he can have any tower or antenna he desires. He never*

made, and does not make, that claim. DePolo asks for only the minimum height necessary to efficiently use the amateur bands on which he experiments and communicates.

Most serious experimenters who are radio amateurs, and certainly many in Southeastern Pennsylvania, use similar structures at their homes that rise, when necessary, to 200, even 250 feet. Leading and nationally known local radio amateur experimenters with multiple antenna structures of similar heights were presented as witnesses by stipulations signed by all of the opponents in the instant case. DePolo needs height to "look" over the tall trees on the highest part of the ridge nearby. Interestingly enough, also on Horseshoe Trail, and just down the road to the Northeast, there are three water towers, and two commercial communications towers. One tower is at least 200-foot tall, beacon-lighted, with substantial mass and thick double sets of guy wires. Evidence of each antenna in the Horseshoe Trail Ridge antenna farm was presented and found as fact by the Hearing Board in the Township.[20] In the other direction, to the West from DePolo on Horseshoe Trail, there is a ham radio tower with stairs built into it, and a large water tank with antennas.

DePolo is Not in a Historic District

The ZBA's argues that DePolo's claim under **Pa. 53 C.S. § 302** fails because he lives in an historic district and therefore **§ 302** does not apply. This claim is not

[20] *See ZHB Decision-finding of fact No.14 - attached to complaint*. "There exists a commercial 200 ft. high tower at the PECO/Aqua site and a noncommercial 90 foot high tower on the Doughty property in Schuylkill Township, both of which are along Horseshoe Trail."

supported by the Township code.

Not DePolo's property, not the neighborhood, and not the entire R1/2 zone – none are classified as historic in any fashion. DePolo is in an R1/2 district, where the description includes only a general reference to the historic character of the Township. There are several R1/2 districts, the most semi-rural portions of the township with the largest lots and most suitable for amateur radio antenna support structures.

The Township Knows How to Create a Historic District. For example, it has a separate classification, the RC district, to protect the Valley Forge National Park, over the ridge and over a mile away from DePolo. It provides:

> ***§208-11*** **RC Rural-Conservation Districts** are designed to encourage the preservation of sizable stream valley, wooded areas and areas of steep slopes within the Township, for protection of the Exception Value Waters Valley Creek Watershed, the limestone/carbonate geology of the Great Valley, **scenic and historic areas in proximity to Valley Forge National Historic Park and other open space and historic purposes.** (emphasis added)

DePolo is not in the RC District.

Why is DePolo's neighborhood not in the RC District? One answer is that Horseshoe Trail is over the ridge and over a mile away from the Valley Forge National Historic Park. Another answer is that DePolo's neighborhood has a long history of radar towers and radio antennas (some remaining) as shown by the photographic history in the ZHB record.

Horseshoe Trail was (and remains) a private, largely unimproved, road which was cut by the US Army Corp of Engineers in the 1950s to access the missile communications base directly across the street from DePolo's property. Furthermore, as to the general nature of the immediate area, in addition to the present radio towers,

there is an old gravel quarry, unfenced and about 90 feet deep, on the road about 1200 feet West from DePolo's home. It is not near any Park.

In addition to the RC District, the Township has a historic overlay district. It provides:

§208-122.3 Historic Overlay District

> An overlay zoning district as established and applied under this article, designating historic resources within the Township.

§208-122.2 Purpose

> The preservation and protection of historic resources in Tredyffrin Township (the "Township") are in the interests of education, property values, and general welfare of the citizens of the Township. The purposes of this article are:
> A. To protect the integrity of the historic resources of Tredyffrin Township;
> B. To establish a process by which proposed changes to historic resources are reviewed by Tredyffrin Township;
> C. To encourage the continued, viable use of historic resources in Tredyffrin Township;
> D. To discourage the unnecessary demolition of historic resources in Tredyffrin Township; and
> E. To maintain the property rights of Township residents.

Why is Horseshoe Trail, with the Plaintiff's property, not included in the Historic Overlay District? The commission enabling ordinance provides that the historical commission shall:

> Review and comment on subdivision or land development applications which include historic resources, in accordance with the requirements and procedures of the Tredyffrin Township Subdivision and Land Development Ordinance.

The historical commission which has never taken any of the positions the Township has now invented. A little history explains why. Beginning about 2008, Plaintiff's approximately three acres was part of a lengthy subdivision proceeding affecting more than 40 acres. Each of the *pro se* neighbors before the ZHB was involved or was given

notice of that proceeding. But no request was made to reclassify the Plaintiff's lot as RC or place it within the Overlay District. The proper time to request zoning restrictions would have been before or during the township planning board's long-running proceedings as it considered the subdivision request of the Hires Estate (of Hires root beer fame). According to township records, that process took years. Many area groups provided comments or input, but DePolo's lot, indeed all of the four Hires lots, were not seen or declared as historical.

CONCLUSION

For the reasons set forth above, the Plaintiff requests that this Honorable Court dismiss the preliminary objections of the Zoning Hearing Board, allow this matter to continue to be adjudicated before this Court and provide for a full review of the evidentiary record and the conclusions reached by the Zoning Hearing Board.

Dated: December 12, 2016

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CERTIFICATE OF SERVICE

I hereby certify on this **12th** day of **December, 2016**, that a true and correct copy of Plaintiff's Response to The Tredyffrin Township Zoning Hearing Board's Preliminary Objections has been served to the following parties by First Class Mail, postage prepaid, to the following:

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Attorney for Plaintiff Jeffrey J. DePolo

EXHIBIT 1

to DePolo's Response to the
Tredyffrin Township ZHB's Preliminary Objections

Listing of PRB-1 Leading Cases

Exhibit 1

List of Federal Cases Administering PRB-1

Thernes v. City of Lakeside Park, 779 F.2d 1187 (6th Cir. 1985)

Bodony v. Incorporated Village of Sands Point, 681 F. Supp. 1009 (E.D.N.Y. 1987)

Izzo v. Borough of River Edge, 843 F.2d 765 (3d Cir. 1988)

Howard v. City of Burlingame, 726 F. Supp. 770 (N.D. Calif. 1989), affirmed 937 F. 2d 1376 (9th Cir. 1991).

MacMillan v. City of Rocky River, 748 F. Supp. 1241 (N.D. Ohio 1990)

Williams v. City of Columbia, 906 F.2d 994, 997 (4th Cir. 1990) (aff'g second denial of variance for 65-foot antenna after reconsideration in light of PRB-1), overruled in part by FCC Wireless Telecommunications Bureau Order DA99-2569 (1999) (aff'g that a balancing of interests approach is not appropriate).

Goldberg v. Charter Township of West Bloomfield, 922 F.2d 841 (1990)

Howard v. City of Burlingame, 937 F2d 1376 (9th Cir. 1991)

Evans v. Boulder, 994 F.2d 755 (10th Cir. 1993)

Heinemann v. Town of Lyme, Civ. Action No 2:91cv00776 (PCD/GLG) (USDC Conn., 1994).

Baskin v. Bath Twp. Bd. of Zoning Appeals, 15 F.3d 569 (6th Cir. 1994)

Baskin v. Bath Twp. Bd. Of Zoning Appeals, 101 F.3d 702 (6th Cir. 1996)

Pentel v. City of Mendota Heights, 13 F.3d 1261 (8th Cir. 1994)

Palmer v. City of Saratoga Springs, 180 F.Supp. 2d 379 (NDNY 2001)

Bosscher v. Twp. of Algoma, 246 F.Supp. 2d 791 (W.D. Mich. 2003)

Snook v. City of Missouri City, 2003 U.S. Dist. LEXIS 27256, 2003 WL 25258302 (S.D. Tex. Aug. 27, 2003, Hittner, J.)

EXHIBIT 2

to DePolo's Response to the
Tredyffrin Township ZHB's Preliminary Objections

Letter of Service for Federal Complaint to all Parties Before the ZHB Dated Dec. 2, 2014

FAMIGLIO & ASSOCIATES

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

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December 2, 2014

Sent PDF Only to Attached List.

Re: Jeffrey J. DePolo v. Tredyffrin Township, et al.
USDC Eastern PA Civil Action No.: 14-6689
Our File No.: 4718-3

Dear Sir/Madam:

You are receiving this letter because you or your client was granted party status in a zoning hearing case before the Tredfyffrin Township Zoning Hearing Board of Appeals in zoning Appeal Number 03-14 involving the application of Jeffrey DePolo. Mr. DePolo has filed a federal court complaint regarding the matter. None of you or your respective clients has been named a party in the federal case as a defendant. However, a copy of the complaint and supporting attachments to the complaint are being forwarded to you. The documents are being provided as a courtesy only. You are NOT involved in the law suit.

If you have any questions or concerns, you should consult your legal counsel.

Very truly yours,

/s/ Robert B. Famiglio

Robert B. Famiglio
Attorney for Jeffrey J. DePolo

P.S. Because of the size of the various exhibits, we are sending the exhibits in more than one transmission to avoid them being returned. All of the separately sent exhibits are referenced in the complaint and the documents should be combined to present the document as filed.

RBF/tlk
Enclosures: Complaint with Exhibits A-D

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