Not Reported in So.2d, 1993 WL 228785 (Fla.Cir.Ct.)
(Cite as: 1993 WL 228785 (Fla.Cir.Ct.))

Florida Circuit Court, Nineteenth Judicial Circuit, Indian River, Martin Okeechobee, and St. Lucie Counties.
David BROWER, Appellant,
v.
INDIAN RIVER COUNTY CODE ENFORCEMENT BOARD, Appellee.
No. 91-0456 CA-25.

June 23, 1993.

Appeal from the Indian River County Code Enforcement Board.
Clifford M. Miller, Vero Beach, for appellant.

Benjamin S. Gross, Vero Beach, for appellee.

ON MOTION FOR CLARIFICATION OR WRIT OF MANDAMUS

***1** The Appellant has filed a Motion For Clarification.... or.... Writ Of Mandamus. Obviously, we cannot grant mandamus relief against an entity which is not a party to this appeal. Nor can we consider or construe the attachments to Appellant's Motion. They were not part of the appellate record and no motion to supplement the record was filed. In fact, they were generated after our decision.

Nonetheless, it appears the mandate in this case was issued prematurely by the Clerk. By separate order, that will be withdrawn. We grant the Motion for Clarification and substitute a revised opinion in its place.

REVISED OPINION

KENNEY, Judge.

Mr. Brower appeals an order issued by Appellee finding him in violation of Sections 911.04(2)(c), 4-31 (amd.); 912.15(4); 917.04; and 911.04(2)(c), Code of Laws and Ordinances of Indian River County, Florida ("Code") relative to his erection of an amateur radio tower. We reverse and remand with instructions.

Appellant is licensed by the Federal Communications Commission ("FCC") as an advanced class amateur radio operator. His wife holds a technician class license. Those licenses entitle them to participate in an emergency services network involving state, national and world-wide communications. Both are active participants in that network through memberships in various organizations.

Without seeking prior approval, Appellant erected a "tower" on his property, which is located within a single-family zoning district. The tower is approximately 68.88 feet high and includes an accompanying antenna. Together they total approximately 95.6 feet in height and are approximately 72.4 feet from the nearest neighbor's property line.

After his initial citation, Appellant appeared at a hearing before Appellee. He presented unrefuted evidence that those ordinances, which absolutely limit amateur radio operators in his situation to tower-heights of 70 feet, would prevent him from effectively participating in emergency communication activities. Furthermore, the evidence established that if Appellant's tower were to fall down, it would collapse upon itself, due to the nature of its design and construction. Thus, it was not a danger to neighbors.

Appellee issued its order finding Appellant in violation of the said sections of the Code, requiring alternative remedies and reserving the right to sanction. Although the record is not clear, sanctions may have thereafter been imposed, but were stayed pending this appeal.

We conclude that Appellee's order was improper because it was based upon local ordinances which are fundamentally illegal and therefore void, as applied to Appellant.

Amateur Radio Preemption, 101 FCC2d 952 (1985) ("PRB-1"), provides that FCC requirements can preempt local ordinances or state statutes. Sec. 125.0185(1), Fla.Stat. incorporates that decision as state law.

Both PRB-1 and 125.0185(1) recognize the legitimate interests of local authorities, but require that ordinances be drafted ("crafted") in such a fashion that the interests of amateur radio communications be reasonably considered. In otherwords, the legitimate needs and concerns of local communities, as reflected through their ordinances, must take into consideration, be balanced against and allow for, the similarly legitimate needs of licensed amateur radio operators.

***2** Thus, local ordinances cannot arbitrarily set a height limitation on towers for licensed amateur radio operators in cases of this nature, *Bodony v. Incorporated Village Of Sands Point*, 681 F.Supp. 1009, 1013 (E.D.N.Y.1987). See also *Evans v. County Commissioners Of County Of Boulder, Colorado*, 752 F.Supp. 973, (D.Colorado, 1990). Although we do not necessarily feel bound to follow those decisions, we agree with the *Evans* court's adoption of prior rulings in that case which concluded that flat prohibitions of this nature are not permitted, *Evans,* at 976.

We conclude that the ordinances in question are nothing more than flat and arbitrary prohibitions enacted without any attempt to consider, much less balance, legitimate community concerns, with similarly legitimate, and legally recognized rights, of amateur radio licensees.

Bodony, supra at 1014 held that ordinance at issue to be void as to that appellant. We likewise conclude that the various ordinances applied against the Appellant in this case are void in their application. Thus, Appellee cannot enforce the ordinances, much less, impose sanctions.

Although it is not necessary for the disposition of this case, we feel obliged to note that we have serious concerns about Indian River County's failure to even define the structure at issue. Throughout its ordinances the term "tower" is used. Indeed, we have used the term in this decision. Yet, it is never defined in the ordinances.

Finally, we are not unmindful of the fact that Appellant constructed his "tower" without first applying for a permit. As Appellee argues, such an application would have been the more appropriate procedure. We agree.

Even if he disagreed with the local ordinances, as a licensed and experienced amateur radio operator, Appellant should have followed local procedural requirements and applied for the permit. If denied, he had legal remedies.

Nevertheless, the law does not require the performance of useless acts in these kinds of situations, *City of Miami Beach v. Breit Bay, Inc.*, 190 So.2d 354 (Fla. 3rd DCA, 1966); *Fair v. Davis*, 283 So.2d 377 (Fla. 1st DCA, 1973); *Bruce v. City of Deerfield Beach*, 423 So.2d 404 (Fla. 4th DCA, 1982). Our review of the applicable Indian River County ordinances leads us to the conclusion that Appellant would have been forced to undertake a futile administrative act, since they create an intricate, confining and illegal, circle which begins and ends with Sec. 912.15(4) of the Code.[FN1] The result is to prohibit "towers" in excess of 70 feet in situations similar to those of Appellant notwithstanding PRB-1 and Sec. 125.0185(1). Thus, any application for a permit would have been futile.

FN1. Sec. 912.15(4), of the Code provides in pertinent part:

> (c) Towers over seventy (70) feet are not allowed in single-family zoning districts
>
> However, Sec. 971.44(1) of the Code provides that transmission towers over seventy (70) feet may be allowed by administrative permit and special exception. Subsection (1)(d) 4 says that such accessory structures are subject to restrictions imposed for accessory uses in Chapter 917 of the Code.
>
> Sec. 917.06(11) of the Code simply prohibits towers in excess of seventy (70) feet, unless special administrative or exceptional use requirements are met. Yet, the reference is back to Chapter 971, from whence we just came.
>
> Sec. 917.04(4) of the Code does provide that accessory uses and structures must comply with maximum height requirements for particular zoning districts, "... except as ... qualified by ... section

> 917.05(7).” Unfortunately, there is no subsection (7) in that section of the Code.
>
> Therefore, one must look to the maximum height allowed in a “particular zoning district.” In this instance, Sec. 912.15(4)(c) of the Code prevails and simply says that towers in single-family zoning districts in excess of seventy (70) feet are not allowed.
>
> Thus, there is a circular dead-end.

In summary, the ordinances at issue in this case are facially void as to this Appellant because they fail to consider, or comply with, the requirements of PRB-1 and Sec. 125.0185(1), Fla.Stat. Thus, Appellee cannot enforce them and any sanctions imposed by Appellee against Appellant shall be vacated and set aside.

FENNELLY, P.J., and KANAREK, J., concur.
Fla.Cir.Ct.,1993.
Brower v. Indian River County Code Enforcement Bd.
Not Reported in So.2d, 1993 WL 228785 (Fla.Cir.Ct.)

END OF DOCUMENT