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FCC OTARD RULE
CONCERNING SATELLITE
DISHES AND ANTENNAS
Questions and Answers

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Q: Briefly explain the FCC Rule pertaining to satellite dishes and antennas.

A: On August 6, 1996, the Federal Communications Commission (FCC) adopted its Rule implementing Section 207 of the Telecommunications Act of 1996. The Rule has been amended three times since its original adoption. The Rule preempts community association restrictions on certain antennas used to receive video programming services. Specifically covered are antennas for over-the-air reception of direct broadcast satellite (DBS) service, multichannel, multipoint distribution service (MMDS), fixed wireless signals, and television broadcast service, and the masts supporting these antennas. Not all antennas are protected by the FCC Rule. The Rule applies to DBS antennas of less than one meter in diameter, including those used to receive or transmit fixed wireless signals, MMDS antennas ("wireless cable") less than one meter in size, including those used to receive or transmit fixed wireless signals, and standard TV antennas. Community associations can still enforce restrictive covenants on other antennas (even if enforcing the covenant impairs access to the signal).

The Rule states that associations may no longer enforce restrictions which prevent, unreasonably delay or unreasonably increase the cost of antenna installation, maintenance, or use, or preclude acceptable signal reception.

Restrictions that do not impair a viewer's ability to receive video programming services remain enforceable, as do safety rules and rules in certain historical districts, even if such rules impair reception. Thus, community associations can still require an owner to comply with rules governing the means, method, and location of the antenna installation, as long as no unreasonable delay or cost is involved and an acceptable quality signal can be obtained. This would include requiring compliance with building codes, screening, unobtrusive placement, painting certain parts of the antenna, camouflage, and other reasonable steps to ensure the safety of the installation and minimize the visual effect on the community.

The FCC Rule is limited in its application to antennas installed on property within the exclusive use or control of the viewer or in which the viewer has a direct or indirect ownership interest. In other words, the FCC Rule does not authorize antenna installation on common property (common elements/common area) unless the owner has exclusive control or use of the property such as a balcony or patio, since these are often limited common elements reserved for the exclusive use of the unit owner.

Q: What is a "fixed wireless signal"?

A: A "fixed wireless signal" is any commercial non-broadcast communications signal transmitted via wireless technology to and/or from a fixed customer location. Fixed wireless signals do not include AM radio, FM radio, HAM radio, CB radio or Digital Audio Radio Service (DARS). The FCC extended the FCC Rule to cover antennas which receive or transmit fixed wireless signals in recognition of the fact that the same antennas used for video services are used for telecommunications and internet access. Under the original Rule, an antenna user could order a telecommunications/video package from a telecommunications service provider, but not a telecommunications-only package, even though the same equipment would be used.

Q: Whose restrictions are prohibited?

A: State or local laws and regulations, including zoning, land-use or building regulations, private covenants, homeowners' association covenants, lease and contract provisions, rules or similar restrictions relating to what people can do on land within their exclusive use or control where they have a direct or indirect ownership interest in the property are prohibited.

Q: What types of antennas are covered by the FCC Rule?

A: 1. An antenna that is (1) used to receive direct broadcast satellite service, including direct-to-home satellite services, or to receive or transmit fixed wireless signals via satellite, and (2) one meter or less in diameter.

2. An antenna that is (1) used to receive video programming services via multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services, or to receive or transmit fixed wireless signals other than via satellite, and (2) that is one meter or less in diameter or diagonal measurement.

3. An antenna that is designed to receive television broadcast signals.

4. A mast supporting any of the above antennas.

5. Transmission-only antennas that are required for the use of any of these antennas.

Q: Are covenants and restrictions that prohibit satellite dishes and MMDS antennas which are larger than 1 meter (39") still enforceable?

A: Yes.

Q: What types of association restrictions against satellite dishes and antennas are prohibited?

A: The Rule prohibits restrictions that impair a viewer's ability to receive signals from a provider of DBS, MMDS or TVBS. A restriction impairs a viewer's ability to receive signals if it: (1) unreasonably delays or prevents installation, maintenance or use of; or (2) unreasonably increases the cost of, installation, maintenance or use of; or (3) precludes a subscriber from receiving an acceptable quality signal from one of these antennas. The Rule does not prohibit restrictions that merely affect a viewer's ability to receive signals as long as the restrictions do not impair. Therefore, architectural restrictions that affect but do not impair a viewer's ability to receive signals are permissible. This is explained in greater detail in the following questions and answers.

Q: What types of restrictions unreasonably delay or prevent installation, maintenance or use of an antenna?

A: A restriction or covenant that prohibits all antennas would prevent users from receiving signals and is prohibited by the Rule. Procedural requirements imposed by an association can also impair the ability to receive service. The FCC has found that approval processes of the location of the antenna, even if expedited, cause an unreasonable delay. In addition, any type of administrative fees imposed are an unreasonable cost. Therefore, an association cannot charge a fee for reviewing notification forms or monitoring compliance with any guidelines it has established.

Q: What type of notice or registration process may an association require?

A: In routine installations, a simple notification form could be required, indicating the type of antenna to be installed, the site, method and manner of antenna installation anticipated. In non-

routine installations, for example, where a valid safety restriction would be violated by the installation, an explanation should be provided on the form outlining why the antenna must be sited in this area/manner, or why an antenna with a mast higher than 12 feet above the roofline is necessary. Although it is also important to adopt rules detailing several preferred locations, an antenna user has a right to install an antenna in a non-preferred location without submitting for approval, absent valid safety or historic preservation concerns, if installation in a preferred location would be impaired.

Q: What are “reasonable delays?”

A: For routine installations which do not violate association rules, the notification process should not delay installation. (The FCC Rule does not permit associations to deny routine installations.) For non-routine installation, the owner should carefully explain to the association on the notification or registration form, why some association rule must be violated in the course of installing an antenna. The association and the homeowner should then discuss possible alternative installations that would conform with the restrictions. These steps should be accomplished as quickly as possible and in no event take longer to resolve than other architectural requests not involving antennas.

Q: What is an unreasonable additional cost to install, maintain or use an antenna?

A: Any requirement to pay a fee in order to be allowed to install an antenna or to review a notification form is considered unreasonable. The FCC has also stated that requiring an owner to have an antenna installed by a professional, as opposed to self-installation, is not permitted. Things to consider in determining the reasonableness of any costs imposed include the cost of the equipment and services, and whether there are similar requirements for other similar installations like air conditioning units or trash receptacles. Restrictions cannot require that relatively unobtrusive DBS dishes be screened by expensive landscaping. A requirement that all dishes be disguised as garden rocks and patio umbrellas would probably be unreasonable, since they tend to be relatively expensive.

Q: May a tenant install an antenna?

A: Yes, a tenant has the same rights as the owner to install an antenna.

Q: What types of camouflaging would likely be considered “reasonable” by the FCC?

A: A requirement to place antennas in a location where they would not be visible from the street, as long as signal reception is not impaired, and the requirements do not unreasonably delay or increase the cost of installation, maintenance or use of the antenna should be reasonable.

Q: May the user be required to paint the antenna?

A: If painting will not violate or void any manufacturer’s warranties, a user may be required to paint an antenna. The FCC has indicated that painting the actual satellite dish, TV broadcast antenna or MDS antenna may not void or violate a warranty. However, painting the mounting materials, accessories or cabling may do so.

Q: What is an “acceptable quality signal?”

A: With direct broadcast satellites (DBS) this answer is simple because satellite signals are digital. Either a signal is received or it is not received. Poor quality signals will not be received through a dish that is properly installed. With television broadcast and MDS signals, the answer is unclear because signals may be indistinct. The FCC has indicated that testing signal strengths from comparable locations on neighboring lots is not enough to show that one lot in question can receive an acceptable quality signal from the same location. The term still has not been defined,

but the FCC did refuse to amend the Rule to prohibit restrictions that include reception of an “optimal signal.”

Q: What restrictions prevent a homeowner from receiving an acceptable quality signal?

A: A requirement that an antenna be placed in a position where reception would be impossible or would be substantially degraded would conflict with the Rule. However, a regulation requiring that antennas be placed to the extent feasible in a location (e.g., backyard versus front yard or roof) that is not visible from the street would be permitted, if this placement would still permit reception of an acceptable quality signal, and does not unreasonably delay or increase the cost of installation, maintenance or use. Delay and increased cost are valid justifications for installing an antenna in a non-preferred location, even if an acceptable quality signal may be obtained in the preferred location.

Q: How can an association find out exactly where on an owner’s property an acceptable quality signal can be received?

A: The board may want to talk to an antenna distributor who can run a test to determine where antennas may be placed to receive acceptable signals. Boards may also want to direct the installer to locations where the board wishes to have the dish or antenna placed, and have the installer tell the board if receipt of signals is possible in these locations. Obviously, some cooperation will be required from the owner, as well as the installer. However, an association cannot require an owner to provide certification that an acceptable quality signal cannot be obtained prior to allowing the owner to install the antenna in an alternative location. Furthermore, the Association has the burden of proving that an owner can obtain a signal in a preferred location.

Q: Are there any other restrictions against satellite dishes and antennas that are permitted?

A: Yes. Legitimate safety restrictions are permitted even if they impair reception or delay or increase the cost of installation, maintenance or use of the antenna. The association can enforce the safety restriction while the FCC reviews the validity of the restriction. Examples of valid safety restrictions include fire codes preventing people from installing antennas on fire escapes, restrictions requiring that a person not place an antenna within a certain distance from a power line, electrical code requirements to properly ground the antenna, restrictions prohibiting installation at a location that will obstruct a driver’s view of an intersection or street, and installation specifications and requirements that describe the proper method to secure an antenna. In addition, there can be safety restrictions that address the installation of masts. The safety reason for the restriction must be written in a document that is readily available to antenna users prior to installation, so that a person wanting to install an antenna knows what restrictions apply. The restriction cannot impose a more burdensome requirement than is needed to ensure safety. In addition, the restriction must explain the reason for the safety concern. A safety restriction will not be valid without a specific explanation of the need for a safety restriction.

Restrictions in historic areas may also be valid. Because certain areas are considered uniquely historical and strive to maintain the historical nature of their community, these areas are excepted from the Rule. To qualify as an exempt area, the area must be listed or eligible for listing in the National Register of Historic Places. In addition, the area cannot restrict antennas if such a restriction would not be applied to the extent applicable in a non-discriminatory manner to other modern structures that are comparable in size, weight and appearance and to which local regulation would normally apply. Valid historical areas cannot impose a more burdensome requirement than is needed to ensure the historic preservation goal.

Q. To receive multipoint distribution service (MDS) in an association, the MDS antenna must be attached to a mast of 40 feet. May the association prohibit such masts?

A: An association may develop an application or permit process for masts rising 12 feet above the roofline, but may not absolutely prohibit masts at any height. However, if there is a legitimate safety concern about a mast higher than 12 feet, then the association may be able to prohibit these installations. Rules addressing safety concerns should be adopted by associations in advance.

Q: **Can an owner in a townhome association install an antenna on his/her balcony or patio, roof or side of the townhome?**

A: Yes, since the owner both owns and has exclusive use of these areas. This is true even though the owner may not have exclusive control over the areas, since the association is often responsible for maintenance. The association may impose rules regarding the preferred locations as long as the locations do not impair an owner's ability to receive a signal or unreasonably delay or increase the cost of installation, maintenance or use. In addition, the association may have rules regarding how the antenna is installed and making the owner responsible for any damages to the balcony, patio, roof or siding maintained by the association.

Q: **Can an owner in a condominium association install an antenna on his/her balcony or patio?**

A: It depends on whether the patio or balcony is a common element or limited common element. If the patio or balcony is a limited common element, restricted for the owner's exclusive use, the owner may install an antenna on it. However, the association may impose installation rules and may require that the owner cover the antenna as long as such a requirement does not impair an owner's ability to receive a signal or unreasonably delay or increase the cost of installation, maintenance or use. (The association's declaration and map will define whether the patio or balcony is a limited common element.)

It may also depend on where the owner intends to install the antenna. The FCC provides little guidance on this issue. While the patio or balcony may be a limited common element reserved for the exclusive use of an owner, the building siding or railing is likely the responsibility of the association to maintain and repair. The FCC has issued a declaratory ruling with respect to townhomes, in which the townhome owner also exclusively owned the balcony, but not with respect to condominiums. Whether this is sufficient to prevent installation on the siding or railing in a condominium association will have to be determined by courts and the FCC. However, because a rule that prohibited installation on the building siding or railing (within the patio/balcony area) could have the effect of prohibiting installation all together, a court (or the FCC) could well find that the association rule was contrary to the intent of the FCC Rule and thus allow installation in these cases. In such cases, the association could still have rules regarding how the antenna was installed and making the owner responsible for any damages to the siding or railing. If the antenna extends outside of the patio/balcony area, a much stronger argument exists for a rule prohibiting such installation, since an owner would not have exclusive control or use of the area beyond the patio/balcony.

Q: **Can a condominium unit owner whose patio or balcony does not face in the direction necessary for satellite or antenna signal reception place an antenna in some other place where reception is possible?**

A: No, if doing so requires placement of an antenna on someone else's limited common element or on common property, which generally includes all portions of the condominium outside the unit. The FCC Rule does not apply in such cases.

Q: **Can the association require indoor (attic) antenna installation?**

A: If acceptable reception is possible, installation, maintenance or use is not unreasonably delayed, and the cost is not unreasonably increased, then associations may require indoor installation. However, for some types of service, indoor installation may not be feasible. In those cases, the association may not require indoor installation.

Q: What if a person cannot receive signals because the association's trees are in the way? Does the FCC Rule require the association to trim those trees?

A: The Rule does not place any affirmative obligation on associations to assist homeowners in using an antenna, such as making architectural or landscaping changes to permit homeowners to receive signals. The FCC only preempts "restrictions" on access to adequate signal reception.

Q: Does an association have to amend its declaration to comply with the FCC Rule?

A: No, the Rule simply preempts existing covenants. Associations should, however, revise their rules and guidelines to comply with the FCC Rule and to address legitimate safety issues and the use of masts.

Q: What can an association do in a planned (single family) community to preserve the aesthetic value of the community and still comply with the FCC Rule?

A: Since homeowners in a planned community generally own the lot and everything on it, they will have the right to install an antenna anywhere within that lot, absent specific safety and historic considerations and any valid restrictions adopted by the association. If the homeowners own their own roofs, then they would be permitted to install antennas on the roof. However, if homeowners can receive adequate signals from satellite dishes installed on the ground and ground installation does not unreasonably delay or increase the cost of installation, rooftop installations may be prohibited. Therefore, it is important to specify the preferred locations in the association's rules regarding satellite dishes.

Q: What can an association or homeowner do if there is a dispute over whether a particular restriction is valid?

A: If the association defines the restriction as safety-related, it is valid, unless a court or the FCC determines that it is not safety-related or is not the least burdensome way to ensure the safety goal. Associations or homeowners may also petition the FCC or a local court (county or district) for a ruling to determine whether a particular restriction is permitted or prohibited under this Rule. While the association is waiting for a ruling, it cannot require an owner to remove the antenna or otherwise enforce its rule. If an association has a "highly specialized or unusual" concerns about antenna installation, maintenance or use, it may apply to the FCC for a waiver of the Rule.

Q: How does an association apply for a waiver of the Rule?

A: To file a petition for a waiver, an association must send an original and two copies of the petition and any related documents to the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, D.C. 20554. The association must state specifically why the waiver is necessary in the petition. The petition must be supported by affidavit(s).

Q: Who is responsible for showing that a restriction is enforceable?

A: When a conflict arises about whether a restriction violates the FCC Rule, the association trying to enforce the restriction will be responsible for proving that the restriction is valid. This means that no matter who questions the validity of the restriction, the burden will always be on the association to prove that the restriction is permitted under the Rule.

Q: Can an association fine or otherwise penalize an owner who installs an antenna in violation of any restrictions?

A: Yes, as long as the association rule or restriction authorizes a fine and notice and an opportunity for a hearing are provided. However, the FCC Rule states that no fine or other penalties shall accrue

against an antenna user while a proceeding is pending to determine the validity of any restriction. In addition, if the association's rule is found to be valid, an owner has 21 days in which to remove the antenna prior to the imposition of any sanctions. Fines that continue to increase in amount while a proceeding is pending are probably in violation of the Rule and unenforceable.

Q: May an association continue to enforce its restrictions against placing antennas on common property?

A: Yes. The FCC has determined that the Rule does not apply to common property that is not within an owner's exclusive use or control.

Q: What should associations be doing in response to the FCC Rule and the conflicting information that is circulating about the Rule?

A: First, boards should be adopting reasonable rules relating to antenna installations which address both aesthetic and safety concerns. Boards should also consider distributing a fact sheet telling homeowners what they can and cannot do, outlining the procedure they must follow before installing an antenna. Boards may also want to hold an information session for homeowners. For help in developing reasonable rules, or information that will help you deal with this very complex issue, you could contact your association attorney or the Community Associations Institute (CAI). In addition, boards should meet the antenna distributors to learn more about installation issues and inform distributors about the aesthetic and safety concerns of the association.

Q: Does the FCC have a website where I can get additional information?

A: Yes. The FCC's website is www.fcc.gov.

For a copy of the FCC Rule or if you have questions concerning the Rule, please call (303) 432-9999 or 1-800-809-5242.

The FCC Rule is subject to the interpretation of the FCC and the courts through declaratory rulings and court decisions. As the FCC and courts continue to issue rulings, these questions and answers are subject to change. This outline is a publication of the law firm of Orten & Hindman, P.C. It is provided to clients and others interested in the subject matter and is not intended as legal advice. Readers should not act upon the information in this publication without seeking professional legal counseling.