

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:
Philip Wojcikewicz
Petition for Declaratory Ruling
Under 47 C.F.R. § 1.4000
CSR-6030-0

MEMORANDUM OPINION AND ORDER

Adopted: September 25, 2003

Released: September 29, 2003

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Petitioner Philip Wojcikewicz ("Petitioner") filed a Petition for Declaratory Ruling ("Petition") seeking a determination that the antenna restrictions in the Declaration for Woodmere Townhomes ("Declaration") are prohibited by Section 1.4000 of the Commission's rules, the Over-the-Air Reception Devices ("OTARD") rule (the "Rule").

II. BACKGROUND

2. The Rule, which prohibits governmental and private restrictions that impair the ability of antenna users to install, maintain, or use over-the-air reception devices was adopted by the Commission to implement Section 207 of the Telecommunications Act of 1996 (the "Act").

1 Section 1.4000(d) provides that parties may petition the Commission for a declaratory ruling under Section 1.2 of the Commission's rules to determine whether a particular restriction is permissible or prohibited under the Rule.

2 See Preemption of Local Zoning Regulation of Satellite Earth Stations and Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service, 11 FCC Rcd 19276 (1996) ("Report and Order"), recon. granted in part and denied in part, 13 FCC Rcd 18962 (1998) ("Order on Reconsideration"), Second Report and Order, 13 FCC Rcd 23874 (1998) ("Second Report and Order").

antennas that are one meter or less in diameter and are designed to receive or transmit direct broadcast satellite services; antennas that are one meter or less in diagonal measurement and are designed to receive or transmit video programming services through multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services; and antennas designed to receive television broadcast signals.⁴ For the Rule to apply, the antenna must be installed "on property within the exclusive use or control of an antenna user where the user has a direct or indirect ownership or leasehold interest in the property" upon which the antenna is located.⁵ The Rule provides that a restriction impairs installation, maintenance, or use of a protected antenna if it: (1) unreasonably delays or prevents installation, maintenance, or use; (2) unreasonably increases the cost of installation, maintenance, or use; or (3) precludes reception of an acceptable quality signal.⁶ There are exceptions in the Rule for restrictions necessary to address valid and clearly articulated safety or historic preservation issues, provided such restrictions are as narrowly tailored as possible, impose as little burden as possible, and apply in a nondiscriminatory manner throughout the regulated area.⁷

3. The Rule provides that parties who are affected by antenna restrictions may petition the Commission to determine if the restrictions are permissible or prohibited by the Rule.⁸ The Rule places the burden of demonstrating that a challenged restriction complies with the Rule on the party seeking to impose the restriction.⁹ Petitioner alleges that the Association's restrictions violate the Commission's Rule by requiring prior approval and refusing to allow TV antenna installation on his roof.¹⁰

III. DISCUSSION

4. This case presents two questions: (1) does the OTARD Rule apply to the Association's antenna restrictions on Petitioner's roof; and, (2) if the Rule applies, are the Association's antenna restrictions prohibited?

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³ Section 207 requires the Commission to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of" certain enumerated services. Telecommunications Act of 1996, Pub. L. No. 104-104, § 207, 110 Stat. 56, 114 (1996).

⁴ 47 C.F.R. § 1.4000(a). In October, 2000, the Commission amended the Rule to apply also to antennas that are used to receive and transmit non-video signals. *Promotion of Competitive Networks in Local Telecommunications Markets, Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services*, 15 FCC Rcd 22983 (2000).

⁵ 47 C.F.R. § 1.4000(a).

⁶ *Id.*

⁷ 47 C.F.R. § 1.4000(b).

⁸ 47 C.F.R. § 1.4000(d).

⁹ 47 C.F.R. § 1.4000(e).

¹⁰ Petition at 1-2.

A. Rule Application To Property Interest

5. Petitioner resides in a townhome located in the Woodmere Townhomes community. His home is an interior unit in a group of four adjoining townhomes.¹¹ Petitioner and NAB contend that he owns his lot and townhome, including the roof, and has the exclusive use of his roof.¹²

6. The Association states that its restrictions prohibit only installation of antennas on common areas.¹³ The Association and CAI argue that because the townhome roofs adjoin each other and are maintained and insured by the Association, the roofs are common area.¹⁴ They point out that “the Commission and courts” have previously referred to roofs as examples of common or restricted access areas to which the Rule would not apply.¹⁵ The Association and CAI also argue that if Petitioner were to install his TV antenna on the roof, it would be a “taking” of the common area, prohibited by the Fifth Amendment to the Constitution.¹⁶ The Association contends that Petitioner does not have exclusive use of his roof and that any other owner conceivably might use or control Petitioner’s roof.¹⁷ Finally, the Association contends that because the roof is common area, the Rule does not apply and the Commission does not have jurisdiction over antenna installation on Petitioner’s roof.¹⁸

7. For the Rule to apply, the antenna must be installed "on property within the exclusive use or control of an antenna user where the user has a direct or indirect ownership or leasehold interest in the property" upon which the antenna is located. Roofs or exterior walls may be restricted access areas where tenants are not granted exclusive or permanent possession, but, as the Commission has pointed out, the agreed-upon scope of physical possession is set forth in the lease or other controlling document.¹⁹ In this case, Petitioner owns his townhome.²⁰ Examination of the ownership documents, *i.e.*, the Petitioner’s warranty deed²¹ and the Declaration for Woodmere Townhomes,²² indicate that Petitioner owns the lot and home in fee simple ownership. The Declaration defines the home exterior as the “. . . roof, foundation, steps, footings, decks, outer surface of exterior walls and garage doors of a Home.”²³ Moreover, the Declaration specifies that each owner shall have “. . . the exclusive right to use and enjoy the Owner’s Home and Home Exterior.”²⁴ Based on these documents, we find that for purposes of application of the Rule, Petitioner has a property interest in his roof because it is expressly designated for his exclusive use. As the Rule requires either exclusive use or exclusive control of the property in which

¹¹ Petition, Association’s Breach Agreement (form on which Petitioner submitted diagram and written request to install antenna on back side of his roof.)

¹² Reply of Petitioner at 3; Response of NAB at 2-3, 5.

¹³ Response of Association at 5-7, Exhibit A, 1-2.

¹⁴ Response of Association at 5-7; Response of CAI at 6-8.

¹⁵ Supplementary Response of Association at 2-4; Response of CAI at 3-5.

¹⁶ Supplementary Response of Association at 4-5; Response of CAI at 5-6.

¹⁷ Supplementary Response of Association at 6.

¹⁸ Response of Association at 6-7.

¹⁹ *Second Report and Order*, 13 FCC Rcd at 23897.

²⁰ Reply of Petitioner, Exhibit A at 1-2.

²¹ *Id.*

²² Supplement to Petition, Declaration at 3 (document that governs the Association and home owners with respect to the properties at Woodmere Townhomes).

²³ *Id.*

²⁴ *Id.* at 5.

an antenna user has a leasehold, ownership, or other property interest, this finding, in itself, is sufficient to conclude that the Rule applies to Petitioner's roof.

8. In addition, although the Association and CAI correctly assert that Petitioner does not have exclusive control over his roof as a result of the easement granted to the Association to perform maintenance on the roof, we have previously ruled that the rights of third parties to enter and/or exercise control over the owner's exclusive-use area for such reasons as inspection or maintenance do not defeat the owner's rights under the Rule.²⁵ The Association's easement to perform maintenance therefore does not defeat Petitioner's right to the exclusive use of his roof. In the instant case, we also conclude that the collection of fees from all of the homeowners for insurance and maintenance of the roofs has no bearing on Petitioner's property interest in or exclusive use of his roof, which are set forth in the ownership documents, nor is there an issue of a "taking," as the documents presented show that Petitioner has a property interest in and exclusive use of the roof in question. Based on the record, we find that Petitioner's roof is property within his exclusive use or control in which he has a direct property interest, and that the Rule therefore applies to the Association's restrictions on antenna location on this property.

B. Antenna Restrictions

9. Petitioner asks the Commission to rule on the validity of the antenna installation restrictions found in Sections 3.07 and 8.03 of the Declaration, which provide, in relevant part:

Section 3.07 ALTERATIONS, ADDITIONS OR IMPROVEMENTS TO HOMES AND HOME EXTERIORS: No additions, alterations or improvements (including, without limitation, changes in the exterior color of a Home, construction of an outbuilding, fence, awnings, antenna, satellite dish or similar improvements or changes in landscaping) shall be made to any Lot, Home Exterior or any part of the Home which is visible from outside the Home by an Owner without the prior written consent of the Board in compliance with applicable Municipality ordinances.

* * *

Section 8.03 ANTENNAE: No television antenna, radio receiver or transmitter or other similar device shall be attached to or installed on any portion of any Home Exterior or the Community Area. Without limiting the foregoing, the provisions of this paragraph shall not apply to the Association with respect to the installation of equipment necessary for a master antenna system, cable television system or other similar systems within the Premises.²⁶

10. Petitioner included in his submission the Woodmere Townhome Owners Association Rules and Regulations, which provide, in relevant part:

SATELLITE/ANTENNA INSTALLATION: We strongly encourage satellite dishes to be professionally installed and located on the roof in a location approved by the Board. All dishes must be removed if the home is sold and the purchaser does not agree to maintain the satellite dish. Any damage done by or to the satellite dishes is the responsibility of the homeowner.²⁷

²⁵ *In Re Jordan E. Lourie*, 13 FCC Rcd 16760, 16763-64 (1998). See *Order on Reconsideration*, 13 FCC Rcd 18962, 18995-96 (1998) (reconsideration of the 1996 *Report and Order*).

²⁶ Response of Petitioner, Appendix A, Declaration for Woodmere Townhomes.

²⁷ Response of Petitioner, Appendix A, Woodmere Townhome Owners Association Rules and Regulations, Approved as of March, 2001.

11. Petitioner also included the Woodmere Home Owners Board of Directors Rules & Regulations Amendments and Additions (“Amendments and Additions”), which provide, in relevant part:

II. Installation rules

A. Antenna Size and Type

1. DBS/MDS antennas that are 24” or less in diameter may be installed. Antennas “of any kind” larger than 24” are prohibited.

B. Location

2. If acceptable quality signals may be received by placing antennas inside a dwelling unit, without unreasonable delay or unreasonable additional expense, then the outdoor installation is prohibited.

III. Installation

5. Antenna may not be mounted to the Chimneys of any owners-unit due to the possible impairment to the integrity of that fixture.

V. Safety

1. Antennas shall be installed and secured in a manner that complies with all applicable city and state laws and regulations, and manufacturer’s instructions. The owner, prior to the installation, shall provide the Association with a copy of any applicable governmental permit.

VI. Antenna Camouflaging

A. Antennas may not extend beyond the fence or above the roof line.

VII. Number of Antennas

A. No more than one antenna may be installed by an owner.

IX. Notification Process

A. Any owner desiring to install an antenna must complete a notification form and submit it c/o the Association to the office. If the install is routine (conforms to all rules and restrictions set forth above), it may start immediately.

B. If the install is other than routine for any reason, owners and the Board must establish a mutual time to meet and discuss installation methods.²⁸

12. Prior Approval. Applying the Rule to the Association’s restrictions, we find that its written restrictions and implementation thereof with respect to Petitioner’s request to install his antenna on the roof create an impermissible prior approval requirement for antennas covered by the Rule. A prior approval requirement constitutes an unreasonable delay and is therefore impermissible unless it is

²⁸ Response of Petitioner, Appendix A, the Woodmere Home Owners Board of Directors Rules & Regulations Amendments and Additions.

necessary for bona fide safety or historic preservation considerations.²⁹ In this case, the record reveals neither a safety nor historic preservation justification for the Association's Section 3.07 prior approval requirement. Although the Commission has preserved a restricting entity's right to consider aesthetic factors when promulgating antenna placement restrictions, aesthetic factors alone may not justify a prior approval process.³⁰ Accordingly, we find the Association's prior approval requirement impermissible under the Rule.

13. Notification Process. The Association's Section IX. notification process is permissible only to the extent that it constitutes a simple notification by an owner to the Association that he has installed or is about to install an antenna. If the notification process is implemented so as to delay installation in any way, we will consider it to be a prior approval requirement and impermissible under the Rule.

14. Antenna Size. The Association contends that because Petitioner's TV antenna is larger than one meter in diameter, it is not covered by the Rule.³¹ We find that Petitioner's 6-foot by 8-foot TV antenna is covered by the Rule, which does not restrict the size of TV antennas designed to receive local television broadcast signals.³²

15. Placement Preferences. Section II.B.2. of the Amendments and Additions provides that if acceptable quality signals may be received by placing antennas inside a dwelling unit, without unreasonable delay or unreasonable additional expense, then the outdoor installation is prohibited.³³ In addition, Section VI.A. provides that antennas may not extend beyond the fence or above the roof line. Petitioner states that he has a High Definition-capable television ("HDTV") as well as an HDTV decoder box,³⁴ and that despite installing three different TV antennas in several locations in his attic and boosting the signal with an amplifier, he cannot receive an acceptable quality HDTV signal.³⁵ He complains that the Association refused his request to install his TV antenna on his roof while other owners have installed satellite dishes on their roofs or home exteriors.³⁶

16. A party enforcing restrictions on antennas covered by the Rule may express a preference for location of antennas but has the burden to demonstrate that the preferred placement does not impair installation, maintenance, or use of a protected antenna.³⁷ Petitioner states that the Association's preferred locations impair his reception of an acceptable quality over-the-air digital broadcast signal. The Association has presented no evidence to meet its burden of demonstrating that its preferred placement locations do not impair installation, maintenance, or use of a protected antenna. The Commission

²⁹ For a detailed analysis of prior approval, see *Star Lambert*, 12 FCC Rcd 10445, 10446-47 (1997). See *Order on Reconsideration*, 13 FCC Rcd 18962, 18980-81 (1998) (reconsideration of the 1996 *Report and Order*).

³⁰ *Report and Order*, 11 FCC Rcd at 19288.

³¹ Response of Association at 3, 7.

³² There is no specific size limitation in the Rule for antennas used to receive television broadcasting service ("TVBS"), including analog and digital over-the-air signals in an acceptable quality from non-distant stations. See *First Report and Order*, 11 FCC Rcd 19276, 19301 (1996). See also *Bell Atlantic Video Services Company*, 15 FCC Rcd 7366, 7371 (2000); *Michael J. MacDonald*, 13 FCC Rcd 4844, 4851-52 (1997).

³³ Supplement to Petition, Woodmere Home Owners Board of Directors Rules & Regulations Amendments and Additions at II.B.2 (effective March 1, 2001).

³⁴ Petition at 1; Reply of Petitioner at 5.

³⁵ Petition at 1-2.

³⁶ Reply of Petitioner at 1, 5.

³⁷ 47 C.F.R. § 1.4000(e).

previously found that where prospective antenna users cannot receive an acceptable signal in the locations preferred by a community association, they have the same rights under the Rule to place their antennas in alternative locations as other users have to place their antennas in preferred locations.³⁸ We consequently find that Petitioner has the right to place his TV antenna on his roof or any other location that is within his exclusive use or control where he has a direct or indirect ownership or leasehold interest, and the Association has not met its burden to prove that installation in the preferred alternate location will provide an acceptable quality signal.

17. Other Restrictions. The Amendments and Additions also include other provisions that violate the Rule, although not highlighted by Petitioner. First, Section VII.A. provides that no more than one antenna may be installed by an owner.³⁹ The Commission has ruled that a restricting entity may not impose an arbitrary limit on the number of antennas a viewer may install, provided that they are necessary to receive the video programming available for reception in the viewer's viewing area.⁴⁰ Second, Section V.1. requires that antennas be installed in a manner that complies with "all applicable city and state laws and regulations and manufacturer's instructions," and that the owner, prior to the installation, provide the Association with the "copy of any applicable governmental permit."⁴¹ The Commission has previously found that such requirements are unenforceable where there is nothing in the record to enable it to determine whether the code sections are safety related or whether they otherwise impair installation, maintenance or use under the Rule and because it is unnecessarily burdensome to require a homeowner to cull through all ordinances, laws, regulations, and industry standards to determine which ones apply.⁴² The Petition places before us all the antenna restrictions imposed by Woodmere Townhomes. We find that the foregoing restrictions, having been prohibited by previous rulings, are declared preempted and prohibited in the instant case. Finally, Section III.5. provides that antennas may not be mounted to the chimneys of any owner's unit due to the "possible impairment to the integrity of that fixture."⁴³ The Association's documents in the record do not contain express language that includes or excludes the chimney from the rest of the roof as an area reserved for Petitioner's exclusive use, nor is there any evidence on the basis for or nature of the "possible impairment." In the absence of express exclusion, justification or argument from the Association on this point, we conclude that the Association has not satisfied its burden to justify a blanket prohibition of antenna installation on the chimney if such location is necessary for Petitioner to receive an acceptable quality signal.

IV. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED**, pursuant to Section 1.4000(d) of the Over-the-Air Reception Devices Rule, 47 C.F.R. § 1.4000(d), and Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that the Petition for Declaratory Ruling filed by Philip Wojcikewicz **IS GRANTED** with respect to preemption of Sections 3.07 and 8.03 of the Declaration for Woodmere Townhomes and Sections II.A.1., II.B.2., III.5., V.1., VI.A, VII.A. and IX. of the Woodmere Home Owners Board of Directors Rules & Regulations Amendments and Additions, as discussed herein.

³⁸ *Michael J. MacDonald*, 13 FCC Rcd 4844, 4854 (1997). See *Jay Lubliner and Deborah Galvin*, 13 FCC Rcd 4834, 4840-41 (1997), *app. for rev. denied*, 13 FCC Rcd 16107 (1998).

³⁹ Supplement to Petition, Amendments and Additions, Section VII. A.

⁴⁰ *Stanley and Vera Holliday*, 14 FCC Rcd 17167, 17171 (1999).

⁴¹ Supplement to Petition, Amendments and Additions, Section V.1.

⁴² *Victor Frankfort*, 16 FCC Rcd 2875, 2890 (2001), *app. for rev. denied*, FCC 03-210 (rel. Aug. 27, 2003).

⁴³ Supplement to Petition, Amendments and Additions, Section III. 5.

19. This action is taken by the Chief, Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's rules.⁴⁴

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Media Bureau

⁴⁴ 47 C.F.R. § 0.283.