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

In the Matter of:	)	
	)	
James S. Bannister	)	
	)	CSR 7861-O
Petition for Declaratory Ruling Under 47 C.F.R. § 1.4000	)	
	)	

DECLARATORY RULING

Adopted: July 28, 2009 **Released: July 29, 2009**

By the Acting Chief, Media Bureau:

I. INTRODUCTION

1. Petitioner James S. Bannister ("Petitioner") filed a Petition for Declaratory Ruling ("Petition") seeking a determination that the antenna restrictions of Ponderosa Woods Homeowners Association, San Jose, California are prohibited by the Commission's Over-the-Air Reception Devices Rule, 47 C.F.R. § 1.4000 ("Rule").[1] The Ponderosa Woods Homeowners' Association ("Association") filed a response to the Petition and Petitioner filed a reply. DIRECTV, Inc. and DISH Network LLC ("Satellite Providers") jointly filed comments in support of the Petition. For the reasons discussed below, we grant Petitioner's request and find that the Association's restrictions do not comply with the Commission's OTARD 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[2] was adopted by the Commission to implement Section 207 of the Telecommunications Act of 1996 (the "Act").[3] This provision was intended to advance one of the primary objectives of the Communications Act of 1934: "to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges. . . ."[4]

[1]Section 1.4000(e) 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. 47 C.F.R. § 1.4000(e).

[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*"). The Rule became effective on October 14, 1996. Public Notice DA 96-1755 (Oct. 23, 1996).

[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]Communications Act of 1934, § 1 as amended, 47 U.S.C. § 151.

3. The Rule applies to 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, or any size in Alaska, 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.[5] The Rule also applies to antennas used to receive fixed wireless or broadband internet signals.[6] For the Rule to apply, the antenna must be installed "on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property" upon which the antenna is located.[7] The Rule does not apply to restrictions on installations in common areas.[8] 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.[9] There are exceptions to 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.[10]

4. 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.[11] The Rule places the burden of demonstrating that a challenged restriction complies with the Rule on the party seeking to impose the restriction.[12]

III. DISCUSSION

5. Petitioner resides in a townhome located in the Ponderosa Woods Planned Unit Development ("P.U.D.") in San Jose, California. His home is in a group of adjoining townhomes with co-joined roofs.[13] Petitioner contends that he owns his lot and townhome, including the roof, and that he has the exclusive use of his roof.[14] Petitioner installed an antenna to receive local broadcast television signals and a broadband internet antenna to receive broadband service on the roof of his townhouse.[15]

[5] 47 C.F.R. § 1.4000(a). In October, 2000, the Commission amended the Rule to apply to antennas that are used to receive and transmit fixed wireless 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).

[6] 47 C.F.R. § 1.4000(a)(1)(ii)(A).

[7] 47 C.F.R. § 1.4000(a)(1).

[8] *Second Report and Order* at para 62.

[9] 47 C.F.R. § 1.4000(a)(3).

[10] 47 C.F.R. § 1.4000(b).

[11] 47 C.F.R. § 1.4000(e).

[12] 47 C.F.R. § 1.4000(g).

[13] Petition at 4.

[14] *Id*. at 3.

[15] *Id.* at 1. Petitioner filed an addendum with the Commission on February 12, 2009, stating that Sprint no longer offers Broadband Internet service and that he intended to remove the antenna. The Rule does not cover inoperable antennas. *See Holliday v. Crooked Creek Villages Homeowners Assn., Inc.*, 759 N.E.2d 1088 (2001). Therefore, this ruling pertains only to the television broadcast antenna on Petitioner's roof.

The Association contends that the roof is a common area.[16]

A. Application of the OTARD Rule to Petitioner's Roof

6. As demonstrated by the record, Ponderosa Woods is a planned unit development governed by a Declaration of Covenants, Conditions and Restrictions ("CCRs") that address, among other aspects of the development, the areas designated as "common areas." The Declarations, adopted in 1972, describe the Common Area as follows: "All real property owned by the Association for the common use and enjoyment of the owners."[17] The roofs of the units are not included as common areas in these CCRs.[18]

7. The Association claims that in 1972, at the first Association meeting, a majority of members voted to designate the roofs as common areas. This resolution was never recorded and the CCRs were never amended.[19] The Association argues further that the roofs are common areas because, in some instances, they expand across two to four adjoining units, or in one case, across five individual units, and the Association is responsible for repairing, replacing, and maintaining the roofs on all townhomes.[20] The Association also argues that its ability to enforce an obligation on the homeowners to pay for repairs for all the roofs is evidence that the roofs are common property.[21] The Association contends that the adjoining nature of the roofs negates Petitioners' claim of exclusive use or control.[22] The Association further claims that Petitioner was aware of its *de facto* treatment of the roofs as common areas and thus should be estopped from arguing otherwise.[23] Finally, the Association states that it carries no insurance on the roof while arguing that it owns the roof.[24]

8. The Petitioner and the satellite providers argue that under Commission precedent[25] in determining exclusive use or control, "the lease, condominium declaration, deed or other controlling document is dispositive in individual situations."[26] They argue that under Petitioner's ownership title, which is held in Fee Simple,[27] he owns all of his lot and has an undivided interest in the common areas, which are defined as the streets, sidewalks, club house complex, and swimming pool facilities.[28] They note that the roofs are not defined as part of the common area.[29] Petitioner also says there is no documentary support for the Association's claim that it owns the Petitioner's roof and that the

[16]Opposition at 2-3.

[17]CCRs at Art. I., § 4.

[18]Petition (CCRs).

[19]Opposition at 2.

[20]*Id*. at 2-3.

[21]*Id.* (Letter dated July 12, 2005 from Stephen K. Lew on behalf of the Association at 2).

[22]*Id*. (Letter dated March 28, 2005 from Stephen K. Lew on behalf of the Association at 5).

[23]*Id*. The Association notes that Petitioner served in various capacities on the Association Board, including in his capacity as Treasurer, where he controlled funds for the care, maintenance, and upkeep of the roof areas.

[24]*Id*. at Exhibit. F at 2.

[25]*In the Matter of Philip Wojcikewicz*, 18 FCC Rcd 19523 (2003), *Application for Review Denied,* 22 FCC Rcd 9858 (2007).

[26]Petition at 1; Comments of DIRECTV, Inc. and DISH Network LLC at 7-9.

[27]There is an exception for underground water rights and the disallowance of surface entry.

[28]Petition at 1-2; Comments of DIRECTV, Inc. and DISH Network LLC at 6.

[29]Petition at 2; Comments of DIRECTV, Inc. and DISH Network LLC at 8.

Association does not maintain insurance on the roof or on the Petitioner's individual unit.[30] Petitioner contends that under the *Wojcikewicz* decision, the Commission has already determined that roofs are not common areas just because they may be co-joined and an association's easement for roof maintenance did not defeat the owner's rights under the Rule.[31] Petitioner notes that he added a second floor to his home and built the roof himself, paying with his personal funds to have the roofing applied by the Association's approved roofing contractor.[32] Petitioner indicates that he was required to use the Association's roofer in order for his new roof to be eligible for continued maintenance by the Association.[33] Petitioner submitted evidence of his payment for his roof work.[34]

9. We find that for purposes of determining application of the OTARD rule, Petitioner's roof is an area within his exclusive use or control where he has a direct or indirect ownership interest and is thus covered by our Rule. Roofs or exterior walls may be restricted access areas where tenants are not granted exclusive or permanent possession, but, as the Commission has noted in the *Wojcikewicz* case, the agreed-upon scope of physical possession is set forth in the lease or other controlling document covering the property in question.[35] Other than an affidavit, the Association does not offer any minutes or other documentation from the meeting where it claims the roofs were made common areas. Nevertheless, the Association argues that it was not legally required to amend the CCRs or record the resolution because the roof is a property interest that can be transferred or assigned.[36] However, the Association provides no legal basis for its assertion that the resolution did not have to be recorded or the CCRs amended. Our review indicates to the contrary. Under California provision 1357.110, that took affect in 2003, in order for an operating rule to be valid and enforceable, it must: a) be in writing; b) within the authority of the board of directors of the association conferred by law or by the declaration or bylaws of the association; c) not inconsistent with governing law and the declaration of incorporation or association and bylaws of the association; and d) adopted or amended in good faith, and the rule is reasonable.[37] In this case, Petitioner owns his townhome and has full insurance coverage for it just as he would for a single family structure.[38] Examination of the Deed and title insurance indicates that the house's title is held in Fee Simple with an exception for underground water rights.[39] The common areas are described by lot number and do not include the town house roofs.[40] There is no evidence that the Association acquired any

[30]Reply at 8. Petitioner notes that the Association carries fire and liability insurance on the real estate and structures in the common areas, but doesn't carry any insurance on the individual townhouses. Petitioner argues that insurance coverage of the roofs would be a clear sign of ownership. For example, when two homes were destroyed by fire, the Association expended no resources for the repair and restoration of the damaged roofs.

[31]Petition at 3; *Wojcikewicz*, 18 FCC at 19525-26 (The Commission held that the Petitioner had a property interest in his roof even though it adjoined other townhouse roofs because it was designated for his exclusive use); *see also In re Jordan E. Lourie*, 13 FCC Rcd 16760, 16763 (CSB 1998) (The Bureau held that the Petitioner was the owner of his chimney with exclusive use even though the Association has responsibility for the repair, replacement, and maintenance of the exterior of the townhouse, including the chimney area where the antenna was mounted).

[32]Petition at 3.

[33]*Id.*

[34]*Id*. and Exhibit 6.

[35]*Wojcikewicz*, 18 FCC at 19525; *Second Report and Order*, 13 FCC Rcd at 23897.

[36]Opposition at 2.

[37]Cal. Civ. Code § 1357.11076 (2003).

[38]Petition at 2. We reject the Association's claim that Mr. Bannister lacks legal standing to bring this action since only his wife's name is on the deed. The Rule applies to a petitioner who has a direct or indirect ownership interest in the property. *See* 47 C.F.R. § 1.4000(a).

[39]Petition Exhibit (Grant Deed).

[40]Petition at 2; Preliminary Title Report.

insurance on the roofs of the townhomes. Based on these documents, we find that for purposes of application of the Rule, Petitioner has a property interest in his roof and that he has exclusive use of that area. As the Rule requires either exclusive use or exclusive control of the property in which 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.

10. In addition, although the Association correctly asserts 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, the Commission previously ruled in the *Wojcikewicz* case 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.[41] The Association's easement to perform maintenance does not defeat Petitioner's exclusive use of his roof. Based on the record, we find that the Rule applies to the Petitioner's roof.[42]

B. The Association's Antenna Restrictions

11. Because we find Petitioner's antenna installation is covered by the Rule, we examine the Associations' antenna restrictions and find that they are impermissible when applied to an area covered by the Rule.

12. The Petitioner asks the Commission to rule on the validity of the antenna installation restrictions found in Article IV, Section 10 of the Declaration, which provides, in relevant part:

> No masts, tower or pole or outside television antenna, aerial or radio pole shall be erected, constructed or maintained on any lot located in such manner as to be visible from the outside of such lot unless otherwise approved by the architectural committee.[43]

In response, the Association states that Article IV, Section 10, of its CCRs has not been enforced since the Commission adopted its OTARD rule in 1996 and it did not request that the Petitioner remove the antennas under this provision.[44]

13. The Association instead argues that its demand that Petitioner remove his antennas is based on Article VI of the CCRs, which provides:

> No building, fence, wall or other structure shall be commenced, erected or maintained upon the properties, nor shall any exterior addition to or change or alteration herein be made until the plans and specifications showing the nature, kind, shape, height, materials, and location of the same shall have been submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography by the Board of Directors of the Association, or by an architectural committee composed of three (3) or more representatives appointed by the Board. In the event said Board, or its designated committee, fails to approve or disapprove such design

[41] *Wojcikewicz*, 18 FCC at 19526; *see also In Re Jordan E. Lourie*, 13 FCC Rcd 16760, 16763-64 (1998). *See Order on Reconsideration*, 13 FCC Rcd 18962, 18996 (1998).

[42] *See Second Report and Order at 23897*, where the Commission concluded that the Rule's implementing statute, Section 207 of the 1996 Telecommunications Act, did not authorize extending the rule to cover common areas. We do not address the suggestion of DIRECTV and Dish Network to expand the coverage of our OTARD rule to common areas as this is beyond the scope of this declaratory ruling proceeding.

[43] Declaration of Covenants, Conditions and Restrictions for Ponderosa Woods, page 4 § 10.

[44] Association Response (Letter dated March 28, 2005 from Stephen K. Lew on behalf of the Association at 4).

> and location within thirty (30) days after said plans and specifications have been submitted to it, approval will not be required and this Article will be deemed to have been fully complied with.

14. The Association asserts that the issue here is Petitioner's failure to request a variance from the Architectural Control Committee under Article VI of its CCRs before installing the antennas.[45] The Association argues that the preapproval requirement under Article VI is consistent with California Civil Section 1376,[46] which allows reasonable restrictions on antenna erection, maintenance, and enforcement.[47] We find that both Articles IV and VI of the Association's CCRs are inconsistent with the OTARD rule. Under the Rule, a prior approval requirement constitutes an unreasonable delay and is therefore impermissible unless it is necessary for bona fide safety or historic preservation considerations which do not exist here.[48] Although the Association has correctly eliminated enforcement of Article IV, Section 10, the Association continues to enforce Article VI which creates a prior approval requirement that is also unenforceable under the OTARD rule. 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.[49] We offer no opinion as to whether the restriction at issue complies with California state law. It is sufficient for resolution of the petition to conclude that the Association's prior approval requirement is impermissible under the Rule.[50]

IV. ORDERING CLAUSES

15. 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 James S. Bannister **IS GRANTED** with respect to antenna restrictions of the Ponderosa Woods Homeowners' Association as discussed herein.

16. This action is taken by the Acting Chief, Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's rules.[51]

FEDERAL COMMUNICATIONS COMMISSION

Robert H. Ratcliffe
Acting Chief
Media Bureau

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[45] *Id.*

[46] Cal. Civ. Code § 1376 (1995).

[47] Association Response at 2.

[48] *See Wojcikewicz* at 19528-29; *Star Lambert*, 12 FCC Rcd 10445, 10446-47 (1997); *see also Report and Order* at 19280*; Order on Reconsideration* 13 FCC Rcd 18962, 18980-81 (1998) (*reconsideration of the 1996 Report and Order*).

[49] Report and Order, 11 FCC Rcd at 19288.

[50] The Commission has previously found that Congress, in enacting Section 207 of the 1996 Telecommunications Act, intended to preempt state regulations that conflict with that legislation's implementing rules. *Report and* Order, 11 FCC Rcd at 19284-50; *see also Building Owners and Managers Ass'n Int'l. et al. v Federal Communications Commission*, 254 F.3d 89, 96 (2001) (The Court held that the extension of the OTARD rule to leased property was constitutional even though it could alter state property rights).

[51] 47 C.F.R. § 0.283.