

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

In the Matter of:)	
)	
Richard Rhoad)	
)	CSR 7862-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 Richard Rhoad ("Petitioner") filed a Petition for Declaratory Ruling ("Petition") seeking a determination that the antenna restrictions of the Villas at Highland Lakes Board of Trustees ("Board"), Westerville, Ohio, are prohibited by the Commission's Over-the-Air Reception Devices Rule, 47 C.F.R. § 1.4000 ("Rule").¹ The Board filed a response to the Petition, and DIRECTV and Dish Network LLC ("Dish") filed joint comments. The Petitioner filed a reply as did DIRECTV and Dish. In addition, after the pleading cycle ended, the Board requested leave to file an additional response to which the Petitioner replied.² For the reasons discussed below, we grant the petition in part and deny in part the Petitioner's request.

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 devices³ was adopted by the Commission

¹Section 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 In the interest of developing a complete record, we will consider both of these additional filings.

³See *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*, IB Docket No. 95-59 and CS Docket No. 96-83, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking ("*Report and Order*"), 11 FCC Rcd. 19276 (1996) (consolidated), *on reconsideration*, 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).

to implement Section 207 of the Telecommunications Act of 1996 (the "Act").⁴ 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. . . ."⁵

3. The Rule applies to antennas that are one meter or less in diameter, or any size in Alaska, 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.⁶ 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.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

II. Discussion

5. The Petitioner seeks a ruling that he can install his satellite dish antenna in his driveway or in certain areas adjacent to his condominium unit because those areas are reserved for his exclusive use

⁴ 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).

⁵ Communications Act of 1934, § 1 as amended, 47 U.S.C. § 151.

⁶ 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 wireless Internet 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*, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22983 (2000).

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).

and, therefore, are covered by the Rule. The Board asserts that the areas other than his driveway are common areas and therefore are not covered by the Commission's Rule. As demonstrated by the record, the Villas at Highland Lakes is a condominium development governed by Declarations and Bylaws ("Declarations") that address, among other aspects of the development, the areas designated as "common" and "limited common" elements. The Declarations, adopted in 1996, describe Common Areas as follows: "All of the condominium Property, including all of the land and all improvements thereon and appurtenances thereto, except those portions labeled or described herein or on the Drawings as part of a Unit, are Common Areas." The Declarations describe Limited Common Areas as "Those portions of the Common Areas that are labeled and designated "limited common areas" on the Drawings or herein are Limited Common Areas. In the case of each Unit these Limited Common Areas consist of an exterior parking area immediately in front of the garage serving the Unit. Each such Limited Common Area is reserved for the exclusive use of the owners and occupants of the Unit it is designed or designated to serve."¹³

6. In his original Petition filed in 2007, Petitioner requested the Commission to find that he is entitled to install a satellite antenna on his roof, on his outside wall, or on a post on property outside his condominium unit.¹⁴ In Reply Comments in response to the Board's Opposition, Petitioner now requests the Commission to find that he is entitled to install an antenna in his driveway area or in an "area from the shrubs and/or bushes up to the condominium unit."¹⁵ With respect to the latter area, Petitioner states that although the Declarations that accompany the property include only the driveway area in the definition of limited common areas, another document entitled "Rules and Regulations" was adopted by the Board on October 15, 2003 and indicated that the Limited Common Area included the area from the shrubs and bushes up to the condominium unit.¹⁶

7. In explanation, the Board states that its directors mislabeled a drawing in the handbook it gave to unit owners and included areas around the units as limited common areas.¹⁷ These areas are not so designated on the recorded drawings for the condominiums. The Board states that it had intended to allow satellite antennas in this mislabeled area but when it was discovered that this was in fact a common area, it decided not to permit antennas in this location.¹⁸ The Board further states that it has no restriction on or regulation of antennas installed in the driveway area. In addition, the Board asserts that it has passed a rule to allow installation of antennas in a small portion of the common element surrounding each unit. It states that this rule will allow installation in a more practical area than the driveway.¹⁹ The Board's rule requires that the mast for the antenna be no more than four feet tall and that cables and wires be painted a color similar to the unit's siding.²⁰ The Board did not attach a copy of this rule but we note that the area they are offering for antenna installation is different, and appears

¹³ See Exhibit A attached to the Board's reponse to Petition.

¹⁴ Petition at 7.

¹⁵ Reply Comments filed June 12, 2008. The pages of Mr. Rhoad's reply comments are not numbered but this request appears on the sixth page.

¹⁶ *Id.*

¹⁷ Board's Reponse at 3.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

smaller, than the area in the mislabeled handbook.²¹

8. In response, Petitioner asserts that the Board's rule allowing antennas on part of the common elements has never been made public, and he questions its existence. In addition, he argues that the designation of limited common areas in the Rules and Regulations supercedes that of the Declarations. He requests that the Commission direct the Board to allow antennas in three areas: the "mislabeled" area from the shrubs up to the unit, the area between the unit and the sidewalk that the Board is offering as an alternative, and the parking or driveway area that is labeled a limited common area in the Declarations. DIRECTV and Dish Network support Petitioner's contentions.²²

9. First, we find that the driveway area for each unit at the Villas at Highland Lakes is an area within the exclusive use and control of the unit owner or his designee and thus our rules prohibit the Board from restricting antenna installation there.²³ The Declarations are clear on this point and the Board does not argue otherwise.

10. Second, with respect to the area described as that from the bushes or shrubs up to the unit, we find that this is a common area and does not meet the definition of an exclusive use area as required by the Rule. Therefore, the Rule does not apply to antenna installations in this space. The condominium Declarations that were filed when the community was developed make clear that this area is common and these declarations have been duly recorded and convey certain property rights.²⁴ These Declarations are the controlling documents for our purposes.²⁵ We see no evidence that the 2004 Rules and Regulations were intended to affirmatively modify these rights nor does it appear that these rules were properly recorded as amendments to the Declarations. DIRECTV and Dish Network argue that an association can change its rules and can offer additional areas for antenna installation.²⁶ However, a change in rules cannot shift ownership of land without the necessary formal procedures and an expressed intent to accomplish such a shift.²⁷ In this case, the Board has represented that it will allow antenna installation in a small area close to the units that is designated a common area in the condominium documents. The Board did not, however, indicate any intention to change the designation of this area to a limited common area.²⁸ Both the Board and the Petitioner in their additional pleadings cite state court cases with respect to the need for formal amendment to change condominium declarations. The cases cited by the Board support the assertion that actions changing common areas to

²¹ See Exhibits C & D attached to the Board's Response.

²² See Joint Comments and Reply Comments filed by DIRECTV and Dish Network.

²³ The record does not indicate whether the wiring to connect an antenna installed in this area to receiving equipment inside the unit would run over or through a common area. If the wiring does not remain within the Petitioner's exclusive use area, the installation would not be covered by the Rule.

²⁴ See Exhibit A attached to the Board's response to Petition.

²⁵ *Second Report and Order*, 13 FCC Rcd at 23897; *In the Matter of Philip Wojcikewicz*, 22 FCC Rcd 9858 (2007); *In the Matter of James Bannister*, DA 09-1673 (MB 2009).

²⁶ Reply Comments filed by DIRECTV and Dish Network at 4.

²⁷ See e.g. Ohio Revised Code §5311.05(10) which requires the affirmative vote of unit owners exercising not less than seventy five per cent of the voting power to amend a condominium declaration and Ohio Revised Code §5311.031(A)(3) which requires recordation of declaration amendments that reallocate undivided interests in common elements.

²⁸ Board Response at 3.

limited common or exclusive use areas require unanimous approval of all unit owners.²⁹ The Petitioner cites several cases that he characterizes as decisions that do not “favor” associations. However, these cases involve situations where the court examines the particular facts and equities of individual cases and these opinions do not undermine the general principal that changes to condominium declarations must be approved by unit owners and duly recorded.³⁰ The Commission’s role in this proceeding is to determine whether or not the OTARD rule applies to a proposed antenna installation area based on its status under the existing legal documents. As the Commission stated in addressing issues surrounding OTARD’s implementation, in order to avoid Constitutional impediments, “. . .the agreed-upon scope of the physical possession [necessary for the rule to apply] is set forth in the lease or other controlling document; individual residents generally do not have the right to possess and use the common areas for their exclusive benefit over the property owner’s objection.”³¹ Here, the area in question is designated as common by the controlling documents and based on this, we find that the Petitioner does not have exclusive use of this area and the Rule, therefore, does not apply.

11. Finally, with respect to the area between the sidewalk and the unit, since this area is also designated on the official documents of the condominium as common area and not within the exclusive use of the unit owner, it is not covered by the OTARD Rule. Consequently, the Board is free to offer it as an alternative installation site but it is also free to impose whatever restrictions it desires since this area is not covered by the Rule. The fact that not all unit owners will be able to take advantage of this space is irrelevant to the question of whether the OTARD rule applies.³² Merely because an individual does not have an area within his exclusive use that he can use for antenna installation does not require an association or landlord to allow installation in a common area.³³

²⁹ See *Grimes v. Moreland*, 322 N.E. 2d 699, 703 (1974); *The Falls Homeowners’ Association, Inc. v Aveyard* 1994 WL 409626 (Ohio App. 2 Dist. 1994); *The Ridgely Condominium Association, Inc. v Smyrnioudis*, 343 Md. 357 (1996).

³⁰ See *O’Neil v Atwell*, 73 Ohio App. 3d 631, 638 (1991); *Belden v. Webb*, 122 Ohio App. 3d. 199 (1997); *Jefferson Place Condominium Association v. Naples*, 124 Ohio App. 3d 394 (1998); and *Claridges of Walden Condominium Association v. Wenk*, 1991 WL 157624 (Ohio App. 11 Dist. 1991).

³¹ *Second Report and Order* at 23897.

³² See Petitioner’s Reply at 8; Petitioner’s Additional Reply at 4.

³³ 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.

III. Ordering Clauses

12. 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, the Petition is **GRANTED IN PART** and **DENIED IN PART** .

13. This action is taken by the Acting Chief, Media Bureau, pursuant to authority delegated by Section 0.283, 47 C.F.R. §0.283, of the Commission's rules.

FEDERAL COMMUNICATIONS COMISSION

Robert H. Ratcliffe
Acting Chief
Media Bureau