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Recent Updates and Impacts on Association Law

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FCC CLARIFIES SATELLITE DISH RULE

During the Fall of 1998, the Federal Communications Commission (“FCC”) issued two orders addressing and clarifying the regulations on satellite dishes and antennae it promulgated pursuant to the Federal Telecommunications Act of 1996.

The first of these two orders, the Order on Reconsideration, released September 25, 1998 (“FCC Order”) deals with modifications to the FCC’s rule issued in the Fall of 1996. Although the FCC Order makes fairly extensive amendments to the FCC’s rule regarding installation of satellite dishes and antennae on areas under the exclusive use or control of the property owner (“FCC Rule”), most of the amendments are procedural in nature (*i.e.*, dealing with the manner in which enforcement proceedings must be handled), rather than substantive.

The Second Report and Order, released November 20, 1998 (“FCC Second Report”) modifies the FCC Order and also includes the FCC’s long-awaited and long-overdue pronouncement on dishes and antennae proposed to be installed on common and restricted access property (*i.e.*, those areas not under an owner’s exclusive use or control).

A. Dishes and Antennae in Areas Under an Owner’s Exclusive Use or Control

As a practical matter, the only changes to the FCC Rule effected by the FCC Order with which most community associations will have to concern themselves are as follows:

1. A person residing on the property owner’s property with the property owner’s permission (*e.g.*, a tenant) is to be treated as an antenna user covered by the FCC Rule. The FCC Order originally required the tenant to secure the landlord’s consent to installation of a dish or antenna; however, the FCC Second Report rescinded this requirement.

2. The reasonableness of a fee or cost imposed on an antenna owner (such as the costs related to screening or painting satellite dishes) is to be determined in light of the cost of equipment or services.

3. If a proceeding is initiated with the FCC or a court to enforce an association’s antenna restriction, the association must suspend all enforcement efforts pending completion of review. No attorneys’ fees may be collected or assessed, and no further fines or penalties may accrue against an

antenna user while a proceeding is pending to determine an antenna restriction's validity. If the ruling goes against the antenna user, he or she has a 21-day grace period to comply with the ruling, and no fine or penalty may be collected if he or she complies with the ruling during the grace period, unless the association demonstrates, in the same proceeding that resulted in the ruling adverse to the antenna user, that the antenna user's claim in the proceeding was frivolous.

We note that, in the body of the FCC Order, the FCC affirms that an association can require owners to locate their antennae in the least obtrusive location consistent with receiving an acceptable quality signal (“[I]f the viewer can receive the same strength signal in the back yard as in the front yard, then it would be an unnecessary interference with the legitimate prerogatives of local governments to preempt a restriction limiting the placement of the reception device to the back yard.” FCC Order, Paragraph 7. “Under the balance struck in the rules, viewers are entitled to an antenna location, if one is available, that will provide an ‘acceptable’ quality signal. Subject to that limitation, local governments and community associations are entitled, in order to protect the interests of local residents, to restrict antenna placement. . . . This balance is properly struck if a reasonable, but not always optimal, quality signal is available.” FCC Order, Paragraph 51).

However, the FCC Order provides that in order to receive an acceptable quality signal, a DBS antenna or other digital reception device covered by the FCC Rule must be installed in a location where it has an unobstructed, direct view of the satellite or other device from which the signal is received, if such a location exists on the owner's property and the property is covered by the FCC Rule. FCC Order, Paragraph 53.

The last bit of “fine tuning” in the FCC Order deals with the effect of installation of a central reception facility by a community association, landlord or similar private entity. The FCC Order concluded that installation of a central antenna, and a concomitant restriction on installation of individual antennae, is permissible under the FCC Rule so long as it does not impair installation, maintenance and use. FCC Order, Paragraph 86. Thus, an association generally could provide a central antenna and prevent individuals from installing their own antennae if:

1. the individual receives the particular video programming service the viewer desires and could receive with an individual antenna (*e.g.*, the individual would be entitled to receive service from a specific DBS provider, not simply a DBS service selected by the association);
2. the reception in the individual's home using the central antenna is of an acceptable quality as good as, or better than, the quality of reception he or she could receive with an individual antenna;
3. the costs associated with the use of the central antenna are not greater than the cost of installation, maintenance and use of an individual antenna; and
4. the requirement to use the central antenna in lieu of an individual antenna does not unreasonably delay the individual's ability to receive video programming.

FCC Order, Paragraph 88.

The FCC also noted that an association cannot deter individuals from purchasing their own antennae by announcing the association's intention to install a central antenna and using the

announcement as a basis to prohibit individual installations for an indefinite period of time. Under the FCC Rule, an association could not install a central antenna and then require individual owners to remove their antennae at their own expense, because such requirement would impose an unreasonable expense. It would be permissible, however, if the association paid for the individual antenna removal and reimbursed the owner for the value of the antenna. Finally, the FCC Rule also prohibits a restriction that imposes additional costs that total more than the individual would pay for installation, maintenance and use of an individual antenna in an exclusive use area.

B. Dishes and Antennae in Areas Not Under an Owner's Exclusive Use or Control

On November 20, 1998, the FCC issued its pronouncement on satellite dishes and antennae proposed to be installed in areas *not* under an owner's exclusive use or control. The FCC basically decided that difficulties ranging from constitutional issues of Fifth Amendment takings to practical problems such as consumers climbing over common area roofs to install dishes and antennae, liability for damage to common area caused by installations, and maintenance concerns, "weigh heavily against an extension of our rules to cover [common or restricted access] property." FCC Second Report, Paragraph 51.

Because the FCC has (at least for the time being) declined to exercise jurisdiction over satellite dishes installed in common and restricted access property (FCC Second Report, Paragraph 5), California community associations will continue to be governed by Civil Code Section 1376 with respect to dish and antenna installations in such areas.

Under Section 1376, an owner may install a satellite dish or antenna so long as the dish or antenna (a) has a diameter or diagonal measurement of thirty-six inches (36") or less, and (b) is not visible from any street or common area. An association may impose reasonable restrictions on installation of dishes and antennae with diameters or diagonal measurements of thirty-six inches (36") or less, which restrictions may not significantly increase cost or significantly decrease efficiency or performance of the video or antenna system, and which include pre-installation notice and application to the association (*e.g.*, architectural approval), provisions for maintenance, repair or replacement of roofs or other building components, and requirements for installers of dishes and antennae to indemnify or reimburse the association or its members for loss or damage caused by the installation, maintenance or use of such dish or antenna. Associations can continue to completely prohibit dishes and antennae with a diameter or diagonal measurement in excess of thirty-six inches (36") that are proposed to be installed in common or restricted access property.

C. The Satellite Dish and Antenna Issue Appears to be Resolved – For Now

Community associations and those who work with them are well-advised not to become too complacent regarding the FCC's staying out of the business of regulating dishes and antenna in common and restricted access property. FCC Chairman William E. Kennard, in a separate statement in the FCC Second Report, expressed his disappointment that the Telecommunications Act of 1996 did not permit the FCC to go as far as it might have, and further expressed an interest in working with Congress to find ways to provide access to competitive video services for more owners.

In other words, the last chapter in this ongoing satellite dish and antenna saga is a long way from being written, so stay tuned!❶

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