

THRILLS AND SPILLS IN THE REAL ESTATE BUSINESS: *AND NOW IT'S THE ...FCC AFTER US?!*

By J. Robert Eckley

I don't think there is a Residential CC&R, A Subdivider's Declaration, a set of Homeowner's Association Rules or a Landlord's Regulation sheet that doesn't prohibit the homeowner or tenant from installing outside or visible telecommunication antennas, discs, dishes, reception systems, or related structures and wiring at his structure at least some how and in some way. I also don't think there is a law firm in town that doesn't put these "aesthetic" restrictions in when they draft these kind of documents, or a homeowner's architectural committee or a landlord that wouldn't order an offending homeowner or tenant to tear down an offending installation in a heartbeat after the discovery of it.

That's why it is so disconcerting to me that all of this is going on when all of the foregoing restrictions, declarations, rules, clauses and orders are almost completely illegal! You heard me right! Most of this has been in violation of federal law since 1996!

The Federal Communication Commission ("FCC"), under its mandate from Congress and with the full status of federal law, superseding all state law and private agreements to the contrary, passed this rule as 47 C.F.R. 1.4000, in effect since October 14, 1996 (the "Rule"). It prohibits all restrictions that "impair" the installation, maintenance, or use of antennas, dishes or other apparatus used for or capable of receiving video programming, whether or not even used purely for video. The rule applies to video antennas including direct-to-home satellite dishes that are less than one meter in diameter, TV antennas, and wireless cable antennas. In November, 1998, the rule was amended, effectively January 22, 1999, to widen applicability to rental property where the renter has exclusive use, such as a balcony or patio. The Rule applies to property used for commercial lease purposes just as it applies to residential properties.

The Rule goes further to specifically prohibit most restrictions that: (1) unreasonably delay or prevent installation, maintenance or use; (2) unreasonably increase the cost of installation, maintenance or use; or (3) preclude reception of an acceptable quality signal. There are a few exceptions: Restrictions that do not "impair" (at that term is used above) are acceptable (and, frankly, by the definition it is hard to think of any restriction that would not "impair"), as well as restrictions which are required for public safety (such as electrical installation codes) or historic preservation.

Under some circumstances, a community association or landlord can restrict individual antennas, but only if a community antenna or dish is made readily available at community or landlord cost to the homeowner or tenant and as long as the cost or reception is not an "impairment" as that as been defined, above. The Rule does not give the homeowner or tenant the right to use common areas that are owned by a landlord, community association or jointly by a condominium or cooperative owners, but only provided that the homeowner or tenant is free to mount it himself on property that is controlled by him.

The Rules applies to viewers who place video antennas on property that they own and that is within their exclusive use or control, including condominium owners and cooperative owners

who have an area where they have exclusive use, such as a balcony or patio, in which to install the antenna. The rule applies to town homes and manufactured homes, as well as single family homes.

Prohibited "impairment" can also be the effect of other control methods. A sampling of them:

- Any local restriction that prohibits all antennas, which would prevent viewers from receiving signals: PROHIBITED!

- Any form of Procedural requirements can generate an unreasonable delay. (example: local regulations, which require a permit or approval prior to installation). PROHIBITED!

- Any requirement to pay fees to a local authority or committee for a permit can be an impairment. PROHIBITED!

- A requirement that an antenna or dish be located where reception would be impossible or substantially degraded. PROHIBITED!

- A regulation requiring that antennas be placed where they are not visible from the street: PROHIBITED! They "might" be permissible if this placement does not prevent reception of an acceptable quality signal or impose unreasonable expense or delay, either of which are PROHIBITED! (Example: if it costs more to put in rear of house rather than side, then requirement for placement in rear would be PROHIBITED!)

- Digital signal devices and antennas (DBS or MMDS) must be installed where it has an unobstructed, direct view of the satellite or other device from which video programming is received. Any impairment of that right: PROHIBITED!

The Rule bars restrictions from any source, including local governments, including zoning, land-use or building authorities, restrictions from management or homeowners, town home, condominium or cooperative associations and from any source including ordinances, laws, contracts, deed restrictions, covenants, by-laws, title reports and debt instruments. It covers manufactured housing (mobile home) park owners and landlords, including lease restrictions. Renters are not even required to obtain the permission of landlords prior to installation, as long as no damage will occur (and even if there is damage, the tenant must only repair it when he vacates).

Restrictions based on the availability of a central antenna will generally be permissible if: (1) the viewer receives the particular video programming service the viewer desires and could receive with an individual antenna, (e.g. the viewer would be entitled to receive service from a specific DBS provider, not simply a provider selected by the association); (2) the video reception in the viewer's home using the central antenna is as good as, or better than, the quality the viewer 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 instead of an individual antenna does not unreasonably delay the viewer's ability to receive video programming.

The penalty for levying an unlawful impairment on a homeowner or tenant can be a fine or judgment for the cost of replacing a receptacle that has been torn down, plus other consequential damages and, if it was done with any form of contract with the aggrieved party such as Association Rules or tenancy agreements, the attorneys fees of the aggrieved. Owners, property managers, site managers, real estate licensees and even local zoning authorities can be held liable for causing the impairment either by enforcing such a rule or by assisting in the impairment or removal. It can also result in other significant FCC sanctions as well, including injunctive relief and referral to other federal agencies.

In Arizona, a violation of federal law would also likely constitute a breach of the Association Rules by the Association, a breach of the Landlord-Tenant Act by the landlord in residential tenancy, a breach of a commercial leasing agreement by the landlord and a potential violation of the Consumer Fraud Act against the homeowner or tenant, where there is a strong potential for the assessment of punitive damages against an offending association or landlord. As a violation of federal law, it is also probably a breach of the licensing rules for the real estate licensee under ARS 32.2153 (A), which require all licensees to obey the federal law.

To avoid a violation or an accusation of misrepresentation, there is also probably a duty to repeal offending regulations that run afoul of the law and to notify homeowners or tenants that a prior restriction is revoked, so that the mere presence of it on the books, alone--whether or not enforced--will not unlawfully "chill" the homeowner's or tenant's decision to install a complying receptacle. Those who have been "chilled" from installing one by regulations in violation of the Rule probably have the same claims as those against whom action has been taken.

The restricting entity may petition the FCC for a waiver from the Rule, but the grounds must demonstrate that the proposed restriction falls into one of the clear exceptions. In the meantime, the restriction cannot be enforced while the petition is pending (which could take a long, long time), unless its a petition for safety or historic preservation (but the petitioner had better win it). The restricting entity has the burden of proving that the restriction is valid, no matter who questions the validity. If the commission determines in rare instances that the restriction is valid, the offending homeowner or tenant is given a minimum of 21 days to comply with an adverse ruling to avoid a fine. Either side can appeal.

If you, your local authorities, community association or landlords are enforcing any rule or regulation that commits any of these "impairments," watch out! Advice to the offenders: With the assistance of your counsel, repeal it now or, if you qualify, seek waiver. Advice to the aggrieved: If you are suffering or have suffered prohibited impairment and wish to contest it, contact your association, management, lawyer, or the FCC. The Federal Communications Commission can be reached at (1-888-225-5322).

How did something like this get passed? Well: Consider the size and power of the media and broadcast lobby that almost "owns" the FCC! But consider also that the "Iridium Concept"--an integrated worldwide plan for attaining almost universally wireless communication--is in play right now! Allow society to tear down the domestic transmission receptacles this great lobby has engineered and you fairly well scuttle the trillion-dollar communication infrastructure being built for the third millennium, virtually as you read this! Yes, there are both pros and cons to this

dilemma and the likelihood is that we are going to see a lot more communications changes in the Internet Age. But the writing is on the wall: The poles are coming down and the wires are heading to the furnaces to be melted into bottoms for pots and pans. Stand in the way of this revolution and be prepared to be hit by that historically unstoppable legal freight train called... "Progress"