

# FCC RELEASES NEW RULES PREEMPTING LOCAL RESTRICTIONS ON ANTENNAS FOR HOME USE

***By Howard J. Barr***

The Commission's rules preempting governmental and non- governmental restrictions on antennas used to receive video programming services in the home are now effective. The Commission's decision covers satellite earth stations one meter in diameter or less and other over-the-air antennas such as those used to receive television ("TV") and wireless cable services one meter in diameter or diagonal measurement. These types of antennas were previously the subject of two separate rule making proceedings which were combined into this one Order.

Any restriction that impairs the installation, maintenance or use of such antennas is prohibited. This includes state and local laws and regulations, including zoning, land use, or building regulations, or any private covenant, homeowner association rule or similar restriction.

## **Definition of Impair**

For purposes of the rule, the Commission will find that a restriction "impairs" installation, maintenance or use if it:

- - unreasonably delays or prevents installation, maintenance, or use;
- - unreasonably increases the cost of installation, maintenance, or use; or
- - precludes reception of an acceptable quality signal.

Unreasonable delays may include procedural requirements such as those requiring community association or zoning board approval, or the procurement of a permit or payment of a fee. Unreasonable costs might include requiring an antenna owner to screen the antenna with expensive landscaping while a requirement that the antenna be painted might be more reasonable. Similarly, a restriction that would prohibit an antenna in the front yard or other visible place might be reasonable if quality reception could be had in the back yard. Local conditions involving safety or historic preservation, however, may justify greater restriction if they are no more burdensome than necessary to achieve those purposes.

## **Non-Governmental Restrictions**

In addition to zoning regulations, the new rules apply to homeowners' agreements and restrictive covenants on property that is within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property. This includes situations where the antenna user owns a single family detached house or single family row house that is subject to a restrictive covenant in the deed. The Commission's rule would also apply where the user has an indirect ownership interest in the property, such as a condominium or co-op, and installs an antenna in an area that is within the user's exclusive use or control. The rule is not applicable to apartment buildings or similar multiple dwelling units ("MDUs"), but the Commission will take this up in a Further Notice of Proposed Rule Making (see below).

## **Process and Procedure**

Under the Commission's Rule both antenna users and entities attempting to enforce the restrictions may seek relief from the Commission or a court. Either party may seek a declaratory ruling from the Commission and entities seeking to enforce a restriction may also petition the Commission for a waiver under certain circumstances. The burden of proof, however, will always be on the party bringing such action.

In an action to determine whether the restriction at issue is permitted for reasons of safety or historic preservation, the restriction may be enforced during the proceeding. Otherwise, the restriction may not be enforced until a ruling is made and a viewer may install, use and maintain an antenna during the pendency of the proceeding. If the ruling ultimately upholds the restriction, however, the viewer may be subject to the initial fine or penalty, but such penalty shall not accrue during the proceeding.

### **Further Notice of Proposed Rule Making**

The Commission also instituted a Further Notice of Proposed Rule Making in which it seeks further comment on its legal authority to preempt restrictions on antennas to be located on property in which a viewer does not have exclusive control or an ownership interest. Such property includes common areas, rental properties or MDUs, where a community association or landlord is legally responsible for maintenance and repair and can be liable for failure to perform its duties properly.

Specifically, the Commission seeks to square its legal authority with two cases where it was held that the imposition of communications facilities on private property raised issues such as the "takings" and "just compensation" clauses of the Fifth Amendment to the Constitution.

Comments are due September 27, 1996, with replies due October 28, 1996. \* \* \*