

Are Unsightly Antennas and Dishes Ruining Your Condominium?

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Condominium developers and owners' associations typically seek to preserve the aesthetic appearance and marketability of their condominiums by limiting the unit owners' use of building exteriors. As telecommunications technology continues its rapid development, developers and owners' associations must contend with antennas and satellite dishes that can turn balconies, decks and rooftops into warrens of unsightly equipment.

Drafters of restrictions on the installation of antennas and satellite dishes must now contend with a broadly worded regulation that severely limits developers' and associations' ability to restrict antennas and dishes. Under the authority of the Federal Telecommunications Act of 1996, the Federal Communications Commission (the "FCC") has adopted 47 C.F.R. § 1.4000, otherwise known as the "Over-the-Air Reception Devices Rule" or simply the "OTARD rule." (1)

1. OTARD Rule Basics

In general, the OTARD rule provides that any law, regulation or restriction on property "within the exclusive use or control" of the user of an antenna in which the user has a "direct or indirect ownership or leasehold interest" is prohibited if it "impairs the installation, maintenance or use" of the antenna.(2) A restriction "impairs the installation, maintenance or use" of the antenna if it: ·

- "unreasonably delays or prevents installation, maintenance or use" of the antenna, ·
- "unreasonably increases the cost of installation, maintenance or use" of the antenna, or ·
- "precludes reception or transmission of an acceptable quality signal."(3)

In a condominium, each unit owner holds a direct or indirect ownership interest in all common elements, and typically has exclusive use or control of one or more exterior limited common element areas, such as balconies, decks, patios and similar areas. These exclusive use areas are covered by the OTARD rule.(4) The rule applies to antennas one meter or less in diameter (or any size if located in Alaska) that are used to receive direct broadcast satellite service (including direct-to-home satellite service) or to receive or transmit fixed wireless signals via satellite,(5) antennas one meter or less in diameter or diagonal measurement that are used to receive video programming services via multipoint distribution services or to receive or transmit fixed wireless signals other than via satellite, antennas that are used to receive television broadcast signals, and masts supporting any of the foregoing types of antennas.(6)

The only exceptions to the OTARD rule are restrictions necessitated by safety or historic preservation concerns. Even then, the restrictions must impose no more burden than necessary upon affected antenna users and apply in a nondiscriminatory manner to comparable appurtenances, devices and fixtures.(7) Local governments and associations can apply to the FCC for waivers from the rule, but waivers will only be granted if the FCC finds that there are "local concerns of a highly specialized or unusual nature."(8)

Parties may challenge the validity of a restriction under the OTARD rule by petitioning the FCC or a "court of competent jurisdiction" for a declaratory ruling(9) The burden of demonstrating that a challenged restriction complies with the rule rests with the party seeking to impose the restriction.(10)

2. Problems for Drafters of Condominium Restrictions

For drafters of restrictions on antennas and dishes in condominiums, the main difficulties with the OTARD rule are the rule's use of reasonableness standards and the strict interpretation of those standards by the FCC. An outright ban on the installation, maintenance or use of antennas or dishes in areas within the exclusive use or control of the user clearly would violate the rule.(11) According to the FCC, even far less burdensome restrictions would violate the rule.

The FCC has determined, for example, that:

- One cannot require a unit owner to obtain owners' association approval or permits before installing,

maintaining or using an antenna, because any such requirement would result in unreasonable delay.⁽¹²⁾

- One cannot compel a unit owner to take any action that would increase, to the slightest extent, the cost to the unit owner of installing, maintaining or using the antenna because any such increase in cost is an unreasonable increase.⁽¹³⁾
- One cannot limit the number of antennas an owner may install in a given location if doing so would prevent the owner from receiving the desired services.⁽¹⁴⁾

It is also difficult to draft restrictions that will comply with the OTARD rule over time. How can one know what restrictions on installation will unreasonably increase costs when prices are changing as often as they are in the telecommunications business? How can one craft a reasonable limitation on antenna placement without knowing how new technologies will affect reception or transmission quality?

3. Drafting Valid Restrictions

It is still possible to draft restrictions that fit within the confines of the rule. The key to drafting a valid restriction is to tailor it as narrowly as possible to achieve the desired objective and then provide for alternative solutions in the event a particular unit owner's demands for service, changing technology, or other circumstances cause the restriction to impair the installation, maintenance or use of an antenna by causing delays, increasing costs, or decreasing reception or transmission quality. It may be a good idea to place restrictions in condominium documents that easily can be modified to keep pace with changing technology, such as the condominium rules and regulations rather than the declaration.⁽¹⁵⁾

Following are some types of restrictions that should be permissible under the OTARD rule.

a. Ban with "Saving Language." A complete prohibition on the installation of antennas and dishes would comply with the rule as long as it is accompanied by "saving language" providing that the restriction does not apply to the extent it conflicts with law or fails in a particular case to meet any of the rule's reasonableness standards. This type of restriction would be easy to draft, but may not adequately

address the developer's or the association's concerns in particular situations in which the prohibition does not apply.

b. Require the Use of a Common Antenna. A restriction requiring unit owners to use a common antenna in lieu of installing personal antennas should comply with the rule, provided that the restriction meets certain requirements. The common antenna would have to provide all of the reception and transmission services that a unit owner could receive using personal antennas, at no extra cost and at an equal or better level of quality.⁽¹⁶⁾ Furthermore, connection to the common antenna could not result in any delay to unit owners beyond that which the unit owners would experience in installing, maintaining and using personal antennas.

The advantage of using a common antenna is that it would give the developer and association the ability to choose a location that is out-of-the-way or screened from public view. The condominium documents should address how the developer and association plan to absorb any additional costs to unit owners as a result of the common antenna, facilitate quick hook-ups by unit owners, and upgrade equipment without delay in order to meet unit owners' demands for new services. Nothing in the rule should prevent the association from specially assessing unit owners using the common antenna for the costs of using, maintaining and hooking up to the common antenna, but only to the extent such costs do not exceed the costs that the unit owners would incur by using, maintaining and hooking up their own personal antennas for the services each receives. Hook-ups and upgrades to the common antenna must occur within the same time it would take a unit owner to hook up or upgrade a personal antenna to receive the same service.

More than one common antenna may be required if different unit owners wish to receive different services. Developers and associations also should consider whether the unit owners will need access to the location of the common antenna, and whether, as a result of such access, applicable building codes would require modifications to the condominium's design.

c. Require Installation in a Common Location. A restriction requiring unit owners to install individual antennas in a designated location within the common elements (such as on the roof of the building) rather than in areas within the unit owners' exclusive use or control should comply with the rule as long as the restriction also provides that if this arrangement increases costs, causes delays, or diminishes service quality in any particular case, the affected owner would be

allowed to install an individual antenna in his or her exclusive use area. A "common location" arrangement must satisfy many of the same standards that must be satisfied in the "common antenna" arrangement discussed above. In particular, the developer or association would have the flexibility to choose the location, but the location must allow adequate reception and transmission, and no additional delays or costs could be placed on unit owners.

d. Minor Restrictions Relating to Aesthetics or Installation. Minor restrictions addressing specific aesthetic or installation issues should comply with the rule as long as they do not cause delays, increases in costs or decreases in quality of service. These restrictions could be used alone or in combination with any of the other types of restrictions suggested above. Examples would include:

- Restrictions requiring painting or screening of the antenna or dish, as long as the painting or screening does not invalidate any manufacturer's warranty and the association pays the cost of the painting or screening⁽¹⁷⁾ .
- Restrictions requiring antennas and dishes to be located in unobtrusive locations within the unit owners' exclusive use areas, provided the reception or transmission is of adequate quality in those locations,⁽¹⁸⁾ .
- Restrictions prohibiting unit owners from installing antennas or dishes in, on or over common elements over which the unit owners do not have "exclusive use or control;"⁽¹⁹⁾ .
- Restrictions requiring that any contractor employed to install a dish or antenna must have insurance covering personal injuries and property damage,⁽²⁰⁾ and .
- Restrictions requiring unit owners to indemnify the association and its members from claims and liability for personal injury or property damage caused by the installation, maintenance or use of antennas and dishes within the unit owners' exclusive use areas.⁽²¹⁾

4. Conclusion. While the OTARD rule is an obstacle to condominium developers and associations trying to preserve the aesthetic appearance and marketability of their condominiums by restricting the installation of antennas and dishes, it does not completely prevent developers and associations from regulating antennas and dishes. With creativity and careful drafting, developers and associations should be able to craft restrictions that go at least part of the way in meeting their goals. _____

¹ State regulations may also apply. *See, e.g.,* Cal. Civil Code § 1376 (WESTLAW through ch. 219 of 2002 Reg. Sess. urgency legislation, ch. 19 (end) of 2nd Ex. Sess., ch. 4 of 3rd Ex. Sess. & March 5, 2002 elections).

² *See* 47 C.F.R. § 1.4000(a)(1) (2001).

³ *See* 47 C.F.R. § 1.4000(a)(3)(i)-(iii) (2001).

⁴ One option for avoiding the applicability of the OTARD rule to a condominium would be to design the condominium so that no areas are within the "exclusive use or control" of any unit owner. It seems likely, though, that such a design might negatively affect the marketability of the units.

⁵ The term "fixed wireless signals" is defined in the OTARD rule to mean any commercial non-broadcast communications signals transmitted via wireless technology to and/or from a fixed customer location. *See* 47 C.F.R. § 1.4000(a)(2) (2001). Examples include wireless signals used to provide telephone service or high-speed Internet access. "Fixed wireless signals" do not include AM/FM radio, amateur ("HAM") radio, Citizens Band ("CB") radio, or Digital Audio Radio Service ("DARS") signals, among others. *See* 47 C.F.R. § 1.4000(a)(2) (2001).

⁶ *See* 47 C.F.R. § 1.4000(a)(1)(i)-(iv) (2001).

⁷ *See* 47 C.F.R. § 1.4000(b)(1), (2) and (3) (2001).

⁸ *See* 47 C.F.R. § 1.4000(d) (2001).

⁹ See 47 C.F.R. § 1.4000(e) (2001). The OTARD rule does not limit "court[s] of competent jurisdiction" to either federal or state courts. See *id.*

¹⁰ See 47 C.F.R. § 1.4000(g) (2001).

¹¹ Such outright bans violate the OTARD rule by definition because they prevent the installation, maintenance and use of antennas. See 47 C.F.R. § 1.4000(a)(1) and (a)(3)(i); *In re Jason Peterson*, 13 F.C.C.R. 10455, 10464-65 (1997).

¹² See *In re Daniel and Corey Roberts*, 16 F.C.C.R. 10972 (2001); *In re Star Lambert and SBCA*, 12 F.C.C.R. 10455, 10464-65 (1997).

¹³ See, e.g., *In re James Sadler*, 13 F.C.C.R. 12559, 12568, 12571 (1998) (invalidating a requirement that a unit owner move a dish from its location on an exterior wall to the common area roof because the \$250-\$350 cost of doing so would impose an unreasonable expense, and ruling impermissible a restriction requiring the use of contractors to install antennas because it could impose unreasonable costs on unit owners); *In re Michael J. MacDonald*, 13 F.C.C.R. 4844, 4852 (1997) (invalidating a permit requirement in part because the \$5 permit fee was an unreasonable expense).

¹⁴ See *In re Stanley and Vera Holliday*, 14 F.C.C.R. 17167, 17171 (1999).

¹⁵ It may also be possible to come up with general language that would cause restrictions to apply to all telecommunications technology that may in the future be developed.

¹⁶ Because personal antennas likely would be located closer to the units than a common antenna, it might appear that the cost of wiring to connect units to a common antenna would always exceed the cost to connect units to personal antennas. It seems possible, however, that a condominium developer could pay for the extra wiring up front by including it in the initial construction of the building, in which case the cost of connecting units to the common

antenna might be less than or equal to the cost of connecting units to personal antennas.

¹⁷ See *In re Otto and Ida M. Trabue*, 14 F.C.C.R. 8602, 8608-8609 (1999); *In re Michael J. MacDonald*, 13 F.C.C.R. 4844, 4854 (1997).

¹⁸ But see *In re James Sadler*, 13 F.C.C.R. 12559, 12569 (1998).

¹⁹ Although the FCC has not issued a ruling on this point, the OTARD rule itself provides that it applies only to property "within the exclusive use or control of the antenna user." See 47 C.F.R § 1.4000(a)(1) (2001).

²⁰ See *In re James Sadler*, 13 F.C.C.R. 12559, 12571-72 (1998). Note, however, that it is impermissible under the rule to require that a contractor be used to install the antenna or dish or that the contractor or unit owner provide the owners' association with copies of the contractor's worker's compensation and liability insurance policies. See *id.*

²¹ See *In re James Sadler*, 13 F.C.C.R. 12559, 12570-71 (1998). These indemnification provisions are invalid if unit owners are required to install their antennas and dishes within a common location. See *id.*