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**LOCAL CONTROL  
OF  
ANTENNAS, TOWERS, AND SATELLITE DISHES**

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**Jonathan Miller, Steven Tempelman, and Edward Ziegler**

**Technical Services Report No. 3  
Rocky Mountain Land Use Institute**



**College of Law  
University of Denver**

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# **LOCAL CONTROL OF ANTENNAS, TOWERS AND SATELLITE DISHES**

*A Survey of Legal Claims  
And Federal Preemption Issues*

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## ANTENNAS, TOWERS, AND SATELLITE DISHES

### **AMATEUR ANTENNAS**

Zoning ordinances often attempt to regulate the height and placement of amateur radio antennas and communication towers, with varying degrees of success. The justification for such regulation is that antennas may be a safety hazards, may decrease property values, and may constitute "eyesores." Legal claims challenging the validity of local regulations are often based on federal preemption or constitutional grounds. However, such ordinances as applied to amateur radio antennas will generally be upheld so long as the regulations are not preempted by federal law. Ordinances regulating transmission towers are also likely to be upheld so long as the ordinances are clearly written.

### **PREEMPTION**

Height and placement limitations on amateur radio antennas are subject to preemption claims under Federal Communication Regulations ("PRB-1").<sup>1</sup> Local regulations that operate to preclude amateur communications in their communities are in direct conflict with federal objectives and are preempted. However, in enacting PRB-1, the F.C.C. refused to entirely preempt the field. The F.C.C. refused to specify any particular height limitation as permissible for a local regulation and similarly declined to suggest the precise language that may be contained in local ordinances.

An outright ban on antennas in any zoning district is preempted.<sup>2</sup> Courts have reached different results on height limitations. In a recent case, *People v. Krimko*,<sup>3</sup> a New York court rejected a federal preemption challenge to a village zoning ordinance which provided that radio and television antennae (other than parabolic antennae) could not be placed more than 5 feet above the roof of a building, when affixed to a building, or more than 35 feet above the mean ground level measured from the foundation of the building. The defendant therein was charged with maintaining an amateur radio tower in violation of the height restriction. The defendant claimed that the ordinance was preempted by PRB-1, a memorandum opinion and order of the Federal Communications Commission dated September 16, 1985 regarding federal preemption of state and local regulations pertaining to amateur radio facilities. The court rejected the claim, noting:

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<sup>1</sup> See PRB-1 "Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities." 101 F.C.C.2d 952 (1985) ("PRB-1"). Note that any regulation based solely on concerns of interference is also preempted. *Schroeder v. Municipal Court for Los Cerritos Judicial Dist.*, 141 Cal. Rptr. 85 (2d Dist. 1977).

<sup>2</sup> *Thernes v. Lakeside Park*, 779 F.2d 1187, 1189 (6th Cir. 1986) (ban preempted by PRB-1).

<sup>3</sup> 145 Misc.2d 822, 548 N.Y.S.2d 615 (1989).

A reading of PRB-1 indicates that it was not the intention of the F.C.C. to establish an absolute preemption of all state and local ordinances and regulations; the order enunciated a policy of limited preemption. The F.C.C. stated in Paragraph 22: "In this situation, we believe it is appropriate to strike a balance between the federal interest in promoting amateur operations and the legitimate interests of local governments in regulating zoning matters. The cornerstone on which we will predicate our decision is that a reasonable accommodation may be made between the two sides."

The absolute preemption of the field suggested by the defendant is not supported by the language of PRB-1. Indeed, after noting the relationship between amateur station communications and the type and size of antennas employed, the F.C.C. specifically abjured a precise regulation of antenna height, stating in Paragraph 25: "We will not, however, specify any particular height limitation below which a local government may not regulate, nor will we suggest the precise language that must be contained in local ordinances, such as mechanisms for special exceptions, variances, or conditional use permits. Nevertheless, local regulations which involve placement, screening, or height of antennas based on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose."

In the absence of a showing that the Building Ordinance fails to accommodate the reasonable needs of the amateur radio community addressed by PRB-1, it is the view of this Court that the Building Ordinance of the Village of Kings Point falls within the general parameters of permissible regulation, with leave for Defendant to show that the Building Ordinance, as administered in this instance, conflicts with the amateur radio requirements of the F.C.C.<sup>4</sup>

However, an ordinance that establishes blanket limitations on antenna height, with no provision for allowing such a structure as a special use or a conditional use, has been held to be preempted.<sup>5</sup> In the case of *Bodony v. Sands Point*,<sup>6</sup> a federal district court held that a fixed antenna height limitation of 25 feet was preempted. The court noted:

One factor in determining the range and effectiveness of radio communication is the height of the antenna. Measurement from the ground

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<sup>4</sup> *Id.*, 145 Misc.2d at 822-824, 548 N.Y.S.2d at 615-616.

<sup>5</sup> *Evans v. Board of County Comrs.*, 752 F. Supp. 973, 976-977 (D. Colo. 1990) (absolute thirty-five foot height limitation prohibited).

<sup>6</sup> 681 F. Supp. 1009 (E.D.N.Y. 1987).

tells us little. A 25 foot antenna in a valley surrounded by hills might be useless, while that equipment on a mountaintop might give optimum results. An antenna rising above the obstacles that interfere with radio signals obviously gives a greater range and better reception than an antenna of lesser height.

The fact that [the local ordinance] does not prohibit amateur communications is not the answer to a claim of preemption. An absolute limitation of height affects Bodony's right to the full use of his amateur extra class license and the license to use his property as an amateur radio station issued by the F.C.C. The Zoning Board did not consider a height above 25 feet that would at the same time "accomplish the local authority's legitimate purpose." The F.C.C., in asserting a limited preemption, placed upon the Zoning Board the duty of striking "a balance between the federal interest in promoting amateur operations and the legitimate interests of local governments in regulating zoning matters." The recital by defendants of the findings of the Zoning Board in arguing its opposition to Bodony's motion does not preclude litigation of the validity of [the ordinance] as it affects Bodony. [citation omitted]

It is clear from the record of the hearing before the Zoning Board that a limit of 25 feet of antenna height seriously interferes with the full enjoyment by Bodony of his license to operate an amateur radio station.

The record fails to show that the erection of the proposed antenna will endanger the health, safety and general welfare of the residents or be detrimental to the character of the neighborhood or to the residents. The Zoning Board did not determine the height above which the antenna would endanger the health, safety, and general welfare of the residents. It is uncertain how the erection of the proposed antenna system will affect the outward appearance or aesthetic harmony of the neighborhood, given the proposed shielding of the system by trees. The action of the Zoning Board is devoid of any effort to make "a reasonable accommodation ... between the two sides."

We find that [the local ordinance] is invalid as it applies to the plaintiff Andrew B. Bodony as an amateur extra class operator at the site licensed by the F.C.C. as an amateur radio station. Our discussion on the height of amateur radio station antennas is not intended to suggest an appropriate height. We base our ruling on PRB-1, in preempting the right of the Zoning Board to arbitrarily fix a limitation on the height of an antenna to 25 feet.<sup>7</sup>

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<sup>7</sup> *Id.* at 1012.

However, requiring a special permit<sup>8</sup> or allowing an antenna as a conditional use<sup>9</sup> is acceptable. The city may be required to individually consider each application.<sup>10</sup> Finally, the city should at least attempt to negotiate a satisfactory compromise with the applicant, but is obviously not required to grant approval.<sup>11</sup> Cities may also suggest alternatives such as lesser height, limitation on hours of full extension, or disguising the appearance of the antenna.<sup>12</sup>

### **CONSTITUTIONAL CHALLENGES**

Any ordinance seeking to regulate amateur antennas should be drafted unambiguously.<sup>13</sup> If amateur radio antennas are sought to be regulated, they should be explicitly mentioned.<sup>14</sup> Amateurs often complain of being unfairly 'singled out.' However ordinances distinguishing between antennas and other structures generally do not violate the Equal Protection clause.<sup>15</sup> Because of their uniqueness, satellite, ham, and CB antennas may be regulated in a different manner than radio and

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<sup>8</sup> *Howard v. Burlingame*, 1988 WL 169074 (N.D. Cal. 1988) (facially valid provision that "ham ... antennas may only be installed in the rear yard and only with a special permit").

<sup>9</sup> *Bulchis v. Edmonds*, 671 F. Supp. 1270 (W.D. Wash. 1987) (ordinance that, in a single-family residential zone, required an antenna or tower projecting more than 25 feet above the ground to obtain a conditional use permit not facially invalid).

<sup>10</sup> *Howard v. Burlingame*, 937 F.2d 1376, 1381 (9th Cir. 1991). The cost of individual analysis and review may be burdensome, but PRB-1 does not foreclose the city from shifting the financial burden of evaluating ham radio antenna applications to applicants.

<sup>11</sup> 937 F.2d at 1380. See, e.g., *Williams v. Columbia*, 906 F.2d 994, 997 (4th Cir. 1990) (affirming second denial of variance for 65-foot antenna after reconsideration in light of PRB-1); *MacMillian v. Rocky River*, 748 F. Supp. 1241, 1248 (N.D. Ohio 1990) (PRB-1 does not mandate that city approve antenna).

<sup>12</sup> *Howard v. Burlingame*, 1988 WL 1690074 (N.D. Cal. 1988)(disapproving city council's either/or approach of "either get the 51-foot antenna or not.").

<sup>13</sup> An example of a proper clause would be one that is clearly written to require all amateur antennas measuring over seventeen feet to get approval of the board. *Williams v. Columbia*, 906 F.2d 994, 998 (4th Cir. 1990) (finding such a clause was not void for vagueness).

<sup>14</sup> A court struck down a zoning ordinance requiring a special use permit for "radio towers and antennas" as it was overbroad and void since it applied not only to persons seeking to erect amateur radio towers and antennas, but also to all owners of television sets, AM-FM radios, and other devices which required an antenna. *Baysinger v. Northglenn*, 575 P.2d 425 (Colo. 1978).

<sup>15</sup> Amateur radio antennas are usually regulated differently than chimneys, spires and other structures. There is at least a rational distinction between antennas, which are not ordinarily considered part of a building, and chimneys, spires, and other structures, which are integral parts of a building. *Williams v. Columbia*, 906 F.2d 994, 998 (4th Cir. 1990).



television antennas.<sup>16</sup>

Amateur radio operators may also claim that their right to free speech is being infringed. Courts, however, hold that antenna height and placement restrictions are legitimate, content-neutral time, place and manner regulations, which have only a tangential relationship to speech.<sup>17</sup> Operators have also raised Commerce Clause claims which the courts generally have rejected.<sup>18</sup>

### **TRANSMISSION TOWERS**

Ordinances regulating transmission towers generally are not challenged as being federally preempted.<sup>19</sup> Height restrictions should be explicitly set out in the ordinance as applying to transmission towers.<sup>20</sup> Another effective way to regulate these towers is to allow them as special uses<sup>21</sup> or conditional uses.<sup>22</sup> Use

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<sup>16</sup> Satellite, ham, and CB antennas present special problems, particularly aesthetic, not usually associated with other antennas. *Howard v. Burlingame*, 1988 WL 169074 (N.D. Cal. 1988) (such a claim for violation of equal protection "borders on the laughable"). Amateur radio antennas may also be treated differently than satellite dishes. *Bulchis v. Edmonds*, 671 F. Supp. 1270 (W.D. Wash. 1987) (upholding ordinance governing satellite dish antennas which provided for waiver from its provisions, and the regular antenna/tower section which had no such provision).

<sup>17</sup> See, e.g., *Howard v. Burlingame*, 937 F.2d at 1381.

<sup>18</sup> *Guschke v. Oklahoma City*, 763 F.2d 379, 384 (10th Cir. 1985) (35-foot limitation has only an incidental effect on state commerce, but the state's interest in zoning is great). These challenges will generally fail as "neither the ordinances themselves nor their application unreasonably burden interstate commerce. They are not protectionist measures, but simple, garden variety zoning ordinances." *Howard*, 1988 WL 169074 at \*3.

<sup>19</sup> The Federal Communications Act does not preempt local regulation. *Kroeger v. Stahl*, 148 F. Supp. 403 (D.N.J. 1957).

<sup>20</sup> An ordinance permitting radio, television and other transmission structures in R/C-40 districts allowed a maximum height of 2 1/2 stories or 35 feet for R/C-40 districts. The court concluded that these height restrictions apply to buildings and not to transmission structures. *Jaffee on behalf of Cragmoor Preservation Alliance v. RCI Corp.*, 119 A.D.2d 854, 500 N.Y.S.2d 427 (1986). Attempts to have large towers characterized as nuisances have also failed. See, e.g., *State ex rel. Board of Com'rs v. WOR-TV Tower*, 121 A.2d 764 (N.J. Super. Ct. 1956) (760 foot tower not nuisance per se).

<sup>21</sup> Even though the applicable section of the regulations provides for the consideration of only certain criteria, certain factors unique to these transmission structures may also be looked at. *Syracuse Land Corp. (WFBL) v. Clay*, 112 A.D.2d 51, 490 N.Y.S.2d 663 (1985) (inclusion of only site-related criteria in special permit section of zoning regulations did not preclude town board from considering other factors, without amendment of ordinance, in determining whether to issue permit for antennae).

<sup>22</sup> See, e.g., *Farmington v. Viacom Broadcasting, Inc.*, 522 A.2d 318, 321 (Conn. App. Ct. 1987) (requirement that owner dismantle existing tower as condition to approval of new and taller tower had substantial relationship to request for new tower and to town's goal that mountain on which tower was located

variances may also be granted.<sup>23</sup> However, safety should be a paramount concern, when granting a variance for these towers.<sup>24</sup>

### **IMMUNITY FROM ZONING**

Governmental entities may be exempt from local zoning restrictions.<sup>25</sup> Ordinances may also provide exceptions for 'public utilities'. Different tests have been applied for public utility status.<sup>26</sup> This issue frequently arises in cases involving commercial radio stations<sup>27</sup> and cellular operators.<sup>28</sup> In some states,

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not be "dotted with numerous towers" which would affect property values and character of surrounding neighborhoods).

<sup>23</sup> A variance was upheld for a tower 200 feet high even in district zoned primarily for single-family residences since, due to moist soil condition, condition of subject parcel was such that denial of variance would probably result in complete nonuse of parcel. *Sherman v. Board of Appeals*, 235 N.E.2d 800 (Mass. 1968) (noting that value of land and residences in neighborhood would not be adversely affected by such grant).

<sup>24</sup> A variance may properly be denied for this reason, even when evidence of adequate safety is provided by petitioner. Affidavits filed by a property owner seeking a variance for a 125-foot radio tower atop his building were insufficient to invalidate a denial of variance on the ground that the proposed tower would create a hazard and be against the public interest. *Zoning Bd. of Adjustment v. Marshall*, 387 S.W.2d 714 (Tex. Civ. App. 1965).

Variances may even be denied when no safety risk is present. See, e.g., *Hohmann v. Thomsen*, 32 A.D.2d 669, 300 N.Y.S.2d 781 (1969) (where 103-foot transmission tower, used solely for business, was not in harmony with residential area granting of variance was improper).

<sup>25</sup> *Glasco v. Baltimore County*, 581 A.2d 822 (Md. 1990) (county not bound by its zoning regulations).

<sup>26</sup> Regulation by a state public utility commission (PUC) is generally not dispositive of an organization's status for zoning purposes. *McGinnis v. Quest Microwave VII, Inc.*, 494 N.E.2d 1150 (Ohio Ct. App. 1985). In fact, PUC regulation is not necessarily required for an entity to be considered a public utility. *Marano v. Gibbs*, 544 N.E.2d 635 (Ohio 1989). However, an entity may be characterized as a public utility if the nature of its operation is a matter of public concern, and membership is indiscriminately and reasonably made available to the general public. *Id.* at 637 (one-way and two-way telephone services, mobile telephone services, and voice paging held to be public utilities).

<sup>27</sup> *Mamma v. Zoning Bd. of Appeals*, 110 Misc. 2d 534, 442 N.Y.S.2d 689 (1981) (commercial radio not public utility); *Commonwealth, Public Utility Com. v. WVCH Communications, Inc.*, 351 A.2d 328 (Pa. Commw. 1976) (finding that just because radio station serves a public interest and is regulated to some extent by FCC does not make it a "public utility"). However, other courts hold that because the public interest is so directly affected in the business of radio broadcasting, a radio broadcasting station is a "public utility" for zoning purposes. *State ex rel. Pruzan v. Redman*, 374 P.2d 1002 (Wash. 1962), overruled on other grounds, *Save a Valuable Environment v. Bothell*, 576 P.2d 401 (Wash. 1978); *Collins v. Swackhamer*, 600 N.E.2d 1079 (Ohio Ct. App. 1991).

religious users may receive some special protection from local zoning restrictions.<sup>29</sup>

### **SATELLITE DISHES**

Since the introduction of satellite dish antennas, citizens have been concerned that the large parabolic assemblies would damage property values, create safety hazards, and visually harm the aesthetic character of communities. When town councils began to write ordinances to interfere with or prohibit the proliferation of satellite dish antennas, the F.C.C., in 1986, stepped in to protect this burgeoning communications industry. Although Congress could have permitted the F.C.C. to entirely preempt all state and local zoning of satellite antenna systems,<sup>30</sup> the F.C.C. regulations essentially require that a community not discriminate against satellite antenna systems. If an ordinance discriminates against satellite dish antennas, it must be justified by clear health, safety, and aesthetic objectives and it must not impose unreasonable physical or economic limitations on satellite dish reception.

### **F.C.C. PREEMPTION OF TELEVISION RECEIVE ONLY SATELLITE DISHES**

In response to concerns of the broadcast industry that local zoning ordinances might interfere with the installation of satellite antennas<sup>31</sup> by individuals and thus frustrate the federal goal of expanding satellite-delivered services,<sup>32</sup> the F.C.C. promulgated the following regulation in 1986:

§ 25.104 Preemption of local zoning of earth stations.

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<sup>28</sup> Courts have generally held cellular operators to be "public utilities". *Payne v. Taylor*, 178 A.D.2d 979, 578 N.Y.S.2d 327 (1991) (400-foot antenna tower to facilitate supply of cellular telephone service was a "public utility building" for purposes of zoning ordinance.); *Hawk v. Zoning Hearing Bd.*, 618 A.2d 1087, 1090 (Pa. Commw. 1992) (cellular radio communications provider was a "public utility" for zoning purposes, even though not subject to jurisdiction of the PUC).

<sup>29</sup> "The limitations on municipal power to regulate ... [the religious] aspects of community life are severe .... [t]he ends of municipal zoning regulation seldom are considered important enough to justify restrictions which cripple or even seriously inconvenience a religious institution." *Burlington Assembly of God Church v. Zoning Bd. of Adjustment*, 570 A.2d 495, 497 (N.J. Super. 1989) (proposed broadcasts of the Church constitute speech protected by the First Amendment; use variance improperly denied). But see Duerksen, *Regulating Religious Properties in the 1990s: Divine Guidance from the Supreme Court*, 14 *Zon. & Plan. L. Rep.* 169 (1991).

<sup>30</sup> Louis S. Sorrell, *Federal Preemption of State and Local Zoning Regulations of Satellite Earth Stations, Communications and the Law* 31, 48 (August, 1987).

<sup>31</sup> Also known as: satellite dish antennas, "SDA2s", television receive-only antennas, "TVROs", and earth stations.

<sup>32</sup> See *In Re Preemption of Local Zoning Regulations of Receive-Only Satellite Earth Stations*, 100 F.C.C.2d 846, 856 (1985).

State and local zoning or other regulations that differentiate between satellite receive-only antennas and other types of antenna facilities are preempted unless such regulations:

(a) Have a reasonable and clearly defined health, safety or aesthetic objective; and

(b) Do not operate to impose unreasonable limitations on, or prevent, reception of satellite delivered signals by receive-only antennas or to impose costs on the users of such antennas that are excessive in the light of the purchase and installation cost of the equipment.

Regulation of satellite transmitting antennas is preempted in the same manner except that state and local health and safety regulation is not preempted.<sup>33</sup>

In adopting this regulation, the F.C.C. had no desire to become, in effect, "a national zoning board," and it sought to avoid the administrative burden of having to review a large number of cases individually. It therefore suggested that individual satellite antenna users who believed that local zoning ordinances conflicted with the 1986 Regulation should simply invoke the regulation, "pursuing any legal remedies they might have" against such an ordinance.<sup>34</sup>

### ***F.C.C.'S ROLE IN POLICING LOCAL CONTROLS***

The F.C.C. originally left it to the owner to pursue legal remedies. The Town of Deerfield, New York promulgated an ordinance prohibiting dish and tower type antennae on housing lots less than one-half acre in size.<sup>35</sup> In *Town of Deerfield, N.Y. v. F.C.C.*,<sup>36</sup> an owner of a dish on an undersized lot requested help from the F.C.C. The F.C.C. wrote back, stating "[i]t appears that communities are generally failing to abide by our standards." The F.C.C., however, at that time did not wish to deal with individual petitions or to intervene in local disputes, and suggested that the

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<sup>33</sup> Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, 51 Fed. Reg. 5519, 5526 (1986) (codified as 47 C.F.R. § 25.104 (1992) ("1986 Regulation" or "§ 25.104")).

<sup>34</sup> 1986 Regulation at 5524.

<sup>35</sup> *Carino v. Town of Deerfield*, 750 F. Supp. 1156 (N.D. N.Y. 1990) *aff'd* 940 F.2d 649 (2d Cir. 1991). The ordinance states:

1. In R-1 or R-2 District no dish or tower type antennae shall be erected on any lot less than one half (1/2) acre. . . .

*Id.*, 1159 (citing Section 17(B) of Town of Deerfield Ordinances).

<sup>36</sup> 992 F.2d 420 (2d Cir. 1993).

owner retain an attorney and exhaust all other courses of action.<sup>37</sup> Subsequently the owner entered into a protracted series of litigations and appeals.<sup>38</sup> The F.C.C. eventually intervened and ruled that the town ordinance was preempted.<sup>39</sup> The town appealed. The Federal Court of Appeals for the Second Circuit, held that "[in] the Commission's preference to eschew immediate agency action [the F.C.C. cannot] review, alter or prevent enforcement of the judgment for an Article III court."<sup>40</sup> The F.C.C. may, in the future, consider intervening at the behest of an owner at an earlier stage of litigation.

### **PREEMPTION AND SATELLITE DISH TECHNOLOGY**

The C-Band communications satellites, which rebroadcast television and radio signals, are boosted into a geostationary orbit 22,247 miles above the earth along a band above the equator, called the Clarke Belt. The transmission typically is focused across the entire continent of North America and Hawaii. The F.C.C. permits satellites to be separated by two degrees of arc; thus for the continental United States, there are approximately 24 satellites beaming programming within view. Each C-band satellite, broadcasting 15-17 watts, carries 24 channels, waves polarized horizontally and vertically, with each channel capable of carrying one television broadcast and twenty-eight additional audio signals.<sup>41</sup>

To receive satellite signals, a user must install a "dish" which is essentially a parabolic microwave lens capable of gathering sufficient energy from a satellite that it is directed towards and focusing that energy on a feedhorn assembly that guides the waves into a low noise amplifier and converter. The signal is thence carried by coaxial cable to the satellite receiver and then finally the television. To discern between signals of different satellites and to gather a sufficient quantity of broadcast energy, satellite dishes are required to be approximately 7 to 12 feet in diameter, depending upon where in the country the installation is located. Reception is

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<sup>37</sup> 992 F.2d at 424 (quoting "Letter dated March 20, 1987 from FCC Chief of Satellite Radio Branch to Joseph A. Carino").

<sup>38</sup> These cases included litigating the fines for having installed a dish, denial of a building permit to install a dish, denial of a variance, as well as constitutional attacks on the town ordinance, and a conspiracy theory against the town. *Carino v. Town of Deerfield*, 750 F. Supp 1156, 1161-1171, *Carino v. Pilon*; 142 A.D.2d 996, 530 N.Y.S.2d 1022, *Appeal dismissed and denied*, 72 N.Y.2d 1038, 534 N.Y.S.2d 935, 531 N.E.2d 655 (1988).

<sup>39</sup> *Town of Deerfield v. F.C.C.*, 992 F.2d 420, 426 (citing FCC Memorandum Opinion and Order, March 31, 1992).

<sup>40</sup> 992 F.2d at 430.

<sup>41</sup> See generally Frank Baylin, et al., *Home Satellite TV Installation and Troubleshooting Manual* (3rd Ed. 1991) and other satellite dish books published by Baylin Publications.

diminished by weather (moisture in the clouds will attenuate the microwave signal), and influenced by other sources of radiation in sensitive frequencies, such as those produced by other radar signals or communications devices.

For the satellite dish to be at all effective, it must have an unobstructed view of the satellite it is aimed at. To receive signals from a satellite, dishes intended for home use must be rotated along an arc from horizon to horizon.<sup>42</sup> This movement is typically propelled by a motor attached to an arm that moves the entire dish assembly on a mount that functions in a fashion similar to a telescopic observatory. The entire assembly must be placed in a position such that the view of the satellite arc in the sky is not obstructed by buildings or trees. The microwave signals behave essentially like light since they are also electromagnetic radiation, but of a slightly longer wavelength. If the dish can "see" the satellite it can then receive the signal. The locus of the positions of azimuth and angle of the dish's orientation required to sweep the satellite arc (Clarke belt) is often referred to as the "window."<sup>43</sup>

Therefore land use planners must be aware that certain restrictions on size and placement of a satellite dish may render the dish entirely useless. The 1986 F.C.C. Regulation intended to preclude zoning that would cripple the use of satellite dish antennae. Where there is no cable and limited television reception or where the viewer desires virtually unlimited access to broadcast signals, there will usually be a strong market for satellite dishes.

#### ***DISCRIMINATION BETWEEN DIFFERENT FORMS OF ANTENNA FACILITIES***

The threshold F.C.C. preemption test in § 25.104 is whether the local ordinance differentiates between different forms of antenna facilities. Thus, if all outside antennae are unilaterally banned, for example in an historic district, then courts will typically uphold that ordinance. In *Breeling v. Churchill*,<sup>44</sup> all outside antennas were banned in a restrictive covenant.<sup>45</sup> The court held that even if the F.C.C. preemption were to apply (which it usually doesn't with regard to private

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<sup>42</sup> For a good discussion of the satellite arc and window, please refer to Henry B. Roth, *Regulating Satellite Dish Antennas*, APA Report No. 394 (1986).

<sup>43</sup> *Id.*

<sup>44</sup> 423 N.W.2d 469 (Neb. 1988).

<sup>45</sup> The covenant reads as follows:

Outside Antennas Prohibited. No outside radio, television, ham broadcasting, or other electronic antenna or aerial shall be erected or placed on any structure or on any lot. If used, any such antenna or aerial shall be placed in the attic of the house or in any other place in the house where it will be concealed from any side of the house.

*Id.* at 470.

contracts),<sup>46</sup> the rule would be upheld as non-discriminatory.<sup>47</sup> However, in *Minars v. Rose*<sup>48</sup> the zoning board "effectively banned" satellite dishes as "not 'customarily incidental' to a single family dwelling."<sup>49</sup> The court overturned this decision as preempted by § 25.104.<sup>50</sup> A Maine ordinance, reported in *Brophy v. Town of Castine*,<sup>51</sup> required that all structures in a community be 75 feet from the Bagaduce River. This ordinance was upheld, being even-handed on its face, even though the plaintiff's lot was too small to provide any place with an unobstructed view to the South (the approximate locus of the satellite arc for all of the continental U.S.) further than 37 feet from the river.<sup>52</sup>

### **REASONABLE AND CLEARLY DEFINED OBJECTIVES**

When a local ordinance distinguishes between satellite dish antennas and other forms of external television reception facilities, the ordinance must state clearly defined health, safety, or aesthetic objectives and must not impose unreasonable costs or limitations on satellite signal reception. In *Alsar Technology, Inc. v. Zoning Board of Adjustment of the Town of Nutley*,<sup>53</sup> the town promulgated regulations, including

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<sup>46</sup> This is not always true. See the section on Covenants, *infra*, and *Portola Hills Community Assn. v. James*, 4 Cal. App. 4th 289, 5 Cal. Rptr. 2d 580 (1992).

<sup>47</sup> *Breeling*, 423 N.W.2d at 471.

<sup>48</sup> *Minars v. Rose*, 123 A.D.2d 766, 507 N.Y.S.2d 241 (1986).

<sup>49</sup> 507 N.Y.S.2d at A.D.2d 242, 123 A.D.2d at 767.

<sup>50</sup> *Id.*

<sup>51</sup> 534 A.2d 663 (Me. 1987).

<sup>52</sup> *Id.* See also *Lyons v. City of Fort Lauderdale*, 1988 U.S. Dist. LEXIS 17646 (S.D. Fla. 1988).

<sup>53</sup> 235 N.J. Super. 471, 563 A.2d 83 (1989).

Code of Nutley, Chapter 240, Article VII, Section 240-31.1:

A. Satellite Dishes, as defined in § 240-3, are only permitted as a conditional use as an accessory structure to a principal use and only if all of the following are complied with:

- (1) There shall be one (1) per lot or one (1) per principal structure, whichever is less.
- (2) The use of the dish shall be solely for the use of such lot or such structure.
- (3) There shall be a maximum height of seven (7) feet, measured at the highest point of its outer circumference or any extension, including the supporting structure to the grade.
- (4) The location shall be:
  - (a) At least ten (10) feet away from the principal structure.
  - (b) In the rear yard only, at least eight (8) feet away from adjoining property lines and at least fifty (50) feet away from any front or side street line.
- (5) The dish shall be screened from view from adjoining properties and street which shall be at least seven (7) feet in height at the time of planting and which height shall be

height, yard and setback restrictions. The owner's backyard was only two feet deep, the sideyards were slightly greater than 10 feet wide, and the front yard setback from street to the front of the house was less than 25 feet.<sup>54</sup> At a town Board of Adjustment hearing the owner requested a roof-top satellite dish antenna installation. The owner provided expert testimony that the neighborhood aesthetics and property values would not be harmed. Neighbors testified against installation of the dish fearing that the dish would be "unsafe and unattractive."<sup>55</sup> The variance being denied, the owner challenged the decision as arbitrary and capricious, in light of both the F.C.C.'s preemption and the paucity of substantive testimony in opposition to granting the variance, and argued that the ordinance was unconstitutional, lacking "reasonable and clearly defined health, safety or aesthetic objective[s], [and] ... prevent[ing] the reception of satellite-delivered signals...."<sup>56</sup> The court held that since the ordinance dealt only with satellite dish antennas, it was discriminatory and further lacked "clearly defined objectives", and was therefore preempted.<sup>57</sup> The court further found that the ordinance prevented satellite reception,<sup>58</sup> and that the shielding requirement would impose prohibitive and unreasonable costs.<sup>59</sup>

Similarly, in *Village of Elm Grove v. Py*,<sup>60</sup> a local television executive installed

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maintained. Such evergreen planting shall be at least four (4) feet from the outer circumference of the dish, or as otherwise determined by the Planning Board.

(6) All wiring to or from the dish shall be placed underground.

(7) No dish shall be permitted to have any lettering thereon or to be used as an advertising or identification sign.

(8) The color of the dish shall blend with the surroundings and have an open mesh surface.

B. A transmitting dish is not a permitted use except for amateur radio operators licensed by the Federal Communications Commission at the licensee's authorized station location. The Planning Board is hereby authorized to grant a conditional use permit for such antennas subject to reasonable requirements, consistent with orders and opinions of the Federal Communications Commission concerning public safety, health and aesthetics.

*Id.*, 235 N.J. Super. at 475-476, 563 A.2d at 85.

<sup>54</sup> 235 N.J. Super. at 475, 563 A.2d at 85.

<sup>55</sup> 235 N.J. Super. at 476, 563 A.2d at 85-86.

<sup>56</sup> The owners also pleaded violation of the First Amendment and sought attorney's fees.

<sup>57</sup> 235 N.J. Super. at 480, 563 A.2d at 88.

<sup>58</sup> The height restriction precluded having a satellite antenna of adequate diameter to receive and distinguish signals, and the shielding, by vegetation, would effectively block the signals. *Id.*

<sup>59</sup> To shield the antenna from view a homeowner might have to plant 150 feet of trees. *Id.*

<sup>60</sup> 724 F. Supp. 612 (E.D. Wis. 1989).



a satellite dish receiving system at his home to monitor his station's broadcasts.<sup>61</sup> The town zoning code declared these objectives:

[T]o provide adequate light, pure air, and safety from fire and other dangers, to conserve the taxable value of land and buildings throughout the Village, to avoid congestion in the public streets and highways, and to promote the public health, safety, comfort, morals and welfare, all in accordance with a comprehensive zoning plan.<sup>62</sup>

In particular the ordinance required that a satellite dish "be colored so as to blend into their surroundings,"<sup>63</sup> screened, electrically grounded, wind-resistant, and installed with buried connecting wires.<sup>64</sup> Thus far, the ordinance clearly defines aesthetic and safety precautions. The ordinance required preferential treatment of placement of a satellite dish antenna: in the backyard if an adequate signal may be received there or, if not, in the side yard, and, only if neither the back nor side yards were feasible, then on the roof. Satellite dish antennas would never be permitted in either front or corner yards. The city reserved to itself the right to determine the adequacy of reception at any given placement.<sup>65</sup> The ordinance further regulated the size and number of dish antennas.<sup>66</sup> The village acknowledged that it would deny the owner a variance since the proposed plan would "cause a substantial depreciation in the property values of said neighborhood within said applicable

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<sup>61</sup> 724 F. Supp. at 613. One third of his viewing thus was non-consumer oriented. The village attempted to prevent the owner from invoking the 1986 FCC Regulation, due to his commercial activities. This was unsuccessful. *Id.* at 613-614.

<sup>62</sup> *Id.*, 724 F. Supp. at 614 (quoting Village of Elm Grove Code of Ordinances, Preamble to Chapter 6, the Zoning Ordinance [hereinafter "Elm Grove Ord."]).

<sup>63</sup> *Id.* (citing Elm Grove Ord. § 6.12B.06(a)).

<sup>64</sup> *Id.* (citing Elm Grove Ord. § 6.12B.06(a)-(e)).

<sup>65</sup> 724 F. Supp. at 615 (quoting Elm Grove Ord. § 6.12B.03).

<sup>66</sup> 724 F. Supp. at 615.

(a) No ground mounted antenna may exceed ten (10) feet in height, as measured from the ground to the highest point of the antenna.

(b) No roof mounted satellite television antenna may exceed two (2) feet in height, as measured when it is sitting on the ground.

(c) The diameter of the satellite antennas shall not exceed eight (8) feet for ground mounted antennas and (2) feet for roof mounted antennas.

(d) At any one time, no lot may, have existing or erected more than one large (i.e., in excess of four (4) feet in diameter) or three small (i.e., less than four feet in diameter) satellite television antennas.

*Id.* (quoting Elm Grove Ord. § 6.12B.04).

district."<sup>67</sup> The court held that the variance procedure, "based solely upon property value considerations and without regard for reasonable reception," was thus invalid under the F.C.C. Regulation.<sup>68</sup>

### **SCREENING AS AN UNREASONABLE LIMITATION**

Certain screening requirements, designed to diminish the aesthetic impact of the seven foot-plus parabolic structures, substantially interfere with satellite signal reception. This kind of legislation is clearly preempted by the 1986 F.C.C. Regulation. In *Olsen v. Baltimore*,<sup>69</sup> the city restricted satellite antenna dishes to those that were wire mesh and six feet in diameter or less in the General Residential district:

In the case of the placement or erection of microwave antennas (satellite dishes), the Board may consider the quality of signal reception but must find that the antenna will not interfere with the rights of the adjacent and neighboring properties to light, air and sun. In addition, the Board may specify the placement of the antenna and require screening.<sup>70</sup>

The owner installed a ten-foot diameter dish on the roof of his eleven-foot wide townhouse.<sup>71</sup> When told to remove the dish, the owner brought suit. He argued that the standards require a fair balance between the "strong federal interest in preserving the rights of individuals to construct and use antennas to receive satellite delivered signals and the legitimate interests of local governments in regulating land uses,"<sup>72</sup> but that the "general terms of health, safety, and general welfare, and morals ... do not approach the particularized and specifically tailored provisions that the F.C.C. regulation requires...."<sup>73</sup>

The appellate court, however, never decided the validity of the ordinance and instead relied upon the Montgomery Urban Renewal Plan which controlled. Under

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<sup>67</sup> 724 F. Supp. at 616 (quoting Elm Grove Ord. § 1.04(a)).

<sup>68</sup> *Id.*

<sup>69</sup> 582 A.2d 1225 (Md. 1990).

<sup>70</sup> 321 Md. at 330, 582 A.2d at 1228 (quoting Baltimore City Code, Article 30, § 11.0-5(a)14 (1976, 1983 Repl.Vol., 1989 Supp)).

<sup>71</sup> 321 Md. at 326, 582 A.2d at 1226.

<sup>72</sup> 321 Md. at 330, 582 A.2d at 1228.

<sup>73</sup> *Id.*

that plan, all external antennae were prohibited in an even-handed, non-discriminatory fashion and thus met F.C.C. requirements.<sup>74</sup>

However, in a similar case, *Van Meter v. Township of Maplewood*,<sup>75</sup> a town ordinance forbade "the use of a dish antenna greater than six feet in height" and required that the dish be placed in the rear yard, and screened from view by evergreen planting at least six feet in height.<sup>76</sup> After the owner erected the satellite dish antenna on the roof of his house, the town sought its removal. The owner challenged the ordinance in district court.

Although the district court found valid aesthetic and safety concerns supporting the ordinance, the ordinance was held preempted as an unreasonable restraint on satellite dish reception. First, the ordinance provision limiting the maximum height of any part of the antenna to six feet was deemed unreasonable since it made signal reception technically impossible. Second, the screening requirement was unreasonable because the evergreen planting could impair or limit reception by obstructing the antenna's line of sight. Third, the cost of planting shrubbery would easily exceed the price of the owner's initial investment in the equipment.<sup>77</sup>

### **PREEMPTION OF LOCAL ORDINANCES WITH NO CLEARLY DEFINED STANDARDS**

An ordinance may not delegate legislative rule-making authority to a board. In *Hunter v. City of Whittier*,<sup>78</sup> the city required a conditional use permit to install a satellite dish, and limited the height of the antenna to fifteen feet above grade, screened from view of the street and surrounding properties.<sup>79</sup> The court held that by delegating all authority to the board, the city had promulgated no "clearly defined health, safety or aesthetic standards."<sup>80</sup> Thus, the ordinance provided "for no meaningful legislative standard for the zoning administrator to determine placement and screening requirements and no recognition of the owner's right to receive signals

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<sup>74</sup> 321 Md. at 333-334, 582 A.2d at 1229-1230.

<sup>75</sup> 696 F. Supp. 1024 (D.N.J. 1988).

<sup>76</sup> 696 F. Supp at 1026.

<sup>77</sup> The federal district court held that "the ordinance functions as an unreasonable burden on reception because its provisions make reception technically impossible and it is generally insensitive to the unique conditions that govern signal reception at any given sight." *Id.* at 1030.

<sup>78</sup> 209 Cal. App. 3d 588, 257 Cal. Rptr. 559 (1989).

<sup>79</sup> 209 Cal. App. 3d at 590, 257 Cal. Rptr. at 560.

<sup>80</sup> 209 Cal. App. 3d at 590, 257 Cal. Rptr. at 561.

as a factor to be evaluated."<sup>81</sup>

If an ordinance is to distinguish between satellite dish and other forms of antennae, the ordinance promulgated must define clear standards. In *Kessler v. Town of Niskayuna*,<sup>82</sup> the town building code considered satellite dishes as accessory structures, limited to fifteen feet in height and not permitted in a front yard.<sup>83</sup> The code made no mention of any other type of antenna facility.<sup>84</sup> Thus the ordinance met the threshold requirement of discrimination, subjecting it to F.C.C. preemption analysis.<sup>85</sup> The court then found that the objectives and purpose stated within the town building code<sup>86</sup> to be general and to not provide a reasonable and clearly defined health, safety or aesthetic objective in placing unreasonable limitations against the users of satellite dishes. The ordinance was preempted.<sup>87</sup> "To avoid preemption by the F.C.C. Order, an ordinance must clearly state a permissible objective behind drawing a distinction between TVROs and other types of antennas ... [A] local ordinance will not avoid preemption if it is supported only by a general

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<sup>81</sup> *Id.*, 209 Cal. App. 3d at 599, 257 Cal. Rptr. at 566.

<sup>82</sup> 774 F. Supp. 711 (N.D. N.Y. 1991).

<sup>83</sup> 774 F. Supp. at 713. The Niskayuna Building Code provides:  
SATELLITE RECEIVING DISH – A device commonly parabolic in shape, mounted at a fixed point on the ground for the purpose of capturing television signals, transmitted via satellite communications facilities and serving the same or similar function as the common television antenna. For purposes of this ordinance, a satellite receiving dish shall be classified as a major accessory structure.  
\* \* \* \*

5.7.1.2. Accessory structures are not permitted in the front yard of any lot.

5.7.1.3. Unless otherwise specified, accessory structures shall not exceed fifteen (15) feet in height.  
*Id.*, at n.2 (quoting Niskayuna Building Code, art. II).

<sup>84</sup> The court noted that it had twice suggested to the town attorney that the building code made no mention of other kinds of television receiving devices. "Twice the Town's attorney affirmatively pronounced that the ordinance does so discriminate." 774 F. Supp at 713.

<sup>85</sup> 774 F. Supp. at 714-715.

<sup>86</sup> Section 1.2 Purposes

It is the purpose of this ordinance to preserve the land, to promote the health, safety, morals, and general welfare of the community, and to lessen congestion in the streets, to secure safety from fire, flood, panic, and other dangers, to provide adequate light and air, to prevent the overcrowding of land, to promote land conservation, to avoid undue concentration of population, to facilitate the adequate provision for transportation, water, sewerage, schools, parks, and other public requirements.  
774 F. Supp. at 714 (quoting Niskayuna Building Code § 1.2).

<sup>87</sup> 774 F. Supp. at 715.

statement of aesthetic purpose that does not justify its disparate treatment of TVROs from other antenna facilities."<sup>88</sup>

### **REGULATION MAKING RECEPTION NOT ECONOMICALLY FEASIBLE**

Regulation limiting satellite dish antenna installation, under the 1986 F.C.C. Regulation, must not impose unreasonable costs on the user, in light of the cost of the antenna system itself. In *Cawley v. City of Port Jervis*,<sup>89</sup> the city provided for an elaborate, costly, and nearly impossible variance procedure, involving the requirement of screening foliage.<sup>90</sup> The owner, not availing himself of the procedure, challenged the ordinance. The federal district court found that the variance procedure would easily exceed the cost of the antenna,<sup>91</sup> as would the cost

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<sup>88</sup> 774 F. Supp. at 716. The court held that in contrast with the "more enlightened" ordinances cited in *Cawley* and *Elm Grove*. (citing *Cawley v. City of Port Jervis*, 753 F. Supp. 128, 132 (S.D.N.Y. 1990) and *Village of Elm Grove v. Py*, 724 F. Supp. 612, 612 (E.D.Wis. 1989)).

<sup>89</sup> 753 F. Supp. 128 (S.D. N.Y. 1990).

<sup>90</sup> The variance procedure required that each applicant must pay a \$100 application fee, submit two copies of an application form, twelve copies of survey maps or site plans, provide a letter explaining the project, a short-form environmental assessment form, and proof of ownership of the property or written permission from the owner. The procedure took a minimum of two months and required three meetings of the Zoning Board of Administrators. 753 F. Supp. at 129.

The Port Jervis City Zoning Ordinance § 158-169 quoted in *Cawley*, 753 F. Supp at 129, reads, in its entirety, as follows:

Satellite dish antennas (earth receiving stations) are subject to the following supplementary requirements:

A. Size Limitation. Satellite dish antennas may be permitted accessory to residential or non-residential use as noted in the Use Table, provided that they have a maximum radius of four (4) feet.

B. Building Permit. The installation of a satellite dish antenna shall require the issuance of a building permit.

C. Screening. The satellite dish antenna must be screened from the street and adjoining property owners with foliage of such height and density so as to screen said antenna during the entire year.

D. Location. The satellite dish antenna shall be located on the ground and shall not be located on any trailer or portable device.

E. Setback. The satellite dish antenna shall be located in the side or rear yards of a lot only, and shall be an accessory structure requiring compliance with all minimum setback dimensions stated in the Bulk Table.

F. Elevation. The satellite dish antenna shall not be connected to or placed upon any roof and shall not at any point be elevated to reach a height of more than fifteen (15) feet above the natural grade of the subject lot. In no event shall the natural grade be changed by any means in order to increase the elevation of the antenna.

<sup>91</sup> 753 F. Supp. at 130.

of the required foliage.<sup>92</sup> The ordinance was held invalid, for failing to meet "clearly defined health, safety or aesthetic objective[s]."<sup>93</sup> The foliage requirement, alone, invalidated the ordinance, by blocking signal reception.<sup>94</sup> The ordinance, the court noted, "could conceivably have been intended to protect a local cable-television franchise holder from competition."<sup>95</sup>

### **AESTHETIC OBJECTIVES AND HISTORIC CHARACTER**

Ordinances which have successfully preserved neighborhood aesthetics and community character have done so without specifically singling out satellite dish antennae. The local regulation must rule out all external antennas. In Haddon Heights, New Jersey, *Nationwide Satellite Company v. Zoning Board of Adjustment*,<sup>96</sup> a property owner and a satellite dish antenna distributor installed a \$5000 satellite system on the roof of the owner's home and then applied for a bulk variance. When denied, the owner challenged the section of the zoning ordinance limiting dishes to seven feet in diameter.<sup>97</sup> The court overturned the ordinance: "[L]ocal aesthetic considerations, no matter how legitimate, must yield in this case to federal regulatory power."<sup>98</sup>

The ordinance was then amended to permit dishes to ten feet in diameter; however, dishes are not permitted in the front of any structure, are not to exceed twelve feet in height, and the antenna must be "screened, buffered, or situated in such a manner that it cannot be visually seen from the public right of way ... or visually seen from the ground level of any adjacent property."<sup>99</sup> The owner once

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<sup>92</sup> *Id.*

<sup>93</sup> 753 F. Supp. at 131.

<sup>94</sup> *Id.*

<sup>95</sup> 753 F. Supp. at 131-132. The court found particularly objectionable the "virtually unfettered discretion [by the Zoning Board of Appeal] to grant or deny a variance," which not only "did not save the ordinance from preemption," but which the FCC requirement of a clearly designed objective was "designed to forbid...." *Id.* at 132.

<sup>96</sup> 243 N.J. Super. 18, 578 A.2d 389 (1990).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*, 243 N.J. Super at 20, 578 A.2d at 390.

<sup>99</sup> *Id.*, 243 N.J. Super at 22, 578 A.2d at 391.

again sought a variance.<sup>100</sup> The board denied the permit. The ruling was appealed. The trial court judge again found the height and screening requirements too restrictive, stating that the F.C.C. regulations place a "heavy burden" on the municipality to show that its ordinance is not unreasonable.<sup>101</sup> The New Jersey Superior Court affirmed, quoting the F.C.C.: "Communities which are truly concerned with preserving their unique historic character may do so if they do not discriminate against satellite receive-only antennas."<sup>102</sup>

## **MISCELLANEOUS CONSTITUTIONAL CLAIMS**

### **FIRST AMENDMENT CLAIMS**

First Amendment considerations seldom amount to a compelling argument in satellite dish zoning cases. In *Alsar Technology, Inc. v. Zoning Board of Adjustment*,<sup>103</sup> the court quoted Justice Blackmun in *Schad v. Mt. Ephraim*,<sup>104</sup> with respect to First Amendment claims, "the power of local governments to zone and control land use ... is broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life."<sup>105</sup> However, in *Johnson v. City of Pleasanton*,<sup>106</sup> the owner appealed a summary injunction partially in favor of the city requiring the owner to move his satellite dish antenna. The city testified that if the dish were lowered to the required ten foot height restriction, it would meet with no undue interference, although its angle would have to be changed.<sup>107</sup> The owner claimed that his First Amendment rights to receive telecasts had been abridged. Citing *Red*

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<sup>100</sup> In testimony before the board, an engineer testified that no location on the ground would permit reasonable reception without installation of a thirty-five foot, \$3500-\$4000 tower, which, of course would be visible. Otherwise, without a roof mounting, due to trees and other obstructions, only 7 of 200 satellite broadcast stations would be available. A real estate broker testified that the roof mounted antenna would detract from property values, although he had seen no others nor was aware of any that were so affected. Three neighbors expressed concerns about the aesthetic impact on the neighborhood. *Id.*

<sup>101</sup> *Id.*, 243 N.J. Super at 27, 578 A.2d at 394.

<sup>102</sup> *Id.*, 243 N.J. Super at 37-38, 578 A.2d at 399 (quoting 51 Fed. Reg. 5523 (1986)).

<sup>103</sup> 235 N.J. Super 471, 563 A.2d 83 (1989).

<sup>104</sup> 452 U.S. 61 (1981).

<sup>105</sup> *Alsar Technology*, 235 N.J. Super at 484, 563 A.2d at 90 (quoting *Schad v. Mt. Ephraim*, 452 U.S. 61, 68 (1981)).

<sup>106</sup> 982 F.2d 350 (9th Cir. 1992).

<sup>107</sup> 982 F.2d at 352. (This statement is physically incorrect; the change in angle to an object over 22,000 miles away is virtually unmeasurable.)

*Lion Broadcasting Co. v. F.C.C.*,<sup>108</sup> the court, while affirming the public's First Amendment rights to receive meaningful television broadcasts, explained that:

*Red Lion* does not stand for the absolute right to receive the maximum amount of programming feasibly accessible via satellite. The Ordinance is a content-neutral ordinance regulating time, place and manner of expression. A content-neutral ordinance will be upheld against a First Amendment challenge as long as it furthers a substantial governmental interest and does not unreasonably limit alternative avenues of communication.<sup>109</sup>

The court noted that the conflict had become acute since the owners had utilized "a good part of their lot" in installing a swimming pool. Thus, the optimum placement of the dish which would be in compliance with the local ordinance would be on a deck over their swimming pool. The court noted "[t]he case becomes as much a freedom to swim case as a freedom of speech case."<sup>110</sup>

### **OVERBREADTH**

Overbroad definitions can cause problems for a city. Aiken, South Carolina required a building permit for any structure, defined as "that which is built or constructed."<sup>111</sup> Thus, the court, finding that a building permit would "technically [be] required for ... say, a basketball goal, a swing set or a birdbath or perhaps ... artificial pink flamingos",<sup>112</sup> refused to issue an injunction for removal of a satellite dish, and in the name of judicial economy, refused to remand the case for further consideration.<sup>113</sup>

### **EQUAL PROTECTION**

A ordinance providing a moratorium on satellite dish installation was overturned in Ohio on Equal Protection, where two members of the community were

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<sup>108</sup> 982 F.2d at 353 (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1967)).

<sup>109</sup> 982 F.2d at 353 (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)). The court also cited *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (where by analogy the ordinance served a "substantial government interest in safety and aesthetic values," *id.*, 982 F.2d at 353) and *Howard v. City of Burlingame*, 937 F.2d 1376, 1381 (9th Cir. 1991) (a zoning ordinance limiting the height of radio antennas was a legitimate time, place and manner restriction). 982 F.2d at 353.

<sup>110</sup> In *Lyons v. City of Fort Lauderdale*, 1988 U.S. Dist. LEXIS 17646 (S.D. Fla. 1988), the court found that the "right to receive speech freely . . . though cherished . . . is [not] an absolute right." *Id.* at 17650 (following *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1967)).

<sup>111</sup> 289 S.C. 239, 345 S.E.2d 760 (S.C. App. 1986).

<sup>112</sup> 289 S.C. at 239, 345 S.E.2d at 762.

<sup>113</sup> *Id.*



granted a permit and a third was not.<sup>114</sup>

### **EXHAUSTION OF REMEDIES**

A satellite dish user need not exhaust all administrative remedies prior to seeking judicial remedies, since the adjudication may test the validity of the ordinance in light of federal preemption. In March of 1984, as reported in *Neufeld v. The City of Baltimore*,<sup>115</sup> an owner installed a ten-foot, solid satellite dish on a pole in his front yard, violating a thirty-foot setback ordinance and failing to get a building permit. "On January 23, 1985, apparently in connection with the sale of a cable television franchise to United Cable of Baltimore,"<sup>116</sup> the city enacted more stringent satellite dish zoning ordinances restricting dishes to under six feet in diameter except that "some entities, including schools, museums, churches, hotels and taverns [could] erect free standing satellite dishes up to twelve feet wide."<sup>117</sup> Radio and television antennae, notwithstanding, could rise twelve feet above buildings.<sup>118</sup> After eleven criminal convictions the owner dismantled his dish and initiated a lawsuit.<sup>119</sup> The city argued that the owner must first seek a variance, exhausting all remedies before bringing suit.<sup>120</sup> The court held that the owner need not exhaust all administrative remedies,<sup>121</sup> since the owner's contention was that the F.C.C. regulations preempted the zoning ordinance.<sup>122</sup> The court upheld the convictions of the owner's violation of the facially neutral setback ordinance, but

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<sup>114</sup> *Stella Satellite Systems, Inc. v. Warrensville Heights*, 602 N.E.2d 1268 (Ohio ct. App. 1991).

<sup>115</sup> 820 F. Supp. 963 (D. Md. 1993).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> The city also objected, using what the court characterized as a "hypertechnical pleading." The city argued that Neufeld had named the wrong party, the correct one being "The Mayor and City Council of Baltimore City." The city also argued *res judicata* and *collateral estoppel*, which in turn was denied since the city had not met the burden of proof showing that civil issues had adequately been adjudicated in the earlier criminal proceedings. *Id.*

<sup>121</sup> *Id.* "Maryland law does not require exhaustion [of remedies] when a plaintiff 'brings a direct attack on the power or authority (including whether it was validly enacted) of the legislative body to adopt the legislation from which relief is sought.'" *Id.* (quoting *Harbor Island Marina, Inc. v. Board of County Comrs.*, 407 A.2d 738 (1979)).

<sup>122</sup> 820 F. Supp at 963.

barred claims on all other counts, since the satellite dish zoning ordinance was preempted and the city enjoined from future enforcement.<sup>123</sup>

### **ATTORNEY'S FEES**

Reasonable attorney's fees may be awarded when a town attempts to enforce an invalid ordinance. For example in *Ermler v. Town of Brookhaven*,<sup>124</sup> the town, having lost a battle with a homeowner over the constitutionality of its satellite dish zoning ordinance refused to sign a final consent judgment, granting the homeowner the right to maintain his antenna in perpetuity.<sup>125</sup> The signing would have settled the case without the adjudication of attorney's fees. The court held that although there was no legal basis to maintain the antenna in perpetuity, the city, having issued a Final Notice of Violation, had reversed its position only due to the lawsuit, and that the homeowner, having thus succeeded, was entitled to reasonable attorney's fees.<sup>126</sup>

### **COVENANTS AGAINST SATELLITE DISHES**

Federal preemption typically only affects state, not private action.<sup>127</sup> However, in *Portola Hills Community v. James*,<sup>128</sup> a California appellate court assessed sanctions against a community association. The association enforced a set of conditions that read in part: "Satellite Dish: Absolutely no satellite dish of any nature will be acceptable on the exterior of the units or lots anywhere within the

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<sup>123</sup> 820 F. Supp. at 969.

<sup>124</sup> 780 F. Supp. 120 (E.D.N.Y. 1992).

<sup>125</sup> 780 F.Supp. at 122.

The homeowner had been advised in July, 1990, by the Chief Building Inspector that he should apply for a permit to build an accessory structure to install their satellite dish. He was told that the permit would "inevitably" be denied, and that he then should apply for a variance.

The homeowner simply installed the dish. He was issued a Notice of Violation, and given fifteen days to remove the dish. He commenced the suit seeking an injunction, declaratory relief, and attorney's fees. When the homeowner's attorney confronted the town with *Van Meter v. Township of Maplewood*, 696 F. Supp. 1024 (D.N.J. 1988), the town reversed itself, stating that a building permit was not required, that setback limitations were no longer in force and that the homeowner could keep his dish. *Ermler*, 780 F. Supp at 121.

<sup>126</sup> 780 F. Supp. at 123.

<sup>127</sup> For example, in *Ross v. Hatfield*, 640 F. Supp. 708 (D. Kan. 1986), the court dismissed for lack of subject matter jurisdiction a complaint against an Overland Park, Kansas, subdivision named 'Summercrest' which banned all external television receiving antennae or devices. In *Breeling v. Churchill*, 423 N.W.2d 469 (Neb. 1988), the court noted it would not rule on a private covenant eventhough it would have survived preemption in that it treated all antenna evenhandedly.

<sup>128</sup> 4 Cal. App. 4th 289, 5 Cal. Rptr. 2d 580 (1992).

Association. Cable television has been provided for this purpose."<sup>129</sup> The California Civil Code provided that: "The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development."<sup>130</sup> The court held that "the homeowner is allowed to prove that a particular restriction is unreasonable,"<sup>131</sup> and that it was patently unreasonable that an invisible satellite dish could be offensive.<sup>132</sup>

### **THE ORDINANCE MUST BEAR A RATIONAL RELATION TO THE NEEDS OF THE COMMUNITY**

When an ordinance addresses the needs of the community in a fashion that does not discriminate between satellite dishes and other antennas or other external facilities, the ordinance will be upheld. In *Lyons v. City of Fort Lauderdale*,<sup>133</sup> a zoning ordinance provided: "There shall be a rear yard which shall not be less than fifteen (15) feet and where the lot abuts on a waterway the rear yard shall not be less than twenty-five (25) feet measured from the edge of the waterway."<sup>134</sup> The owner's house was situated on the twenty-five foot line from the waterway, precluding any legal location for a satellite dish. The satellite dish was placed fourteen feet from the rear lot boundary. The city ordered removal of the dish and

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<sup>129</sup> 4 Cal. App. 4th at 291, 5 Cal. Rptr. 2d at 580.

The owner was sued by the association for installing a satellite dish, even though the dish was not visible from the street, nor from his neighbors' property, and had been camouflaged to some degree with a fence and foliage. The owner offered to plant more trees. The trial court, while acknowledging a presumption that the by-laws were valid, held the ban against satellite dishes to be unreasonable. The owner was awarded costs in excess of \$14,000 including attorney fees. *Id.*, 4 Cal. App. 4th at 292, 5 Cal. Rptr. 2d at 580.

<sup>130</sup> 4 Cal. App. 4th at 292-293, 5 Cal. Rptr. 2d at 580 (*quoting* Civil Code § 1354).

<sup>131</sup> 4 Cal. App. 4th at 293, 5 Cal. Rptr. 2d at 580.

<sup>132</sup> "[N]o reasonable attorney could believe that this appeal had any merit." *Id.*, 4 Cal. App. 4th at 294, 5 Cal. Rptr. 2d at 580.

The court awarded costs and a sanction of \$3000 to the defendant, the plaintiff and its appellate counsel jointly and severally liable. *Id.*, 4 Cal. App. 4th at 294-295, 5 Cal. Rptr. 2d at 580. The court was also piqued that the plaintiff had stated that the trial court judge based his ruling "on the mistaken belief that this section provides for a total ban on satellite dishes." The court responded, "Mistaken belief? . . . The mistake here was solely plaintiff's. And it will prove costly." *Id.*

<sup>133</sup> 1988 U.S. Dist. LEXIS 17646 (S.D. Fla. 1988).

<sup>134</sup> *Id.* (*quoting* City of Fort Lauderdale Code of Ordinances, Section 47-7.7). The "rear yard" is "defined as an 'unoccupied area extending across the full width of the lot ... measured at its least dimension'" and a "setback" as "the minimum horizontal distance between a principal structure and the boundary lines...." *Id.*

a fine of \$20 per day.<sup>135</sup> The owner then argued that the dish was an accessory structure, that his First and Fifth Amendment rights had been violated, and that the ordinance was preempted.<sup>136</sup> The court found, following *Red Lion*,<sup>137</sup> that the "right to receive speech freely . . . though cherished . . . is [not] an absolute right."<sup>138</sup> The court admitted that for the City's zoning laws to stand, they "must bear a substantial relation to the general welfare, be drawn in the least restrictive means and be necessary to promote a compelling government interest."<sup>139</sup>

Since the purpose of the Fort Lauderdale zoning ordinance was "to provide for open rear yards in residential districts, maintain property values, provide access for safety vehicles, and to preserve the character and quality of life in the city's neighborhoods,"<sup>140</sup> the court held that the ordinance substantially related to the general welfare of the city. The court further upheld the twenty-five foot setback finding that it was narrowly drawn. The court decided that the ordinance served a compelling state interest in regulating "the private use of land."<sup>141</sup> The court also rejected the owner's takings claim.<sup>142</sup> Finally, the court ruled that since the ordinance did not discriminate between satellite dishes and other antennas, but rather applied to all accessory uses, it was not preempted by F.C.C. regulation § 25.104.<sup>143</sup>

### **IMPORTANCE OF NEW TECHNOLOGY**

New satellite technology is currently being developed. Hughes aircraft, a subsidiary of General Motors, is engaged in a one billion dollar project to place two new satellites in orbit.<sup>144</sup> Each satellite will have internal rotation to stabilize it, thus allowing its solar panels to always remain optimally turned to the sun. It will

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<sup>135</sup> *Id.* at \*1-2.

<sup>136</sup> *Id.* at \*2-9.

<sup>137</sup> *Id.* at \*3 (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)).

<sup>138</sup> *Id.* at \*4.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at \*5.

<sup>141</sup> *Id.* at \*5-6.

<sup>142</sup> *Id.* at \*7-8.

<sup>143</sup> *Id.* at \*8-9.

<sup>144</sup> Andrew Kupfer with Ani Hadjian, *Hughes Gambles on High-Tech TV*, *Fortune*, Aug. 23, 1993.

broadcast approximately 100 watts of energy, approximately six times more than previous television broadcast satellites. It will utilize precisely-sculpted transmitting antennae such that it may compensate for areas of the continent that are either more distant from the satellite or are accustomed to heavier rainfall interfering with the signal. Thus, Hughes predicts that the subscribers will utilize an 18-22 inch dish uniformly throughout the country. Each subscriber will calibrate their dish to point at only one satellite. There will be no need for concrete platforms, moving actuator arms, and large structures. These dishes are envisioned to be placed on decks or roofs, and to provide essentially an enhanced cable service. Direct Broadcast Satellites ("DBS") as they are called, will eventually provide up to 50 stations on a fee basis, and another 100 stations on a pay-per-view basis.<sup>145</sup> Thus, these satellites will not provide the same range of services as the large dishes operating on the C-Band. An ARIAN launch of two satellites (with a third held as a spare) is scheduled for late winter, 1993. DBS installations and broadcasts are scheduled to begin in the summer of 1994. Therefore, it appears that current satellite technology requiring dishes 8 to 12 feet in diameter, will be extant for perhaps only a few more decades. DBS and cable will provide, however, fewer stations and less flexibility. The cost of DBS and cable to the user is generally acknowledged to be initially lower, but greater over the course of time. It is projected that the over four million larger dish satellite antenna users will continue to be supported by networks and satellites well into the first decades of the next millennia.<sup>146</sup>

### **TOWARDS A CONCLUSION**

For a satellite dish restrictive ordinance to stand, it must foremost deal with all antenna facilities equally. If, for example, all external antennae are banned in an historic district or if no type of antenna facility is permitted within a certain specified distance from a waterway, then the 1986 F.C.C. preemptive regulation will not be called into play. If, however, an ordinance specifically discriminates against satellite dish antenna systems, then the ordinance must clearly state what health, safety and general welfare standards this discrimination directly promotes. This has turned out to be difficult to do. The courts will typically not accept generalized purposes; a specific harm must be addressed. Neither statements of diminishing property values, nor general aesthetics are sufficient.

Courts, on the other hand will not strike down a satellite dish ordinance if the restriction impinges on dissemination of information as provided for by the First Amendment. The courts recognize the legitimacy of land use planning and the opportunity for ideas and speech to be broadcast through other channels and media.

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<sup>145</sup> Telephone Interview with Tom Hunt, former cable executive, DBS entrepreneur (Oct. 24, 1993).

<sup>146</sup> Interview with Jan Strobel, Vice President, Satellite Showcase, Inc., of Colorado (October 23, 1993).

Courts have been particularly reactive to ordinances that appear to allow restrictions on placement and size of satellite dishes or that require special screening to protect the dish from view. These ordinances often either make reception of the satellite signals impossible by blocking reception from at least some of the satellites or make the costs of installation unreasonable in light of the costs of the components of the system. The F.C.C. Regulation clearly preempts this type of ordinance. Perhaps, in the future, means will be developed to incorporate satellite dishes in the architecture of one's home to preclude the need for this type of ordinance.<sup>147</sup>

Some municipalities have attempted to avoid review by delegating the authority to permit satellite dish installation to zoning boards or through the mechanism of variances. The courts will typically overturn ordinances that do not provide clear objective standards for review.

Thus, the ordinance that withstands judicial scrutiny must be narrowly tailored to express "reasonable and clearly defined health, safety or aesthetic objectives," to not impose unreasonable limitations or costs upon the earth station owner, and ultimately to not discriminate between different forms of television antenna facilities. There remains a threat to municipalities endeavoring to restrict the proliferation of satellite dish antennae that the F.C.C. will intervene, taking a more active role in litigations of this kind in the future.

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<sup>147</sup> Recently satellite dish antennas disguised to look like rocks and umbrellas over patio tables have been announced. These are still considered expensive.