Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Philip Wojcikiewicz	)	
	)	CSR-6030-0
	)	
Application for Review	)	
	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: May 22, 2007 **Released: May 25, 2007**

By the Commission:

I. INTRODUCTION

1. The Woodmere Townhome Association of Darien, Illinois ("Association") and the Community Associations Institute ("CAI") each filed an Application for Review of a Memorandum Opinion and Order ("Order") issued by the Media Bureau ("Bureau"). The Order granted a Petition for Declaratory Ruling filed by Petitioner Philip Wojcikiewicz[1] ("Petitioner") pursuant to the Commission's Over-the-Air Reception Devices ("OTARD") Rule.[2] Petitioner replied to the Applications for Review and filed a Motion to Dismiss both Applications for Review. For the reasons discussed below, we deny the Applications for Review.

II. BACKGROUND

2. The Over-the-Air Reception Devices rule prohibits governmental and private restrictions that impair the ability of antenna users to install, maintain, or use Over-the-Air Reception Devices[3] and was adopted by the Commission to implement Section 207 of the Telecommunications Act of 1996.[4] The

[1] In the caption and text of this Memorandum Opinion and Order we correct a previous misspelling of the Petitioner's name. *See In the Matter of Philip Wojcikewicz[sic],* 18 FCC Rcd 19523 (2003).

[2] 47 C.F.R. § 1.4000.

[3] *See Preemption of Local Zoning Regulation of Satellite Earth Stations and Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service,* 11 FCC Rcd 19276 (1996) ("*Report and Order*"), *recon. granted in part and denied in part*, 13 FCC Rcd 18962 (1998) ("*Order on Reconsideration*"), Second Report and Order, 13 FCC Rcd 23874 (1998) ("*Second Report and Order*"). The Rule took effect on October 14, 1996. Public Notice DA 96-1755 (Oct. 23, 1996).

[4] Section 207 requires the Commission to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of certain enumerated services." Telecommunications Act of 1996, Pub. L. No. 104-104 § 207, 110 Stat. 56, 114 (1996).

rule applies to antennas that receive television broadcast signals.[5] For the Rule to apply, the antenna must be installed "on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property" upon which the antenna is located.[6] The Rule preempts restrictions that impair installation, maintenance, or use of a protected antenna by: (1) unreasonably delaying or preventing installation, maintenance, or use; (2) unreasonably increasing the cost of installation, maintenance, or use; or (3) precluding reception of an acceptable quality signal.[7] There are exceptions in the Rule for restrictions necessary to address valid and clearly articulated safety or historic preservation issues, provided such restrictions are as narrowly tailored as possible, impose as little burden as possible, and apply in a nondiscriminatory manner throughout the regulated area.[8] The Rule provides that parties who are affected by antenna restrictions may petition the Commission to determine if the restrictions are permissible or prohibited by the Rule.[9]

3. Prior to bringing this matter to the Commission, Petitioner filed a written request pursuant to the Association's rules requesting permission to install on his roof a television antenna for use in conjunction with his High Definition digital television set. Petitioner also presented his case to the Board of Directors of the Association. After receiving no response from the Association or the Board, he filed a Petition for Declaratory Ruling with the Bureau seeking a determination that the antenna restrictions in the Declaration for Woodmere Townhomes ("Declaration") are prohibited by the Commission's rules.[10] In response to this petition, the Association and CAI argued that the OTARD rule does not apply to the Association's rules because the property in question is not under the exclusive use or control of Petitioner and because Petitioner does not have an ownership interest in the property in question.[11] The Bureau found that Petitioner had exclusive use of and a property interest in the roof of his townhome.[12] Therefore, the Bureau concluded that the OTARD rule applied to the Association's restrictions on Petitioner's antenna use.[13] Having found that the OTARD rule applied to the property in question, the Bureau concluded that the Association's restrictions did not comply with the rule.[14] Specifically, the Bureau found that the Association imposed an impermissible prior approval requirement for antennas covered by the Rule; an impermissible size limitation on Petitioner's television broadcast

[5] 47 C.F.R. § 1.4000(a). The rule also applies to antennas that are one meter or less in diameter and are designed to receive or transmit direct broadcast satellite ("DBS") services; antennas that are one meter or less in diagonal measurement and are designed to receive or transmit programming services through multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services. There is no size limitation for DBS antennas in Alaska. *See also, Promotion of Competitive Networks in Local Telecommunications Markets, Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services*, 15 FCC Rcd 22983 (2000).

[6] 47 C.F.R. § 1.4000(a).

[7] *Id*.

[8] 47 C.F.R. § 1.4000(b).

[9] 47 C.F.R. § 1.4000(d).

[10] Declaration refers to the Declaration for Woodmere Townhomes; *See* Application for Review by Woodmere Townhome Association ("Association") Appendix B, CSR Docket No. 6030-0 (filed Oct. 29, 2003). The restrictions in question required prior approval for installation of a satellite dish antenna and flatly prohibited exterior installation of a television broadcast antenna. *See* Response of Petitioner, Appendix A, Declaration for Woodmere Townhomes.

[11] *See, e.g.,* Response of Association at 6-7.

[12] *In re Wojcikiewicz*, *Memorandum Opinion and Order*, CSR-6030-0, 18 FCC Rcd 19523, 19525-26 ¶¶ 5-8 (2003).

[13] *Id*.

[14] *Id*.

antenna; and an impermissible placement restriction, which would prevent installation where the antenna can receive an acceptable quality signal, to wit, on the roof of Petitioner's townhome.[15] The Bureau concluded that each of these non-complying restrictions were and are preempted by our Rule.[16]

4. The Association and CAI each filed an Application for Review challenging the Bureau's decision that Petitioner had exclusive use of the roof and also challenging the Bureau's finding that Petitioner has the requisite property interest in the roof.[17] We deny the Applications and affirm the preemption of the Association's restrictions, as ordered by the Bureau.

III. DISCUSSION

5. The Commission will grant an Application for Review of an action taken on delegated authority when such action, *inter alia*, conflicts with statute, regulation, precedent or established Commission policy; involves application of a precedent or policy that should be overturned; or makes an erroneous finding as to an important or material factual question.[18] The Association and CAI assert that the Bureau's Order misapplied the Rule, relied on an erroneous finding of fact, and creates a precedent that should be vacated.[19] The Association and CAI do not appear to dispute the Bureau's analysis that the Commission's Rule preempts antenna restrictions of the type imposed by the Association. Rather, they argue that the Rule is inapplicable to Petitioner's antenna installation and that, therefore, the Association's antenna restrictions should not be preempted. For the reasons discussed below, we find the Bureau's decision in this case is consistent with Commission precedent and regulation and therefore we affirm the Bureau's order.

A. Ownership of the Property

6. The Order found that Petitioner resides in the Woodmere Townhomes community in a townhome that he owns.[20] His home is an interior unit in a group of four adjoining townhomes.[21] Petitioner contended that he owned his lot and townhome, including the roof,[22] and the Bureau agreed.[23] The Association and CAI disagree with the Bureau's finding. They claim the townhome roof connects with each unit and is one solid structure. They also point out that "the Commission and courts" have previously referred to roofs as examples of common or restricted access areas to which the Rule would not apply.[24]

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[15] *Id.* at ¶¶ 12-17 (also finding that other restrictions imposed by the Association but not specifically challenged by Petitioner did not comply with the Commission's rule).

[16] *Id.* at ¶ 18.

[17] *See* Application for Review by Community Associations Institute ("CAI"), CSR- 6030-0 (filed Oct. 30, 2003); Association Application for Review (filed on October 29, 2003) at 11.

[18] *See* 47 C.F.R. § 1.115. *See also, In Re Lubliner*, 13 FCC Rcd 16107, 16110 (1998).

[19] CAI Application for Review at 5; Association's Application for Review at 11-17.

[20] *In Re Philip Wojcikiewicz*, 18 FCC Rcd 19523, 19525 (MB 2003).

[21] Association's Breach Agreement (form on which Petitioner submitted diagram and written request to install antenna on back side of his roof.) attached to original Petition for Declaratory Ruling. Each unit shares a party wall with at least one other unit.

[22] Reply of Petitioner at 3; Response of NAB at 2-3, 5.

[23] *In Re Philip Wojcikiewicz*, 18 FCC Rcd 19523, 19525 (MB 2003).

[24] Association's Supplementary Response to Application for Review at 2-4; Response of CAI at 3-5.

7. For the Rule to apply, the antenna must be installed "on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property" upon which the antenna is located.[25] The Commission has previously found that, as a general matter, roofs or exterior walls may, in some circumstances, be restricted access areas where tenants are not granted exclusive or permanent possession.[26] However, the lease, condominium declaration, deed or other controlling document is dispositive in individual situations.[27] The Bureau decision found that Petitioner had the requisite property interest based upon the Petitioner's warranty deed[28] and the Declaration for Woodmere Townhomes,[29] which indicate that Petitioner owns the lot and home in fee simple ownership. Moreover, the Declaration defines the home exterior as the "roof, foundation, steps, footings, decks, outer surface of exterior walls and garage doors of a Home."[30] In its Application for Review, the Association claims the Media Bureau did not look at the Declaration as a whole in deciding whether Petitioner has an ownership interest.[31] The Association argues that because it has responsibility for repairs, replacement and maintenance, it has an ownership interest in the roof.[32] We conclude it is explicit in the warranty deed (the controlling document) that Petitioner owns his townhome and there is no dispute to his ownership.[33] Moreover, we have found previously that "the fact that the Association has responsibility for the repairs, replacements and maintenance . . . where the antenna would be mounted is not controlling."[34]

8. CAI argues that the Bureau erred by not discussing Illinois case law and statutes because property law is dominated by state law.[35] Neither CAI nor the Association made this argument to the Bureau in response to the Petitioner's Petition for a Declaratory Ruling.[36] Furthermore, CAI offers no support for its argument, and if there are relevant state statutes or decisions that support CAI's position, CAI has failed to cite them.[37] The express language in the Woodmere Townhome Declaration gives Petitioner an ownership interest in his townhome, including the roof, and nothing offered by the Applicants contradicts this language.

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[25] 47 C.F.R. § 1.4000(a).

[26] *See Report and Order, supra note 1,* at 19305.

[27] *See, e.g., Second Report and Order*, 13 FCC Rcd at 23897.

[28] Reply of Petitioner, Exhibit A at 1-2.

[29] Supplement to Petition, Declaration at 3 (document that governs the Association and home owners with respect to the properties at Woodmere Townhomes).

[30] *Id*.

[31] Association's Application for Review at 14 (claiming that other clauses within the Declaration show the Association, and not Petitioner, has an ownership interest).

[32] *Id*. In particular, the Association claims because the maintenance expenses are paid out of Association funds, the Association, rather than Petitioner, has an ownership interest.

[33] Reply of Petitioner, Exhibit A at 1-2.

[34] *In Re Jordan E. Lourie*, 13 FCC Rcd 16760, 16763-64 (CSB 1998). *See also Order on Reconsideration*, 13 FCC Rcd 18962, 18995-96 (1998) (reconsideration of the 1996 *Report and Order*) (hereafter *"Lourie").* The rights of third parties to enter and/or exercise control over the owner's exclusive use area for such reasons as inspection or maintenance do not defeat ownership under the Rule.

[35] CAI Application for Review at 9.

[36] *See, e.g.,* Association Response to Petitioner's Petition for Declaratory Ruling.

[37] CAI Application for Review at 9.

9. CAI also disputes the Bureau's interchangeable use of the terms "property interest" and "ownership interest" because a property interest is broader than an ownership interest.[38] The Rule recognizes several property interests, including direct ownership, indirect ownership or leasehold.[39] We find the Bureau's use of the term "property interest" is not significant here. The Bureau correctly found that Petitioner has an ownership interest, direct or indirect, in the roof based on the express terms of the warranty deed and Declaration.[40]

10. Based on CAI's contention that Petitioner has no ownership interest in the roof, CAI asserts that Petitioner's installation of an antenna on the roof would constitute an uncompensated "taking" of property in violation of the Fifth Amendment to the Constitution.[41] Because we agree with the Bureau's conclusion that the Petitioner owns the townhome, including the roof,[42] CAI's argument is without merit. There was no Fifth Amendment taking. In addition, in *Building Owners and Managers Association International v. FCC* ("*BOMA*"), the United States Court of Appeals for the District of Columbia found that the OTARD rule does not constitute a per se taking of a landlord's property.[43] The Court held that a tenant may place an antenna on his rented property because the landlord has consented to occupation of the land.[44] As the Court held that a tenant installing an antenna on his leased property is not a per se taking, then, *a fortiori,* a townhome owner installing an antenna on property in which he has an ownership interest also is not a per se taking.

B. Exclusive Use of the Property

11. For the OTARD rule to apply, the antenna user must have exclusive use or control of the property, as well as the requisite ownership or leasehold interest.[45] We affirm the Bureau's finding that Petitioner has exclusive use of the property in question.

12. The Bureau found that Petitioner had exclusive use of his roof because the Declaration expressly designates the roof for Petitioner's exclusive use.[46] The Association and CAI argue that Petitioner cannot have exclusive use or control of the roof because it is shared with other townhomes as a joint roof and other parties are entitled to beneficial use of the roof.[47] We conclude that their contention that the roof is shared is trumped by the express, unambiguous language of the Association's Declaration. The Declaration gives Petitioner the "exclusive right to use and enjoy the Owner's home and Home Exterior."[48] The home exterior is defined as "[the] roof, foundation, steps, footings, decks, outer space of exterior walls and garage doors of a home."[49] Here the express language in the Association's Declaration

[38] CAI Application for Review at 6.

[39] *See* 47 C.F.R. § 1.4000(a)(1). The specific language states explicitly, "where the user has a direct or indirect ownership or leasehold interest in the property…"

[40] *In Re Philip Wojcikiewicz*, 18 FCC Rcd 19523, 19525 (MB 2003).

[41] CAI Application for Review at 12.

[42] *Id*.

[43] *Bldg. Owners and Managers Ass'n Int'l v. FCC*, 254 F.3d 89, 97-100 (D.C. Cir. 2001).

[44] *Id*.

[45] 47 C.F.R. § 1.4000(a).

[46] Supplement to Association's Application for Review at 5.

[47] Association's Application for Review at 12. *See also* CAI Application for Review at 11.

[48] Supplement to Association's Application for Review, Declaration at 6 (document that governs the Association and home owners with respect to the properties at Woodmere Townhomes).

[49] *Id.*

governs.

13. The Association and CAI cannot rely on the easement granted to the Association to perform maintenance on the roof to overturn the Bureau's decision. As we have previously found, the rights of third parties to enter and/or exercise control over the owner's exclusive-use area for such reasons as inspection or maintenance do not defeat the owner's rights under the Rule.[50] "[E]xclusive use or control" is all that is necessary to come under the protections guaranteed by the Rule[51] (emphasis added). We conclude that the Association's easement to perform maintenance, while defeating exclusive control, does not defeat Petitioner's right to the exclusive use of his roof. Further, the collection of fees from all of the homeowners for insurance, repair, replacement and maintenance of the roofs has no bearing on Petitioner's exclusive use of his roof, which is set forth in the Declaration. In *Lourie*, we rejected the argument that an Association's responsibility for repairs, replacement and maintenance defeats the homeowner's exclusive use, saying "the obligation to repair and maintain . . . detracts in no way from Lourie's exclusive use of the chimney."[52] Therefore, the Bureau correctly found that Petitioner had exclusive use of the roof.

IV. CONCLUSION

14. Based on the record before us, as discussed above, we find the Bureau's decision in this matter was correct and in accord with Commission precedent and regulation.

V. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED,** that the Applications for Review filed by the Woodmere Townhome Association and the Community Associations Institute **ARE DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[50] *See Lourie*, *supra,* note 34.

[51] *See* 47 C.F.R. § 1.4000(a)(1).

[52] *See Lourie*, *supra,* note 34.