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Satellite Dishes: Regulation Is No Simple Task

By Sidney D. Hemsley, MTAS Senior Law Consultant

Can municipalities regulate satellite television antennas in residential and historic areas for aesthetic reasons? The answer to that question depends on the answer to two more questions. Unfortunately, the answer to neither of them comes with a money-back guarantee.

The first question

The threshold question is whether municipalities in Tennessee can even zone solely for aesthetic purposes. The answer is a qualified yes. The Tennessee Supreme Court in State of Tennessee v. Smith, 618 S.W.2d 474 (1981) upheld state statutes regulating junkyards near highways and declared that:

"... in recent years most courts which have considered junkyard regulations similar to those involved here have had no difficulty in sustaining them as a proper exercise of the police power of a state or local government, even if scenic or aesthetic consideration have been found to be the only basis for their enactment. (Citations omitted) ... Although some authorities to the contrary may be found, we find these cases to be better reasoned and in more accord with modern concerns for environmental protection, control of pollution and prevention of unsightliness. We believe that the views expressed in City of Norris v. Bradford (which earlier held that municipal regulations couldn't be based solely on aesthetics) must be considered in the light of the facts of that case and that they cannot be literally applied to all of the myriad concerns and problems facing state and local governments at this time."

That language isn't carte blanche for blanket municipal regulations banning satellite dishes from front yards and rooftops and towers in every residential neighborhood, and entirely from historic areas. However, it does give municipalities a state legal foundation supporting some regulation of satellite dishes in those residential and historic areas where looks do matter — depending on the facts and circumstances. That foundation might even support a complete ban on satellite dishes in certain historic areas, and perhaps other areas of a municipality, depending upon the character of the area in question, and what aesthetic interests the municipality is attempting to promote.

The second question

Does the regulation of satellite dishes comply with the Federal Communications Commission (FCC) rules governing municipal regulation of antennas? This question has proved legal quicksand for municipalities.
The FCC regulations

FCC Report DC-362, dated Jan. 14, 1986, outlines an FCC rule that limits municipal restrictions on the location of satellite dishes. That rule says that state and local zoning or other regulations that differentiate between television receive-only (TVRO) antennas and other types of antenna facilities are pre-empted unless they pass a two-pronged test. They must:

1. have a reasonable and clearly defined health, safety, or aesthetic objective; and
2. not impose unreasonable limitations on, or prevent, reception by TVROs of a satellite-delivered signal, or impose costs on the users of such antennas that are excessive in light of the purchase and installation cost of the equipment (47 C.F.R., Sec. 25.104 (1980)).

Cities lose most satellite dish cases

Several recent federal and state cases have applied the FCC rule to local zoning limitations on the location of TVROs. The pioneer is Van Meter v. Township of Maplewood, 696 F.2d 1024 (D.N.J. 1988). In this case, some New Jersey property owners installed a TVRO dish antenna 10 feet in diameter on their roof. A zoning ordinance designed to reduce the visual impact of satellite television channels, said the court, "... it is clear that the ordinance functions as an unreasonable burden on reception because its provisions make reception technically impossible and because it is generally insensitive to the unique conditions that govern signal reception on any given site" (emphasis is mine).

From that perspective, the ordinance was defective in several areas. It limited the size of the dish to 6 feet in diameter, but a dish 10 feet in diameter angled at the required elevation would exceed that limitation. Its requirement that antennas be screened from view with evergreens 6 feet in height was insensitive to the impact of shielding on the antenna's "reception window." The configuration of some lots might prohibit effective screening that would still permit effective reception, and some view corridors. The ordinance prohibited transmitting dish antennas. The installer testified that the roof installation was necessary to enable the property owners to receive signals from all available satellite television channels.

The U.S. District Court for New Jersey found that the zoning ordinance impermissibly differentiated between receiving and transmitting dish antennas by forbidding use of the latter; it did not apply to UHF and VHF antennas, FM and radio short wave antennas. Under the FCC regulations, the zoning ordinance was pre-empted, unless it complied with the two-pronged test.

In the court's mind, the ordinance satisfied the first prong of the FCC rule. It didn't contain a "clearly defined health, safety, or aesthetic objective," but the court inferred one; it was designed to reduce the visual impact of satellite dishes (an aesthetic interest), and the prohibition on roof installation and the height limitation promoted safety.

But the ordinance failed to satisfy the second prong because it placed an unreasonable burden on reception. While the FCC rule didn't entitle property owners to "all" the available satellite television channels, said the court, "... that was not enough to get the regulation by virtue of the first prong of the FCC test: "A valid ordinance ... must explicitly state why it differentiates between TVROs and other antenna facilities," said the court, which didn't even reach the question of whether the ordinance failed the second prong of the FCC test.

Kessler v. Town of Niskayuna, 774 F. Supp. 711 (1991) adopted the reasoning of Crawley and flatly declared that Van Meter's position on the first prong of the FCC test "devoid of any authority." The declared purpose of the City of Niskayuna's satellite dish regulations was "to preserve the land, to promote the health, safety, morals, and general welfare of the community..." That was not enough to get the regulation by virtue of the first prong of the FCC test: "A valid ordinance ... must explicitly state why it differentiates between TVROs and other antenna facilities," said the court, which didn't even reach the question of whether the ordinance failed the second prong of the FCC test.

In Crawley v. City of Port Jervis, 753 F. Supp. 128 (S.D. N.Y.), it was said that:

"... the health, safety, or aesthetic objective must be expressly articulated in the ordinance itself or in accompanying regulations. Virtually every ordinance restricting TVRO antenna placement might be said to have an implied aesthetic objective. If such an implied and unclear purpose could satisfy the FCC regulation, the words 'clearly defined' would be meaningless."

In Crawley the ordinance contained size, screening, location, and height limitations but no mention of the health, safety, or aesthetic interest of any of them served. The court conceded that the provisions of the ordinance "suggest that it was enraged for aesthetic reasons" but went on to say "it could conceivably have been intended to protect a local cable-television franchise holder from competition."

A variance provision in the ordinance fared no better: "The BZA (Zoning Board of Appeals) has virtually unfettered discretion to grant or deny a variance to a zoning ordinance. The applicant must be expressly articulated in the ordinance, with its requirement of a 'clearly defined' objective, was designed to forbid that sort of standardless discretion."

The ordinance also failed the second prong of the FCC test for reasons similar to those in Van Meter. After sparring with the City of Port Jervis, N.Y., some property owners installed the satellite dish without obtaining a building permit and in violation of the ordinance's screening and setback requirements. But the court agreed with the property owners that movement of the satellite dish to an area permitted under the ordinance would unreasonably restrict reception of half the channels, and screening the dish would make reception nearly impossible. Said the court, "An ordinance may not limit reception by requiring an antenna to be screened so that the line of sight is obscured."

In that case, Alsar Technology applied for a building permit to install a TVRO dish on the roofs of certain property owners in Nutley, N.J. The permit was denied, based on city code provisions strictly limiting the location, number, height, and appearance of satellite dishes. The court held that the Nutley ordinance preempted it didn't regulate other types of antennas; therefore, it had to pass the two-pronged test.

Under the first prong, the ordinance failed to state any reasonable and clearly defined health, safety, or aesthetic standards. "For example," said the court, "there is no health, safety, or aesthetic objective for limiting maximum height of antenna dishes to 7 feet as opposed to 8 or 10 feet...

In other words, the court said that it had adopted the position that each satellite dish restriction must be supported by some health, safety, or aesthetic reason. The ordinance failed the second prong because the only possible location for the satellite dish was on the roof, an installation not permitted under the ordinance. The configuration of the yard and the screening requirements excessively interfered with reception in permitted location. (The rear yard was only 2 feet deep, the side yards only slightly greater than 10 feet, and the front setback from the street only 25 feet.) The ordinance provided no alternative placement.
impossible. Said the court, "there is no health, safety, or aesthetic
reason for limiting maximum height of antenna external antennas in the same manner."

The FCC position is ambiguous on the question of whether or not complete total bans on antennas are permissible. It begins by speaking of "reasonable requirements" and concludes with a suggestion that fixed external antennas might be totally banned to preserve the historic character of a community.

Unfortunately, the report goes no further in enlightening its readers on that question. However, given the pervasiveness of television as a public information and entertainment medium, such bans probably raise First Amendment issues the courts would likely resolve in favor of the antennas, except perhaps where unique local interests are at stake, such as the preservation of historic communities or neighborhoods.

The preservation of historic districts became an issue in Olsen v. City of Baltimore, 582 A.2d 1225 (Md. 1990). A property owner’s satellite dish size and roof installation violated a Baltimore city ordinance. The property owner argued that the ordinance discriminated against satellite dishes that could not comply with the FCC rule. FCC Report No. DC-362 says: "The FCC rule would permit a municipality to simply prohibit all antennas in front yards, on roofs, or other locations, or to enact a blanket ban on all antennas within the municipality. Indeed, one FCC commissioner dissented in part from the FCC rule on the premise that it fails to accommodate the local interests as well as "reasonable requirements" and does not excessively interfere with the historic character of a community."

"Antennae, air conditioning equipment, grills, roof decks, satellite dishes, and other contemporary elements shall not be visible from any point of the street unless otherwise approved by the Commissioner of the Department of Housing and Community Development."
The property in question was in the Federal Hill National Historic District. One of the objectives of the Urban Renewal Plan was to "preserve and enhance the historical and architectural charter of the neighborhood and structures." The court never had to reach the question of whether the plan’s antenna restriction passed both prongs of the FCC test because it didn’t discriminate against satellite dish antennas; had it done so, that language might have helped it over the first prong. (The satellite dish was 10 feet wide; it was mounted on a townhouse 11-1/2 feet wide). As it was, Paragraph 31, pages 15-16 of the FCC report became a leg the court used to support the antenna ban in the historic district.

What should a city do?

That is where the law stands governing the regulation of TVROs by municipalities. It compels a municipality to do three things to satisfy both state and federal law governing aesthetic regulation of such antennas:

- First, the municipality must determine whether its regulations discriminate against TVROs. If they do, they are preempted by the FCC regulations unless the municipality can demonstrate that its regulations pass the two-pronged FCC rule test. So far, that has been a tough job for municipalities.
- Second, the municipality must determine whether its regulations pass the first prong of the test. That is done by making sure that strong aesthetic reasons support each specific antenna regulation. Firmly identify the aesthetic reasons in the regulation. Remember also that under both state and federal law such regulations might also be enacted and defended on public safety and health grounds. That may help municipalities relative to rooftop, tower, and other antenna locations susceptible to high winds and other adverse weather conditions.
- Third, the municipality must determine whether its regulations pass the second prong of the test. The regulations cannot unreasonably interfere with TVRO reception or impose unreasonable costs on the property owner. In that connection, make sure that the antenna regulations provide an escape hatch for property configurations and peculiarities that make it either completely impossible for an antenna installation on the property to comply with the ordinance, or impossible for an antenna installation on the property to comply with the ordinance and to receive an adequate signal.
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