

EX PARTE OR LATE FILED

ORIGINAL

MORRISON & FOERSTER LLP

SAN FRANCISCO
LOS ANGELES
SACRAMENTO
ORANGE COUNTY
PALO ALTO
WALNUT CREEK
SEATTLE

ATTORNEYS AT LAW

2000 PENNSYLVANIA AVENUE, N.W. 100
WASHINGTON, D.C. 20006-1812
TELEPHONE (202) 887-1500
TELEFACSIMILE (202) 887-0763

NEW YORK
DENVER
LONDON
BRUSSELS
HONG KONG
TOKYO

June 19, 1996

Writer's Direct Dial Number
(202) 887-8745

By Messenger

Sonja Rifken, Esq.
Office of the General Counsel
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

BOOKET FILE COPY ORIGINAL

RECEIVED

JUN 19 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: *Ex Parte* Presentation, IB Docket No. 95-59

Dear Sonja:

I am enclosing a memorandum that addresses, in more detail than our previously filed comments, why the Commission's proposed Section 25.104(f) would not effectuate a "takings." (This memorandum was prepared for SBCA by Latham & Watkins, counsel to one of our members, DIRECTV, Inc.)

If you have any questions regarding the memorandum or would like to discuss the issues further, please do not hesitate to contact me at (202) 887-8745.

Very truly yours,

Diane S. Killory

Counsel to Satellite Broadcasting and
Communications Association

Enclosure

No. of Copies rec'd
List ABCDE

CTB

MORRISON & FOERSTER LLP

Sonja Rifken, Esq.
June 19, 1996
Page Two

cc: William A. Caton
Christopher J. Wright
William H. Johnson
Gary Laden
Jackie Spindler
Randi Albert
Ryan Wallach
John P. Stern
Rosalee Chiara
Meryl Icove

MEMORANDUM

Re: Analysis of Proposed Section 25.104(f) Under the Fifth Amendment

Date: June 19, 1996

RECEIVED
JUN 19 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

The federal government may enact statutes and promulgate regulations that prohibit the enforcement of restrictive covenants, encumbrances and homeowners' association rules that are inconsistent with a legitimate federal objective. Such enactments are not considered "takings" requiring compensation pursuant to the Fifth Amendment of the Constitution of the United States.

The Commission has proposed, in Section 25.104(f) of its Rules, to render unenforceable any "restrictive covenant, encumbrance, homeowners' association rule, or other nongovernmental restriction . . . [that] impairs a viewer's ability to receive video programming services over a satellite antenna less than one meter in diameter." See *Preemption of Local Zoning Regulation of Satellite Earth Stations*, FCC 96-78, ¶ 62 (Further Notice of Proposed Rulemaking, March 11, 1996). As the Commission noted in the Further Notice, proposed Section 25.104(f) reflects Congress's objectives in passing Section 207 of the Telecommunications Act of 1996, the legislative history of which expresses an explicit desire to remove private, nongovernmental restrictions that impair a viewer's ability to receive signals by DBS antennas H.R. Rep. No. 204, 104th Cong., 1st Sess. at 124 (1995) ("existing regulations, including . . . restrictive covenants or home owners' association rules, shall be unenforceable to the extent contrary to this section").

A restrictive covenant is an interest in real property in favor of the owner of the "dominant estate" that prevents the owner of the "servient estate" from engaging in an activity that he or she would otherwise be privileged to do. POWELL ON REAL PROPERTY, § 34.02[2] (1995). Restrictive covenants are used by homeowners associations, for example, to prevent property owners within the association from engaging in a myriad of activities, including the installation of satellite antennas. Section 25.104(f) would prohibit the enforcement of these restrictive covenants to the extent they impair a viewer's ability to receive signals over a satellite antenna one meter in diameter or smaller.

The Fifth Amendment requires the government to compensate a property owner if it "takes" the homeowner's property. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014-15 (1992). Direct appropriation of property is the classic form of taking, and at one time such condemnation was thought to be the only compensable taking under the Fifth Amendment. See *Legal Tender Cases*, 20 L. Ed. 287 (1871). See also *Adaman Mutual Water Co. v. United States*, 278 F.2d 842 (9th Cir. 1960) (condemnation of servient estate led to finding that negative easement had been taken); *Washington Suburban Sanitary Comm'n v. Frankel*, 470 A.2d 813, 816-17 (Md. App. 1984) ("a negative easement is a property interest the taking of

which compensation must be paid when the easement is extinguished by condemnation of the servient tenement”), *vacated on other grounds*, 487 A 2d 651 (Md. 1985).

Fifth Amendment jurisprudence has developed, however, to recognize that in some circumstances a government regulation can be so burdensome as to effect a taking of property, without actual condemnation or appropriation. *Lucas*, 505 U.S. at 1015. Restrictive covenants are now recognized to be “part and parcel of the land to which they are attached.” *Chapman v. Sheridan-Wyoming Coal Co.*, 333 U.S. 621, 627 (1950). Unlike the condemnation cases, however, cases involving restrictive covenant face a higher hurdle before a takings will be found.

These “regulatory takings” are only sometimes considered *per se* takings. There are two classes of such *per se* takings, which require no further analysis of the public purpose behind the regulation. *Id.* A regulation will be considered a *per se* taking if it (1) requires the landowner to suffer a permanent physical invasion of his or her property by a third party, or (2) “denies all economically beneficial or productive use of land.” *Id.* If a regulation does not result in a *per se* taking, the courts will engage in an “*ad hoc* inquiry” to examine “the character of governmental action, its economic impact, and its interference with reasonable investment-backed expectations.” *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

The prohibition on enforcement of certain restrictive covenants in proposed Section 25.104(f) is not a *per se* regulatory taking. First, homeowners who hold a restrictive covenant will not suffer any *physical* occupation of the *homeowner’s* land if their neighbors are permitted to install a DBS antenna on the neighbors, let alone a permanent physical occupation. *Compare Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (statute that required landlord to allow cable television company to install cables on landlord’s building resulted in taking). Second, allowing the installation of a DBS antenna will not render the value of either party’s land economically useless. Indeed, neither the owner of the dominant estate nor the owner of the servient estate is likely to suffer *any* diminution in value of his or her property by nullification of restrictions on DBS antennas one meter or less in diameter. *Compare Lucas*, 505 U.S. at 1033 (statute requiring a property owner to leave his two beachfront lots in their natural state violated the takings clause by rendering the land economically useless without providing just compensation, unless on remand state could show development prohibited by nuisance law).

Because there is no *per se* takings here, any takings challenge to proposed Section 25.104(f) would be examined under the “multifactor analysis” used by courts. As noted above, under this approach the courts examine on an *ad hoc* basis “the character of governmental action, its economic impact, and its interference with reasonable investment-backed expectations.” *PruneYard*, 447 U.S. 74. Under this analysis, the government has “considerable latitude in regulating property rights in ways that may adversely affect the owners.” *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987). Significantly, this latitude allows the government to abrogate restrictive covenants that interfere with the federal objectives enunciated in the regulation. *See, e.g., Senior Civil Liberties Ass’n v. Kemp*, 761 F. Supp. 1528, 1559 (M.D. Fla. 1991) (dismissing takings challenge against Fair Housing Amendments Act of 1988 (“FHAA”), on the ground that “[e]ven when a state recognizes a certain property right as a separate interest, its abrogation is not necessarily a taking”), *aff’d*, 965 F.2d 1030 (11th Cir.

1992). The FHAA discussed in *Senior Civil Liberties* declared unlawful, *inter alia*, any refusal “to sell or rent . . . or to otherwise make unavailable or deny, a dwelling to any person” because of the age of his or her family members. 42 U.S.C. § 3604. While Congress did not expressly so state in the statute, it intended that the FHAA would prohibit the enforcement of “special restrictive covenants or other terms or conditions” inconsistent with its purposes. H.R. Rep. No. 711, 100th Cong., 2d Sess. 23-24 (1988); *see also United States v. Scott*, 738 F. Supp. 1555, 1561 D. Kan. (1992) (describing legislative history of Housing Act).

Members of a homeowners’ association challenged the validity of the FHAA under the Fifth Amendment, claiming that the federal government had “taken” their restrictive covenants without compensation. *Senior Civil Liberties*, 761 F. Supp. at 1533. These restrictive easements were contained in the homeowners association’s declaration of restrictions and required, among other things, that at least one resident of each home be at least 55 years of age. *Id.* Plaintiffs argued that the FHAA’s nullification of the prohibition on younger residents in the properties neighboring their own constituted a takings. *Id.*

The court dismissed the takings claim, finding that the FHAA promoted a legitimate government purpose and resulted in little economic harm to the plaintiffs. *Id.* at 1558. The court found that the provisions of the Housing Act nullifying the restrictive covenants constituted a “public program adjusting the benefits and burdens of economic life to promote the common good,” not a takings subject to compensation. *Id.* at 1558-59. The court further found it “difficult to ascertain to what extent [the FHAA] took anything from Plaintiffs.” *Id.*

A Fifth Amendment challenge to Section 25 104(f) would be dismissed under the *Senior Civil Liberties* analysis. *See also Westwood Homeowners Association v. Tenhoff*, 745 P.2d 976 (Ariz. App. 1987) (holding that a state legislative refusal to enforce restrictive covenants against group homes for developmentally disabled was not a taking). The proposed rule would not result in any taking of property, but would merely adjust “the benefits and burdens of economic life to promote the common good.” By providing all Americans, regardless of where they reside, with the freedom to access DBS services, the proposed rule advances the legitimate federal interest in making available “to all the people of the United States . . . world-wide wire and radio communication service.” Section 1 of the Communications Act, 47 U.S.C. § 151.

In addition, nullification of a landowner’s ability to prevent his or her neighbor from installing a DBS antenna would have no measurable economic impact upon the value of the landowner’s property. In fact, the property could be more valuable to a prospective purchaser who wanted access to video services competitive to cable. Finally, a landowner would be hard-pressed to demonstrate any “investment-backed expectations” based on that part of the deed restrictions that would prevent neighbors from installing DBS antennas one meter or less in diameter.

* * *

For all these reasons, Section 25 104(f) should withstand any "takings" challenge.