COMMUNITY ASSOCIATIONS INSTITUTE

The nation's voice for condominium, cooperative and homeowner associations

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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September 27, 1996

Mr. William F. Caton
Acting Secretary
Office of the Secretary
Federal Communications Commission
Room 222, 1919 M Street, N.W.
Washington, D.C. 20554

Re: In the Matter of: Preemption of Local Zoning Regulations of Satellite Earth Stations: IB Docket No. 95-59; In the Matter of: Implementation of Section 207 of the Telecommunications Act of 1996 Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Services: CS Docket Number 96-83, FCC 96-151 Further Notice of Proposed Rulemaking

Dear Mr. Caton:

Pursuant to the Further Notice of Proposed Rulemaking, the Community Associations Institute, joined by the American Resort Development Association and the National Association of Housing Cooperatives, respectfully submits the enclosed Comments. The original and eleven (11) copies have been provided.

The Community Associations Institute, the American Resort Development Association, and the National Association of Housing Cooperatives appreciate the opportunity to submit Comments on the Proposed Rule and hope that the FCC takes these Comments into consideration when drafting the final rule.

Sincerely,

Robert M. Diamond

Robert M. Diamond
President
Community Associations Institute

Enclosures

1630 Duke Street
Alexandria, VA 22314
(703) 548-8600
Fax (703) 684-1581

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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Implementation of Section 207 of the Telecommunications Act of 1996	)	FCC 96-151
	)	
Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service	)	

COMMENTS OF THE COMMUNITY ASSOCIATIONS INSTITUTE

JOINED BY

AMERICAN RESORT DEVELOPMENT ASSOCIATION

AND

NATIONAL ASSOCIATION OF HOUSING COOPERATIVES

Submitted by

Robert M. Diamond
President
Barbara A. Byrd, CAI
Executive Vice President
Community Associations
Institute

September 27, 1996

TABLE OF CONTENTS

SUMMARY iii

I. INTRODUCTION 1

A. The Community Associations Institute 2

B. The American Resort Development Association 3

C. The National Association of Housing Cooperatives 4

II. LEGAL FRAMEWORK OF COMMUNITY ASSOCIATIONS 4

A. What is a Community Association? 4

III. AN INDIVIDUAL OWNER ONLY POSSESSES AN UNDIVIDED INTEREST IN COMMON PROPERTY: THEREFORE, THE OWNER MAY NOT CONVERT COMMON PROPERTY TO SUCH OWNER'S EXCLUSIVE USE 8

IV. ANY FCC-MANDATED INDIVIDUAL OCCUPATION OF COMMON PROPERTY WOULD BE A PROHIBITED "TAKING" UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION 14

V. CONGRESS DID NOT GRANT THE FCC AUTHORITY TO PROVIDE COMPENSATION FOR TAKING COMMON PROPERTY 18

VI. THE PROVISION OF DBS, TELEVISION BROADCAST, AND MDS IS NOT A CONSTITUTIONALLY-MANDATED PUBLIC POLICY 23

VII. REQUIRING TELECOMMUNICATIONS EQUIPMENT INSTALLATION ON COMMON PROPERTY WOULD POSE MYRIAD PROBLEMS FOR ASSOCIATIONS 27

A COMMON ANTENNA SUPPLYING SERVICE TO ALL ASSOCIATION OWNERS AND RESIDENTS WHO DESIRE SERVICE IS PRACTICAL AND FEASIBLE 32

A, Common Antenna Installation Is Both Feasible and Practical, but Should Not Be Mandated by the FCC 33

IX. IF THE ASSOCIATION ELECTS TO INSTALL A COMMON ANTENNA ON COMMON PROPERTY, THE ASSOCIATION SHOULD BE PERMITTED TO PROHIBIT INSTALLATION OF EQUIPMENT USED TO RECEIVE THE SAME SERVICE ON INDIVIDUAL PROPERTY 36

X. CONCLUSION 37

APPENDIX

Comments, Frost, Christenson & Associates
Comments, Woodbridge Village Association
Affidavit, James Reinhart
Letter, Fred Baron
Letter, Peterson Roofing
Letter, Premier Roofing
Letter, Beauregard Heights
Letter, the Willoughby of Chevy Chase Condominium
Letter, Parc East Condominium
Letter, Colonial Villages
Alternative Cable Company, Proposal for Condominiums
Alternative Cable Company, Resident Information Sheet
ShareDish brochures

SUMMARY

CAI, ARDA, and NAHC support the broad public policy objectives of the Telecommunications Act of 1996: to promote broad public access to information received through telecommunications equipment and competition within the industry that will result in enhanced technology and lower prices to consumers. However, fundamental rights guaranteed by the United States Constitution must be not abrogated in the process.

The FCC, in its Further Notice of Proposed Rulemaking, requests Comments on the legal, constitutional, and practical issues involved in permitting individuals to install their own telecommunications equipment on common property. It is CAI's, ARDA's, NAHC's position that if the FCC were to permit access to and use of common property by individual owners without the consent of other property owners, that would be a constitutionally prohibited taking. In community associations, common property is either owned by all unit owners as tenants in common, or by the association itself. Every owner has an non-exclusive easement for the use of that common property. As a general principle of property law, in order for one tenant in common to alter or use common property and interfere with the easement rights of other owners, the consent of all other tenants in common is necessary. This principle has been codified in several states' condominium or planned community acts, as well as association documents. An individual unit owner does not exclusively own any portion of the common property. Therefore, in any community association, installation on common property by an individual would deprive all other tenants in common, or the association, of the right to use and possess the common property upon which the individual has installed equipment.

This taking of private property rights is forbidden by the Fifth Amendment of the U.S.

Constitution. Neither Congress nor any governmental agency may take property owned by one person and permit its possession and use by another. The U.S. Supreme Court invalidated a similar law in Loretto v. Manhattan Teleprompter. The FCC may not force a taking of common property for individual use absent statutory authorization of compensation for this taking.

Section 207 of the Telecommunications Act contains no language to indicate that compensation is to be paid for taking private property. The FCC lacks the authority to provide just compensation to tenants in common or associations in this situation. The case of Bell Atlantic v. FCC requires that statutory authority to provide compensation for taking property must be expressly stated in the statute, or implied by necessity. There is neither express nor implied authority provided in Section 207. Therefore, the FCC has no authority to provide compensation for common property taken.

Practically speaking, a myriad of problems would result should individuals be permitted to install telecommunications equipment on common property. Improper installation could lead to damage to common property, exposing the association and its members to increased costs of maintenance and repair, and other unintended risks. Alterations to the roof would void roof warranties. Liability questions would arise if more than one installation results in damage. Individual installation could exacerbate tensions between residents, as there may be insufficient space to accommodate individual equipment installation for all residents.

CAI, ARDA, and NAHC do not assert that § 207 is unconstitutional. However, if the FCC were to issue a rule permitting installation of individual telecommunications equipment

on common property, they would be misinterpreting § 207 and ignoring constitutional and other legal precedents and the practical problems which would certainly result. CAI, ARDA, and NAHC respectfully urge the FCC to recognize that Section 207 cannot apply to common property.

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COMMENTS

I. INTRODUCTION

Pursuant to the Further Notice of Proposed Rulemaking released August 6, 1996, in the above-captioned proceeding, the Community Associations Institute ("CAI"), joined by the American Resort Development Association ("ARDA") and the National Association of Housing Cooperatives ("NAHC"), submits the following Comments. CAI, ARDA, and NAHC understand and support the broad public policy aimed at eliminating impediments to equal access to direct broadcast satellite ("DBS"), television broadcast, and multipoint distribution systems ("MDS") services. The community associations served by these three organizations have serious concerns about how community associations may implement a rule mandating individual antenna installation on common property, however. Those concerns are summarized below.

These Comments are divided into the following sections: 1) an introduction to the three organizations filing the Comments; 2) a description of the legal framework of community associations; 3) a legal analysis of individual ownership and easement rights to use and alter common property; 4) a discussion of the taking issue, as it relates to both rental and common property; 5) a discussion of § 207 of the Telecommunications Act of 1996 and the statutory authority granted to the FCC by this section; 6) a discussion of the practical problems associations would experience as a result of a rule requiring individual installation of telecommunications equipment on common property; and 7) a discussion of the common antenna proposal outlined in the Comments submitted by CAI, ARDA, and NAHC in the DBS and television broadcast and MMDS proceedings.

A. The Community Associations Institute

The Community Associations Institute is a national, nonprofit 501(c)(6) association created to educate and represent America's residential community association industry. CAI is a multi-disciplinary alliance leading the industry and fostering effective community associations. CAI's members include condominium and homeowner associations, cooperatives, and association-governed planned communities of all sizes and architectural types; community association managers and management firms; individual homeowners; lawyers, accountants, engineers, builders/developers and other providers of professional services and products for community associations. CAI has nearly 15,000 members in 57 chapters throughout the United States and in several foreign countries.

CAI is the national voice of community associations and their members on issues of common concern. Since its inception in 1973, CAI has consistently represented those interests before state and federal legislatures and courts and has been the leader in accumulating and disseminating the body of knowledge which affects community association management, law, and operations. One of CAI's goals is to improve the operation and quality of life of community associations for the benefit of those who reside in them.

According to estimates, approximately 32 million Americans live in dwellings governed by a community association. Other estimates show that in 1993 there were approximately 12 million homes located within over 150,000 community associations across the country. Clifford J. Treese, CPCU, ARM, ed. Community Association FactBook, inside cover (1993). Development of, and homeownership in, community associations continues to escalate.

B. The American Resort Development Association

The American Resort Development Association is the only international trade organization exclusively representing the resort and recreational development industry. Established in 1969, ARDA's members include privately-held companies and major corporations in the United States and overseas. ARDA is considered to be the definitive resource for information about the resort industry.

ARDA's diverse membership includes companies with interests in timeshare resorts,

vacation clubs, fractional or interval ownership, private membership camp resorts, land development, lot sales, second homes, hotels, and resort communities.

ARDA is actively committed to consumer affairs and has initiated a comprehensive consumer awareness public relations campaign. In addition, ARDA has launched a rigorous professional development program, the ARDA Education Institute, to promote the highest possible standards in marketing, sales, and customer service. ARDA actively promotes compliance with an industry Code of Standards and Ethics.

C. The National Association of Housing Cooperatives

The National Association of Housing Cooperatives, organized in 1950, is a nonprofit national federation of housing cooperatives, professionals, organizations, and individuals promoting the interests of cooperative housing communities.

II. LEGAL FRAMEWORK OF COMMUNITY ASSOCIATIONS

A. What is a Community Association?

"Community association" is a broad term: many different types of legal entities are classified as community associations. Generally, a community association is an aggregation of property owners who: (a) own their individual residences or the right to live in individual residences; (b) have either an interest in property owned in common or membership in a

corporation or association which owns common property; and c) have an easement of non-exclusive use in the common property. The association manages this common property on behalf of the individual owners for the common good of the community. To maintain the common property, each owner pays assessments to the association. There are three major types of community associations: condominiums, cooperatives, and planned communities. Each type of community association grants different legal rights to and imposes different legal responsibilities upon individual owners and residents. Treese, Community Association FactBook, 1.

State law controls the creation, operation, management, and dissolution of community associations. Cooperatives and planned communities may be created and managed pursuant to common law principles, but in many states there are state laws regulating these developments. Condominiums must be created pursuant to a state enabling act. Treese, Community Associations FactBook, 5. All fifty states and the District of Columbia have passed some type of statute regulating condominiums, usually called the Condominium Act or Horizontal Property Act. Many states have also passed similar legislation regarding planned communities and cooperatives.

There are three different types of property in community associations: common property (usually called "common elements" in condominiums and "common areas" in planned communities), limited common elements or areas, and individually-owned property (called "units" in condominiums, "apartments" in cooperatives, and "lots" in planned communities). In condominiums, each unit owner has an undivided tenancy-in-common ownership interest in the common elements. Unif. Condominium Act, Section 1-103(7)

(1990).[1] In cooperatives and planned communities, the common property is owned by an association, usually incorporated. Unif. Common Interest Ownership Act Sections 1-103(4), (10).[2] Common property is described in the declaration. Unfinished parts of walls, floors, and ceilings described in the declaration as boundaries of a unit (e.g., the material underneath floorboards, plaster, paint, wallpaper, wallboard) usually are common property. Unif. Condominium Act, Section 2-102(1). Any fixture (e.g., flue, duct, wire, bearing element, conduit) that is used by more than one unit is common property. Unif. Condominium Act, Section 2-102(2). Exterior walls, roofs, landscaping, and parking spaces are usually common elements in a condominium.

In addition, some community associations have "limited common property" owned either by all members of the association in common or the association itself, but where

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[1] The Uniform Condominium Act (UCA) was drafted by the National Conference of Commissioners on Uniform State Laws. There are two versions of the UCA, one adopted in 1977 and one amended in 1980. The UCA 1977 version has been adopted by three states and the District of Columbia. The 1980 version has been adopted by nine states. Two other states have passed parts of the UCA. Citations are from the Official 1990 Text of Uniform Real Property Acts.

There are three major Uniform Laws and one Model Act relating to community associations drafted by the National Conference of Commissioners on Uniform State Laws. The Uniform Condominium Act is the oldest of the three, originally drafted in 1977 and revised in 1980. The Uniform Planned Community Act was drafted in 1980, and the Model Real Estate Cooperative Act was drafted at about the same time. The Uniform Common Interest Ownership Act was drafted in 1982 to consolidate the three previous Acts into one comprehensive statutory scheme. All four Acts have sections which contain similar language. When the language between the four Acts is similar, citations are to the Uniform Condominium Act, the oldest and most widely adopted of the three Acts.

2. The Uniform Common Interest Ownership Act (UCIOA) has been adopted in seven states. Legislation adopting the UCIOA is pending in at least four other states. Citations are from the Official 1990 Text of Uniform Real Property Acts.

exclusive access to or use of the limited common property is limited to only a single or a few individual unit owners. Unif. Condominium Act, Section 1-103(16). Limited common property may include fixtures such as wires, conduits, chutes, flues, or bearing walls used by only one unit or owner, or fixtures such as shutters, awning, exterior doors, porches, patios, or balconies located outside the boundary of the unit and designed for use only by that particular unit. Unif. Condominium Act, Sections 2-102(2), (4).

Regardless of the form of community association, community associations have one principle in common: each owner in the association has an non-exclusive right to use the common area subject to reasonable regulation by the board of directors. This easement permits each owner access to the common areas; it does not permit an owner to exclude others from enjoying their own non-exclusive rights. If one owner usurps a portion of common property for that owner's exclusive use, all other owners are deprived of the use of that portion. Depriving an owner of an easement is the same as taking another's property. Any rule issued by the FCC must deal with the fact that granting any one owner exclusive right to use a portion of common property is a taking of other owners' easement right, which is an integral part of the property rights acquired by an owner when purchasing a unit, apartment, or lot in an association.

Some community associations have a great deal of common property while others have little property held in common. Association documents identify and classify the property in the development and classify this property as common, limited common, and individual. Due to the infinite variety of developments, it is difficult to state with specificity the amount of common property in a development. However, these property distinctions are

crucial to understanding the effect of the FCC's implementation of § 207 on each community association.

The association is established to manage the common property for the benefit of all owners. The association is comprised of all owners in the development; membership is mandatory. The owners elect a board of directors to govern the association. Treese, Community Association FactBook, 21. To manage the common property, the association has the ability to levy and collect assessments, which must be paid by all owners. Treese, Community Association FactBook, 1. The association also has the authority to adopt and amend bylaws and rules and regulations to carry out the association's management functions. Unif. Condominium Act Section 3-103(a). The association has the authority to regulate limited common areas. The legal documents which create the community association specify the property rights that the association and the owners have in regard to the three types of property described above.

III. AN INDIVIDUAL OWNER ONLY POSSESSES AN UNDIVIDED INTEREST IN COMMON PROPERTY: THEREFORE, THE OWNER MAY NOT CONVERT COMMON PROPERTY TO SUCH OWNER'S EXCLUSIVE USE

Even though an individual unit or lot owner has an interest in the common property, the owner does not have the right to alter or exclusively use any portion of this property. In a condominium, the unit owner owns the unit (which may or may not include the interior portion of the unit walls) in fee simple; no other person or entity has any ownership rights in

the unit. The unit owner only possesses an undivided interest in the common elements, which is shared with all other unit owners. Unif. Common Interest Ownership Act, § 1-103(8). Such an interest in the common areas creates a tenancy in common with all other unit owners. Dutcher v. Owens, 647 S.W.2d 948, 949-50 (Tex. 1983) (citations omitted).

In a cooperative, the individual resident owns no real property. Instead, the resident owns stock in the cooperative association and is permitted to exclusive use of a unit. Unif. Common Interest Ownership Act § 1-103(10). The cooperative association owns all of the real estate.

In a planned community, an individual solely owns a portion of real estate. The association holds title to the common areas. Unif. Common Interest Ownership Act § 1-103(4)(ii). The portion of individually owned property is usually larger than in a condominium residence. Therefore, the amount of property upon which an individual may install telecommunications equipment as permitted by 47 C.F.R. § 1.4000 is greater in a planned community, as opposed to a condominium and a cooperative.

It is well-established property law that a tenant in common must obtain the consent of all other co-owners before he or she may alter or use property owned in common. The tenant in common cannot divide the property and stake out his or her "share" (the size of which is determined by the percentage interest held by the individual in the property) and appropriate that share to the exclusion of the other tenants in common. Division of the property may only be accomplished by a suit for partition, not by nonjudicial action. Therefore, one tenant in common does not have a separate interest in any portion of the common property to the

exclusion of the other tenants. Property owned by tenants in common is not individually-owned property.

Since individual owners do not have a separable interest in common property, they may not alter or appropriate common property to their exclusive use. An individual may not separate out his or her interest in common property. Such an alteration or appropriation of common property would be a conversion of common property to a limited common element, or individual property, abrogating the rights of the other co-owners in that particular portion of common property. The UCA permits such conversions only after association approval (since the board is comprised of owners who would also be losing their property rights in the common area converted). Unif. Condominium Act § 2-111(2). Some states have different provisions in their condominium acts which require unanimous consent of all co-owners before an individual owner may unilaterally alter, appropriate, or change the use of common elements, particularly in condominiums.[3] This revision conforms more closely to real property law principles. Many a declaration (which creates the community association) also states that unanimous consent is required for approval of individual alterations to or appropriation of common property. In addition, many states have provided that common elements are not to be subject to a suit for partition or division.[4]

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[5] See, Haw. Rev. Stat. § 514A-13(b) (1985)
Mass. Gen. Laws Ann. 183A § 5(c)
Mo. Rev. Stat. § 448.130(3).

[4] See, Mass. Gen. Laws Ann. 183A § 5(b);
Mo. Rev. Stat. §448.070

Many cases illustrate this principle. In Kaplan v. Boudreaux, 410 Mass. 435, 573 N.E.2d 495 (Mass. 1991), the court held that an amendment to a condominium's bylaws that permitted an individual exclusive use of common elements was a violation of the Massachusetts Condominium Act, because such a conversion required the consent of all unit owners. A Connecticut appeals court also held that unanimous, formal consent was necessary before any unit owner converted common property to that owner's exclusive use. Grey v. Coastal States Holding Company, 22 Conn. App. 497, 578 A.2d 1080 (1990). Similar results have been obtained in Arizona (Makeever v. Lyle, 125 Ariz. 384, 609 P.2d 1084 (Ariz. App. 1980)), Arkansas (Preston v. Bass, 680 S.W.2d 195 (Ark. App. 1984)), Florida (Enright v. C. Towers Owners Ass'n., Inc., 370 So. 2d 28 (Fla. Dist. Ct. App. 1979)), Hawaii (Penney v. Association of Apartment Owners of Hale Kaanapali, 776 P.2d 393 (Hi. 1989)), Missouri (Porter v. Hawks Nest Inc., 659 S.W.2d 786 (Mo. App. 1983)), New Jersey (Newmeyer v. Gastman, No. A-1938-92TI (N.J. App. 2/4/94), and Ohio (U.S. v. Fairway Village Condominium Ass'n., 879 F. Supp. 798 (N. D. Ohio 1995).

Although in some instances an individual may convert common property to individual use with only association approval, there are many cases throughout the United States where an association board's decision to permit such conversion has been invalidated. In Posey v. Leavitt, 229 Cal. App. 3d 1236 (1991), the court found that consent of all owners to individual encroachment on common property was necessary, even though the common property was owned by the association, not the unit owners in common. The association itself could not approve such a conversion. In Florida, an appeals court invalidated an amendment to an association declaration to permit the association board to grant exclusive

easements of common elements to individual owners since each owner held the common property as a tenant in common. Roth v. Springlake II Homeowners Association Inc., 533 So. 2d 819 (Fla. Dist. Ct. App. 1988). These cases have invalidated these conversions, since they exclude other co-owners from a portion of the common property.

If the association owns the common property, the board's consent is usually required before an individual may convert common property to that individual's use. Unif. Condominium Act § 2-111.

This statutory and case law demonstrates that individual owners may not alter or appropriate the use of common property without the consent of either the board or all of the other unit owners. Any encroachment on common property without obtaining permission subjects the association board to liability for breach of their fiduciary duty towards the other unit owners. See, Posey v. Leavitt. Individual owners may not usurp common property because they do not own a divisible, separate interest in this property. In a condominium, individual owners own all of the common area, but no owner owns 100% of any portion of the common property to the exclusion of all other owners. Possessing an undivided interest in common property is not tantamount to a sole ownership interest in real property: one tenant in common cannot usurp the property rights of the other co-owners without their consent. To do so would be to deprive these co-owners of their fundamental property rights. In a cooperative or a planned community, the individual owner has no right to alter or appropriate common property, for the owner has no ownership right in that property.

For an individual owner to usurp a portion of the common area for individual use without the consent of the other owners would be the same as taking over property in which

the individual has no interest. For example, in a non-association subdivision, it is clear that one neighbor may not make use of another neighbor's garage, deck, or backyard without permission. Common law property principles mandate the same result when common property is involved.

Under the common law, legal action is available to bar appropriation of property by one who does not solely own that property. Those whose property is appropriated may file a trespass action against the appropriator, ejecting this person from the property. No damage to the property is necessary for a trespass action; mere entry onto the property is sufficient. Black's Law Dictionary 1502-3 (6th Ed. 1990).

In purchasing common property, a tenant in common necessarily receives a property interest limited by the interests of all other tenants in common. For any tenant to alter or use common property without the consent of those who also own the property is the same as converting property owned by others to their own use. The important question in determining whether an individual has a right to alter property is whether any other individual has an interest in that property. An individual cannot abrogate property rights of others without their consent. The fact that the FCC might rule that the association cannot prevent this appropriation makes the appropriation through common law and statutory remedies no less a taking.

IV. ANY FCC-MANDATED INDIVIDUAL OCCUPATION OF COMMON PROPERTY WOULD BE A PROHIBITED "TAKING" UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

If the FCC were to require that associations permit individual owners to install telecommunications equipment on rental common property, that would be taking property owned by landlords, tenants in common or the association. A taking without just compensation is clearly prohibited by the Fifth Amendment to the United States Constitution.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 868 (1982), is the applicable takings case. In Loretto, the United States Supreme Court found that a New York statute obligating a landlord to permit a cable television company to install its wires on the landlord's property was an uncompensated taking under the Fifth Amendment. The Court held that any "permanent physical occupation is a taking." Loretto, 458 U.S. at 426. It is irrelevant whether the state or a third party authorized by the state would be permanently occupying the space. Loretto, 458 U.S. at 432, n.9.

The Loretto analysis would apply to any FCC regulation requiring owners or associations to permit individual installation of telecommunications equipment on rental or common property.[5] In community associations where the common property is owned by the association, the owners clearly have no right to convert such property to individual use. The

[5] In most community associations, at least some of the units or lots are rented. If a renter in a community association were to seek to install telecommunications equipment on common property, he or she would be barred, both as a renter and a resident in a community association. If he or she were to seek installation on individually owned property which he or she rents, then installation would be prohibited, absent the owner's consent.

association and the individual owners are separate. In community associations where the common property is owned by tenants in common, state statutes prohibit common property partition. For example, a unit owner may not invade the commonly-owned roof and claim one section as his or her own to the exclusion of all others. Since common property in community associations is not unilaterally owned by an individual, that individual may not appropriate that property for individual use. Common property, whether owned by the association or co-owned by all unit owners, is equivalent to the landlord's property in Loretto. Neither rental nor common property are owned by the tenant or resident seeking to install telecommunications equipment.

Installation of telecommunications equipment on common property would be a permanent physical occupation, similar to that in Loretto. In Loretto, the cable company was permitted by the statute to install its "plates, boxes, wires, bolts, and screws" on the landlord's property. Loretto, 458 U.S. at 438. Such "placement of . . . fixed structures" was held to be a permanent physical occupation. Loretto, 458 U.S. at 437. In this case, the FCC would be mandating installation of similar devices on common property, as well as antenna, towers or masts, coaxial cables, screws, bolts, and other parts. These parts are "fixtures" which would be as permanent as those in Loretto.[6] Therefore, the occupation of common property envisioned by the FCC would be akin to that in Loretto, and constitute a taking.

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[6] In this case, the installation of individual telecommunications equipment would be even more permanent than that considered in Loretto. The Court noted there, that if the building were to convert to another non-residential use, the cable company would be required to remove the cable. Loretto, at 437. Since the FCC appears to have made no distinction between residential and commercial property for the purpose of this rulemaking proceeding, a conversion of the property to another use may not permit the owner or association to require removal.

In the earlier proceedings, some Commenters stated that Loretto is inapposite in this case because this regulation would give individual owners access to common property, not the service providers. SBCA DBS Reply at 5; DIRECTV DBS Reply at 8. These Commenters relied on a footnote in Loretto, which states:

> If § 828 [of the New York Code] required landlords to provide cable installation if a tenant so desires, the statute might present a different question from the question before us, since the landlord would own the installation. Ownership would give the landlord rights to the placement, manner, use, and possibly the disposition of the installation. The fact of ownership is . . . not simply incidental (citations omitted); it would give a landlord (rather than a [cable television] company) full authority over the installation except only as government specifically limited that authority.

Loretto, 458 U.S. 440, n.19. It is clear that landlord, tenant in common, or association ownership of the cable installation would remove a situation from the Loretto analysis. However, the FCC is not proposing that landlords, tenants in common, or community associations have any ownership rights in the telecommunications equipment installation by individual owners. The equipment would be owned by individuals or by the service providers (of course, if the telecommunication equipment were rented by the individual, the situation would be the same as in Loretto). The association would have no control over the means, method, and location of telecommunications equipment installation in the situation envisioned by the FCC. Therefore, Loretto would still apply to any exclusive use of common property by individual owners, as the association would not own the installation or have control over its means, method, and location.

Commenters have also argued that the situation here would be different from that in Loretto, because the individual owner would be permitted access to the property, not the

service provider, and because this situation would be similar to a regulation governing the landlord-tenant relationship. DIRECTV, DBS Comments at 8. DIRECTV cites FCC v. Florida Power Corp., 480 U.S. 245, 94 L. Ed. 2d 282, 107 S. Ct. 1107 (1987), as support for this distinction. Florida Power, however, states, "it is the invitation, not the rent, that makes the difference. The line which separates these cases from Loretto is the unambiguous distinction between a commercial lessee and an interloper with a government license." Florida Power, 480 U.S. 252-253. (emphasis added). In Florida Power, the cable companies were invited (for a fee) to enter into a pole attachment agreement. Due to this invitation, the subsequent regulation of the rent to be paid Florida Power was not deemed to be a taking. The Court distinguished this case from Loretto, because the Pole Attachments Act did not require Florida Power "to suffer the physical occupation of a portion of his building by a third party," Florida Power, at 480 U.S. 282, citing Loretto, 458 U.S. at 440, which would be the case in this situation. Therefore, Florida Power is inapposite to this situation.

Additionally, in Massachusetts, a state statute mandating cable installation on rental property, if requested by the tenant, has been held unconstitutional. Greater Worcester Cablevision, Inc. v. Carabetta Enterprises, Inc., 682 F.Supp. 1244 (D. Mass. 1985). The statute required a taking by "obliging landlords to permit cable operators to install cable equipment on their property." Greater Worcester Cablevision, at 1247. Under this analysis, it is irrelevant as to which party is granted access to another's property; such an invasion of another's property is still an uncompensated taking.

If the FCC were to issue a rule relating to the installation of individually-owned telecommunications equipment on common property, then this rule would almost certainly

violate the taking clause of the Fifth Amendment. Individual owners do not unilaterally own common property; therefore, any installation mandated by the FCC would be a prohibited installation on another's property. Since installation of telecommunications equipment would be a permanent physical occupation of common property, the Loretto analysis would apply. Any FCC rule obligating associations to permit individual telecommunications equipment on common property would be a taking. Any such taking would be unconstitutional unless compensated. U.S. Const. amend. V.

V. CONGRESS DID NOT GRANT THE FCC AUTHORITY TO PROVIDE COMPENSATION FOR TAKING COMMON PROPERTY

Section 207 of the Telecommunications Act of 1996 did not grant the FCC authority to take common property for individual occupation and use. Section 207 does not preempt common law property law principles. In addition, § 207 does not provide compensation for the taking of this property.

Section 207 of the Telecommunications Act provides as follows (emphasis added):

> Within 180 days after the date of enactment of this Act, the Commission shall, pursuant to section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming service through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast television and DBS services.

Section 207 grants the FCC authority to preempt "restrictions" on access to telecommunications services, not real property law principles. The legislative history on § 207 further clarifies that: