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

Re: IB Docket No. 95-59
CS Docket No. 96-83
Regulation of Antennas in Homeowners Association Common Areas

Dear Mr. Caton, and Commissioners:

This letter is intended to address the issue of the contemplated F.C.C. rules regarding the regulation of antennas in the common areas of homeowners associations. It is my understanding you have invited comments on this issue.

I have been practicing law for eighteen years. I have been specializing exclusively in homeowners association law since 1985, at which time I went to work for Wayne Hyatt, a preeminent and pioneering attorney in this area. My current firm, Epsten & Grinnell, also specializes in "community association" law. Personally, I do a little of everything, from rendering opinions on what an association can and cannot do, to amending governing documents, to actual trial work. I have litigated several cases involving satellite dishes installed in violation of private covenants.

First a few words about "common area". Understanding its nature is essential to any analysis of individual property rights. Common area derives its name from a form of joint property ownership known as "tenancy in common." This simply means two or more persons own the property, jointly. In the typical community association deed, the homeowner's interest in the common area is expressed as, for example, an "undivided 1/100th interest." In a community of one hundred (100) units, this would entitle each of the one hundred homeowners to the use and possession of the entire (i.e. undivided) common area. This concept should be distinguished from "exclusive use common area", which is a specific portion of the common area to which a homeowner has been granted the exclusive use and possession by a deed or by the governing documents.

In some associations the "common area" is actually owned by the association to which it has been deeded by the developer. Often

it is called the "recreation area." To call it common area is really a misnomer, since it is not owned in common by the homeowners. In such cases, the governing documents generally give each homeowner an "easement of enjoyment" or some equivalent interest in the common area. These "easements" are property rights equivalent to, for example, an "easement for ingress or egress" typically found in a homeowner's deed. Thus, in either case (common area owned in common by homeowners or owned by the association) the homeowners possess a judicially enforceable property interest in the common area.

What occurs when one owner seeks to take a portion of the common area for his or her own exclusive use? The issue of the individual homeowner's right to use a specific portion of the common area, to the exclusion of other homeowners, was addressed in California in the case of Posey v. Leavitt, 229 Cal.App.3d 1236 (1991). In this case, a homeowner built an addition to his deck, extending it into the common area. The extension obstructed the view of a neighbor who sued both the deck owner and the Association for granting permission to build the extension. The Court found it unclear as to who owned the common area (homeowners jointly vs. Association), but treated it as if it were owned by the Association with the homeowners having easements of enjoyment. The decision is, however, equally applicable to either situation.

The Court draws the following conclusion: "an encroachment into the common area impairs the easements of the other owners over the common area, and thus requires the consent of all of the homeowners." Stated differently, whenever the individual homeowners have an express property right in the common area, whether it be an easement of enjoyment or joint ownership, each and every individual owner lacks both the right and power to use a portion of the common area to the exclusion of the others. The unanimous (100%) consent of all homeowners is required. To do otherwise constitutes a direct violation of, and infringement upon, the judicially recognized property rights of the other homeowners.

As an experienced practitioner, I can assure you that obtaining the consent of all homeowners on any issue is a virtual impossibility. I have never seen it occur. Many homeowner associations struggle to get a majority to act on anything, and many struggle to obtain a quorum (51%)in order to hold a valid membership meeting. A "one hundred percent" requirement means it will not happen.

In the context of an F.C.C. rule with respect to antennas in the common area, any rule protecting or authorizing a right to

install antennas would (1) violate individual property rights as they now exist in the State of California, and (2) be meaningless if coupled with the "one hundred percent" requirement since permission will never occur. From both a legal and a practical point of view, such a rule makes no sense in light of existing property rights, and would most certainly be the subject of years of litigation seeking to defend and vindicate the property rights which such a rule would impair.

But there are other, more practical reasons for restraint in the common area. Community association living is inherently high density. Many people have yet to adjust to living in close proximity to a large number of people, and having only limited space for recreation and other uses. Many are offended and adverse to the fact so many rights of control are ceded to the homeowners association under this type of residential scheme, and only a small group of individuals (Board of Directors) controls many facets of their home life. A rule which sends the message that your property rights are going to be further diluted by the Federal Government is not the message that should be sent. Protecting homeowner's rights to use their separate interests is one thing; granting virtually unrestricted access by others to property each homeowner owns as a tenant in common offends the integrity of individual property rights.

Consider the impact of a rule which provides virtually unrestricted access to common areas for antenna installation purposes. Certainly some areas will be greatly preferred over others, resulting in a concentration of antennas. Those living nearby will likely find a decrease in the market value of their units from the clutter and congestion of antennas and wires. Homeowners will compete for the best locations. Pro and anti antenna factions will develop, a very common occurrence in homeowner associations when a right of use issue arises. Maintenance issues will arise, and the homeowners association will become the antenna policeman, required to monitor the common area for the damage and safety effects from the proliferation of antenna structures.

In my experience, it would make more sense to focus upon a "community" antenna in the common area, as opposed to allowing the proliferation of individual antennas. One community antenna which could be accessed by all would permit central control by the homeowners association, and virtual elimination of all of the legal and practical obstacles. Consider a rule that, perhaps, guarantees

such a community antenna when it is requested by a significant number of homeowners. This would be the appropriate response in light of the true essence of community association living.

Your consideration of my comments and concerns is greatly appreciated.

Very truly yours,

EPSTEN & GRINNELL

James F. Danow

JFD:slm