of the fabric upon which the modern city must design the future."[15]

So long as the private design review process is conducted along procedural due process requirements it is a legitimate and desirable exercise of property owners' interests which will be upheld by the courts. The design and environmental purposes of public and private restrictions, reasonably limited and nondiscriminatory, should be an exemption extended by the Commission.

Protection against abuse of restrictions on devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution services, or direct broadcast satellite services is afforded by the discipline of the market. Deregulation and the freeing of competitive forces already put in place by the Commission are effective restraints on abuse. Thus, analysis of the Proposed Regulation should give substantial weight to aesthetic controls imposed by landlords and owners through private agreements.

F. RELIANCE ON PRUNEYARD IS UNWARRANTED

Several commenters have relied upon PruneYard in supporting the Proposed Regulation. In analyzing the Proposed Regulation to determine whether it violates the

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[15] Metromedia, Inc. v. City of Pasadena, 216 Cal. App. 2d 270 (1963), app. dism'd, 376 U.S. 186 (1964).

Takings Clause, access to video information services does not rise to the level of a colorable constitutional argument based on the First Amendment.

As described in connection with Loretto, government policies and public benefits are irrelevant in per se takings. As to First Amendment concerns, the Loretto Court acknowledged it had no reason to question the finding of the New York Court of Appeals that the act served the legitimate public purpose of "rapid development of and maximum penetration by a means of communication which has important educational and community aspect." Loretto, 458 U.S. at 425. Nevertheless, the Court concluded that "a permanent physical occupation authorized by government is a taking without regard to the public interests it may serve." Id. at 426.

In PruneYard, which dealt with a state constitutional right to solicit signatures in shopping centers, there was no permanent physical invasion of the property (unlike the Proposed Regulation) and the Court applied the Penn Central three-factor analysis. PruneYard does not support a First Amendment limitation to or weighting in such analysis. In holding that a taking did not occur, a key finding for the Court was that preventing shopping center owners from prohibiting this sort of activity would not unreasonably impair the value or use of their property. PruneYard, 447 U.S. at 83. As the concurring

opinion of Mr. Justice Marshall (the author of the subsequent Loretto opinion) states, "there has been no showing of interference with appellant's normal business operations." Id. at 94. Indeed, the use of the shopping center's property in PruneYard was consistent with the reasons that the property was held open to the public, namely that it is "a business establishment that is open to the public to come and go as they please." Id. at 87.

The decision quoted from the California Supreme Court's opinion which distinguished this shopping center, with 25,000 persons of the general public daily using the property, from other properties (or even portions of properties, such as roof space) where use is more restricted:

> A handful of additional orderly persons soliciting signatures and distributing bandbills in connection therewith, under reasonable regulations adopted by defendant to assure that these activities do not interfere with normal business operations . . . would not markedly dilute defendant's property rights.

Id. at 78.

This situation differs completely from the position of property owners subject to the Proposed Regulation in that the owner's opening of the property to the tenant does not extend an invitation to use the private property of the owner, such as the roof, which is specifically excluded from the demised premises. The notion of implied

consent to use the property which the Court relies on so heavily in PruneYard is not applicable here where the owners are careful to delineate the boundaries of the demised property to exclude areas such as the roof and exterior walls.

In particular, the PruneYard Court was careful to distinguish on the Penn Central three-factor grounds the facts and state constitutional right in PruneYard from the findings of unconstitutional takings despite claims of First Amendment protections in Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972) (finding against First Amendment claims challenging privately owned shopping center's restriction against the distribution of handbills), and Hudgens v. NLRB, 424 U.S. 507, 517-21 (1976) (finding against First Amendment claims challenging privately owned shopping center's restriction against pickets). PruneYard, 447 U.S. at 80-81.

G. INCREASED EMPHASIS BY COURTS AND LEGISLATURES UPON THE PROTECTION OF PROPERTY RIGHTS

As explained above, the general movement of the Court is to protect private property under the Taking Clause.[16]

Along the same lines is Executive Order 12630 of March 15, 1988, "Governmental Actions and Interference with Constitutionally Protected Property Rights." Refer-

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[16] This trend has been underlined by many experts on constitutional law, including Chief Judge Oakes of the Second Circuit Court of Appeals. Oakes, "Property Rights" in Constitutional Analysis Today, 56 Wash. L. Rev. 583 (1981).

ring to Court decisions, it states that in reaffirming the fundamental protection of private property rights they have also "reaffirmed that governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required." Section 1(b) requires that government decision-makers should review their actions carefully to prevent unnecessary takings.

Section 3 lays down general principles to guide executive departments and agencies. Section 3(b) cautions that "[a]ctions undertaken by government officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may constitute a taking of property." Section 3(e) warns that actions that may have a significant impact "on the use or value of private property should be scrutinized to avoid undue or unplanned burdens on the public fisc." Finally, Section 5(b) requires executive agencies to "identify the takings implication" of proposed regulatory actions.

In addition, several states have passed different forms of takings impact assessment laws and value diminution laws imposing compensation requirements when a taking, variously defined, is imminent.

Loretto and Hodel are judicial inventions for putting some kind of halt to the denaturalization and disin-

tegration of the concept of property. As the Court continues its century-long struggle to define an acceptable balance between individual and societal rights, it is apparent at least to the justices of the Court that this constitutional riddle needs more definite answers. By referring to the common understanding of what property at the core is all about, the settled usage that gives rise to legally recognized property entitlements, the Court is building up trenchant legal tests for a taking.

This is a reaction to its finding how hard it is to maintain an open-ended balancing posture; in the Penn Central case, the Court acknowledged difficulty in articulating what constitutes a taking. A per se rule, whether it be a permanent physical occupation or another core stick of the bundle denominated "property," is a bright line that provides a trenchant legal test for a taking, one that can be understood by a lay person and one that lawyers can utilize in advising clients. The cases laying down hard-and-fast rules are a token of the limitations on popular government by law.

The Court's trend toward defining the Fifth Amendment to set up of a private sphere of individual self-determination, securely buffered from politics by law, militates against the adoption of the Proposed Regulation. Elimination of the private property owner's power of possession, use, and enjoyment of the space used for

antennae installations and removal of the power to control entry by an occupant is not likely to survive judicial (or legislative) scrutiny.

II. THE COMMISSION MUST APPLY A NARROW CONSTRUCTION OF THE STATUTORY PROHIBITION ON CERTAIN PRIVATE RESTRICTIONS

The relevant case law is clear that, in light of the substantial Fifth Amendment implications described above in this Declaration, the FCC must narrowly interpret Section 207. The statutory directive "to prohibit restrictions" and the House Report explanation that Congress intended to preempt "restrictive covenants or encumbrances" fall far, far short of a broad statutory mandate to promote various video signal delivery businesses through a requirement that owners allow placement of or place antennae at the sole discretion of occupants on owners' or common private property.

As the D.C. Circuit Court of Appeals held in Bell Atlantic v. FCC, 24 F.3d 1441, 1445 (D.C. Cir. 1994), "[w]ithin the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions."[17] The court went on to state that when administrative interpretation of a statute would create a class of cases with an uncon-

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[17] Citing Rust v. Sullivan, 500 U.S. 173, 190-91 (1991); Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575-78 (1988).

stitutional taking, use of a "narrowing construction" prevents executive encroachment on Congress's exclusive powers to raise revenue and to appropriate funds. Id.

A fair interpretation of Section 207 does not require construing the statutory direction to prohibit certain private restrictions as going beyond the restrictions covered by the implementing rule the Commission adopted in August 1996. That rule -- addressing "any private covenant, homeowners' association rule or similar restriction on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property" -- encompasses the full extent (and perhaps more) of what the House Report intended as "restrictive covenants or encumbrances." The Proposed Regulation -- whether as a right to installation by occupants, an obligation on owners, a right to installation by third parties, or other limit on restrictions in private agreements on such action -- would be contrary to the narrowing construction of Section 207 required to avoid an unconstitutional taking.

Moreover, the Commission does not contend in its Further Notice (and cannot reasonably contend) that the proposed implied taking power is necessary in order to avoid defeating the authorization in and purpose of Section 207. See Bell Atlantic, 24 F.3d at 1446. While the Commission asks whether a further requirement on

landlords is authorized under Section 207, the § 1.4000 rule does not depend on restrictions on owners' or common private property.

The constitutional demand for a narrowing construction of Section 207 against the Proposed Regulation is particularly strong in light of the contrast between Section 207 and three other sections of the Telecommunications Act of 1996. These other sections clearly and specifically authorize a physical occupation of certain facilities, office space or other property as to certain other entities. In contrast, proponents of the Proposed Regulation can only argue that the physical taking for video reception equipment should be promulgated pursuant to a purported implied broad mandate and general policy from Section 207.

1. Section 224(f)(1) states that a "utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduct, or right-of-way owned or controlled by it." Sections 224(d)-(e) address compensation, and Section 224(f)(2) addresses insufficient capacity, safety, reliability and generally applicable engineering purposes.

Reflecting the huge complexities that would be involved in implementing the Proposed Regulation for landlords, the Commission in its August 8, 1996 intercon-

nection order (CC Docket No. 96-98) concluded that "the reasonableness of particular conditions for access imposed by a utility should be resolved on a case-specific basis." (Par. 1143) In particular, the Commission rejected the request by WinStar Communications to interpret this right of access to include roofs and riser conduit; the Commission recognized that "an overly broad interpretation of ['pole, duct, conduit, or right-of-way'] could impact the owners and managers of small buildings . . . by requiring additional resources to effectively control and monitor such rights-of-way located on their properties."[18]

2. Section 251(b)(4) requires local exchange carriers to "afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services at rates, terms, and conditions that are consistent with section 224".

3. Section 251(c)(6) requires incumbent local exchange carriers to provide "physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier." This section also specifies "rates, terms and conditions that are just, reasonable, and

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[18] Par. 1185 (emphasis added) & n.2895; WinStar Communications Petition for Clarification or Reconsideration at 4-5 (Sept. 30, 1996).

nondiscriminatory," and addresses space and other technical limitations.

When Congress intended a taking with compensation in these other circumstances, it clearly and specifically indicated that intention in the Telecommunications Act of 1996. Nothing in Section 207 addresses a taking or compensation for placement of antennae on owners' or common private property, and no such requirement can be implied.

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EDUCATION

B.A., New York University, 1940
M.A., University of Wisconsin, 1941
LL.B., Harvard Law School, 1948
Fellow, American Academy of Arts & Sciences

TEACHING

Teacher, Harvard Law School, 1952-present;
Louis D. Brandeis Professor of Law, Harvard University, 1976-present

PUBLIC SERVICE

Federal

Chairman, President Johnson's Task Force on the Preservation of Natural Beauty, 1964
Assistant Secretary for Metropolitan Development, HUD, 1966-1969
Chairman, President Johnson's Task Force on Suburban Problems, 1967-1968
Director, New Communities Corporation, 1974-1976
Chairman, President Carter's Task Force on Housing, Land Use and the Environment, 1976

State

Chairman, Joint Center for Urban Studies, MIT-Harvard, 1969-1973
Director, New Communities Corporation, 1974-1976
Chairman, Massachusetts State Housing Finance Agency, 1975-1977
Director, Gov. Dukakis's Management Task Force, 1974-1978
Special Master to the Superior Court in *Board of Education v. City of Boston*, April 1981
Special Master to the Superior Court in *City of Quincy v. MDC*, 1983

SELECTED PUBLICATIONS

Land Planning Law in a Free Society (1950)
Land-Use Planning: A Casebook on the Use, Misuse, and Re-Use of Urban Land (1959, 3rd ed. 1976, suppl. 1980, 4th ed. 1989, suppl. 1991 and 1992)
Federal Credit and Private Housing (1960)

Law and Land (1964)
Golden Age of American law (1965)
Housing the Poor in Suburbia (with D. Iatridis), (1985)
Property and Law (with L. Liebman), (1977, 2nd ed. 1986)
Financing the Solar Home (with D. Barrett), (1978)
Cities, Law and Social Policy (1984)
Of Judges, Politics and Flounders: Perspectives on the Cleaning Up of Boston Harbor (1986)
The Wrong Side of the Tracks (1986)
Zoning and the American Dream: Promises Still to Keep (edited with J. Kayden), (1989)
Landmark Justice. The Influence of William J. Brennan on America's Communities (with J. Kayden (1989)
Suburbs under Siege: Race, Space, and Audacious Judges (1996)

PUBLIC SERVICE ACTIVITIES

Consultant, Agency for International Development
Special Advisor to Governor on Health Services Financing
Chairman, Lincoln Institute of Land Policy Round Table
Chairman, Town Planning Committee of the Jerusalem Committee
Vice President, World Society and Ekistics
Trustee, Zelda Zinn Foundation
Member, Editorial Board, Town Planning Review
Advisor, John Simon Guggenheim Memorial Foundation
Board of Governors, Haifa University

MEMBERSHIP IN PROFESSIONAL ORGANIZATIONS

Advisory Committee of the Conservation Foundation
American Bar Association
American Academy of Arts and Scientists
American Law Institute
American Institute of Planners
British Town Planning Institute
Building Advisory Council of the National Academy
Committee on Environmental Studies of American Academy of Arts and Sciences
Department of legal Studies of the National Academy of Sciences Highway Research Board
Phi Beta Kappa

PRIVATE PRACTICE

General Editor, Beacon Press series, "*Classics of the Law*"
Consultant, Agency for International Development Integrating the role of Special Masters in complex institutional litigation for 20th Century Foundation

Working on an Encyclopedia of International Planning Law, and Joint Ventures of Public and Private Sectors in Real Estate Development

Involved in organizing conferences between U.S. and former U.S.S.R. environmental protection institutions to evaluate, compare and develop recommendations for design and improvement

Actively promoting cooperation between the United States and Eastern Europe in areas of privatization, land-use reforms and planning, housing and economic development

Working closely with the World Bank to develop privatization and housing programs for Poland

Working on a Resident Advisor's Program for Russia and Eastern Europe, under the aegis of the Agency for International Development

Consultant to the Spanish Government on reorganization of Spanish railroads

Founder, Chairman of the Board and Director of Advanced Nuclear Magnetic Resonance Systems, Inc.

Founder of Integrated Computer Systems

EXHIBIT B

America's Rental Housing

Number of Rental Units on Property	Number of Properties
1	8,967,891
2	1,596,877
3	342,183
4	365,660
multihousing:	
5 - 20	476,934
21 - 40	63,771
41-49	12,064
50-99	30,976
100 - 199	21,354
200 - 299	7,694
300 - 399	2,857
400 - 499	1,216
500 - 599	423
600 - 699	216
700 - 799	127
800 - 899	78
900 - 999	48
1,000 + units	161

Source:
1991 Residential Finance Survey, U.S. Bureau of the Census

EXHIBIT C

America's Rental Housing

Apartment Properties with 5 - 40 Units

Number of Rental Units on Property	Number of Properties	Number of Units
5	91,394	456,970
6	120,960	725,760
7	36,902	258,314
8	74,012	592,096
9	18,776	168,984
10	26,984	269,840
11	9,888	108,768
12	32,355	388,260
13	7,080	92,040
14	9,858	138,012
15	6,792	101,880
16	16,308	260,928
17	4,286	72,862
18	8,897	160,146
19	3,072	58,368
20	9,370	187,440
21	4,198	88,158
22	4,307	94,754
23	2,431	55,913
24	13,248	317,952
25	2,819	70,475
26	3,436	89,336
27	1,594	43,038
28	3,561	99,708
29	1,020	29,580
30	4,123	123,690
31	1,758	54,498
32	4,823	154,336
33	1,719	56,727
34	1,538	52,292
35	1,325	46,375
36	3,887	139,932
37	1,176	43,512
38	1,588	60,344
39	1,515	59,085
40	3,705	148,200
Total	540,705	5,868,573

Source: 1991 Residential Finance Survey, U.S. Bureau of the Census

EXHIBIT D

National Leased Housing Association
serving America's rental housing needs
NLHA

1300 19TH STREET, N.W. / SUITE 410 / WASHINGTON, D.C. 20036
(202) 785-8888 / FAX (202) 785-2008

CONSIDERATIONS FOR FEDERALLY SUBSIDIZED HOUSING
RE: SECTION 207 OF THE TELECOMMUNICATIONS ACT OF 1996

If the FCC were to require that all owners of multi-building residential properties make reception available using their own facilities, a number of issues arise with regard to privately-owned federally subsidized housing.

Generally, any operating costs incurred by owners of subsidized housing ultimately are paid by the federal government. There are a variety of ways in which the costs are passed through to the Department of Housing and Urban Development.

I. Increased Rental Payments

Under the Section 8 project-based rental assistance program, owners receive a subsidy from the federal government (through HUD) for renting to low income families.

Generally, when the subsidy is tied to the project, HUD has the ability to review the operating expenses of the property and deem whether such expenses are "eligible." Should the FCC require owners to install satellite dishes on Section 8 buildings, HUD would be required to amend the list of "eligible" expenses to include the purchase and maintenance of the satellite dishes. These costs will increase the operating budgets of the properties and therefore necessitate rent increases. Such rent increases are paid through an increase in the monthly subsidy paid by HUD. The cumulative effect of such rent increases (on over 1 million units) would put a substantial drain on HUD's scarce resources, requiring additional appropriations from Congress.

II. Project Reserves In some instances, the cost of the satellite dishes may be paid out of the property's "residual receipts" account - as these monies typically revert to HUD when the subsidy contract expires - the federal government is still footing the bill.

Denise B. Muha
Executive Director

OCT 24 199

EXHIBIT E

Hills Communities

7420 Montgomery Road • Cincinnati, Ohio 45236
(513) 984-0300 • FAX (513) 985-4802

October 28, 1996

Peter W. Schwartz
National Apartment Association
201 N. Union Street, #200
Alexandria, VA 22314

Dear Peter:

We note with interest a recent filing by Phillips Electronics in the Further Notice of Proposed Rulemaking before the Federal Communications Commission in IB Docket No. 95-59 and CS Docket No. 96-83. In their filing, they note our Wellington Place property in Fishers, Indiana.

It is true that on this particular 500 unit property we have an agreement with Novner Enterprises, Inc. of Cincinnati, Ohio to provide cable TV and DBS service to our Wellington Place community in Fishers, Indiana. Hills doesn't have an exclusive agreement with Thompson Consumer Electronics. Novner Enterprises, Inc., at great cost to themselves, has wired our community to provide DBS service to those tenants who desire to spend the extra money required to view DBS service. At this time only 20% of the residents are taking the DBS alternative because the cost is so much higher than typical cable TV service. We found that to rewire our existing communities for DBS would be cost prohibitive and would cause monumental legal problems with our current cable TV service providers. We would have to internal wire all existing apartments to make this system aesthetically pleasing for a small number of tenants who would use this service.

We understand that Phillips is using this property as an example supporting a mandate from the FCC for installation of a similar system for all apartment properties in the United States. Such a mandate would require a giant leap of economic and legal faith.

Hills Communities also has other properties where we would not even consider the type of system at Wellington Place. Telecommunications systems have to be looked at on a case-by-case basis in view of the economic, technical, and competitive situation at each location. If the FCC mandated that each property install a satellite system, the economic realities and preexisting legal arrangements with other technologies that are already in place would create a nightmare for Hills Communities.

In many cases, a satellite antenna system makes absolutely no sense because of market realities. Having to retrofit all of our existing properties is totally impractical and may create all types of legal problems with existing system providers. Even going forward, we don't see how a universal mandate makes any sense. This technology is changing so fast that we are already worried about being able to keep up and stay ahead of the technology tidal wave. To do so, we need to keep all of our options open.

Sincerely,

Hills Real Estate Group, A Limited Partnership
By: Hills Developers, Inc., General Partner

Stephen Guttman
President
/pjt