maintenance and repair and can be liable for failure to perform its duties properly." We agree entirely with this statement, and would only add that building owners are often found liable for the acts of others even when they have performed their own duties properly. Consequently, control over safety violations is of even greater concern than the FNPRM stated.

In any event, we repeat that the Commission must not interfere with the authority of building owners and managers to preserve the safety and security of their properties.

Conclusion

The Commission should recognize the substantial Constitutional obstacles that foreclose the adoption of the extreme measures urged by the service providers to allow them to force their way onto private property. The Commission should further recognize (1) that it lacks the power under Section 207 of the 1996 Act and Section 303 of the 1034 Act to prohibit property owners from controlling the placement of antennas on multi-tenant property subject to leases and in common areas, (2) that it lacks jurisdiction to compel landlords *qua* landlords to themselves provide reception services to their tenants, and (3) that there are sound and persuasive constitutional, statutory,

and policy reasons why the Commission should not preempt these private, non-governmental relationships.

Respectfully submitted,

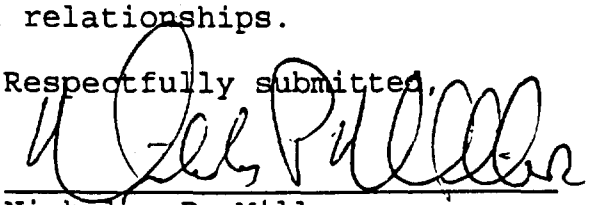

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EXHIBIT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Preemption of Local Zoning Regulation of Satellite Earth Stations	)	IB Docket No. 95-59
	)	
In the Matter of	)	
	)	
Implementation of Section 207 of the Telecommunications Act of 1996	)	CS Docket No. 96-83
	)	
Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service	)	

DECLARATION OF CHARLES M. HAAR
IN SUPPORT OF REPLY COMMENTS OF
NATIONAL APARTMENT ASSOCIATION
BUILDING OWNERS AND MANAGERS ASSOCIATION
NATIONAL REALTY COMMITTEE
INSTITUTE OF REAL ESTATE MANAGEMENT
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
NATIONAL MULTI HOUSING COUNCIL
AMERICAN SENIORS HOUSING ASSOCIATION
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS

I, Charles M. Haar, declare as follows:

I submit this Declaration in support of the Reply Comments of the above-named associations.

I am a Professor of Law at Harvard Law School and have served in this capacity since 1955. I have taught and written on property and constitutional law issues for thirty years. A copy of my resumé is attached. I have edited a Casebook on Property and Law (with L. Liebman),

and a Land-Use Planning Casebook (5th ed. 1996). The most recent book is Suburbs Under Siege; Race, Space, and Audacious Judges (Princeton U. Press 1996). I was Chief Reporter for the American Law Institute's Model Land Development Code in 1963-65; Assistant Secretary for Metropolitan Development in the U.S. Department of Housing and Urban Development in 1965-68; Chair of Presidential Commissions on housing and urban development (Presidents Johnson and Carter); and Chairman of the Massachusetts Housing Finance Agency.

Based on the foregoing, I submit to the Commission in this Declaration the following analysis making two points: (1) a regulation that would require placement of antennae on owners' and common private property (by tenants or other occupants, involuntarily by owners or by third parties), or limit restrictions in private agreements on such action, would be a taking under the Fifth Amendment, according to several lines of cases; and (2) because of the Fifth Amendment implications, the Commission must apply a narrow construction of the Section 207 prohibition on certain private restrictions.

I. THE PROPOSED REGULATION IS A TAKING

A. A "PER SE" TAKING

Under current United States Supreme Court precedent, "a permanent physical occupation authorized by government is a taking without regard to the public interests that

it may serve." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982). Loretto involved a New York statute which authorized the installation of cable television equipment on plaintiff Loretto's apartment building rooftop. The Court held that this statute constituted a taking under the Fifth Amendment as applied to the states under the Fourteenth Amendment. The installation involved the placement of cables along the roof "attached by screws or nails penetrating the masonry," and the placement of two large silver boxes along the roof cables installed with bolts. Id. at 422. In finding a taking, the Court noted that "physical intrusion by government" is a property restriction of unusually serious character for purposes of the Takings Clause. Id. at 426.

In the Commission's Further Notice of Proposed Rulemaking, the Commission seeks comments on a proposed rule in connection with Section 207 of the Telecommunications Act of 1996 (the "Proposed Regulation"). The Proposed Regulation, in requiring that owners allow placement of antennae (by occupants, involuntarily by owners or by third parties) on owners' and common private property, or limit restrictions in private agreements on such action, would directly implicate the Loretto rule. Such installation of reception equipment would be precisely the kind of permanent physical occupation deemed as a

taking by Loretto and the line of cases which follow its analysis.

The reasoning of Loretto extends from an analysis of the character of property rights and the nature of the intrusion by government. The Court did not look at the justification for the government's physical intrusion, but exclusively at what the government had done to the claimant. It considered the injury to the claimant to be particularly serious not because of the financial loss involved or other factors, but because of the intrusiveness of the government's action. The Court found that the claimant could not use the physical area occupied by the cable equipment and concluded that it is unconstitutional permanently to prevent an owner from occupying her own property. Consequent upon the occupation, the "owner has no right to possess the occupied space himself ... [he] cannot exclude others [from the space, and he] can make no nonpossessory use of the property." Id. at 435-36. A permanent physical occupation is an especially severe incursion on the ordinary prerogatives of ownership, and constitutes a per se taking of property; this per se rule provides certainty and underscores the constitutional protection of private property.

Subsequent Court opinions explicitly reaffirm the Loretto rule: a regulation that has the effect of subjecting property to a permanent physical occupation is a

taking per se no matter how trivial the burden thus imposed.[1]

In Loretto, the Court addressed the issue of the public benefit of the proposed regulation, finding that

> where the character of governmental action is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.[2]

Following this reasoning, the Proposed Regulation effects a Fifth Amendment taking on a property owner who -- pursuant to a lease or other private agreement -- cannot prevent placement on the owners' or common private property of one or what could be many satellite dishes, microwave receivers, and other antennae. The Court will not entertain any weighing of the relative costs and benefits associated with the regulation in the case of a permanent physical occupation. Therefore, any public benefit or purpose (such as increased competition in video services or the provision of video services with educational and cultural benefit to the consumer) is irrelevant to the analysis of whether a taking has oc-

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[1] See, e.g., Nollan v. California Coastal Commission, 483 U.S. 825, 831 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 489 n.18 (1987); Yee v. City of Escondido, 503 U.S. 519, 527 (1992).

[2] Loretto, 458 U.S. at 434-35 (citing Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978)).

curred. Once it is established that a regulation authorizes a permanent physical occupation, as the Proposed Regulation would, a taking has occurred and further analysis of importance of public benefits or degree of economic impact on the owner is moot.

B. ASSUMING ARGUENDO THAT CERTAIN RECEPTION EQUIPMENT IS NOT A PERMANENT INSTALLATION, THE PROPOSED REGULATION REMAINS A TAKING

Some commenters have suggested that some installations of reception equipment pursuant to the Proposed Regulation may not be "permanent" and thus not subject to the Loretto per se takings rule.[3]

The Court addressed a situation in Nollan in which the occupation (a requirement of public access) was characterized as not permanent yet the Court still found a taking. There is a literal sense in which Nollan's land was not subject to a "permanent" physical occupation as Loretto's was, but the Court dismissed this contention. What is pivotal in the Court's view must be the state of being legally defenseless against invasion at any time. Even for non-permanent antennae installations, Court precedent would render the Proposed Regulation a taking.

A regulation falling outside the per se takings rule for permanent physical occupations would be construed

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[3] Perhaps certain equipment could be placed on a balcony and secured by ballast or its own weight, owned by the occupant and removed when the occupant vacated the premises.

under the Penn Central factual analysis. Penn Central identifies three factors which have "particular significance" in this analysis: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with investment-backed expectations"; and (3) "the character of the governmental action."[4] An examination of each of these factors in the context of the Proposed Regulation renders the same outcome as under the Loretto rule: the Proposed Regulation works a taking on the property owner.

a. Severe economic impact of the Proposed Regulation on owners. The market for residential as well as commercial property depends in large part on the appearance of the building itself and the area surrounding the building. If occupants (be they condominium owners, apartment tenants, commercial lessees or owners without exclusive use or control of the building) were allowed to install reception equipment at their discretion around the property, the value of the property on the market could decrease substantially.

Moreover, the Proposed Regulation would interfere with the ability of an owner (or association of owners) to manage its property. Effective property management requires an owner to decide on a property-specific basis

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[4] Penn Central, 438 U.S. at 124. See also Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

the physical aspects, facilities (including rapidly evolving communications equipment) and service offerings of its property based on its own complex, multiyear analysis of consumer demands, supply opportunities and costs. Instead of market-oriented management, the Proposed Regulation would require owners to devote substantial resources to implementing the government-imposed rules, including resources associated with, among other things, training property managers on the rules, monitoring whether occupants' requests and actions comply with the Commission's rules as well as applicable health and safety codes, developing and collecting charges as allowed by the rules, sorting out interfering requests from multiple occupants or services providers, and implementing procedures and training for various emergency situations.

In the context of CC Docket No. 96-98, the Commission concluded in August 1996 that a right of access to roofs and riser conduit "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." (FCC 96-325, at Par. 1185.)

b. Substantial interference with investment backed expectations. Any regulation which may interfere with the market value of a piece of property would natu-

rally affect any expectations of investors who financed the building as well.

c. Character of the Proposed Regulation authorizes a physical invasion. Even if the structure is temporary, the Proposed Regulation authorizes a physical appropriation of the property as well as a permanent and continuous right to install such a structure. In Nollan, 483 U.S. at 832, the Court stated that a permanent physical occupation occurs "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." Under Nollan, the right to traverse the property, whether or not continually exercised, effected an impermissible taking. It is the "permanent and continuous right" to install the equipment which works the taking, because the right may be exercised at any time without the consent of the owner of the property.

Therefore, the regulation would constitute a taking based on the three-factor analysis set forth in the Penn Central line of cases.

C. CLOAKING THE PROPOSED REGULATION AS A REGULATION OF THE OWNER/OCCUPANT RELATIONSHIP FAILS TO SAVE THE PROPOSED REGULATION FROM THE TAKINGS CLAUSE

1. The Loretto footnote is not applicable to the Proposed Regulation

Some commenters argued that the holding in Loretto was "very narrow" and applies only to the situation of physical occupation by a third party of a portion of the claimant's property. Moreover, a footnote in Loretto states that "[i]f [the statute] 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." Loretto, 458 U.S. at 440 n.19. The footnote continues to describe how in this scenario where the owner would provide the service at the occupant's request, the owner would decide how to comply with the affirmative duty required by this hypothetical statute. Further the footnote indicates that the owner would have the ability to control the physical, aesthetic and other effects of the installation of the service.

Reliance on this dicta and footnote is misplaced in the context of the Proposed Regulation. Unlike a hypothetical statute requiring an owner to install a single cable interconnection, the Proposed Regulation may require an owner or association of owners to install multiple (an open-ended number) satellite dishes (DirecTV vs.

Primestar vs. C-Band vs. others), microwave receivers (MMDS vs. LMDS vs. others) and other antennae. Such multiple installations may be in ways and areas which may affect the physical integrity of a roof and other building structures, a building's safety, security and aesthetics, and thus its economic value. Moreover, the Proposed Regulation may require an owner to install the cabling associated with multiple antennae in limited riser space. Under the demands of accommodating multiple video antennae, the ability of an owner to control the physical, aesthetic and other effects of the installation of the service may be far more limited than envisioned in the Loretto footnote for a single installation, and thus a taking would be caused.

2. FCC v. Florida Power is not applicable to the Proposed Regulation

Certain commenters and perhaps the Commission appear to rely on FCC v. Florida Power Corp., 480 U.S. 245, 252 (1987), as further evidence of the limited application of the per se takings rule enunciated in Loretto. However, the holding of Florida Power is inapplicable to the Proposed Regulation and its effects on owners. In particular, Florida Power holds that the Loretto per se takings rule does not apply to that case because the Pole Attachments Act at issue in Florida Power, as interpreted by the Court, did not require Florida Power to carry lines belonging to the cable company on its utility

poles. Similarly, the Court in Yee, 503 U.S. at 528, analyzed a local rent control ordinance and found that Loretto did not apply because the ordinance involved regulation without a physical taking or taking of the property owners' right to exclude: "Put bluntly, no government has required any physical invasion of petitioners' property."

In contrast, the Proposed Regulation would do exactly the opposite by requiring owners to install antennae.

D. BUNDLE OF RIGHTS OWNED BY A PROPERTY OWNER

The recent trend in the Court applies the doctrine of "conceptual severance" in taking cases. By continually referring to an owner's "bundle of property rights," the Court is adopting the modern conceptualization of property as an aggregation of rights rather than a single, unitary thing.[5] Any regulation that abstracts and impacts one of the traditional key powers or privileges of property rights -- use or exclusion, for example -- is found to be a taking under the eminent domain clause.

In Kaiser Aetna, 444 U.S. at 179-80, the Court concentrated upon "the 'right to exclude' so universally held to be a fundamental element of the property right."

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[5] See Hohfeld, Fundamental Legal Conceptions as Applied to Judicial Reasoning, 26 Yale L.J. 710 (1917); Michelman, Discretionary Interests -- Takings, Motives, and Unconstitutional Conditions: Commentary on Radin and Sullivan, 55 Alb. L. Rev. 619 (1992).

Loretto referred to this passage (Loretto, 458 U.S. at 435-36) in declaring that "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." Again, Nollan employed this severance approach in broadening Loretto's "permanent occupation" concept. In characterizing the right to exclude as "one of the most essential sticks in the bundle of rights that are commonly characterized as property," it construed a public access easement as a complete thing taken, separate from the parcel as a whole. Nollan, 483 U.S. at 831-32.

Hodel v. Irving, 481 U.S. 704 (1987), is perhaps the clearest exposition thus far of the Court's view of certain fundamental private rights being so embodied in the concept of "property" that their loss gives rise to a right to compensation under the Fifth Amendment. The statute under attack in Hodel provided that upon the death of the owner of an extremely fractionated interest in allotted land, the interest should not pass to devisees but should escheat to the tribe whose land it was prior to allotment. The Court conceded a number of factors in favor of validity: the statute would lead to greater efficiency and fairness; it distributed both benefits and burdens broadly across the class of tribal members. However, the particular right affected -- denominated by the Court as "the right to pass on proper-

ty" -- lies too close to the core of ordinary notions of property rights; it "has been part of the Anglo-American legal system since feudal times". Id. at 716.[6]

In PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 n.6 (1980), the Court emphasized:

> [T]he term "property" as used in the Taking Clause includes the entire "group of rights inhering in the citizen's [ownership]." . . . It is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess."

The Court is most likely to extend the Hodel doctrine of separate and distinct interests to the Proposed Regulation that would bar an owner's right to exclude an occupant from the roof and other premises owned by the property owner, or that prevents the owner from the use

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[6] Thus, Hodel adds market alienability as another essential strand of property whose attempted abrogation constitutes a per se taking. In effect, the state may not convert fee simple property into a life estate, even if such conversion is conditioned on the owner's failure to alienate during the owner's lifetime.

The Court cemented, in this fashion, the conceptual severance approach: the Court built onto the "right to exclude others" and the "right to pass on property" as examples of core strands. Both are among "the most essential sticks in the bundle of rights that are commonly characterized as property." See also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 518-19 (1987) (dividing up the time elements of property rights).

and enjoyment of the space occupied by the antennae. That the Proposed Regulation would erect barriers to what are widely held to be fundamental elements of the ownership privilege renders it vulnerable to constitutional attack. Indeed, the Proposed Regulation stands to erode just these essential powers, to exclude or to use, by forcing owners and homeowner associations to permit the installation of reception equipment on their property wherever and whenever the occupant or other owner without exclusive control or use may wish. Once the property owners lose control over the right to exclude installation of items against their wishes, they lose that which distinguishes property ownership itself, the rights "to possess, use and dispose of it." United States v. General Motors Corp., 323 U.S. 373, 378 (1945).

E. PROPERTY RIGHTS IN AESTHETIC CONTROLS

The Commission's action on the § 1.4000 rule suggests that the Commission would give insufficient weight in analyzing the Proposed Regulation to the recognition in modern law that aesthetic controls are a significant component of property values and property rights.

In the § 1.4000 rule, the Commission has created an exemption for restrictions "that serve legitimate safety goals." (Par. 5(b)(1) and Par. 24 of Report and Order.) It has also adopted a rule safeguarding registered historic preservation areas. (Par. 5(b)(2) and Par. 26.)

Having gone this far toward accommodating local interests the Commission halts and treats environmental and aesthetic concerns with less consideration. (Par. 27.) In so doing, it is acting in accordance with the historic and out-dated treatment of aesthetic controls by ordinance, building restriction, lease, homeowners association agreement, or other private agreement. By not considering the modern trends of legislation and adjudication, however, it is sacrificing significant property values; impeding market decision-making by localities, private builders and owners, and associations; and undercutting sensitive environmental concerns. Indeed, some may discern a Philistine air in the Commission's rule and any similar analysis of the Proposed Regulation that runs the danger of the Commission being branded a scoffer of beauty and a derider of efforts to shape the appearance of the built and natural environments.

The Commission agrees that Congress intended that it should "consider and incorporate appropriate local concerns," and "to minimalize any interference owed to local governments and associations." The Commission also (Par. 19) takes tentative steps toward adopting aesthetics as a full-scale exemption by mentioning: a requirement to paint an antenna so that it blends into the background;

screening; and, in general, requirements justified by visual impact.[7]

This hesitant approach to environmental values is a retreat from the advancement and understanding of the goals of community, building and commercial environment appearance. It behooves the Commission to make explicit an exemption for reasonable aesthetic control of dishes and antennae.

The history of aesthetic controls in this country is a useful analogy for the Commission's consideration. At the outset, the courts were outrightly hostile to aesthetic values; they were not recognized as a legitimate government interest.[8] The modern judicial position

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[7] See also Par. 37 regarding height and installation restrictions in the BOCA code. Furthermore, the Report and Order states that the Commission does not believe that the rule would adversely affect the quality of the human environment in a significant fashion (Par. 26): "While we see no need to create a general exemption for environmental concerns," it argues, it does exempt registered historic preservation areas. Finally, the rule states that the Commission will consider granting waivers where it is determined that the particularly unique environmental character or nature of an area requires the restriction. (Par. 27).

[8] See Haar and Wolf, eds., Land-Use Planning 518-555 (4th ed. 1989). Aesthetic values were deemed too subjective and vague to warrant legal protection; consequently, the courts went so far as to say that the presence of aesthetic motives would taint an ordinance otherwise valid under the traditional health, safety, morals, and welfare components of the police power. As the early Passaic v. Peterson Bill Posting Co., 62 A. 267, 268 (N.J. 1905), put it: "[A]esthetic considerations are a matter of luxury and indulgence

(continued...)

accepted in most jurisdictions is that government can regulate solely for aesthetics, as described below.

Aesthetic controls, public or private, over the form and placement of antennae and dishes reflect values representative of community-wide sentiment. Eyesores should not be permitted to undermine coherent community goals. Owners and homeowner associations can define what is attractive and what is ugly about antennae and reception devices, the same way they outlaw junkyards and rag-strewn clotheslines.[9]

Over the past two decades, aesthetic considerations flourished and became routine on federal as well as state levels. There are numerous examples of legislative assertions of beauty as an appropriate end of government activity.[10] For example, the status of aesthetic values

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[8](...continued)
rather than of necessity . . . ." This gave way -- not without a struggle -- to intermediate judicial acceptance when it was seen that aesthetic values advanced such traditional goals as the preservation of property values.

[9] See People v. Stover, 191 N.E.2d 27 (N.Y. 1963). It is increasingly recognized that community consensus can protect against arbitrary application of regulation or restriction. See United Advertising Corp. v. Borough of Metuchen, 198 A.2d 447 (N.J. 1964). In a fundamental sense, there is a collective property right to the neighborhood or commercial environment exercised by its owners.

[10] The Report and Order itself incorporates elements of the National Historic Preservation Act of 1976 in its use of the National Register for Historic Places in carving out an exemption for historic districts.

is sharply recognized in the National Environmental Policy Act of 1967, 42 U.S.C. § 4321 (NEPA). Section 4331(b)(2) of NEPA includes, among the purposes of its "Environmental Impact Statements," the assurance of "healthful, productive and aesthetically and culturally pleasing surroundings." See Ely v. Velde, 451 F.2d 1130, 1134 (4th Cir. 1971) ("other environmental . . . factors" than those directly related to health and safety are "the very ones accepted in . . . NEPA").[11]

Perhaps the most direct acceptance of aesthetic controls on the federal level is that of Justice Douglas in Berman v. Parker, 348 U.S. 26, 33 (1954):

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . . If those who govern the District of Columbia decide that the nation's Capitol should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.[12]

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[11] The aesthetic-environmental language is also found in the so-called Little NEPAs of the states. See, e.g., State v. Erickson, 285 N.W.2d 84 (Minn. 1979). Similarly, the National Highway Beautification Act regulates the manner and placement of billboards along federally assisted highways.

[12] More recently, in Members of City Council of City of Los Angeles v. Taxpayer for Vincent, 466 U.S. 789, 805 (1984), the Court stated" "It is well settled that the state may legitimately exercise its police powers to advance aesthetic values." See also Metromedia Inc. v. City of San Diego, 453 U.S. 490 (1981).

In light of the Commission's exemption for historic districts, the statements of Penn Central are especially pertinent; there the Court emphasized that "historic conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing -- or perhaps developing for the first time -- the quality of life for people." Penn Central, 438 U.S. at 108.

The Proposed Regulation would be evaluated in the context of this evolution and progress of aesthetic and environmental goals. The Report and Order, in its gingerly handling of roof line controls, may be faulted as out of step with the modern legislative and judicial endorsement of aesthetic values and design review. Certainly Paragraph 46's tentative conclusion that "non-governmental restrictions appear to be related primarily to aesthetic concerns," and the further tentative conclusion "that it was therefore appropriate to accord them less deference than local government regulations that can be based on health and safety considerations" will raise eyebrows in many circles.[13]

Increasingly, private design review is the most effective way for property owners to implement a consen-

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[13] See, e.g., Williams, Jr. and Taylor, 1 American Planning Law § 11.10 (1988 Revision): "[n]o trend is more clearly defined in current law than the trend towards full recognition of aesthetics as a valid basis for regulations". The demotion of aesthetics proffered by the Commission is an outdated view of the law.

sual decision on the aesthetic appearance of their community.[14] Widespread agreement -- expressed often in terms of enhanced property values -- exists on ensuring that utilitarian objects are hidden from sight on or around buildings. Mechanical equipment on roofs (ventilators, exhaust outlets, air conditioners), as part of the policy for community or commercial environment appearance, is usually not permitted to be visible from the street. Regulating the appearance of a community, building or commercial environment is the proper domain of the community itself and the owner(s) since the local community and owner(s) are the best judges of what is desirable for that community, building or commercial environment. Further, there is a direct line between aesthetics and property values: "economic and aesthetic considerations together constitute the nearly inseparable warp and woof

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[14] Reid v. Architectural Board of Review, 192 N.E.2d 74 (Ohio 1963), is the classic case upholding such controls. Private design review, as an alternative or supplement to local government, controls aesthetics of the physical environment by private agreement, typically through community associations. See Baah, Private Design Review in Edge City in Design Review, Challenging Urban Aesthetic Control 187 (Scheer and Preisiev eds. 1994). In many communities with design review, Baah adds, "unsightly physical features -- such as graffiti, billboards, chain-link fences, weeds and overgrown landscaping -- are now only found in public property." Id. at 196.