

# *Chadwick, Washington, Olters, Moriarty & Lynn, P.C.*

## **LEGAL UPDATE**

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*The information presented is not intended as specific legal advice to any association as your documents or the specific facts of your situation may require a different result. The laws cited herein may change from time to time.*

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### **I. LEGISLATIVE UPDATE.**



#### **A. Federal Communications Commission Rule on Satellite Dishes and Antennas.**

As many of you are aware, under the Telecommunications Act of 1996 which was signed into law this year, the Federal Communications Commission ("FCC") adopted a rule which became effective on October 4, 1996, concerning restrictions on viewers' ability to receive video programming signals from direct broadcast satellites ("DBS"), multichannel multi point distribution (wireless cable) services ("MMDS"), and television broadcast stations ("TVBS").

The new rule prohibits restrictions that impair the installation, maintenance or use of certain antennas used to receive video programming. The antennas include DBS dishes that are less than one meter (39" in diameter (larger in Alaska)), antennas used to receive MMDS which are less than 12 feet in height, and TV antennas of any size. The stated purpose of this new law is to promote competition among video programming service providers, enhance consumer choice and assure wide access to communications and resulted from the lobbying efforts of the satellite manufacturers and service providers.

Specifically, the new rule preempts certain private covenants, community association rules or similar restrictions relating to what people can do on land within their exclusive use or control where they have a direct or indirect ownership interest in the property. The FCC has defined these areas specifically as any part of a single family home, a condominium unit and its limited common elements such as balconies. If a satellite dish or antenna is to be installed on or in such locations, associations may not impose any restrictions which would impair a homeowner's ability to receive signals from providers of the above-referenced antennas. Under the rule, **any restrictions regarding these covered antennas which prevent, unreasonably delay or unreasonably increase the cost of the antenna installation, maintenance or use, or preclude acceptable signal reception are deemed to impair a viewer's ability to receive such video programming.**

The FCC stated in comments to the rule that a blanket prohibition of antennas covered by this rule would be an impermissible impairment, but that associations may require homeowners to place them, to the extent feasible, in locations that are not visible or which are the least visible from the street if this placement would still permit reception of an "acceptable quality signal." The FCC has also taken the position in their comments that requiring prior approval or permits from homeowners who wish to install such antennas is an unreasonable delay. Because the FCC rule has left room in its rule for associations to prescribe the location of antennas, they should be able to require homeowners to provide prior notification to their association so that they can be informed of the acceptable locations. While prior notice of 2 to 3 days might be acceptable, the usual 30 to 60 day architectural review process would most likely be prohibited. Accordingly, associations may wish to hire their own "experts" or work with antenna companies to predetermine acceptable locations and notify their communities before homeowners install antennas. Associations may wish to adopt rules regarding placement and inform their membership of the new rule in newsletters and mailings.

Associations may also, under the new rule, enforce certain camouflage requirements such as painting or landscaping or require indoor (e.g. attic or window) installation so long as these requirements do not cost the homeowner more than the cost of the antenna, which the FCC has stated excludes its service costs, and allow for an "acceptable quality signal." Things to consider in determining the reasonableness of costs imposed include the cost of the equipment, whether there are similar requirements for other similar installations, such as air conditioning units or trash receptacles and the visual impact the antenna has on the surroundings. Regarding what constitutes an "acceptable quality signal," with DBS, the answer is simple because these satellite dishes are digital. The dish must point southwest at an angle of 35 degrees above the horizon to receive a signal. With TV antennas and MMDS signals, however, the answer is not clear because signals or reception may not be clear.

Associations should note that restrictions which serve a legitimate safety purpose or are designed to preserve historic districts which are listed or eligible to be listed in the National Register of Historic Places are not prohibited under the new rule. To be valid, however, these restrictions must not be more burdensome than required to ensure safety or the historic preservation goal. Also, safety restrictions must be written in the text, preamble or legislative history of the restriction or published in a document that is readily available to antenna users. The FCC stated that examples of valid safety restrictions include fire codes which prevent people from installing antennas on fire escapes, restrictions requiring that a person not place an antenna within a certain distance from a power line, electrical code requirements to properly ground the antenna and installation requirements that describe the proper method to secure an antenna. Regarding MMDS dishes and TV antennas, safety regulations such as the BOCA Code provisions which require permits for masts and antennas exceeding 12 feet above the roof line remain valid.

In the event an association's rule is challenged as conflicting with the FCC Rule, the burden of proof is on the association and not the homeowner to establish that its rule or restriction does not conflict with the FCC's rule. There are two forums to which an association or homeowner may turn to determine the validity of an antenna restriction. They could either seek administrative review of the rule with the FCC or seek declaratory relief from a court of competent jurisdiction. The antenna provider lobby, however, has filed a petition with the FCC requesting that this jurisdiction be limited to the FCC only.

Regarding the installation of these antennas on land or areas which are commonly owned and thus not within the exclusive use of a homeowner, the FCC informally has stated that the same analysis may not apply because arguably, an individual resident (or viewer) has no legal right to alter commonly owned property unilaterally, and therefore has no right to these common areas to install an antenna without permission to the exclusion of all other owners. The FCC is reserving its judgment on this issue pending further review. Comments to the FCC regarding this issue were due September 27, 1996, and reply comments were due October 28, 1996. The FCC has at least 30 days to review the Comments and write a rule and has predicted that a rule on the common/rental property issue may be finalized in January, 1997, at the earliest. Until the FCC issues a further ruling on this issue, homeowner association rules regarding antennas as they relate to commonly owned property, such as common elements of a condominium or common areas of a property owners' association, are not preempted and may still be enforced by homeowner associations. Because the definition of common elements or common property in each association is unique, boards of directors should carefully review their governing documents in determining whether they can enforce their restrictions regarding antennas. CAI recently sent out an update in which they reported that members of Congress are being heavily lobbied to allow individual owners access to common property.

CAI's position is that:

\* Common property is not individually owned, but equally shared as an UNDIVIDED INTEREST by all owners or is owned by the Association. No owner has the right to claim that property for their own use.

\* By adding Section 207, Congress intended to preempt association rules with outright prohibitions. But if Congress had intended to alter property ownership rights, they would have used clear language and authorized compensation for the "taking."

\*As Congress did not authorize the taking of private “common” property with the necessary provision for the payment of just and fair compensation, the FCC would be exceeding its authority by so doing.



\*Although spurring competition to offer a greater range and access to telecommunication is important, the FCC should not overthrow basic real property law and fundamental principals of constitutional law.

Allowing individual antennas on common property opens many areas of concern and expense for associations, including liability for injuries, increased maintenance costs for landscaping and maintenance of the antennas, allocation of limited resources among many owners and damage to common area grounds not to mention the impact on aesthetics and property values.

Obviously, it is too early to know how the FCC or courts will interpret the FCC Rule in specific cases, but the spirit of the FCC Rule and the comments accompanying the Rule review process suggest that the rights of the individual will probably be favored strongly by the FCC over the interests of the Association with respect to enforcement of conflicts, especially where the concern is the “quality” of reception. The comments are not controlling or legally binding, only persuasive, therefore there may be some flexibility within a literal interpretation of the Rule. Write to your congressional representatives and express your opposition and concerns. If you have any questions, please call us.

**B. New Legislation in Virginia.** Several new laws of importance for Associations passed in the 1996 legislative session and went into effect on July 1, 1996.

**1. 14.1-125.2. Filing Fee Increase.** There was a \$3.00 increase in all documents to be filed in the Circuit Court, including foreclosure suits, injunctive actions and liens and certificates of release of lien. Lien filing and release fees will now be \$16.00 each. The increase is to fund the information technology fund for Clerks to obtain office and information technology equipment and improve public access to the Court system. The fees will expire on July 1, 1997, unless reenacted.

**2. PROPERTY OWNERS’ ASSOCIATION ACT Section 55-509.2 and CONDOMINIUM ACT Section 55-79.74 -- TRANSFER OF DOCUMENTS BY DECLARANT.** This amendment requires a declarant, within 45 days after turnover of control, to provide to an Association all association books and records, minute books, all rules, regulations and amendments, statement of receipts and expenditures from the date of the recording of the association documents to the end of the regular accounting period immediately succeeding the first election of a unit owner Board of Directors within certain time limitations, approved plans and specifications for all improvements or as-built plans if available, all insurance policies in force, written unexpired warranties of contractors, current contracts and a list of manufacturers of components of the condominium. The management company hired by the Declarant is also responsible for providing this information. This is an important and much needed amendment that should save new associations a lot of time and money in gathering this information.

**3. CONDOMINIUM ACT Section 55-79.53. COMPLIANCE WITH CONDOMINIUM INSTRUMENTS.** This is an important change that may greatly benefit many Associations, especially older condominiums or those with poorly drafted documents. The compliance section of the Condominium Act has been amended to provide that the prevailing party shall be entitled to recover reasonable attorneys’ fees and costs expended in an enforcement action. However, please note that this section could also be used to require an Association to pay the opposing party’s attorneys’ fees and costs if the Association loses.

**4. CONDOMINIUM ACT Section 55-79.80:3- - OCCUPANCY RESTRICTIONS.** (Patron-Senator Patricia S. Ticer). This amendment authorizes the unit owners’ association, to the extent the condominium instruments expressly provide, to limit the number of persons who may occupy a condominium unit as a dwelling. The bill provides

that any limitation shall be reasonable and shall not be more restrictive than the applicable local zoning ordinance. The bill also requires the limitation to be disclosed in the Public Offering Statement of a new condominium. Comment: This bill gives legislative backing to what some condominium instruments already provide and may be of use in overcoming claims of discrimination regarding families. This provision cannot be applied retroactively by law to existing covenants that are more restrictive than the local zoning ordinance, but newly enacted provisions cannot be more restrictive than the zoning ordinance. Unfortunately, the zoning ordinances in many cases would allow too many occupants for the size and facilities of some condominiums.

**5. Good news for cooperatives! Section 55-248.35. VIRGINIA RESIDENTIAL LANDLORD AND TENANT ACT.** This amendment allows the landlord to add the cost of service of any notice or process by a sheriff or private process server to those items which the landlord may recover from the tenant.

**6. 8.01-43 and 44 - ACTIONS AGAINST PARENTS FOR DAMAGES TO PROPERTY BY MINORS.** This act increases from \$1,500 to \$2,500 the maximum amount that may be recovered from the parents of a minor who damages public or private property.

**7. 8.01-27.1 -** Amends the maximum allowable bad check processing charge to \$25 from \$20.

**8. 46.2-1224. Parking.** Loudoun County is added to the list of counties that can regulate parking within their boundaries. Fairfax County is authorized to restrict commercial vehicles from parking in residentially zoned areas.

**9. HOUSE JOINT RESOLUTION NO. 8 - REGULATION OF PROPERTY OWNERS' ASSOCIATIONS.** This Resolution requests that the Virginia Housing Study Commission study the desirability and feasibility of making declarants of property owners' association comply with the same registration and operational requirements of declarants of condominiums. This would most likely involve preparation of a public offering statement, turnover of control within a specific time period, record keeping requirements and other protections for purchasers of lots. The Resolution requires the study to be completed by the January 1997 legislative session after public hearing and comment.

**C. PRINCE WILLIAM COUNTY.** Effective January 1, 1997, Prince William County will require that all site and subdivision plans submitted after January 1, 1997, shall be submitted using the metric standard. VDOT is requiring that metric measurements be used in plans and applications for roads proposed to be accepted into the state system after September 30, 2000.

**II. VIRGINIA SNOW REMOVAL REQUIREMENTS.** Are you ready for the winter of 1997? Is your contract for snow removal signed yet? Boards should be aware of their state and local jurisdiction's requirements regarding snow removal and any liability which may attach for failing to clear snow from walkways. In the City of Alexandria, homeowners and certain occupants of residences are required to remove snow from the public sidewalk abutting their property. Section 5-2-21 of the Alexandria City Code requires that people remove any snow, ice or sleet which falls on the public sidewalk within 24 hours from the end of the snow fall. It is unlawful, however, to move snow into any city street from any property. If the ice or sleet cannot be removed without damaging the sidewalk, owners/occupants may cover the affected areas with salt, ashes or other appropriate substances which will render it safe for travel within 24 hours. The only persons who are excepted from this snow removal requirement are tenants who reside in a building in which four or more units are rented by one landlord. In that case, the landlord/owner or the Association is responsible for removing snow from the sidewalks. If an owner/occupant fails to remove snow from the sidewalk abutting his property, the City, upon 48 hours notice, may remove the snow, ice or sleet and charge the costs of doing so to the owner/occupant. Such a charge may be collected in the same manner as City taxes and, if unpaid, will constitute a lien against the property.

Fairfax and Prince William Counties do not have specific snow removal requirements like the City of Alexandria's for public sidewalks abutting private property. Boards and homeowners should be aware, however, of the common law in Virginia which imposes a duty on landowners and occupants of premises to use reasonable and ordinary care in keeping their property reasonably safe for the benefit of invitees, that is, persons who enter onto the premises in response to an express or implied invitation of the landowner. In the usual case, there is no obligation to protect the invitee against dangers which are known to him, or which are so obvious and apparent to him that he may reasonably be expected to discover them. Under Virginia law, the obviousness of the danger serves to minimize any duty on the landowner's part to warn or to remove the danger.

In the case of Tate v. Rice, 227 Va. 341, 315 S.E.2d 385 (1984), the Virginia Supreme Court applied this common law to the issue of snow removal from private driveways and sidewalks and ruled that the duty in Virginia to maintain premises in a condition which is reasonably safe for an invitee does not extend to warning or removing snow from a private driveway or sidewalk because it is an open and obvious condition on the property. Although homeowners in Virginia are not required under common law to remove snow from sidewalks abutting their property, it would be prudent to do so within a reasonable time after a snowfall, not only to avoid any claims of liability, but for the safety of family, friends and school children using those sidewalks.

**III. Welcome on board to all new Board members!** Remember that under our retainer, Board members can call us without incurring any attorneys' fees to ask questions about issues facing the association. You can use this service for early advice when a problem is perceived or is just beginning to hopefully avoid situations that could develop into costly problems for the association. As board composition or telephone numbers change, please help us keep our records updated by sending us the updated information. Situations may arise where we need to reach you quickly.

