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CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

## DO THE DISHES! Satellite Receivers & Community Associations

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A few years ago, private satellite dishes were a rarity. Today, with costs coming down and service improving, these dishes are becoming commonplace. As common as they are, many community members consider their presence to be a source of aesthetic irritation, and quite a few have attempted to ban them or regulate their use. Associations that do attempt to regulate these devices must be aware of the federal guidelines protecting satellite dishes.

The right of community associations to regulate the placement of dishes is directly addressed by the Federal Communications Commission ("FCC") regulations.

In 1996, the FCC adopted the Over The Air Reception Devices Rule ("the OTARD rule") [See 47 C.F.R. §1.4000]. The OTARD rule prohibits restrictions that impair the installation, maintenance or use of antennas used to receive video programming. The rule applies to video antennas, including satellite dishes that are less than one meter (39 inches) in diameter, television antennas, and wireless cable antennas. The rule prohibits most restrictions that:

1. unreasonably delay or prevent installation, maintenance or use; or

2. unreasonably increase the cost of installation, maintenance or use; or
3. preclude reception of an acceptable quality signal [47 C.F.R. §1.400(a)].

Accordingly, with certain exceptions as described below, associations may not enforce rules and restrictions that cause any one of these three impairments.

The OTARD rule applies to viewers who place video antennas on property that they own (or have a leasehold interest in), and that is within their exclusive use or control; this would include condominium owners who have an area where they have exclusive use, such as a balcony or patio. Therefore, the rule would apply to the installation of an individual antenna by a resident on the lanai of his or her condominium unit or on the outside of a home in a community governed by a homeowners association.

The association has the right to list preferred locations within the unit for the installation of individual antennas in its rules, or it may require that the color of the dish conform to the aesthetic standards of the community. However, the burden of proof for the enforceability of any rule or restriction affecting the installation, maintenance, or use of an antenna will be on the association. Thus, any rule concerning the installation of individual antennas will be subject to strict scrutiny. The only exceptions to the Rule are restrictions that are necessitated by safety or

## TIDBITS

### Did You Know ???

A lis pendens is a document that is recorded against property to put people on notice that there is an action pending on the property. For example, a lien foreclosure complaint is accompanied by a lis pendens to insure that the real property cannot be sold or encumbered without the lis pendens being noticed and perhaps resolved.

- ✓ No action operates as a lis pendens on any property unless a notice of commencement of the action is recorded in the office of the clerk of the circuit court of the county where the property is located.
- ✓ The lis pendens must contain the names of the parties, time of institution of the action, name of the court in which the action is pending, a description of the property involved or to be affected, and a statement of the relief sought as to the property. Failure to include all of the requisite information could invalidate the lis pendens.

*continued on page 2*

*continued on page 2*



**DISHES...***continued from page 1*

historic preservation concerns, and even then, the restrictions must be as narrowly tailored as possible, impose as little burden as possible, and applied in a nondiscriminatory manner throughout the regulated area. [47 C.F.R. §1.4000(b)].

It is important to note that the Rule does not apply to the common elements of a community. Therefore, an association may prohibit individual antenna installations in the common elements that are not within the exclusive use or control of the owner. However, if the association desires to permit individual antenna installations on the common elements, it may do so, and its rules and regulations controlling that installation do not have to comply with the OTARD rule.

Some associations have sought to reduce "dish clutter" by installing a centrally-located dish for the reception of programming. Generally speaking, a good compromise can be reached when an association offers a central dish in exchange for the removal of individual dishes, and this is generally considered to be permissible under the OTARD rule. However, in order to compel a homeowner to remove their individual antenna, there must be no "impairment of services." Thus, the centrally-located antenna must provide the same quality and diversity of programming as the individual antenna at the same cost. If any unit-owners wish to receive programming not available over the central dish, then those unit owners must be permitted to maintain their individual antennas, if they so desire.

As of the date of this article, there are no FCC advisory opinions or FCC rulings governing the removal of individual dishes in favor of centrally-located receivers. The sole document giving guidance is an FCC Order on Reconsideration issued in 1998. These FCC orders are not given the same precedential weight as appellate court decisions, but they do provide persuasive instruction.

Paragraph 89 of this Order on Reconsideration clearly states that a community association may not impair a resident from installing a satellite dish in **anticipation** of the arrival of a central dish. Once the central dish is

operational, the association may require the removal of the individual dishes as long as the association reimburses the homeowner for the value of the "antenna" in question. This general rule begs the question as to whether hardware inside the unit (specifically internal receivers which can be connected with the main satellite) are also included in this reimbursement amount. Again, there is no FCC statement or ruling directly on point addressing equipment inside the unit. However, all indications are that the "impairment" analysis would control this situation, and "antenna" would arguably include the dish, cables, **and** the internal receiver.

Each situation must be reviewed on a case-by-case basis to determine if an "impairment" exists. Any rule or regulation, or any other action by the association which could be considered an "impairment" of a consumer's right to receive television signals violates the OTARD rule. It is important to know that "impairment" refers to both physical and economic impairment. Under the (as of yet) poorly articulated "economic impairment" analysis, any kind of economic impairment must be paid for by the impairing authority. Therefore, if the centrally located dish will give residents the identical picture quality and programming diversity as their individually owned dishes, then its use may be compelled. However, if this winds up costing the individual owner one dollar extra per year, then the association must pay that dollar.

At the other end of the spectrum, many subscriber-based services provide free equipment to the consumer in exchange for a contract of one year or more, but an early cancellation fee may apply. If the association requires a homeowner to remove his or her dish, thereby causing an early cancellation fee, the association must be prepared to pay this fee. Similarly, if the receiver inside the house (or any other piece of equipment in the technology chain) is no longer of any use to the consumer because of an association-promulgated rule, then the association must reimburse the individual homeowner for the value of that equipment. The board of directors will need to determine if the aesthetic value of removing individual satellite dishes outweighs the multiple reimbursement of early cancellation fees and equipment

**TIDBITS****Did You Know ???***continued from page 1*

- ✓ Except as to persons in actual possession of the property or easements of use, the lis pendens constitutes a bar to the enforcement of any instruments that remain unrecorded at the time of the filing of lis pendens, unless the holder of that unrecorded instrument intervenes within 20 days.
- ✓ Unless it is based on a recorded instrument or lien, a lis pendens lasts only one year from the commencement of the initial action, except when extended by the court for good cause. Since assessment liens are recorded, lis pendens based on these liens are not subject to this one year limitation.
- ✓ For those actions not founded on a recorded instrument, the court may require the posting of a bond, or cost deposit. The court may control and discharge a lis pendens not founded on a recorded instrument in the same manner as the court may grant and dissolve an injunction.

purchase costs, which will be triggered by this mass removal.

The only way to definitively determine if a particular satellite rule or restriction is permissible under the OTARD rule is to petition the FCC for a declaratory ruling. However, this is often inadvisable because the ruling may take over a year, and whatever rule the association wishes to promulgate will be under suspension until the ruling is issued. Given the risks involved, the FCC advises that any association rules requiring the removal of individual satellite dishes be applied only prospectively to homeowners who have not yet purchased an individual satellite dish.

# Just the F.A.Q.s

## Frequently Asked Questions

### Question:

I recently moved to Florida and was elected to my condominium association's board of directors. I have never served on a condominium board before and am in need of any information, suggestions or advice you can give me in this endeavor.

### Answer:

The following is a list of the most common mistakes made by condominium associations and potential headaches inherited by new board members:

- **Knowledge is power.** Become very well acquainted with your association's declaration, bylaws, articles of incorporation and rules and regulations, as well as Chapter 718, Florida Statutes (the Condominium Act), and the administrative rules pertaining thereto. You owe it to yourself and the members of the community who elected you to represent their interests to fully appreciate and understand your duties and responsibilities as a member of the Board of Directors.
- **Hurricane shutter specifications:** The condominium statute requires every board of directors to adopt specifications for the installation of hurricane shutters. Unit owners are entitled to install shutters in accordance with the board's specifications. Many associations (perhaps a majority) have never adopted the required specifications.
- **Notice posting location:** The law requires the board to adopt a rule specifying where official association notices are posted. Although most associations have a set place where notices are posted, most boards have never adopted a formal rule specifying posting location, as required by the law. Recent code changes probably require updates for those associations which have adopted specifications.
- **Q&A Sheet:** The law requires every condominium association to prepare a "Question and Answer Sheet," commonly referred to as the "Q&A Sheet." It is essentially a disclosure document. The Q&A Sheet must be updated annually. Many associations do not have a Q&A Sheet, and more yet fail to update it annually.
- **Fidelity bonding:** The statute requires an association to have fidelity bonding (or similar insurance, sometimes known as employee dishonesty or crime coverage) in place, for the maximum amount of association funds exposed to theft. In many cases, associations are grossly underinsured with their fidelity coverage, and it can come back to haunt an association after an employee or agent dishonesty incident.
- **Rules and regulations:** Assuming the association is granted rulemaking authority in the governing documents, the condominium statute requires any rule regarding use of the units (apartments) to be publicly noticed fourteen days in advance of the meeting at which it is adopted. This notice must be posted and mailed out to every unit owner. There is no similar requirement for common element rules; the regular forty-eight hour posting typically suffices. Many associations adopt rules regarding unit use without the required public notice, which only becomes an issue when the association attempts to enforce the rule in court or arbitration, or when attempting to collect a fine.
- **Board voting:** Many associations continue to cling to the erroneous assumption that, under *Robert's Rules of Order*, the president of the board is not entitled to vote on matters before the board, except to break a tie. If the president is a director (and he or she almost always is), then not only is he or she entitled to vote, he or she is obligated to vote, except in the event of a conflict of interest. The statute also requires the vote of each director, by name, to be recorded in the minutes for each vote that is taken.
- **Agendas:** The condominium statute requires that any item of business that is to be taken up at a board meeting must be specifically included on the posted agenda for the meeting. Generic designations such as "new business" are not sufficient. Many boards routinely violate this law. There is a somewhat complicated procedure for emergency situations.
- **Sunshine requirements:** The condominium statute requires that every board meeting be publicly noticed and open to unit owner observation and participation, except when meeting with the association's legal counsel. Many boards engage in "executive sessions" for potentially sensitive matters such as personnel, board political problems, etc. Although usually well intentioned, any gathering of a quorum of the board for conducting association business, whether or not a vote is taken, is contrary to the law unless proper notice and participation rights have been given.
- **Fining procedures:** The condominium statute provides that no fine may be levied until an opportunity for a hearing, before a committee of unit owners other than board members, has been provided. Many associations conduct their fining procedures outside the bounds of the law, usually involving notice violations or the failure to provide the opportunity for the required hearing.
- **Special assessment procedures:** Assuming that the board is given special assessment authority in the governing documents (and some documents require a membership vote), the public notice requirement is similar to rule-making, discussed above, requiring fourteen days posted and mailed notice. The notice must contain a statement of the purposes of the proposed assessment. Once the assessment is levied, a second notice must be sent out, which again indicates the purpose for which the assessment was levied.



# CASENOTES

## KEEPING GOOD FAITH

In the case of *Doyle v. Maruszczak*, 834 So.2d 307 (Fla. 5th DCA 2003), the Fifth District Court of Appeal analyzed the duty a real estate agent owes to its client. Richard Doyle was a licensed real estate sales agent, employed by Hernando Beach Realty. The Maruszczaks hired Doyle to find them property in the Hernando Beach area. In connection with that representation, the parties signed a transaction broker agreement which stated that Hernando Beach Realty was providing representation that included the duty to deal honestly and fairly with the Maruszczaks.

The Maruszczaks were shown a number of lots for possible purchase. One such lot, Lot 11, was of interest to the Maruszczaks and they instructed Doyle to negotiate for the purchase of that lot at the best price and terms he could obtain. After the listing on Lot 11 expired, Marchant, the owner of the lot, offered Lot 11 to Doyle at a reduced price, and Doyle purchased the property for himself. The Maruszczaks claimed Doyle breached his fiduciary duty when he purchased Lot 11 without notice to them, since they had previously informed him that they were interested in acquiring this property and even instructed Doyle to negotiate its purchase on their behalf. The Maruszczaks thereafter sued Doyle seeking injunctive relief and the imposition of a constructive trust over Lot 11.

The appellate court stated that the pivotal issue in the case is whether Doyle possessed a fiduciary relationship with the Maruszczaks. The uncontroverted evidence established that the Maruszczaks hired Doyle as their agent, and Hernando Beach Realty agreed to deal with them honestly and fairly. When the relationship of principal and agent exists, the ultimate good faith is required in all of the transactions of the agent towards his principal, and the agent cannot put himself in a position adverse to that of his principal. Where the agent, employed to purchase for the principal, purchases for himself, all of the profits and advantages gained in the

transaction are presumed to be held in trust for the principal by the agent.

The District Court of Appeal held that the lower court's entry of a summary judgment was improper since there were issues of material fact with respect to whether or not the owner of Lot 11 would have ever sold the property to the Maruszczaks. However, the District Court of Appeal did affirm the trial court's conclusion that Doyle undertook a fiduciary duty to the Maruszczaks.

## ELECTION PROCEDURES MUST BE STRICTLY FOLLOWED

In the case of *M.J. Gentry vs. Casa Del Sol [Winter Haven] Condominium Association, Inc.*, Case No.02-5465 (Coln/Amended Final Order/February 19, 2003), a unit owner filed a Petition for Arbitration regarding the Association's failure to abide by its By-Laws which specified that the Association's annual meeting was to be held at 3:00 p.m. on the third Friday in February of each year. The Association, in its nearly 30 years of operation, had held the annual meeting on the specified date only once, in 1974. The remaining annual meetings were held in October, November or December, in order to accommodate the unit owners. However, no amendment was ever enacted to actually change the date required by the By-Laws.

The Arbitrator found that the Association had in fact violated the provisions of its By-Laws regarding the holding of its annual meetings. Although the Association was allegedly holding the annual meeting on a date it believed was convenient to the unit owners, it was not authorized to change the meeting date without a validly enacted amendment to the Association's By-Laws reflecting the change. Accordingly, the Arbitrator ordered the Association to comply with the By-Laws and hold the meeting on the date specified therein. Alternatively, the Association was required to validly amend its By-Laws to reflect the desired changes to its annual meeting dates.

CASENOTES