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FCC Preemption of Zoning Ordinances That Restrict Satellite Dish Antenna Placement: Sound Policy or Legislative Overkill?

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FCC PREEMPTION OF ZONING ORDINANCES THAT RESTRICT SATELLITE DISH ANTENNA PLACEMENT: SOUND POLICY OR LEGISLATIVE OVERKILL?

INTRODUCTION

In the past decade, the number of satellite dish antennas placed into operation by both homeowners and businesses has increased dramatically.[1] This relatively new form of communications technology has emerged as a competitive alternative to cable television, offering consumers a wider range of programming choices.[2] Local zoning ordinances, however, often hinder the ability to install, and effectively use, a dish antenna.[3] These

[1] Zelica Marie Grieve, Note, Latera v. Isle at Mission Bay Homeowners Ass'n: *The Homeowner's First Amendment Right to Receive Information*, 20 NOVA L. REV. 531, 532 (1995). The number of satellite dishes in use in the United States has increased from 900,000 in 1984 to 4.3 million today. *See* First Annual Report to Congress Assessing the Status of Competition in the Market for Cable Television and Other Video Programming Services, 59 Fed. Reg. 64657, 64659 (1994) [hereinafter Market Competition] (discussing home satellite dish study showing four million users in 1994); *see also* Doug Abrahms, *FCC Ruling Would Favor TV Dishes Over Zoning*, WASH. POST, Feb. 24, 1996, at A13 (stating that number of backyard dishes could reach 7 million by end of 1996 and 20 million by turn of century); Stephen Higgins, *Home Satellite Dish Sales Soar*, NEW HAVEN REG., Aug. 13, 1996, at D1, *available in* 1996 WL 12006266 (stating that sales of home satellite dishes have increased 65 percent since 1986, from 235,000 per year in 1986, to 384,000 in 1995). For a general discussion on the satellite dish industry, see Ward White, *Home Satellite Dish Industry: A Brief Study of Growth and Development*, 34 HOW. L.J. 243 (1991).

[2] *See* Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 F.C.C.R. 4962, 5016 (1990) [hereinafter Competition Policy] (finding home satellite dishes are effective alternative to cable services); *see also* Jim Kirk, *Dissatisfied With Cable, Some Users Switching To Satellite Dishes*, CHI. SUN-TIMES, Feb. 16, 1997, at 22 (stating that while cable subscription grew 1% over past year, satellite subscriptions grew by more than 50%); Michael D. Sorkin, *New TV Satellite Dishes Biting into Cable Market, Prices Plummet for Latest Video Technology*, ST. LOUIS POST-DISPATCH, Nov. 3, 1996, at 1A, *available in* 1996 WL 2800937 (finding that largest cable company in the United States, TCI, lost 70,000 customers in the third quarter of 1996).

[3] *See* Loschiavo v. City of Dearborn, 33 F.3d 548, 550 (6th Cir. 1994) (involving satellite dish antenna owner who was denied application for variance regarding in-

restrictions have sparked a controversy between those who assert an established federal interest in promoting the availability of all communications technology and those who feel that the regulation of land use can best be dealt with at the local level. In 1986, the Federal Communications Commission (the "FCC") tried to balance these competing interests by adopting 47 C.F.R. § 25.104 (the "1986 Order") which preempted local zoning ordinances in a limited manner.[4] The 1986 Order proved to be less effective than the FCC had hoped, however, as many municipalities continued to place undue burdens on satellite dish owners.[5] In addition, specific provisions of the 1986 Order were ei-

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stallation of antenna in backyard); Kessler v. Town of Niskayuna, 774 F. Supp. 711, 712 (N.D.N.Y. 1991) (denying variance in relation to roof installation of satellite dish); Gouge v. City of Snellville, 287 S.E.2d 539, 541 (Ga. 1982) (upholding limitation of satellite dish installation to rear yard); *see also* John McDonald, *Satellite Dish Law Hearing Set*, NEWSDAY, Mar. 25, 1996, at 19 (stating that one village in Suffolk County, New York, bans installation of satellite dishes, while another village in Nassau County, New York, requires dish to be surrounded by Canadian Hemlocks).

[4] *See* Preemption of Local Zoning of Earth Stations, 47 C.F.R. § 25.104 (1986), *amended by* 47 C.F.R. § 25.104 (1996) [hereinafter 47 C.F.R. § 25.104]. This section provides:

> State and local zoning or other regulations that differentiate between satellite receive-only antennas and other types of antenna facilities are preempted unless such regulations:
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> (a) Have a reasonable and clearly defined health, safety or aesthetic objective; and
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> (b) Do not operate to impose unreasonable limitations on, or prevent, receptions of satellite delivered signals by receive only antennas or to impose costs on the users of such antennas that are excessive in light of the purchase and installation cost of the equipment.
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> Regulation of satellite transmitting antennas is preempted in the same manner except that state and local health and safety regulation is not preempted.

Id. See James R. Hobson, *Home Satellite Dishes and Other Antennas: The Local Zoning Threat of "Equal Treatment,"* 10 COMM. LAW. 3 (1992) (stating that FCC compromised in finding that localities that differentiated between satellite dishes and other antennas would have to justify it based on health, safety, or aesthetic objectives).

[5] *See* Comments of Hughes Network Systems, Inc., at p. 9-10 (on file at FCC Reference Center, IB Docket No. 95-59, received July 14, 1995) [hereinafter Network Comments]. San Juan Capistrano, California requires the applicant to deposit $3,000 which is used to pay a $55 an hour charge for city officials to review the drawings of the antenna. *Id.* In Jupiter, Florida, town officials demanded that a 1.8 meter satellite dish mounted on the canopy of a gas station be screened from view. Structural alterations costing $50,000 would be required to make the canopy strong enough to support the screening. *Id.* at 9; *see also supra* note 3; Jeffrey Bils, *Dish Tiff Pits Safety vs. Channel Surfing*, CHI. TRIB., Apr. 6, 1994, at 1 (finding American Satellite Television Alliance has received hundreds of complaints from people who

ther too vague to apply consistently[6] or altogether unworkable.[7] These events led the FCC to adopt a revised order (the "1996 Order") which significantly broadened the scope of FCC preemption of local zoning ordinances.[8]

The release of the 1986 Order was strongly criticized by those who believe that FCC preemption constitutes an unwarranted intrusion into traditionally local matters.[9] The 1996 Or-

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believe zoning law in their town violates FCC rules). *But see* John Hayes & Larry J. Smith, *Report of the Subcommittee on Zoning Process*, 23 URB. LAW. 855, 856 (1992) (stating that since enactment of rules, municipalities have tried to create regulations that conform to FCC order).

[6] *See Kessler*, 774 F. Supp. at 714 (indicating that discrimination, whether express or through operation of ordinance, triggers preemption); Van Meter v. Township of Maplewood, 696 F. Supp. 1024, 1029 (D.N.J. 1988) (holding that ordinance that effectively discriminated against dish antennas is subject to preemption); Olsen v. City Counsel, 582 A.2d 1225, 1230 (Md. 1990) (stating that ordinances that appear neutral but operate to discriminate against satellite dish antennas would be subject to preemption); Preemption of Local Zoning Regulation of Satellite Earth Stations, 10 F.C.C.R. 6982, 6999 (1995) [hereinafter 1995 Full Report] (discussing ordinance that effectively discriminated against satellite dishes, yet was deemed valid by state court). Although many courts have held that ordinances that were discriminatory in effect as well as ordinances that discriminated explicitly through their wording were subject to preemption, it is unclear whether the order required this interpretation. 1995 Full Report, *supra*, at 6999; *see also* McDonald, *supra* note 3, at 19 (quoting Assemblyman Dennis Gorski arguing that FCC ruling is "vague and open to interpretation").

[7] The FCC required aggrieved parties to exhaust all other remedies before requesting FCC review of a controversy. Common Carrier Services; Preemption of Local Zoning and Other Regulation of Receive-Only Satellite Earth Stations, 51 Fed. Reg. 5519, 5524 (1986) [hereinafter 1986 Order]. In 1993, the Second Circuit invalidated this requirement stating that the Commission did not have the power to review matters already decided by an Article III court of competent jurisdiction. Town of Deerfield v. FCC, 992 F.2d 420, 428 (2d Cir. 1993). Such a procedure would render court opinions merely advisory. *Id.*

[8] Preemption of Local Zoning Regulations; Satellite Earth Stations, 61 Fed. Reg. 10896 (1996) (to be codified at 47 C.F.R. § 25.104) [hereinafter 1996 Order]; *see also infra* Appendix (quoting text of 1996 Order in pertinent part). The new FCC rule preempts "unreasonable" restrictions on satellite dishes. *Protest Over Easing Satellite Dish Restriction*, COLUMBIAN, Apr. 3, 1996, *available in* 1996 WL 9734672. The FCC ruled that municipalities and local government agencies may no longer restrict satellite dishes less than 1 meter wide in residential areas, and less than 2 meters wide in commercial areas. Linda Young, *Hostile Reception: FCC's Rules Over Satellite Dishes Leave Towns Mad*, CHI. TRIB., Apr. 17, 1996, at D1. The Telecommunications Act of 1996 mandated that the FCC enact rules that eliminate local laws that prevent citizens from using satellite dishes. Doug Abrahms, *FCC Halts Local Bans on Satellite TV Dishes*, WASH. TIMES, Aug. 7, 1996, at B7.

[9] *See* 2 ROHAN, ZONING AND LAND USE CONTROLS § 10A.06 (1997) (citing response of National League of Cities). Commentators on behalf of local communities asserted that there was no evidence of undue restrictions on satellite use and that, in any event, adequate local remedies are available. Preemption of Local Zoning Regulations, 50 Fed. Reg. 13986, 13987 (1985) [hereinafter 1985 Notice].

der has sparked a new round of perhaps more intense opposition.[10] One dissenter asserted that "[the new rule] means that the dish can be placed on the front lawn, on the roof, sticking out from the geranium bed, wherever the dish owner wants."[11] This note responds to such criticisms by examining the history of the conflict between dish owners and zoning bodies and demonstrating that the revised order intelligently reflects experience and knowledge gained by the FCC since the release of the 1986 Order. Part I of this note provides background information regarding the satellite dish industry and the technical requirements of satellite dish use. Part II examines the legal rights of zoning bodies and dish owners prior to the 1986 Order. Part III outlines FCC preemption over the past decade and examines the factors that made the revision of the 1986 Order both necessary and appropriate. Finally, Part IV of this note asserts that although the 1996 Order offers greater protection to dish owners, it also affords local governments substantial flexibility to ensure that satellite dishes will not dominate the landscape, thus indicating that many of the fears of local zoning officials are exaggerated.

I. THE SATELLITE DISH INDUSTRY

Satellite dish antennas can be separated into two basic categories: those which can only receive signals and those which can both transmit and receive signals. "Receive-only" dish antennas were introduced in 1980.[12] At that time, receive-only dishes

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[10] *See, e.g.*, Comments of Bloomfield Township, 2 (on file at FCC Reference Center, IB Docket No. 95-59, received July 14, 1995) [hereinafter Bloomfield Comments] (expressing belief that revised rule fails to balance federal and state interests and will operate as total prohibition against any local zoning); Comments of Michigan and Texas Communities, iii (on file at FCC Reference Center, IB Docket No. 95-59, received July 14, 1995) [hereinafter Michigan Comments] (asserting that rule will have negative consequences on public health, safety, and welfare); *see also* Doug Abrahms, *Mayors Dish Out Objections to Satellite - TV Zoning Ban*, WASH. TIMES, Apr. 3, 1996, at B8 (indicating that mayor brought 10 foot satellite dish to FCC doorstep to protest new rules); *Protest Over Easing Satellite Dish Restrictions*, *supra* note 8 (stating that several mayors oppose new FCC ruling and are calling for revision); Basil Talbott, *Satellite Dish Limits Scrapped/FCC Puts Emphasis On TV Competition*, CHI. SUN-TIMES, Apr. 8, 1996, at 2 (quoting Chicago official's opinion that federal government is intruding on local function).

[11] Young, *supra* note 8, at D1.

[12] Comments of the Satellite Broadcasting and Communications Association of America, 6 (on file at FCC Reference Center, IB Docket No. 95-59, received July 14, 1995) [hereinafter SBCA Comments]. By 1995 sales of this type of dish totaled approximately 4.5 million. *Id.*; *see also* Market Competition, *supra* note 1, at 64659

could operate only on the C-band frequency, which is a relatively weak frequency, and thus requires the use of rather large dishes to receive signals.[13] Older C-band dish models range in size from eight to twelve feet in diameter and weigh up to 1,300 pounds.[14] Technological advancements enabled the production of smaller and lighter antennas.[15] Today, the average C-band dish measures 7.5 feet in diameter and weighs only 90 pounds.[16] Users of C-band antennas can receive unscrambled signals free of charge and can also subscribe to C-band service providers to receive other signals that would otherwise be scrambled.[17]

Consumers may also receive satellite signals through medium and high power Ku-band antennas, introduced in 1991 and 1994 respectively.[18] Ku-band satellite dishes range in size from eighteen inches to one meter in diameter.[19] In order for this an-

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(stating that home satellite dish technology was first developed in 1976).

[13] Van Meter v. Township of Maplewood, 696 F. Supp. 1024, 1030 (D.N.J. 1988) (discussing technical requirements of reception); 1986 Order, *supra* note 7, at 5524 n.77; LELAND L. JOHNSON, TOWARD COMPETITION IN CABLE TELEVISION 117 (1994) (stating that C-band frequencies are lower power satellites, requiring larger antenna to get reception than KU-band); Bob Weiner, *When Regulation Becomes Just a Word*, NEWSDAY, Sept. 16, 1991, at 42 (finding that dish required to receive weak signal must be nine feet in diameter).

[14] SBCA Comments, *supra* note 12, at 23.

[15] For a detailed discussion of the evolution of satellite dish technology see *id.* at 22-24; JOHNSON, *supra* note 13, at 111-125 .

[16] SBCA Comments, *supra* note 12, at 23; Preemption of Local Zoning Regulation of Satellite Earth Stations, 11 F.C.C.R. 5809, 5810 (1996) [hereinafter 1996 Full Report] (stating that C-Band can measure as small as six feet in diameter, but typically are 7.5 feet in diameter). The C-Band antennas can receive different programming that may not be available to users of the smaller Ku-Band satellite dishes. *Id.*

[17] SBCA Comments, *supra* note 12, at 6 n.11. Of the 4.5 million C-Band dishes in use today, approximately half receive signals from service providers. *Id.* Approximately 70 unscrambled video programming signals are available. Competition Policy, *supra* note 2, at 5016 n.149; *see* Bill & Jan Moeller, *Satellite System for Road Potatoes*, WASH. TIMES, Oct. 2, 1992, at G11 (stating that unscrambled programming consists mostly of educational stations and news feeds). A decoder or descrambler is needed to watch scrambled channels. *Id.* For an overview of paid subscription satellite services and the effect of piracy on such services see White, *supra* note 1.

[18] SBCA Comments, *supra* note 12, at 7. In the short time since their introduction, 1.2 million people have subscribed to Ku-Band service providers. *Id.* at 8.

[19] *Id.* at 1 n.1. The size of the dish necessary to receive signals transmitted on the Ku-band frequency depends on the power of the transmitting satellite. 1996 Full Report, *supra* note 16, at 5810 n.7. Some service providers use medium power satellites whose signals can only be received by an antenna about one meter in diameter. *Id.* Direct Broadcast Satellite (DBS) service providers use high power satellites that require the use of an antenna only 18 inches in diameter. *Id.*; JOHNSON, *supra* note

tenna to receive any signals, the user must subscribe to one of a number of service providers.[20] Depending upon which service the user subscribes to, the Ku-band dish is able to receive anywhere from 20 to 150 channels.[21]

Satellite dishes that can both transmit and receive signals are commonly referred to as very small aperture terminals ("VSAT").[22] These antennas measure one to two meters in diameter[23] and are mainly used by businesses that wish to relay pertinent sales, pricing, and inventory information to stores, offices, and warehouses in various locations.[24] VSAT manufacturers predict that in the near future these dishes will enable physicians to treat patients from afar by reading satellite transmitted x-rays as well as enable schools to use these anten-

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13, at 121 tbl. 6-2 (finding medium power Ku-band to range from three to four feet in diameter, while high power Ku-band ranges from one to two feet in diameter).

[20] Mark Basch, *Invasion of Satellite Dishes, Consumers are Tuning into the Concept of Smaller, Lower-Priced Digital Systems*, FLA. TIMES-UNION, Dec. 2, 1996, at 12, *available in* 1996 WL 15968087. DBS dish owners can receive programming only if it is transmitted from satellites owned by the DBS company to which they subscribe, while C-band owners can aim their dishes at 22 satellites. *Id.*

[21] SBCA Comments, *supra* note 12, at 7; *see* Sylvia Rubin, *And the Dish Ran Away With the Viewers/TV Satellite Dishes Offer a Dizzying Variety of Channels*, SAN FRANCISCO CHRON., Jan. 19, 1997, at 30 (comparing DBS systems in terms of price, convenience, and number of channels).

[22] 1996 Full Report, *supra* note 16, at 5810. Hughes Communications Galaxy, Inc. is currently developing a service called the "SPACEWAY" network. *See* Comments of Hughes Communications Galaxy, Inc., 1-2 (on file at FCC Reference Center, IB Docket No. 95-59, received July 14, 1995) [hereinafter Galaxy Comments]. This system will operate through a "USAT" (ultra small aperture terminal) to a transmit/receive antenna. *Id.* at 2. The antenna measures 66 centimeters in diameter and will cost less than $1,000. *Id.* The network is scheduled to be in operation by 1998. *Id.* at 1. *See* Christina Lee, *Costa Mesa Firm Wins Contract for Satellite Equipment*, L.A. TIMES, May 21, 1991, at 7 (stating that VSATs allow for "two way communications between distant cities and central computer").

[23] 1996 Order, *supra* note 8, at 5810; Network Comments, *supra* note 5, at iii.

[24] *See* 1995 Full Report, *supra* note 6, at 6989. Wal-Mart is a prominent user of VSAT antennas. Network Comments, *supra* note 5, at 1. Wal-Mart not only tracks inventory using the VSAT network, but it also connects suppliers to the system, who, as a result, have access to the same inventory information and can thus schedule deliveries more efficiently. *Id.* at 2. In fact, Sam Walton used the system to transmit his weekly video conference to all employees in every Wal-Mart store. *Id.*; *see* Rene Stutzman, *Satellite Industry Doesn't Fear the Coming of Interactive TV: Businesses Say Their Dishes Won't Be Run Over By Time-Warner's Electronic Superhighway Project*, ORLANDO SENTINEL, July 25, 1993, at F1, *available in* 1993 WL 5236183 (stating that VSATs are used "primarily by far-flung companies that want to bounce computer data, such as inventory information or credit checks, between branch offices and corporate headquarters").

nas for two-way long distance learning.[25] One negative aspect of VSAT antennas, however, is that they emit radio frequency (RF) radiation which raises health and safety concerns.[26]

The main requirement for any type of satellite dish antenna to properly transmit or receive signals is the existence of an unobstructed line between the user's antenna and the orbiting communications satellite.[27] This is necessary because satellite transmissions are actually microwave signals that must travel in a straight line from the transmitter to the receiver.[28] In order to create the required unobstructed line, a satellite dish must be placed outdoors.[29] Depending upon the size of the dish and the surrounding topography, many people find outdoor placement of dishes aesthetically displeasing.[30] As a result, satellite dishes

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[25] Galaxy Comments, *supra* note 22, at 1.

[26] Even VSAT manufacturers admit that the effects of RF radiation on health and safety is a legitimate concern. Network Comments, *supra* note 5, at 32. They contend, however, that although the FCC has refrained, in both the 1986 and 1996 Orders, from preempting local ordinances concerning the health and safety effects of RF Radiation, this area presents the most compelling case for FCC preemption. *Id.* This assertion is based on the fact that while land use characteristics may vary among locales, the effects of RF radiation do not. *Id.* at 33. The FCC, as the expert in the field, has access to better scientific evidence than any local community. *Id.* at 32-33. Local ordinances regarding RF radiation are often based on fear. The FCC, however, is in the position to rationally determine what constitutes an appropriate level of RF Radiation. *Id.* at 32-34.

[27] *See* 1986 Order, *supra* note 7, at 5524 n.76; Basch, *supra* note 20, at 12 (stating that dish can be mounted anywhere, as long as dish has direct exposure to satellite). Experts have testified that dish antennas receive signals from one of 19 satellites in geostationary orbit 22,300 miles above the equator. *See* Van Meter v. Township of Maplewood, 696 F. Supp. 1024, 1030 (D.N.J. 1988). Dishes receive signals from one satellite at a time and are usually equipped with an electric rotor that allows the antenna to be realigned with other satellites when necessary. *Id.* Ku-bands are also susceptible to signal loss due to heavy rainfall. JOHNSON, *supra* note 13, at 117.

[28] Grieve, *supra* note 1, at 533 (discussing technical requirements for proper reception of satellite signals); *see also* James E. Peltz, *California Amplifier Rebounds Strategies: The Company's Profits are Rising After it Switched its Focus to Commercial Products and Made a Big Push Overseas*, L.A. TIMES, June 23, 1992, at 10 (stating that home satellite dishes operate on microwave signals).

[29] Grieve, *supra* note 1, at 533. Factors such as topography, landscaping, and physical obstructions often dictate the location of optimal dish placement for creating an unobstructed line between the antenna and the orbiting satellite. *Id.*

[30] "If [preemption] is adopted, the FCC (and Congress) should be prepared for howls of protest from the average citizen when a strange colored satellite dish is installed." Michigan Comments, *supra* note 10, at 6. One writer referred to satellite dishes as "metal bowls fouling the landscape." Young, *supra* note 8, at D1. Even large C-band dish antennas, however, can be disguised as patio furniture or rocks to better fit with the overall landscape. SBCA Comments, *supra* note 12, at 24. Paint-

are often the target of local zoning regulations. These zoning ordinances frequently operate to make it impossible to achieve an unobstructed line between the dish and the orbiting satellite, thus severely limiting reception or prohibiting dish use altogether.[31]

II. COMMON LAW REGARDING ZONING ORDINANCES THAT REGULATE SATELLITE DISH INSTALLATION

It is well settled that local regulation of land use via a zoning plan constitutes a valid exercise of a state's police power to promote reasonable objectives.[32] Furthermore, advancing a community's aesthetic value represents a reasonable government objective.[33] Given the negative impact on aesthetics attributable

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ing the antenna to match the surrounding environment is not practical, however, because dishes are often made of a specially coated fiberglass that can only be recoated on site by the manufacturer at a cost ranging from $500 to $3,000. 1995 Full Report, *supra* note 6, at 6989.

[31] For example, maximum size limitations, restrictions on the maximum height an antenna can extend from the ground, and requirements that the dish be screened from view can frustrate a dish user's ability to receive signals. *See generally* Loschiavo v. City of Dearborn, 33 F.3d 548, 550 (6th Cir. 1994) (imposing eight foot diameter and 12 foot height restrictions); Johnson v. City of Pleasanton, 781 F. Supp. 632, 634 n.2 (N.D. Ca. 1991) (stating that local ordinance restricts satellite dishes to maximum height of 10 feet and requires dish be earth-tone in color unless totally screened from neighboring property and right-of-way); Cawley v. City of Port Jervis, 753 F. Supp. 128, 129 n.2 (S.D.N.Y 1990) (ordering four foot maximum radius of dish, 15 foot height restriction, and screening with evergreen foliage); Nationwide Satellite Co. v. Borough of Haddon Heights, 578 A.2d 389, 391 (N.J. Super. App. Div. 1990) (restricting satellite dishes to seven foot limit in diameter, imposing 12 foot height restriction and requiring dish to be "screened, buffered or situated in such a manner that it cannot be visually seen from the public right of way abutting the lot on which the structure is situated or visually seen from the ground level of any adjacent property") (quoting Haddon Heights Ordinance No. 724); Alsar Tech., Inc. v. Town of Nutley, 563 A.2d 83, 85 (N.J. Super. Ct. Law Div. 1989) (restricting satellite dishes to maximum height of seven feet and requiring dish to be screened with evergreens at least seven feet tall).

[32] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). An ordinance will only be declared unconstitutional if its provisions are "clearly arbitrary and unreasonable" and have "no substantial relation to the public health, safety, morals or general welfare." *Id.* at 395. In addition, zoning ordinances are entitled to a presumption of validity. "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Id.* at 388 (citing Radice v. New York, 264 U.S. 292, 294 (1924)).

[33] Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984) (stating "state may legitimately exercise its police powers to advance aesthetic values"); Johnson v. City of Pleasanton, 982 F.2d 350, 354 (9th Cir. 1992) (holding that height, screening, and set-back requirements were valid time, place, and manner regulation to further city's interest in aesthetic values); Abbott v. City

to satellite dish antennas, it initially seems within a local government's power to heavily regulate or completely ban these antennas through zoning restrictions. However, the right to receive broadcast communications is encompassed in one's right to free speech.[34] The presumption of validity ordinarily granted to local zoning regulations carries much less weight if the ordinance negatively impacts upon the right to free speech.[35]

Satellite dish owners have raised the right to free speech issue in court to challenge the validity of restrictive zoning ordinances by claiming that the restrictions limited their access to broadcast communications.[36] However, even when an ordinance affects one's First Amendment rights it still may be upheld as a content-neutral restriction on the time, place, and manner in which an activity is undertaken.[37] To ascertain whether a zoning

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of Cape Canaveral, 840 F. Supp. 880, 886 (M.D. Fl. 1994) (recognizing validity of aesthetic objective with respect to ordinance that imposed height restrictions on satellite dish antennas and required owner to obtain permits prior to installation); Brophy v. Town of Castine, 534 A.2d 663, 664 (Me. 1987) (stating that setback requirement is valid means of advancing state's interest in general welfare). One court noted that while the preservation of aesthetics is a legitimate objective of a local ordinance, the town must show that the restrictions in fact advance that goal. L.I.M.A. Partners v. Borough of Northvale, 530 A.2d 839, 845 (N.J. Super. Ct. App. Div. 1987) (citing State v. Miller, 416 A.2d 821, 828 (N.J. 1980)).

[34] Red Lion Broad. Co., Inc. v. FCC, 395 U.S. 367, 390 (1969). "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas ... [t]hat right may not constitutionally be abridged either by Congress or by the FCC." *Id.*; *see Abbott*, 840 F. Supp. at 886 (stating that First Amendment protects right to receive access to television broadcasts); *Brophy*, 534 A.2d at 664 (acknowledging that right to receive information is component of free speech); *L.I.M.A. Partners*, 530 A.2d at 845 (asserting that communications facilities are medium of communication and therefore implicate First Amendment interests).

[35] *See* Schad v. Mt. Ephraim, 452 U.S. 61, 77 (1981) (Blackmun., J. concurring). When a zoning law restricts a protected liberty, it must be narrowly drawn and further a sufficiently substantial government interest. *Id.* at 68. In addition, when a zoning ordinance impinges on the satellite dish owner's First Amendment rights, a greater specificity of the local objective being advanced is required. Hunter v. City of Whittier, 257 Cal. Rptr. 559, 564 (2d Dist. 1989).

[36] *See, e.g., Loschiavo*, 33 F.3d at 548; *Johnson*, 982 F.2d at 350; Neufeld v. City of Baltimore, 863 F. Supp. 255 (D. Md. 1994); *Abbott*, 840 F. Supp. at 880; *Hunter*, 257 Cal. Rptr. at 564; Gouge v. City of Snellville, 287 S.E.2d 539 (Ga. 1982); *Brophy*, 534 A.2d at 663; *L.I.M.A. Partners*, 530 A.2d at 839.

[37] *See* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 48-49 (1986). This analysis has been specifically applied to validate ordinances restricting placement of satellite dish antennas. *See, e.g.*, Neufeld v. City of Baltimore, *available in* 1995 WL 711955 (unpublished disposition of 70 F.3d at 1263 (4th Cir. 1995))(holding that ordinance which prohibited all structures from person's front yard was valid content-neutral time, place, and manner restriction); *Abbott*, 840 F. Supp. at 886 (finding that content-neutral ordinance advanced substantial government interest in pre-

restriction is valid, a court must determine whether the ordinance in question furthers a "substantial government interest and do[es] not unreasonably limit alternative avenues of communication."[38] Working against dish owners is the fact that with respect to satellite dish antennas, minor limitations on reception caused by restrictive zoning and the availability of cable services can both serve as adequate alternatives.[39]

Another argument advanced by satellite dish antenna owners is that the local ordinance, on its face, violates the Equal Protection Clause as it treats dish owners differently than users of other types of antennas.[40] Unfortunately for dish users, the right to receive information via satellite transmissions does not constitute a fundamental right, but only a relative right which may be more easily outweighed by other conflicting government interests.[41] Therefore, under the proper analysis, the ordinance need

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serving aesthetics and that cable service in area provided adequate alternative).

[38] *Renton*, 475 U.S. at 50; *Schad*, 452 U.S. at 68 (holding that zoning ordinances that hinder protected liberty must be narrowly drawn to advance substantial government interest).

[39] *See Neufeld*, 1995 WL 711955, at *2 (stating that availability of cable services is adequate alternative); *Abbott*, 840 F. Supp. at 886 (asserting that First Amendment does not grant dish user absolute right to receive every broadcast signal). In addition, the *Neufeld* court stated that a dipole television antenna would satisfy the adequate alternatives requirement. *Neufeld*, 1995 WL 711955, at *2. In one case, the optimal placement of the dish that would comply with the ordinance was in a part of the yard that was occupied by a pool. Building a deck or platform over part of the pool on which the antenna could rest was then considered an adequate alternative for First Amendment purposes. *Johnson*, 982 F.2d at 353.

[40] *See Neufeld*, 1995 WL 711955, at *3 n.5; *Abbott*, 840 F. Supp. at 886. In *Neufeld*, the satellite antenna user contended that differences in the allowable use of dishes by schools and businesses as compared with that of single family homes violated the Equal Protection Clause. *Neufeld*, 1995 WL 711955, at *3 n.5. In *Abbott*, the plaintiff asserted that height restrictions placed on satellite antennas but not on other types of antennas constituted discriminatory treatment in violation of the Equal Protection Clause. *Abbott*, 840 F. Supp. at 886. In another case, a dish owner contended that requiring a building permit for satellite dishes but not for users of other antennas violated the Equal Protection Clause. Decker v. City of Plantation, 706 F. Supp. 851, 854 (S.D. Fl. 1989).

[41] *See Abbott*, 840 F. Supp. at 886 (stating that right to receive "satellite television programming of one's choice" is not fundamental); *Decker*, 706 F. Supp. at 854 (holding that right to receive information can be outweighed by local government's interest in protecting community aesthetics). Statutes which adversely affect fundamental rights are subject to the highest level of judicial review, strict scrutiny. Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 457 (1988). State laws that do not affect fundamental rights, however, will be upheld if they bear only a rational relationship to a state interest. *See generally* HENRY S. ABRAHAMSON, FREEDOM AND THE COURT 11-35 (1988) (discussing development and justification for different levels of judicial review).

only be rationally related to a legitimate state interest to be upheld.[42] Even when a seemingly neutral ordinance is applied in a discriminatory manner,[43] there is no guarantee that the harm to dish owners will be redressed[44] because the Supreme Court has previously held that some selective enforcement of statutes may be constitutionally permissible.[45]

Finally, in one case, a satellite dish owner asserted that a local regulation that eventually rendered his antenna useless amounted to a taking of property by the government.[46] This dish owner was also ultimately unsuccessful in his fight. The takings claim is an extremely difficult one to advance because aggrieved parties must show by clear and convincing evidence that: (1) the ordinance impacted them in a significantly detrimental manner; and (2) the ordinance is not substantially related to public health, safety, morality, or welfare.[47]

It is very difficult for dish owners, based on their constitutional rights alone, to overcome the restrictions on satellite an-

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[42] *See supra* note 41. In *Abbott v. City of Cape Canaveral,* a zoning ordinance that was deemed rationally related to the state's goals of ensuring safety and promoting aesthetics withstood an equal protection challenge. *Abbott*, 840 F. Supp. at 886.

[43] For example, in *Gouge v. City of Snellville*, the plaintiff asserted that local officials enforced zoning ordinances to restrict the placement of his satellite dish antenna but did not enforce the ordinance against owners of other non-complying structures. 287 S.E.2d 539, 542 (Ga. 1982).

[44] *See id.* While "[z]oning ordinances must be enforced in a reasonable and nondiscriminatory manner in order to satisfy equal protection requirements, ... whether they are so uniformly enforced is a question of fact." *Id.* at 543 (holding that plaintiff failed to establish sufficient evidence that equal protection violation had occurred).

[45] Oyler v. Boles, 368 U.S. 448, 456 (1962). In this case, inmates asserted that a recidivist statute was only being enforced against a minority of offenders subject to its provisions. The court stated that the conscious exercise of some selectivity in enforcement does not in itself violate the Constitution unless the selective enforcement was based on some "unjustifiable standard" or "arbitrary classification." *Id.*

[46] *Gouge*, 287 S.E.2d at 541-42. In addition, commentators on behalf of Michigan and Texas communities claim that the federal government may be liable under the doctrine of inverse condemnation. In an inverse condemnation situation, the government does not literally "take" property, but instead, a de facto taking occurs that materially decreases private property values while advancing a governmental objective. Michigan Comments, *supra* note 10, at 19-20.

[47] *Gouge*, 287 S.E. 2d at 542. In *Langenegger v. United States,* the court stated that whether just compensation is warranted largely depends on the circumstances of the case. 756 F.2d 1565, 1570 (Fed. Cir. 1985); *see also* Terry Rice, 1991 *Survey of New York Law: Zoning & Land Use*, 43 SYRACUSE L. REV. 615, 653-54 (1992) (discussing difficulties in succeeding with "governmental taking" claim in zoning situations).

tenna use imposed by local ordinances.[48] In addition, relatively little case law exists that specifically addresses the issue of the constitutional rights of a satellite dish user. This is a result of two factors. First, satellite dish antennas represent a recently developed, cutting edge technology.[49] Second, the FCC issued its first preemption order soon after these antennas were introduced.[50] Courts often consider the effect of administrative regulations before ruling on constitutional issues, therefore, a dish owner's constitutional claims are seldom addressed.[51]

III. THE 1986 PREEMPTION ORDER AND ITS UNINTENDED RESULTS

As more dish owners complained that their ability to install and use satellite antennas was being frustrated by local zoning regulations, the need for FCC intervention became increasingly apparent.[52] The FCC indicated its desire not to become a national zoning board and expressed its firm belief that the federal government should afford some deference to local officials regarding matters that had traditionally been addressed at the local level.[53] At the same time, however, an established federal in-

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[48] *See supra* notes 32-47 and accompanying text. Also working in the local government's favor is a recent decision which stated that if a town has no ordinance in place that addresses antenna use, the zoning board may suspend all installations for a short time while town officials research the issue and decide whether to impose restrictions. Cellular Tel. Co. v. Village of Harrison, N.Y. L.J., Nov. 30, 1995, at 35 (col. 3) (N.Y. Sup. Ct. 1995) (upholding 90 day moritorium on cellular telephone antenna installation).

[49] *See supra* notes 12-31 and accompanying text.

[50] *See supra* note 4 and accompanying text.

[51] *See, e.g.*, L.I.M.A. Partners v. Borough of Northvale, 530 A.2d 839, 841 (N.J. Super. Ct. App. Div. 1987) (refraining from considering constitutional issues because trial court did not consider impact of 1986 preemption order).

[52] *See* 1995 Full Report, *supra* note 6, at 6992. Many local government officials, however, asserted that the existence of unduly restrictive zoning ordinances was a rare occurrence that had been magnified by the satellite industry. *Id.* In addition, the huge growth of the satellite dish industry led to several new concerns for the FCC. One was piracy of premium television by satellite dish owners. To deal with this emerging problem, Congress enacted the Cable Communications Policy Act of 1984. For further discussion of this topic, see Gary E. Bishop, *The Home Satellite Dish Antenna: Will the Cable Communications Policy Act of 1984 Descramble the Unauthorized Viewing Controversy?*, 25 WASHBURN L.J. 66 (1985).

[53] *See* 1986 Order, *supra* note 7, at 5524. Cities complained that they were opposed to a system that created excessive FCC involvement in local disputes. *Id.* The FCC believed that this concern could be resolved by designing a rule which gave local zoning bodies the opportunity to determine what course best served local objectives while still conforming to federal policy. *Id.*; *see also* James R. Hobson & Jeffrey

terest existed in making "communications services available to all people of the United States."[54] Furthermore, an amendment to the Communications Act created a federal right for individuals to receive unscrambled programming signals.[55] The FCC interpreted these statutory provisions as "establish[ing] a federal interest in assuring that the right to construct and use antennas to receive satellite delivered signals is not unreasonably re-

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O. Moreno, *Preemption of Local Regulation of Radio Antennas: A Post* Deerfield *Policy for the FCC*, 46 Fed. Comm. L.J. 433, 436 (1994) ("[T]he commission noted that it did not intend to become a national zoning board ... . Presumably, the Commission envisioned itself as a forum of last resort if local relief were wrongfully denied.").

[54] 1986 Order, *supra* note 7, at 5522. Congress expressed its intention to promote communications services by creating the FCC through the enactment of Section 1 of the Communications Act of 1934. *See* 47 U.S.C. § 151 (1997). This section provides:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States, without discrimination on the basis of race, color, religion, national origin or sex, a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provision of this chapter.

Id. One commentator contended that although 47 U.S.C § 151 granted the FCC certain powers, it did not state any express interest that would grant the Commission the authority to preempt all local zoning ordinances. Michigan Comments, *supra* note 10, at 9. In addition, some assert that the revised order completely disregards the federal interest in "promoting safety of life and property" in violation of 47 U.S.C § 151. *Id.* The FCC counters these arguments by noting that "[n]ot one of the various courts that have considered our preemption rule since 1986 has questioned our authority to act in this area." 1996 Full Report, *supra* note 16, at 5811.

[55] This right is expressed through a provision which exempts unscrambled, unmarketed satellite cable programming from a regulation that prohibits piracy of satellite transmissions. *See* 47 U.S.C. § 605(b) (1997). Congress enacted this provision in response to its desire to guarantee that Americans living in areas where cable programming was unavailable would be able to receive unscrambled, satellite transmitted programming. 1985 Notice, *supra* note 9, at 13988. State and local regulations that prevent or hinder people from installing antennas to receive such programming interfere with this right. *Id.* Some commentators debated whether or not this provision created only a limited "sanction" rather than an "unequivocal" right on which preemption may be based. 1986 Order, *supra* note 7, at 5520. No court has acted on this assertion, however, to challenge the FCC's authority to preempt. *See, e.g.*, Cawley v. Port Jervis, 753 F. Supp. 128, 131 n.5 (S.D.N.Y. 1990); Alsar Tech., Inc. v. Town of Nutley, 563 A.2d 83, 90 (N.J. Super. Ct. Law Div. 1989).

stricted by local regulation."[56] This led the FCC to conclude that, notwithstanding legitimate local interests, some form of federal preemption would be necessary.[57]

A. *The 1986 Preemption Order*

In 1984, United Satellite Communications, Inc. ("USCI") and other companies petitioned the FCC for a declaratory ruling to preempt a Chicago zoning ordinance that required a public hearing, a one hundred dollar application fee, and the approval of three agencies before a dish could be installed.[58] The petitioners asserted that this ordinance placed an undue burden on them which affected their ability to sell satellite dish antennas in Chicago.[59] In 1986, after issuing a Notice of Proposed Rule Making and soliciting comments on the matter, the FCC addressed the

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[56] 1986 Order, *supra* note 7, at 5522.

[57] In the Notice of Proposed Rulemaking, the FCC made an initial determination that it has the authority to preempt local ordinances. 1985 Notice, *supra* note 9, at 13987. The FCC contended preemption was warranted when "the state regulation stands as an obstacle to the accomplishment of congressional purpose." *Id.* at 13988 (citing Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984)). The FCC felt evidence indicated that some state regulations interfered with the federal interests established in 47 C.F.R. § 151 and 47 C.F.R. § 605, thus warranting preemption. *Id.* at 13986; *see supra* notes 54-56 and accompanying text. The FCC's authority to preempt is derived from the federal government's powers under the Constitution's supremacy clause. U.S. CONST. art. VI, cl. 2. This authority extends to federal regulations as they carry no less preemptive effect than a federal statute. New York v. FCC, 486 U.S. 57, 63 (1988) (holding that federal regulation, authorized by statute, can preempt state or local law); Fidelity Fed. Savs. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982). In *Alsar Technology, Inc. v. Town of Nutley,* local governments also asserted that 47 U.S.C. § 605(f) created a conflict which made the FCC's intent vague. *Alsar Tech., Inc.,* 563 A.2d at 87. The town conceded the fact that 47 U.S.C. § 605(b) created the federal right to receive signals, but noted that subsection (f) stated that local laws would not be affected. *Id.* Given the wording of the 1986 Order, which included standards for preemption, the court ultimately found that the FCC's intent to preempt was clear. *Id.*

[58] 1985 Notice, *supra* note 9, at 13987. USCI's petition requested that the FCC issue a preemption of local ordinances when the regulations:

> (1) Lack a direct and tangible relationship to legitimate and neutral zoning or public health and safety considerations;
>
> (2) Interpose requirements that frustrate the reception of satellite-transmitted signals; and
>
> (3) Are contradictory to the preeminent federal interests in establishing and fostering interstate satellite program delivery services to the public.

Id. See Hobson & Moreno, *supra* note 53, at 437-38 (detailing events leading to the 1986 Order).

[59] *See* Karen J. Shapiro, *Federal Oversight of State and Local Regulation of Satellite Earth Stations: Uniformity Through Preemption?,* 37 J. URB. & CONTEMP. L. 325, 327 (1990).

petitioners' concerns by adopting what it termed a rule of "limited preemption."[60]

The main thrust of the 1986 Order was to prohibit local zoning ordinances from discriminating between satellite receive-only dishes and other types of antennas.[61] Local ordinances were only subject to preemption when they regulated satellite dish antennas in a different manner than other antennas.[62] Even if such differential treatment did occur, the ordinance could escape preemption if local authorities could justify the distinction. This could be achieved by demonstrating that a reasonable health, safety, or aesthetic objective existed and that no unreasonable limitations on reception or excessive costs were imposed on the user.[63]

B. Loopholes and Vague Standards

In her dissent (in part) to the 1986 Order, Commissioner Mimi Dawson, an admitted conservative who favors states'

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[60] 1986 Order, *supra* note 7, at 5522. The order was considered "limited" because it did not operate as a complete ban on any local regulation of satellite dish placement. Towns could still impose reasonable requirements on all antennas as long as satellite dishes were not discriminated against in some way. *Id.* at 5523. The FCC chose a limited preemption over a total preemption because it wanted to accommodate as best it could local interests in promoting interstate communications and historic preservation. *Id.*

[61] *See* 47 C.F.R. § 25.104, *supra* note 4. Some commentators suggest that rather than issuing a general policy statement, the FCC should actually review individual cases to determine whether preemption was appropriate. The FCC rejected this suggestion finding it contrary to its stated desire not to become overly involved in local disputes. 1986 Order, *supra* note 7, at 5524.

[62] *See* 47 C.F.R. § 25.104, *supra* note 4; *see also supra* note 6 and accompanying text; *see generally*, Rice, *supra* note 47, at 631-34 (discussing implications of statutes which differentiate between satellite and other antennas).

[63] 47 C.F.R. § 25.104, *supra* note 4. A review of the case law shows that in only one case in which the local zoning code discriminated against satellite dish users was the town able to satisfy both prongs of the preemption exception. *See* Abbott v. City of Cape Canaveral, 840 F. Supp. 880, 884-85 (M.D. Fl. 1994). After determining that a reasonable local objective existed, the court held that the plaintiff's expenditure of $1,400 was not excessive when compared to the $2,150 spent on equipment costs, and that since plaintiff was able to receive all signals from satellites intended to serve his area, the inability to receive signals from other satellites was not an unreasonable limitation on reception. *Id.* at 885. Other cases that survived preemption involved ordinances that were not deemed discriminatory. *See, e.g.*, Carino v. Town of Deerfield, 750 F. Supp. 1156, 1160-61 (N.D.N.Y. 1990) (discussing state court holding that ordinance that banned tower type antennas and satellite dishes from lots of less than 1/2 acre was not discriminatory); Brophy v. Town of Castine, 534 A.2d 663 (Me. 1987) (involving 75 foot setback requirement that applied to all structures).

rights, discussed her belief that the preemption order did not extend far enough to protect the federal interest in maintaining the use of such programming devices because it left a major loophole through which a local ordinance could restrict the placement of satellite dish antennas.[64] This loophole revolved around the previously articulated differentiation standard which dictated that as long as a zoning code treated all antennas equally, it would not be subject to preemption.[65] This left open the possibility for a town to impose a blanket ban in certain areas (with a grandfather clause for existing antennas).[66] In addition, the order imposed minimal preemption in the area of transmitting antennas. Any health or safety objective could, therefore, justify a total ban of these dishes.[67]

Certain terminology within the 1986 Order offered little interpretive guidance to the reader and led to inconsistencies in the preemption of ordinances which placed restrictions on dish antennas. For example, the phrase "clearly defined objective" did not indicate whether the local objective must be stated explicitly in the text of the regulation itself or if the requirement could be satisfied by implying such a purpose.[68] Furthermore,

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[64] *See* 1986 Order, *supra* note 7, at 5526-27 (Commissioner Mimi Weyforth Dawson, dissenting in part). "I cannot support the Commission's blessing of either blanket bans against all communications antennas or ordinances which allow discrimination in effect against satellite antennas." *Id.* at 5526.

[65] *See* 47 C.F.R. § 25.104, *supra* note 4.

[66] *See* 1986 Order, *supra* note 7, at 5527. There could then be a grandfather clause for all existing antenna dishes. *Id.* Commissioner Weyforth Dawson noted that by not differentiating between satellite dishes and other antennas, an ordinance that imposed a blanket ban against all antennas would be entirely permissive. *Id.* The FCC adopted this standard to allow towns truly concerned with their unique historic character to protect this interest by regulating all antennas. *Id.* at 5523. Commissioner Weyforth Dawson asserted, however, that this ability to blanket ban antennas exists regardless of whether historic preservation is the local community's objective. *Id.* at 5527.

[67] 47 C.F.R. § 25.104, *supra* note 4. The FCC excluded consideration of transmitting equipment from the 1995 Notice, therefore, they obtained little evidence on which to base preemption in this context. 1986 Order, *supra* note 7, at 5525. They did, however, reserve the issue for review if it became apparent that zoning ordinances were interfering with the consumers' ability to use transmitting dishes. *Id.*

[68] 47 C.F.R. § 25.104, *supra* note 4. Although most courts held that the local objective must be specifically stated in the text of the regulation itself, authority existed that such a purpose could also be implied. *See* Neufeld v. City of Baltimore, 863 F. Supp. 255, 259 (D. Md. 1994) (invalidating ordinance because town failed to explicitly state health, safety, or aesthetic objective); Kessler v. Town of Niskayuna, 774 F. Supp. 711, 716 (N.D.N.Y. 1991) (holding that town must explicitly state why it is applying differential treatment to receive only satellite dishes and other anten-

the terms "unreasonable limitation" and "excessive costs" were treated by the courts as questions of fact, which inevitably led to inconsistent application of the FCC rule.[69] Finally, although many courts ruled that local ordinances that discriminated against satellite dishes explicitly through their wording, or in effect as applied, would be subject to preemption, a reasonable interpretation could limit preemption to cases of explicit discrimination.[70]

C. *Continued Non-Compliance By Communities*

Notwithstanding the availability of the "equal treatment" loophole present in the 1986 Order, many towns continued to enact ordinances that blatantly violated the requirements of section 25.104 and thus unduly burdened dish users.[71] In some in-

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nas); Cawley v. City of Port Jervis, 753 F. Supp. 128, 131 (S.D.N.Y. 1990) ("[T]he courts that have carefully considered the language and regulatory history of the FCC regulation on this point have concluded that the regulation requires the ordinance to define its objective explicitly. The court agrees with [this] view."); Hunter v. City of Whittier, 257 Cal. Rptr. 559, 566 (2d Dist. 1989) (stating that general standards incorporated in variance procedure do not satisfy requirements of preemption rule); Alsar Tech., Inc. v. Town of Nutley, 563 A.2d 83, 87 (N.J. Super. Ct. Law Div. 1989) (holding that ordinance which failed to state clearly defined objective is invalid for that reason alone). *But see Abbott*, 840 F. Supp. at 884 (implying reasonable objective from preamble to the town's ordinance); Van Meter v. Township of Maplewood, 696 F. Supp. 1024, 1029-30 (D.N.J. 1988). "Although it does not state its purposes explicitly, the Ordinance is clearly an attempt to diminish the visual impact of the antennas." *Van Meter*, 696 F. Supp. at 1029-30.

[69] *Compare, Abbott*, 840 F. Supp. at 885 (finding that $1,400 cost of compliance was not excessive in light of purchase and installation costs totaling over $2,000); Bloomfield Hills v. Gargaro, 443 N.W.2d 495, 498-99 (Mich. Ct. App. 1989) (stating that $12,877 cost of compliance to install $5,768 satellite dish was not excessive as matter of law); *with Cawley*, 753 F. Supp. at 132 (holding that variance procedure that required $100 fee, 12 copies of survey map, environmental assessment form, and in addition, would take over two months to complete, imposed excessive costs on the user and unreasonable limitations on reception); *Van Meter*, 696 F. Supp. at 1031 (implying that costs of planting 30 feet of six foot hedges to screen satellite dish from view would be excessive cost); *Alsar Tech.*, 563 A.2d at 88 (indicating that town's screening requirement that would necessitate planting of seven foot evergreens along sides of dish owner's property would be excessive cost). Most courts have interpreted "unreasonable limitations" to not necessarily require optimal placement of the satellite dish. *See, e.g., Abbott*, 840 F. Supp. at 855; *Cawley*, 753 F. Supp. at 132; *Van Meter*, 696 F. Supp. at 1030.

[70] *See supra* note 6. The possibility that ordinances which discriminated in effect could escape preemption was to particular concern to Commissioner Dawson. *See* 1986 Order, *supra* note 7, at 5527 ("Other ordinances—even if they have the effect of discriminating against [satellite dishes]—do not come within the ambit of the majority's rule.").

[71] "It is likely that few zoning ordinances comply with the exacting mandates of

stances, the wording of the local ordinance itself made satellite reception technically impossible.[72] In one case, a business spent over $13,000 and 32 months attempting to install a VSAT antenna before the town finally realized its ordinance had been preempted by the FCC.[73] Much of the cost and delay was a result of the town's requirement that the antenna be screened from public view in order to prevent it from being visible from U.S. Highway 1 (a commercially developed, major thoroughfare).[74]

In another case, before the town would allow a dish owner to install a receive-only dish antenna in his side yard, the owner needed to obtain a building permit along with an electric permit from the town, neither of which could be acquired unless he

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the FCC rule ...." Rice, *supra* note 47, at 634; *see also* Town of Deerfield v. FCC, 992 F.2d 420, 424 (2d Cir. 1992) (recounting contents of letter written by FCC to aggrieved dish owner, "[i]t appears that communities are generally failing to abide by our standards"). Both industry and town officials assert that non-compliance is often the result of the community being completely unaware of the preemption order. *See* Comments of the City of Dallas, 11 (on file at FCC Reference Center, IB Docket No. 95-59, received July 14, 1995) [hereinafter Dallas Comments] (stating that most of the 10,000 local jurisdictions they represent are unaware that their zoning ordinances can be preempted by federal agency); Network Comments, *supra* note 5, at 12. "[M]ost local government officials simply do not know and, regrettably, many do not care about federal interests and the FCC's current preemption. The lack of knowledge is understandable [because] VSATs are a 'quiet revolution.' " *Id.*

[72] *See, e.g.*, *Cawley*, 753 F. Supp. at 129 n.2 (citing ordinance that imposed four foot maximum diameter on satellite dishes when technology at time required dishes to be at least eight feet in diameter); *Van Meter*, 696 F. Supp. at 1030 (involving ordinance that imposed six foot height restriction when 10 foot antenna was required to receive signals). "[T]he ordinance functions as an unreasonable burden on reception because its provisions make reception technically impossible and because it is generally insensitive to the unique conditions that govern signal reception on any given site." *Id.* In another case, the ordinance failed to consider what impact its screening requirement would have on reception of signals and was thus deemed unreasonable. *Alsar Tech., Inc.*, 563 A.2d at 83.

[73] Network Comments, *supra* note 5, at 6-7 (outlining dispute between town of Juno Beach, Florida and A.G. Edwards, national securities broker-dealer firm that was trying to install VSAT antenna in order to link up office with company's national VSAT network).

[74] *Id.* at 7. The proposed site for the VSAT antenna was atop a commercial office building located on U.S. Highway 1. *Id.* The town would not review A. G. Edwards' application for over three months. *Id.* After the permit was finally granted and A.G. Edwards installed the necessary screening, the town demanded that the screening be painted, notwithstanding the advice of the installer that painting the screen would decrease its wind resistance and greatly increase the possibility of it being torn. *Id* at 7-8. As predicted, wind damage eventually made the screen unusable. *Id.* at 8. Further disputes ensued and the town did not recognize that the ordinance was indeed subject to preemption until A.G. Edwards threatened to relocate. *Id.* at 8-9.

hired a licensed builder and a master electrician.[75] In addition, he was required to hire an engineer to create a foundation plan for the antenna.[76] All told, the dish owner spent $28,000 to install a $5,000 antenna.[77]

Speed and ease of installation are especially important factors for businesses using VSAT antennas, and local communities' noncompliance with section 25.104 hinders such problem-free implementation.[78] For example, since Wal-Mart tracks its inventory through the use of satellite technology, when a new store opens, merchandise does not even enter the premises until the VSAT system is in place.[79] A lengthy approval process can, therefore, delay the opening of stores when all other aspects are complete.[80] Although many situations similar to these were eventually deemed preempted when the matter ultimately went to

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[75] *See* SBCA Comments, *supra* note 12, at 11-14 (discussing dispute between resident of Prince Georges County, Maryland and local building inspectors). The SBCA implied that this burden could have been avoided because a licensed electrician and a licensed builder were both completely unnecessary to install the satellite antenna. *Id.* at 12.

[76] *Id.* at 13. After the process of creating the foundation plan started, local officials determined that the dish would have to be placed on a 30 foot pole for " 'aesthetic' " reasons. *Id.* The dish owner also had to agree to screen the antenna by planting 30 eight to ten foot pine trees at a cost of $75 to $100 a tree. *Id.* The county finally granted the permits, but only after the dish owner had spent over $23,000 trying to comply with the county's demands. Local officials later notified the dish owner that the permits were issued in error and did not reissue them for another seven months. *Id.*

[77] *Id.*

[78] *See* Network Comments, *supra* note 5, at 2-6. Stores generally can not open until their computer system is in place, whether it be networked through phone lines or satellite signals. Therefore, regulatory delay puts VSAT installers at a serious competitive disadvantage. *Id.* at 5-6.

> "When a company decides to open up a new place of business, competitive factors typically set the date that the business needs to open. If a business had the leisure of several months of lead time, it might not matter if local governmental approval processes were to take a few months. Unfortunately, [this] is a rare event."

Id. at 4. Without government intrusion, a VSAT antenna can easily be installed within several hours. *Id.*

[79] *Id.* at 5.

[80] *See* Network Comments, *supra* note 5, at 5. This is especially true when opening the store involves construction. *Id.* Contractors generally do not include the VSAT antenna in the original application for a building permit because it usually delays the issuing of the permit and thus the entire construction schedule. *Id.* As a result, the VSAT application is usually not filed until the construction is complete. *Id.* At this point, however, the company is already waiting to unload its inventory and begin business. *Id.*

court,[81] the expense, delay, and possibility of litigation harmed the satellite industry's ability to operate as a viable alternative to cable service and threatened the federal interest in making all communications services available to the public.[82] In addition, it is difficult to now ascertain the extent to which these burdens created a "freeze effect" on potential satellite dish users.[83] Many of the restrictions on satellite dish installation could have been avoided if local officials had a better understanding of the technology involved before issuing ordinances.[84] Businesses trying to obtain permits for VSAT antennas have had local officials ask, "But why does a CVS [Pharmacy] have to watch HBO?"[85] Such questions demonstrate the local officials' lack of knowledge regarding such devices and this ignorance often led to the enactment of unduly burdensome ordinances.

D. The Deerfield Decision

A final problematic aspect of the 1986 Order was that no method existed by which the FCC could enforce its order. This procedural omission was actually a calculated decision by the FCC, which further indicated its intention to refrain from acting as a national zoning board.[86] The FCC expected communities to

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[81] *See supra* note 63.

[82] *See* Shapiro, *supra* note 59, at 334-35 (discussing how potential litigation can deter one from purchasing satellite dish antenna, thus making cable an easier alternative). GTE commented that it often finds itself at a competitive disadvantage with respect to the installation of VSAT antennas because of unreasonable installation fees and delays imposed by local communities. 1995 Full Report, *supra* note 6, at 6991. The cost of compliance with local requirements is also a factor that can ultimately sway a consumer to choose cable systems over satellite dish antennas. *See* Network Comments, *supra* note 5, at 3. For example, Hughes Network Systems, Inc. states that total cost to the consumer of its VSAT systems is on average $300 per month over the equipment's five year useful life—a rate they contend is competitive with cable systems. *Id.* They assert that if a local community imposes $3,000 of costs necessary to comply with the ordinance, this creates a serious competitive disadvantage by adding an extra $50 a month over the useful life of the VSAT system. *Id.*

[83] *See* SBCA Comments, *supra* note 12, at 17. From 1994 to the middle of 1995, the SBCA received over 1,000 inquiries from residents and businesses seeking support or information regarding their disputes with various local zoning officials. *Id.* In addition, the SBCA contends that the negative publicity surrounding these controversies creates a "consumer perception that installing a satellite dish will cause trouble in [their] local community." *Id.*

[84] *See supra* note 71 and accompanying text.

[85] Network Comments, *supra* note 5, at 6 n.2.

[86] *See* 1986 Order, *supra* note 7, at 5524. The Commission believed that this objective would be best served by adopting a general policy statement that local com-

comply with the requirements of the order and handle disputes effectively at the local level.[87] Accordingly, the FCC implemented a policy of reviewing local ordinances only after the party challenging the validity of the zoning code had exhausted all legal remedies available to them.[88]

The United States Court of Appeals decision in *Town of Deerfield v. FCC*, however, ultimately invalidated this exhaustion of remedies procedure.[89] In *Deerfield*, Mr. Carino, a satellite dish owner, requested relief from the FCC regarding a zoning ordinance that prevented him from installing his antenna.[90] In a letter responding to his request, the FCC informed Mr. Carino of the exhaustion of remedies requirement and thereby refused to review his case until he met this requirement.[91] Mr. Carino then brought his case to state court which held that the ordinance was not subject to preemption and this ruling was upheld on appeal.[92] Further appeals to the New York Court of Appeals were denied.[93] Finally, Mr. Carino brought his case to federal district

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munities could refer to as a guideline when enacting ordinances regulating placement of satellite dish antennas. *Id.*

[87] *Id.* The FCC, however, did state that it would entertain petitions for further action if evidence surfaced that showed that local communities were not conforming to the standards of the order. *Id.*

[88] "Satellite antenna users who are dissatisfied with the results of any local zoning decision can use the standards adopted here in pursuing any legal remedies they might have." *Id.*

[89] 992 F.2d 420, 427 (2d Cir. 1992) (holding that FCC exhaustion of remedies procedure violated several fundamental statutory and constitutional principles); *see supra* note 7 and accompanying text.

[90] *See* Preemption of Satellite Antenna Zoning Ordinance of Town of Deerfield, New York, 7 F.C.C.R. 2172 (1992) [hereinafter Deerfield Preemption]. This ordinance banned any satellite dish antenna and tower type antenna that weighed over one hundred pounds from any lot under one-half acre. *Id.*

[91] *Deerfield*, 992 F.2d at 424. "Requests for relief under the Commission's rule must demonstrate that *all other remedies including legal action with the assistance of private counsel have been pursued and exhausted.*" *Id.* (quoting letter from FCC Chief of Satellite Radio Branch).

[92] Mr. Carino's trial court action was filed pursuant to a procedure used to review zoning board decisions in New York called an "Article 78 Proceeding." *See* Deerfield Preemption, *supra* note 90, at 2172 (discussing findings of Article 78 Proceeding in *Carino v. Pilon*, R.J.I. #32-87-609 (July 27, 1989)). The trial court upheld the ordinance because the zoning code applied to both dish antennas and tower antennas. *Id.*; Carino v. Pilon, 530 N.Y.S.2d 1022 (App. Div. 1988) (affirming decision of Article 78 proceeding). Ironically, most of Mr. Carino's neighbors had signed a petition in support of his position and no one had appeared in opposition at the original hearings before the zoning board of appeals. *See Deerfield*, 992 F.2d at 424.

[93] Carino v. Pilon, 531 N.E.2d 655 (N.Y. 1988) (dismissing appeal for lack of constitutional question).

court where the court ruled that he was collaterally estopped from raising the preemption issue because the matter had been fully and fairly litigated in state court.[94] Having now exhausted all available remedies, Mr. Carino again requested relief from the FCC. This time the FCC reviewed his case and agreed that the local ordinance distinguished between satellite dishes and other antennas and was, therefore, preempted.[95] The Town of Deerfield then brought suit in federal court to challenge the FCC's authority to review federal court decisions.[96] The court held that the FCC exhaustion of remedies requirement was invalid because it would then render all court decisions advisory.[97] Such a practice, in effect, placed the FCC in the position of a court of last resort thereby violating of the principle of separation of powers.[98] This cemented the notion that, in addition to problems created by continued noncompliance and the vague wording of section 25.104, revision of the 1986 Order would be necessary if the FCC was to retain the ability to review cases and local ordinances inconsistent with FCC policy.

IV. THE REVISED PREEMPTION ORDER REFLECTS SOUND POLICY DERIVED FROM A DECADE OF EXPERIENCE

Commentators on behalf of local communities admitted that, in light of the *Deerfield* decision, some procedural changes to the 1986 Order would be necessary.[99] They insisted, however, that

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[94] Carino v. Town of Deerfield, 750 F. Supp. 1156, 1170 (N.D.N.Y. 1990).

[95] Deerfield Preemption, *supra* note 90, at 2173. Although the town's ordinance did in fact treat satellite dishes and tower type antennas in the same manner, it did not impose any restrictions on other types of antennas or tower antennas weighing under 100 pounds. *Id.* In order to pass the differentiation standard of section 25.104, the zoning ordinance "must affect *'all fixed external antennas in the same manner.'* Deerfield's ordinance fails this test." *Id.*

[96] *Deerfield*, 992 F.2d at 420.

[97] *Id.* at 429; *see supra* note 7 and accompanying text. The court stated that by adopting "exhaust[ion] of judicial remedies, the Commission in effect sought to modify the jurisdiction of Article III courts ... to deprive them of the power to render anything but advisory opinions" in any case involving section 25.104. *Deerfield*, 992 F.2d at 420.

[98] *Id.* at 430 (stating that FCC had in effect tried to "arrogate to itself the power to [] review ... the judgments of the courts").

[99] *See* Comments of Duncan, Weinberg, Miller & Pembroke, P.C. on Behalf of Local Communities, 1-2 (on file at FCC Reference Center, IB Docket No. 95-59, received July 15, 1995)[hereinafter Duncan Comments](stating that in light of *Deerfield* decision, FCC must amend its rule); *see also* Dallas Comments, *supra* note 71, at 1.

substantive changes were unnecessary because the incidents of community non-compliance cited by the satellite industry were anecdotal and exaggerated the extent of the actual problem.[100] While commentators on behalf of the satellite industry provided the FCC with several specific instances of unreasonable burdens placed on satellite dish users by zoning ordinances,[101] local communities were unable to substantiate their claim that the problem was merely aberrational.[102] The need for substantive changes to the 1986 Order was further evidenced by the passage of the Telecommunications Act of 1996.

Section 207 of this Act directed the FCC to "prohibit restrictions that impair a viewer's ability to receive video programming services through ... direct broadcast satellite services."[103] While the FCC retained discretionary authority to preempt under 47 C.F.R. § 151[104] and 47 C.F.R. § 605,[105] with respect to Direct Satellite Broadcast ("DBS") antennas, some form of preemption was now actually required by the Telecommunications Act of 1996.[106] The resulting revision of the 1986 Order satisfied this

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[100] Duncan Comments, *supra* note 99 at 2-4. "Any inhibitions to the development of the technology resulted primarily from the bulky nature of the technology itself." *Id.* at 2; *see* Michigan Comments, *supra* note 10, at 7 (asserting that the FCC's rule is the equivalent of "using a nuclear bomb to kill a gnat"). In addition, towns contended that regular broadcast television and cable service both constituted adequate alternatives. *See* 1996 Full Report, *supra* note 16, at 5811. While this is true for constitutional analysis, the FCC has noted that the federal interest is not to enable people to receive cheap television, but rather to assure the availability of all communications services. *Id.* at 5812. The local community's argument certainly has no relevance in the context of VSAT dishes, which serve an entirely different market. *Id.* at 5811-12.

[101] *See supra* notes 71-85 and accompanying text.

[102] Communities assert that since there are 4.5 million dishes currently in use, the alleged burdens imposed by zoning ordinances must be exaggerated. *See* Michigan Comments, *supra* note 10, at 7. When contrasted with the fact that there are approximately 63.2 million subscribers to cable services in the United States, it seems that the FCC has a long way to go to satisfy its goal of creating a competitive marketplace for communications services. *See* Elizabeth Sanger, *Dishing It In: Satellite TV Making Waves on LI*, NEWSDAY, May 3 1996, at A5.

[103] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[104] *See supra* note 54 and accompanying text.

[105] *See supra* note 55 and accompanying text.

[106] "DBS antenna" refers to satellite dishes that receive signals trasmitted on the Ku-band frequency by Direct Satellite Broadcast (DBS) service provider. *See supra* note 19 and accompanying text. The FCC stated that it did not believe that anything in the new act limited its broad authority to preempt local zoning ordinances restricting a dish user's right to receive satellite transmitted programming. *See* 1996 Full Report, *supra* note 16, at 5812. At the same time it concluded that "Congress has made clear that, at a minimum, we must preempt restrictions im-

federal objective while affording greater deference to local interests than town officials may presently realize.

A. *The 1996 Preemption Order*

In 1991, the Satellite Broadcasting and Communications Association (the "SBCA") filed a petition for a declaratory ruling on several key points of section 25.104.[107] The FCC, however, deferred action on this petition pending final disposition of the *Deerfield* case.[108] Following the invalidation of the exhaustion of legal remedies requirement by the Second Circuit in *Deerfield*, Hughes Network Systems, Inc. ("Hughes") filed a petition requesting that certain local restrictions be declared "per se" discriminatory and unreasonable.[109] Rather than consider the petitions of the SBCA and Hughes specifically the FCC determined that, in light of the factors discussed in the previous section and the effect of the decision in *Deerfield*, the time was ripe to reconsider the FCC preemption policy in general.[110] After adopting a Notice of Proposed Rulemaking and reviewing additional comments, the FCC adopted the 1996 Order, a revised version of 47 C.F.R. § 25.104.[111]

Under this new rule, the threshold determination is whether

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posed on ... all DBS antennas." *Id.*

[107] 1995 Full Report, *supra* note 6, at 6985. Specifically, the SBCA requested:

> (1) an extension of the preemption rule to cover ordinances that effectively ban all antennas (rather than requiring discrimination against satellite facilities);
>
> (2) an exemplary list of presumptively unreasonable types of zoning regulations;
>
> (3) an announced intention by the Commission to review at least some zoning disputes directly;
>
> (4) the elimination of any requirement for an evidentiary hearing in zoning preemption cases; and
>
> (5) a timetable for expedited Commission action in zoning preemption cases.

Id.

[108] *Id.*

[109] *Id.* at 6986. Hughes suggested that a per se presumption of unreasonableness should apply to zoning ordinances applicable to areas designated for commercial or industrial use that restrict the placement of satellite dishes that measure less than two meters in diameter. *Id.*

[110] *Id.* at 6983. In revising the substance of the regulation, the FCC set out "to facilitate application of the Commission's interpretations in varied factual settings, ... minimize intrusion upon local prerogatives in land-use regulation, and to promote full and fair competition between satellite services and other means of communication." *Id.*

[111] 1996 Order, *supra* note 8.

the ordinance "materially limits" reception or transmission, or imposes "more than minimal" costs on the user.[112] Once a local zoning regulation imposes these restrictions, a system of presumptions — based on the size of the antenna and the land use characteristics of the area in question — dictates whether the ordinance will be preempted.[113] With respect to the placement of small satellite dishes,[114] all restrictions are presumed unreasonable.[115] A town proposing the zoning regulation, however, can rebut the presumption by showing that the restriction furthers a clearly defined health or safety objective that is stated in the text of the regulation itself and is no more burdensome to satellite users than necessary to achieve the objective.[116] There is, however, no presumption of unreasonableness governing the zoning of large dishes.[117] Ordinances regarding such dishes will only be preempted if they: (a) materially limit reception or impose more

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[112] *See* 1996 Order, *supra* note 8, at 10898. The FCC switched from the differentiation threshold requirement because it caused unintended results. *See* 1995 Full Report, *supra* note 6, at 6999; *see also supra* notes 6-7, 64-98 and accompanying text. The Notice of Proposed Rulemaking suggested that the term "substantial" be the test for limitations on reception and costs. *See* 1995 Full Report, *supra* note 6, at 7010. Commentators representing both sides of the issue believed that such a standard was vague and would often be litigated. *See* Duncan Comments, *supra* note 99, at 7; Reply Comments of MCI Telecomm. Corp., 3 (on file at FCC Reference Center, IB Docket No. 95-59, received Aug. 13, 1995).

[113] *See* 1996 Order, *supra* note 8, at 10898-99. Satellite industry members argue that a per se preemption approach is necessary to ensure effective competition between satellite technology and other services. *See* Comments of DIRECTV, 5 (on file at FCC Reference Center, IB Docket No. 95-59, received July 14, 1995) [hereinafter DIRECTV Comments]; Network Comments, *supra* note 5, at 22. The FCC rejected a per se preemption approach stating that the more moderate presumptive approach better accommodates the local interests even though such a system may be more difficult to administer. *See* 1996 Full Report, *supra* note 16, at 5813. One commentator asserted that even this limited presumptive approach will cause confusion for homeowners and financially burden local communities. *See* Reply Comments of the City of Dallas, 3 (on file at FCC Reference Center, IB Docket No. 95-59, received Aug. 13, 1995) [hereinafter Dallas II Comments]. The FCC counters that the presumptions will actually decrease disputes by establishing a test that consumers and communities can use to determine whether an ordinance is valid. 1996 Full Report, *supra* note 16, at 5816.

[114] The revised order defines "small antennas" as those that are one meter or less in diameter regardless of where located and less than two meters in diameter if located in a neighborhood where commercial or industrial uses are generally permitted. *See* 1996 Order, *supra* note 8, at 10898.

[115] *Id.*

[116] *See id.* at 10898.

[117] Large dishes are defined as any dish that does not fall within the presumption set forth in 47 C.F.R. § 25.104(b)(1). *See id.* at 10898.

than minimal costs on the dish user; and (b) are not narrowly drawn to advance a clearly defined objective or lack a clearly defined objective altogether.[118]

The revised order also abolished the exhaustion of remedies procedure.[119] Instead, an aggrieved party can now seek review after all nonfederal administrative remedies have been exhausted.[120] To prevent dish users from becoming bogged down at the local level, the FCC outlined various situations in which nonfederal administrative remedies would be deemed exhausted.[121] Finally, the 1996 Order also created a procedure through which towns possessing concerns of a "specialized or unusual" nature — a historic district for example — could apply for a waiver.[122]

B. *Analysis of the 1996 Preemption Order*

Many comments filed on behalf of local governments adamantly expressed the belief that broadening FCC preemption would negatively affect communities across America.[123] Within

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[118] *Id.* at 10898.

[119] In light of the *Deerfield* decision, the FCC recognized the need to review some disputes. *See* 1996 Full Report, *supra* note 16, at 5818.

[120] 1996 Order, *supra* note 8, at 10898-99.

[121] *Id.* One commentator suggested that since there is a procedure by which a dish owner can request relief, a comparable procedure should exist by which a local government can request that the FCC declare a zoning ordinance valid. Duncan Comments, *supra* note 99, at 13-14.

[122] 1996 Order, *supra* note 8, at 10899. The City of Dallas expressed that without enumerated grounds for waivers, local governments will submit every ordinance for review in an attempt to prevent the possibility of preemption because all zoning is enacted to address local concerns of a highly specialized or unusual nature. Dallas Comments, *supra* note 71, at 20. The FCC, on the other hand, argues that zoning is generally geared toward common uses of property in particular areas so not every ordinance would warrant consideration of a waiver. *See* 1996 Full Report, *supra* note 16, at 5819. The treatment of other types of antennas and "modern accouterments" would be relevant factors in the determination of whether a unique circumstance exists to justify a waiver. *Id.*

[123] *See, e.g.*, Reply Comments of City of Sanibel, Fl (on file at FCC Reference Center, IB Docket No. 95-59, received on Aug. 15, 1995) (stating that local governments are "alarmed" by increased federal regulation, "especially in the form of preemption of local zoning powers and control," and proposing instead for federal regulators to prepare model ordinances that can be used by local communities); Reply Comments of the American Planning Association, 1 (on file at FCC Reference Center, IB Docket No. 95-59, received Aug. 14, 1995) (expressing concerns regarding effects rule will have on quality of life); Bloomfield Comments, *supra* note 10 (opposing rule change because it would usurp well-established local zoning authority); Comments of Seattle Department of Construction and Land Use (on file at FCC Reference Center, IB Docket No. 95-59, received July 14, 1995) (charging that "a local government ... is in the best position to set and administer standards for tele-

days of the release of the 1996 Order, two mayors led a protest in front of the FCC headquarters in Washington, D.C.[124] Victor Ashe, Mayor of Knoxville, Tennessee, stated that "dishes will sprout everywhere to the detriment of communities, citizens and property owners."[125]

The criticism of the 1996 Order expressed by local officials is erroneously based on the specter of outdated dishes that are 12 feet in diameter, while the revised rule was written to accommodate land use concerns that are realistic in light of the current state of satellite dish technology. Recent advancements in satellite technology have enabled the production of smaller and lighter antennas which have reduced much of the aesthetic concerns previously associated with satellite dish antennas.[126] By revolving preemption analysis around the size of the antenna and the land use characteristics of the area involved, the FCC recognized that different sized dishes do not necessarily raise the same health, safety, and aesthetic concerns.[127] Furthermore, the presumptions operate within this framework and afford local officials the flexibility necessary to address the reasonable concerns raised by dishes of different sizes.

With respect to dishes that people find the most aesthetically displeasing, such as the large C-Band dish, any ordinance that is reasonable, as defined by the order, will avoid FCC preemption.[128] Even when the rather low thresholds of "material" limitations on reception/transmission and "more than minimal costs on the users" are exceeded, the ordinance can avoid preemption by stating a clearly defined objective furthered by the zoning code without "unnecessarily burdening" the federal inter-

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communication facilities").

[124] Lee Hall, *Satellites: Neighborhood Dish Rules Soon to be History*, ELEC. MEDIA, Apr. 22, 1996, at 22.

[125] *Id.* Town officials also asserted that the rule reflects FCC accommodation of the satellite industry's lobbying efforts. *Agency Cites Telecom Act: Mayors Protest FCC Preemption of Local Dish Zoning Law*, COMM. DAILY, Apr. 3, 1996, at 7. Industry affiliates note that local communities have an incentive to discourage dish use because cable operators typically pay a percentage of their revenue to the local government while satellite antenna owners do not. *See* Comments of Home Box Office, 3 (on file at FCC Reference Center, IB Docket No. 95-59, received July 14, 1995).

[126] *See supra* notes 12-21 and accompanying text.

[127] The FCC also felt that a preemption rule focusing on antenna size was warranted because evidence showed that many local ordinances did not recognize any distinctions among satellite dishes in this context. *See* 1995 Full Report, *supra* note 6, at 6992.

[128] *See* 1996 Full Report, *supra* note 16, at 5814.

est in assuring access to satellite services and promoting competition among communications service providers.[129] For example, when a town requires a permit and a fee before allowing the installation of a satellite dish, if the fee is reasonable in relation to the costs of processing the application, and the permit is necessary to further the stated local interest, then the ordinance would be deemed reasonable and would not be preempted.[130] Under this analysis, the means and costs of advancing the local interest are balanced against the federal interest with the focus on what is reasonable and necessary to advance the local objective.[131] In this respect, the revised order is less preemptive than the 1986 Order.

Under the 1986 Order, an ordinance that treated satellite dishes differently than other antennas had to have a clearly defined objective *and* could not operate to limit reception or impose excessive costs.[132] Both prongs of the test needed to be satisfied independently in order to avoid preemption.[133] Therefore, local regulations that stated a clearly defined objective but were structured so that compliance resulted in limited reception or excessive costs to the user were ruled preempted notwithstanding the fact that the restriction was necessary to advance the stated objective.[134] Under the current balancing test, however, it is possible for an ordinance with a clearly defined objective to limit reception without "unnecessarily burdening" the federal interest,

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[129] *See* 1996 Order, *supra* note 8, at 10898. With respect to the "more than minimal costs" threshold, the FCC stressed that any costs must be very low absent a specific justification by the governmental entity imposing them. 1996 Full Report, *supra* note 16, at 5818.

[130] *See id.*

[131] *Id.*

[132] *See supra* note 4.

[133] *See* Preemption of Local or Other Regulation of Receive-Only Satellite Earth Stations, 2 F.C.C.R. 202, 204 (1987). "Communities are on notice that if they choose to treat satellite antennas in a manner different from other antennas they must comply with *both* (a) and (b) of our rule. Failure to conform to only one of these conditions will result in preemption of the regulation." *Id.*; *see* Alsar Tech., Inc. v. Town of Nutley, 563 A.2d 83, 87-88 (N.J. Super. Ct. Law Div. 1989) (holding that ordinance failing to state any reasonable and clearly defined objective is invalid "for that reason alone").

[134] *See, e.g.*, Van Meter v. Township of Maplewood, 696 F. Supp. 1024, 1031 (D.N.J. 1988) (finding aesthetic purpose but then preempting ordinance because of unreasonable restriction on reception); Nationwide Satellite Co. v. Borough of Haddon Heights, 578 A.2d 389, 394 (N.J. Super. Ct. App. Div. 1990) (holding that ordinance that imposed height and screening requirements that unreasonably limited signal reception was preempted notwithstanding town's clearly defined purpose).

and, therefore, avoid preemption.

With respect to small dish antennas, by allowing the presumption of unreasonableness to be overcome only by health and safety objectives, the FCC essentially denied local officials any ability to regulate for aesthetic reasons.[135] In a residential district, however, a small dish is defined as one that measures less than one meter in diameter, which is much less obtrusive than the older C-band devices and necessarily requires less regulation.[136] The current small dish of choice, the DBS antenna, measures only 18 inches in diameter.[137] Even if someone decides to place a DBS antenna on their front yard, roof, or bed of geraniums, what negative aesthetic impact could this realistically cause?

In addition, overcoming the presumption by stating a clearly defined safety or health objective is not an insurmountable burden for local governments. For example, ordinances which simply require small dishes to be set back a certain distance from a public road to prevent visual obstruction could easily avoid preemption.[138] Therefore, even in the context of small dishes, a zoning ordinance can restrict placement of a satellite dish and still avoid preemption.

CONCLUSION

The *Deerfield* decision and continued non-compliance by communities highlighted the need for the FCC to reconsider its preemption policy regarding local zoning regulations concerning antennas. By switching the focus of preemption from discriminatory treatment to size of the antenna and land use characteristics of the area in question, the FCC implemented a policy that reflects common sense. Common sense dictates that it is generally unnecessary to restrict the placement of a small 18 inch

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[135] The FCC noted that small dishes are no larger than many other structures often found in yards such as mailboxes, air conditioning units, and basketball hoops. 1996 Full Report, *supra* note 16, at 5814.

[136] *See* 1996 Order, *supra* note 8, at 10898.

[137] From its inception in June 1994 until mid-1996, DIRECTV's DBS service had 600,000 subscribers. *See* DIRECTV Comments, *supra* note 113, at 1; *see also* 1995 Full Report, *supra* note 6, at 6992 (noting that there seems to be a trend towards smaller antennas).

[138] *See* 1996 Full Report, *supra* note 16, at 5814. If other objects that could obstruct vision were not subject to the same restriction, the ordinance might be preempted as a "disguised" aesthetic zoning code. *Id.*

dish, but is quite often necessary to restrict the placement of an unsightly eight foot, 100 pound dish that may pose safety risks if not properly installed. The revised order gives town officials the flexibility to avoid preemption of its local zoning by employing such common sense when drafting ordinances. The main effect of the FCC's broadened preemption rule is that it places the impetus on the local government to think more carefully about its regulations and clearly articulate any restrictions it places on satellite dish use. Given the weighty federal interests and constitutional rights involved, this is not a great burden for local officials.

APPENDIX

TEXT OF 1996 ORDER[139]

(a) Any state or local zoning, land use, building or similar regulation that materially limits transmission or reception by satellite earth station antennas, or imposes more than minimal costs on users of such antennas, is preempted unless the promulgating authority can demonstrate that such regulation is reasonable, except that non federal regulation of radio frequency emissions is not preempted by this section. For purposes of this paragraph (a), reasonable means that the local regulation:

(1) Has a clearly defined health, safety, or aesthetic objective that is stated in the text of the regulation itself; and

(2) Furthers the stated health, safety or aesthetic objective without unnecessarily burdening the federal interests in ensuring access to satellite services and in promoting fair and effective competition among competing communications service providers.

(b)(1) Any state or local zoning, land use, building, or similar regulation that affects the installation, maintenance, or use of the following two categories of a satellite earth station antenna shall be presumed unreasonable and is therefore preempted subject to

[139] The 1996 Order appears in pertinent part only. For the full text of the 1996 Order see Preemption of Local Zoning Regulations; Satellite Earth Stations, 61 Fed. Reg. 10896 (1996) (to be codified at 47 C.F.R. § 25.104).

paragraph (b)(2) of this section. No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any regulation covered by this presumption unless the promulgating authority has obtained a waiver from the Commission pursuant to paragraph (e) of this section, or a final declaration from the Commission or a court of competent jurisdiction that the presumption has been rebutted pursuant to paragraph (b)(2) of this section:

(i) A satellite earth station antenna that is two meters or less in diameter and is located or proposed to be located in any area where commercial or industrial uses are generally permitted by nonfederal land-use regulation; or

(ii) A satellite earth station antenna that is one meter or less in diameter in any area, regardless of land use or zoning category.

(2) Any presumption arising from paragraph (b)(1) of this section may be rebutted upon a showing that the regulation in question:

(i) Is necessary to accomplish a clearly defined health or safety objective that is stated in the text of the regulation itself;

(ii) Is no more burdensome to satellite users than is necessary to achieve the health or safety objective; and

(iii) Is specifically applicable on its face to antennas of the class described in paragraph (b)(1) of this section.

(c) Any person aggrieved by the application or potential application of a state or local zoning or other regulation in violation of paragraph (a) of this section may, after exhausting all nonfederal administrative remedies, file a petition with the Commission requesting a declaration that the state or local regulation in question is preempted by this section. Nonfederal administrative remedies, which do not include judicial appeals of administrative determinations, shall be deemed exhausted when:

(1) The petitioner's application for a permit or other authorization required by the state or local authority has been denied and any administrative appeal and

variance procedure has been exhausted;

(2) The petitioner's application for a permit or other authorization required by the state or local authority has been on file for ninety days without final action;

(3) The petitioner has received a permit or other authorization required by the state or local authority that is conditioned upon the petitioner's expenditure of a sum of money, including costs required to screen, pole mount, or otherwise specially install the antenna, greater than the aggregate purchase or total lease cost of the equipment as normally installed; or

(4) A state or local authority has notified the petitioner of impending civil or criminal action in a court of law and there are no more nonfederal administrative steps to be taken.

(d) Procedures regarding filings of petitions requesting declaratory rulings and other related pleadings will be set forth in subsequent Public Notices. All allegations of fact contained in petitions and related pleadings must be supported by affidavit of a person or persons with the personal knowledge thereof.

(e) Any state or local authority that wishes to maintain and enforce zoning or other regulations inconsistent with this section may apply to the Commission for a full or partial waiver of this section. Such waivers may be granted by the Commission in its sole discretion, upon a showing by the applicant that local concerns of a highly specialized or unusual nature create a necessity for regulation inconsistent with this section. No application for waiver shall be considered unless it specifically sets forth the particular regulation for which waiver is sought. Waivers granted in accordance with this section shall not apply to later-enacted or amended regulations by the local authority unless the Commission expressly orders otherwise.

Christopher Neumann