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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY  
WILLIAM F. CATON ACTING SECRETARY  
1919 M STREET N.W.  
WASHINGTON, D.C. 20554

FILE NO. 154-SAT-DR2-96

Dear Mr. Caton

On July 3, 1996 Mr. James Moffat of 84 Old Orchard Lane Orchard Park N.Y. 14127 purchased and had installed on his residence a 7ft.6in. diameter satellite dish. The satellite dish was positioned on the roof.

The location was chosen due to the amount of trees in this area.

Town of Orchard Park building code allows for placement of satellite dishes on side or rear yard, mounted no higher 12ft. in height.

Mr Moffat was notified that this installation was in violation of existing Town of Orchard Park code ( see copy of code enclosed). Mr Moffat had to apply for a variance to town code and on Tuesday August 20, 1996 in a public hearing, his request was denied.

Among the reasons given for denying the variance was size and placement of the dish, Mr. Moffat's ignorance of town code and the availability of cable T.V. .

Mr. Moffat's health is a major factor in why I have been leading a charge in his defense. Petitions, both in favor and opposed were circulated ( see enclosed petition in favor) and submitted to the town Zoning Board of Appeals. There were 23 signatures against and 82 signatures for granting the variance. The Zoning Board said that although there were "some" signatures for, there was "significant" opposition to this variance.

Mr. Moffat has since been notified by the Town of Orchard Park that he has 10 days to remove the satellite dish.

In October of 1991 and January of 1992 I also applied for a variance with the Town of Orchard Park to install a 8ft. in diameter satellite dish on the roof of my residence at 85 Old Orchard Lane Orchard Park N.Y. 14127.

In both cases my request was denied based on the size of the dish and location (minutes of meetings are enclosed).

Mr. Moffat and myself, Jim Culligan, are asking the Federal Communications Commission to do the following:

1. A Declaratory Ruling of Preemption of the Local Zoning code in regards to satellite dish placement as unenforceable based on the 1986 F.C.C. ruling. (see enclosed copy of a synopsis from The Satellite Broadcasting And Communications Association).

2. Prevent the Town of Orchard Park from forcing Mr. Moffat to remove the satellite dish from his house until a decision of this appeal has been made

A copy of this appeal has been given to the Town of Orchard Park Zoning Board.

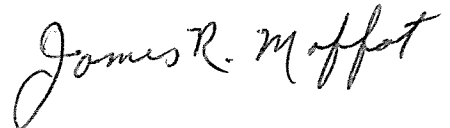
I would also like to thank Mr. Mike Ritter of the F.C.C. for his help in this regard.

Both James Moffat and myself, James Culligan are hoping for a quick and positive decision in this matter. Thank you.

Sincerely;

  
James Culligan

James Moffat



c.c. Town of Orchard Park  
Zoning Board

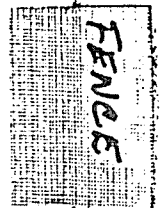
sion Regulations, whose antenna does not exceed sixty (60) feet in total height above ground level and does not occupy more than one-tenth (1/10) of the roof area, chimneys, church spires and belfries, silos, tanks, ventilators or necessary mechanical features not occupying more than one-tenth (1/10) of the roof area.

**B. Roof-mounted antennas. [Amended 8-6-86]**

- (1) Roof-mounted antennas, including dish antennas or other devices for receiving, sending or relaying electronic signals, except as hereinafter provided, shall not project more than six (6) feet above the highest point of the building nor exceed ten (10) square feet of wind-resistance area.
- (2) Roof-mounted antennas, including dish antennas or other devices for receiving, sending or relaying electronic signals in connection with point-to-point bypass communication facilities, which facility is located in an I-1 Industrial Zone, shall not exceed a height of ten (10) feet above the highest point of the building nor exceed four (4) square feet of wind-resistance area.

**C. [Added 8-6-86] The height limitations of Article IV and Article V shall not apply to towers for point-to-point bypass communication facilities located within an I-1 Industrial Zone, which meet the following criteria:**

- (1) Height of any such tower, together with any antennas attached thereto, shall not exceed eighty (80) feet, and the wind-resistance area of any antenna shall not exceed thirty (30) square feet.
- (2) The tower shall be no closer to any lot line than its height (tower and antennas).
- (3) The tower shall be located only in the rear yard and limited to not more than one (1) tower per site.
- (4) A site plan shall be made and shall include the submission of a certification by a registered professional engineer that the tower was designed and installed to





The Chairman then asked if there was anyone in the audience who would wish to speak on behalf of granting this variance. (Twice)

No response.

The Chairman then asked if there was anyone in the audience who would wish to speak against the granting of this variance. (Twice)

No response.

The Chairman then asked if the Secretary had any communications either for or against granting of the variance.

The Secretary stated no communications have been received and the Erie County Department of Planning makes no recommendations.

Mr. Corcoran made a motion, seconded by Mr. Jarocha to GRANT this variance for the following reasons:

1. A practical difficulty has been established, that the problem was created by a builder's error.
2. The variance is not substantial in relationship to the requirement.
3. There will be no change to the character of the neighborhood.
4. The problem cannot be obviated by some other means.
5. The difficulty was not self created.

THE VOTE ON THE RESOLUTION TO GRANT THE VARIANCE BEING:

MC GUIRE	AYE
COON	AYE
ZWOLINSKI	AYE
CORCORAN	AYE
JAROCHA	AYE

THE VOTE BEING UNANIMOUS, THE VARIANCE IS HEREBY GRANTED.

7. ZBA File #42-91 James Culligan, 85 Old Orchard Lane (S.L. 96 MC 2409; SBL#184.09-5-60), Zoned R-2. Requesting variance to erect a 27.5 ft. high T.V. signal receiver. Max. height 12 ft., Sec. 144-24(A)4.

James Culligan, owner of the property and petitioner, appeared. Mr. Culligan is requesting this variance to install a dish antenna because when he moved into this property in June he was advised that Cable television reception was not available and has decided he would prefer a dish antenna over the cable reception even when it is made available. He had his property surveyed by a dish antenna company and determined where the best reception would be for the antenna. The location requires the dish to be placed 27.5 ft. high, which makes it in violation. There are several trees along the lot line that block the reception of a dish antenna in another location. Most of those trees are

owned by the Town of Orchard Park, which does not allow the petitioner to remove them.

There is a vacant lot adjoining his property, which when cleared to build on could possibly allow him to have the dish moved to another location.

He presented a letter to the Board from a real estate agent stating that the dish antenna will not depreciate the property values in his area. Scott Crandell from Crandell Satellite in Springville, New York, appeared for the petitioner as a technical advisor.

Mr. Crandell advised the Board that his company site surveyed Mr. Culligan's property to find a location on the property to allow the best reception for the dish antenna. They plan on installing a mesh antenna, 7½ ft. in diameter.

Mr. Corcoran discussed with the petitioner's dish antenna installer his knowledge regarding the satellite television reception. Mr. Crandell stated he is aware of the information Mr. Corcoran presented to him, but does not feel that the technology that is proposed is perfected enough to be used by residents.

The installer is trying to put the dish so it will not be seen, as much as possible.

Mr. Corcoran also discussed with the petitioner and the installer where he feels the dish can be installed and still have proper reception.

Mr. Zwolinski stated that a letter dated October 14, 1991 was made a part of the file, addressed to one of Mr. Culligan's neighbors, which states that cable service on Old Orchard Lane will be available within the next few weeks.

The Chairman stated that a petition signed by 36 neighbors, was made a part of file, which stated they are in opposition to the requested variance. There were approximately fifteen (15) letters sent to the Board in opposition to the granting of this variance because of aesthetic reasons and concerns over possible harmful rays from the dish antenna.

The petition and the letters were reviewed by all the Board members prior to the meeting.

Mr. Zwolinski stated in his opinion there are no harmful rays that come from a dish antenna.

Mr. Culligan stated he spoke to several of his neighbors a few months ago and at that time those neighbors had no objections to the installation of the dish antenna.

The Chairman then asked if there was anyone in the audience who would wish to speak on behalf of granting this variance. (Twice)

No response.

The Chairman then asked if there was anyone in the audience who would wish to speak against the granting of this variance. (Twice)

## OPPONENTS:

Neal Infante  
87 Old Orchard Lane  
Orchard Park, New York 14127

Vincent Colarossi  
105 Old Orchard Lane  
Orchard Park, New York 14127

Richard Ross  
101 Old Orchard Lane  
Orchard Park, New York 14127

Cindy Zolnowski  
96 Old Orchard Lane  
Orchard Park, New York 14127

Mike Bonetto  
111 Old Orchard Lane  
Orchard Park, New York 14127

Paul Bornhoeft  
92 Old Orchard Lane  
Orchard Park, New York 14127

Gary Bonnas  
72 Old Orchard Lane  
Orchard Park, New York 14127

Don Howard  
109 Old Orchard Lane  
Orchard Park, New York 14127

Mike Danielson  
73 Old Orchard Lane  
Orchard Park, New York 14127

Jeff Phillips  
110 Old Orchard Lane  
Orchard Park, New York 14127

The neighbors believe Mr. Culligan is a good neighbor and they have been put in a difficult position. They feel the local ordinances are for the protection of the neighborhoods. They have concerns over aesthetics, possible wind damage to the dish that could be a safety hazard, and generally want their neighborhood to remain as it is.

The Chairman then asked if the Secretary had any communications either for or against granting of the variance.

The Secretary stated no communications have been received and the Erie County Department of Planning makes no recommendations.

Mr. Zwolinski complimented the petitioner and the neighbors for the way they have handled this case and does not feel the relationships in the neighborhood will be effected by the decision on this case.

Mr. Coon does believe this requested variance is excessive.

Mr. Zwolinski made a motion, seconded by Mr. Corcoran to DENY this variance for the following reasons:

1. Options to receive television signals by commercial cable is available, so a practical difficulty does not exist.
2. The variance is substantial in relation to the requirement.
3. A ground mounted antenna may be installed when the adjoining vacant lot is cleared.
4. There is substantial opposition from adjoining property owners.
5. The problem was in part self created.
6. The character of the neighborhood will be changed by the granting of this variance.

THE VOTE ON THE RESOLUTION TO DENY THIS VARIANCE BEING:

MC GUIRE	AYE
COON	AYE
ZWOLINSKI	AYE
CORCORAN	AYE
JAROCHA	AYE

THE VOTE BEING UNANIMOUS, THE VARIANCE IS HEREBY DENIED.

There being no further business to be presented to the Board, at this time, the Chairman, Michael Mc Guire, adjourned the meeting at 10:30 P.M.

DATED: 10/22/91

Respectfully submitted,

REVIEWED: MHM 10/23/91  
JMW 10/28/91

Marlene G. Peters  
Zoning Board of Appeals Secretary

*Michael Mc Guire*

Michael Mc Guire, Chairman



ZWOLINSKI AYE  
MC GUIRE AYE  
COON AYE  
CORCORAN AYE  
JAROCHA AYE

THE VOTE BEING UNANIMOUS, THE VARIANCE IS HEREBY DENIED.

After the motion, the Chairman allowed a comment from the audience. Chris Siracuse, owner and technician of Tel-Star, Inc., 2477 Main Street, Varysburg, New York, stated that the dish was installed on the roof because of interference from the trees and because of potential vandalism as a result of the proximity to the stadium.

2. ZBA File #1-92 James & Patricia Culligan, 85 Old Orchard Lane, (S.L. 96 MC 2409; SBL #184.09-5-60, Zoned R-2. Requesting variance to erect an oversize TV signal receiver on roof. Ground mounted permanent foundation required, Sec. 144-24(A)4; roof mounted antennas max. 6 ft. above roof and 10 sq. ft. Section 144-21(B)1.

James Culligan and Charles Kelly, Esq. (1038 Abbott Road) appeared before the Board and explained that because of the trees on Mr. Culligan's property, as well as trees on the adjacent properties, it is not possible to ground-mount the receiving dish. It was noted that Mr. Culligan appeared before the Board on 10/15/91 at which time a variance to erect a 27.5 foot high receiver was denied. Mr. Sweet concurred that this request is a significant enough change from the 10/15/91 request to allow it to be heard as a newly-sought variance.

Mr. Kelly explained this dish is allowed per FCC regulations and submitted copies of reports and orders from the Federal Communications Commission and requested that the Board review these prior to making a decision.

Mr. Culligan stated that this property was purchased June 1991 at which time he was not aware that cable service was not available; however, it was further noted that cable service became available in late 1991. Mr. Culligan purchased this property because of its close proximity to Hamburg and stated that all alternate locations have been explored by experts who have deemed it is not possible to locate the dish within the ordinance requirements. A satellite dish over cable service is desired because of the abundance of stations available. The requested dish would be 8 feet above the roof line, with an 8 foot diameter dish.

Mr. McGuire noted he would abstain from the voting as Mr. Culligan's brother is a business associate of his.

The following citizen spoke in support of this variance:

Chris Siracuse, owner and technician for Tel-Star Satellite, Inc.,  
2477 Main Street, Varysburg, NY

The following citizens spoke in opposition of this variance:

Gary Bonnas, 72 Old Orchard Lane  
Neal Infante, 87 Old Orchard Lane  
Don Howard, 109 Old Orchard Lane  
Mike Bonetto, 111 Old Orchard Lane  
Richard Ross, 101 Old Orchard Lane  
Cynthia Zolnowski, 96 Old Orchard Lane  
Anita Crotti, 103 Old Orchard Lane  
Carol Hadson, 77 Old Orchard Lane  
Mike Danielson, 73 Old Orchard Lane

The neighbors stated the following reasons for opposing this variance: (1) aesthetically this dish would take away from the beauty of the area; (2) this may devalue the homes in the neighborhood; (3) television signals are available by commercial cable in the area; (4) this could be a potential safety hazard as a result of possible wind damage to the dish. Mr. Infante submitted 30 letters and a petition signed by 38 neighbors in opposition to this variance (on file). He also noted that the neighbors are opposed to any future variance requests for location of this dish that is not in accordance with Town laws.

Pursuant to section 239-m of the General Municipal Law, this application was referred to the Erie County Department of Planning. Their report, dated 12/30/91 and designated ZR-91-768, stated they had no recommendation.

The Board noted that the Orchard Park ordinance treats satellite dishes in the same fashion as any accessory structure -- the ordinance is intended to regulate dishes for aesthetic and safety reasons, not to keep them out of Orchard Park. They stated that the applicant's difficulty has been self created as he could have purchased other property in Orchard Park that was open and would accommodate a ground mounted satellite dish. It was also noted the strong opposition by neighbors.

Mr. Jarocha made a motion, seconded by Mr. Coon, to deny the variance request by James & Patricia Culligan to erect an oversize TV signal receiver on the roof at 85 Old Orchard Lane, based on the following findings:

1. Cable TV is now available in the area, thereby eliminating any practical difficulty in receiving appropriate TV reception in this area and providing a feasible alternative for the applicant.
2. The variance is substantial in relation to the requirement.
3. There is significant neighborhood opposition to granting this variance and there would be a significant change in the character of the neighborhood with the granting of this variance.
4. The problem is self created because the applicant recently purchased the property and could have purchased other open property in Orchard Park that could accommodate a satellite dish on the ground.

THE VOTE ON RESOLUTION TO DENY THE VARIANCE BEING:

Jan 21, 1992

ZWOLINSKI	AYE
MC GUIRE	ABSTAIN
COON	AYE
CORCORAN	AYE
JAROCHA	AYE

THE VOTE BEING 4-0-1, THE VARIANCE IS HEREBY DENIED.

3. ZBA File #2-92 Robert C. Rung, DBA Health Industries, Inc., 3155 Orchard Park Road (F.L. 460 T10 R7; SBL #153.00-7-38.1), Zoned B-2. Requesting variance to allow parking in front yard. Prohibited, Sec. 144-29(A)4.

Mr. Zwolinski acknowledged receipt of a letter dated 1/21/92 to Robert Sweet from Robert E. Roller, Comvest Consulting, Inc., 495 Aero Drive, Buffalo, New York 14225 (copy on file) that reads as follows:

"Mr. Robert Rung of my office had been scheduled to appear before the Zoning Board of Appeals on Tuesday, January 21, 1991 to request a parking variance on behalf of Health Industries, Inc. to allow for conversion of the building for retail purposes. Because of a family health situation, we have been unable to provide the proper drawings for the requested variance and would like to request that the Board consider tabling the request until the next Zoning Board of Appeals meeting."

Mr. Zwolinski stated this application will be heard at the March 16, 1992 Zoning Board of Appeals meeting.

As a new item of business, Mr. Zwolinski made a motion, seconded by Mr. McGuire, to support the Town Board's authorization that John Mills learn more about the 25.6 acres of available property located at Transit and Mile Strip Roads for future recreational use as this is an extremely worthy project. Mr. Zwolinski noted that future residential development in that section of Orchard Park may be substantial. Motion carried 5-0.

There being no further business to be presented to the Board, Mr. Zwolinski adjourned the meeting at 9:05 p.m.

DATED: 1/22/92

Respectfully submitted

Kathy Gearhart  
Acting Zoning Board of Appeals Secretary

Reviewed: LZ 1/27/92  
JMW 1/27/92

*L. M. Zwolinski*

Leon M. Zwolinski, Chairman

# The SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION

## To Whom It May Concern:

The Satellite Broadcasting and Communications Association of America (SBCA) is a trade association that represents satellite providers, satellite television programmers, earth station equipment manufacturers, and the distributors and retailers of such equipment. The SBCA is actively involved with satellite television issues nationwide, including those issues pertaining to zoning and other regulations affecting the installation of satellite antennas.

This letter is written to advise you, as representative of your community, of certain federal restrictions which exist limiting the ability of local governments to regulate the installation of receive-only satellite antennas.

In January of 1986, the Federal Communications Commission issued a Report and Order preempting local and state regulations that adversely affect the the installation of home earth station antennas. The Report, which has the force and effect of federal law, provides that regulations that differentiate between satellite antennas and other types of antennas are preempted unless such regulations:

- "a) have a reasonable and clearly defined health, safety, or aesthetic objective; AND
- b) do not operate to impose unreasonable limitations on, or prevent, reception 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." (47 C.F.R. Sec. 25.104, FCC CC Docket No. 85-87 hereinafter "FCC Rule".)

To the extent that an ordinance limits the diameter, height, or location (e.g., "rear yard only") of satellite antennas so that a party's ability to receive satellite signals is impaired, the ordinance is subject to preemption. Likewise, an ordinance that places an undue burden or cost through permit or certification requirements is invalid.

In the FCC Rule it is specifically stated by the Commission that:

(A community) cannot unreasonably limit or prevent reception by requiring, for example, that a receive-only antenna be screened so that line of sight is obscured. Moreover, an ordinance which discriminates cannot impose size restrictions only on receive-only antennas which effectively preclude reception. (FCC Rule at para. 36, p. 18.)

And, in an accompanying footnote, the FCC recognizes that a receive-only antenna must have unobstructed line of sight to a satellite and "must be at least 8 to 12 feet in diameter.." (fn. 76 - 77)

The United States District Court for the District of New Jersey recently issued a decision in a case involving zoning restrictions on satellite antennas. The case, Van Meter v. Township of Maplewood (Civil Action No. 87-4677), considered an ordinance which imposed height limitations, screening requirements, and rear yard placement. The court found these restraints to be in violation of the FCC Rule. Among other things, the court found that a "per se prohibition of roof installations...is an unreasonable limitation on reception within the meaning of the (FCC) Order." In response to the Township's defense that a roof mount or other alternative placement could be achieved through a variance proceeding, the court stated that such a proceeding is an unacceptable solution for a number of reasons, not the least of which is the fact that a variance procedure, "imposes burdens other antenna users are not required to bear and is therefore discriminatory within the meaning of the Order." (The decision in this case is now final and it should be noted that the Van Meters recovered substantial attorneys' fees against the township under 42 U.S.C. 1988.)

For your information, in at least two other cases the FCC Rule has been applied to overturn restrictive ordinances. Those cases are: In re Minars v. Rose, 507 NY2d 241 (S.Ct.NY, 1986), and Carteri, et al. v. City of Rochester, Index No. 87-913, (S.Ct. NY, 1987). Other cases on this issue are pending in various jurisdictions.

In addition to the FCC Preemption Rule, several cases have recognized the First Amendment right of individuals to receive satellite signals, thus raising a potential claim for deprivation of civil rights under 42 U.S.C. Secs. 1983, 1988, as was applied in the Van Meter case.

Finally, I would point out that in several pending zoning cases involving restrictions on satellite antennas, claims have been made that such ordinances have been promulgated to protect the local cable franchisee and set forth a cause of action for restraint of trade under federal and state law, seeking substantial damages.

I would respectfully urge that you review this matter in light of the applicable federal protections and seek to make such revisions as are necessary to fully conform to such federal laws. I would be happy to discuss this matter with you at your convenience and provide whatever assistance I can in formulating an ordinance which conforms to the law.

Thank you for your attention in this regard.

Sincerely,



Mark C. Ellison, Vice President  
Government Affairs and General Counsel  
SBCA