

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

In the Matter of)	
)	
Petition of James Moffat)	
Seeking a Declaratory Ruling that)	Application file No.
a Zoning Ordinance of The Town)	154-SAT-DRZ-96
of Orchard Park, NY is Preempted)	
Pursuant to Section 25.104 of)	
Commission Rules)	

REPORT AND ORDER

Adopted: June 30, 1997

Released: July 1, 1997

By the Chief, International Bureau:

I. INTRODUCTION

1. In this Order, we consider the request of James Moffat to declare that a zoning ordinance of the Town of Orchard Park, New York¹ ("Orchard Park" or "Town") is preempted by section 25.104 of the Commission's rules. The Commission has long recognized that state and local governments have a legitimate and important interest in managing land use in their communities and has repeatedly eschewed the role of national zoning board.² Indeed, the Commission seeks to balance local concerns with federal concerns and requires the exhaustion of local review before any federal intervention.³ Nevertheless, the Commission has a mandate to assure access by U.S. consumers to "a rapid, efficient, nation-wide and world-wide wire and radio communications service with adequate facilities at

¹ Petition of James Moffat (Moffat) (File No. 154-SAT-DRZ-96).

² Preemption of Local Zoning and Other Regulation of Receive-Only Satellite Earth Stations. FCC 86-28](1986 Order) at ¶¶ 23, 27 and 39.

³ 47 C.F.R. § 25.104(c) ("the rule").

reasonable charges."⁴ Where local regulations are found to be unreasonable obstacles to such access, as in this case, we are required to act and protect this important federal interest.

2. On September 6, 1996, James Moffat filed a petition for a Declaratory Ruling that an Orchard Park zoning ordinance is preempted, pursuant to 47 C.F.R. § 25.104. The Town declined to reply to the petition. For the reasons discussed below, we find that section 25.104 of the Commission's rules⁵ preempts Orchard Park ordinance, section 144-21(B).⁶

II. BACKGROUND

3. In July 1996, Mr. Moffat purchased a seven foot, six inch (7', 6") satellite antenna and had it professionally installed on the roof of his home. The petition states that the installer advised Mr. Moffat that, due to the location of trees on his property, as well as those on adjoining properties, the antenna needed to be installed on his roof or in his front yard in order to receive an adequate signal. Orchard Park's ordinance restricts roof mounted antennas to a height of no more than six (6) feet.⁷ Neither Mr. Moffat nor the installer applied for a permit for the antenna and, subsequently, Mr. Moffat was notified that his antenna installation was in violation of the Town Code. On August 20, 1996, a hearing for a variance took place before the Orchard Park Zoning Board of Appeals. Thereafter, Mr. Moffat's request for a variance was denied and he was ordered to remove the antenna from his roof.

4. Following the denial of the variance, Mr. Moffat filed the present petition. The petition was amended on April 30, 1997. In response to the amended petition, Orchard Park forwarded to the Commission a copy of its letter to Mr. Moffat and his representative, James Culligan,⁸ stating that both men have declined the opportunity to pursue an appeal with the

⁴ 47 U.S.C. § 151.

⁵ 47 C.F.R. § 25.104.

⁶ The Ordinance reads as follows: Schedules of Height, Lot, Yard & Bulk Regulations § 144-21(B) Roof-mounted antenna ("ordinance").

(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.

⁷ *Id.*

⁸ Mr. James Culligan is Mr. Moffat's neighbor and is acting on his behalf in this matter.

New York State Supreme Court of the Township's denial of a variance.⁹ In addition, the Town has initiated an action in local court against Mr. Moffat to force him to remove his antenna.¹⁰ As stated above, the Town chose not to respond substantively to Mr. Moffat's petition.

III. POSITIONS OF THE PARTIES

5. In his petition, Mr. Moffat asserts that the Zoning Board has based its decision to deny his variance on impermissible reasons, including the availability of cable television in his area.¹¹ He also states that there is no clearly defined health, safety, or aesthetic objective stated in the text of the ordinance, as required by §25.104, to maintain a restriction that impairs reception.¹²

6. As stated above, Orchard Park offers no defense of its ordinance or rebuttal to the facts stated by Mr. Moffat in his petition. The only response filed by the Town is the previously mentioned letter relating to the judicial appeals process. Given the Town's failure to respond directly to the facts contained in the Moffat petition, the Commission will consider those facts uncontested by Orchard Park. The Town's position in this matter is, however, represented by a transcript of Mr. Moffat's variance hearing, which was entered in the record by the petitioner. While the transcript cannot substitute for a formal filing by the Town, it does give an indication of the Town's reasoning in the matter.

7. The transcript of the Zoning Board meeting lists the following six (6) reasons for denying Mr. Moffat's antenna installation:

- (1) The applicant has a self created hardship in that a building permit was not sought for the construction of a non-conforming roof mounted antenna.
- (2) There are several options available to the applicant for achieving a wide

⁹ Letter for Mr. James Culligan, from Joseph M. Campion Jr., Supervising Building Inspector, Town of Orchard Park (May 2, 1997).

¹⁰ Moffat at 2. The Commission has not exercised exclusive jurisdiction in this area and the rule allows parties to pursue remedies in court in lieu of Commission review. In re Preemption of Local Zoning Regulation of Satellite Earth Stations, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 F.C.C. Rcd 19276, ¶ 56-58 (1996) (OTARD).

¹¹ Moffat at 2.

¹² *Id.*

- range of programming for his personal recreation. Old Orchard Lane is serviced by Adelphia Cable. There are smaller dish reception systems available and [we] have had no indication that a ground mounted antenna could not be located on that property.
- (3) This is a strictly personal hardship. The Board sympathizes with the disabilities of the petitioner but this cannot be the basis on which to grant a variance which must be related to the uniqueness of the land.
 - (4) The variance sought is substantial in relationship to the requirements of the ordinance.
 - (5) The opposition of the neighborhood is persuasive.
 - (6) There will be a change in the character of the neighborhood.¹³

IV. DISCUSSION

Procedural Issues

8. Mr. Moffat's petition raises both procedural and substantive issues. We will discuss the procedural issues first. Prior to March 1996, the Commission's policies required petitioners seeking declaratory relief to exhaust all local remedies, including all litigation remedies, before coming here.¹⁴ In its March 1996 Order, the Commission revised its rule governing the preemption of local restrictions on the installation and use of satellite earth station antennas.¹⁵ One of the changes to the rule was to modify the procedural threshold for Commission review. Currently, any person aggrieved by the application of a state or local zoning regulation in violation of the rule may, after exhausting all nonfederal *administrative remedies*, file a petition with the Commission requesting a declaration that the regulation in question is preempted.

9. The March Order defines exhaustion as, among other things, when "any administrative appeal and variance process has been exhausted."¹⁶ In this case, Mr. Moffat failed to apply for a permit before having his antenna installed. This failure was cited as one of the reasons for denying his variance and raises the question of whether he has exhausted available remedies. In the March Order, the Commission stated that "permitting processes" for

¹³ Zoning Board variance hearing transcript (Transcript) at 10.

¹⁴ In 1992, the U.S. Court of Appeals for the Second Circuit invalidated this policy holding that the Commission could not reverse federal court judgments. The Commission has revised its exhaustion policy in light of Town of Deerfield v. FCC, 992 F.2d 420 (2d Cir. 1993)(Deerfield).

¹⁵ Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. 95-59, Report and Order and further Notice of Proposed Rulemaking, 11 F.C.C. Rcd. 5809 (1996) (March Order).

¹⁶ 47 C.F.R. § 25.104(c)(1).

antennas over one meter in size are permissible.¹⁷ The Commission also stated that in order to balance the federal interest at stake with state and local government interests, it would entertain petitions for preemption only after a petitioner has exhausted his nonfederal administrative remedies.¹⁸ At Mr. Moffat's variance hearing, the Town conceded that the failure to seek a permit in the first instance was likely inadvertent on the part of Mr. Moffat and the installer.¹⁹ Under the procedures described in the record, Mr. Moffat would generally be required to complete two levels of nonfederal administrative review in Orchard Park before he could seek Commission review. However, because the Town allowed him to proceed to the second level of review--a variance hearing-- an initial permit was not necessary in this case. Furthermore, because the Town does not argue that Mr. Moffat must meet the procedural threshold of making an initial application, it is illogical for the Town to base its subsequent denial of a variance on the lack of such an application.

10. Another path to exhaustion of administrative remedies is when "a local authority has notified the petitioner of impending civil or criminal action."²⁰ Because the Town has notified Mr. Moffat of impending court action, he may now assert that he has exhausted all nonfederal administrative remedies. The exhaustion requirement does not include judicial appeals of administrative determinations.²¹ Therefore, Mr. Moffat need not pursue a judicial appeal in this matter and is entitled, under section 25.104, to Commission review of this petition. Consequently, because Mr. Moffat is petitioning the Commission from the denial of a variance as well as notification of impending civil action, and no further non-litigation remedies remain, we find that his nonfederal administrative remedies are exhausted.

The Rule

11. The Commission is charged with promulgating rules that, among other things, promote the federal interest in ensuring easy access to satellite delivered services.²² Section 25.104 provides the Commission with a mechanism to accomplish that task in a manner that avoids excessive federal involvement in local land-use issues. The rule states in pertinent

¹⁷ March Order at ¶41.

¹⁸ 47 C.F.R. § 25.104(c)(1).

¹⁹ Transcript at 6.

²⁰ 47 C.F.R. § 25.104(c)(4).

²¹ *Id.*

²² March Order at ¶ 1.

part:

(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, . . .*²³

Materially Limits Reception

12. As noted above, section 25.104 provides that a local zoning restriction that "materially limits" reception by earth station antennas is preempted unless it is demonstrated to be reasonable.²⁴ According to the record, Mr. Moffat's antenna was professionally installed on his roof after a determination that it was the "only location to adequately receive satellite broadcast signals."²⁵ The transcript provides that "[the Zoning Board had] no indication that a ground mounted antenna could not be located on that property."²⁶ However, by choosing not to participate in this proceeding, the Town leaves unchallenged Mr. Moffat's claim that alternative mounting of his antenna would materially limit his reception. In addition, the Commission has stated that it is the Town, not Mr. Moffat, that shoulders the burden of demonstrating compliance with our rules.²⁷ Because the Town does not counter Mr. Moffat's claims of impairment, we conclude that its restriction on his installation of a satellite antenna materially limits reception within the meaning of the rule.

Reasonableness

13. Section 25.104 does allow for zoning restrictions that may impair reception, if they are reasonable.²⁸ In order for a regulation to be reasonable, it must further a "clearly defined health, safety, or aesthetic objective" and not "unnecessarily burden[] the federal interest in ensuring access to satellite services and in promoting fair and effective competition

²³ 47 C.F.R. § 25.104(a) (emphasis added).

²⁴ *Id.*

²⁵ Moffat at 1.

²⁶ Transcript at 10.

²⁷ Notice of Proposed Rulemaking In Re Preemption of Local Zoning Regulation of Satellite Earth Stations, 10 F.C.C. Rcd 6982 ¶67 (1995).

²⁸ 47 C.F.R. § 25.104(a)(1) and (2).

among competing communications service providers."²⁹ In addition, section 25.104 requires that Orchard Park, as the promulgating authority, demonstrate that the ordinance at issue is reasonable.³⁰

14. Had the City responded to Mr. Moffat's petition, it might well have been able to shed light on the concerns which motivated the zoning restriction at issue. However, in view of the record before us, we conclude that Orchard Park has not demonstrated that its restriction is reasonable. The transcript indicates that neither health nor safety was articulated as a reason for the denial of Mr. Moffat's request to mount his antenna. Nor did the City attempt to justify its restriction in the regulation's text or in another publicly available document.³¹ While the Commission recognizes that aesthetics are a permissible regulatory objective,³² the City is obligated to clearly define those objectives. In this case, Orchard Park merely considered the opinions of Mr. Moffat's neighbors as to the antenna's impact on the "beauty of the neighborhood"³³ and used inexplicit and undefined aesthetic concepts such as "uniqueness of the land" and "a change in the character of the neighborhood" to deny the variance.³⁴ These isolated statements, rendered verbally, do not allow us to evaluate the purpose behind the regulation.

15. In addition, by failing to respond to Mr. Moffat's petition, Orchard Park has abdicated its responsibility under section 25.104 to demonstrate that enforcement of its restriction does not unnecessarily burden the federal interests in ensuring access to satellite services and in promoting fair and effective competition among competing service providers.³⁵ While the Commission is sensitive to local land-use concerns, it is not in a position to

²⁹ *Id.*

³⁰ 47 C.F.R. §25.104(a).

³¹ See OTARD, supra note 10, at ¶25 (allowing local authorities to define their regulatory objective in the ordinance's text, preamble, or legislative history, or in a document readily available to antenna users).

³² See 1986 Order supra note 2 at ¶ 35.

³³ The Commission does not regard consideration of testimony by neighboring property owners to be reasonable in assessing an antenna application or variance request. Indeed, beginning with the original preemption Order in 1986 the record on federal preemption of local zoning restrictions is replete with examples of the added cost, delay and discriminatory effect of including the opinions of non-parties in antenna zoning determinations. In addition, the Commission, in the March 1996 Order, states that the contention that satellite antennas negatively impact property values in a community "is not supported by any facts."

³⁴ Transcript at 10.

³⁵ 47 C.F.R. § 25.104(a)(2).

shoulder the responsibility given local governments under section 25.104.³⁶

16. We find, in this case, that the Town ordinance materially limits reception under section 25.104. We also find that the Town has failed to demonstrate that the ordinance is reasonable. Therefore, we find that section 25.104 of Commission rules preempts Orchard Park, New York ordinance §144-21(B).

V. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, pursuant to authority delegated to the Chief, International Bureau (47 C.F.R. §0.261 a (15)) and section 25.104 of the Commission's rules, 47 C.F.R. § 25.104, that the Petition for Declaratory Relief (154-SAT-DRZ-96) IS GRANTED.

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Peter F. Cowhey
Chief, International Bureau

³⁶ Moreover, the record indicates that Orchard Park would have had a difficult time making such a showing. In the transcript, the Zoning Board asserts that "there are several options available to the applicant for achieving a wide range of programming for his personal recreation" and cites the availability of cable and "smaller dish" systems as evidence and reason for denying the variance. This reasoning appears to burden "the federal interest . . . in promoting fair and effective competition among communications service providers." The Commission has stated in previous proceedings that it "will not permit a state to arbitrarily favor one particular communications service over another and local ordinances which engage in arbitrary discrimination will be preempted." See 1986 Order at ¶ 25. The Commission has also stated its belief that "[t]he existence of alternative communications media is not a sufficient justification for discriminatory local regulations . . . [and] has emphasized its policies to maximize consumer choices by developing a competitive marketplace for the provision of telecommunications goods and services." Because digital satellite systems, which use smaller (one meter or less) antennas, and C-Band systems, whose antenna are six to seven feet in diameter, are different services, albeit both delivered via satellite, it would not comport with the Commission's competition policy to restrict one service in lieu of the other. See also 47 C.F.R. § 1.4000. By basing its denial of a variance, in part, on the availability of alternative video services, Orchard Park appears to have effectively burdened the federal interest in "promoting fair and effective competition among communications service providers."