

Kensington Courts Community Association Covenants & Conditions Policy Statement #9

Legal Compliance

The KCCA Declaration of Covenants, Conditions & Restrictions, as Amended states in Article VIII, Section 1 that, “No building, fence, wall, mailbox or other structure shall be commenced, erected or maintained upon the Property, nor shall any exterior addition to or change or alteration therein be made... until the plans and specifications showing the nature, kind, shape, height, materials, and location of the same shall have been submitted to and approval in writing as to harmony of external design and location in relation to surrounding structures and topography by the Board of Directors of the Association, or by a covenant committee... Any exterior addition to or change or alteration made without application having first been made and approval obtained as provided above shall be deemed to be in violation of this covenant and in addition, change or alteration may be required to be restored to the original condition at the Owner’s cost and expense...”

The KCCA Declaration of Covenants, Conditions & Restrictions, as Amended states in Article VIII, Section 3 that, “Upon completion of any construction or alterations or other improvements or structures in accordance with plans and specifications approved by the Board of Directors of the Covenant Committee in accordance with the provisions of this Article, the Board or Covenant Committee shall, at the request of the Owner thereof, issue a certificate of compliance which shall be prima facie evidence that such construction, alteration have been approved by the Board or the Covenant Committee in full compliance with the provisions of this Article and with such other provisions and requirements of this Declaration as may be applicable.”

The KCCA Declaration of Covenants, Conditions & Restrictions, as Amended states in Article VIII, Section 4 that, “The Covenant Committee may from time to time adopt and promulgate such rules and regulations regarding the form and content of plans and specifications to be submitted for approval and may publish such statements of policy, standards, guidelines and/or other matters, as it may consider necessary or appropriate. No such rules, regulations, statements, criteria or the like shall be construed as a waiver of the provisions of this Article or any other provisions or requirement of this Declaration.”

The KCCA Declaration of Covenants, Conditions & Restrictions, as Amended states in Article IX, Section 2 that, “Except for the activities of the Company during the construction of the development of the Property, or as may be necessary in connection with reasonable and necessary repairs or maintenance to any dwelling or upon the Common Area:

(m). no outside television aerial or radio antenna, or other aerial or antenna for either reception or transmission, including but not limited to, satellite dish antenna, shall be maintained upon the property except that such aerials or antenna may be erected and maintained within the dwellings located upon the Property.”

The KCCA Declaration of Covenants, Conditions & Restrictions, as Amended states in Article XII, Section 1 that, “Invalidation of any one of these covenants or restrictions by judgment or court order shall not affect any other provisions which shall remain in full force and effect.

47 C.F.R. § 1.4000- (Over the Air Reception Devices Rule- OTARD):

§1.4000 Restrictions impairing reception of television broadcast signals, direct broadcast satellite services or multichannel multipoint distribution services.

(a)(1) Any restriction, including but not limited to any state or local law or regulation, including zoning, land-use, or building regulations, or any private covenant, contract provision, lease provision, **homeowners' association rule** or similar restriction, on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property **that impairs the installation, maintenance, or use of:**

(i) An antenna that is:

(A) Used to receive direct broadcast satellite service, including direct-to-home satellite service, or to receive or transmit fixed wireless signals via satellite, **and**

(B) One meter or less in diameter...

(iv) ... is prohibited to the extent it so impairs...

(3) For purposes of this section, a law, regulation, or restriction impairs installation, maintenance, or use of an antenna **if it:**

(i) Unreasonably delays or prevents installation, maintenance, or use;

(ii) Unreasonably increases the cost of installation, maintenance, or use; or

(iii) Precludes reception or transmission of an acceptable quality signal.

47 C.F.R. § 1.4000- (Over the Air Reception Devices Rule- OTARD), was implemented via **(First) Report and Order, FCC 96-328 (8-6-96)**, which Provided:

At ¶ 7, "Under our revised rule, localities and associations need not come to the Commission to enforce restrictions that **may affect but do not impair** reception..."

At ¶ 13, "The term 'impair' means to make worse or damage. The House Report explains that Congress meant to prohibit restrictions that 'prevent' the use of antennas, stating, 'the Committee intends this section to preempt enforcement of... restrictive covenants... that prevent the use of antenna(s) designed for off-the-air reception of television broadcast signals or of satellite receivers designed for receipt of DBS services.'"

At ¶ 20, "However, a regulation requiring that antennas be placed to the extent feasible in locations that are not visible from the street would be permitted under our rule, if this placement would not impair reception of an acceptable signal."

At ¶ 21, "... we remove from the scope of this prohibition all restrictions that may affect, but do not impair, a viewers ability to install, use or maintain devices to receive video programming signals through over-the-air... services."

At ¶ 40, "... we believe that the BOCA guideline regarding the permissibility of permits for installations reaching more than 12 feet over the roofline, which we believe to be a safety guideline, may apply to TVBS antennas (erials) as well as to MMDS antennas on masts."

At ¶ 51, "Thus, homeowner's associations and similar non-governmental authorities may regulate antenna placement or indicate a preference for installations that are not visible from the neighboring property, as long as a restriction does not impair reception."

At ¶ 52, "... community associations retain the right to impose restrictions on installations as long as they do not impair reception."

At ¶ 53, "Otherwise [not safety or historical site related], the restriction may not be enforced until the Commission or a court of competent jurisdiction issues a ruling that a restriction is not preempted. In these circumstances, a viewer may install, use and maintain as antenna while the proceeding is pending. While the viewer may be subject to the enforcing authority's fine or other penalty for violation if the restriction is determined to be enforceable, no additional fines or penalties may accrue during the pendency of the proceeding."

FCC Rulings:

In Re James Sadler, DA 98-1284 (1998), “If an antenna user installs a dish in an area that violates legitimate guidelines, then the Association may assess a penalty on the viewer at that time.”.

In Re William Culver, DA 09-1674 (2009), “A placement preference restriction is permitted provided it does not impair the antenna user’s right to install, maintain, or use an antenna covered by the Rule.”,

In Re Stanley and Vera Holliday, DA 99-2132 (1999), “A restricting entity may prohibit the installation of equipment that is merely duplicative and not necessary for the reception of video programming”.

Board Evaluation- Satellite Dishes, in General.

A Review of the OTARD Regulation reveals that it preempts the enforcement of any Homeowner Association covenant which *‘impairs’* a citizens access to satellite programming. It does *not* preempt the enforcement of covenants which do *not* ‘impair’. So, the question, as to the limits of a Homeowners Association enforcement authority *hinges* on the definition of the term “impair”. While the regulation sets the *framework* for defining “impairment”, it does not clearly establish *where* the lines are drawn. For an answer to this question one must turn to the Congressional record, regarding Congressional Intent, and, more immediately to the F.C.C.s Implementing Order and subsequent rulings, which together articulate the *agency’s* intent.

On review of these articulations of agency intent, the KCCA Board has concluded that a full and literal enforcement of **Article IX, 2(m)** of our Covenants, would result in an effective prohibition of all Satellite Installations other than those installed within the Interior of homes, and that, given the requirement for ‘line of site’ signal access in current digital technology, it is highly unlikely that our covenant could be fully enforced without routinely violating this federal regulation.

As a result the Board was confronted with the same sort of challenge that courts are faced with when aspects of laws they are charged to enforce are voided. The Board was obligated to consider the entire context of our full set of covenants, and to find an interpretation that would give maximum effect to the full intent of the covenants, while simultaneously respecting the federal edict.

In the course of that review we recognized that the original intent of the covenant was to preserve the aesthetic quality of the neighborhood, and by extension, the quality of life and property values of ALL of our members. We concluded that permitting satellite dishes of any size to be placed, in any fashion that a person might decide, would not be consistent with this goal, and that, therefore, it was the fiduciary & ethical duty of the board to adopt architectural review policies within its authority; which preserved that intent up to the very edge of permissible law.

That policy requires that dishes be placed in a location that is aesthetically reasonable in the view of the Association’s Architectural Committee, and at the very least, at no location other than a mounting on the rear or sides of a house, and not placed on any poles or other ‘elevating devices’, excluding normal mounting brackets. It is *only* when the Board is satisfied that these criteria cannot be met (which has never happened so far), that alternate solutions can be considered unavoidable.

In line with this continuing objective, redefined to reflect the narrowing of scope, mandated by this federal law, the Covenants Committee, in exercise of its authority pursuant to our Covenants, implemented the modified rule as follows:

COVENANT COMPLIANCE RULE 9-1: SATELLITE DISHES.

General Rules

(1) KCCA requires, as an OTARD permitted ‘enforceable preference’, that all homeowners/residents, if they choose to establish satellite dish service, restrict such installations to a single dish, not exceeding one meter in diameter, to locations on the side walls or back walls of their house, as near the immediately adjacent roofline as possible, with standard mounting brackets only, and without resorting to the installation of any mast or other devices intended to elevate the dish further than standard brackets would accomplish.

(2) If it is *possible* to receive a reasonable quality signal, without significantly impacting cost and without causing an unreasonable delay, from within these constraints, installations of any other dishes, or at any other location or manner, are prohibited.

(3) If it is *not* possible to receive a reasonable quality signal, without significantly impacting cost and without causing an unreasonable delay, from within these constraints, the *first alternate solution* is to alter the location of the satellite dish (all other restrictions remaining in place) to any location on the roof, which is towards the rear of the house, relative to the ridge of the roofline.

(4) In the event that vegetation, located upon the homeowner’s/resident’s property and thereby owned *by* that member, presents an obstruction to a clear signal, thereby rendering it otherwise impossible to access a clear signal (within a reasonable timeframe & cost) at any location permitted within the rules above; and if it is possible to access a clear signal from those locations if that vegetation were not presenting an obstruction, then it is incumbent upon the homeowner/resident to trim such vegetation sufficiently so as to enable an installation, which *is* functional and yet compliant to those rules.

(5) This rule is based in the principle that neither KCCA nor its rules are responsible for the ‘impairment’ that is present, and that, in fact, the homeowner/resident is, in effect, responsible for the creation and/or maintenance of their own impairment, and are not entitled to circumvent these rules through a neglect of their own reasonable responsibility to avoid creating or maintaining their own avoidable impairments.

(6) Accordingly, any costs and/or time delays (reasonably achievable in a matter of a few days, if not mere hours) associated with a homeowner’s / resident’s need to trim *their own* vegetation (in order to gain access to a reasonably clear signal) is *not* deemed to constitute an ‘undue delay’ or impose ‘undue costs’ under federal regulation.

(7) The entirety of the rule above constitutes the “basic rules”.

(8) In the unprecedented event that none of the above provisions make it possible to access a reasonably clear signal (within reasonable cost & timing considerations), a *second alternate solution* is permissible, which permits structural deviations to an installation to the minimum extent necessary to reasonably achieving

a clear signal. The *second alternate solution* continues to prohibit solutions involving multiple dishes, installations on the ground, installations on the front portions of houses (wall or roof), and installations involving masts greater than the absolute minimum necessary to achieving a reasonable signal.

(9) Installations involving multiple dishes, installations on the ground, or installations on the front portions of houses (wall or roof), are to be avoided (as a *last resort solution*) if at all reasonably possible. Because there has never been a case within our development, where reasonably achieving service necessitated resorting to the *second alternate solution* or the *last resort solution*, installations non-complaint to the basic installation guidelines will be presumed by KCCA to be in violation of our rules, until such point as the genuine necessity for the deviation is confirmed.

(10) Satellite Dishes in excess of 1 meter in diameter are expressly prohibited in all cases.

Consequences for Violation

(11) In the event that a satellite dish is installed on a member property in a manner that is inconsistent with the *basic rules*, KCCA will presume that a violation has occurred and a violation review will be conducted.

(12) In the event that KCCA determines through a signal measurement test or other method that a member deviated from the *basic rules*, despite the fact that it was possible for the member to reasonably achieve reasonable service from within the parameters of the *basic rules*, an order will be issued for the member to correct their installation at their own expense, and fines and other penalties may be imposed, including the assessment of all legal costs incurred in achieving the compliance of the member.

(13) Similarly, in the event that KCCA determines through a signal measurement test or other method that a member used a ‘less preferred alternate solution’ when a ‘more preferred alternate solution’ (as laid out above) would have resulted in reasonable access to a reasonable signal, an order will be issued for the member to correct their installation at their own expense, and fines and other penalties may be imposed, including the assessment of all legal costs incurred in achieving the compliance of the member.

(14) Federal regulations may grant some relief from imposition of assessments to recapture these legal costs (but not fines) in the event that the member’s objection is based in a credible point of law, and that member corrects their violation within 21 days of an adverse ruling. However, a violation based in a frivolous or non-existent legal argument will not be shielded from these assessments for recapture of KCCAs legal costs.

Procedure for Association Review / Approval

(15) KCCA requires that all homeowners/residents, who wish to install a satellite dish on their property, complete an architectural review request form, identifying the type of service to be installed, the service provider, the type and

dimensions of antenna, and a sketch identifying the intended location for the antenna. In the event that the planned installation does not comply with the ‘*basic rules*’ as defined above, they are to include a written explanation regarding the basis for the conclusion that a deviation is permitted.

(16) **Important Notice:** Mere statements by an installation technician that a ‘basic rule installation’ will not afford a reasonable quality of signal, will not shield a resident member from a violation (and the legal requirement to move the satellite) if a Member then deviates from a ‘basic rule’ installation and KCCA later determines that a reasonable signal was available within the constraints of a ‘basic rule’ installation.

(17) ACCORDINGLY, Members are strongly urged to either (a) ensure that their installation plans conform to ‘basic rule’ guidelines, or (b) voluntarily consult with the KCCA Architectural Review Committee to ensure KCCA concurrence in the necessity of any deviations.

(18) For purposes of Satellite Dish reviews under the OTARD Rules, a Member’s completion & submittal of KCCA’s multipurpose Architectural Review Request Form constitutes a “notice” (serving to ensure that Members are fully informed as to their responsibilities in an installation) and does not constitute an ‘approval application’, per se.

(19) A member must submit the form before proceeding with an installation, but is not prohibited from installing the dish before a response is received.

(20) HOWEVER, if a member proceeds with installation before a written concurrence is received, they assume the full risk and responsibility for the consequences if they chose to deviate from the ‘basic rule’ installation, and KCCA later determines that this deviation was improper.

(21) On the Other Hand, if a Member determines that they need to deviate from the “basic rule” and opt to wait for KCCA to respond, KCCA will conduct its own review, will identify a solution (including location) that it regards as optimal under the entire set of circumstances, and (if that solution is adopted by the Member) will provide a written notice of concurrence, which will, thereafter, be recognized, as provided within our covenants (at Article VIII, Section 3), as prima facie evidence of compliance with Association Rules.

This policy may be updated or amended as necessary, as the requirement to do so becomes apparent.

The Board of Directors, KCCA, Inc.