

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Application No. 15583 of Gunther and Vilma Muller, pursuant to 11 DCMR 3107.2, for a variance from the provisions of Subsection 201.2 (f) to allow a roof-mounted satellite antenna which does not meet the maximum diameter and height requirements, the minimum set back requirements, or the building height requirements in an R-3 District at premises 2816 Olive Street, N.W. (Square 1212, Lot 190).

HEARING DATE: December 11, 1991 and March 17, 1993
DECISION DATE: April 7, 1993

ORDER

SUMMARY OF EVIDENCE OF RECORD:

1. The property which is the subject of this application is located at 2816 Olive Street, N.W. It is zoned R-3.

2. The R-3 District permits matter of right development of single-family residential uses including detached, semi-detached and row dwellings with a minimum lot area of 2,000 square feet, a minimum lot width of 20 feet, a maximum lot occupancy of 60 percent, and a maximum height limit of three stories/40 feet. Roof-mounted satellite dish antennae are permitted as a matter of right under Subsection 201.2(f) in an R-3 District. However, the antennae are subject to diameter, height and roof setback requirements, as well as minimum dwelling height requirements.

3. The subject lot is rectangular-shaped and has a width of 18.40 feet and a depth of 63.71 feet, and has a total land area of 1,172 square feet.

4. The subject lot is improved with a two-story, brick, single-family rowhouse that was constructed in 1918. The dwelling unit contains approximately 1,104 square feet of living space.

5. The subject property is located in the Georgetown neighborhood of Ward 2. Further, the property is located in the Georgetown Historic District. Therefore, any exterior changes to the dwelling, including the erection of roof satellite dish antennae, are subject to the review of and approval by the Commission of Fine Arts.

6. The Georgetown neighborhood is developed with historic detached, semi-detached and rowhouse residential dwellings. The neighborhood is also developed with low to moderate density commercial establishments, including: hotels, restaurants and retail stores. Rock Creek Park is located one block to the east of the subject property.

7. The applicant seeks Board of Zoning Adjustment approval to maintain a roof satellite dish antenna that exceeds antenna diameter, height and setback requirements set forth in Section 201.2(f) of the Zoning Regulations. The antenna was installed in June 1990. According to the applicant, he is an international civic servant who needs to be informed and needs the roof satellite dish antenna, and that the diameter of the dish antenna that he has erected is the only means through which he can receive the programming he desires.

In this case, the antenna has a diameter of ten feet, whereas, the maximum diameter permitted under the regulation is four feet. Therefore, the dish's diameter is six feet greater than allowed. Second, the antenna's height is more than 14 feet, but the maximum height allowed under the regulation is eight feet. Thus, the antenna is more than six feet higher than allowed. Third, the antenna is set back only 2 1/2 feet from the rear roof edge, however, the regulations proscribe a set back that is equivalent to the height of the antenna. Since the antenna is more than 14 feet high, it must be setback from the rear edge of the roof more than 14 feet. Therefore, the antenna must be moved back at least 12 feet. Finally, in order to erect a roof antenna, the principal dwelling must have a height of at least 50 feet. However, the applicant's dwelling is only approximately 23 feet high.

8. On December 3, 1991, by a memorandum to the Board, the Office of Planning (OP), recommended denial of the application.

OP reasons that there are no unique features of the subject property, and the size and location of the dish antenna would have a detrimental visual impact on the Georgetown Historic District if approved.

9. On December 4, 1991 Advisory Neighborhood Commission 2E (ANC-2E) informed the Board that the ANC did not take a formal position on the application because it did not have a quorum.

10. The Citizens Association of Georgetown (CAG), by letters dated March 11 and 31, 1993 set forth its opposition to the application.

First, CAG argues that the application should be denied because: (a) the antenna's dish diameter is too great; (b) the antenna exceeds the height requirements; (c) the antenna causes a

visual detriment; and (d) the antenna is inconsistent with the historic character of Georgetown. Second, CAG claims that there are no first amendment issues involved in this case. Third, CAG contends that the antenna is an eyesore.

In addition to the foregoing, Ann Hellick, President of CAG opposes the application because the applicant has not availed himself to the Commission of Fine Arts' review.

11. The Corcoran Unit Owners Association (CUOA), by a letter dated November 22, 1991 set forth its opposition to the application. In short, CUOA opposed the application because the dish antenna is inconsistent with the character and appearance of the Georgetown neighborhood.

12. Fifteen individual neighbors also opposed the application. In addition to the opposition stated by CAG and CUOA, the neighbors allege that the dish antenna detracts from the uniformity of other dwellings and will decrease property values; the antenna is unsightly; and the antenna is extremely offensive.

13. At the close of the December 11, 1991 public hearing, the Board left the record open and suspended the hearing until such time as the applicant's plan to relocate the roof-mounted satellite dish antenna had been reviewed by the Commission of Fine Arts (CFA) and the Zoning Administrator.

14. The applicant did not submit the relocation plan to CFA or the Zoning Administrator for review.

FINDINGS OF FACT:

Based on the evidence of record, the Board finds as follows:

1. The applicant seeks Board of Zoning Adjustment approval to maintain a roof satellite dish antenna that exceeds dish antenna diameter, height, and roof setback requirements set forth in Section 201.2(f) of the Zoning Regulations.

2. The applicant's evidence does not meet the burden of proof required under Section 201.2(f).

3. The Board finds the opposition arguments to be persuasive and the Board agrees with the report and recommendation of the Office of Planning.

4. The dish antenna exceeds the the maximum diameter requirements by six feet; it exceeds the maximum antenna height limitation by six feet; and the antenna is 12 feet closer to the rear edge of the roof than the regulations allow.

5. The dwelling upon which the antenna is erected is approximately 23 feet in height. Thus, the dwelling is approximately 27 feet lower than the minimum dwelling height upon which a roof satellite dish antenna may be erected.

6. The applicant did not submit a layout of the proposed relocation of the roof satellite dish antenna to the Commission of Fine Arts ("CFA") for review and approval. Thus, CFA has not reviewed the applicant's relocation plans.

7. The subject site is not unique, therefore, there are no practical difficulties with respect to the owner developing the property in accordance with the Zoning Regulations.

8. A denial of the variance would not deprive the owner of the reasonable use of his property. Further, with regards to the deprivation of resonable use, if the requested variance is denied, the applicant did not present any evidence that such a deprivation would occur.

9. Although the applicant argues that the Board is preempted under federal law from denying the variance, and a denial infringes upon his rights guaranteed under the First Amendment of the United States Constitution, the Board further finds that a denial of a variance would not infringe upon any of the applicant's rights, constitutional or otherwise.

10. The Board's exercise of its local zoning regulatory authority in this case is not preempted by federal law. The applicant's evidence does not address or respond to the issues raised by the opposition, nor does the evidence presented by the applicant meet the burden of proof required under Section 201.2(f).

11. The granting of a variance for the subject property to maintain a dish antenna that exceeds the maximum dish antenna diameter, height and roof setback and minimum dwelling height requirements set forth in Section 201.2(f) of the Zoning Regulations that was installed in June 1990 in an R-3 District of the historic Georgetown neighborhood would substantially impair the intent, purpose and integrity of the zone plan.

CONCLUSIONS OF LAW AND OPINION:

Based on the foregoing findings of fact and evidence of record, the Board concludes that the applicant is seeking a variance. In order for the Board to grant a variance, the applicant must demonstrate that there is a hardship which is inherent in the property.

In this case, the applicant has not met the burden of proof with respect to hardship. Instead, the applicant argues that 11 DCMR 201.2(f) is preempted by the Federal Communications Act of 1934, as amended, and violates the First Amendment of the United States Constitution. The Board disagrees.

The Board concedes that the First Amendment protects the applicant's right to receive reasonable access to meaningful television broadcasts. That right, however, is not an absolute right to receive the maximum amount of programming accessible via satellite. Section 201.2(f) is a content neutral regulation, which furthers a substantial governmental interest and does not unreasonably limit alternative avenues of communication. Moreover, this section serves the substantial governmental interest in preserving the character of Georgetown and that neighborhood's aesthetic values. Furthermore, the section does not unreasonably limit alternative avenues of communication, nor does it place diameter, height and setback requirements that are unreasonable time, place and manner restrictions. With a smaller dish antenna, the applicant is not able to receive signals from as great a distance as with a larger dish antenna, but he is still able to exercise his First Amendment rights. This section is not a blanket prohibition on the use of roof satellite dish antennae. The opposition offered unrefuted evidence that the applicant could exercise his First Amendment rights by installing a smaller dish antenna, or by using cable transmissions or traditional television programming.

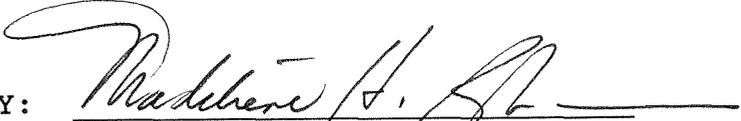
With respect to preemption, since Section 201.2(f) furthers a substantial governmental interest, and does not impose unreasonable limitations on, or prevent reception of satellite delivered signals or impose costs on the uses of dish antenna that are excessive in light of the purchase and installation cost of the equipment, this section is not preempted by federal law. As a matter of law, federal regulations preempt local regulations where federal law occupies the field and there is an irreconcilable conflict between federal and local law. In the instant case, the Federal Communication Commission's regulations do not occupy the field because the regulations are not comprehensive. Here, too, there is no irreconcilable conflict between 11 DCMR 201.2(f) and 47 C.F.R. 25.104 because the federal regulations preempt local zoning only under certain clearly articulated circumstances, none of which are present in this case. See Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, 51 Fed.Reg. 5519, 5526 (1986)(codified at 47 C.F.R. 25.104 (1992)).

The Board further concludes that the relief cannot be granted without substantial detriment to the public good and without substantially impairing the intent, purpose and integrity of the zone plan. Accordingly, it is **ORDERED** that the application be **DENIED**.

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VOTE: 3-0 (Angel F. Clarens, Paula L. Jewell and Sheri M. Pruitt to deny; John G. Parsons and Carrie L. Thornhill not voting, not having heard the case).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: 
MADELIENE H. ROBINSON
Director

FINAL DATE OF ORDER: NOV 30 1993

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

15583Order/TM/bhs

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



BZA APPLICATION NO. 15583

As Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on NOV 30 1993 a copy of the order entered on that date in this matter was mailed postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

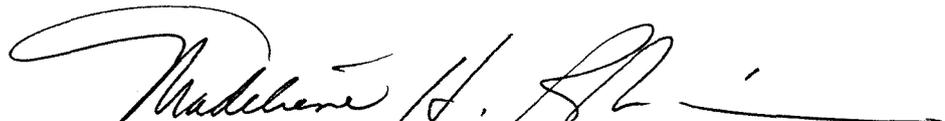
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MADELIENE H. ROBINSON
Director

DATE: NOV 30 1993

15583Att/bhs