

MEMORANDUM

Highly Confidential; Attorney-Client Privileged Communication

To: Officers, Directors and Vice Directors
From: Chris Imlay, W3KD
Re: H.R. 4969 Strategy and Update
Date: December 9, 2014

Greetings. This briefing memo is long overdue. However, we did not want to prepare it until we had some resolution of the results of our effort to cause FCC to undertake on its own initiative the extension of the PRB-1 reasonable accommodation policy to all types of land use regulations, public and private. As of last evening, we got some initial resolution and so it is time to bring all of ODV up to speed on where we are and where, tactically and strategically, we want to go, before the end of this year and into January.

Because there are a number of additions to the Board Family recently (folks who are new to the confidential portions of our legislative campaign) I will reiterate the background of this important effort. Board veterans may wish to skip that part of this memo. It is absolutely crucial that none of this information is shared beyond the Board family so please consider this highly confidential information.

The bottom line is that, as we learned last evening, the relatively new Chief of the Wireless Telecommunications Bureau at FCC has indicated to the Majority Counsel for the Subcommittee on Communications and Technology of the House Energy and Commerce Committee that the Wireless Bureau will not be willing, on its own initiative, to extend its Amateur Radio limited preemption policy to private land use regulations without guidance from Congress *in the form of passed legislation*. We learned this yesterday. It is not a surprise. We have a proposed strategy going forward to pursue a shortcut to achieve our longstanding goal, which is outlined below.

Background

Since 1985, when FCC released the PRB-1 declaratory ruling establishing a limited preemption policy that then and now applies only to municipal land use restrictions, we have taken periodic steps to attempt to extend that policy (codified at 47 C.F.R. § 97.15(b)) to private land use restrictions (covenants, CC&Rs, deed restrictions, homeowner's association regulations, etc.) as well. FCC has arbitrarily, but consistently, refused to do that. In recent years, following the 1996 enactment of the OTARD regulation (which preempted covenants relative to over-the-air video reception devices in residential areas, premised on an affirmative determination that it has jurisdiction to prohibit unreasonable private land use restrictions affecting telecommunications facilities) in response to a specific Congressional directive to FCC to do so, FCC told ARRL that it would not do the same for Amateur Radio absent a similar Congressional directive.

Having had trouble with two prior legislative efforts to apply the PRB-1 policy to covenants (despite good support from Congressman Steve Israel of New York and others), we developed a two-part legislative strategy to accomplish the goal. First, we were able to obtain legislation in 2012 (Section 6414 of the *Middle Class Tax Relief and Job Creation Act of 2012*, Public Law 112-96), calling on the FCC, in consultation with the Office of Emergency Communications of the Department of Homeland Security, to complete a study on “the uses and capabilities of Amateur Radio Service communications in emergencies and disaster relief;” and to submit to the Committee on Energy and Commerce of the House of Representatives and to the Committee on Commerce, Science and Transportation of the Senate a report on the findings of such study. To be included in the Study, among other things, were: (1) an identification of impediments to enhanced Amateur Radio Service communications, such as the effects of unreasonable or unnecessary private land use restrictions on residential antenna installations; and (2) recommendations regarding the removal of such impediments. The study and the report to Congress by FCC and DHS were to be the first step. The second step was to take the factual findings by FCC and DHS and use those as a premise for Phase II of the legislative effort, the extension of the PRB-1 policy to covenants.

FCC issued a *Public Notice*, (DA 12-523) on April 2, 2012 seeking public comment for the study, and ARRL filed extensive comments building a strong record showing the exponential increase in private land use regulations and the preclusive effect they have on Amateur Radio. There was almost no input from the other side, except a filing by the Community Associations Institute (CAI). FCC released its *Report* to Congress and to the public on August 20, 2012. The Report, however, was a disappointment. It did not constitute a report on the issues; rather, it was nothing more than an unfairly weighted summary of the comments filed. FCC said that on the subject of preemption of private land use regulations, FCC concluded that it did not intend on its own initiative to revisit the issue of including private land use regulations in its limited preemption policy. Rather, it reiterated that it is willing to act swiftly to extend its limited preemption policy to include private land use regulations should Congress direct that it be done. So, using that and the good record that had been developed, we commenced in the Spring of 2013 to attempt “Phase II” of the legislative plan.

In April, May and June of 2013, former ARRL congressional relations consultant, John Chwat and I made a substantial number of Congressional office visits on both the Senate and House sides of Capitol Hill looking for initial sponsors for a draft Bill that would extend the FCC Amateur Radio preemption policy to CC&Rs. Though we appeared to have been unsuccessful at the time, we did meet and identify in the process two Hill staffers who were hams and who understood our concerns and expressed sympathy with them. One of those staffers was Josh Baggett, KK4NDB, who works for Rep. Adam Kinzinger, an Illinois Republican and a member of the Energy & Commerce Committee. We got a good reception from Josh but no promises to sponsor our Bill.

We did not hear back from Josh, and I was unhappy with Chwat for not following up with him or others. But in early November of 2013, Chwat received a call from Dave Redl, the Majority Counsel to the Communications and Technology Subcommittee of the House Energy and Commerce Committee. Redl wanted to see us. The C&T Subcommittee is chaired by Greg Walden of Oregon, W7EQI. We were well-acquainted with Dave Redl, who is both candid and

affable. Chwat and I had, earlier in 2013, talked in detail to Redl's predecessor (who left the Hill to lobby for the motion picture industry) about our Phase II CC&R Bill and we had been told that Walden didn't normally sponsor bills that came before his subcommittee, but we had no reason to think that Walden would be hostile to our Bill if we got it introduced in the House through someone else.

Meanwhile, as a separate matter, following the July, 2013 ARRL Board meeting, Vice President (then Director) Fenstermaker and President Craigie had prepared letters to Walden asking him for help with FCC staff's refusal to grant ARRL a special call sign commemorating our Centennial anniversary. I had, at President Craigie's request, hand delivered those letters to Walden's office (to his Senior Policy Advisor, Ray Baum, with whom I had worked on another project unrelated to ARRL). Ray was not overly responsive afterward, and I thought perhaps Walden was not going to help us with that special call sign matter.

Also prior to the Redl meeting, Josh Baggett of Rep. Kinzinger's office told Chwat and me that Josh was working on our CC&R Bill; that Kinzinger was willing to support it, and that Josh had spoken with "some people" about the text of it. He said it could be introduced by Kinzinger, but that the language would have to be changed from our draft. We weren't offered any revised text.

We went in to see Dave Redl on November 14, 2013. Redl first said the ARRL "special call sign" request had been "taken care of that so that will happen for you." He said that ARRL would be granted the special call sign authority from the Wireless Bureau but it would have to wait just long enough for the *new Wireless Bureau Chief Roger Sherman* (who had at that time just been appointed by new FCC Chairman Tom Wheeler) to take over at FCC. Redl said that Roger Sherman was "still up here (i.e. on the Hill)" and that Sherman would issue ARRL a letter granting the special call sign request we made.

As to our CC&R bill, apparently Kinzinger had approached Walden or the Subcommittee about it. Redl said that Walden "wants to engage on this and get this done for you." He said that the problem is that their plate was totally full during the remainder of this year and that it would have to be done next session, i.e. after January 1, 2014. What Redl said Walden wanted to do *ideally* was to have a bill introduced (by Kinzinger) that wasn't based on the argument that Amateur emergency communications depended on this. Instead (and Redl said that in his view, that this is the better argument) the Bill should be based on achieving "regulatory parity." The regulatory parity argument goes this way: (1) FCC in 1985 declared a strong Federal interest in Amateur Radio communications; (2) on this premise it issued a limited preemption policy that protected amateur radio communications (*not* antennas, but communications) from unreasonable municipal land use regulations; but (3) unreasonable private land use regulations have the same preclusive effect on Amateur communication as do municipal land use regulations, and (4) therefore there should be regulatory parity and the policy should apply across the board because there is no functional difference between the preclusion effect on Amateur communications of unreasonable municipal land use regulations and the preclusion effect of unreasonable private land use regulations. Redl said that that argument should be the entire thrust of the Bill.

Once the Bill was introduced, Redl said that it would be endorsed by Walden. However, rather than get Republicans all wired up about Federal government intrusion into private contracts, Walden's theory was that the introduction and markup of the Bill would provide enough cover for FCC, *at Walden's urging*, to issue a Declaratory Ruling extending PRB-1 to CC&Rs (with the support of Roger Sherman, the WTB Chief who Redl referred to as "their guy"). In other words, Walden ideally didn't actually want the Bill to pass, but he wanted to get FCC to do what we ultimately want, and to give FCC enough "guidance" from Congress that they are comfortable doing so themselves. This we viewed at the time to be a brilliant strategy -- if he could make it happen -- because it would be the absolute fastest way for us to get PRB-1 protection from CC&Rs. There was no doubt in Redl's mind that FCC has the jurisdiction to issue a declaratory ruling or rulemaking to make it happen. They just needed "cover" and some incentive.

We had a long conversation that same day about making sure that the effort doesn't allow what Redl called "199-foot towers with very large rotatable antennas on them" for anyone that wants one. I made sure that he understood that FCC hadn't allowed that in PRB-1 before now, and I assured him that there is no effort to expand the limited preemption policy, about which there is a lot of case law about what must be permitted and what may not be.

What Redl told us that Walden wanted us to do was to *stand down* until after the first of January, 2014, *and call off any legislative efforts on this topic until then, and to work with them after January 1, 2014*. I told Redl that we would do as they asked, because we really had no good alternative and this looked very good as a course of action that incorporated Walden's critical and welcome support.

The Legislative Effort During 2014

The effort with respect to our Bill did not begin until after the January, 2014 Board Meeting. We had as of January 1, 2014 retained The Keelen Group (TKG) as our new Congressional Relations consultants, and they have been exceptionally helpful in this process. It was an inauspicious start: Redl and Baggett called us in and presented a draft bill that had apparently been drafted by Baggett. The draft was completely unacceptable and we couldn't possibly support it. The draft had been approved by Dave Redl, so we had to do some serious diplomacy in order to get the draft back to where we wanted it to be. The findings of Baggett's draft of the Bill were excellent; they spoke of extending PRB-1 provisions to CC&Rs and noted the escalating difficulties that hams had with CC&Rs. But the operative provision of the Bill, Section 3, would have asked FCC to abandon PRB-1 entirely and to apply to Amateur antennas of all sorts the provisions of the OTARD (Over The Air Reception Devices) policy. The OTARD test is not at all well-suited to Amateur Radio antennas. Worse, their draft would have *tasked FCC with determining the height of antennas that would be subject to the policy*. It would have effectively undone 30 years of PRB-1 case law. It would have been a disaster. We met with Redl and Baggett and looked over the Bill and we had to tell them that it wouldn't work for us at all. We explained our concerns in a memo and provided them some replacement language. We then proposed replacement language for the operative provision of the Bill.

There followed a very long delay, during which we were worried that the lack of communication on the text of the Bill might have derailed the train. But finally the Bill text was redone through the office of legislative counsel and it was exactly what we had asked for.

Kinzinger wanted a single Democratic cosponsor before he was willing to drop the Bill for us, so that it would indeed be a bipartisan legislative effort. That turned out to be *very* important to Kinzinger and it is good for us to be able to note that this is a consummate bipartisan Bill. But not any Democrat would do from Kinzinger's perspective. Kinzinger was VERY selective about who would suit him on the minority side. He gave us only three names of "approved" Democrats that we could contact about original cosponsorship. Of the three, we tried first Representative Peter Welch, a Vermont Democrat who apparently works well with Kinzinger. The legislative assistant to Welch was helpful, but there was a very, very long delay between our initial meetings with Welch's staff and a decision on cosponsorship. While we were waiting, we met with the two other Democrats on Kinzinger's list and asked them to be cosponsors, but we mentioned that Welch had been asked to be the original cosponsor with Kinzinger. When Welch ultimately declined (because there had been influential Vermonters unknown to us who urged Welch to stay away from this issue) we went back to Kinzinger and asked for another list of names. We got only a couple more, though we had a number of suggestions of members of Congress who had helped us before. All of our recommendations were declined by Kinzinger, save for Representative Joe Courtney of Connecticut. It was frustrating, to say the least. We had put Courtney on the list because of his close relationship with Dave and Linda Sumner, but Courtney had no other reason to back us on this. It took a long time for Courtney to make a decision but he ultimately agreed to be the original co-sponsor.

So we began the "full court press" to get cosponsors for this Bill in June. This was so late in the year that we hoped to get, at the most, 30 cosponsors. Due to the unprecedented effort and the leadership of President Craigie, Directors Lisenco and Isely and many others, we now have almost 70 cosponsors on the Bill. The response of the membership and the Board family has been unprecedented, and in just a few short months, far too few to seriously attempt to get the Bill passed this session (which is effectively over now), we have obtained far more support, far more easily, than we have ever been able to generate before. Part of this is due to the excellent connections that TKG has and their good efforts on our behalf. We have also received interest from Senator Susan Collins of Maine in introducing a Senate Companion Bill in January. TKG and I will be following up on that later this month.

"The Call" to FCC from the Subcommittee

Once we realized in August that we would be finishing the year with far more than the 30 cosponsors that we were asked by Redl to get in order to demonstrate good, solid support and guidance for FCC on the Hill based on our Bill (in furtherance of the plan to get FCC to apply its PRB-1 policy to all types of land use regulations), President Craigie and I, with Frank McCarthy of TKG, had a meeting with Redl to make sure that the plan that Redl had developed to shortcut this process and persuade FCC to act on its own was on track. Redl initially indicated that rather than Walden contacting FCC, he, Redl, would be the likely candidate to contact Roger Sherman at FCC due to the close working relationship that Redl has with Sherman and because Redl can deal directly with Sherman. We were able to affirm that the "shortcut" plan was on track.

At the beginning of October, Frank McCarthy and I met with Redl to ask him what the next steps would be, in view of the fact that we had about 60 cosponsors at the time, twice what we were requested to generate. Redl, on October 1, 2014 outlined a specific plan that, initially, I was skeptical of because it didn't involve -- at the outset -- a call from Greg Walden himself to FCC. However, when Redl outlined a "graduated" plan to pressure FCC to modify Section 97.15(b) on its own without passage of the Bill, the more we discussed it, the more sense it made. It was, in order, as follows:

1. Redl had a series of issues that he had to meet with Roger Sherman about starting in early October and for the next several weeks thereafter. Redl was to raise the subject of extending the PRB-1 three-part test to private land use regulations with Sherman, beginning at those meetings, and feel Roger out about this. Redl assured us that Roger is more closely attuned to what the Subcommittee wants and what Greg Walden wants than anyone else at FCC. Since Roger is the one who will have to do the implementation of the objectives of the Bill anyway, it was right and necessary to start with Roger. To initiate a call from Walden to Tom Wheeler in the first instance would, Redl said, be bad form and bad strategy. Also, Redl said that he and Sherman have a very good rapport. They talk turkey to each other.

2. Redl anticipated that he would get pushback from Sherman in one of two possible forms. Either Roger would assert that FCC has no jurisdiction to do this, or Roger will assert that there is no open docket on this subject. I reminded Redl that the FCC has itself said unequivocally that it does have ample jurisdiction to preempt private land use regulations in the OTARD proceeding and that FCC had held that private land use regulations are subject to less deference than governmental land use regulations because the former are based solely on aesthetics and governmental land use regulations are based on safety and aesthetics. As to the absence of a pending rulemaking, I told Redl that we could have either a Request for Declaratory Ruling or a Petition for Rule Making on file within two weeks, so that is not an obstacle. Redl said that if we have to do that (and he anticipated that FCC would not be able to just issue an order on this, and I agree with him) there would be enough pressure brought to bear on FCC to do the right thing so that we would end up with what we want.

3. In the worst case, if Sherman refused to do this, a call from Walden to Tom Wheeler would be the next step, which we were assured would be done as necessary. I asked Redl whether he was sure that this graduated approach was better than having Greg Walden call Tom Wheeler directly. Redl said absolutely it was for the above reasons and because this would be so low on Tom Wheeler's agenda that the call from Walden would not likely have the desired effect and because Redl was frankly reluctant, "despite the fact that Walden likes to think of himself as your grand patron and loves ham radio" to have Walden burn a chit with Wheeler on this unless it was necessary to do so.

4. In the very worst case, if we have to pursue this legislation next January, Redl said that "if necessary, Greg would go on the Bill himself". By this time, we had heard

from Senator Susan Collins of Maine (via Josh Baggett in Kinzinger's office) about sponsoring a companion Bill in the Senate. So, if we have to pursue this next year, we thought that we would have not only most of the cosponsors this year ready to do so again, but we would also have a companion Bill in the Senate and can move this along in any of several ways next term.

That was the plan, developed in October with Redl. I floated this to the Executive Committee at its meeting in Memphis in October. The EC agreed with the strategy. We were prepared to file a Petition if we had to.

Frank had asked Redl at the October 1 meeting when we should get back to him about this to see how we were doing, and Redl said he was having a series of meetings with Roger Sherman in the next couple of weeks in October and to get back to Redl "after the elections" in early November.

Redl's Discussions with Roger Sherman, FCC WTB Chief.

Frank McCarthy of TKG followed up with some calls to Redl's office in November after the elections. Redl reported to Frank that Redl had indeed made our pitch to Sherman. Sherman said that he would "get together with my Amateur Radio guys and see what we (FCC) can do." To us, this was terrible news. What it meant was that Sherman intended to consult with Bill Cross and Scot Stone at FCC. We were well-aware of the advice that Cross and Stone would have inevitably provided to Sherman: they would very obviously advise Sherman to stay the course set by the prior PRB and WTB and refuse, absent Congressional instruction, to preempt covenants in any respect at all. It would have been too much to expect that they would advise Sherman differently.

There followed very little feedback from Redl through Thanksgiving, but Frank and I did meet with Redl a week *prior to* Thanksgiving. Before that meeting, Redl and Frank had a conversation, after which Frank sent this to me on November 18 describing Redl's efforts since our early October meeting:

(Redl) and I spoke briefly this morning. The short of it is that he spoke to Roger Sherman and expressed the Chairman's position: he'd like the FCC to move forward without the need for passing the bill. Redl emphasized the significance of the large number of cosponsors added to the bill in such a short period of time - testament to the strong support for agency action. Sherman has his people at the FCC looking at the bill and what implementation would look like. For the purposes of our meeting next week, I'd like to get a good idea of what the ARRL can provide to the agency to help guide them along.

The meeting among me, Frank, and Redl just before Thanksgiving was kind of a false alarm. We had assumed that by the time of the meeting, Redl would have spoken again with Sherman and would have some response from Sherman as to what FCC was willing to do on its own. That didn't happen because Sherman was, that week, involved with a spectrum auction that was shaping up to be the biggest one FCC conducted to date, producing more than 35 billion

dollars, so Sherman was sidetracked and he and Redl did no more than trade calls before our meeting with Redl.

Redl didn't get back to us and Kay and I bugged Frank about the lack of any resolution of this. Frank spent last weekend with Representative Walden at some meetings and spoke repeatedly to Walden about our dismay at not having had the FCC proposal resolved by now. Walden sent an e-mail to Redl over the weekend and yesterday afternoon, Redl called Sherman and then Redl called Frank.

Redl reported to Frank that Roger Sherman effectively said no, WTB would not initiate a rule change on 97.15(b) without some firm guidance from Congress by means of passed legislation. Clearly, what transpired at FCC behind Roger Sherman's office closed doors was that Roger's plan to "discuss this with the (WTB) Amateur Radio folks and see what we can do" meant that he would be conferring with Cross and/or Stone. Equally clearly, Cross and Stone advised Sherman to stay the course that FCC had set over the past 30 years. Sherman reportedly told Redl that FCC had told ARRL repeatedly that FCC would have to have some guidance from Congress in order for it to take action to extend the preemption policy to covenants. Frank said that he told Redl that we had hoped that obtaining a specific Bill with 70 cosponsors obtained in just a few months would have been guidance enough for the agency. Redl thought that it should have been enough.

I told Frank that when Sherman told Redl that Sherman would be talking to his "amateur radio guys," we well knew what the recommendation from Cross and Stone would be; they would certainly want Sherman to act consistently with the prior decisions of Kathleen Ham, etc. etc. because to do otherwise would make their prior decisions (into some of which Cross and Stone had input) look flakey. It would have been naïve to think that Cross and Stone would provide any other input than that and clearly they didn't. Sherman apparently didn't want to buck his staff so the answer Sherman gave was the one that Cross and Stone wanted him to give to Redl.

Frank pushed Redl on the phone. Frank asked if Walden, together with the ranking minority member of the *Subcommittee* (Representatives Eshoo or Pallone), could write a letter now to Tom Wheeler asking FCC to please do this to avoid the need for further legislation in this area next year. Redl said that such a letter was complicated because it was not clear at this point whether Eshoo would be the ranking minority member of the Subcommittee rather than Pallone, and so far there is no clear successor to Stephen Chang, the minority counsel for the Subcommittee who has just left the Hill. Besides, the letter would have to be signed by Upton, Walden and the ranking minority member of the Subcommittee and that will take some amount of time to engineer.

Thinking that Redl might not want Walden to participate in something as overt and traceable as a letter, Frank then asked if Walden could call Wheeler and put the pressure on that way, as per the previous plan. They apparently have each other's cell phone numbers and speak occasionally or even frequently. Redl was worried that with the issue of the Comm Act Rewrite now in the wind, Walden might not want to burn capital with Wheeler on this issue, but he did not throw cold water on the idea.

The Proposed Way Forward

1. What is anticipated right now is that Frank and I will meet with Josh Baggett and Dave Redl soon (late this week or next) and discuss strategies (other than actually passing the Bill next session). Frank will set that up at the earliest opportunity.
2. At that meeting I intend to remind Redl that it was his idea in the first place to aggressively push FCC to do this on their own in order to avoid having Walden tied to pushing a bill that would bring the “heavy hand” of the Federal government (Redl’s term) down on private HOAs. However, I don’t want to sell that so hard that Baggett gets worried that his boss, a conservative Republican, should be worried about being the spear carrier for the Bill.
3. Frank also wants to take me in to see Susan Collins’ office about a Senate version of the Bill, hopefully next week.
4. The close relationship between TKG and Representative Walden is actually the close relationship between Matt Keelen and Rep. Walden. Matt can’t be a part of this effort immediately because he is now in Africa for some projects he has on the table.
5. Looking into next year, it does appear that we should prepare to push the legislative effort with the same vigor that we have been doing thus far. It does not appear that we will have a plan anytime soon that would firmly obviate the need to commit to the legislative effort duplicating H.R. 4969, which is not unexpected.

While it is not a positive development that Roger Sherman has not agreed to change the course that FCC has been on for many years now relative to covenant preemption, that outcome should surprise no one. Nor does it indicate any shortcoming in our effort or our strategy to preempt covenants. Quite the contrary. Due to the dedication and quality of our current Board, some dedicated members and a crackerjack Congressional relations firm, we have done more on this project than we have ever done in any legislative effort heretofore and we have done it in an amazingly short time. Walden is good where he is for the next Congressional Term, and it is hoped that the Board will continue to support the effort. If successful, we will have achieved something very meaningful for a lot of hams.

It is worth noting especially that the membership has not been made aware of the shortcut plan for achieving covenant preemption described in this memo. The members have been told that getting this legislation passed may be an effort that goes into the next term. Given that, there is no reason why the membership should not be willing to restart the grassroots effort in January just as they responded (so well) between June and now.

Due to the candor in this memo about our strategies, please under no circumstances share this with anyone outside the Board Official Family. Thanks. Please let me know any questions that you have about this very long memo.

73, Chris W3KD