**Version FH2**

**A BILL**

To direct the Federal Communications Commission to amend its rules so as to prohibit the application to amateur stations of certain private land use restrictions, and for other purposes.

**Sec. 1. Short title**

This Act may be cited as the Emergency Communications Act of 2020.

**Sec. 2. Findings**

Congress finds the following:

(1) More than 730,000[[1]](#footnote-1) radio amateurs in the United States are licensed by the Federal Communications Commission in the amateur radio services.

(2) Amateur radio, at no cost to taxpayers, provides a fertile ground for technical self-training in modern telecommunications, electronics technology, and emergency communications techniques and protocols.

(3) There is a strong Federal interest in the effective performance of amateur stations established at the residences of licensees. Such stations have been shown to be frequently and increasingly precluded by unreasonable private land use restrictions, including restrictive covenants.

(4) Federal Communications Commission regulations have for over[[2]](#footnote-2) three decades prohibited the application to stations in the amateur service of State and local regulations that preclude or fail to reasonably accommodate amateur service communications, or that do not constitute the minimum practicable regulation to accomplish a legitimate State or local purpose. Commission policy has been and is to require States and localities to permit erection of a station antenna structure at heights and dimensions sufficient to accommodate amateur service communications.

(5) The Commission has sought guidance and direction from Congress with respect to the application of the Commission’s limited preemption policy regarding amateur service communications to private land use restrictions, including restrictive covenants.

(6) There are aesthetic and common property considerations that are uniquely applicable to private land use regulations and the community associations obligated to enforce covenants, conditions, and restrictions in deed-restricted communities. These considerations are dissimilar to those applicable to State law and local ordinances regulating the same residential amateur radio facilities.

(7) In recognition of these considerations, a separate Federal policy than exists at section 97.15(b) of title 47, Code of Federal Regulations, is warranted concerning amateur service communications in deed-restricted communities.

(8) Community associations should fairly administer private land use regulations in the interest of their communities, while nevertheless permitting the installation and maintenance of effective outdoor amateur radio antennas. There exist antenna designs and installations that can be consistent with the aesthetics and physical characteristics of land and structures in community associations while accommodating communications in the amateur radio services.

(9) Private land use regulations that are unrelated to a Community Association, yet run with the land, require treatment similar to other private land use regulations.[[3]](#footnote-3)

**SEC. 3. APPLICATION OF PRIVATE LAND USE RESTRICTIONS TO AMATEUR STATIONS.**

(a) Amendment Of FCC Rules.—Not later than 120 days after the date of the enactment of this Act, the Federal Communications Commission shall amend section 97.15 of title 47, Code of Federal Regulations, by adding a new paragraph that prohibits the application to amateur stations of any private land use restriction, including a restrictive covenant, that **neither** —

(1) on its face or as applied, precludes communications in an amateur radio service; **nor**

(2) fails to permit a person authorized to operate in an amateur radio service[[4]](#footnote-4) to install and maintain an effective outdoor antenna on property under the exclusive use or control of the licensee.

(b) Additional Requirements.—In amending its rules as required by subsection (a), the Commission shall—

(1) require any licensee in an amateur radio service to notify and obtain prior approval from a community association concerning installation of an outdoor antenna, but only when required by community association covenants;[[5]](#footnote-5)

(2) except on the roof top in multiple dwelling units (“MDUs”) such as apartments and condominiums, in which case reasonable safety precautions and aesthetic limits may be established, permit a community association to prohibit installation of any antenna or antenna support structure by a licensee in an amateur radio service on common property not under the exclusive use or control of the licensee;[[6]](#footnote-6) and,

(3) subject to paragraph (a) and to assure availability of approval under paragraph (b)1, permit a community association to establish reasonable written rules, which shall include a timely decision, concerning health, safety or aesthetic considerations that accommodate reasonably amateur communications and represent the minimum practicable restriction to accomplish the local association’s legitimate purposes.

**SEC. 4. AFFIRMATION OF LIMITED PREEMPTION OF STATE AND LOCAL LAND USE REGULATION.**

The Federal Communications Commission’s regulation found at section 97.15(b) of title 47, Code of Federal Regulations shall remain applicable to State and local land use regulation of amateur service communications.[[7]](#footnote-7)

**SEC. 5. SAFE HARBOR PROVISIONS.**

(a) Otard-Similar Antennas.— An antenna for use by a Radio Amateur which is similar in all material respects to an antenna already permissible under the FCC’s OTARD (Over-the-Air-Reception-Devices) rule, found at 47 CFR § 1.4000, may be erected and those burdens and procedures that would apply to an OTARD antenna shall apply to the similar antenna erected for amateur radio purposes.

 (b) Flag Pole Antennas.— Any flag pole less than 38 feet in total height[[8]](#footnote-8) receiving the protections of The Freedom to Display the American Flag Act of 2005, found at 4 U.S. Code §5 may be used as an antenna in an amateur radio service.[[9]](#footnote-9)

*[K1VR: Another way to draft these concepts:]*

**“Safe Harbor” Provision.** Radio Amateurs may erect and maintain antennas similar or identical in appearance to satellite dishes, VHF/UHF TV Broadcast Service Yagis, broadband internet antennas (see the OTARD Rule at 47 CFR §1.4000); single wires (or “minimally visible” antennas); temporary antennas (or antennas raised only in hours of darkness); and temporary antennas no higher than 38 feet above ground level. A flagpole that is consistent with, and controlled by, “The Freedom to Display the American Flag Act of 2005,” 4 U.S.C. § 7 (3), with no appurtenance at a height greater than five feet above ground level, may also be used as an antenna in the Amateur Service without further regulation by the Association.[[10]](#footnote-10)

**SEC. 6. PERMISSIBLE RESTRICTIONS.**

(a) Notwithstanding the above, and subject to the standards specified in paragraphs (1) to (4) below, a Community Association may adopt or enforce any of the following restrictions on the installation and maintenance of antennas and antenna support structures:

 (1) it may require that antennas and antenna support structures be installed in compliance with manufacturer’s specifications, applicable zoning ordinances, amateur radio tower ordinances, if any, and national or governmental building codes;

 (2) it may require that antennas and antenna support structures be maintained in good condition and that any deteriorated or structurally unsafe apparatus be repaired, replaced, or removed;

 (3) it may require that antennas and antenna support structures be removed if the property on which they are located is sold to a person who does not have federal authorization to operate the radio apparatus installed on the property;

 (4) it may require that ground-mounted electrical enclosures, ground-mounted control enclosures or guy wire anchors be screened, if the ground-mounted electrical enclosures, ground-mounted control enclosures, or guy wire anchors are visible from the public street faced by the dwelling;

(b) A restriction permitted by Subsection (a), if adopted, must be reasonably applied and enforced.

(c) Where there is a “limited common area” and a Radio Amateur has the right to exclude use by others, the property so concerned shall be treated as property under the exclusive use or control of the owner. For the purposes of this regulation, an Association’s access for roof repairs, landscaping, or other maintenance activities, shall be treated as a permission or an easement that does not limit or destroy the owner’s exclusive use or control.[[11]](#footnote-11)

(d) A Community Association may not require a Radio Amateur to notify and obtain prior approval from the Association for the installation of an outdoor antenna or antenna support structure, if such notice and requirement for prior approval was not present in the covenants presented to the owner at closing;[[12]](#footnote-12)

(e) If a Community Association requires that the installation of antennas or antenna support structures be approved before installation, approval may not be withheld if the proposed installation meets or exceeds the restrictions permitted by Subsection (a).

(f) If a covenant or restriction requires an owner to submit an application for approval of antennas or antenna support structures, this section does not negate the requirement, but the information required to be submitted as part of the application for the installation of antennas or antenna support structures may not be greater or more detailed than the application for any other improvement.

(g) Where existing covenants or restrictions require prior approval for the installation of antennas or antenna support structures, the failure of the Association to act on the owners request for approval within 45 days from the time that an owner seeks approval shall be deemed to be approval.

(h) Where a Radio Amateur chooses to use an existing structure as an antenna or antenna support structure, creating no additional material element, no prior approval shall be required.

(i) Where no organizational mechanism for approval of an antenna or antenna support structure exists, no mechanism is required and neither notification nor prior approval may be required.

(j) In a hearing, action, or proceeding to determine whether an antenna or antenna support structure complies with the restrictions permitted by this Act, the party asserting non-compliance bears the burden of proof.

**SEC. 7. ENFORCEMENT.**

(a) Stay. — Except with respect to restrictions pertaining to safety and historic preservation, if a proceeding is initiated to seek a waiver at the FCC, or by filing a petition seeking a declaratory ruling from the FCC or a court of competent jurisdiction, the person or entity seeking to enforce the antenna restrictions in question must suspend all enforcement efforts pending completion of review.[[13]](#footnote-13)

 (b) Burden. — In any proceeding regarding the scope or interpretation of any provision of this section, the burden of demonstrating that a particular land use restriction complies with this section and does not impair the installation, maintenance, or use of devices used for Amateur Radio shall be on the party that seeks to impose or maintain the restriction.[[14]](#footnote-14)

(c) Need to Show a Substantial Interest. — In any action brought by the association for violation of a land use restriction on Amateur Radio antennas, the association or a person with the right to enforce a land use or deed restriction shall bear the burden of proof that any restriction as to the size, place, duration, and manner of placement or display of such flag is necessary to protect a substantial interest of the association.[[15]](#footnote-15)

 (d) Access to Federal Court. — This statute creates a right that an authorized Radio Amateur may enforce. Furthermore, as a federal right, while it may be enforced in any appropriate state court, an action may be sought in U.S. District Court without first going to a state court.

**SEC. 8. DEFINITIONS.**

In this Act:

*[From previous ARPA]*

 (1) COMMUNITY ASSOCIATION.—The term “community association” means any nonprofit mandatory membership organization, having within its covenants or governing documents the explicit authority to act as described in Section 3(b),[[16]](#footnote-16) composed of owners of real estate described in a declaration of covenants or created pursuant to a covenant or other applicable law with respect to which a person, by virtue of the person’s ownership of or interest in a unit or parcel, is obligated to pay for a share of real estate taxes, insurance premiums, maintenance, improvement, services, or other expenses related to common elements, other units, or any other real estate other than the unit or parcel described in the declaration.

 *[From NH Draft]*

 (1)  COMMUNITY ASSOCIATION. — The term “community association” means any non-profit mandatory membership organization composed of owners of real estate described in a declaration of covenants or created pursuant to a covenant or other applicable law with respect to which a person, by virtue of the person’s ownership of or interest in a unit or parcel, is obligated to pay for a share of real estate taxes, insurance premiums, maintenance, improvement, services, or other expenses related to common elements, other units, or any other real estate other than the unit or parcel described in the declaration, where such organization, commonly known as a Home Owner Association, has an existing board, with published rules and procedures, and such rules or procedures have granted to that board the right to control architectural features such as an amateur radio station antenna structure. The term “Community Association” does not include limited purpose Associations such as road associations and lake associations that have not reserved the right to control architectural features, or to control development.[[17]](#footnote-17)

 (2) TERMS DEFINED IN REGULATIONS.—The terms “amateur radio services”, “amateur service”, and “amateur station”[[18]](#footnote-18) have the meanings given such terms in section 97.3 of title 47, Code of Federal Regulations.

1. What’s a current number of radio amateurs in the USA? Source? [↑](#footnote-ref-1)
2. ARPA originally said “for three decades.” As the original PRB-1 was 1985, the exact amount is now 34 years. [↑](#footnote-ref-2)
3. This is a concept not found in the original ARPA. [↑](#footnote-ref-3)
4. This language is broader than the concept of allowing only licensees to take advantage of this statute. It will permit lawful residents, such as Canadians or CEPT-licensed individuals to erect an antenna without a U.S. license. [↑](#footnote-ref-4)
5. The idea here is that we are attempting to prevent a mere “road association” from being an HOA. [↑](#footnote-ref-5)
6. This is an attempt to help out the apartment dweller. [↑](#footnote-ref-6)
7. ARPA said that the FCC “may not change” PRB-1. Should the Commission ever wish to do a favor for Radio Amateurs, that language could hurt. [↑](#footnote-ref-7)
8. Why 38’? I wanted to pick a number greater than ¼ wave on 40m (33’), approximately the same height as a typical maximum height for a roof (35’), and possibly tall enough (if equipped with “top hat” radials) to work on 80 meters. At 38’, it is only 3’ higher than a 35’ ridge pole (roof peak). [↑](#footnote-ref-8)
9. Note that the Freedom to Display the American Flag Act of 2005 restricts the erection of a flag to “residential property within the association with respect to which such member has a separate ownership interest or a right to exclusive possession or use.” It does not deal with limited common areas, or common areas. [↑](#footnote-ref-9)
10. “The Freedom to Display the American Flag Act of 2005,” 4 U.S.C. § 7. Section 3 of that statute reads:

RIGHT TO DISPLAY THE FLAG OF THE UNITED STATES." A condominium association, cooperative association, or residential real estate management association may not adopt or enforce any policy, or enter into any agreement, that would restrict or prevent a member of the Association from displaying the flag of the United States on residential property within the association with respect to which such member has a separate ownership interest or a right to exclusive possession or use. [↑](#footnote-ref-10)
11. For example, See *In the Matter of James S. Bannister,* FCC DA 09-1673 (2009), <https://apps.fcc.gov/edocs_public/attachmatch/DA-09-1673A1.pdf> (an OTARD case that offers some hope, because the FCC allowed a broadcast TV antenna and broadband internet antenna, where the Association claimed that roofs are common areas, but the FCC ruled that the Association’s easement for roof maintenance “did not defeat the owner’s rights under the Rule.”) [↑](#footnote-ref-11)
12. Radio amateurs want this to be a subject that was covered in the original CC&Rs that they signed, and they do not want a new by-law, regulation or rule to be created now giving the HOA a power it did not previously have – just because they have now been reminded to create a new regulation where there may previously have been no regulation. [↑](#footnote-ref-12)
13. Concept stolen from 47 CFR §1.4000 (a)(4). [↑](#footnote-ref-13)
14. Stolen from 47 CFR §1.4000 (g). [↑](#footnote-ref-14)
15. Concept stolen from the Virginia “Freedom to Display the American Flag Act” § 55-513 [↑](#footnote-ref-15)
16. Trying to avoid the “inadvertent” regulation of antennas. [↑](#footnote-ref-16)
17. This version of the definition is more explicit in several ways. It requires existing rules and procedures. It excludes “inadvertent” associations such as road associations and lake association so as to avoid problems where there were none before. [↑](#footnote-ref-17)
18. Think about all those Canadians and South Americans hoping to operate from their GA, SC, and FL condos. They are authoried, but not “licensees.” The same is true of CEPT reciprocal privilege operators. The word “amateur” is defined at 47 CFR § 97.3(4): “amateurs, that is duly authorized persons interested in radio technique solely with a personal aim and without pecuniary interest.” Now why should we seek to protect such people? Because if you have a 12 unit development, one Canadian and one Colombian ham could have an impact on emergency communications if allowed to have an antenna by moving enough other residents to allow a favorable vote. [↑](#footnote-ref-18)