**Analyzing the Amateur Radio Parity Act**

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The Amateur Radio Parity Act, formerly H.R. 555, and S. 1534 (ARPA), as drafted, harms the Amateur Radio Service more than it helps, preventing effective communications in emergencies or to create international good will. [2]

**Here's what ARPA says.** Stripped down to essentials, here's what the bill (emphasis provided) says:

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—

(1) on its face or as applied, **precludes communications in an amateur radio service**;

(2) fails to permit a licensee in an amateur radio service to install and maintain **an effective outdoor antenna on property under the exclusive use or control** of the licensee; **or**

(3) **does not constitute the minimum practicable restriction** on such communications to accomplish the lawful purposes of a community association seeking to enforce such restriction.

(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;

(2) **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; and

(3) subject to the standards specified in paragraphs (1) and (2) of subsection (a), permit a community association to **establish reasonable written rules concerning height, location, size, and aesthetic impact of, and installation requirements for**, outdoor antennas and support structures for the purpose of conducting communications in the amateur radio services.

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[2] These are two of the five purposes of the Amateur Radio Service. 47 CFR § 97.1.

SEC. 5. Definitions.

In this Act:

(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.

**PROBLEMS**

Amateur Radio operators ("Hams") need antennas and antenna support structures (poles, masts, towers) for effective communications. As written, a **short whip antenna, useful only at UHF and for local communications (not for distant or international communications) could be the best a ham could get.** Hostile homeowner associations (HOAs) will limit a ham to a not-very-useful, but still "effective" at that frequency, six-inch 440 MHz outdoor whip.

Radios require antennas. The size and shape of such antennas depends on the frequency of the radio communications, and the distance the radio signal must travel for the desired communications. A radio transmitter without an antenna designed for the frequency of the intended communication is like an Indy 500 racer without tires and wheels — no matter how powerful the engine, how skilled the driver, how sleek the design — that car is not going anywhere.

Amateur Radio operators ("Hams") are federally licensed to engage in radio communications. The importance of their work has been recognized in American communications law for over 100 years. To engage in their licensed communications, Hams require, as do all other forms of radio communications, antennas and antenna support structures (poles, masts, towers).

As written, ARPA denies to an Amateur Radio operator the ability to install an antenna of the size and shape needed for communications. As written, an HOA in full compliance with its rights under ARPA, could limit an Amateur Radio operator to just a **short whip antenna, an antenna that is only useful only for communications at UHF (Ultra High Frequency) frequencies -- effective only for local communications (not for distant or international communications).** By limiting a ham to such a not very-useful, but still "effective" at that frequency, six-inch 440 MHz outdoor whip, the HOA would be in compliance with ARPA.

The bill says that an HOA cannot "preclude communications" and must permit "an effective outdoor antenna under exclusive use or control of the licenses." But a 440 MHz whip, only six inches tall, satisfies both of those conditions – yet the range of communications might only be 1-3 miles. Some might argue that antennas that are effective on all amateur bands are far beyond the scope of ARPA. *However*, in the original PRB-1 Order, the FCC wrote:

> Some amateur antenna configurations require more substantial installations than others if they are to provide the amateur operator with the communications that he/she desires to engage in. For example, an antenna array for International amateur communications will differ from an antenna used to contact other amateur operators at shorter distances. . . . local regulations which involve placement, screening, or height of antennas based on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur communications, and [FH: not "or"] to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose.

FCC Memorandum and Opinion Order 85-506 (PRB-1, 1985), at ¶ 25 (1985).

As written, the bill says that the *"minimum practicable restriction" is not required*, if (a) the HOA does not preclude communications, (b) the outdoor antenna permitted is "effective" [perhaps on 440 MHz], and (c) the place the antenna will sit is under the exclusive use or control of the licensee.

**The "OR" clause is a major problem.** ARPA, in § (a)(1) and (a)(2), says that an HOA cannot preclude communications and must permit an effective outdoor antenna, **OR**, in § (a)(3) it says the HOA must have "the minimum practicable restriction." Despite the expressed intent that the bill should create parity between hams governed by municipal zoning, and hams governed by an HOA, this bill does not create that parity. It is *very* different from PRB-1 (47 CFR § 97.15(b)). If the HOA allows a six-inch tall 440 MHz whip, the HOA is not required to have "the minimum practicable restriction." That's the meaning of the "or" clause. In contrast, PRB-1 ***requires*** of municipalities that they must not preclude the amateur service communications that the radio ham desires (see above), **AND** the regulation must be the "minimum practicable regulation."

**The aesthetics clause is an HF antenna killer.** Under ARPA, an HOA may establish reasonable written rules concerning "aesthetic impact."

"Aesthetics" is a subjective standard. It is the most powerful tool used by associations to deny any requested improvement. Perhaps 99% of all HOA regulations permit, if not mandate, the use of "aesthetics" as the standard.

"Aesthetics" is also not a *fixed* standard even within a given HOA; it can change with a change in membership of an HOA Architectural Control Committee or Board of Directors. "Aesthetics" can be interpreted one way for Bill Smith on Green Street and another way for Jim Smith on Blue Street.

Courts have uniformly upheld "aesthetics" as a valid criteria for ACC/Board denial of a homeowner's request, if the governing documents permit "aesthetics" to be used as a standard. Courts also have not required uniformity of result because the "aesthetic" standard is intentionally broad, vague and unbounded by any objective limitation ARPA converts "aesthetics" into federal law.

This means that a decision based on "aesthetics" will be deemed to be compliant with the language of the bill and will not be appealable. Again the words "preclude", "permit", "minimum practical restriction", "effective" or "efficient" cannot trump "aesthetics". Aesthetics cannot be beaten.

Look at Page 11 of *CAI's Statement for the Record,* ¶ 4.[3] They cite permissible judgment criteria — sight easements, interference with air, light and open space, permitted height of principal structures … or other apparatus. Those all fall under the "aesthetic" rubric. These criteria are not objective limitations and the courts will uphold a decision based on any of these as being within both the right of an HOA and CAI to use "aesthetics" as a standard.

Using "aesthetics," an HOA has the absolute right to permit only hidden, small wires, below the roofline short verticals hidden from the eyes of an adjoining lot (but what if it is an apartment building and the owner has no outdoor space at all?). The bill permits an HOA to prohibit roof-mounted antennas of any kind and to prohibit any freestanding tower, vertical and any yagi or hex beam.

Some HOAs could, within the guidelines of ARPA go further and determine, based on "aesthetics" that *any visible antenna* has a negative aesthetic impact. The bill provides no guidance or standards on the subject of aesthetics, and there is no mediation or arbitration required. The radio amateur would have to litigate. Mandatory litigation is not good public policy. The aesthetics clause will be used routinely to ban anything an HOA doesn't want. Under existing case law such a ban would be found to be valid and in compliance with the ARPA.

For decades, HOAs have used "aesthetics" to prohibit:

(a) the display of the American flag, and the erection of flagpoles;
(b) the installation of solar panels;
(c) energy efficient roofing shingles;
(d) rain water collection systems;
(e) composting;
(f) xeriscaping;
(g) certain types of turf;
(h) display of political signs;
(i) installation of standby electric generators;
(j) installation of satellite TV dishes;
(k) installation of exterior wireless internet masts/tower and antennas;
(l) installation of TV masts, towers and antennas.

[3] CAI = the Community Associations Institute.

**Installation requirements are an antenna killer.** Section (b)3 grants an HOA the right to create installation requirements. HOAs will thus have the power to establish installation requirements that, for example, require a Professional Engineer to stamp the plans for the installation of any antenna or antenna support structure (e.g., the plans for almost invisible wire antennas? The plan for a wire vertical hung over a tree in the homeowner's trees?), to inspect the construction, and to stamp the "as-built" drawings. The cost of requiring plans to be prepared by Professional Engineers would certainly add substantial, and perhaps prohibitive costs, to any requested installation. Such abusive "installation requirements" are currently prohibited under the OTARD rules governing the installation of TV, wireless broadband and satellite TV antennas under OTARD. Federal court decisions under PRB-1 have also held that the imposition of prohibitive costs by municipalities is prohibited.

The bill authorizes an HOA to demand, as an installation requirement, the Amateur Radio operator to provide $5 million/$10 million in liability insurance coverage, naming the HOA as an additional insured, and to require the posting of a bond. Where does a homeowner even get a bond for a wire in his trees?

HOAs will get *creative* in establishing *very expensive-to-implement* installation requirements. As mentioned, this would be inconsistent with other antenna law for HOA situations. For example, in the OTARD rule:

> 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 of an acceptable quality signal.

47 CFR § 1.4000 (a)(2).

There is no difference between an antenna for a radio wave in the same frequency range for broadcast TV or satellite TV, and a radio wave for amateur radio, but this bill clearly permits them to be treated differently. A radio wave is a radio wave. Only the content is different. There should not be dramatically different installation requirements for almost identical antennas, one used for TV reception, and one used for amateur radio.

**There are other problems with ARPA.**

**Sometimes, prior approval is impossible .** What if an HOA was formed *only* for the purposes of plowing the roads and picking up the trash? For those limited associations, sometimes called a "road association," or a "lake association," it could be *ultra vires* (outside the power of the HOA) to approve an antenna. What if the HOA were to never vote, either yes or no? While some HOAs have a "negative approval clause,"[4] what if it doesn't?

Under this bill, at § 3(b)(3), isn't a community association required "to establish reasonable written rules concerning height, location, size, and aesthetic impact of, and installation requirements for, outdoor antennas and support structures for the purpose of conducting communications in the amateur radio services."? *Response:* **No.** Under this bill, the FCC **shall *permit*** a Community Association to establish reasonable rules, but the Association is **not *required*** to establish such rules (see the "or" clause). On the other hand, with or without the FCC, the Association could always amend its rules, even before the passage of ARPA – so this is no change in the law at all, and certainly no new advantage to hams.

Wouldn't an HOA that *never* votes "preclude communications in an amateur service." NO, that's not what the proposed statute says. It says that an HOA cannot enforce

> the application to amateur stations of **any private land use restriction, including a restrictive covenant,** that—
> (1) on its face or as applied, **precludes communications in an amateur radio service**;

So let's say there is no "private land use restriction, including a restrictive covenant, [that] precludes communications in an amateur radio service." Yet there is still no prior approval. A ham that goes ahead and puts up a dipole is violating federal law.

Also, this bill has no "grandfather" clause, to protect existing installations – where the ham may have had the antennas, masts and towers up for decades.

**There is no requirement that the HOA must act in a timely way.** There is not even a requirement that the HOA must decide. *But the ham must still obtain prior approval.* One Virginia ham, AA9BZ, has been waiting since 2011 for a final decision, despite a favorable Virginia statute, on the installation of his flagpole for a stand-alone house at Belmont Country Club, a Toll Brothers community in Ashburn, VA. His story is detailed at http://lovemyflag.org. I represented AA9BZ.

What if the association is moribund and hasn't met or taken any action in years? What if there are no HOA officers or Architectural Review Committee to even ask for prior approval? The bill has no requirement for negotiation, no requirement for a written decision stating the reasons for denial (so that a ham might modify the application with a greater likelihood of success the second time around).

[4] This would be a rule where a proposal is approved unless acted upon within, for example, 45 days.

There are hams whose HOAs have no architectural review board/committee and limited authority. Such HOAs exist in at least Maine, Florida, Texas and Wisconsin. Those hams are scared of the prior approval requirement, because approval was never previously required (or the thought even mentioned in their documents), and they were breaking no CC&R.

If the HOA has no power to regulate antennas, and there is no CC&R on the subject, does a ham still need "prior approval"? YES. The bill reads: "[T]he Commission shall – . . . require any licensee in an amateur radio service to notify and obtain prior approval from a community association concerning installation of an outdoor antenna . . ."

The hope that no FCC enforcement agent is going to sanction a ham for failure to obtain prior approval Is not comforting. But there is less concern about FCC enforcement than the fact that virtually every modern CC&R allows any covered homeowner to seek enforcement against a neighbor. This law would effectively add "prior approval" (under the "obey all laws" clause) to the CC&Rs, creating a good reason to fear any neighbor on a mission. Plus, encouraging law-breaking because the law may not be enforced is never a good idea.

**ARPA's "prior approval" requirement destroys the defense of laches.** In the past, a ham could defend a complaint against him by arguing the equitable principle that the HOA had failed to enforce a covenant (that the HOA has slept on its rights). With prior approval required by statute, that defense disappears.

**The OTARD rule does not require prior approval.** If you want to erect a one meter dish, or a VHF/UHF TV Yagi, under 47 CFR §1.4000 (**O**ver **T**he **A**ir **R**eception **D**evices, or "OTARD"), the Association has the burden and must petition the FCC to prevent such an antenna. Here, the burden is on the ham to get prior approval. ***Hams who want to provide emergency communications, when all else has failed, won't even be in parity with TV watchers.***

**The "exclusive use or control" clause is another antenna killer.** What if the roof is the only practical place to put an antenna? Is it under "exclusive use or control"? A deck or porch may not meet the test of "exclusive use and control." If a ham lives in a town house with a back yard (the place where the family grill is located), is there "exclusive use or control" when the association mows the lawn? An apartment-style building (a multi-unit dwelling) may have no outdoor area under the ham's "exclusive use or control." For the typical Florida high-rise, with no access to the roof and lacking a lanai or porch, it is hard to imagine *any* effective HF antenna. A ham in a high-rise? Out of luck.

These questions can be very tricky, and will result in litigation. 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 yields some hope, because a broadcast TV antenna and broadband internet antenna was allowed on a roof, 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.") But should a statute require litigation to determine the outcome? Ham radio is a service "without pecuniary interest." There's no money to fund litigation.

**The bill doesn't help with non-HOA deed restrictions.** In a non-HOA situation where there is a deed restriction against outdoor antennas, that deed restriction would be invalid as to one-meter satellite TV dishes, and TV broadcast service Yagis, because the OTARD rule is a preemption. But this bill won't help hams with just deed restrictions (no HOA – no common expenses). The deed restriction will be enforced by any disgruntled owner covered by the same deed restriction.

**Should we create federal law violators?** Without this bill, erecting an outdoor antenna in an HOA situation creates a contract dispute. With this bill, when a ham renews his or her license, the question before the FCC would be: Does the applicant's misconduct suggest that he or she lacks the requisite character qualifications to remain a licensee? "In evaluating the weight of prior misconduct, to be considered are the willfulness of the misconduct, the frequency of such misbehavior, its currency, the seriousness of the misconduct, efforts made to remedy the wrong, and [the applicant's] record of compliance with Commission rules and rehabilitation."[5] Does this activity show a propensity to obey the law and to deal honestly with the Commission? With this bill, and without a "prior approval," the ham violates a federal law, and may have done so for years. In appropriate circumstances, the Commission may decide to revoke (47 U.S.C. §312) or not to renew (47 U.S.C. § 309(k)) a ham license. Think about this: a family radio user who puts a GMRS or CB[6] antenna on the roof may violate a CC&R, but he's not breaking federal law. If this law passes, the **licensed radio ham is *worse off* than an unlicensed radio user**.

The Amateur Radio Parity Act instructs the FCC to amend its rules to "require any licensee in an amateur radio service to notify and obtain prior approval from a community association concerning installation of an outdoor antenna." A violation of FCC rules made under ARPA would be a violation of Section 503(b) of the Communications Act of 1934. The radio amateur would be liable for a penalty (called a "monetary forfeiture" in FCC law) under 47 CFR §§ 1.80(a)(2) and 1.80(b)(7) of up to $122,500.

Does the FCC actually attempt to collect from a radio ham? YES. In 2012, in the case of *US v. Baxter*, prosecuted by the U.S. Attorney in Maine, the U.S. District Court for the District of Maine granted a Motion for Summary Judgment in the amount of $10,000 against Glenn Baxter, later the former-K1MAN. *U.S. v. Baxter*, 841 F. Supp. 2d 378 (USDC D. Maine 2012)[7]

In effect, this bill delegates the power to affect an FCC license to an HOA.

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[5] *In the Matter of Kevin David Mitnick* [N6NHG], WT Docket No. 01-344, FCC 02D-02, Sippel, A.L.J., December 23, 2002. https://apps.fcc.gov/edocs_public/attachmatch/FCC-02D-02A1.pdf. OK, I concede that Mitnick's crimes were worse than putting up a dipole. This only attenuates the fear. It does not eliminate it.

[6] GMRS=General Mobile Radio Service; CB=Citizen's Band.

[7] Baxter died in 2017, at age 75, having lost his license and having lost his case. http://www.arrl.org/news/glenn-baxter-ex-k1man-sk-engaged-in-protracted-enforcement-battle-with-fcc

**The bill has no enforcement mechanism.** Where *in the bill* does it say what a ham can do to enforce this new law? In OTARD and cellular telephone matters, the remedy for zoning conflicts is spelled out in the statute or regulations. But here, can you go straight to federal court? In light of *Armstrong v. Exceptional Child Center, Inc.*, 135 S.Ct. 1378 (2015), there may be no implied private right of action anywhere for injunctive relief to enforce against an HOA. The bill should provide a statutory right to complain to a federal court. *Armstrong* could preclude a complaint in federal court. What homeowner amateur can afford to litigate?

**There are many types of HOAs.** This bill was an attempt to make "one size fit all." It was wrong to bunch apartments, townhouses, single family homes, and ranches into one bill.

**FCC regulations to implement the law cannot cure the problems with the bill.** Since the 1985 creation of PRB-1, the FCC has been unwilling to help out HOA dwellers. If and when the Commission writes regulations to implement ARPA, they won't go a word beyond what the statute says.

**Hams will now have two levels of approval.** A ham lucky enough to obtain a prior approval from the HOA will still need a building permit from the municipality, and perhaps zoning approval too. *Opponents will enjoy two bites at the apple, and enjoy the opportunity for delay.* In the past, perhaps with a stealth antenna (the ARRL publishes books and articles on how to build them), a ham might have ignored the CC&R if his antenna was hardly visible and avoided (legally) a building permit. With the requirement to obtain prior approval, a stealth antenna is now a violation of federal law, and the attempt to get approval from the municipality can bring opponents out of the dark.

**Conclusion.** These are just brief examples of the issues we have with the current bill. There are others. For these reasons, as well as those not discussed, the ARRL respectfully asks that ARPA not proceed to passage — as the damage it will inflict on the Amateur Radio community is far greater than any benefit to be derived from the bill. Thus, the ARRL has requested that the bill be withdrawn or any effort to advance it be suspended.