**BRIEFING PAPER**

**The “Emergency Communications Enhancement Act of 2013.”**

**ARRL, the national association for Amateur Radio**

**113th Congress, First Session**

Amateur Radio operators face a serious and growing problem that limits their ability to fulfill their mission as volunteer communicators ready to respond to natural disasters and other emergencies: unreasonable restrictions on antenna installations at their residences. A positive step that partly addressed the problem was taken by the Federal Communications Commission (FCC) in 1985 when it adopted limited preemption of state and local regulation of antenna structures. However, the FCC has declined to act on its own to take the next step and to apply the same policy to private land use restrictions. Because such private restrictions are becoming ever more common across the country, the more than 700,000 radio amateurs in the United States need the help of Congress in the form of an instruction to the FCC to extend its existing policy on an equal basis to all residential antenna installations.

This briefing paper accompanies a draft Bill which would require that the FCC amend Section 97.15(b) of its regulations [47 C.F.R. §97.15(b)] to extend its existing policy with respect to state and local regulation of federally licensed Amateur Radio station antenna structures so that it will apply equally to private land use restrictions. The policy preempts land use restrictions of antenna structures that preclude or fail to reasonably accommodate amateur service communications. Such restrictions must constitute the minimum practicable regulation necessary to accomplish the land use authority’s legitimate purpose.

Section 6414 of the *Middle Class Tax Relief and Job Creation Act of 2012*, Public Law 112-96, called 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 were: (1) a review of the importance of emergency Amateur Radio service communications relating to disasters, severe weather, and other threats to lives and property in the United States; (2) recommendations for enhancement in the voluntary deployment of amateur radio operators in disaster and emergency communications and disaster relief efforts; (3) the improved integration of Amateur Radio operators in the planning and furtherance of initiatives of the Federal government; (4) 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 (5) recommendations regarding the removal of such impediments.

FCC, in response to this legislation, issued a *Public Notice,* (DA 12-523) on April 2, 2012 seeking public comments on the uses and capabilities of Amateur Radio Service communications in emergencies and disaster relief; on the importance to the United States of emergency Amateur Radio Service communications; and on impediments to enhanced Amateur Radio Service emergency communications.

ARRL and others submitted comments and data to FCC in May, 2012. The record in that docket showed that, as of 1998, one out of eight Americans lived in private common-interest communities (“CICs”). These include Planned Unit Developments, Master Planned Communities, condominiums, cooperatives, gated communities, and any community with a community or homeowners’ association (“HOA”). All CICs are regulated by private land use regulations, typically referred to as “Covenants, Conditions and Restrictions” or “CC&Rs”. CICs are typically created by declaration, applicable to entire developments that bind individual homeowners. According to the Community Associations Institute (CAI), an association of community associations, the estimated numbers of CICs in the United States (i.e. association-governed communities, housing units and residents over time) is as follows:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| Year |  | Communities |  | Housing Units |  | Residents |
| 1970 |  | 10,000 |  | 701,000 |  | 2.1 million |
| 1980 |  | 36,000 |  | 3.6 million |  | 9.6 million |
| 1990 |  | 130,000 |  | 11.6 million |  | 29.6 million |
| 2000 |  | 222,500 |  | 17.8 million |  | 45.2 million |
| 2002 |  | 240,000 |  | 19.2 million |  | 48.0 million |
| 2004 |  | 260,000 |  | 20.8 million |  | 51.8 million |
| 2006 |  | 286,000 |  | 23.1 million |  | 57.0 million |
| 2008 |  | 300,800 |  | 24.1 million |  | 59.5 million |
| 2010 |  | 309,600 |  | 24.8 million |  | 62.0 million |
| 2011 |  | 314,200 |  | 25.1 million |  | 62.3 million |

This exponential growth in CICs in the United States is a major obstacle to radio Amateurs, because it indicates that the ability of a buyer of real property to acquire property that is not burdened by private land use regulations (and thus the ability to erect a reasonable, efficient Amateur Radio antenna at his or her residence) is seriously decreasing. CICs are ubiquitous in the United States and one who wants (or must due to proximity to work, family etc.) to live in a CIC, be it a residential community or a planned city, has no choice but to abide by the restrictions established by the CIC private management and governance. *Amateur Radio antennas are severely restricted or precluded entirely in most of them*. CC&Rs are not arms-length contractual negotiations between buyers and sellers of land with respect to the restrictions. The CC&Rs bound each parcel in a development before the buyer ever came to the table. The only decision by a buyer of an individual parcel or unit is whether or not to purchase a residence in a subdivision regulated by CC&Rs in light of their burdening the development. *That decision is often dictated by factors other than whether or not the buyer desires to erect and maintain an Amateur Radio antenna*. Often, therefore, a licensed radio Amateur must purchase property in a CIC and suffer a complete prohibition on Amateur Radio operation or the completely subjective determination of a homeowner’s association or architectural control committee as to whether an Amateur Radio station can be operated at all from the licensee’s home.[[1]](#footnote-1) The record shows that Amateur Radio emergency communications efforts have been foreclosed by or severely curtailed as the direct result of private land use regulations. An analysis in the record of the types of antenna restrictions found in CICs shows that the restrictions either: prohibit all outdoor antennas; permit only small video delivery antennas but preclude Amateur antennas; permit only those structures approved by the HOA, without specifying standards which would allow the resident to know in advance whether or not his or her antenna installation will or will not likely be approved; or which prohibit all radio *transmission* *or reception* within the CIC.

FCC in 1985 issued a declaratory ruling, subsequently codified, which addressed the conflicts between *State and municipal land use regulations* and the maintenance and use of outdoor Amateur Radio antennas in residential areas.[[2]](#footnote-2) That declaratory ruling struck a balance between legitimate local land use regulations and the acknowledged Federal interest in promoting and protecting Amateur Radio public service and emergency communications. *Amateur Radio Preemption*, 101 FCC 2d 952 (1985); *codified at* 47 C.F.R. Section 97.15(b). The policy is a three-part test for the legitimacy of local regulations which affect Amateur Radio antennas and their support structures. First, State and local regulations that operate to preclude Amateur communications in their communities are in direct conflict with Federal objectives and must be preempted. Second, local regulations which involve placement, screening or height of Amateur Radio antennas based on health, safety or aesthetic considerations must be crafted to accommodate reasonably Amateur Radio communications. Third, local regulations must represent the “minimum practicable” regulation to accomplish the local authority’s legitimate purpose. Since 1985, however, FCC has refused to apply this flexible policy to private land use regulations, assuming that they are private contractual agreements that were in some way negotiable. FCC has revisited this issue several times and concluded that, if Congress were to instruct FCC to include private land use regulations in its preemption policy, it would do so expeditiously. [[3]](#footnote-3)

FCC has, however, affirmatively determined that it has jurisdiction to prohibit unreasonable private land use restrictions over telecommunications facilities. Pursuant to Section 207 of the *Telecommunications Act of 1996 [[4]](#footnote-4)* FCC was ordered to promulgate regulations to prohibit restrictions that impair a viewer’s ability to receive video programming services through over-the-air video reception antennas, or “OTARDs”). Congress specifically instructed FCC to extend this prohibition to nongovernmental restrictions such as “restrictive covenants and encumbrances.” [[5]](#footnote-5) FCC immediately thereafter adopted rules which invalidated restrictions, including private covenants, homeowners’ association rules or similar restrictions on property within the exclusive use or control of the antenna user that impair the installation, maintenance or use of an OTARD antenna.

FCC released its *Report* on Amateur Radio emergency communications and impediments thereto to Congress and to the public on August 20, 2012. The Report was not what was called for by Section 6414 of the Middle Class Tax Relief and Job Creation Act of 2012 in several respects. It did not include an independent evaluation of the subjects required by the legislation to be studied. Instead, it was in effect a summary of the public comments received. However, The FCC did conclude, among other things, that:

The responses to the *Public Notice* indicate agreement between the amateur radio community and public safety community as to the utility of amateur radio in emergency response situations. Amateur radio communications are suited to disaster response in a way that many more advanced forms of communication today are not, thereby allowing it to supplement other emergency communications activities during disasters.

\*\*\*\*\*

Additionally, because amateur radio networks are typically spread across wide geographical areas, they have the ability to spread critical disaster-related information to areas far from the disaster area. Because they can utilize different frequency bands and emission types, amateur radio networks can operate under a wide variety of conditions. The flexibility and geographical dispersion of amateur radio networks provide advantages for relaying information out of localized disaster zones and into outside jurisdictions coordinating recovery efforts.

FCC did not question any of the showings made with respect to the profound crippling effect of CC&Rs on Amateur Radio emergency communications. However, 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. It is obvious that FCC is looking to Congress for guidance in this area, as it has indicated.

This Bill would not impose significant restrictions on HOAs or other CICs. The FCC has in place a workable policy which balances local land use considerations, and the strong Federal interest in effective Amateur Radio communications. The policy can only be understood to be applicable to *all* types of land use regulations which preclude, fail to reasonably accommodate, or do not constitute the minimum practicable regulation of Amateur Radio stations consistent with the land use authority’s legitimate purpose. The uniform application of this policy is consistent with Congressional policy. [[6]](#footnote-6)

The record in the FCC’s 2012 docket proceeding reveals that the prevalence and increasing numbers of CICs in the United States is exponential, and that CC&Rs prohibit the installation and maintenance of residential Amateur Radio antennas in most of them. No Amateur Radio communications system can function in an emergency without the skilled Amateur Radio operators who hone their communications skills on a daily basis from their home stations. Some form of effective Amateur Radio station must be facilitated from the licensee’s residence in order for the cadre of trained operators to continue to be ready, willing and able to provide volunteer communications immediately when called upon to do so.

1. FCC has acknowledged that private land use regulations are used as a means of precluding the use of outdoor antennas. *See, Preemption of Local Zoning Regulation of Satellite Earth Stations and In re Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*; 11 FCC Rcd. 19276, 19301, at fn 12 (1996), [“(r)estrictive covenants are … used by homeowners’ associations to prevent property owners within the association from installing antennas.” ] [↑](#footnote-ref-1)
2. FCC acknowledged in 1985 that an outdoor antenna of some type is a necessary component for most types of Amateur Radio communications. *Amateur Radio Preemption,* 14 FCC Rcd. at 19413 (1985). [↑](#footnote-ref-2)
3. *Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antenna and Support Structures, and Amendment of Section 97.15 of the Commission’s Rules Governing the Amateur Radio Service, Memorandum Opinion and Order*, FCC 01-372, 17 FCC Rcd. 333, 337 ( December 26, 2001)("...should Congress see fit to enact a statutory directive mandating the expansion of our reasonable accommodation policy, the Commission would expeditiously act to fulfill its obligation thereunder."). [↑](#footnote-ref-3)
4. Public Law 104-104, 110 Stat.56 (1996). [↑](#footnote-ref-4)
5. See, House Report No. 204, 104th Congress, 1st Session, at 124 (1995). [↑](#footnote-ref-5)
6. It is specific Congressional policy that “reasonable accommodation should be made for the effective operation of amateur radio from residences, private vehicles and public areas, and that regulation at all levels of government should facilitate and encourage amateur radio operation as a public benefit.” Public Law 103-408, (Joint Resolution) [↑](#footnote-ref-6)