

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

**In the Matter of** )  
 )  
**Amendment of Part 97 of the Commission’s** ) **RM-\_\_\_\_\_**  
**Rules Governing the Amateur Radio Service;** )  
**Private Land Use Regulations Restricting** )  
**Amateur Radio Communications** )

**To: The Commission**  
**Via: ECFS**

**PETITION FOR RULE MAKING**

ARRL, the national association for Amateur Radio, formally known as the American Radio Relay League, Incorporated (ARRL), by counsel and pursuant to Section 1.401 of the Commission’s Rules (47 C.F.R. §1.401) hereby respectfully requests that the Commission issue a *Notice of Proposed Rule Making* at an early date, proposing to amend Section 97.15 of the Commission’s Rules (47 C.F.R. §97.15) in accordance with the Appendix attached, to permit licensed Amateur Radio operators to erect and maintain at their residences an effective outdoor antenna for the purpose of conducting Amateur Radio communications, notwithstanding the provisions of any private land use regulations that may be imposed on the residential real property owned or leased by those Amateur Radio licensees. Such effective outdoor antenna installations would be subject to reasonable conditions and requirements imposed by community associations, also known as homeowner’s associations (HOAs), if the governing documents of the HOA otherwise so empower the HOA. The relief requested herein is critically necessary in order to provide for the sustainability of the Amateur Radio Service in the near term and in the future; and the ability of licensees in that Service to fulfill their Federal public service obligations set forth at Section 97.1 of the Commission’s rules. The rule requested herein would

apply only to those Amateur Radio antenna systems proposed or installed after the effective date of a Report and Order adopted in this proceeding. As good cause for the relief requested herein, ARRL states as follows:

**I. Summary of Proposed Rule and Summary of the Issue.**

1. ARRL proposes herein, per Appendix A attached hereto, to add to the Part 97 service rules governing the Amateur Radio Service, and specifically to the Section thereof pertaining to Amateur Radio antenna structures (Section 97.15), a new subsection to read as follows:

Any private land use restriction, including restrictive covenants and regulations imposed by a community association, which on its face or as applied:

- (1) precludes or fails to permit amateur service communications;
- (2) fails to permit a licensee to install and maintain an effective outdoor antenna capable of operation on all amateur radio frequency bands, on property under the exclusive use or control of the licensee; or
- (3) which does not constitute the minimum practicable restriction on such communications to accomplish the lawful purposes specifically articulated in the declaration of covenants of a community association seeking to enforce such restriction,

is prohibited and may not be enforced.

Subject to the foregoing, and with respect to antennas first installed after the effective date hereof, a community association (if so empowered by the declaration of covenants or governing document of record) may (a) require an amateur radio licensee to obtain approval from the association of a proposed antenna before initial installation; (b) prohibit the installation of an antenna or antenna support structure by a licensee on common property not under the exclusive use or control of the licensee; and (c) establish reasonable written rules concerning height, location, size, and aesthetic impact of, and installation requirements for, effective outdoor antennas and support structures for the purpose of conducting communications in the amateur radio service.

*(See Private Land Use Regulations Concerning Amateur Radio Antenna Structures, Report and Order, \_\_\_\_\_ FCC Rcd. \_\_\_\_\_(201\_) for details).*

2. This new subsection *would not modify or have any other effect* on the limited preemption policy established by the Commission in 1985 and codified at 47 C.F.R. § 97.15(b)

thereafter, which pertains and will continue to pertain only to State and municipal (i.e. governmental) land use regulations such as zoning regulations and municipal building codes.

*Amateur Radio Preemption*, 101 FCC 2d 952 (1985); *codified at* 47 C.F.R. § 97.15(b).

3. It is critical to the near-term and long-term sustainability of the Amateur Service; to the realization of the public benefits and capabilities of Amateur Radio Service volunteer communications in emergencies and disaster relief; in achieving preparedness therefor; and to accomplish the numerous other public interest goals and Federal objectives for the Amateur Radio Service<sup>1</sup> that this proposed new rule be enacted without delay. Private land use regulations which either prohibit or which do not accommodate the installation and maintenance of an effective outdoor antenna in residences of Amateur Service licensees are unquestionably the most significant and damaging impediments to Amateur Radio Service communications that exist now. They are already precluding opportunities for young people to become active in the avocation and to conduct technical self-training and participate in STEM learning activities inherent in an active, experiential learning environment. Without the relief in this Petition, the future of Amateur Radio is bleak indeed.

4. Amateur Radio is an avocational pursuit, conducted for the most part from residences of licensees. The one absolute necessity for Amateur Radio stations to function is some form of outdoor antenna.<sup>2</sup> These need not be elaborate structures with substantial aesthetic impact;<sup>3</sup> but they must be effective, efficient, reliable, permanent antennas; and they must be installed in residential areas in order to be usable by licensees on an ongoing basis for testing and

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<sup>1</sup> See, 47 C.F.R. §97.1

<sup>2</sup> The Commission 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).

<sup>3</sup> Indeed, some effective outdoor antennas for certain types of Amateur communications include thin-gauge wire antennas in trees that present no significant aesthetic impact at all. Some vertical antennas double as flagpoles; and in some suburban lots, antennas can be visually screened by existing principal or accessory structures.

experimentation, emergency drills and exercises, so that they will be ready to be used when the next disaster strikes. Now, according to data provided by the Community Associations Institute, 90 percent of new housing starts in the United States are subject to deed restrictions, homeowners' association rules, and other limitations on the use of land which increasingly make installation of outdoor Amateur Radio antennas ineffective or impossible. The reason for the proliferation in the past 30 or so years (and for the near-universal application in new construction now) of private land use regulations is that private lenders for real estate developments now, essentially uniformly require the filing of a declaration of deed restrictions by the developer as a condition of funding the development project. The declarations of restrictions filed with the subdivision plats in the local land records bind every property in the subdivision.

5. Private land use regulations are not “contracts” in the sense that there is any meeting of the minds between the buyer and seller of land with respect to them. Rather, they are simply restrictions on the use of owned land, imposed by the developer of a subdivision by recordation in the land records of the jurisdiction when it is first created. They bind all lots in the subdivision. If an Amateur Radio licensee wants to buy a home in a subdivision burdened by deed restrictions, that licensee has precisely two options: buy the residence subject to the restrictions, or do not buy the residence. There is no negotiation possible because the restrictions are already in place and cannot be waived by a seller in favor of a buyer. If a homeowner in a deed-restricted community develops an interest in Amateur Radio *after* purchasing the property, or if his or her children develop an interest, they are precluded completely from installing any effective outdoor antenna and are therefore barred from active participation in Amateur Radio.

6. Deed restrictions, the language of which is propagated from one subdivision to the next, contain one of two general types of provisions with respect to antennas: they either prohibit

outdoor antennas completely,<sup>4</sup> or they subject all such structures to the prior approval of the homeowners' association (HOA).<sup>5</sup> In the latter case, there are typically no standards governing whether HOA approval might be given or withheld. There is no negotiation possible with the HOA and therefore no contractual element at all. A person seeking to purchase a residence in a deed restricted community containing the latter type language, even if he or she is aware of the terms of the CC&Rs applicable to the subdivision, cannot know when the property is purchased whether or not a prospective antenna will or will not be approved. In ARRL's extensive experience, the answer to a request made by a landowner of an HOA for approval of any antenna is most often in the negative. The apparent reason for the negative response is that it is the safest course of action for the HOA to take. No matter how insignificant the aesthetic impact of a proposed Amateur Radio antenna installation, the safest thing for a homeowners' association to avoid criticism from another homeowner is to deny the approval.

7. Increasingly, due to the proliferation of antenna-preclusive private land use regulations, a licensed radio Amateur must either (1) purchase property in a deed restricted community and suffer a complete prohibition on Amateur Radio operation due to the covenant language itself; or (2) subject herself or himself to the completely subjective and arbitrary determination of a homeowner's association or that association's architectural control committee as to whether an Amateur Radio station can be operated from the licensee's home. With the prevalence of private land use regulations currently, there is most often no choice in the matter. Radio amateurs are increasingly precluded entirely from installing and maintaining any outdoor

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<sup>4</sup> The typically overbroad language of private land use restrictions would preclude a wide variety of modern telecommunications technology and the Internet of Things. Rules prohibiting outdoor antennas would prohibit weather station sensors with wi-fi connections to the residence; security devices, dog fences and the like, all of which utilize outdoor antennas.

<sup>5</sup> A very few, older declarations of covenants provide only for common road maintenance and the like, but the overwhelming majority of declarations of covenants provide comprehensive land use regulation for aesthetic purposes.

antenna. In an otherwise vibrant, growing public service avocation, the Amateur Service as a whole is facing “death by a thousand cuts.” The Commission 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.”].

8. There has been shown overwhelming bipartisan support from the United States Congress during the past five years<sup>6</sup> for the relief requested, which provides guidance to the Commission. The specific language in the legislation repeatedly passed unanimously by the House of Representatives and which has obtained support in the Senate is fully consistent with the single rule change proposed in the attached Appendix. The provisions contained therein reflect the accommodation reached (at the urging of House and Senate members of the respective committees of jurisdiction) between ARRL and the Community Associations Institute (CAI), the only national association representing HOAs. That accommodation resulted in CAI’s and ARRL’s written expressions of support for Federal legislation which containing the substance of the provisions proposed herein in Appendix A. *That legislation was passed unanimously by the House of Representatives four separate times and has the support of the Senate Commerce Committee and the current Administration.*

9. The Commission specifically held in 1996, as is more fully explained hereinbelow, that it has jurisdiction to prohibit unreasonable private land use restrictions over telecommunications

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<sup>6</sup> See, H.R. 4969 in the 113<sup>th</sup> Congress; H.R. 1301 and S. 1685 in the 114<sup>th</sup> Congress; and H.R. 555 and S.1534 in the 115<sup>th</sup> Congress. These Bills are discussed *infra*.

facilities, where those private land use regulations conflict with Federal objectives. Citing *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987) the Commission has noted that it may invalidate or limit certain terms of private contracts relating to property rights, and that such private land use regulations do not enjoy special immunity from federal authority. In fact, the Commission has taken the position that nongovernmental land use restrictions, being related primarily to aesthetic concerns, are therefore appropriately accorded less deference than are local governmental regulations that can be based on health and safety considerations. The Commission, thirty-three years ago, established a beneficial balance between municipal governmental land use regulatory authority and declared that there existed a “strong Federal interest” in Amateur Radio communications. It promulgated a balanced policy which resulted in most cases in the reasonable accommodation of Amateur Radio outdoor antennas in municipal ordinances and State statutes. It is critical now to complete the task commenced in 1985, and to enact the balanced, negotiated accommodation for Amateur Radio proposed in the Appendix, so as to make Amateur Radio sustainable in the long term, while addressing the legitimate concerns of HOAs.

## **II. The Federal Goals for the Amateur Radio Service are Valuable and Should be Protected.**

10. Since its inception and the commencement of Federal licensing in the early 1910s, the Amateur Radio Service has always been far more than a “hobby.” Rather, it has been a means for individuals to expand their knowledge of electronics and radio technology. The varied purposes and goals for the Service summarized by the Commission’s rules (47 C.F.R. §97.1) establishing the Amateur Service illustrate its versatility:

*The rules and regulations in this part are designed to provide an amateur radio service having a fundamental purpose as expressed in the following principles:*

*(a) Recognition and enhancement of the value of the amateur service to the public as a voluntary noncommercial communication service, particularly with respect to providing emergency communications.*

*(b) Continuation and extension of the amateur's proven ability to contribute to the advancement of the radio art.*

*(c) Encouragement and improvement of the amateur service through rules which provide for advancing skills in both the communication and technical phases of the art.*

*(d) Expansion of the existing reservoir within the amateur radio service of trained operators, technicians, and electronics experts.*

*(e) Continuation and extension of the amateur's unique ability to enhance international goodwill.*

11. Each of those five principles is interrelated, having in common as a foundation the radio Amateur's ability to communicate effectively and efficiently in a variety of circumstances. Volunteer public service and emergency communications are fundamental functions of the Amateur Service that is most obvious to the public. Public service and emergency communications are enhanced and facilitated by their ability to refine, adapt and improve equipment (including better and more efficient antennas); experiment with new and varied communications technologies and systems in order to better understand and utilize the propagation of radio waves. By virtue of this technical self-training and the educational programs available to the Amateur Radio community, the Service can effectively provide a variety of primary, supplemental and restorative communications for emergency and disaster relief agencies and organizations. Beyond our borders, the Amateur Service consistently serves as a valuable resource. International cooperation in Amateur-satellite technology has contributed to a vibrant Amateur-Satellite Service.

12. A non-commercial, public service avocation, Amateur Radio communications are provided on a voluntary basis. The communications are nonetheless inherently reliable. This is because their infrastructure is largely decentralized. Amateur Radio relies not on commercial power mains or fixed repeaters or other relay facilities that can fail, but instead on the multitude of individual stations deployed ubiquitously in residences throughout towns, counties, states and the United States. These volunteers offer their stations and skills for public service events and activities, as well as emergency and disaster relief communications at no cost to States, municipalities, disaster relief agencies, or to the Federal Government. Radio amateurs respond immediately, and without a call to duty, following any type of emergency or disaster with working communications facilities and systems, manned by volunteer, trained communicators and technicians. They assist in restoring public safety communications facilities. They provide communications until those public safety facilities are restored to operation. They provide interoperability and mutual aid communications between and among public safety and other entities (interoperability that typically does not exist, even now, on an interagency basis). They provide efficient communications for disaster relief agencies, such as the American Red Cross, FEMA and the Salvation Army, for the duration of disaster recovery efforts. Amateurs are known for their immediate responses to hurricanes, tornadoes, earthquakes, snow and ice storms, floods and other natural disasters. They are immediately available during and in the aftermath of such events, and commence communications in support of public safety and disaster relief agencies and state emergency response agencies in the early stages of disaster recovery.

13. Amateur Radio is also a service that promotes technical self-training and innumerable opportunities for STEM education for young people through experiential learning. Many telecommunications professionals derived their interest and most of their basic skills from their

avocational accomplishments in Amateur Radio. Many developments in modern telecommunications, including low-Earth-orbit microsatellite technology, mesh networks, and many refinements and adaptations of new technologies were and are the direct result of Amateur Radio experimentation and inventiveness. That innovative spirit still exists today, with the ever-increasing complexity of modern digital and satellite communications. Amateur broadband systems and other high-data-rate multimedia systems are in full deployment now. Software-defined radio equipment is now widely deployed in the Amateur high-frequency bands. The potential for improvement in Amateur Radio emergency communications and interoperability communications for served agencies as a result of the adaptation and regular use of new technology is limitless.

14. Worldwide, nationwide, statewide and local communications networks of Amateur Radio stations are in operation twenty-four hours a day, every day of every year, using Amateur stations located in licensees' homes. Since the Amateur Service is decentralized (i.e. not dependent on fixed infrastructure) and ubiquitous, the ability of radio amateurs to provide reliable communications instantly over any path cannot be defeated by any disaster, act of terrorism, or by any other means whatsoever.<sup>7</sup> The volunteer services provided by radio amateurs could not be duplicated by governmental entities at the Federal, state or local level at any cost. However, these services are provided at no cost. The Commission has at times described the Amateur Service as “a service that is a model of public responsiveness in times of emergency and distress and a service that is a model of self-enforcement and volunteerism.”<sup>8</sup>

15. Congress has repeatedly recognized the value of Amateur Radio. In Public Law 103-408 in 1994, Congress declared that Amateurs are to be “commended for their contributions to

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<sup>7</sup> Following the recent Hawaii false attack alarm, networks of Amateur Radio operators were the first to disseminate an all-clear notification, due to their ongoing liaison with the United States Coast Guard and other served agencies.

<sup>8</sup> *Report and Order*, Docket 83-28, released December 23, 1983.

technical progress in electronics, and for their emergency radio communications in times of disaster;” that the Commission is “urged to continue and enhance the development of the Amateur Radio Service as a public benefit by enacting rules and regulations which encourage the use of new technologies” in the Amateur Service; and to make “*reasonable accommodation 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.”

16. Earlier, in 1988, in Public Law 100-594, a sense of Congress resolution, at Section 10 thereof, Congress held that it “strongly encourages and supports the Amateur Radio Service and its emergency communications efforts;” and that “Government agencies shall take into account the valuable contributions made by Amateur Radio operators when considering actions affecting the Amateur Radio Service.” In the Communications Amendments Act of 1982, Public Law 97-259, Congress, in praising the accomplishments of the Amateur Service, held that: “the Amateur Radio Service is as old as radio itself. Every single one of the early radio pioneers, experimenters, and inventors was an amateur; commercial, military and government radio was unknown. The zeal and dedication to the service of mankind of those early pioneers has provided the spiritual foundation for amateur radio over the years. The contributions of amateur radio operators to our present day communication techniques, facilities, and emergency communications have been invaluable.”

17. The service of the 750,000 licensed U.S. Amateurs continues into the 21<sup>st</sup> Century. In the post-Hurricane Katrina report undertaken by the Department of Homeland Security and issued by the White House, Amateur Radio was cited by the investigating commission as one of the things that “went right” during what became one of the greatest natural disasters in United

States history.<sup>9</sup> Lives were saved because of Amateurs being able to relay information out of the impacted area and routing it to the appropriate emergency response service. This dedication to service is exemplified almost daily across the country, and more often recently. For example, Amateur Radio's response to the devastation in Puerto Rico in 2017 contributed very substantially to the saving of lives and the restoration efforts for months in the aftermath of the Hurricane.<sup>10</sup>

18. Former Federal Emergency Management Agency (FEMA) Director Craig Fugate, at an FCC earthquake forum concerning emergency communications planning in 2011, stated that:

Finally, I have got to get back to Amateur Radio... They are the first ones in the first days getting the word out as the other systems come back up. I think that there is a tendency (to believe) that we have done so much to build infrastructure and resiliency in all of our other systems, we have tended to dismiss that role -when everything else fails, Amateur Radio often times is our last line of defense. And I think at times we get so sophisticated, and we have gotten so used to the reliability and resilience in our wireless and wired and our broadcast industry, and in all our public safety communications, that we can never fathom that they will fail. They do.

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<sup>9</sup> See United States. Executive Office of the President. *The Federal Response To Hurricane Katrina – Lessons Learned* Washington: GPO, 2006 at Appendix B page 135.

<sup>10</sup> See, PS Docket 17-344, Comments of ARRL, the national association for Amateur Radio, filed which included the following:

Because of the utter devastation that occurred in Puerto Rico, the 300 to 400 Amateur Radio stations regularly available there were not all available to provide restorative and other emergency communications because the operators themselves were concerned at the outset with basic survival of themselves and their families. ARRL estimates that there were approximately 40 Amateur Radio stations throughout the Island providing communications throughout the recovery effort. However, it was obvious that additional resources were going to be needed. And Amateur Radio volunteers responded immediately, without hesitation. Fifty of the nation's most accomplished Amateur Radio operators responded within 24 hours to the call of the American Red Cross to deploy to Puerto Rico and provide emergency communications. At the behest of Red Cross, ARRL called upon the United States' Amateur Radio community to provide up to 25 two-person teams of highly qualified hams. The group's principal mission was to move health-and-welfare information from the island back to the US mainland, where that data was used by the Red Cross. The group remained on the island for 3 weeks.

ARRL equipped each two-person team with a modern digital HF transceiver, special software, a wire antenna, a power supply and all the connecting cables, fitted in a rugged waterproof container such as is shown below. In addition, ARRL sent a number of small, 2,000-Watt portable generators as well as solar-powered battery chargers of the variety the US military uses on extended deployments. ARRL's Ham Aid program adapted and provided nearly \$75,000 in Amateur Radio equipment to the volunteers that deployed to Puerto Rico and to the ARRL Puerto Rico Section staff.

They have. They will. When you need Amateur Radio (operators), you really need them.

Amateur Radio is available, ready, willing and able to provide these services at no cost to anyone. Referencing Amateur Radio, Fugate said “During the initial communications out of Haiti (following the January 12, 2010 earthquake there), volunteers using assigned frequencies that they are allocated, their own equipment, their own money-- nobody pays them-- were the first ones oftentimes getting word out in the critical first hours and first days as the rest of the systems came back up. I think that there is a tendency because we have done so much to build infrastructure and resiliency in all our other systems, we have tended to dismiss that role: ‘When Everything Else Fails,’ Amateur Radio oftentimes is our last line of defense.”

19. There is no single model for effective communications during disasters and emergencies. By their very nature, emergencies will range from a localized situation affecting one community to a more regional need affecting multiple counties or larger areas. Wide scale disasters may affect multiple states or even entire regions of the country (such as a hurricane which, in its course, can affect states from Florida up the entire Eastern portion of the United States to Maine, and/or the entire Gulf coast and southern United States into Texas). Disasters and emergencies do not respect territorial borders. They do not stop at county or state lines. They do not respect the limits of jurisdiction of a State or municipal public safety agency. Differences in communications needs for support to emergency management and disaster response officials will exist in each event. A station at a licensee’s residence without appropriate, effective outdoor antennas or facilities which are not in regular operation and configured so that the station can conduct communications on the appropriate frequency bands in a given situation is a wasted resource and an emergency preparedness opportunity lost. Because of the differences in propagation at various times of the day; the different communications needs

of served agencies; and the distances and paths that emergency communications may need to cover, radio Amateurs must have the ability, and flexibility, to utilize any and all of their authorized frequency allocations [from medium-frequency (MF) through ultra-high-frequency (UHF) and above] using effective outdoor antennas suitable for the purpose are necessary in order for the Service to be functional and useful<sup>11</sup> in disasters and emergency relief.

20. The frequency agility, resiliency and flexibility of the Amateur Radio Service, and the communications skills of its licensees are principal reasons why it is considered a valuable resource by emergency officials. Regardless of atmospheric conditions, radio wave propagation, availability of commercial power, the need for varied emissions types, the Amateur Service has frequency allocations that will allow communications to be conducted into, within and out of an affected area and the ability to provide voice and data interoperability for disaster relief agencies and public safety services. The resiliency and flexibility of Amateur Radio plays an important role in supporting our towns, cities and communities. Amateur Radio emergency preparedness exercises emphasize the operation of residential fixed stations without reliance on commercial power mains for extended periods of time. If the basic communications infrastructure in a disaster area is available, Amateur Radio can leverage it. If the infrastructure is not in place, the Amateur Service can still provide support communication without any dependency on it. As well, they assist in restoring telecommunications facilities in disaster areas to operational status as well, because they are technically proficient. Most recently, radio Amateurs in Puerto Rico and the U.S. Virgin Islands actively participated in the restoration of telecommunications

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<sup>11</sup> The role of Amateur Radio in disaster relief is actually increasing. According to NOAA, In 2018 (as of October 9), there have been 11 weather and climate disaster events with losses exceeding \$1 billion each across the United States. These events included 1 drought event, 6 severe storm events, 1 tropical cyclone event, 1 wildfire event, and 2 winter storm events. Overall, these events resulted in the deaths of 105 people and had significant economic effects on the areas impacted. The 1980–2017 annual average is 6.0 events (CPI-adjusted); the annual average for the most recent 5 years (2013–2017) is 11.6 events (CPI-adjusted). See, <https://www.ncdc.noaa.gov/billions/> .

facilities damaged by Hurricane Maria which providing communications using Amateur stations for first responders and disaster relief agencies.

21. The use of, and the immediate capability of radio Amateurs to use small segments of the medium, high, very high, and ultra-high frequency bands, and microwave frequencies, serves a fundamental purpose: It ensures that radio Amateurs have the flexibility at all times of the day and night to provide long distance and short distance communications, voice, data or video, as needed with relatively flexible bandwidth emissions. As actual examples, a radio Amateur in the United States might communicate with his or her counterpart in Puerto Rico, the Virgin Islands, or Guam before, during and after hurricanes or typhoons to coordinate relief efforts and delivery of medical supplies when other facilities are inoperable or overloaded. They may work with international relief organizations providing time-sensitive, life-saving communications into disaster stricken areas such a Haitian earthquake or a Japanese tsunami. He or she might provide video transmissions from helicopters in support of, and to coordinate, fire crews fighting the Colorado forest fires or overlooking flood areas. Short- distance voice transmissions among Amateurs allowed interoperability services by relaying of messages between NASA personnel and FBI agents in efforts to locate Space Shuttle Columbia wreckage in Texas. Amateur Radio continues to be a critical communications medium, whether dealing with the response to tornadoes in Alabama, Missouri or Oklahoma; wildfires in New Mexico or California; hurricanes on the Eastern seaboard and the Gulf Coast, snow emergencies in New England, or flooding along the Mississippi River basin.

22. Constantly seeking greater volunteer service roles, ARRL has maintained an affiliation with Citizen Corps, a program for neighborhood alerting and security organized by the Department of Homeland Security. ARRL has long had memoranda of understanding with the

Federal Emergency Management Agency (FEMA); with the National Weather Service; with the National Communications System of the Department of Defense; and with other entities such as the American Red Cross and the Salvation Army SATERN disaster response teams. Through the ARRL's Amateur Radio Emergency Service® program (ARES ®), hundreds of memoranda of cooperation are in place with state and local emergency management agencies, local disaster relief agencies, hospitals and other groups involved with disaster relief and emergency response delineating the role of Amateur Radio Operators in emergencies in local areas and for specific purposes.

23. The type of Amateur Radio activity, the type of emergency, and the area of communication coverage needed are factors in determining what type of antenna is required to provide adequate communications. While VHF and UHF communications are used in a localized public service activity or emergency, those bands have propagation limitations. Most VHF / UHF emergency communications tend to be conducted using traditional FM telephony emissions. FM signals do not generally propagate as far as do other emission modes, so their effective range is limited. In addition, the VHF / UHF bands have shorter range capability – generally limited to line-of-sight communications unless repeater systems are involved in a given event. Because of these limitations, an outdoor antenna is critical and the higher the antenna, the greater its coverage. Terrain factors, such as a mountain or a range of mountains or a location in a valley will greatly impact VHF / UHF coverage. Many areas have established VHF / UHF repeaters on higher points in the area to increase their coverage (such as the tops of buildings or on mountain peaks). While a repeater will generally increase the area over which effective communications can be provided, it is not a panacea for the line-of sight propagation limitation. In any situation where automatically controlled remote stations are involved, the failure of the

infrastructure at that remote location can render it useless until repairs are made at the site. In that case, HF and simplex VHF communications are utilized.

24. HF communications have the ability to provide both local and longer distance communications. Because of this flexibility, the majority of Amateur Radio groups and individuals providing emergency communications incorporate HF communications into their emergency response planning.<sup>12</sup> Because of the frequencies involved, effective, reliable HF communication antennas are larger than are their VHF or UHF counterparts. All antennas are affected by the height of the antenna above ground level; communications are limited if the elevation is too low. HF communication is also affected by the time of day and the effects of the Earth's atmosphere. The frequency and antenna that would be most conducive for daytime communications from an Amateur Radio licensee to a given location will be different during the nighttime. The frequency agility of Amateur Radio accommodates these changes, but it requires effective outdoor antennas for different bands in every case. An antenna feed point too close to the ground will substantially change the angle of radiation of the signal and affect the effective distance of reliable communications. Some HF emergency communications response plans take this fact into consideration and utilize the technique (known as "near vertical incident skywave, or NVIS) where appropriate. For example, towns on separate sides of a tall mountain range might incorporate an NVIS antenna system to achieve the ability to communicate between them for mutual assistance.<sup>13</sup>

25. While the exact nature of an event constituting a communications emergency that would necessitate the use of Amateur Radio cannot be predicted, the two most common

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<sup>12</sup> For example, the Center for Disease Control has used HF Amateur communications for communications to medical centers.

<sup>13</sup> See "Antenna Height and Communications Effectiveness" by R. Dean Straw, N6BV, and Gerald L. Hall, K1TD, at [www.arrl.org/files/file/antplnr.pdf](http://www.arrl.org/files/file/antplnr.pdf) for a more thorough explanation of the impact antenna height plays on the ability of an Amateur station to function effectively and reliably.

categories of events are natural disasters and weather-related emergencies. Hurricanes, tornados and winter storms are among the most common of these events. Because of this, the Amateur Radio Service interfaces with the National Weather Service (NWS) and the National Hurricane Center (NHC). The SKYWARN program of the NWS provides thousands of volunteers nationwide to serve as the “eyes” of the NWS using Amateur Radio stations at their residences when severe weather is imminent. These spotters also provide critical meteorological data that cannot be observed at the altitudes below NWS radar systems. While there are some trained SKYWARN spotters who participate from their personal vehicles as mobile units positioned at certain strategic locations, the majority of SKYWARN participants provide their detailed observations from their home station locations. Effective and reliable antennas are needed in order for these home stations to provide these detailed observations. SKYWARN recommends the ability to use 30 watts of power to an outdoor antenna.

26. The timeliness of SKYWARN reports submitted via Amateur Radio confirms what NWS sees on weather radars; it substantially increases the precision of severe weather forecasting; and it allows NWS to increase the warning and preparation times for those citizens in harm’s way. The program works very well: according to statistics from the NWS, approximately 290,000 trained SKYWARN spotters – *the majority being licensed Amateur Radio operators* – assist the NWS in providing accurate, reliable and immediate information on approximately 10,000 thunderstorms, 5,000 floods and 1,000 tornadoes on average each year.<sup>14</sup>

27. The National Hurricane Center, on the campus of Florida International University in Miami, is a major National Weather Service program supported by Amateur Radio. For the past

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<sup>14</sup> See “NWS- What Is Skywarn?” [www.nws.noaa.gov/skywarn/](http://www.nws.noaa.gov/skywarn/).

35 years, volunteer operators at the NHC's dedicated Amateur Radio station (callsign WX4NHC) are active during any hurricane activation. Because reports arrive from the Atlantic and Pacific basins, HF communication serves as a core component of this valuable NWS tool. The utility of HF communications in this life-saving effort reflects the need of Amateur Stations in the field to provide their information from home stations to the NHC via effective, reliable HF antennas.

28. The importance of fixed antennas at a licensee's residence, and the insufficiency of a mobile or portable Amateur Radio station in lieu of a station at the residence of the licensee cannot be overestimated. Furthermore, many Amateur Radio operators are older or disabled persons. The public service avocation is an important opportunity for many licensees who may not be able to travel often or at all, but who can meaningfully contribute from their home stations despite any physical limitation. For those who could operate away from home via portable or mobile operation using mobile or transportable antennas, it is noteworthy that mobile or portable antennas do not perform nearly as well, or as reliably, as do typical outdoor, home station antennas. For emergency communications programs such as SKYWARN, the need for geographically diverse, fixed residential Amateur stations is obviously a cornerstone of the program. It is premised on the availability of large numbers of residential Amateur stations available on little or no advance notice in order for the program to work. Mobile communications in SKYWARN are discouraged.

29. In every communications event there is a need for home stations with effective outdoor antennas. There is a need for properly equipped and trained relay stations, taking information from the field on one set of frequencies and then moving it on to the proper destination via another frequency or band. In extended emergencies, such as was the case at the

Pentagon after the 9/11 attacks, there is always a need for new stations to assume the responsibilities of relieving the network control station or relay stations that have been on task for many hours and need to be relieved. Many experienced and trained operators who can and are willing to provide these types of disaster communications services cannot be utilized to provide support communications because they are precluded by private land-use restrictions from erecting or maintaining antennas suitable for the purpose – a resource wasted.

30. Amateur Radio is not intended to supplant existing communications systems and it is not a “first response” radio service. Rather, Amateur Radio’s appropriate role is to supplement existing public safety, public service or disaster relief communications when those services’ normal communications are overloaded, off-line, or rendered unavailable. The ability to bridge the gap until normal communications for those agencies and services has been restored is the real strength and value of the Amateur Service.

31. The value of Amateur Radio in disasters is due also to the widespread geographic distribution of the licensees throughout neighborhoods, communities and States and to the residential installations of the stations. There will as the result of those factors *always* be Amateur Radio stations inside and outside a disaster area, capable of providing reliable, immediate disaster relief communications instantly, within or outside the disaster area, over any path distance and to any location whatsoever. The high level of organization and preparedness is dependent on regular drills, exercises and emergency simulations using these residential radio stations and their integration into emergency planning. Emergency preparedness requires actively developing the experiential knowledge of radio and the operating skills a licensee must have in order to be useful during a disaster. This learning requires frequent practice that takes place at a home station during a licensee's personal free time. The operators are certified, having

completed emergency communications certification courses that provide the educational background necessary for such serious work, and the stations are maintained within the licensees' residences in a constant state of readiness. This cannot be done without effective residential, outdoor antennas. The ability to participate in regularly scheduled drills provides readiness – for both equipment and operators – and it must be possible from a home station.

### **III. Private Land Use Regulations are Ubiquitous and Impede or Preclude Amateur Radio Communications**

32. By 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”.<sup>15</sup> CICs are typically created by declaration, applicable to entire developments and subdivisions that bind individual homeowners and limit the use of their residential land. According to CAI, the national association of community associations, the estimated numbers of CICs in the United States (i.e.

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<sup>15</sup> Private land use regulations take a number of different forms, but are typically referred to, especially in western states, as “Covenants, Conditions and Restrictions” or “CC&Rs”. In fact, these private land use regulations can be equitable servitudes, covenants, deed restrictions, or Declarations of Covenants, Conditions and Restrictions. Owners of real property who purchase their property with equitable servitudes agree not to do certain things. Both affirmative promises to do something and promises to not do something became used by developers for residential and commercial projects starting in the early 20<sup>th</sup> Century. A covenant is a servitude if either the benefit or the burden (right or obligation) “runs with the land” (i.e. is binding on subsequent purchasers). Covenants may be enforced by injunction, and sometimes by other legal means. Covenants are created when the owner of land – such as the creator of a real estate development – creates covenants that affect the land and of which the contracting parties and subsequent owners have notice. This is usually accomplished by recording a set of covenants in the public land records of the county or city where the development is located. With covenants, the original buyer as well as subsequent buyers are subject to the obligations imposed on the property by the original owner – hence, the term “running with the land.” Homeowners often refer to covenants as “deed restrictions.” The terms are often used interchangeably. “Deed restriction” implies a restrictive covenant – a promise not to do something, but covenants also include both affirmative obligations and restrictions. The term “Declaration of Covenants, Conditions and Restrictions” (or CC&Rs) is a common (and redundant) term for covenants that are imposed and enforced by a mandatory association.

association-governed communities, housing units and residents, over time) was (as of 2017) 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
2010	311,600	24.8 million	62.0 million
2013	328,500	26.3 million	65.7 million
2014	333,600	26.7 million	66.7 million
2015	338,000	26.2 million	68.0 million
2016	342,000	26.3 million	69.0 million
2017	344,500	26.6 million	70.0 million

CAI noted in 2018<sup>16</sup> that the number of community associations in the United States is between 346,000 and 348,000.<sup>17</sup> Furthermore, and more ominous for Amateur Radio operators, data published by CAI indicated that *90 percent of new housing starts in the United States are subject to private land use regulations. As was noted hereinabove, this is directly attributable to the fact that lenders for new residential land development projects in the United States now uniformly require the filing of a declaration of covenants along with the subdivision plat when a new residential development begins. These declarations of covenants limit and most often preclude the installation and maintenance of outdoor Amateur Radio antenna installations, regardless of the potential presence or absence of aesthetic impact of a proposed Amateur Radio antenna installation. They increasingly preclude or render ineffective Amateur Radio*

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<sup>16</sup> See, <https://www.caionline.org/PressReleases/pages/statisticalinformation.aspx>, last viewed December 9, 2018.

<sup>17</sup> The States with the largest numbers of CICs are Florida (with a 2017 estimated number of 48,000 governing 9,753,000 residents); California (with a 2017 estimated number of 45,900 governing 9,327,000 residents) and Texas (with a 2017 estimated number of 20,000 governing 4,064,000 residents).

communications and are imposed without regard to the effect on Amateur Radio communications.

33. CICs are defined in the Third Restatement of Property [Servitudes, Section 6.2 (2000)] as “a real estate development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal (a) to pay for the use of, or contribute to the maintenance of, property held or enjoyed in common by the individual owners, or (b) to pay dues or assessments to an association that provides services or facilities to the common property or to the individually owned property, or that enforces other servitudes burdening the property in the development or neighborhood.” The same document notes that a CIC is characterized by either commonly held property or a community association, although most CIC’s have both. CICs are typically created by declaration, which imposes the CC&Rs that bind individual homeowners. CICs are relatively new in terms of housing arrangements in the United States. Early in the 20<sup>th</sup> century, they were not prevalent, but by the 1960s, CICs were becoming ubiquitous. With golf and retirement communities, the concept spread, especially in the southern and southwestern states.

34. The exponential growth in CICs in the United States is of great concern 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. A 1999 Gallup Organization’s survey of community association homeowner satisfaction led CAI in 2005 to conclude that “more than four in five housing starts during the past 5 to 8 years have been built as part of an association-governed community.” A 1993 article about public and private land use regulations prepared for a real estate course at the University of Houston in Texas claimed that

an estimated 50 percent of new home construction in Houston occurred in highly restricted residential communities.<sup>18</sup>

35. Nor are CICs limited to “residential communities”. They now include *entire cities* with all of the attributes of a public city, including business districts. An example is Reston, Virginia, which is spread over 74,000 acres and has a population of over 35,000 persons. It contains 12,500 residential units and more than 500 businesses. It has 21 churches, 4 shopping centers, eight public schools, and a sewage treatment plant. The streets and businesses are open to the general public. But it is a privately managed CIC.<sup>19</sup> Another example is Columbia, Maryland, located between Washington, D.C. and Baltimore, MD. Columbia, built by the Rouse Corporation in the 1960s with private financing, has 96,000 residents, shopping malls, restaurants, retail stores, industrial firms, an “Interfaith Center”, healthcare facilities and schools.<sup>20</sup> CICs are therefore becoming ubiquitous in the United States at the present time 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 or community, 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.*<sup>21</sup>

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<sup>18</sup> Wilson, Reid C., *Public and Private Land Use Regulation: Zoning and Deed Restrictions* (University of Houston Real Estate Documents, Workouts and Closings Course, June 1993).

<sup>19</sup> Siegel, S. *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years after Marsh v. Alabama*, Op. Cit. 6 WM. & Mary Bill Rts J. at 479 (1998)

<sup>20</sup> See, Saxton, Margaret F., *Protecting the Marketplace of Ideas: Access for Solicitors in Common Interest Communities*, 51 U.C.L.A. L. Rev. 1437, 1448 (2004) and citations therein.

<sup>21</sup> CICs often impose a number of restrictions on their members. These are typically contained in declarations of restrictions *by reference* in the real estate deed, which becomes a use limitation on the part of the property buyer and enforceable by the community association, by individual homeowners in the development or by the developer. Purchasers are bound by these restrictions whether or not they read or understood them, and they are not negotiable between a seller and a buyer of real property in the development. The restrictions typically cover a wide range of architectural and aesthetic limitations which are alleged to protect the value of property in the community. Residents often find these restrictions extreme. The restrictions limit such things as paint colors, pets, sports, sporting equipment, Christmas lights, outdoor furniture, woodpile placement, antennas and the operation of radio transmitters and receivers within the regulated communities. Association dues can be used to pay for a lawsuit enforcing a restriction, and many CC&Rs or association bylaws require the defendant homeowner to reimburse the association’s

36. Commentators and some courts have analogized the community association to a miniature (or in the case of planned cities, not so miniature) government. The community association, like a government, requires the ability to tax its residents in the form of assessments in order to provide for and maintain common infrastructure.<sup>22</sup> The association provides to its members utility services, road maintenance, street and common area lighting and refuse removal. Funded with assessments or taxes levied on the members of the community, the powers vested in a board of directors, council of co-owners, board of managers or other body is clearly analogous to the governing body of a municipality, but the decisionmaking with respect to the administration of CC&Rs and the development of regulations is often far more arbitrary and not subject to the processes required by law for public adjudication of issues.

37. As the comprehensive development of residential subdivisions evolved, developers created increasingly elaborate schemes of private land use. These schemes were adopted initially by including all of the restrictions in each deed from the developer to the initial lot owners. Larger developments which were completed in phases utilized separate sets of “boilerplate” deed restrictions which were each recorded prior to any deeds to individual lot owners in each phase of the development, typically with the subdivision plat by the developer. Therefore, *there are never 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. Today, developers typically adopt master restrictions applicable to an entire development and record these with the subdivision plat before the subdivision is built. The only decision by a buyer of an individual parcel or unit is whether or not to purchase a residence in a

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legal fees or the legal fees of individual residents who bring civil actions in court to enforce the covenants. Financial obligations are enforced by placing liens on property of the resident incurring the obligation.

<sup>22</sup> See, e.g., Hyatt, Wayne and Rhoads, James, *Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations*, 12 Wake Forest L. Rev. 915, 918 (1976).

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<sup>23</sup> 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.<sup>24</sup> With the

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<sup>23</sup> ARRL in 2012 conducted a study of CC&R language, which revealed numerous typical examples of CC&R language which, on the face of those private land use restrictions or as applied, precludes Amateur Radio antennas completely. The typical provisions of CC&Rs relative to Amateur Radio antennas are draconian indeed. Language prohibiting all types of Amateur Radio antennas are exemplified by the language in a restriction from a community called The Lakes of Powell in Delaware County, Ohio, which reads as follows:

Section L - Antennae. No outside television or radio aerial or antenna, or other aerial or antenna, including satellite receiving dishes, for reception or transmission, shall be maintained on the premises, to the extent permissible under applicable statutes and regulations, including those administered by the Federal Communications Commission, except that this restriction shall not apply to satellite dishes with a diameter less than twenty-four (24"), erected or installed to minimize visibility for the street which the dwelling fronts.

Another version of the same language is found in the declaration of covenants for the development called Mira Lago West in Palm Harbor, Florida which precludes all outdoor antennas except for over-the-air video reception devices as defined in the Commission's regulations (which completely excludes Amateur Radio antennas). The provision, which does not permit antennas inside or outside of a residence, reads as follows:

Section 12 - Antennas and Roof Structures. No television, radio, or other electronic towers, aerials, antennas, satellite dishes or devices of any type for the reception or transmission of radio or television broadcasts or other means of communication shall hereafter be erected, constructed, placed or permitted to remain on any lot or upon any improvements thereon, except that this prohibition shall not apply to those antennas specifically covered by 47 C.F.R. part 1, Subpart S, section 1.4000 (or any successor provision) promulgated under the telecommunications act of 1996 as amended from time to time. The association shall be empowered to adopt rules governing the types of antennas that are permissible hereunder and establishing reasonable, non-discriminatory restrictions relating to safety, location and maintenance of antennas. To the extent that reception of an acceptable signal would not be impaired, an antenna permissible pursuant to the rules of the Association may only be installed in a side or rear yard location, not visible from the street or neighboring property, and integrated with the dwelling and surrounding landscape. Antennas shall be installed in compliance with all state and local laws and regulations, including zoning, land use and building regulations.

<sup>24</sup> Examples of these types of private land use restrictions, taken from ARRL's 2012 study, are as follows. From the deed restrictions of the Shadow Creek Ranch, Houston and Pearland, Texas:

Section 20 - Devices for Reception of Audio/Video Signals. No exterior antennas, aerials, satellite dishes, or other apparatus for the reception or transmission of audio/video signals of any kind shall be placed on the exterior portions of any Tract unless such device is not visible from the street or from any adjacent Property and has received ARC approval.

current prevalence of private land use regulations and CICs, there is most often no choice in the matter.

38. *Initially*, CC&Rs were treated by the law as purely contractual matters between consenting parties. At that time, deed restrictions of any type were strictly construed as restraints on the free alienation of property, since they sought to restrict the right of subsequent real property owners. Over time, some types of deed restrictions were deemed unenforceable as a matter of public policy (such as restrictions on sale and purchase of land according to race, and restrictions mandating the use of wood shingles - a fire hazard - on houses). However, there was a shift in the interpretation of CC&Rs, such that they are now *liberally, not strictly, construed so as to enforce their intent*. The use of very detailed and very restrictive CC&Rs is routine in residential community development.

39. CC&R provisions with respect to antennas are now almost universal.<sup>25</sup> Though the language differs somewhat in geographic areas, the restrictions on residential antenna installations fall into a very few general categories. ARRL in 2012<sup>26</sup> conducted a very short

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From the deed restrictions of Hidden Spring Subdivision in St. Charles County, Missouri:

Section B Towers, antennas, aerials, discs or other similar devices or installations designed or used for the transmission or reception of radio waves or signals shall not be permitted unless authorized by the Architectural Review Committee. Small discs no greater than three (3) foot in diameter, shall be permitted.

<sup>25</sup> The Commission 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 sometimes (sic) used by homeowners’ associations to prevent property owners within the association from installing antennas.”].

<sup>26</sup> See ARRL comments filed May 16, 2012 in Docket 12-91, in response to the *Public Notice*, DA 12-523, released April 2, 2012. That *Public Notice* sought 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. The *Public Notice* in that proceeding was called for by Section 6414 of the *Middle Class Tax Relief and Job Creation Act of 2012*, Public Law 112-96. The legislation called on the Commission, 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

online survey of those Commission-licensed radio Amateurs who were both active in emergency communications and currently subject to residential private land use restrictions where they live. ARRL asked that the survey respondents provide copies of the language of those CC&Rs which apply to residential antenna installations, together with a narrative of their experiences with private land use regulations. A sampling of the more than 870 responses to that survey provided a very good understanding of the deed restriction language commonly found in CICs and an anecdotal understanding of the prevalence and severity of these restrictions. The responding radio Amateurs reported that their emergency communications efforts had been foreclosed by or severely curtailed as the direct result of private land use regulations.<sup>27</sup> In essence, CC&R

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submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science and Transportation of the Senate a report on the findings of such study. Included within the scope of the study were to be: (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.

<sup>27</sup> The *Public Notice* in GN Docket 12-91, at Question 2.c. on page 4, asked what steps Amateur Radio operators can take to minimize the risk that an antenna installation will encounter unreasonable or unnecessary private land use restrictions. Examples of “options” listed included using a transmitter at a location not subject to such restrictions or placing an antenna on a structure used by a commercial mobile radio service provider or government entity. There is no alternative for many Amateur Radio licensees (and decreasing opportunities for most licensees) to purchase real property other than in CICs that restrict antennas. As is discussed more fully below, it is possible under Commission rules to operate mobile or portable transmitters away from a licensee’s residence periodically, but one of the basic reasons why Amateur Radio emergency communications are so effective is the widespread geographic distribution of fixed, functioning and immediately available stations that can be deployed immediately for communications into or from a disaster area, or for other purposes. As an example, and as discussed above, the SKYWARN severe weather reporting program operated in conjunction with the National Weather Service relies on fixed Amateur stations in licensees’ homes almost exclusively for reporting significant weather conditions or damage resulting therefrom. State and local emergency management agencies rely on Amateur Radio for the same purpose. As to mounting antennas on a CMRS structure or government building, these are not options that are available to Amateur Radio operators for several reasons. First, Amateur Radio is a non-commercial avocation, and the cost of leasing a CMRS antenna support and space in a transmitter building, or space in a government facility is prohibitively expensive. Second, Amateur Radio operators use rotatable, directional antennas in many cases that are not easily installed or maintained on CMRS or governmental facilities. Third, the Amateur Service is principally an experimental radio service and the equipment utilized is replaced, modified, and upgraded frequently. Finally, using power sources other than commercial mains is not easily done in station configurations outside the licensee’s residence. While Amateur Radio repeaters might be sited at a CMRS or government facility under certain circumstances, it is not an alternative for most individual Amateur stations.

language with respect to antennas (as that language would apply to Amateur Radio antennas) fall into five basic categories:

(A) Those which prohibit all outdoor antennas without exception.<sup>28</sup>

(B) Those which permit some types of antennas, usually very small ones as defined in the Commission's rule governing over-the-air video delivery service antennas (47 C.F.R. § 1.4000) but prohibit all other types of antennas such as Amateur Radio antennas.<sup>29</sup>

(C) Those which permit antennas that are of a certain configuration, size or height, usually based on visibility from the street or from adjacent parcels of land but without regard to antenna performance.<sup>30</sup>

(D) Those which permit only those buildings and structures that are approved by either an Architectural Control Board or by the homeowners' association itself. (Note: typically, these types of CC&R antenna restrictions do not contain any standards which might guide the Architectural Control Board or whatever the competent evaluating entity might be, or which would allow the resident to know in advance whether or not his or her antenna installation will or will not likely be approved). These type regulations are the most prevalent.<sup>31</sup>

(E) Those which prohibit all Amateur Radio (or occasionally any radio) *transmission or reception* or which prohibit radio transmitters.<sup>32</sup>

40. None of these types of restrictions takes into account the effectiveness of the communications provided by the facilities served by the antennas, (except in some cases with respect to over-the-air video reception devices, discussed hereinbelow). Obviously, CC&Rs in

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<sup>28</sup> Examples of this type of CC&R language are found in Exhibit C of ARRL's comments in Docket 12-91 on page 11, referring to the Emerald Forest Subdivision in Bexar, TX; on page 12, referring to the Pine Hollow Condominium subdivision in Englewood, Florida; on page 14, referring to the Ellis Plantation Home Owners Inc. subdivision in Manassas, Virginia; on page 16 referring to the Bridlewood Community Association of Prince William County, Virginia; on page 25 pertaining to the Winding River Plantation, Southport, NC.; and on page 26 referring to the Charter Point Subdivision in San Diego County, CA.

<sup>29</sup> Examples of this type of CC&R language are found in Exhibit C of ARRL's comments in Docket 12-91 on page 4, referring to the Yacht Club II Homeowner's Association in Colorado; on page 19, referring to an unspecified real estate development; on page 24 referring to the Freeman Farms subdivision in Maricopa County, Arizona; on page 25 referring to the Forest Lakes Subdivision, northern Albemarle County near Charlottesville, VA; and on page 28 referring to the Wellington Hills Subdivision in Springfield, MO.

<sup>30</sup> Examples of this type of CC&R language are found in Exhibit C of ARRL's comments in Docket 12-91 at page 4 referring to the Windfield Subdivision in Davidson County, NC; on page 5, referring to the Woodridge Community in Apex, NC; on page 10 referring to the Silver Lake subdivision in Pearland, TX; on page 17 referring to the Plum Tree Court subdivision in Reno, NV; and on page 20 referring to the Country Place 6 Subdivision and other properties of Terra Verde Development in and around Norman, OK and Oklahoma City, OK.

<sup>31</sup> Examples of this type of requirement are prevalent throughout Exhibit C of ARRL's comments in Docket 12-91.

<sup>32</sup> Examples of this type of CC&R language are found in Exhibit C of ARRL's comments in Docket 12-91 at page 15 thereof referring to the Dawson Ranch in Fremont County, CO; on page 25 thereof referring to the Chatswood HOA of Sherman Oaks, CA; and on page 27 referring to the Harbor Lights community in Kitsap County, WA.

categories (A), (B) or (E) would prohibit entirely the installation or maintenance of an Amateur Radio antenna in any functional configuration. Those in category (C) might or might not in a given location permit a functional antenna depending on the configuration of a residential parcel of land in question and the severity of the regulations, but the regulations in that class typically effectively prohibit Amateur Radio antennas due to size limitations set forth in the CC&Rs. Those types of regulations do not take into account the communications effectiveness of any antenna permitted thereby.

41. Interestingly, the CC&Rs (in Categories B and C above) that were imposed on residential real property after the enactment of 47 C.F.R. § 1.4000 by the Commission in 1996 typically are aimed at limiting even small, over-the-air video reception antennas to the greatest extent possible consistent with compliance with that rule section, while prohibiting all other types of outdoor antennas. This illustrates the very clear and consistent prejudice against outdoor antennas that is overwhelmingly present within CICs, and the need for some relief for Amateur Radio licensees. Some CC&R language developed after the enactment by the Commission of 47 C.F.R. § 1.4000 nevertheless prohibits all outdoor antennas, in clear violation of that rule section.

42. Those CC&Rs in category (D), which is perhaps the most prevalent type of language currently, delegate the decision to allow or disallow the FCC-licensed Amateur Radio operator to provide Amateur Radio emergency communications or to participate in emergency preparedness drills and exercises (by virtue of the unfettered authority to grant or deny authority to erect an Amateur Radio antenna) to the governing board of the homeowners' association or its architectural control committee. Typically, there are no standards which would provide guidance for approval or disapproval of such antennas, so the decisions of the association members or the architectural control committee are inherently subjective, if not completely arbitrary. *A person*

*seeking to purchase a residence in a CIC with CC&Rs containing this language, even if he or she is aware of the terms of the CC&Rs applicable to the subdivision, cannot know when the property is purchased whether an antenna will or will not be approved.*

43. Therefore, Amateur Radio is indeed being subjected to “death by a thousand cuts.” The Commission and the United States Congress has repeatedly noted the value of the Amateur Radio Service and the Commission long ago declared a “strong Federal interest” in the ability of licensees to conduct Amateur Radio communications. The Commission has acknowledged 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). To date, however, the Commission has allowed its more than 750,000 licensees to be precluded completely from providing Amateur Radio public service communications by means of preclusive private land use regulations, and the situation is worsening exponentially and constantly. Relief is necessary now.

#### **IV. The Commission Has Confirmed that it Has Authority to Limit Private Land Use Regulations Where There is a Direct Conflict with Federal Telecommunications Policy.**

44. The Commission in 1985 issued a declaratory ruling, subsequently codified, which addressed the conflicts between State and local land use regulations and the maintenance and use of outdoor Amateur Radio antennas in residential areas.<sup>33</sup> That declaratory ruling enunciated an eminently workable, limited preemption policy of “reasonable accommodation” by which the Commission struck a balance between legitimate local land use regulations and the important Federal interest in promoting and protecting Amateur Radio public service and emergency communications. The policy applied to the regulation of amateur radio communications by states and municipal governments. It addressed prohibitions or unreasonably restrictive structural

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<sup>33</sup> The Commission 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).

limitations imposed by non-federal, governmental entities. *Amateur Radio Preemption*, 101 FCC 2d 952 (1985); *codified at* 47 C.F.R. Section 97.15(b). The declaratory ruling is often referred to as "PRB-1", the docket number associated by the Commission's then Private Radio Bureau for the notice and comment proceeding that led to the issuance of the ruling.

45. Following receipt of notice and comment, in September of 1985 the Commission issued *Amateur Radio Preemption*. In its declaratory ruling, the Commission stated, in relevant part:

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...we recognize here that there are certain general state and local interests which may, in their even-handed applications, legitimately affect amateur radio facilities. Nonetheless, there is also a strong federal interest in promoting amateur communications. Evidence of the interest may be found in the comprehensive set of rules that the Commission has adopted to regulate the amateur service. Those rules set forth procedures for the licensing of stations and operators, frequency allocations, technical standards which amateur radio equipment must meet and operating practices which amateur operators must follow. We recognize the amateur radio service as a voluntary, noncommercial communication service, particularly with respect to providing emergency communications. Moreover, the amateur radio service provides a reservoir of trained operators, technicians and electronic experts who can be called on in times of national or local emergencies. By its nature, the Amateur Radio Service also provides the opportunity for individual operators to further international goodwill. Upon weighing these interests, we believe a limited preemption policy is warranted. *State and local regulations that operate to preclude amateur communications in their communities are in direct conflict with federal objectives and must be preempted.*

...Because amateur station communications are only as effective as the antennas employed, antenna height restrictions directly affect the effectiveness of amateur communications. Some amateur antenna configurations require more substantial installations than others if they are to provide the amateur operators with the communications 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...*[L]ocal 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 to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose.*

(*Id.*, at 959-60) (citations omitted; emphasis added)

46. The Commission had noted the assumption in earlier court decisions of an apparent absence of intent on the part of the Federal government to preempt amateur antenna regulation, and consequently clarified its position on the matter. The Commission preempted local regulation of Amateur Radio antennas, to the extent that local regulations preclude, or do not reasonably accommodate Amateur communications; or which do not represent the minimum practicable regulation to accomplish the local authority's legitimate purpose. It is apparent that effective Amateur communications require antennas to be erected in clear space, at heights and configurations reflecting the type of communications to be conducted and the path lengths typically used, relative to the surrounding terrain.

47. Following the release of *Amateur Radio Preemption*, *supra*, the initial question which faced the courts was whether such an action was within the FCC's authority, and whether that authority was reasonably exercised. A series of cases following *Amateur Radio Preemption* uniformly held that the preemption policy was a proper exercise of the Commission's authority.<sup>34</sup> Court decisions on the subject have held without exception that local restrictions on amateur antennas that constitute effective prohibitions on communications and/or which involve fixed, arbitrary limitations are facially void as preempted.<sup>35</sup>

48. In September of 1989, the Commission revised its Amateur Radio Service rules to codify at 47 C.F.R. § 97.15(b) the essential holding of *Amateur Radio Preemption*, as follows:

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<sup>34</sup> See, e.g., *Thernes v. City of Lakeside Park, Kentucky, et al.*, 779 F. 2d 1187, 59 Pike and Fischer Radio Regulation 2nd Series 1306 (6th Circuit, 1986); *on remand*, 62 Pike and Fischer Radio Regulation 2nd Series 284 (E.D. Kentucky, 1986); *Bodony v. Incorporated Village of Sands Point, et al.*, 681 F. Supp. 1009, 64 Pike and Fischer Radio Regulation 2nd Series 307 (E.D. NY, 1987); *Bulchis v. City of Edmonds*, 671 F. Supp. 1270 (W.D. Wash, 1987); *Izzo v. Borough of River Edge, et al.*, 843 F.2d 765 (3d Cir., 1988) (holding that the FCC's preemption order "infuses into the proceeding a federal concern, a factor which distinguishes the case from a routine land use dispute having no such dimension." The Court recognized that "(b)ecause the effectiveness of radio communication depends on the height of antennas, local regulation of those structures could pose a direct conflict with federal objectives").

<sup>35</sup> See, *Evans v. Board of Commissioners*, 752 F. Supp. 973, (D. Colo. 1990); *MacMillan v. City of Rocky River*, 748 F. Supp. 1241 (N.D. Ohio, 1990); *Pentel v. City of Mendota Heights*, 13 F. 3d 1261 (8th Cir., 1994).

(b) Except as otherwise provided herein, a station antenna structure may be erected at heights and dimensions sufficient to accommodate amateur service communications. [State and local regulation of a station antenna structure must not preclude amateur service communications. Rather, it must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose. See, PRB-1, 101 FCC 2d 952 (1985) for details.]

The policy is a three-part test for the legitimacy of State and municipal regulations which affect Amateur Radio communications. 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. *Amateur Radio Preemption, supra*, 101 FCC 2d at 960. This policy has worked well since 1985, *in the circumstances to which it applies*. It does not entitle a radio Amateur to install in residential areas any antenna he or she wishes to install. The three-part test for local regulations leaves wide leeway for municipal land use regulators acting in good faith to regulate the aesthetics and the safety aspects of Amateur Radio antenna installations. The flexibility of the “no prohibition”, “reasonable accommodation” and “minimum practicable regulation” tests for local land use regulations provided a means (which proved workable) for Amateur Radio licensees and municipal land use regulators to work together to reach compromise and agreement on the structuring of ordinances, special use permits, building regulations, and the like. It has been a great success overall, and it has fostered and promoted Amateur Radio emergency communications preparedness by virtue of the ability of licensed radio Amateurs to operate from

their residences. It also fosters international goodwill, and it permits young people who become interested in Amateur Radio to participate in their educational avocation without unnecessary constraint. Their Amateur Radio communications are protected against unreasonable municipal land use regulations.

49. Yet, since 1985 and to the present time, the Commission has drawn an incorrect distinction between State and municipal restrictions on Amateur Radio communications on the one hand, and private land use regulations on the other; and it has repeatedly declined to preempt or limit the latter. In *Amateur Radio Preemption*, at ¶ 7, the Commission stated that:

“Since...restrictive covenants are contractual agreements between private parties, they are not generally a matter of concern to the Commission.” In footnote 6 of ¶ 25 of *Amateur Radio Preemption*, the Commission reiterated, but did not explain, its terse holding: “We reiterate that our ruling herein does not reach restrictive covenants in private contractual agreements. Such agreements are voluntarily entered into by the buyer or tenant (sic) when the agreement is executed and do not usually concern this Commission.” *The premise of the Commission in creating a dichotomy between governmental land use regulation of Amateur Radio communications and private land use regulation of those same antennas was then and is now an absolute fallacy*: the Commission assumed that CC&Rs were private contractual agreements between buyers and sellers of land that were in some way negotiable.<sup>36</sup> The contractual characteristic of private land use regulation has not existed in the United States for a great many years, as discussed above. The terms of CC&Rs are not negotiable between sellers and buyers of

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<sup>36</sup> Even if private land use regulations *were* a matter of arms-length negotiation between buyers and sellers of land (which they most assuredly are not), the Commission never explained in *Amateur Radio Preemption* why that fact would negate the “strong Federal interest” in promoting amateur communications, “particularly with respect to providing emergency communications” so it was unclear why the Commission was unconcerned about the ability of radio Amateurs to provide those communications simply because the radio Amateur happened to live in a CIC. Amateur Radio communications that are precluded by virtue of municipal land use regulations are contrary to Federal telecommunications policy to the exact same extent as those communications that are precluded by private land use regulations.

land. Declarations of CC&Rs are in place on a comprehensive basis long before a buyer of land comes to the table. CC&Rs which preclude or severely limit Amateur Radio antennas and communications are ubiquitous and prevalent, and they are increasing as fast as are CICs. There is no meeting of the minds between an Amateur Radio licensee buyer and his or her seller when purchasing land in a CIC. The private land use restrictions are already in place and are binding on the buyer of residential real property, and the only issue is whether or not the buyer has the flexibility to live elsewhere. In many, if not most cases, and increasingly, the purchase of land by an Amateur Radio licensee in a CC&R-restricted community is a *fait accompli*. He or she must live in a particular area due to career or family exigencies, and the ability to purchase property suitable to the person's needs which is not within a CIC is diminishing. A person's life decisions cannot be altered in most cases based on the ability or inability to erect an antenna, and as discussed above, in many cases at the time a residence is purchased, the buyer cannot know whether or not he or she will be able to erect and maintain an Amateur Radio antenna anyway. Furthermore, the logic of the different treatment fails: It does not matter one whit whether an Amateur Radio operator is prohibited from installing and maintaining at his or her residence an effective outdoor antenna: the effect is precisely the same either way, and the Commission's finding long ago that there is a "strong Federal interest" in effective Amateur Radio communications is frustrated, regardless of the type of land use restriction that precludes those communications.

50. The Commission's 1985 finding that CC&Rs were a matter of private agreement and therefore did not "concern" the Commission could only have been realistically premised on a jurisdictional determination; i.e. that the Commission did not have authority over purely private contractual agreements. Otherwise, it is inexplicable that the Commission would not have any

“concern” that private land use restrictions would preclude Amateur Radio communications entirely; or that they would fail to reasonably accommodate Amateur Radio communications; or that the CC&Rs might not constitute the “minimum practicable regulation” in order to accomplish whatever the legitimate purpose of the CC&Rs might be. It cannot logically be the case that the Commission has no interest in protecting an Amateur Station’s ability to prepare for or provide public service or emergency communications in a private land use regulated community but it does have an interest in protecting that same station from unreasonable State or municipal land use regulations which have the same effect<sup>37</sup>, *unless* (1) the Commission, in 1985, believed that it did not have the jurisdiction to preempt private land use regulations, or else (2) it believed that the decision to purchase property in a CIC and hence to accept the terms of the CC&Rs was voluntary on the part of the radio Amateur.

51. It is clear today that the decision to live in a CIC is not often voluntary, given the prevalence of CICs and of the accompanying CC&Rs which prohibit or severely restrict antennas (or which subject a licensee to a decisionmaking process that is without specified standards, and which is completely beyond his or her control or ability to influence). And it became clear in 1996 that the Commission has ample jurisdiction to preempt any private land use regulations which frustrate Federal telecommunications policy.

52. In 1996, Congress passed the *Telecommunications Act of 1996*<sup>38</sup> which was an omnibus telecommunications reform Bill. At Section 207 thereof, entitled *Restrictions on Over-The-Air Reception Devices*, the Commission was ordered, within 180 days of enactment of the legislation to promulgate (pursuant to Section 303 of the Communications Act of 1934)

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<sup>37</sup> It is true *a priori* that private land use regulations which preclude or fail to reasonably accommodate Amateur Radio communications, or which do not constitute the minimum practicable regulation to accomplish the goal of the private regulations are just as inconsistent with the strong Federal interest in Amateur Radio communications as are zoning regulations of those same facilities which do not meet the same test.

<sup>38</sup> Public Law 104-104, 110 Stat.56 (1996).

regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services (known now as over-the-air television reception devices, or "OTARDs"). Congress instructed the Commission to extend this prohibition to nongovernmental restrictions such as "restrictive covenants and encumbrances."<sup>39</sup> Pursuant to this legislation, the Commission commenced a rulemaking proceeding which resulted<sup>40</sup> in the adoption of Section 1.4000 of the Commission's rules.<sup>41</sup> That rule invalidated restrictions, including private covenants, homeowners' association rules or similar restrictions on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property, that impairs the installation, maintenance or use of an antenna for the reception of direct broadcast satellite service one meter or less in diameter or in Alaska; an antenna designed to receive video programming via multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services which are one meter or less in diameter or diagonal measurement; or an antenna that is designed to receive television broadcast signals.<sup>42</sup> The legislation was later extended to preclude such restrictions on wireless broadband devices.

53. In adopting Section 1.4000, the Commission found specifically that it has jurisdiction

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<sup>39</sup> See, House Report No. 204, 104<sup>th</sup> Congress, 1<sup>st</sup> Session, at 124 (1995).

<sup>40</sup> *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 (1996).

<sup>41</sup> 47 C.F.R. § 1.4000 (1996).

<sup>42</sup> Notably, there are no size limitations specified with respect to over-the-air television broadcast receive antennas. Some are very large; larger than many Amateur Radio HF, VHF and UHF antennas and arrays.

to prohibit unreasonable private land use restrictions pertaining to telecommunications facilities.

The Commission stated<sup>43</sup> as follows:

The government may abrogate restrictive covenants that interfere with federal objectives enunciated in a regulation. In *Seniors Civil Liberties Ass'n v. Kemp* (citation omitted) the District Court found no taking in an implementation of the Fair Housing Amendments Act (FHAA) that declared unlawful age-based restrictive covenants, thereby abrogating the homeowner's association's rules requiring that at least one resident of each home be at least 55 years of age. The court found that the FHAA provisions nullifying the restrictive covenants constituted a "public program adjusting the benefits of economic life to promote the common good", and not a taking subject to compensation (footnote omitted). Similarly, the Commission's rule implementing Section 207 promotes the common good by advancing a legitimate federal interest in ensuring access to communications (footnote omitted) and therefore justifies prohibition of nongovernmental restrictions that impair such access.

...Some commenters also challenge our authority to prohibit these restrictions under the Commerce Clause. The Supreme Court has made it clear that Congress not only can supersede local regulation, but also can change contractual relationships between private parties through the exercise of its constitutional powers, including the Commerce Clause. U.S. Const. art. I, §8, cl.3. In *Connolly v. Pension Benefit Guaranty Corp.* (citation omitted) the Court stated,

Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights in property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.

If a regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights, does not always transform the regulation into an illegal taking.

Moreover, in *FCC v. Florida Power Corp.* [480 U.S. 245 (1987)] the Court permitted the Commission to invalidate certain terms of private contracts relating to property rights....Courts have also found that homeowner covenants do not enjoy special immunity from federal power (citations omitted). Thus, we conclude that the authority bestowed upon the Commission to adopt a rule that prohibits restrictive covenants or other similar nongovernmental restrictions is not constitutionally infirm.

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<sup>43</sup> *Op. Cit., 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 (1996).

...In proposing a strict preemption of such private restrictions without a specific rebuttal or waiver provision (footnote omitted), we noted that nongovernmental restrictions appear to be related primarily to aesthetic concerns. We tentatively concluded that it was therefore appropriate to accord them less deference than local governmental regulations that can be based on health and safety considerations...

Thus, finding that it had jurisdiction to limit private land use regulations, and finding that private land use regulations are entitled to less deference than are municipal land use regulations because the former principally deal with aesthetics, the Commission decided to apply to private land use regulations the same rule and procedures applicable to government regulations of these same OTARD facilities where the property subject to the private regulations is under the exclusive use or control of the antenna user and the user has a direct or indirect ownership interest in the property.

54. The parallel between the OTARD policy and the relationship between Amateur Radio licensees and homeowners' associations or other enforcers of private land use regulations is obvious. The Commission has for 33 years maintained that there is a strong Federal interest in effective Amateur Radio communications and that municipal land use regulations which preclude or fail to make reasonable accommodation for Amateur Radio communications are preempted. Since those municipal land use regulations are entitled to more deference from the Commission than are private land use regulations; since an outdoor antenna is a necessary component of an effective Amateur Radio station; since the Commission has found that it has the jurisdiction to preempt private land use regulations where they conflict with Federal telecommunications policy; and since limits of the application of private land use regulations which, on their face or as applied do not permit the installation and maintenance of an effective outdoor antenna are obviously contrary to the same strong Federal interest in effective Amateur

Radio communications, the path that the Commission should take in this case is clear: a policy entitling Amateur Radio operators to an effective outdoor antenna in every case is called for. Reasonable conditions and prior approval of an HOA are not inconsistent with that entitlement.

55. Notwithstanding the findings of the Commission in 1996 with respect to Federal jurisdiction over private land use regulations which interfere with Federal telecommunications policy, the Commission declined in 1999 to extend its *Amateur Radio Preemption* policy to private land use regulations. ARRL had asked the Commission in a Petition for Rule Making filed February 7, 1996 (RM-8763) to clarify several aspects of its *Amateur Radio Preemption* policy, including extending the “no prohibition, reasonable accommodation, and least practicable regulation” three-part test to private land use regulations. ARRL’s premise was that the Commission’s finding in 1985 that private land use regulations did not “concern” the Commission was based on jurisdictional considerations, and the jurisdictional issue had been squarely resolved in favor of FCC jurisdiction in the OTARD proceeding. In fact (as quoted *infra*) the Commission had specifically determined in that proceeding that *private land use regulations were entitled to less, not more, deference than governmental land use regulations which interfere with Federal telecommunications policy*. Nevertheless, the (then) Deputy Chief, Wireless Telecommunications Bureau, in a tersely worded *Order* released under delegated authority November 19, 1999,<sup>44</sup> declined to extend the *Amateur Radio Preemption* policy to

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<sup>44</sup> *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*, DA 99-2569 (WTB rel. November 19, 1999); *affirmed with modifications by Order on Reconsideration*, 15 FCC Rcd. 22151 (Deputy Chief, WTB, 2000); *review denied by Memorandum Opinion and Order*, FCC 01-372 (December 26, 2001). In the Order on Reconsideration, the Deputy Chief, WTB, attempted to distinguish the OTARD policy from the *Amateur Radio Preemption* policy by arguing that OTARD antennas are relatively small, and Amateur Radio antennas can be very large in some installations. The Deputy Chief cited for that incorrect and unsupported premise an unusually large “moonbounce” antenna array located in a very rural area of Texas unburdened by CC&Rs as an example of the difference in antenna size. The logic of the Deputy Chief, WTB in that *Order on Reconsideration* was faulty in several major respects. First of all, the OTARD preemption policy was, and Section 1.4000 of the Commission’s rules is, far more restrictive and limiting of a CIC’s jurisdiction than is *Amateur*

CC&Rs.<sup>45</sup> However, the Commission did “strongly encourage” CICs to apply the “no prohibition, reasonable accommodation, and least practicable regulation” three-part test to private land use regulation of Amateur radio antennas:

Notwithstanding the clear policy statement that was set forth in PRB-1 excluding restrictive covenants in private contractual agreements as being outside the reach of our limited preemption (citation to *Amateur Radio Preemption* omitted) we nevertheless strongly encourage associations of homeowners and private contracting parties to follow the principle of reasonable accommodation and to apply it to any and all instances of amateur service communications where they may be involved.

*Order*, DA 99-2569 at ¶ 6

This admonition neither had nor could have had any effect on the consistent prohibitions of Amateur Radio antennas.<sup>46</sup> In fact, the situation has developed precisely contrary to the Commission’s admonition: since 1999, as is noted above, the number of CICs has radically increased and the ability of a licensed Amateur Radio operator to install and maintain any

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*Radio Preemption*. The OTARD rule intrudes significantly on both municipal and private land use jurisdiction, and does so pursuant to a clearly articulated Congressional goal, which is the protection of competition among commercial video delivery systems and services. There has never been a suggestion that the OTARD policy, or any similar restrictive preemption policy should be applicable to Amateur Radio antennas in CICs, so the comparison by the Deputy Chief, WTB at the time was a comparison of “apples and oranges.” Second, the relief requested herein in Appendix A is far less intrusive with respect to HOA jurisdiction than is the OTARD policy. See *infra*.

<sup>45</sup> ARRL had argued in RM-8763, among other things, that the judicial enforcement of CC&Rs constituted “state action” and that therefore, “private” land use regulations were of necessity subject to the same limitations as are governmental land use regulations. Neither the Deputy Chief, WTB nor the Commission ever addressed that argument. In the November 19, 1999 *Order* in RM-8763, the Deputy Chief, WTB stated that, since the Commission’s policy on private land use regulations was “clear” it was unnecessary for the Commission to determine whether or not judicial enforcement of covenants constitutes “state action”. Such a finding, which has been made in several judicial decisions, e.g. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Park Redlands Covenant Control Committee v. Simon*, 181 Cal. App. 3d 87 (1986); *Ross v. Hatfield*, 640 F. Supp. 708 (D.C. Kansas, 1986); would subject otherwise purely private conduct to the constitutional limitations applicable to government action. However, it certainly was not “unnecessary” for the Commission to make that determination. The Commission in fact could not have reasonably dismissed ARRL’s Petition *without* making that determination, since its premise for the dismissal of the Petition was (the erroneous view) that CC&R regulation of antennas was a matter of purely private agreement.

<sup>46</sup> The admonition does, however, establish that the Commission’s *intention* is, and has been, for its *Amateur Radio Preemption* policy of no prohibition, reasonable accommodation and least practicable regulation to accomplish a legitimate interest of the regulator to apply to all types of land use regulation of Amateur Radio antennas. The only other question, therefore, is whether the Commission has the jurisdiction to apply its policy to private as well as governmental land use regulations. That question is now beyond any doubt answered in the affirmative.

effective Amateur Radio antenna from a residence has been substantially diminished or precluded entirely in entire planned cities.

56. ARRL did not in 1985, when the Commission issued its *Amateur Radio Preemption* declaratory ruling, challenge the Commission's uneven handling of State and local versus private land use regulations. It was apparent at the time that the Commission's statement that it did not have an "interest" in private land use regulations assumed a lack of jurisdiction. That is the only explanation for why it did not, despite its very specific finding at the time of a "strong Federal interest in promoting Amateur Radio communications," apply its flexible, no preclusion, reasonable accommodation, least practicable regulation policy equally to *all* types of land use regulations. After the 1996 Telecommunications Act's directive to preempt all regulation of OTARD devices by municipal or private land use authorities, however, and the Commission's finding that it did have jurisdiction to regulate or even preempt private land use regulations, and that it was appropriate to accord them *less deference than local governmental regulations*, ARRL asked the Commission in 1999 to apply the 1985 *Amateur Radio Preemption* policy to all types of land use regulations. The Commission, in response, said in 1999, 2000 and 2001 that it preferred to have guidance from Congress in order to do that. The Commission's 2012 in the Report to Congress, DA 12-1342, released August 20, 2012<sup>47</sup> noted that, *absent guidance from*

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<sup>47</sup> Section 6414 of the *Middle Class Tax Relief and Job Creation Act of 2012*, Public Law 112-96, called on the Commission, 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. The Commission, 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

Congress, there was “no compelling reason” to “revisit the Commission’s previous determinations that preemption should not be expanded to CC&Rs” (covenants, conditions and restrictions). But it nevertheless reiterated in the report that should Congress provide such guidance, the Commission would act immediately (consistent with its prior urging that HOAs apply a “no preclusion, reasonable accommodation, least practicable regulation” policy on their own initiative).

**V. Congress, ARRL and CAI Have Provided Ample Guidance to the Commission, Establishing a Bright Line Test for Private Land Use Regulations to Support a Sustainable Amateur Radio Service and to Protect the Legitimate Interests of HOAs.**

57. Following the Commission’s directive to seek Congressional guidance relative to the preclusive effect of private land use regulations on Amateur Radio operators, ARRL consulted with members of the House Energy and Commerce Committee and with the Senate Commerce Committee, and in June of 2013, toward the end of the 113th Congress, Representatives Adam

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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. The Commission 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* indicated 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.

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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.

The Commission 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 private land use regulations. Rather, it reiterated that it is willing to act swiftly to provide relief to Amateur Radio operators from private land use regulations, should Congress provide guidance in the area.

Kinzinger of Illinois and Joe Courtney of Connecticut introduced a bipartisan Bill, H.R. 4969, the Amateur Radio Parity Act of 2014. That Bill called on the Commission to amend its Section 97.15(b) regulations concerning the height and dimensions of station antenna structures to prohibit a private land use restriction from applying to amateur service communications if the restriction precludes such communications, fails to accommodate such communications, or does not constitute the minimum practicable restriction on such communications to accomplish the legitimate purpose of the private entity seeking to enforce such restriction. Effectively, it asked that the Commission extend the essential holding of *Amateur Radio Preemption* to both State and local land use regulations and private land use regulations affecting Amateur Radio communications. The Bill was popular on a bipartisan basis and in the few months prior to Congress' adjournment in 2014 the Bill garnered 69 cosponsors. The Bill would not have imposed significant restrictions on HOAs or CICs. The premise was that the Commission had in place a workable policy which balanced local land use considerations, and the strong Federal interest in effective Amateur Radio communications. The policy should 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 established 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.

58. Early in the 114<sup>th</sup> Congress, the same Bill was introduced March 4, 2015 as H.R. 1301 by Representatives Kinzinger and Courtney. A companion Bill S.1685, was introduced in

the Senate on June 25, 2015 by Senators Roger Wicker of Mississippi and Richard Blumenthal of Connecticut. The House Bill ultimately garnered significant bipartisan support with 126 cosponsors. However, it also brought statements of concern from the Community Associations Institute, with respect to the lack of specificity of the “reasonable accommodation” requirement. The staff of the House Subcommittee on Communications and Technology, wishing to resolve these concerns, brought ARRL and CAI representatives together to work cooperatively to resolve CAI’s concerns. The result of that effort was a slightly revised Bill which more precisely enunciated the relationship between a HOA and a licensed radio Amateur residing in a community regulated by the HOA. H.R. 1301 was amended such that it directed the Commission to amend its station antenna structure regulations to prohibit a private land use restriction from applying to amateur radio stations if the restriction: (1) precludes communications in the Amateur Radio Service; (2) fails to permit a licensee of Amateur Radio Service to install and maintain an effective outdoor antenna on property under its exclusive use or control, or (3) is not the minimum practicable restriction to accomplish the lawful purposes of a community association seeking to enforce the restriction. Before installing an outdoor antenna, however, the amended H.R. 1301<sup>48</sup> provided that an amateur radio licensee must obtain a community

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<sup>48</sup> The operative language of H.R. 1301 read as follows:

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;

association's prior approval. A community association<sup>49</sup> may: (1) prohibit installations on common property not under the exclusive control of the licensee, and (2) establish installation rules for amateur radio antennas and support structures.

59. The premises for the legislation stated in the Bill were several. The Bill stated Congressional findings as follows:

(1) More than 730,000 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 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.

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(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.

<sup>49</sup> The definition of “community association” in the Bill was as follows:

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.

(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.

There is also included in the Bill text language that disassociates the provisions of the Bill pertaining only to private land use regulations from the Commission's *Amateur Radio Preemption* policy, 47 C.F.R. §97.15(b) such that the regulation, which now pertains only to State and municipal regulation of Amateur Radio communications, (1) is independent from the provisions to be applied to private land use regulations; and (2) is unchanged by the provisions dealing with private land use regulations.

60. The result of the negotiations that led to the meeting of the minds between ARRL and CAI was that the support for the amended H.R. 1301 by both parties was memorialized in correspondence from each party addressed to Representative Greg Walden, then Chair of the House Subcommittee on Communications and Technology. The Bill as amended passed in the House of Representatives unanimously in September of 2016. S. 1685, which had been

considered by and which was approved by the Senate Commerce Committee, was not amended and was not further considered by the Senate. The Senate did not act on H.R. 1301 before the end of the 114<sup>th</sup> Congress. However, there was only one Senator, Bill Nelson (D-Florida), who registered any concern about the Parity Act provisions and there were four cosponsors of the Senate Bill.

61. Immediately upon the commencement of the 115<sup>th</sup> Congress, on January 13, 2017, H.R. 555, the Amateur Radio Parity Act of 2017 (which was identical to the version of H.R. 1301 that had passed the House in 2016 was introduced, again by Representatives Kinzinger and Courtney). The Bill passed unanimously again, this time four days after being introduced. A Senate companion Bill was introduced by Senators Wicker and Blumenthal on July 12, 2017. Senator Nelson of Florida continued to oppose the Senate Bill but his view was unique. Twice more during the current Congress, the current Parity Act language was passed by the House, once as a component of the National Defense Authorization Act (NDAA) and more recently as part of the FY 2018 Financial Services and General Government (FSGG) appropriations legislation that is still pending. Therefore, the Parity Act language that resulted from extensive negotiations between ARRL and CAI has been passed by the House without objection *four different times* in the past two years, and three times in the current Congress.

62. Clearly, the House of Representatives (acting on a completely bipartisan basis), ARRL, and CAI have all agreed upon a “bright line” test to distinguish between unreasonable private land use restrictions from those which are reasonable. Those private land use regulations (or the application of them) which prohibit, preclude or fail to permit the installation and maintenance of effective, outdoor Amateur Radio antennas; and those which do not constitute the minimum practicable regulation to accomplish the CIC’s (principally aesthetic) legitimate

goals are precluded. Meanwhile, Amateur Radio antenna installations are not entitled to be installed in common areas,<sup>50</sup> and HOAs are entitled to require prior approval of each antenna installation<sup>51</sup> and to enact reasonable regulations governing the installations. What is reasonable differs depending on the residential circumstances of the licensee. The application of the HOA's regulations must be evaluated on a case-by-case basis. An HOA might well require single family homeowners within a planned subdivision to locate an Amateur Radio antenna at a location which will be least obtrusive from surrounding parcels or from public rights-of-way.<sup>52</sup> However, the owner of a cooperative or condominium in a multiple unit dwelling may not be able to install a permanent outdoor antenna, but might be able to erect a temporary antenna on a patio, balcony or deck, for example, when the licensed Amateur station is in use. Some form of Amateur Radio operation using an effective outdoor antenna 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 communications immediately when called upon to do so, on a uniform basis. HOA regulation of Amateur Radio antenna installations cannot be arbitrary. For example, an Amateur Radio operator who moves to a suburban community in, for example, Northern Virginia who can erect and maintain on a rooftop a television broadcast receive antenna atop her or his roof of any size or configuration pursuant to the OTARD rules should also be permitted to erect an Amateur Radio antenna of the same general size and configuration at the same residence.

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<sup>50</sup> Even the OTARD rules do not currently require that owners of residences in multiple-unit dwellings be given access to common areas for antenna installations. See, 47 C.F.R. § 1.4000(a)(1) (areas for OTARD antenna installation must be under the "exclusive use and control" of the property owner).

<sup>51</sup> Similar to the building permit requirement for municipal land use approval of antennas, it is not unreasonable to require radio Amateurs to obtain prior approval of the HOA before a new installation commences after the effective date of this regulation. However, the HOA is subject to the overarching requirement that it must permit an effective outdoor antenna in all cases, and the prior approval requirement would necessitate that the HOA's governing documents enable such a requirement in the first place. The HOA cannot have any more authority than what is accorded by the Declaration of Covenants under any circumstances.

<sup>52</sup> However, as the Commission has noted in the past, imposition of excessive costs or burdens on an applicant for an Amateur Radio antenna authorization (such as a complete vegetative screening requirement) can constitute a *de facto* prohibition; it cannot be said to be a reasonable accommodation; and it cannot be said to constitute the minimum practicable regulation to accomplish even an aesthetic objective.

63. The path forward furnished by this legislation; the overwhelming support for it in both the House and Senate; and the complete accord that has been reached between ARRL (as the national association for Amateur Radio) and CAI, (the only national association representing the interests of homeowners' associations in the United States) has provided the level of guidance that the Commission has been seeking with respect to achieving a balance between the strong Federal interest in Amateur Radio communications and the interests of CICs and communities regulated by private land use regulations. The rules proposed in the attached Appendix are indeed balanced and reflect the understandings reached in the legislative process over the past five years. The Commission should enact these rules which necessarily prohibit the application to Amateur Radio stations of deed restrictions which preclude Amateur Radio communications. Those deed restrictions which do not permit an Amateur Radio operator living in a deed-restricted community to install and maintain an effective outdoor antenna on property under the exclusive use or control of the licensee should be prohibited; as should those restrictions which do not impose the minimum practicable restriction on Amateur communications to accomplish the lawful purposes of an HOA seeking to enforce the restriction. Yet, Amateurs who wish to install an antenna in a deed restricted community where there is an HOA may (if the HOA's governing documents permit such), notify and obtain prior approval of the HOA. HOAs can preclude Amateur antennas in common areas (property not under the exclusive use of the licensee). If their governing documents permit it, HOAs can enact reasonable written rules governing height, location, size and aesthetic impact of, and new installation requirements for, outdoor antennas and support structures for amateur communications. This regulation is and is intended to be prospective only, and is not applicable to antennas installed prior to the effective date of the regulation.

## **VI. Conclusions.**

64. Radio Amateurs provide, on a volunteer basis, public service, emergency and disaster relief communications using radio stations located in their residences. Their volunteer service costs taxpayers nothing. Reliable communications are provided at no cost to any served agency or to any government entity. FEMA has stated that when Amateur Radio operators are needed in an emergency or disaster, they are really needed. Congress has many times favorably cited the Amateur Radio Service as a model of public responsiveness and volunteerism. Agencies served by Amateur Radio include the American Red Cross, the Salvation Army, the Federal Emergency Management Agency, the Department of Defense and each and every state office of emergency services. Disaster relief planning exercises and emergency communications certification courses guarantee trained operators throughout the United States, located within and outside disaster relief areas. Amateur Radio also provides an opportunity for STEM education in experiential learning programs and technical self-training by licensees which is of immense value. Finally, it provides ample opportunities for international goodwill, cultural learning and positive social connections.

65. Land use restrictions that prohibit the installation of outdoor Amateur Radio antenna systems are the largest threat to Amateur Radio communications. Private land use regulations are escalating quickly and exponentially. An outdoor antenna is critical to the effectiveness of an Amateur Radio station. Typically, all Amateur Radio antennas are prohibited in residential areas by private land use regulations. In other instances, prior approval of the homeowners' association is required for any outdoor antenna installation, but there are no standards governing the homeowners' association's approval process and almost always, approval requests are denied.

66. Thirty-three years ago, the Commission held that there was a “strong Federal interest” in effective and reliable Amateur Radio communications. The Commission also found that zoning ordinances often unreasonably restricted Amateur Radio antennas in residential areas. In a docket proceeding referred to as “PRB-1” the Commission created a three-part test for municipal regulations affecting Amateur Radio communications. State or local land use regulations: (a) cannot preclude Amateur Radio communications; (b) must make “reasonable accommodation” for Amateur Radio communications; and (c) must constitute the “minimum practicable restriction” in order to accomplish a legitimate municipal purpose. See, 47 C.F.R. §97.15(b). The FCC did not extend this policy to private land use regulations at the time, assuming that they were merely private agreements between buyers and sellers of land. However, in implementing the Telecommunications Act of 1996, the Commission found that: (a) it does have jurisdiction to preempt private land use regulations that conflict with Federal policy; and (b) that private land use regulations are entitled to less deference than municipal regulations because the former are premised solely on aesthetic considerations, rather than safety issues, whereas municipal regulations are concerned with both. In response to ARRL’s repeated requests that the Commission apply its *Amateur Radio Preemption* policy equally to all types of land use regulations which unreasonably restrict or preclude volunteer, public service communications, the Commission said that it would do so upon receiving some guidance from Congress in this area.

67. The United States Congress has overwhelmingly and consistently supported the Amateur Radio Parity Act, upon which the instant Petition is based, for the past five years. The House has passed the legislation on four different occasions, including three times during this current session of Congress. This is bipartisan legislation that costs the Federal government

nothing at all. It is now time for actual and functional parity in the Commission's regulations in order to protect the strong Federal interest in Amateur Radio communications. The rule in the attached Appendix, which incorporates all of the elements of the Parity Act legislation, is a balanced provision that would protect both the entitlement of Amateur Radio volunteers to be able to utilize their FCC-issued licenses to provide emergency, disaster relief and public service communications, while at the same time protecting the aesthetic concerns and the jurisdiction of homeowners' associations. The language has the support of both ARRL and the Community Associations Institute (CAI) which is the national association of homeowners' associations. ARRL and CAI have cooperatively and carefully negotiated the provisions of the Bill, and both organizations have stated their support for those provisions. The language in the attached appendix for the regulation implementing the Bill language is consistent with the provisions of the Bill.

Therefore, the foregoing considered, ARRL, the national association for Amateur Radio, respectfully requests that the Commission issue a Notice of Proposed Rule Making at an early

date, proposing to adopt the language set forth in the attached Appendix and to modify Section 97.15 of the Amateur Service Rules to include the language set forth therein.

Respectfully submitted,

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# APPENDIX A

Section 97.15 of the Commission's rules, which currently reads as follows:

**§ 97.15 Station antenna structures.**

(a) Owners of certain antenna structures more than 60.96 meters (200 feet) above ground level at the site or located near or at a public use airport must notify the Federal Aviation Administration and register with the Commission as required by part 17 of this chapter.

(b) Except as otherwise provided herein, a station antenna structure may be erected at heights and dimensions sufficient to accommodate amateur service communications. (State and local regulation of a station antenna structure must not preclude amateur service communications. Rather, it must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose. See PRB-1, 101 FCC 2d 952 (1985) for details.)

(c) Antennas used to transmit in the 2200 m and 630 m bands must not exceed 60 meters in height above ground level.

Would be amended to read as follows:

**§ 97.15 Station antenna structures.**

(a) Owners of certain antenna structures more than 60.96 meters (200 feet) above ground level at the site or located near or at a public use airport must notify the Federal Aviation Administration and register with the Commission as required by part 17 of this chapter.

(b) Except as otherwise provided herein, a station antenna structure may be erected at heights and dimensions sufficient to accommodate amateur service communications. (State and local regulation of a station antenna structure must not preclude amateur service communications. Rather, it must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose. See PRB-1, 101 FCC 2d 952 (1985) for details.)

(c) Any private land use restriction, including restrictive covenants and regulations imposed by a community association, that on its face or as applied

(1) precludes or fails to permit amateur service communications; (2) fails to permit a licensee to install and maintain an effective outdoor antenna capable of operation on all amateur radio frequency bands, on property under the exclusive use or control of the licensee; or (3) which does not constitute the minimum practicable restriction on such communications to accomplish the lawful purposes specifically articulated in the declaration of covenants of a community association seeking to enforce such restriction, is prohibited and may not be enforced.

Subject to the foregoing, and with respect to antennas first installed after the effective date hereof, a community association (if so empowered by the declaration of covenants) may (a) require an amateur radio licensee to obtain approval from the association of a proposed antenna before initial installation; (b) prohibit the installation of an antenna or antenna support structure by a licensee on common property not under the exclusive use or control of the licensee; and (c) establish reasonable written rules concerning height, location, size, and aesthetic impact of, and installation requirements for, effective outdoor antennas and support structures for the purpose of conducting communications in the amateur radio service.

*(See Private Land Use Regulations Concerning Amateur Radio Antenna Structures, Report and Order, \_\_\_\_\_ FCC Rcd. \_\_\_\_\_ (201\_) for details).*

(d) Antennas used to transmit in the 2200 m and 630 m bands must not exceed 60 meters in height above ground level.