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MEMORANDUM

To:	Hap Rigby, Esquire; Greg Orlando, Esquire; Matthew Plaster, Esquire
From:	Chris Imlay, General Counsel, ARRL, the national association for Amateur Radio
Copy:	Frank McCarthy, The Keelen Group
Re:	False and Misleading Information Disseminated by the Community Associations Institute, Alexandria, VA Concerning S.1685, the Amateur Radio Parity Act of 2015.
Date:	July 31, 2015

Greetings. This memorandum is submitted pursuant to your recent meeting with Frank McCarthy of The Keelen Group concerning S.1685. ARRL the national association for Amateur Radio is most grateful for Senator Thune's interest in this legislation, which would extend to all types of land use regulation, municipal and private, a very flexible, 30-year old FCC regulatory policy intended to protect the strong Federal interest in Amateur Radio communications while protecting the inherently local jurisdiction and processes of municipal land use planners and regulators and homeowner's associations in deed-restricted communities. Only very recently have we noted any significant level of concern about S.1685 (or its House counterpart, H.R. 1301, which now has some 95 cosponsors) from the Community Associations Institute (CAI), an association of homeowners' associations (HOA). CAI has placed on its web site many material misstatements of fact and disturbingly inaccurate conclusions about S.1685, though they have not visited Senate offices to date, as far as we can tell. It is unclear why CAI feels the need to oppose this legislation, since the Bill does not threaten HOAs or intrude on HOAs' jurisdiction whatsoever. CAI was all but invisible on the House side last year when we obtained 69 cosponsors for H.R. 4969, and they have been invisible on the Hill this year but apparently have now decided to take a different avenue with their members.

To respond to each allegation in the disturbingly misleading article on our legislation that appears on the CAI web site (quoted in red below:

"If you don't want 75 foot towers throughout your community, you must contact your Members of Congress today and ask them to oppose H.R. 1301 (in the House) and S. 1685 (in the Senate)."

There is absolutely nothing in the FCC's 30-year-old reasonable accommodation policy with respect to Amateur Radio communications (codified at 47 C.F.R. § 97.15(b)) that would mandate or authorize "75-foot towers" "throughout" a community, whether that community is regulated by municipal zoning and building codes or by private land use regulations. Antenna height, configuration and the extent to which it is aesthetically compatible on a given parcel of

residential land is now subject to municipal jurisdiction and, should S.1685 pass, it would continue to be subject to homeowners' association jurisdiction as well. The *only* obligation of an HOA within a subdivision regulated by private land use regulations would be the same as that which is applicable to municipal land use regulators now: the HOA (1) could not preclude Amateur Radio communications; (2) it must reasonably accommodate Amateur Radio communications; and (3) the HOA regulations must constitute the minimum practicable regulation consistent with the HOA's legitimate purpose (i.e. aesthetics). How that is done in each and every case would be left to the good faith discretion of the HOA, just as it is left to the discretion of municipal land use regulators now.

"Contact your U.S. Representative and U.S. Senators today and ask them to oppose all legislation prohibiting community association review or approval of HAM radio towers and large, fixed antennas by clicking here."

There is nothing in S.1685 which would "prohibit" community association review or approval of Amateur Radio antennas. Nor is there anything that would mandate "radio towers" or "large, fixed antennas." The language is inflammatory. The question in each case, with respect to each parcel of residential real property is what is reasonable with respect to that parcel. That decision in every case is made by the HOA, premised on good faith negotiation with the FCC-licensed Amateur Radio operator. S.1685 preserves all HOA jurisdiction to review and approve each individual proposed antenna installation.

"H.R. 1301/S. 1685 pre-empt community associations' architectural guidelines and rules related to installation of HAM radio towers and antennas. If the legislation passes (and it is moving forward in a way that is threatening), community associations would not be able to require prior approval for 70' HAM radio towers and antennas nor would community associations have the ability to create reasonable processes and aesthetic guidelines."

This is a complete misrepresentation. The legislation does not preempt HOA's architectural guidelines or rules regarding amateur radio antennas (unless those rules, or the language of the deed restrictions, covenants, HOA regulations or architectural guidelines prohibit outdoor antennas *completely*). An HOA, in the exercise of its normal review processes for proposed antennas, would be obligated only to make reasonable accommodation and not impose restrictions that are more than what is practically necessary to achieve the HOA's (aesthetic) goal. The HOA would continue to have the authority to require prior approval for any given outdoor antenna installation (just as municipal land use regulators are now able to require prior approval in the form of building permits or conditional use permits for antenna installations) and "reasonable processes and aesthetic guidelines" are precisely what the FCC reasonable accommodation policy calls for.

"HAM radio enthusiasts indicate this legislation is needed so they may respond to and assist in communication during a local disaster. The truth is HAM radio enthusiasts who aid the public interest do so at the site of a local disaster with portable equipment. They do not need permanent equipment at their residence; especially towers and antennas that pose a health and safety risk to their neighbors."

A major benefit of Amateur Radio stations in residences is that, at the time of any disaster or emergency, there are always Amateur Radio operators inside and outside the disaster areas to provide communications for first responders and, later, for disaster relief agencies. An Amateur Radio station is like a fire extinguisher on the wall. It has to be there and ready when a disaster strikes, and Amateur Radio's resilience during natural disasters and the ubiquitous geographic distribution of the stations in residences and their preexisting readiness are the factors that make the Service valuable when the emergency occurs. Emergency communications are not the only justification for having a functional, operating Amateur station at one's residence. FCC's rules (47 C.F.R. §97.3) set forth numerous Federal objectives for the Amateur Service. Congress has on numerous occasions noted these benefits as well. Public Law 103-408 in 1994, a Joint Resolution to recognize the achievements of radio amateurs, and to establish support for such amateurs as national policy, called for reasonable accommodation for Amateur Radio from residences. It declared that Amateurs are to be "commended for their contributions to technical progress in electronics, and for their emergency radio communications in times of disaster;" and that the FCC is "urged to make "reasonable accommodation for the effective operation of Amateur Radio from residences, private vehicles and public areas;" and to "facilitate and encourage amateur radio operation as a public benefit."

It is impossible to have a functioning Amateur Radio station that will be available when needed if all that is permitted is portable antennas and transmitters. Nor does that permit emergency communications drills and exercises that are an integral part of the emergency planning of virtually all States and U.S. territories.

The statement that "towers and antennas…pose a health and safety risk" to neighbors is an inflammatory and false inference. FCC regulations comprehensively address issues of radio frequency energy exposure and ensure safety in residential areas. All Amateur Radio licensees must comply with FCC standards in rules relative to the environmental safety of their station installations. Municipal zoning and building code requirements address structural safety of antennas. FCC declared in 1996, when enacting regulations (as instructed by Congress) to preempt government and private land use regulations restricting the use of over-the-air video reception devices in residential areas (47 C.F.R. §1.4000), that (1) it has the jurisdiction to preempt private land use regulations that conflict with telecommunications policy; and (2) that private land use regulations are related primarily to aesthetic concerns and it is therefore appropriate to accord them *less deference* than local governmental regulations that can be based on health and safety considerations as well as aesthetics. HOA regulations therefore are irrelevant to health and safety issues. Furthermore, the FCC's Wireless Telecommunications Bureau, in an *Order* released November 19, 1999, stated that the Commission "strongly encourage(s)" homeowner's associations to apply the "no prohibition, reasonable accommodation, and least practicable regulation" three-part test to private land use regulation of Amateur radio antennas:

> "…we …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 (1999).

"The truth is the majority of community associations tell CAI that HAM radio operators are welcome to pursue their hobby if they follow community guidelines.
In a 2014 survey conducted by CAI covering community associations in 46 states, 64 percent of respondents confirmed their association's board or architectural review committee had never denied a request to install a HAM radio antenna.
An additional 27 percent of survey respondents found no record of a denial. The survey also found that associations routinely provide space for HAM radio clubs so residents can pursue their radio hobby."

The repeated pejorative references to Amateur Radio as a "hobby" denigrates the Service and ignores decades of Congressional and FCC support for the "strong Federal interest" in Amateur Radio communications. In any case, however, the suggestion that HOA regulations, covenants and other deed restrictions accommodate Amateur Radio now is not at all truthful or well-taken. In fact, as was established in a 2012 FCC Docket proceeding (Docket 12-91, Report # DA 12-1342) there are two basic types of antenna provisions in private land use regulations. They either preclude outdoor Amateur Radio antennas outright, or else they subject residents' applications for even unobtrusive antennas to the standardless review of the HOA or architectural control committee. These provisions, when coupled with the exponential increase in the number of communities subject to private land use regulations, result in an expanding inhibition and preclusion of Amateur Radio and threaten its existence. FCC has acknowledged that private land use regulations are used as a means of precluding the use of outdoor antennas. *See, Preemption of Local Zoning Regulation of Satellite Earth Stations and In re Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*; 11 FCC Rcd. 19276, 19301, at fn 12 (1996), ["(r)estrictive covenants are … used by homeowners' associations to prevent property owners within the association from installing antennas."].

It is of course irrelevant whether or not there have been records of denials of authorizations for outdoor antennas in a deed-restricted subdivision; ARRL has not been privy to CAI's alleged, but unquantified "survey" or its results. But the issue, instead, is how many requests have been made to the HOAs and what the disposition of each was. It is highly unlikely that an Amateur Radio operator will move into a subdivision which has covenants that prohibit outdoor antennas and then request authority to install one. The HOA would have no ability to grant or deny such approval in any case. The record in the 2012 FCC docket proceeding on this subject does not support the argument that there are routinely some accommodations made for Amateur Radio in residential subdivisions regulated by private land use regulations. Instead, it establishes that Amateur Radio is not permitted in deed-restricted communities at all.

Nor has it been ARRL's experience that HOAs routinely permit common area Amateur Radio stations and CAI has not quantified its vague claim to the contrary.

Please let me know if additional information is called for. Again, thanks to you and to Senator Thune for your interest in S. 1685.
Chris Imlay