



It Seems to Us

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Restrictive Covenants

“The problem with restrictive covenants is that in growing areas of the country there is no way to avoid them.”

A radio station, amateur or otherwise, is only as effective as its antenna. From the days of the earliest experimenters right up to the present time, amateurs' desires for the best possible skyhook have not always been welcomed by our neighbors and our communities.

Most of us prefer to have a station — perhaps not our only station — in our home. There is ample case law establishing that an amateur station is a reasonable and normal accessory use of residential property. While land use is regulated at the local level, it is well established that the regulation of interstate and foreign communication by wire or radio is in the federal sphere.

At the request of the ARRL, in 1985 the FCC asserted limited federal preemption of state and local regulation of amateur station antenna structures. The principle, called “PRB-1” because at the time the Amateur Radio Service was in the purview of the Private Radio Bureau, is now written into §97.15(b) of the FCC Rules: “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.”

PRB-1 has been of great assistance to countless amateurs in dealing with their local land use agencies. However, in 1985 the FCC was not persuaded that it had the authority to preempt private land use regulations such as covenants, conditions and restrictions (CC&Rs). In theory the purchaser of real estate that is subject to CC&Rs accepts them voluntarily; if you don’t like them you don’t have to buy the property. At that time it was still possible in most of the country to find housing that was not subject to CC&Rs, so it could be argued that their impact on Amateur Radio was not a federal issue.

Unfortunately, since then CC&Rs have spread like invasive species. For five years beginning in 1996 the ARRL went to the FCC with the argument that the effect of applying PRB-1 to government but not to private land use regulation was to deprive the residents of areas blighted by CC&Rs of adequate emergency communications facilities. Ultimately we were told that the FCC would take corrective action only if instructed to by Congress.

So we went to Congress. As we predicted on this page in September 2001, it wasn’t easy — but after a decade of patient effort we achieved success on an important first step. A section of Public Law 112-96, signed by President Obama on February 22, 2012, required the FCC in consultation with the Office of Emergency Communications in the Department of Homeland Security to complete a study on the uses and capabilities of Amateur Radio communications in emergencies and disaster relief, including identifying “impediments to enhanced Amateur Radio Service communications and recommendations regarding the removal of such impediments.” The statute specifically identifies “the effects of unreasonable or unnecessary private land use restrictions on residential

antenna installations” as an example of such an impediment. A report on the findings of the study is due to be submitted to the House and Senate Commerce Committees by August 17.

On April 2 the FCC opened a proceeding to gather information for its study. The Commission posed 16 questions, ten dealing with the importance of amateur emergency communications and six with impediments to enhanced communications. In response the ARRL submitted a 128-page filing that documents the importance of what we do in providing communications relating to disasters, severe weather, and other threats to lives and property and discusses in great detail the impediments presented by private land use regulations. The filing includes 91 examples of restrictive covenants, most of which either prohibit Amateur Radio antennas or make them subject to the arbitrary whims of an Architectural Control Committee or some other body and many of which are illegal as written. Also included are 43 case studies that document the real-world experiences of amateurs in 21 states who have tried to live with CC&Rs but have ended up with unsatisfactory antennas or none at all. These examples were drawn from more than 870 responses to requests for input from ARRL members and other amateurs.

Citing estimates by the Community Associations Institute (CAI), the ARRL filing notes that in 2011 there were 314,200 association-governed communities with 62.3 million residents — figures that have more than doubled since 1990. In 2005 CAI concluded that “more than four in five housing starts during the past five to eight years have been built as part of an association-governed community.” The result is that in the areas of the country with the fastest population growth it is virtually impossible to avoid restrictive covenants when purchasing a home. Clearly, what might have been regarded as a state or local issue in 1985 is a national issue today and requires a federal solution.

When the FCC reports to Congress we are hopeful that its recommendations will reflect the reality that is illustrated by the ARRL filing. We are also hopeful that — unless the FCC is persuaded to act on its own — the committees of jurisdiction will use the report to develop legislation along the lines of §207 of the Telecommunications Act of 1996, which instructed the FCC to prohibit restrictions on terrestrial and satellite television receiving antennas. The Commission later expanded the resulting provision to include antennas for fixed wireless broadband access.

The FCC has the authority as well as the obligation to see that all of its Amateur Radio licensees are treated equitably. The evidence is clear that with so many millions of Americans having no choice to do otherwise, it is sound public policy to extend the benefits of the Commission’s time-tested PRB-1 limited preemption policy to those who must live subject to private land use regulations.

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