

## PRB-1

PRB-1, cited as "Amateur Radio Preemption, 101 FCC2d 952 (1985)," is a limited preemption of local zoning ordinances. It delineates three rules for local municipalities to follow in regulating antenna structures: (1) state and local regulations that operate to preclude amateur communications are in direct conflict with federal objectives and must be preempted; (2) local regulations that involve placement, screening or height of antennas based on health, safety or aesthetic considerations must be crafted to reasonably accommodate amateur communications; and (3) such local regulations must represent the minimum practicable regulation to accomplish the local authority's legitimate purpose. The heart of PRB-1 is codified in the FCC Rules [97.15(e)]. Of course, what is "reasonable" depends on the circumstances! For suggestions about what to do when you are faced with a restrictive ordinance, see "Interacting with Municipal Officials," below.

### Local Zoning Ordinances

In the past, amateurs relied solely on their powers of persuasion when dealing with local officials. Conflicts between amateurs and local authorities over the antenna height, placement in the yard, number of antennas on a particular support structure (eg, a tower) and the like were common. In the absence of detailed federal regulations governing amateur antennas (except for those aspects discussed previously), municipal leaders often fill in the void and use their broad discretion in public health and safety matters to enact regulations that limit antennas and supporting structures. The people who write these regulations have a lot of other things on their mind, so these regulations seldom take into account your need for an antenna of certain dimensions and height to be effective (working the DXpeditions, running phone patches to the South Pole and so on), so conflicts arise.

The situation reached epidemic proportions in the early 1980s and amateurs who invested family savings in fighting local zoning, building codes and covenant restrictions in the courts around the country were losing because there was no clear statement of any federal interest in the matter by the FCC. The courts held that the FCC regulates radio, but because the FCC had issued no statement restraining the zoning power of cities and counties, the traditionally local interest in zoning regulations that protects the public generally superseded the interests of any individual amateur.

By October 1983, the ARRL Board of Directors reviewed the adverse court decisions and recognized that antenna restrictions would continue to be a major stumbling block unless a statement of federal preemption emerged from the FCC. On July 16, 1984, the League filed a formal request asking the FCC to issue a declaratory ruling that would declare void all local ordinances that preclude or significantly inhibit effective, reliable amateur communications. Hundreds of comments were filed when the FCC established a pleading cycle, labeled PRB-1 ("PRB" being the designation for the FCC's Private Radio Bureau, the bureau in the FCC's internal organization that handled Amateur Radio matters at that time. It has been replaced by the Wireless Telecommunications Bureau). Comments were filed by amateurs, zoning authorities and city planners.

September 19, 1985, was a red-letter day in the history of Amateur Radio, as the FCC issued its now-famous PRB-1 declaratory *Memorandum Opinion and Order*, which says, in pertinent part, that "state and local regulations that operate to preclude amateur communications in their communities are in direct conflict with federal objectives and must be preempted."

May 31, 1989, marked another milestone when the Commission adopted the revised and reorganized Part 97. The new rules codify the essence of the PRB-1 ruling: ". . . State or local regulation of amateur antennas may not preclude, but must reasonably accommodate, such

communications, and must constitute the minimum practicable regulation to accomplish the local authority's legitimate purpose. " [97.15(e)].

The specific holding of PRB-1 has been of extreme benefit to amateurs and, with a few exceptions, has encouraged open cooperation and dialogue between the communities seeking to regulate amateur antennas and amateurs. Now that important language of PRB-1 has been incorporated into the FCC rules, the federal interest and official FCC policy with respect to amateur communications can be more easily demonstrated to municipal officials who need to be educated by you and your fellow hams.

### Interaction with Municipal Officials

Don't be intimidated by the thought of going to city hall for a permit. Virtually all ham radio operators who own the physical area necessary for the safe installation of a tower should be able to legally erect a tower of *some* size. Here are the steps to take to enhance your chances of getting as much tower as you wish:

### Information Gathering

Because regulations pertaining to antennas and the way building and zoning departments (or the equivalent) process permits vary from city to city, the first and most important step is information gathering. This means a visit or a phone call to your local building/zoning department or the equivalent, to obtain a copy of the **zoning ordinances**. Don't settle for anything less than the *whole booklet* of regulations! If the clerk or secretary offers to photocopy for you only the pages that pertain to antennas, keep in mind the sections mentioned, and politely thank him or her. But then get the entire booklet (which normally costs between \$5 and \$15).

You should get the whole booklet because you need to know more than just the sections under which the town regulates antenna heights. You need to know what procedures to follow when you apply for a permit. You also need to know how to appeal an adverse decision if you don't get a favorable ruling from the building inspector (or the zoning enforcement officer, or the equivalent) on the first try. Furthermore, if you ever need to seek the advice of a lawyer, the first thing the attorney will need to see is the entire body of regulatory law affecting land-use regulations for the town. Therefore, obtain the entire book and study the regulations carefully.

### Zoning Regs Defined

But what are zoning regulations, exactly? Zoning regulations are rules that establish the permitted uses and the minimum and maximum dimensional requirements of structures in established areas or "zones." Ninety-nine percent of the time, a ham will want to put up an antenna/tower at his home, which will be in a residential zone. Because the overwhelming number of jurisdictions hold Amateur Radio to be a normal, accessory (as opposed to primary) use of residential property, it is proper in a residential zone. Similarly, such edifices as swimming pools, tennis courts and tool sheds are considered accessory structures on residential property.

But in addition to use rules, zoning regulations also establish rules as to how *high* structures are permitted to be. You may find your proposed tower being held to the same height standards as other "buildings" or "structures" permitted in a residential zone. Read the definitions section near the beginning of the zoning rules. Sometimes the definition of "building" is broad enough to include a tower, or antennas may be defined specifically. If the regulations do *not* define antennas specifically, see if they mention "accessory structures." Read the definition to see if antennas are

included in that definition. You may find a section that defines flagpoles, church steeples and similar structures in language that could easily apply to towers as well.

Your town may be concerned with building codes, which are standards relating to safety that have been agreed upon by engineers from the architectural, structural, civil and other engineering disciplines. Once the building inspector determines that your tower is proper and would not violate zoning regulations pertaining to use and dimensions, your construction must still be carried out in accordance with building codes. Fortunately, this is rarely a problem. Tower manufacturers provide detailed specifications and plans for proper installation in accordance with all building codes.

### Meeting the Building Inspector

After you have had a chance to study the regulations, you can probably tell which rules apply to your installation. If the clerk or secretary pointed out certain sections, look at those sections first to see if you agree. The regulations, when read in the context of your proposed antenna installation, should be understandable. If the regulations are full of legal mumbo-jumbo, however, now is the time to consult a lawyer, such as an ARRL Volunteer Counsel. But if you feel confident about your level of understanding and have familiarized yourself enough to carry on an intelligent conversation about the regulations, make an appointment with the building inspector (or the appropriate city official). Be prepared to discuss the proposed location, height and purpose of your structure, and take along the basic engineering data provided by the tower manufacturer to satisfy building code concerns. Also, take along a rough drawing of your property that shows your boundary lines, the house and other buildings nearby, and the proposed location of the tower.

The building inspector, much like a police officer walking a beat, is the first interpreter of the law, in this case the zoning law. What he or she says will be the first indication of the steps you will have to take to get a permit for your installation. After you present your proposal, listen carefully to what the building inspector says. Building inspectors are often willing to be helpful and grant your permit, provided you follow the correct application procedures. For example, you may need to file a map of your property drawn to scale.

If the building inspector appears negative, pay attention nevertheless to what he has to say, even if his reasoning may be wrong. It is important to thoroughly understand the basis for his opinion. Do not go into the confrontation mode with the building inspector; keep your "grid current" low! Don't wave a copy of PRB-1 or Part 97 in his face and "command" him to give you the permit because of federal law. He's not going to know what you're talking about, nor is he likely to make a snap decision in your favor that might get him into hot water later. If you are going to talk legal issues, moreover, he's going to want his lawyer (the town attorney) in on it.

In many situations, the building inspector will have the authority to grant a building permit or other approvals without the involvement of any of the higher-ups. This is why it's important to maintain a good relationship with him if possible.

Sometimes (especially if you're lucky), zoning ordinances specifically exempt antennas from the height restrictions of other structures. Depending on how your town's ordinances are written, it may be necessary for you to seek the permission of a zoning commissioner or land-use board. Usually this means that the zoning regulations are set up to allow antennas to a certain height limit without the need of a hearing, but if you want to exceed the "usual" height threshold, you need to apply for a special permit. This means that the drafters of the zoning ordinances decided that certain uses of structures could only be permitted after a public hearing and demonstration of special need.

While this undoubtedly means more red tape and delay if you find yourself in this situation, such a requirement is not illegal in the eyes of the law (including PRB-1). It does provide a forum for potential opposition from neighbors, however, and preparation for the hearing is all-important.

If there is a problem, it will be one of two varieties: It may be a matter of interpretation of the ordinance by the building inspector, or the ordinance may be written in such a way that he is unable to reasonably come up with any other interpretation. If the ordinance is prohibitive under any reasonable interpretation, you should immediately seek the advice of a lawyer.

If the problem is that you disagree with the building inspector's interpretation of the zoning regulations, that's not as serious. While you may ultimately need a lawyer to resolve the issue, you can still carry the issue further yourself. Tell the building inspector in a *nonconfrontational* manner that you have a different interpretation and ask him for his comments. See if you can narrow it down as to where the problem lies. If it is a problem with the way the ordinance is written, eg, under no possible interpretation can you get your permit, that is a more serious problem. It may mean that the ordinance is illegal, and therefore invalid. The town officials won't like that and are more apt to fight vigorously against having their ordinance invalidated. They would rather change an interpretation for a particular situation than throw out their entire ordinance and have to start from scratch. If you run into an unresolvable problem with the building inspector, you should then, as a last resort, calmly tell him about PRB-1 and the rules [97.15(e)]. As mentioned previously, more often than not, you will find that it does not help at the building inspector level. At most, all you may get across is that the federal government, through the FCC, has acted under a preemption order called PRB-1. You can say that local governments cannot prohibit antenna towers, nor can they unreasonably restrict them in terms of size and height. However, you can't expect the building inspector to be equipped to engage in a lengthy discussion of the nuances of the legalities of federal preemption.

### The Appeal

If there is a reasonable interpretation or even a loophole in the regulations under which you should be allowed to put up the antenna/tower, you can usually appeal that decision to your town's Zoning Board of Appeals (ZBA) or equivalent body. If you have absolutely no alternative, you can ask the ZBA for a variance. This means you are asking the ZBA to relax the zoning rules in your case, to give you a special exemption because of some exceptional difficulty or unreasonable hardship. Variances are granted sparingly because it is difficult to establish severe hardship. Remember, too, that if you apply for a variance, you are admitting in the eyes of the law that the ordinance applies to your antenna. This means that you can't contest or challenge the applicability or the jurisdiction of the ordinance in a later proceeding.

The procedure for appealing the building inspector's ruling is outlined in the regulations. You are given a chance to explain what Amateur Radio is and to present your alternative interpretation that would permit you to legally erect your tower or to explain that your hardship is severe enough that you ought to be allowed to put up your tower despite the zoning rules.

PRB-1 should be used to persuade the ZBA to adopt your more reasonable interpretation because federal law requires it to adopt as reasonable an interpretation as possible. If there is no possible interpretation of the zoning regulations that will allow your tower to go up, then tell the ZBA that PRB-1 and Section 97.15(e) are binding federal regulations that supersede the ZBA's law if there is a conflict. That is, its interpretation of its own zoning ordinance should be guided by the binding order rendered by the FCC in PRB-1. In other words, the local regulations cannot regulate in the "overkill mode." But make no mistake about it; state and local governments can, under the specific language of PRB-1, still regulate antennas for reasons of health, safety and welfare, as long as the

regulations are reasonable.

#### **Additional Guidelines for the Presentation**

Here are a few other things to keep in mind when you make your presentation before the ZBA: Make sure you can establish the safety factors of your tower. On matters of safety, there should be *no compromise* by the municipality. If your installation does not meet building-code requirements, no board (or court, if it comes to that) will allow it. The manufacturer's specifications must be followed.

On the other hand, aesthetics and welfare, particularly the effect on the surrounding property values, are more likely to be areas of compromise by the ZBA. Your task here is threefold: You have to demonstrate your *need* for the proposed tower and the *safety* of the structure, and you have to show that you have taken reasonable steps to *lessen the impact on the surrounding property*.

As mentioned previously, ARRL HQ has helpful materials to assist you in preparing for the hearing in the "PRB-1 Package." The League can also refer you to ARRL Volunteer Counsels or Consulting Engineers near you.

If you haven't done so, try to gauge the opposition, if any, of your neighbors prior to the hearing. Neighbors who show up at the hearing can be friendly or adversarial; touching base with your neighbors in advance is a good way to transform adversaries into people who will speak in support of your position. Be prepared to answer all questions that you can anticipate. Although the touchy area of radio-frequency interference (RFI) does not fall under the jurisdiction of the ZBA, your reaction to questions about RFI might be used by the ZBA members to judge your character (which could form the unwritten or unstated basis for a denial). A ZBA member is more likely to give the benefit of the doubt to someone who sounds like a responsible, good neighbor.

If neighbors or ZBA members raise concerns about RFI, one of the most effective statements you can make is to explain that, although years ago the home-brew nature of ham stations may have resulted in hams being responsible for RFI, today that is hardly the case. With the present level of Amateur Radio sophistication, RFI is rarely a problem, and when it is, it is usually the fault of the manufacturers of the stereo, TV or other home-entertainment device. But explain to the ZBA members that you will work with your neighbors to resolve any RFI problems in the rare event that RFI problems occur. Also, point out that a tower taller than neighbors' homes will help direct your signals *above* their houses, providing added "insurance" against possible problems.

When you make your presentation, keep it clear, concise and simple. Use a written outline so you don't forget key points, but speak directly and respectfully to the ZBA members in your own words. Avoid technical language or ham radio jargon that's incomprehensible to non-hams. The ZBA does not, and has no reason to, care about dB, SWR, wavelengths, DX or anything else "sacred" to Amateur Radio operators. They care about how big your aerial is going to be and what damage it could do to a neighbor's home if it falls (you might point out that towers rarely fall or break, and if they do, it is generally not from the bottom). Emphasize the public service nature of Amateur Radio, and its value to your community in an emergency.

Make sure your demeanor is professional, and dress in a conservative businesslike manner (leave your ARES jumpsuit, call-sign cap, and painter's pants at home). Make sure, also, not to operate in a vacuum; enlist the support of the local Amateur Radio community and ask as many of your fellow hams as possible to show up for the hearing. A unified show of support will make a profound impression on ZBA members who are, after all, ordinary people yet politicians at heart.

### Private Restrictions

There are circumstances under which it is very difficult to erect a tower or an antenna of any kind. Covenants and deed restrictions can be highly restrictive. (See "But I Never Agreed to That!".) A condominium owner "owns" only that which exists *within* the confines of the four walls that forms his unit. The rest of the building and the land are owned by someone else or owned in common by all the unit owners. Unless you can persuade the condominium association to allow you to put up an antenna in a common area, you had better concentrate on operating mobile from your car or bone up on so-called "invisible" or limited-space antennas in attics or crawl spaces in the ceiling (although this may also be a violation of the condominium bylaws). You cannot expect to be able to put up a tower on land or a building that you do not own outright. Private restrictions, commonly called *CC&Rs* (covenants, conditions and restrictions) are another aspect of antenna/tower regulation that exist outside of the zoning regulatory body. *CC&Rs* are the "fine print" that may be referenced in the deed to your property, *especially* if you are in a planned subdivision that has underground utilities. Your best bet before proceeding with your tower plans is to take a copy of your deed to an attorney to have a limited title search done for the specific purpose of determining whether private restrictions will affect your rights. If you're buying a new home, have a title search done *before* you sign on the dotted line. When you agree to purchase the property, you agree to accept covenants and deed restrictions on the land records, which may preclude you from being able to put up a tower at your new dream home. See **Deed Restrictions** below.

### Summary

With respect to governmental, as opposed to private, restrictions, it all boils down to one simple fact: Any licensed ham radio operator who has the private property of a sufficiently sized parcel of land, has the right under federal law to erect a tower and antenna, subject to the reasonable regulation of local and state government.

A substantial amount of money has been spent in legal costs by amateurs in attempts to have courts tell local governments that their idea of reasonable is *not* reasonable under PRB-1. Sometimes a clash cannot be avoided. But if you're like most of us, you want to know how best to go about putting up the highest tower you can without getting into a big legal struggle and alienating your otherwise friendly neighbors.

Emphasis from the start should be on the practical aspects of planning a successful campaign for getting the necessary approvals:

- Be realistic about the physical limitations of your backyard.
- Go on an information-gathering mission at the local town hall to determine which officials and regulations are applicable to your proposed antenna installation.
- Discuss your plans with the local building inspector.
- Determine whether the building inspector's interpretation of how the zoning rules apply to your plans is fair or should be respectfully challenged.
- Then, if you are dissatisfied with the inspector's interpretation, obtain information from ARRL HQ and seek legal advice from a competent attorney as to whether there is any reasonable interpretation of the regulations that would allow you to put up the tower.

· If no such interpretation presents itself, seek a variance or make a frontal assault on the ordinance as being in violation of PRB-1. Once you get into this area of the law, legal advice is often a necessity.

Most amateurs who follow these steps come out of it with a positive result. If a final decision by your local zoning board is unsatisfactory, however, you have the option of taking the matter to court.

## Deed Restrictions

Long before zoning regulation of land existed, private restrictions in deeds controlled how land could be used. The English system of common law, that we have inherited, permitted a seller of land to impose certain restrictions on the use of that land, which the seller, even after the sale was long past, could enforce in the courts. These restrictions or covenants were included in the deed from seller to buyer. Today, as noted above, deed restrictions are typically referred to as covenants, conditions and restrictions, *CC&Rs*.

These days, covenants are commonly used, especially in new housing developments, by builders or developers as a means of controlling land use after individual parcels are sold off. Suppose a builder has a tract of 100 homes and is selling them one at a time. The builder, until he is able to sell all of the lots, wants to maintain uniformity so that, for example, one of the buyers cannot paint his house 20 different day-glo colors, making the remaining unsold lots less marketable.

Since the CB boom of the mid-1970s, builders and developers have included antennas in the standard list of things they don't want homeowners to install while the builder is attempting to sell the remainder of the houses in the development. They are concerned that people may find antennas or towers unattractive. So when the subdivision plan is filed in a town's land records, a list of covenants is filed, too. Every deed from the builder makes reference to the list, subjecting every buyer down the line to the restrictions.

Typically, the declaration of covenants provides that enforcement authority passes from the developer to the homeowner's association after the developer sells all the houses in the development and goes on his merry way. The homeowner's association is, among other things, charged with maintaining the aesthetics of the neighborhood and can often determine whether additional structures, such as a tool shed, swing set or antenna can be built. If a homeowner installs an antenna in violation of a covenant, the homeowner's association can bring that owner to court to enforce the covenant. (See "But I Never Agreed to That!".)

## Conclusion

Some hams are blessed with living in communities where there are neither zoning nor covenant restrictions on their antenna farms. However, you can't assume that this is the case in your own particular situation. The time to start looking into whether it's okay to put up a tower is *before*, not *after*, you start pouring the concrete for your base section. If you exercise common sense (eg, resist the temptation to put up a Big Bertha on a city lot) and good-faith compliance with the legal procedures, you will undoubtedly be successful in securing permission for an appropriately sized tower for your antenna system. But keep in mind that what you do, and how you do it, affects not only you, but all other radio amateurs in your town, and perhaps -- through precedent-setting court cases -- amateurs throughout the entire country.