

Read mail Room 2/15/00
File in AM 8763
Comments to Petition for
Reconsideration filed on
12/17/99 and 12/20/99.

Dear FCC,

I would like to make comments as to rewording PRB-1. I wrote the Kansas Amateur Radio Act of 2000. The wording of PRB-1 is erroneous and has remove homeowner associations from local government control.

Kansas Bill 2644 Killed by PRB-1

Kansas Bill 2644 was affectedly killed on grounds stating that when the FCC wrote PRB-1 they preempted restrictive covenants in contractual agreements. The League of Kansas Municipalities (LKM) claimed that the proposed Kansas Bill would not honor their preemption. With any luck the bill will die a natural death by tabling so we can have another chance, provided the FCC can undo what they have done.

A few very alarming things transpired from the Kansas Utilities Committee meeting. First of all, the LKM faction has made it known that they would not permit any new cell phone towers or amateur radio towers to exist in the State of Kansas. This is made possible by the interesting fact that the FCC in their preemption has removed and made exempted this group of home owner associations from Federal, State and local laws. Thanks to the FCC, once a restrictive covenant is written the community is powerless to do anything other than accept the conditions. Homeowner associations now use a universal or boiler plate covenant which are being created by this very unified group. It is a forced agreement. Accept or don't live here. As the agreements are now universally written there is no longer a choice. Like it or not if you have to live in a community, you need a home to live in. Prior to PRB-1, Homeowner associations were govern as a subset of the local zoning board. The reason for being governed by the zoning board is the fact they are indeed a zoning agency with their own board to change at will their restrictions. Up till the exception of PRB-1 homeowner association were not private as they didn't meet the criteria of being so.

Homeowner Association Exempted From Local Government By FCC Have Gone Wild

I visited over 30 housing and building sites in three counties around Wichita. Antennas are not permitted up to 10 acre lots. This is not all, some covenants are excluding dogs above a certain weight requiring the owners to weigh their dogs. Some covenants are excluding horses from 5 acres and up saying that they don't want that type of person from buying into their area. Both of these are in conflict of local laws. Best believe that these factions are now federally empowered and they are using that power any which way they can. They have been preemption from local and state laws by the very agency that was trying to protect us. Developers are the first do this by filing a restrictive covenant as soon as the property is zoned. These folks are well organized and are moving in on cell phone towers and amateur radio now as we hams don't have a lobbying force large enough to combat their efforts. Commercial TV and Radio is next. Their reasoning is that with satellite, there is no longer a reason to have any ground based transmitting antennas of any kind. Folks this is the truth.

FCC Can Repair The Order of Things

Had the FCC written: **Restrictive covenants fall under the zoning guide lines of local government and will not be addressed by the Commission** this would have made everything fall into the natural order of things. Restrictive covenants conceived by developers are not private, but use to fall under local zoning guide lines. But instead the FCC chose to define something they knew nothing about and changed the order of government and cut all safe guards provide by local government by enacting this exclusion into law. With the FCC preemption, they reclassified the local restrictive covenant from local zoning to "Private" and at the same time they nullifies PRB-1 as far as amateur radio is concerned. It has now proven to be a slow death

sentence for amateur radio. In case you are not aware of the difference in covenants, let me explain the difference.

Two types of Restrictive Covenants

There are two types of covenant restrictions. These are private restrictions and restrictions imposed by a governing body. Both of these are commonly called CC&Rs (covenants, conditions and restrictions).

Private Covenant Restrictions

Private restrictions by definition are restrictions that apply or are confined to a singular property. A singular action placing restrictions on a singular property. An action which removes the property from public control and participation and may limit or remove the property from public use.

Years ago a private land owner could create a covenant between himself and a prospective buyer or owner to control future land use. This act came from the English system of common law, that we have inherited, which permits a seller of land to impose certain restrictions on the use of that land, by the seller, even after the sale has long past. A change to this type of covenant can only be made by order of a judge in a court of law. The restrictions are part of the deed or the title itself. The important factor that should be noted is that the property already has an existing condition or has been approved for its intended use through proper zoning or governing channels. The seller in this case can specify the future use of the property. This property then becomes exempt from all future zoning and code changes as long as it is maintained in the specified condition and is not used for an illegal purpose. An example is an area or structure (on or with real-estate) that is sold or given such as a historical site, a memorial, a park or a preserve. The private restriction is exempt from all future local and federal zoning restrictions unless it affects the safety or welfare of the community. PRB-1 clearly exempts this restriction from its order.

Governing Body Restrictions

Governing body restrictions are those restrictions that apply to all property or real estate within its governing authority. Property within the authority is broken up by areas or zones that define property use. These restrictions are dynamic in nature. In other words, the restrictions may be changed to meet the needs of those that live or work within these zones.

Governing body restrictions are conditions specified by any level of government. Generally land restrictions are imposed by a governing body's Zoning Board. Some governing bodies due to their size may act on their own behalf without a separate agency such as a zoning board. These organizations set forth land use requirements. Any laws that are affected or created by these organizations are passed on to the governing body. As laws are dynamic in nature a land use protection provision is built in. The user is protected from changing laws by what is known as a Grandfather Clause. This clause states that a user/owner is not required to conform to new requirements or restrictions as long as there is no change in the property use or ownership. This clause does not apply if compliance is required for the reason of community safety or welfare.

Once a law is passed, by the governing body or higher level of governing body that affects the governing body's authority, it becomes a restriction (law) that requires compliance by the user or owner of property within the area of authority. Existing users/owners will be protected by the Grandfather Clause and new users/owners will be required to comply with the new restriction. What this means is that all property sold or developed on or after September 19, 1985, are preempted by PRB-1. This order supersedes any restriction that is in conflict with this order. On or after this date, no restriction may be placed on property unless a private restriction, as defined above, that is in conflict with this order.

Existing property and property which is to be constructed must conform to building codes and zoning requirements. These codes and zoning requirements/restrictions that have been put in place must meet all federal, state and local laws. Additional restrictions may be placed on the property by the owner, developer or the corporate developer. These restrictions may be in the form of material, looks of a structure or the appearance of the property. All these things may be done as long as they don't violate zoning, building codes, private restrictions and must be in compliance with federal, state and local laws. Laws are researched by the builder, developer or the developers attorneys before the restrictions are filed to assure compliance. These restrictions, like any governing body's restrictions, can be change at any time in the future should the need arise. PRB-1 preempts all zoning to include the right to have amateur radio antennas and towers by licensed amateur radio operators. Any restriction eliminating the use of amateur radio antennas and towers may not appear in CC&R or zoning document filed on or after September 19, 1985 to be in compliance with federal law. Property sold after this date shall have any restrictions of this nature removed, the same as any new replacement law that has been enacted.

Homeowner Are A Zoning Authority Under the Local Government Zoning Board

Homeowners meet all the criteria of a zoning authority with it's own governing board. It does not meet any of the criteria of a Private Restriction. Using Wyoming law for an example lets look at the definition of zoning and it will be self evident that homeowner associations are indeed a zoning agency falling under the authority of local government. Compare this to the guide lines of Private Restrictions discussed earlier. The following Wyoming law can be found on the web at:

<http://legisweb.state.wy.us/titles/98titles/title15/t15chp1.htm>

ARTICLE 6

ZONING

15-1-601. Regulations; scope and purpose; uniformity within authorized districts; to follow plan; objectives.

(a) The governing body of any city or town, by ordinance, may:

(i) Regulate and restrict the:

(A) Height, number of stories and size of buildings and other structures;

(B) Percentage of lot that may be occupied;

(C) Size of yards, courts and other open spaces;

(D) Density of population; and

(E) Location and use of buildings, structures and land for trade, industry, residence or other purposes;

(ii) Establish setback building lines.

(b) The governing body may divide the city or town into districts of such number, shape and area as it deems necessary, and within those districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land.

(c) Regulations may differ from one (1) district to another but shall be uniform for each class or kind of buildings within a district.

(d) All regulations shall be made:

(i) In accordance with a comprehensive plan and designed to:

(A) Lessen congestion in the streets;

(B) Secure safety from fire, panic and other dangers;

(C) Promote health and general welfare;

(D) Provide adequate light and air;

(E) Prevent the overcrowding of land;

(F) Avoid undue concentration of population; and

(G) Facilitate adequate provisions for transportation, water, sewerage, schools, parks and other public requirements.

(ii) With reasonable consideration, among other things, of the character of the district and its peculiar suitability for particular uses; and

(iii) With a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the city or town;

(iv) With consideration given to the historic integrity of certain neighborhoods or districts and a view to preserving, rehabilitating and maintaining historic properties and encouraging compatible uses within the neighborhoods or districts, but no regulation made to carry out the purposes of this paragraph is valid to the extent it constitutes an unconstitutional taking without compensation.

15-1-602. Regulations; powers of governing body; public hearing; notice.

(a) The governing body shall specify how regulations, restrictions and the district boundaries are to be determined, established, enforced, amended, supplemented or otherwise changed.

(b) No regulation, restriction or boundary is effective until after a public hearing. At least fifteen (15) days notice of the time and place of the hearing shall be published in a newspaper of general circulation in the city or town.

15-1-603. Regulations; protest makes change ineffective; exception; hearing and notice.

(a) If there is a protest against a change in the regulations, restrictions or district boundaries signed by the owners of twenty percent (20%) or more of the area of the lots included in the proposed change, or of those immediately adjacent within a distance of one hundred forty (140) feet, the change is not effective except upon the affirmative vote of three-fourths (3/4) of all the members of the governing body. In determining the one hundred forty (140) feet, the width of any intervening street or alley shall not be included.

(b) The provisions for public hearings and notice specified in W.S. 15-1-602 apply to all changes.

15-1-604. Zoning commission; appointment; duties; effect on governing body.

The mayor, with the consent of the governing body, shall appoint a zoning commission to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. The commission shall make a preliminary report and hold public hearings before submitting its final report. The governing body shall not hold its public hearings or take action until it has received the commission's final report. If a city planning commission already exists, it may be appointed as the zoning commission.

15-1-608. Board of adjustment; powers and duties; vote required.

(a) The board shall:

(i) Hear and decide:

(A) Appeals from and review any order, requirement, decision or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to this article;

(B) All matters referred to it or upon which it is required to pass under any such ordinance.

(ii) Fix a reasonable time for hearing an appeal, give public notice, adequate notice to the parties in interest and decide the appeal within a reasonable time. Any party may appear in person at a hearing or by agent or attorney;

(iii) Adopt rules in accordance with the provisions of any ordinance adopted pursuant to this article.

(b) The board has the power to:

15-1-608. Board of adjustment; powers and duties; vote required.

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(B) All matters referred to it or upon which it is required to pass under any such ordinance.

(ii) Fix a reasonable time for hearing an appeal, give public notice, adequate notice to the parties in interest and decide the appeal within a reasonable time. Any party may appear in person at a hearing or by agent or attorney;

(iii) Adopt rules in accordance with the provisions of any ordinance adopted pursuant to this article.

(b) The board has the power to:

(i) Hear and decide special exemptions to the terms of the ordinance upon which the board is required to pass under the ordinance;

Kansas The First Battle

This is the first battle site for the LKM lobbyist organization. It was a test condition to assert and assure the power of the group. Now as a matter of record, the LKM organization and others like them can contest constitutionally any state law that has already been passed as they have now proven exemption for their group at the state level.

The FCC Needs To Act Immediately

In FCC 85-506 36149 or PRB-1 the FCC need to correct the wording at the bottom of page 10.

Replace Foot Note 6 stating:

"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 when the agreement is executed and do not usually concern this Commission."

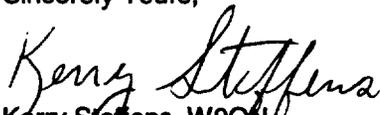
With the following statement:

"We reiterate that our ruling herein does not include restrictive covenants. Such agreements fall under the jurisdiction of the local governing zoning authority and do not usually concern this Commission."

Replacing this statement would return the homeowners association to the natural order of government.

Thanks you for your consideration.

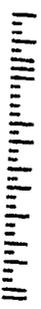
Sincerely Yours,


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