

DOCKET FILE COPY ORIGINAL

March 31, 2000

Office of the Secretary
Federal Communications Commission
445 12th St SW

Washington, DC 20554

RM-8763/

Re: RM8763 November 1999 PRB-1 Antenna Restrictions, and the ARRL "Petition for Reconsideration" of same (may be Order # DA2569), filed in late December 1999

Dear Secretary

Please forward this letter and the attached photocopies of a recent editorial from an amateur radio periodical (CQ Magazine-March 2000) to the proper Commissioner(s) to whom this project has been assigned.

I found it not only to be quite interesting, but also to be very informative and "to the point". I thought it may help the Commissioners, in presenting and/or clarifying more of the entire "antenna vs living quarters" situation, as it now exists in today's living communities and residential developments, as opposed to back in 1985, when PRB-1 Ruling was first enacted.

Sincerely



Craig S. Kidder W8CK
(a concerned and affected amateur radio operator)

encl: 3 cc's of CQ Editorial
3 cc's of authors photocopy permission request and reply

No. of Copies rec'd 0+2
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An Editorial

Dairy Farms, Antenna Farms, and the 14th Amendment

Back in 1985, the FCC issued a limited federal preemption of local antenna regulations as applied to amateur radio operators. The document, called PRB-1, said that there is "a strong federal interest in promoting amateur communications" and that "(s)tate and local regulations that operate to preclude amateur communications ... are in direct conflict with federal objectives and must be preempted." The FCC ruled that local regulations "must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose," such as safety or aesthetics. However, in a footnote to that sentence, the Commission reiterated an earlier statement that the ruling "does not reach restrictive covenants in private contractual agreements," explaining that "(s)uch agreements are voluntarily entered into by the buyer or tenant when the agreement is executed and do not usually concern this Commission."

Restrictive covenants, also known as deed restrictions or "CC&Rs," are attachments to the deed or rental contract for your house, condo, or apartment that place certain restrictions on your use of the property—even if it is *your* property—and are passed on from one owner to the next. For example, my wife and I are prohibited by a deed restriction from operating a dairy farm on our postage-stamp size, semi-urban property. Now, we can live quite well without a dairy farm on our one tenth or so of an acre. But what if the deed restrictions said I couldn't put up an *antenna* farm, or more specifically, any outdoor antenna at all? This would pose a major problem. My choice would have been to try to negotiate the removal of the restriction (easier said than done in most places) or to buy a different house.

In theory, all terms of a private contract are negotiable, and the federal government historically has been extremely hesitant to stick its fingers into private contracts. Generally speaking, most of us would agree that we are capable of making informed personal and business decisions without government "help." The FCC, mindful of this history, said 15 years ago that it had no authority to extend the terms of PRB-1 to private contracts.

The landscape of buying a home in this country has changed dramatically since 1985, however. The traditional American residential real-estate transaction of one

person or family purchasing a home from another, with usage subject only to local laws and zoning regulations, is becoming a rarity. Over the past 15 years, there has been an explosion in the growth of "planned communities," in which an entire neighborhood—or even a town-size development—is built by a single developer and each property is sold subject to a host of restrictive covenants regarding what you may and may not do with and to your home. These restrictions range from permitted paint colors to types of trees and shrubs you may plant, to barring any outdoor antennas and prohibiting radio transmissions of any sort. Not only are these restrictions written into the deeds, they are enforced after the developer leaves by homeowners' associations with *de facto* governmental powers (more on this later).

Fifteen years ago, you might indeed have had the choice to buy a different house in a nearby neighborhood if you didn't like the restrictions that came along with a proposed purchase. Today, however, in many parts of the country it is virtually impossible to buy or lease a home in any given geographic area without being part of a "planned community" with restrictions on outdoor antennas. Today, if you want to live in a particular area, you may have very little choice. In addition, many homeowners' associations enact restrictions *after the fact*, and may force you to move if you don't comply. What can hams do?

The ARRL's Petition

In 1996, with over a decade of experience in real-world application of PRB-1 in cases around the country, the ARRL filed a petition with the FCC, asking it to extend the reach of its preemption policy to include restrictive covenants and similar private regulations, and to clarify that the "prohibitive and excessive fees" and other costs imposed by some municipalities as part of the permit process do not meet the FCC's requirements for "reasonable accommodation" and "minimum practicable regulation" set forth in PRB-1. The FCC sat on the petition for three years and then, last November, denied it, again saying that restrictive covenants in private contracts are "outside the reach of our limited preemption." The ARRL promptly filed a petition for reconsideration, citing the many changes of the past 15 years. We believe the ARRL position is correct and

strongly urge the FCC to reexamine the matter from a year-2000 perspective.

The Public Policy Question

Federal preemption of private contracts is extremely rare, but it is certainly not unprecedented. Even the FCC, since 1985, has seen fit to do so, and this is why it is appropriate for it to consider doing so now.

In the past, the federal government has placed limits on deed restrictions in real-estate transactions only when those restrictions were deemed to be contrary to law or "public policy." The best example deals with discrimination. Up through the 1960s, it was not at all uncommon for a deed restriction to limit future sale of the property to members of particular racial or religious groups. After passage of civil rights and fair housing laws in the '60s and '70s, these provisions of private contracts were declared illegal because they violated the public policy that racial and religious discrimination in housing sales is wrong.

Along comes the 1990s and the explosive growth of "planned communities" that prohibit outdoor antennas as part of their deed restrictions. Well, these limits weren't a problem just for hams. By barring all outdoor antennas, these developments essentially required residents to subscribe to cable TV (with no choice of cable company) in order to have TV signals with anything more than "rabbit ears" quality. The FCC began to be bombarded with complaints from residents who were unhappy with their designated cable provider, and from broadcasters and satellite TV companies who complained that these restrictions illegally stifled competition, limited consumer choice in access to news and entertainment, and restricted interstate commerce. It has long been the public policy of the United States that competition and free choice in the marketplace are good things (and conversely, that monopolies and restrictions on consumer choice are bad); and the Constitution clearly states that only the federal government may regulate interstate commerce.

In response, the FCC correctly preempted those restrictive covenants that barred citizens from putting up antennas to receive broadcast television and/or direct satellite TV transmissions. Now, the ARRL correctly asks the FCC, "What about us?" After all, the FCC has already said it has a "strong federal interest" in

promoting amateur radio, and that local regulations that effectively bar amateur operation "are in direct conflict with federal objectives." In other words, they violate public policy. This, coupled with the Commission's previous decisions to preempt private restrictions on outdoor receiving antennas, make it very clear that the FCC has the authority, and the just cause, to extend that preemption to amateur transmitting antennas as well. After all, from a visual perspective (and this is the concern of most of these restrictions

—controlling the visual aesthetics of a development), there is no difference between a receiving antenna and a transmitting antenna, or between an amateur band antenna and a TV antenna. "We hold these truths to be self-evident, that all antennas are created equal." From a regulatory perspective, indeed they are. And the 14th Amendment guarantees all Americans "equal protection of the laws." Thus, a law that requires private contracts to permit one sort of antenna must also require that they permit other, similar,

antennas. Federal regulations carry the force of law, so that applies here as well.

A Clear and Present Danger

Another provision of the 14th Amendment is the requirement for "due process of law." One of the biggest problems with these massive "private" developments is that their governing bodies—generally homeowners' associations or condo boards—have in fact become *de facto* local governments, but without the requirements of due process.

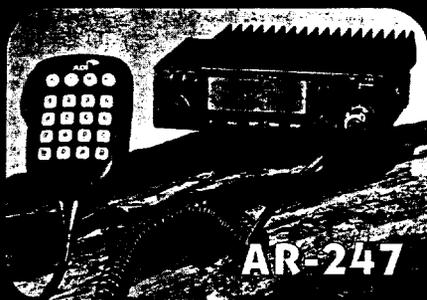
In many of these developments, "the board" has taken on most of the responsibilities and powers of local government, often contracting privately for police and fire protection, road maintenance, and trash removal, levying taxes (in the form of common charges and special assessments), setting rules of acceptable conduct, regulating land use, and imposing penalties for violations. Yet these boards are not accountable to anyone (yes, there are elections, but they are not subject to laws that apply to elections for public office), and since their actions generally fall under the umbrella of "private contract," their decisions often are not subject to judicial review and are essentially above the law. Often, there is no appeal, and the penalty for opposing "the board" is to be forced to move—providing the board approves of your potential buyer. The "developments" that they govern are often huge, and could many times qualify to become municipalities in their own right, but then they would be subject to things such as due process and honest elections.

For some reason, millions of Americans have opted to trade a vast amount of personal freedom for a "nice-looking" neighborhood and the perception of greater security than in surrounding areas. In all too many places today, your only choice is which one of these mini-dictatorships you're going to live in.

In our view, it is these "private developments"—not the Internet, not restructuring—that pose the greatest danger today to the future of amateur radio, because they are beyond the reach of government regulation and are, in many cases, above the law. In fact, the danger they pose to our liberties goes far beyond amateur radio.

The ARRL is right. The FCC needs to take a hard look at these *de facto* local governments, at its own previous actions regarding amateur antennas and other types of antennas, and at its responsibility as an agency of the federal government to assure due process and the equal protection of the laws to all citizens. In short, the FCC needs to reconsider. And it needs to change its mind and provide the same protections to amateurs living in "planned communities" as it does to those living outside them. ■

Out of the Darkness...



AR-247



PR-222

Tired of Two-Meters? Busy, overcrowded channels got you down? Well, one of the most underutilized pieces of ham radio "real estate" is just a new piece of equipment away. The 1.35 Meter (222 MHz) ham band has all of the best benefits of both the Two-Meter and 440 MHz ham band, including superior range in and around buildings, but without the large amount of overcrowding suffered by those "other" ham bands.

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Both radios are modern designs with all the features you'd expect, including direct frequency entry, lots of memory channels (40 channels for the PR-222, 80 channels for the AR-247), compact and rugged metal chassis, and CTCSS encode/decode. The AR-247 even features DCS (Digital Coded Squelch) for use with amateur repeater systems of years to come.

No longer do you have to settle for paying over-inflated prices for gear that was designed more than a decade ago. No longer do a few "big name" manufacturers have a virtual monopoly on equipment for 1.35 Meters.

The future of the 222 MHz ham band has finally arrived. ADI is the future of 222 MHz.

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ADI AR-247 - 1.35 M Mobile

Tx Range: 222-225 MHz
 Rx Range: 216-229 MHz
 Power Out: 30 watts
 80 memories, plus a CALL channel
 CTCSS (50 tones) and DCS (106 tones)
 Encode, Decode, and tone scan
 Canadian ham band expandable
 Backlit microphone
 Direct frequency entry
 DTMF redialer for autopatch use
 Small size! Just 1.5" (H) x 5.5" (W) x 6.25" (D)
 Lots more!

ADI/PRYME

PR-222 - 1.35 M Handheld

Tx Range: 222-225 MHz
 Rx Range: 219 - 228 MHz
 Power Out: 5 watts with supplied battery
 40 memories, plus a CALL channel
 CTCSS (38 tones)
 Canadian ham band expandable
 Direct frequency entry
 Small Size! Just 4.25" (H) x 2" (W) x 0.75" (D)
 (excluding battery pack)
 Lots more!



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Subj: **April Zero Bias editorial by Rich Moseson W2VU (pse forward-tnx)**
Date: 3/22/00 10:25:01 AM Eastern Standard Time
From: W8CK
To: cq@cq-amateur-radio.com

Hi Rich

Just a note to tell you how much I enjoyed , and agree with , your editorial regarding deed restrictions.

I happen to live in , and operate a ham station out of , a covenant deed restricted community , and your total coverage of the subject couldn't be better.

I just hope that you might, other than just the magazine article, have a direct way to forward your article verbatim to the powers that be at the FCC, so that they can truly see the entire picture and the total problem as you so aptly portrayed it.

Rich, I strongly believe that they have never gotten the message in total, and that , if they do see all the aspects, as you outlined them so thoroughly, they really would "see the light" and revise PRB-1 so that the large number of us restricted hams will have a chance to utilize antennas that we need, for the public good, with no real effect on the so called "aesthetics" of the restricted communities--at least , no more than the federally mandated tv antennas, as you state in the editorial.

Even a routing through the ARRL to the FCC, as an addendum to their revision request may be a possibility, if you don't think a direct message would be in order.

To me , any way would be very good, and would certainly be very appropriate. The FCC should be made aware of the total scenario, so that they can make the correct decision once and for all. Deed restricted communities do , in my experience as well as yours, operate on their own, above the law, with little governmental or municipal intervention, and will not provide any reasonable practical accomodation to a homeowner under any circumstance . I was even forced to remove my United States Flag from the front courtyard of my condo because, according to my condo boards' definition, "it altered the appearance of the front of my condominium", and as such, was "against the rules"

Rich, you certainly have my , and thousands of other hams support, and I hope you can help to get the message through, for the benefit of all. Keep up the good work, and keep me posted, if you can find the time.

Yours Sincerely

Craig S. Kidder W8CK

Subj: **Re: April Zero Bias editorial by Rich Moseson W2VU (pse forward-tnx)**
Date: 3/23/00 5:59:27 PM Eastern Standard Time
From: CQMagazine
To: W8CK

Hi Craig --

Many thanks, and I'm hoping that the right folks at the FCC do see the editorial, either directly, via staff members who read the magazine, via the ARRL, or via readers/citizens who wish to share it with them. You have my permission to photocopy it and mail it to the commissioners &/or your Congressional representatives, if you desire.

73,
Rich W2VU