



May 17, 2012

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

**RE: GN Docket No. 12-91—Impediments to Amateur Radio
Communications**

Dear Ms. Dortch:

On behalf of Community Associations Institute (CAI),¹ I am pleased to respond to the Federal Communications Commission's (FCC or Commission) request for comments regarding the impact of deed-based covenants on enhanced amateur radio communication as well as the use and capability of amateur radio communications during national emergencies.

Required Study on Private Land Use Covenants is Biased and Flawed

Public Law 112-96 directs the Commission to study land-use restrictions to assess the impact of these restrictions on amateur radio operators. The FCC is instructed to identify any "impediments" to enhanced amateur radio communications and to offer legislative recommendations to overcome or set aside such obstacles for amateur radio operators. Regretably, the statute does not permit the Commission to reach its own

¹ CAI is the only national organization dedicated to fostering competent, well-governed community associations that are home to approximately one in every five American households. For nearly 40 years, CAI has been the leader in providing education and resources to the volunteer homeowners who govern community associations and the professionals who support them. CAI's 30,000 members include community association volunteer leaders, professional managers, community management firms, and other professionals and companies that provide products and services to community associations.

conclusions regarding land-use restrictions. The statute dictates the Commission view community association covenants, conditions, and restrictions (commonly known as CC&Rs) as impediments to enhanced amateur radio communications and the participation of amateur radio operators in matters of homeland security. On behalf of CAI members and the 62 million American households located in community associations across the country, I strongly urge the Commission to proceed with all due diligence and propriety concerning any proposal to vitiate private covenants that may govern the installation and use of amateur radio towers, antenna, or other external devices in community associations.²

CAI members believe the study required by the Middle Class Tax Relief and Job Creation Act is fundamentally flawed and urges the Commission to acknowledge this fact. Notwithstanding the overt effort to force the FCC to validate a pre-conceived conclusion, CAI members strongly urge that the Commission take a broader approach to the request that private covenants, which are valid under both State and federal law, be voided in this manner.

CAI notes the Commission has expressly rejected prior petitions to set aside CC&Rs on behalf of amateur radio operators. In FCC Memorandum Opinion and Order 85-506, known as PRB-1, the Commission declined to override CC&Rs that may contain restrictions or guidelines on amateur radio operations. The Commission wrote "Since these restrictive covenants are contractual agreements between private parties, they are not generally a matter of concern to the Commission."³ The Commission further commented in its opinion that "Purchasers or lessees are free to choose whether they wish to reside where such restrictions on amateur antennas are in effect or settle elsewhere."⁴ Finally, the Commission further commented in a footnote in its opinion that "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."⁵

² All community associations have three defining characteristics: (1) membership is mandatory and automatic for all owners; (2) certain documents bind all owners to be governed by the community association; and (3) mandatory lien-based assessments are levied on each owner in order to operate and maintain the community association. There are three basic types of community associations: condominiums, cooperatives and planned communities.

³ FCC Memorandum Opinion and Order 85-506, Paragraph 7.

⁴ *Ibid.*, Paragraph 9.

⁵ *Ibid.*, Footnote 6.

Private land use covenants are the foundation of the community association model of housing. According to research conducted this year by IBOPE Zogby International, homeowners purchase in a community association based on overall neighborhood attractiveness, association property maintenance services, and the protection of property values.⁶ This survey also reported that 76 percent of association residents found that association rules and covenants protect and enhance the value of their community and property.⁷ This includes architectural guidelines enforced within these communities.

A private contractual relationship exists between each owner or resident within an association and these parties have the legitimate expectation of receiving the services and benefits resulting from this agreement. This is reflected in the survey's finding that an overwhelming 86 percent of association residents have an unambiguous preference to retain control over land use policies within their community.⁸ The Commission is being asked to legitimize efforts to extinguish these contractual relationships and is being pressured to reach a conclusion before even examining policies in communities that accommodate individual interests or hobbies of association residents. This is troubling.

CAI members commend the Commission for seeking public comment on the series of questions published in the *Federal Register* and urges that the Commission continue its deliberative approach to the study. CAI notes that interested parties were only provided a 45 day comment period to respond to the Commission's questions. It is our understanding the abbreviated comment period is intended to facilitate the Commission's fulfilling of its deadline to report findings to Congress.

CAI members do not believe there is any compelling reason for a study that could broadly impair the private property rights of community association residents to be rushed to completion. It is a suspect notion that private contractual obligations may be unilaterally rewritten by the federal government to accommodate one party's hobby interests. Accordingly, we urge the Commission ensure that all affected parties continue to have opportunity to participate in the examination of any "impediments" to amateur radio communications.

⁶ Foundation for Community Association Research: 2012 IBOPE Zogby International Survey on Community Associations available at:

www.caionline.org/info/research/Documents/National_Homeowner_Research.pdf

⁷ 2012 IBOPE Zogby International Survey on Community Associations, p. 5.

⁸ 2012 IBOPE Zogby International Survey on Community Associations, p. 6.

Association CC&Rs Provide for Amateur Radio Communications

The majority of community associations have broad architectural rules that apply to all structures and properties within the association. These restrictions may cover the exterior of homes, vegetation, and other property improvements. In general, most association architectural rules will permit variations, but require the approval of an architectural review committee or of the association governing board. The review process applies equally to all homeowners for all variations from association rules and restrictions.

As an example, a typical architectural restriction may require that no structure of any type may be constructed on any lot without the prior approval of the architectural review committee or governing board. This permits individual residents to request variations from community standards, but importantly protects the rights of all other residents who may be affected by the variation. The process of building consensus within the community and among neighbors for the approval of a variation from community standards is longstanding, well understood, and validated by State law.

In fact, this process is so well known for the approval of architectural variances of all types that amateur radio enthusiasts are urged to work with their community association to obtain approval to install equipment and other external devices. The American Radio Relay League, for example, has prepared an extensive presentation for amateur radio operators to educate and persuade community association boards and architectural review committees of the benefits of amateur radio and progress made in external antenna technology. This process of building consensus within communities is the proper approach and stands in sharp contrast with the evident desire by some to have the Commission recommend that Congress rewrite private contracts.

In addition to the need for community consensus to protect the rights of all parties, there are instances where association residents may seek to modify property over which they do not have control or exclusive ownership. Association rules will likely prevent such action and it is vital that association control over common elements continues. This is the case in traditional condominium associations and site-condominiums (land-based condominiums containing a single-family dwelling unattached to any other dwelling).

Owners of condominium units normally assume ownership of their units and any utility infrastructure serving their unit. The remainder of the condominium facility is commonly owned property by all unit owners. Examples of commonly owned property include, but

are not limited to, exterior walls, roofs, parking garages, interior halls, and other facilities shared by all unit owners and residents in the condominium. Thus, it is not within the individual rights of a unit owner to install or physically attach an external device to the condominium as the unit owner does not exclusively own the physical structure of the condominium. To do so could constitute a taking of another's private property unless the installation is otherwise expressly permitted by State or federal law.⁹

The FCC has acknowledged this principle of law in its rules governing the use and installation of Over-the-Air-Reception Devices (OTARD). Under the Commission's OTARD rules, condominium residents have the ability to install an antenna or dish to receive television or other communication services. These devices are subject to size restrictions and may only be installed in areas that the resident owns or has exclusive rights to use or control.

FCC Should Re-Affirm its Long-Standing Position on the Role of Private Contracts

The FCC's OTARD rules demonstrate the substantial legal questions of federal law requiring physical occupation of property owned by others. The authority of local governments and individuals to govern the use of real property is fundamental to our system of government. The federal government should not vitiate private contracts unless there is an unambiguous and demonstrated compelling interest that does not permit adoption of policy alternatives. It is difficult to see how the pursuit of a hobby rises to the level of a compelling national interest sufficient to set aside valid private contracts and land use covenants.

As recently as 2001, the Commission affirmed its long-standing position regarding only limited pre-emption of State and local law. In its December 12, 2001, Order on Reconsideration (RM 7863) the Commission opined that amateur radio is "a voluntary noncommercial service" and that "there has not been a sufficient showing that CC&Rs prevent amateur radio operators from pursuing the basis and purpose of the amateur service."¹⁰ The Commission further noted that notwithstanding restrictions CC&Rs may impose on the installation of amateur radio towers and antenna, "the Commission does not exercise its preemption power lightly, and employs this power only as necessary to carry out the provisions of the Communications Act."¹¹

⁹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)

¹⁰ PRB-1 Order on Reconsideration (RM 8763), Paragraphs 6, 7.

¹¹ *Ibid.*, Paragraph 7.

In these opinions, the Commission specifically noted that CC&Rs do not prohibit amateur radio operators from pursuit of their hobby. The Commission found that installation of an antenna at a residence governed by CC&Rs is not required for an amateur radio licensee to participate in communications that accomplish the purposes of the Communications Act. The Commission wrote that “there are other methods amateur radio operators can use to transmit amateur service communications that do not require an antenna installation at their residence. These methods include, among other things, operation of the station at a location other than their residence, mobile operation, and use of a club station.”¹² Given these findings by the Commission, CAI strongly urges the FCC to continue its respect for voluntary private contractual relationships and resist calls for pre-emption of such legal instruments.

CC&Rs Not Impediments to “Enhanced” Amateur Radio Communications

Amateur radio operators should follow the same procedures as all other residents of the association in seeking a variance from association guidelines. Taking the time to meet the association’s request guidelines, providing an accurate description of the actual variance sought, communicating with neighbors, and obtaining approval before beginning the installation of an external communications device are important steps for amateur radio operators. These are common steps that must be taken to gain approval for most variance requests and do not apply solely to amateur radio operators. CAI urges amateur radio operators to take a constructive rather than combative approach with their neighbors. Confrontations generally do not benefit communities or foster cooperation and understanding between neighbors.

The Commission should carefully consider the possibility that some in the amateur radio community simply do not wish to follow established and well-known community rules that may apply to the practice of their hobby. Rules that govern all properties and residents; that apply to all parties equally; and permit a deliberative process to obtain a rule variation are reasonable. Further, association governing documents may be modified by association owners and residents. These documents are not, by-and-large, static. That the opportunity for amending CC&Rs exists further demonstrates that not only may amateur radio enthusiasts be accommodated by CC&Rs, but that these homeowners have the additional opportunity to change association rules. However, no homeowner in pursuit of their hobby interests can circumvent rules and processes that

¹² *Ibid.*, Paragraph 6.

apply to all residents. To do so would unreasonably restrain the rights of all other owners in the association as provided by the association's CC&Rs. Permitting one group of neighbors to ignore with impunity established community processes will only lead to greater frustration in associations; this will not serve the long-term interests of amateur radio.

CAI members understand that technology evolves and that advances have been made with regard to amateur radio antenna technology and other improvements that may limit interference with other communications devices used by residents. This being the case, amateur radio operators should seek to cooperatively engage with their neighbors and seek permission to install and use these devices. However, notwithstanding technological advances, amateur radio antennas continue to vary in size and form dependent upon the broadcast frequency the operator wishes to use. Thus, the decision to limit the installation of such external equipment must remain among the contracted parties.

Impact of CC&Rs on Emergency Communications Likely Minimal

It is commendable that amateur radio operators participate in civil defense by providing some ancillary communication services to professional first responders. CAI members strongly support the idea of working with and for one's community in a cooperative manner. This is why CAI members were encouraged by the Commission's question regarding actions that amateur radio enthusiasts can take to comply with reasonable private land use restrictions.

CAI believes the impact of CC&Rs on the ability of amateur radio operators to supplement emergency communications is likely minimal and any limitations on such activity do not impair civil defense or disaster response activities. Anecdotally, this is clear given the depth and breadth of emergency communications services credited to amateur radio operators as cited in the Commission's request for comments. There are numerous accounts of amateur radio operators offering assistance during natural disasters and other emergencies. If association CC&Rs constitute an "unreasonable" restraint to such communications, the evidence would bear this out as opportunity for amateur radio operators to participate in such activities would have been substantially limited. That this role continues unabated casts doubt on the premise that private land use restrictions inhibit amateur radio communications in times of national emergencies.

As the Commission noted, there are numerous methods of transmitting amateur radio communications that do not require a fixed antenna and transceiver. This is why many amateur radio clubs maintain and routinely test mobile communications units. Further, amateur radio “field days” provide numerous operators the opportunity to broadcast from remote, low-power stations. In times of disaster or national emergency, such mobile communications units (in many cases installed in trucks and vans) are much more likely to contribute to civil defense activities than residentially-based communications centers and signal repeaters that can be rendered inoperable by high winds, floods, earthquakes, or power disruptions. In fact, it is for these very reasons that local amateur clubs own and operate mobile disaster communication units. In general, association CC&Rs will not affect operation of these mobile units.

CAI also notes that advances in communications technology have occurred across the spectrum of communications networks and devices, including emergency communications. One of the clear lessons learned from the terrorist attacks on September 11, 2001, and the aftermath of Hurricane Katrina in 2005 was the need for enhanced communications capabilities for first responders. The Congress has made considerable resources available to States and localities to improve emergency communications and the interoperability of these systems. The Congressional Research Service has estimated that total federal resources made available to States and localities for these purposes over the time period 2001–2010 exceeds \$13 billion.¹³ There is no doubt that construction, expansion, and upgrading of State and local emergency response communications centers, infrastructure, and equipment have greatly improved civil defense and disaster response coordination and communication.

While amateur radio operators may augment State and local emergency communications capabilities in some fashion, federal and State policymakers have clearly opted against reliance on volunteer radio operators (notwithstanding their knowledge or expertise) for communications services in times of emergency. The investments and attendant improvements in emergency communications and the interoperability of these networks will likely further diminish the role of amateur radio in

¹³ Linda K. Moore, *Congressional Research Service Memorandum on Federal Funding of State and Local Emergency Communications Projects*, March 18, 2011, p. 5.

disaster response or times of national emergency. This trend may also be hastened by the dramatic expansion and availability of personal mobile communication devices and social media outlets. Technology has dramatically changed how Americans communicate one with another and how the government and citizens communicate as well. These technological and societal changes will inevitably, if not currently, surpass the contribution that amateur radio operators make to civil defense and national disaster response communications.

Conclusion

CAI members appreciate the Commission's public request for comments on the study required by Public Law 112-96. It is CAI's belief that the statutory language directing the Commission to undertake the study is biased and flawed. CAI members urge the Commission to seek out information from all interested parties concerning the processes available for amateur radio operators living in associations to obtain approval to install external devices to support their hobby activities. To accomplish this purpose, the Commission should consider extending its comments deadline.

CAI strongly urges the Commission respect the private property rights of association homeowners. The purchase of a unit or property in a community association does not mean that owners surrender their rights under State or federal law to exercise control over property. Rather, based on statute and jurisprudence, these homeowners have voluntarily contracted together to make joint decisions on the exercise of certain private property rights. CAI members will continue to voice opposition to any attempt to degrade these private property rights and urges the Commission to respect the legal foundations of the community association model of housing.

Thank you for the opportunity to comment on the Commission's study. If I may provide any additional information do not hesitate to contact me at (703) 970-9220.

Sincerely,

A handwritten signature in black ink that reads "Thomas M. Skiba". The signature is written in a cursive style with a large, stylized initial 'T'.

Thomas M. Skiba, CAE
Chief Executive Officer
Community Associations Institute