



Gregory G. Smith, CMCA, AMS, PCAM
2017 President
Associa Northern California-Stockton
Stockton, CA

Mr. Kelly G. Richardson, Esq.
Immediate Past President
Richardson Harman Ober PC
Pasadena, CA

Peter Kristian
Chairman
Government & Public Affairs Committee
Hilton Head Plantation—General Manager
Hilton Head Island, SC

Ronald L. Perl, Esq.
Chairman
Federal Legislative Action Committee
Hill Wallack, LLP
Princeton, NJ

Thomas M. Skiba, CAE
Chief Executive Officer

Dawn M. Bauman, CAE
Senior Vice President
Government and Public Affairs

June 9, 2017

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

RE: WC Docket No. 17-79—Accelerating Broadband Deployment by Removing Barriers to Infrastructure Development

Transmitted via Electronic Comments Filing System

Dear Ms. Dortch:

On behalf of the Community Associations Institute (CAI), I am pleased to respond to the Federal Communications Commission's (FCC or Commission) request for information and comments on state laws and local ordinances that may unlawfully impede the deployment of infrastructure required to expand availability and access to wireless broadband Internet services.

CAI members have a strong interest in consumer access to wireless broadband Internet services, having embraced emerging technology to more efficiently manage community association assets and communicate with residents. These efficiencies would not be possible without access to broadband Internet service via wireless or wireline connectivity.

Community associations also place high value on access to wireless communications as a key means of providing information to residents in disasters or emergencies. Resilient communications networks utilizing widely embraced technology such as personal mobile devices require access to wireless service. CAI members know of no more effective and efficient means of communicating with association residents, first-responders, and local officials as a means of early warning

6402 Arlington Blvd.
Suite 500
Falls Church, VA 22042

888.224.4321
www.caionline.org

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 more than 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 more than 33,000 members include community association volunteer leaders, professional managers, community management firms and other professionals and companies that provide products and services to associations.

(e.g. earthquake early warning systems under development) and, once the disaster or emergency has occurred, in continuing to keep everyone informed. CAI members also are aware of the connectivity issues raised by the Internet in the aftermath of a disaster or emergency. Resilient communication networks for mobile devices are a necessity.

Finally, CAI members have a keen interest in the accessibility of wireless broadband Internet service because demand by community association homeowners and residents for such services is high. Increasingly, wireless and wireline broadband Internet service are regarded by housing consumers in similar manner as access to traditional utilities. As consumers of broadband Internet services, association homeowners expect broadband Internet service to be readily available and associations are responding to this demand. To better understand the role of the association in meeting owner and resident demand, it is necessary to provide additional background on the community association housing model.

About the Community Association Housing Model

Community associations are commonly known as condominium associations, homeowner associations, and housing cooperatives. Generally organized as private non-profit organizations, community associations operate pursuant to various state statutes and certain conventional real estate practices. Housing units and lots in the community are subject to a declaration of covenants (covenants, conditions, and restrictions or CC&Rs), that are enforced by a Board of Directors (Trustees or Managers in some states) comprised of homeowner volunteers elected by owners in the community. In purchasing a lot or unit in a community association, owners agree to be bound by the association's CC&Rs and bylaws.

The Foundation for Community Association Research (FCAR)¹ has documented strong consumer demand for the community association housing model over the past half century. In 2015, FCAR estimated the number of community associations nationwide at 338,000, accounting for more than 26 million housing units. There are more than 68 million community association residents, representing almost 1 in 5 households nationally.²

The value of housing units in community associations is estimated at \$5.28 trillion. In 2015, association homeowners paid \$85 billion in association assessments to fund maintenance and operation of community infrastructure. To further support community infrastructure and services, homeowners have set aside \$23 billion in reserves for the repair, replacement and enhancement of association assets such as roofs, streets, and elevators as well as to ensure community compliance with state and federal land use and environmental requirements.³

¹ The Foundation for Community Association Research is the driving force for community association research, development, and scholarship, providing authoritative analysis on community association trends, issues, and operations.

² Foundation for Community Association Research: *Statistical Review for 2015 (Summary)*. Note: 2016 statistical information under development.

³ *Ibid*

Community Associations and Wireless Communications Infrastructure Development

According to national research, a supermajority of community association homeowners has consistently expressed the view that enforcement of association land use policies and architectural standards protect and promote the value of properties in the association.⁴ It is therefore rather unremarkable that community associations participate in municipal hearings concerning the installation of communications infrastructure to be sited on rights of way within or adjacent to the community.

A key component of any locality's permitting process is providing interested parties the opportunity to comment on proposals to site or substantially alter existing communications facilities. Opportunities for engagement and discussion included in local statutes or permitting requirements are important to community association residents and should not be diminished. CAI members strongly support meaningful association and homeowner engagement if a communications service provider is seeking access to a public right of way or easement that may cross association common property.

The comments below are respectfully submitted to offer Commissioners and staff insights on the concerns of community association homeowners regarding infrastructure development. While the following commentary addresses telecommunications infrastructure, the basic principles would apply to the placement of substantially similar facilities on or near community association common property.

Paragraphs 91 and 92: Telecommunications Act of 1996 and Legitimacy of Aesthetic Concerns

The Commission seeks comments concerning the validity of aesthetic concerns in the permitting process and the extent to which such concerns violate 47 U.S.C. § 332 and § 253 which provide, in pertinent part—

Section 332(c)(7)(B)(i). The regulation of the placement, construction, and modification of personal wireless service facilities by a state or local government or instrumentality thereof...

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services...

Section 253(a). In General.—No state or local statute or regulation, or other state or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

The Commission, in paragraph 91, notes the various circuit courts have taken different views of what actions may prohibit or have the effect of prohibiting telecommunication services in the context of the Section 332 and 253 preemptions. The Commission's analysis in paragraph 91 indicates a number of circuit courts show deference to local concerns with regard to the siting

⁴ Community Associations Institute, *Validation: Sixth National Survey Affirms Community Association Success* (May 2016, Falls Church, VA), p. 5. Available at <https://www.caionline.org/validation>.

of communications infrastructure. Such deference ranges from requiring applicants to demonstrate that additional attempts to reasonably accommodate local concerns are unlikely to be successful to requiring applicants show the proposed facilities are the least intrusive option available.

Congress was also mindful of such consumer considerations and the proper role of state and local governments in land use policy. In the conference report accompanying Public Law 104-104 (Telecommunications Act of 1996), conferees opined it was the intent of Congress that localities retain authority to subject siting of communication facilities in residential areas to scrutiny. Conferees noted a locality could deny a siting permit in a residential area and avoid violating the “prohibit or effect of prohibiting” provisions of Section 253. The conferees wrote—

*The conferees also intend that the phrase, “unreasonably discriminate among providers of functionally equivalent services” will provide localities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services. For example, the conferees do not intend that if a state or a local government grants a permit in a commercial district, it must also grant a permit for a competitor’s 50-foot tower in a residential district.*⁵

Deference to the concerns of local homeowners in the design and siting of telecommunications infrastructure is appropriate and does not, on its face, prohibit or have the effect of prohibiting telecommunication services. This is a rational policy approach to balance the economic decision of consumers to protect the value of their greatest asset—their home—by purchasing a home or land in a community association while promoting consumer access to a competitive wireless marketplace.⁶

Community association homeowners made a deliberate choice to purchase a particular home or lot in a community precisely because association architectural standards have the effect of maintaining the visual and aesthetic attributes of the community. CAI members oppose any action by the Commission to preempt state or local statutes or regulations to relieve telecommunications service providers from collaborating with communities in the permitting process to reach consensus on communications facilities siting and expansion.

To be clear, CAI members do not oppose siting communications facilities or improving access to a competitive wireless broadband marketplace. On the contrary, CAI members strongly support the continued development and deployment of next generation wireless technology and infrastructure. The concerns of CAI members are that a further tilting of the already expansive and strong federal preemption in favor of siting facilities will jeopardize the

⁵ Senate Report No. 104-230 (p. 208) accompanying S. 652, the “Telecommunications Act of 1996”, which became Public Law 104-104 on February 8, 1996. (*Emphasis added*).

⁶ Researchers have found that homes in community associations are generally valued at least 5 to 6 percent more than other homes. See Agan, A. & Tabarrok, A. (2005). What are private governments worth. *Regulation*, 28 (3), 14-17.

willingness of facility owners to accommodate reasonable local concerns regarding the visual and aesthetic character of communities.

To illustrate, CAI members have reported examples of community associations, acting in a proprietary capacity on behalf of all association homeowners, successfully negotiating to site communications facilities on association common property. Such facilities have included towers with breakaway capability to address safety concerns. Other towers and facilities have been disguised and integrated into the community's visual and aesthetic character. Communities have sited next generation communications infrastructure that is increasingly less intrusive than prior technology. These outcomes are the direct result of a collaborative negotiating process between the association and the facility owner to preserve community aesthetics and expand access to communications services.

Based on these experiences, CAI members urge the Commission to carefully assess any refinement of the existing federal preemption that may have the effect of removing incentives for collaboration. Just as localities should act on valid and complete permit applications to site communications facilities on appropriate rights of way, the owners of such facilities should not willfully ignore the concerns of local homeowners, be they association homeowners or non-association homeowners. In removing impediments to siting communications facilities, the Commission should not place impediments to the accommodation of reasonable visual and aesthetic concerns of localities and community associations.

Paragraphs 95, 96, & 98. Regulations & Other Legal Requirements; Unreasonable Discrimination

CAI members have expressed concern regarding the Commission's commentary in Paragraphs 95 and 96 concerning the scope and applicability of state and local authority over communications facilities siting. CAI members interpret such statements as applying to state and local actions that are preempted under the Telecommunications Act of 1996, and not the actions of private land owners. CAI members support access to wireless broadband services but do not support any degradation of a property owner's control over the activities of third parties on private land.

While community associations offer municipal-type services to homeowners, community associations are private organizations organized to undertake activities that provide a direct benefit to privately owned property. Community associations are not local governments or instrumentalities of local governments. Community associations are not state actors in any capacity.

As private entities, community associations routinely negotiate with communications service providers to lease land or other common property to site wireless telecommunications facilities. The exercise of these prerogatives is not in form or substance different from the exercise of property rights by any individual or corporate property owner. The Commission should avoid even the appearance of degrading property owners' direct control over the activities on private property.

To this end, community association covenants routinely require utility infrastructure to be installed underground where possible. In some instances, the decision to require utility connections in an underground conduit is for aesthetic purposes and in others it is to mitigate disaster damage to community infrastructure that may occur with aboveground facilities. Community associations with underground utilities may find it beneficial to allow communications service providers to attach certain communications facilities to streetlights. However, because the poles on which streetlights are mounted are association-owned and association roads are not public facilities, any decision to allow an attachment should remain under the purview of the association.

Conclusion

CAI members report that community association homeowners, as communications consumers, increasingly value access to wireless broadband Internet service. This is evidenced by more and more community associations negotiating with communications service providers to site communications facilities on association owned and controlled property.

New technology is leading to substantial change in communications infrastructure. Community associations are more likely to accept next generation infrastructure, such as a Distributed Antenna System (DAS), which are smaller and less obtrusive than prior generations of communications technology. However, as owners and operators of private land and facilities, the authority to control placement of communications facilities on such land and properties must remain with the community association. Similarly, community association residents must be allowed the opportunity for meaningful public comment and collaboration when permits are requested to site communications facilities on rights of way or easements that cross or are adjacent to the association.

Thank you for your consideration of these comments and the concerns of CAI members. If the Commission requires any additional information, do not hesitate to contact me at (703) 970-9224 or dbauman@caionline.org.

Sincerely,



Dawn M. Bauman, CAE
Senior Vice President, Government & Public Affairs
Community Associations Institute