Just Say No to H.R. 555/S.1534

By Fred Hopengarten, Esq., K1VR

I've been receiving a lot of inquiries lately that ask for my position on the Amateur Radio Parity Act, passed by the House as H.R. 555, and now before the Senate as S. 1534. I'm against it. Why do I oppose H.R. 555/S. 1534?

I like the ARRL. Before delving into the bill, you should know that I'm a big fan of the ARRL, and this is not an attack on the League. I've been an ARRL member continuously since 1956 (that's 61 years, if you were a communications major), and I've been a Life member since 1972. I donate money, and I'm a member of the ARRL Diamond Club. I'm only attacking the proposed legislation. Why?

A 440 MHz whip may be all you get. A homeowner association (HOA) could limit a ham to a 440 MHz outdoor whip. The bill says that an HOA cannot "preclude communications" and must permit "an effective outdoor antenna under exclusive use or control of the licenses." A 440 MHz whip satisfies both of those conditions. The ARRL FAQ on this subject says: "The entitlement to operate on all amateur bands or to maintain antennas that are effective on all amateur bands at the same time is far beyond the scope of either PRB-1 or ARPA." However, in the original PRB-1 Order, the FCC wrote:

> Some amateur antenna configurations require more substantial installations than others if they are to provide the amateur operator with the communications that he/she desires to engage in. For example, an antenna array for International amateur communications will differ from an antenna used to contact other amateur operators at shorter distances. . . . local regulations which involve placement, screening, or height of antennas based on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur communications, and [FH: not "or"] to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose.

PRB-1 at ¶ 25 (1985).

The ARRL FAQ continues: "That said, an amateur's expectation for the types of effective outdoor antenna that the HOA will be obligated to permit differs depending on the type of land use involved." *I find no basis for that statement in HR 555*, which says, as cited above, that an HOA cannot "preclude communications" and must permit "an effective outdoor antenna under exclusive use or control of the licenses," OR (not "and") the HOA must have "the minimum practicable restriction." I read this to mean that the *"minimum practicable restriction" is not required*, if (a) the HOA does not preclude communications, (b) the outdoor antenna permitted is "effective" [perhaps on 440 MHz], and (c) the place the antenna will sit is under the exclusive use or control of the licensee.

The "OR" clause is dangerous. S. 1534 says that an HOA cannot preclude communications and must permit an effective outdoor antenna, **OR** the HOA must have "the minimum practicable restriction." Despite the expressed intent to write a bill that would create parity between hams

governed by municipal zoning, and hams governed by an HOA, this bill is really different from PRB-1 (47 CFR § 97.15(b)). If the HOA allows a 440 MHz whip to stick out of your window, the HOA is not required to have "the minimum practicable restriction." That's the meaning of the "or" clause. In contrast, PRB-1 requires of municipalities that they must not preclude the amateur service communications that the radio ham desires (see above), **AND** the regulation must be the "minimum practicable regulation."

The aesthetics clause could be an antenna killer. Under S. 1534, an HOA may establish reasonable written rules concerning height, location, size, aesthetic impact, and installation requirements. I fear that an HOA, and later a court, could decide that *any visible antenna* has a negative aesthetic impact, if the HOA says so. The bill provides no guidance or standards, no mediation, no arbitration.

Installation requirements could be an antenna killer. The HOA could establish an installation requirement that, for example, requires a Professional Engineer to stamp the plans (the plans for a 15 meter dipole? Or a 40 meter wire vertical hung over a tree in the nearby woods?), inspect the construction, and stamp the "as-built" drawings. P.E. costs could be a big multiple of antenna costs. The HOA could require $5 million/$10 million liability insurance coverage, naming the HOA as an additional insured. I'll bet HOA's will be *creative* in establishing *very expensive-to-implement* installation requirements.

Prior approval may be impossible. What if your HOA was formed *only* for the purposes of plowing the roads and picking up the trash? It could be *ultra vires* (outside the power of the HOA) to approve an antenna. What if the HOA never votes, either yes or no?

But isn't a community association required "to establish reasonable written rules concerning height, location, size, and aesthetic impact of, and installation requirements for, outdoor antennas and support structures for the purpose of conducting communications in the amateur radio services." See § 3(b)(3)? *Response:* No. Under this bill, the FCC shall *permit* a Community Association to establish reasonable rules, but the Association is not *required* to establish such rules (see the "or" clause). On the other hand, with or without the FCC, the Association could always amend its rules, even before the passage of HR 555 – so this is no change in the law at all, and certainly no new advantage to hams.

There is no requirement that the HOA must act in a timely way. There is not even a requirement that the HOA must decide. But the ham must still obtain prior approval. The ARRL FAQ says: "There is no indication that an HOA has ever simply failed to adjudicate an antenna proposal and no indication that a timetable is necessary." *Ever?* It is a complicated case, but AA9BZ has been waiting since 2011 for a final decision on the installation of his flagpole for a stand-alone house at Belmont Country Club, a Toll Brothers community in Ashburn, VA. See http://lovemyflag.org. I represented AA9BZ.

What if the association is moribund and hasn't met or taken any action in years? What if there are no HOA officers or Architectural Review Committee to even ask for prior approval? There is no requirement for negotiation, no requirement for a written decision stating the reasons for denial (so that a ham might modify the application with a greater likelihood of success the second time around).

The ARRL FAQ argues that limited CC&Rs (common covenants and restraints), perhaps situations where the HOA exists only to deal with roads and trash, are "few and far between." I know of no basis for that statement, and I am presently representing a radio ham who has an HOA that does only roads. My experiences belie the "few and far between" statement. Hams who are scared of the prior approval requirement have reached out to me, because approval was never previously required (or the thought even mentioned in their documents), and they were breaking no CC&R.

The FAQ goes on to state: "If a radio Amateur who lives in a deed-restricted community where the CC&Rs do not empower an HOA to regulate antennas chooses to not avail himself or herself of the provisions of the FCC rules enacted pursuant to ARPA, there is no obligation to do that." I think that sentence says: If the HOA has no power to regulate antennas, and there is no CC&R on the subject, you don't have to obtain "prior approval," you may disobey this federal statute. That's just wrong. The bill reads:

> [T]he Commission shall –
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> . . . require any licensee in an amateur radio service to notify and obtain prior approval from a community association concerning installation of an outdoor antenna . . .

The FAQ then assures readers that "No FCC enforcement agent is going to sanction a ham [for failure to obtain prior approval]." While encouraging law-breaking is not a good idea, I am less concerned about FCC enforcement than I am about the fact that every CC&R I've ever read allows any covered homeowner to seek enforcement, and that this law would effectively add "prior approval" (under the "obey all laws" clause) to the CC&Rs, and create a good reason to fear any neighbor on a mission.

The OTARD rule does not require prior approval. If you want to erect a one meter dish, or a VHF/UHF TV Yagi, under 47 CFR §1.4000 (**O**ver **T**he **A**ir **R**eception **D**evices), the Association must petition the FCC to prevent it. Here, the burden is on the ham to get prior approval. Hams won't be in parity with TV watchers.

The "exclusive use or control" clause may be an antenna killer. Want to put an antenna outdoors on your roof? Is it under your exclusive use or control? And the same may be true of your deck, porch, or lanai. If you live in a town house with a back yard (the place where your grill is located), do you have exclusive use or control when the association mows your lawn? If you live in an apartment-style building (a multi-unit dwelling), you may have no outdoor area under your "exclusive use or control." These questions can be very tricky, and result in litigation. See *In the Matter of James S.*

Bannister, FCC DA 09-1673 (2009), https://apps.fcc.gov/edocs_public/attachmatch/DA-09-1673A1.pdf (an OTARD case that gives me some hope, because a broadcast TV antenna and broadband internet antenna was allowed on a roof, where the association claimed that roofs are common areas, but the FCC ruled that the association's easement for roof maintenance "did not defeat the owner's rights under the Rule.")

The bill doesn't help with non-HOA deed restrictions. In a non-HOA situation where there is a deed restriction against outdoor antennas, that deed restriction would be invalid as to one-meter satellite TV dishes, and TV broadcast service Yagis, because the OTARD rule is a preemption. But this bill won't help hams with just deed restrictions (no HOA – no common expenses). The deed restriction can be enforced by any disgruntled owner covered by the same deed restriction.

You may violate federal law! Without this bill, erecting an outdoor antenna in an HOA situation creates a contract dispute. When you go to renew your license, the question before the FCC would be: Does the applicant's misconduct suggest that he or she lacks the requisite character qualifications to remain a licensee. "In evaluating the weight of prior misconduct, to be considered are the willfulness of the misconduct, the frequency of such misbehavior, its currency, the seriousness of the misconduct, efforts made to remedy the wrong, and [the applicant's] record of compliance with Commission rules and rehabilitation."[1] Does this activity show a propensity to obey the law and to deal honestly with the Commission? With this bill, and without a prior approval, you break a federal law, and, in appropriate circumstances, the Commission may decide to revoke (47 U.S.C. §312) or not to renew (47 U.S.C. § 309(k)) your license. Think about this: a CB'er who puts up an 11-meter beam may violate a CC&R, but he's not breaking federal law. If this law passes, you'll be *worse off* than a CB'er.

The bill has no enforcement mechanism. Where *in the bill* does it say what a ham can do to enforce this new law? In OTARD and cellular telephone matters, the remedy for zoning conflicts is spelled out in the statute or regulations. But here, can you go straight to federal court? I don't know. Probably not in the Third Circuit. See *DePolo v. Bd. Of Sup'rs Tredyffrin Twp.,* 835 F. 3d 381(3d Cir. 2016). And, in light of *Armstrong v. Exceptional Child Center, Inc.*, 135 S.Ct. 1378 (2015), a 5-4 decision, there may be no implied private right of action anywhere for injunctive relief to enforce against an HOA.

I don't believe that the problems can be cleared up in the report or in conference. A committee report is not law. When there are differences between the House and Senate bills, the conference committee can do wonders. Here, the bills are identical. What is there to conference on?

[1] *In the Matter of Kevin David Mitnick* [N6NHG], WT Docket No. 01-344, FCC 02D-02, Sippel, A.L.J., December 23, 2002. https://apps.fcc.gov/edocs_public/attachmatch/FCC-02D-02A1.pdf

I have doubts that FCC regulations implementing the law will cure the problems with the bill. As the FAQ says: "The FCC is not given much leeway in implementing ARPA's basic provisions, which are specifically stated in the House and Senate Bills." Since the 1985 creation of PRB-1 (thank you, ARRL – we owe ya), the FCC has been unwilling to help out HOA dwellers. When the Commission writes its regulations, I'm betting that they won't go a word beyond what the statute says.

You may now have two levels of approval. If you should be lucky enough to obtain a prior approval from the HOA, you'll still need a building permit from your municipality, and perhaps zoning approval too. Your opponents may enjoy two bites at the apple.

Conclusion. These are short explanations. I could create a law review version, in excruciating detail, with many footnotes. But now you know why I don't think you should urge your U.S. senator to vote aye on S. 1534. Moreover, I think you should voice your opinion to your Director and Vice Director. Find them at http://www.arrl.org/divisions. I do not support this bill, and neither should you.

A Word on Making Legislation. It is hard. And we should not be hard on the individuals who worked on this very difficult topic. But the ARRL FAQ says: "Those who think that there is a better solution, let's hear about it." So here are some suggested solutions:

- Where no reasonable standards are adopted by an HOA, FCC regulations should include a default standard.

- I suggest a step-ladder approach for HOA communities, with different antenna rules for apartment-like ownership, common-wall townhomes, stand alone home on lots one-acre or less, and stand alone homes on large properties. There should be different rules for townhomes, as opposed to homes on 10+ acres.

- I suggest that there should be some "safe-harbor" provisions, or at least a requirement that the FCC establish "safe-harbor" provisions: antennas similar or identical in appearance to OTARD satellite dishes, VHF/UHF TV Broadcast Service Yagis, broadband internet antennas; single wires (or "minimally visible" antennas); flagpoles; temporary antennas (or antennas raised only in hours of darkness), Buddipoles or ground planes no higher than 12 feet (the height of a basketball net with backboard). And why not flagpoles? See "The Freedom to Display the American Flag Act of 2005," 4 U.S.C. § 7. Section 3 of that statute reads:

> RIGHT TO DISPLAY THE FLAG OF THE UNITED STATES." A condominium association, cooperative association, or residential real estate management association may not adopt or enforce any policy, or enter into any agreement, that would restrict or prevent a member of the association from displaying the flag of the United States on residential property within the association with

respect to which such member has a separate ownership interest or a right to exclusive possession or use.

- To avoid complications like the *Armstrong* case mentioned above, the bill should spell out an enforcement mechanism, just as the original bill which resulted in the OTARD rule does.
- Change “or” to “and” (see above).

P.S. I’d like to know which ARRL directors voted *against* supporting this bill, so I can contribute to their next election campaign, but apparently the ARRL Board now has some sort of loyalty restriction that prevents an officer or director from telling you if he or she voted no. But that’s another topic. While I am neither a director nor vice director, I wonder if the ARRL will attempt to punish me for publishing this opinion.