Food for Thought

The author, a former FCC attorney, argues that the "Amateur Radio Parity Act," in its current form, may do hams more harm than good and urges a rewrite prior to Senate action.

Why H.R. 555 is Not Good (Enough) for Hams

BY JIM TALENS,* N3JT

Anyone who lives in a planned community knows that the community's Declaration of Covenants, Conditions and Restrictions (CC&Rs) is typically quite strict about erecting ham antennas of any kind. Some even prohibit the transmission of amateur radio signals from anywhere within the community, whether a private home or common community property. These CC&Rs are contractual in nature — the buyer of the property signed an agreement to abide by the HOA (Home Owner Association) or "community association" rules when the property was purchased. The amateur has had no recourse. Not until H.R. 555 appeared was there a first step toward change.

H.R. 555, the Amateur Radio Parity Act of 2017, passed by voice vote of the House of Representatives of Congress on January 24, 2017 (*An identical version of this bill passed the House in 2016, but was never acted on by the Senate –ed.*). It has been touted by some as real movement toward relief from the myriad CC&R restrictions against ham radio antennas. It would, its proponents argue, put licensed amateurs on essentially an even playing field with those living in private homes without CC&Rs. Indeed, Section 2, para. (7), of H.R. 555 expresses an intention to bring the equivalent of PRB-1 to deed-restricted communities. [*See* 101 FCC 2d 952, (PRB-1), and 47 C.F.R. Section 97.15(b)]

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Considerable interest has been expressed for the Senate to follow with a similar bill to complete the legislative action necessary to free us from the shackles of CC&Rs. But all this enthusiasm is overstated. The language of H.R. 555, if it becomes law, will *not* achieve its stated goal. The Senate must adopt different language if the process is to produce final legislation that helps radio amateurs in antenna-restricted communities achieve true parity with their fellow hams who do not live under CC&Rs. Let's take a look at some of the provisions of H.R. 555.

What bands? Section 1, Application of Private Land Use Restrictions to Amateur Stations, prohibits any HOA restriction that "precludes communications in an amateur radio service." This provision assures that the HOA cannot stop an amateur from using an indoor antenna, a prohibition that some HOAs included in their bylaws. That's a positive. But the provision also gives the HOA power to effectively limit what bands an amateur may use, even indoors, because the provision says that there can be no restriction that precludes communications "in an amateur radio service," not "in any licensed amateur radio band." This means an HOA could permit only operation on 2 meters because that's in the "amateur radio service" and on its face satisfies the Section 1 requirement. Moreover, for those with exclusive-use properties (private homes), the HOA will have an incentive for aesthetic reasons to limit the size of any outdoor antenna.

Section 2 prohibits restrictions against an "effective" outdoor antenna. What is an effective outdoor antenna? It may not be easily defined, but certainly a 2-meter whip is an effective outdoor antenna for communication in an amateur radio service. Combine it with Section 1 and you satisfy the two bill requirements: An effective outdoor antenna (it's long enough for 2 meters) in an amateur radio service.

The better approach would be for the bill to prohibit any HOA restriction that prohibits reasonable antennas for communications at any frequency authorized by an amateur radio license. This, at least, would remove a barrier to operation that might otherwise relegate an HF operator to 2 meters. The Senate bill should be written accordingly.

Prior Approval. Section 3, Application of Private Land Use Restrictions to Amateur Stations, Section (b)(1), requires an amateur licensee "to notify and obtain prior approval from a community association concerning installation of an outdoor antenna." Anybody who lives in a CC&R community knows that prior approval will not come readily, to say the least. Unlike a non-CC&R community, where PRB-1 assures up front that an antenna may be constructed subject to reasonable accommodation by state or local law, this bill would require that the CC&R resident must apply to the community for permission no matter how small the antenna — even a simple wire or mobile antenna affixed to the gutter.

Does the HOA have written rules regarding amateur radio antennas, and do its administrators understand the provisions of the federal law? In some cases, the HOA is merely an accounting tool for handling real estate taxes, maintenance, etc. It likely will not know a thing about the federal law or the standards under it, let alone procedures for redress. It is hardly equipped to respond to a request for prior approval of an antenna. What if there is no response at all to the request, or the HOA has no standards for approving antennas? Is that tacit approval or tacit denial?

In any event, the requirement for prior approval constitutes a stark shift in burden because permission for even modest antennas, barely visible or not at all visible, must be affirmatively sought and given. For parity with PRB-1, the HOA should abide by default standards under the bill and then adopted by the FCC, presumably consistent with those set forth in Section 97.15(b). If indeed the goal of H.R. 555 is parity with PRB-1, why is there a burden to seek prior approval? Why is there no requirement that the FCC promulgate a rule like 97.15(b) for these community associations?

"Put simply, H.R. 555 does little to help amateurs and risks permanently assuring… that many HOA dwellers … will not be able to erect useful outside amateur radio antennas."

Federal Law Violation?

One legal consequence of H.R. 555 is that a deed-restricted resident who has been successfully using an outdoor stealth wire antenna for years without permission now moves from possible risk of contract breach to the realm of federal law violation. If there is failure to seek and obtain prior approval for an antenna through the HOA, the property owner would then be in violation of the statute and associated federal regulations (FCC rules). That is because federal law preempts HOA rules, meaning violation, enforcement, challenge, or compliance must be resolved in a federal venue, not in a local state court under contract law. (Note that a CBer caught doing the same thing is subject only to a contractual violation, not federal law, because only the Amateur Radio Service is included in the bill.)

Further, to add a bit of complexity and risk to this, an amateur radio license, when issued or renewed, carries a requirement for its holder to comply with all applicable FCC rules and regulations. An unapproved stealth antenna would be a violation of FCC regulations, for which there could be licensing consequences. (Maybe not likely, but possible.)

Whither a Dispute? Also lacking in the legislation is a procedure for the FCC to deal with disputes, as is the case the FCC's Over the Air Reception Devices (OTARD) rule under 47 C.F.R. Section 1.4000 that sets standards for requests for waivers and petitions for declaratory rulings. There is no such procedure provided in H.R. 555. Going to a federal court or dealing with a rule violation is not a ride in the park. The experience would likely be both protracted and costly. There should be a mechanism for FCC declaratory rulings or waivers, as in Section 1.4000.

Under H.R. 555 Section (b)(3), an HOA is permitted to establish reasonable rules concerning height, location, size and aesthetic impact of outdoor antennas. Going further, Section (b)(2) permits the HOA to prohibit installation of an antenna on common property not under the exclusive use or control of the licensee. Thus, an amateur cannot expect approval from an HOA to erect a wire antenna, let alone a beam, on the roof of a multi-story building; on the roof of a duplex condominium, or on a sliver of adjoining land to his stand-alone house in a deed-restricted community.

So how does H.R. 555 achieve its stated goal of establishing parity in terms of reasonable accommodation of amateurs with minimal practical regulation to communicate, and to provide, at their own cost, emergency communications? How does an HOA for 5-acre plots deal with an outdoor dipole antenna request? Can a townhouse owner put up a wire on his patio behind his house? The legislation should authorize and direct the FCC to parse out the needs for these and other situations, including multi-unit buildings, to provide a more equitable and meaningful parity to PRB-1 and Section 97.15(b) for amateurs living in all HOA communities.

Parity with PRB-1? Not quite! Most condominium owners reside in buildings that are exempt from the putative benefits of H.R. 555 because the bill's provisions address only those who have exclusive use or control of their properties. In other words, H.R. 555 may help only a minority of amateurs. It is quite evident that the Community Association Institute, which lobbies for real estate interests, was highly influential in crafting the language of this legislation to limit its benefits to a small segment of deed-restricted homeowners.

Even for those with HOA properties who might benefit from this legislation (single family dwellings), there are difficulties ahead. Cases decided by the FCC under the OTARD Rule illustrate the challenges because of similarities in much of the important language. 47 C.F.R. Section 1.4000 of the Commission's Rules (the OTARD Rule) prohibits governmental and private restrictions that impair the ability of antenna users to install, maintain, or use over-the-air-reception devices. It was adopted by the Commission to implement Section 207 of the Telecommunications Act of 1996. In one case, a homeowner in a deed-restricted community was denied permission to install a TV antenna on the side of his home near the roof peak. The HOA claimed he could get acceptable reception from a location in the back of the house below the roofline. Under the rule, a placement preference restriction is permitted provided it does not impair the antenna user's right to install, maintain, or use an antenna covered by the rule. A placement restriction impairs if it (1) unreasonably delays or prevents installation, maintenance, or use of the antenna, (2) unreasonably increases the cost of installation, maintenance or use of the antenna, or (3) prevents the antenna from receiving an acceptable quality signal. The burden was on the HOA to rebut the homeowner's assertion that he could not get adequate line-of-sight reception at the HOA's preferred location, but the HOA provided no technical support for its position and lost. [*See* Culver, <http://bit.ly/2rdPNCA>]

It is important to understand that the burden under the OTARD Rule is on the HOA to show that its restrictions comply with the rule's placement preference conditions. But under H.R. 555, the burden of securing prior approval for an antenna is entirely on the radio amateur, and there is no requirement that the FCC develop further rules to provide non-judicial means for those treated unfairly to seek declaratory rulings or waivers. In short, the considerations applicable to private land use and CC&R communities really are not so different, but H.R. 555 makes them very different.

Conclusion

If you are living in an HOA community or ever expect to live in a "community association" environment, you may want to become more active in correcting the version of parity that H.R. 555 purports to offer. Put simply, H.R. 555 does little to help amateurs and risks permanently assuring, with the imprimatur of federal law, that many HOA dwellers (especially those in high rises and townhouses) will not be able to erect useful outside amateur radio antennas. Exert whatever efforts you can toward helping the Senate pass a more ham-friendly conceived and drafted bill.

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