

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:)	
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)	
2018 Biennial Review of)	WT Docket No. 18-374
Telecommunications Regulations)	
)	

COMMENTS OF COMMUNITY ASSOCIATIONS INSTITUTE

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on behalf of

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Summary

Accelerating Wireless Broadband Technology Deployment (47 CFR Part 17)

Community Associations Institute recommends the Wireless Telecommunications Bureau (Bureau) not seek to amend rules or policies that will further degrade the legitimate interests of property owners in local permitting processes governing communications infrastructure in residential areas. The Commission should avoid actions that limit or otherwise chill a community association's opportunity to engage in meaningful negotiations with entities subject to the Commission's jurisdiction concerning access to rights of way that cross or abut community association common elements. CAI further recommends the Bureau take no action to preempt or otherwise degrade private property rights of community associations in communications facilities siting on association common property or property subject to a community association covenant.

PRB-1 and Community Association Covenants (47 CFR Part 97)

Community Associations Institute recommends the Bureau take no action to expand the Commission's orders preempting state and local laws and regulations concerning amateur service communications to community association covenants. There has been no material change in the record meriting a change in the Commission's long-standing view that community association covenants are contracts between private parties and that such agreements do not usually concern the Commission.

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Community Associations Institute¹ submits these comments in response to the Federal Communications Commission’s (FCC or Commission) request for comments pursuant to the statutory biennial review of certain Commission regulations. These comments are in reply to the request of the Wireless Telecommunications Bureau in the above referenced docket.²

I. Background on Community Associations

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

¹ Based in Falls Church, VA, CAI is the only national organization dedicated to fostering competent, well-governed community associations (homeowner associations, condominium associations, and housing cooperatives) 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 40,000 members include community association volunteer leaders, professional managers, community management firms and other professionals and companies that provide products and services to associations.

² *2018 Biennial Review of Telecommunications Regulations*, DA 18-1260 (rel. Dec. 17, 2018)

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. Community associations are by law required to disclose association covenants to consumers purchasing a home, unit, or lot prior to the consumer closing on a purchase contract.³ Consumers understand community association covenants are legally binding contractual obligations that govern the use of land and establish rights and responsibilities of the association and property owners.⁴ According to national research, 90 percent of community association homeowners assert that association covenants protect and improve the value of their homes, often a household's largest asset.⁵

The value of housing units in community associations is estimated at \$5.88 trillion. In 2017, association homeowners paid \$90 billion in association assessments to fund maintenance and operation of community infrastructure. To further support community infrastructure and services, homeowners have set aside \$25 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.⁶

³ See *Uniform Common Interest Ownership Act (2008)* Section 4-103. Public Offering Statement; General Provision.; Section 4-108. Purchaser's Right To Cancel.; Section 4-109. Resales of Units. Twelve states have adopted a version of the Uniform Common Interest Ownership Act while most states have adopted statutes based on the Uniform Act.

⁴ See, e.g., *Mathis v. Mathis* (1948), 402 Ill. 66, holding in a conveyance of a real estate interest containing a covenant, "the covenant runs with the land and is binding upon subsequent owners." See additionally, *Rosteck v. Old Willow Falls Condominium Assn.*, 899 F.2d 694, "But the condominium declaration is a contract..."

⁵ *2018 Homeowner Satisfaction Survey*, Zogby Analytics for the Foundation for Community Association Research (June 2018). Available at https://foundation.caionline.org/wp-content/uploads/2018/06/HOMEsweetHOA_2018.pdf

⁶ Foundation for Community Association Research: Statistical Review for 2017 (Summary). Available at <https://foundation.caionline.org/wp-content/uploads/2018/06/2017StatsReview.pdf>

II. Accelerating Wireless Broadband Technology Deployment (47 CFR Part 17)

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

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 (e.g. earthquake early warning systems under development) and, once the disaster or emergency has occurred, communicating important information to officials and residents.

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. In the wake of recent natural disasters, community association boards and community managers relied on mobile communications networks to alert residents, locate residents, implement disaster recovery operations, and facilitate community recovery.

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.

A. Wireless Communications Infrastructure Development in Residential Areas

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 abut or cross association common property.

The Commission has previously expressed interest in the standards by which localities evaluate permits, raising questions if aesthetic concerns are a permissible variable in a locality's permitting process. 47 U.S.C. § 332 and § 253 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.

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 but have validated a locality's interest in aesthetic concerns.⁷

⁷ *T-Mobile Ne. LLC v. Town of Islip*, 2012 (E.D.N.Y., Sept. 21, 2012)

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.*⁸

Concerns of property owners in residential areas pertaining to 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. CAI members oppose any action by the Commission to preempt state or local statutes or regulations that relieve or have the effect of relieving

⁸ 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).

telecommunications service providers of the requirement to collaborate 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 willingness of facility owners to accommodate reasonable local concerns and concerns of community associations.

B. Wireless Communications Infrastructure Development on Association Common Property or Real Property Subject to Association Covenants

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 real property subject to the association's covenants. 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 the right of community associations to manage

common property and enforce covenants to the benefit of all property owners and residents to the extent permissible under law.

III. PRB-1 and Community Association Covenants

Private land use covenants are the legal foundation of the community association housing model. 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 the covenant. The Commission has resisted coercion to intervene in lawful contracts between private parties that do not impair interstate commerce, impair interstate and intrastate telecommunications services and radio services, or otherwise disrupt a Federal interest. Absent explicit statutory direction, the Commission has generally deemed such contractual relationships to not concern the Commission.⁹

The Commission has preempted private contracts that unreasonably interfere with federally-regulated commercial interstate and intrastate telecommunications services where there is a clear statutory authorization to do so.¹⁰ Where such a clear statutory directive is lacking, the Commission has stopped well short of vitiating private contracts to accommodate, non-commercial, voluntary, individual hobbies, even if such a hobby were federally-licensed.¹¹

⁹ FCC Memorandum and Opinion Order 85-506 (PRB-1, 1985), ¶ 7.

¹⁰ See *FCC v. Florida Power Corp.*, 480 U.S. 245. 1986 in which the Supreme Court upheld the Commission's authority under the Pole Attachments Act of 1978 (47 U.S.C. § 224) to determine the reasonableness of private pole attachment agreements in States lacking a regulatory structure to determine reasonableness of such contracts. See also FCC Memorandum and Opinion Order 96-328 where the Commission, pursuant to explicit statutory directive, preempted certain nongovernmental restrictions concerning Over-the-Air-Reception-Devices.

¹¹ See PRB-1 (1985); Memorandum Opinion and Order FCC 99-2569 (PRB-1 (1999); Order on Reconsideration FCC RM 8763 (PRB-1 (2000 – Reconsideration)); Order on Reconsideration FCC RM 8763 (PRB-1 (2001)); DA 12-1342: FCC Report to Congress Pursuant to Section 6414 of the Middle Class Tax Relief and Job Creation Act of 2012, ¶ 39

To this end, the Commission expressly declined to determine if Congress has afforded the Commission authority to vitiate private contracts voluntarily entered by the parties that are lawful under the Constitution and Federal statute.¹² Rather, the Commission has prudently determined that voluntary, lawful contracts that do not disrupt a federal interest and that are knowingly entered by private parties should not be set aside unless a constitutional, statutory directive has been enacted by Congress.¹³

A. Association Covenants are Private Contracts

State law controls the creation, operation, management, and dissolution of community associations and all community associations are created pursuant to a state enabling act. All states have adopted a statutory and regulatory scheme informed in large measure by various uniform acts drafted by the National Conference of Commissioners on Uniform State Laws.¹⁴ These state statutory and regulatory frameworks are the basis of covenants governing the obligations of community associations, association property owners, and association residents.

As noted, courts have long held community association covenants to be binding contractual obligations on property owners and successors.¹⁵ The Commission has upheld this view, writing “*Since these restrictive covenants are contractual agreements between private parties, they are not generally a concern of the Commission.*”¹⁶ The Commission reinforced this view by stating, “*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*

¹² See PRB-1 (2000-Reconsideration) ¶ 6. See also PRB-1 (2001-Reconsideration) ¶ 6.

¹³ PRB-1 (2001-Reconsideration) ¶ 8.

¹⁴ See, e.g., the Uniform Condominium Act, the Uniform Planned Community Act, and the Uniform Common Interest Ownership Act, accessible at www.uniformlaws.org.

¹⁵ See Footnote 4.

¹⁶ PRB-1, 1985, ¶ 7.

tenant when the agreement is executed and do not usually concern this Commission.”¹⁷ The

Commission’s views in this matter are in the legal mainstream and consistent with Federal and state statute and jurisprudence.

In general, community association by-laws, rules, regulations, or authorities must be grounded in statute or a lawful declaration of covenants. It is well established law that community associations may develop and enforce architectural standards and guidelines.¹⁸ Such guidelines ensure that the purposes for which the covenant was established do not erode over time and protect association common property by facilitating the management, operation, use, repair, modification, and improvement of such property. Architectural standards and guidelines further ensure that the property of individual owners will not decrease in value.¹⁹

National surveys consistently show that association residents and property owners view their association’s covenants as an important tool to protect the overall community’s interest. A survey conducted by Zogby Analytics for the Foundation for Community Association Research found that association homeowners view association rules (e.g., architectural standards) as a means to protect the value of homes and real estate. In 2018, 62 percent of surveyed association homeowners indicated their association’s rules directly protect or enhance property values with

¹⁷ *Ibid.*, Footnote 6.

¹⁸ See, e.g., *Bear Creek Planning Committee v. Ferwerda* (2011) 193 Cal.App.4th 1178 in which the court held the association had authority to adopt architectural standards and to adopt additional architectural guidelines based on empowering language in the association’s covenants. See also *Dolan-King v. Rancho Sante Fe Association* (2000) 81 Cal.App.4th 965 in which the court held an association’s architectural standards constitute a benefit for association homeowners.

¹⁹ 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.

28 percent responding association rules have a neutral impact on value.²⁰ These data are consistent with prior survey results and consistent with the views of CAI members expressed in member surveys.

B. Community Associations Accommodate Amateur Service Communications

In 2014, CAI surveyed member community association board members, community managers, and community attorneys to determine how or if community associations accommodate requests by radio amateurs to install and maintain towers and antennas. The survey was directed at membership groups with direct responsibility for community association day-to-day operations.

CAI's member survey found that 91 percent of respondents could not document an instance in which a radio amateur's request to site an antenna or other equipment necessary to broadcast on spectrum allocated to the amateur radio service was denied. The survey revealed a number of examples where community associations made space available in community buildings for amateur radio clubs and equipment. One association reported it allowed radio amateurs to site an antenna on top of the community's clubhouse. The survey additionally revealed that the majority of community association covenants contain no prohibition on radio communications whatsoever.

The survey also confirmed the views of CAI members with 95 percent of respondents agreeing that their community's architectural covenants preserve and protect the value of their home. Additionally, 78 percent of respondents indicated that radio amateurs should not be exempted from their community association's covenants while 11 percent of respondents

²⁰ *2018 Homeowner Satisfaction Survey*, Foundation for Community Association Research (Falls Church, Va., June 2018. Available at https://foundation.caionline.org/research/survey_homeowner/

indicated radio amateurs should be exempted from covenants that govern the siting of external antennas.

CAI members profess no hostility to amateur service communications or toward radio amateurs. In general, CAI members expressed no opinion on amateur service communications other than radio amateurs should abide by their community's covenants in the same manner as all residents and owners.

C. Amateur Service and Disaster Communications

Radio amateurs have long supported disaster communications and participate in programs established by the Commission, the U.S. Department of Defense, state and local government, and non-profits for this purpose. There is such a deep and broad record of such emergency communications by radio amateurs that it is unnecessary, if not impossible, to summarize the volume of disaster communications contacts made by radio amateurs.

On its face, the volume of disaster communications contacts made by radio amateurs definitively shows that radio amateurs face few obstacles in providing emergency communications. There has been no material change in this record since the Commission last examined the topic in 2012.²¹

A curious finding of CAI's survey on community associations and amateur service communications pertained to the role of radio amateurs in community associations in times of emergency or disaster. While some associations reported that radio amateurs in their community participated in the community's disaster plan, 81 percent indicated that radio amateurs played no

²¹ Uses and Capabilities of Amateur Radio Service Communications in Emergencies and Disaster Relief: Report to Congress Pursuant to Section 6414 of the Middle Class Tax Relief and Job Creation Act of 2012 (DA 12-1342)

role in the association's disaster communications plan. Only 5 percent of surveyed communities reported that radio amateurs provided disaster communications capability for the association.

While it is a documented fact that the amateur service is an effective, decentralized, and resilient communications network that plays a valuable role in disaster communications, amateur service communications are no substitute for the interoperable communications networks owned and operated by state and local governments or the U.S. Department of Defense. Since 2001, the Federal government has invested more than \$13 billion in resilient, interoperable communications networks.²²

Private interests have invested billions to improve the resilience of communications networks which have had a material impact on disaster response as well as human health and safety in disasters. FCC Chairman Pai has noted the importance of private communications in recent disasters—

“In the case of Harvey, the one bit of good news is that wireless networks were much more resilient than in some previous disasters. About 5% of cell sites were down, as opposed to 25% for Hurricane Sandy. That wireless connectivity was literally a lifeline for many. In the initial phase of Harvey, Houston's main 911 emergency response center received more than 96,000 calls, many of which were from wireless phones. Many of the more than 11,000 people rescued by the Coast Guard were found because of wireless calls. That includes one 14-year-old girl who was saved after telling Siri, “Call the Coast Guard.” People also used their

²² Linda K. Moore, Congressional Research Service, *CRS Distribution Memorandum on Federal Funding of State and Local Emergency Communications Projects*, March 18, 2011, p. 5.

*smartphones to access social media platforms like Facebook and Twitter to
summon help and keep tabs on their family, friends, and neighbors.”²³*

CAI members share Chairman Pai’s views and through their own extensive experience can confirm the role of private communications in disaster response and recovery in community associations.

CAI members remain supportive of radio amateurs continuing to supplement government disaster communications. The existing record of successful disaster communication shows that radio amateurs will continue their vital role well into the future.

D. Community Associations and Housing Choice

CAI members strongly support the community association housing model and work daily to ensure community associations are welcoming neighborhoods. The housing model is attractive to a number of consumers and has grown over the previous 40 years. This growth has led to additional housing choices for consumers. Many consumers desire to purchase a home in a community association for access to amenities of the association and to protect the value of their home. Many consumers opt against purchasing a home in a community association precisely to avoid association covenants, by-laws, and regulations—these consumers strongly desire maximum control of their property under state law.

The Commission noted in 2012 that the market meets the housing needs of radio amateurs, writing “our review of the record does not indicate that amateur operators are unable to find homes not subject to [association covenants]”.²⁴ A federal preemption of community

²³ [Remarks of FCC Chairman Ajit Pai at Mobile World Congress Americas](#), San Francisco, CA (Sept. 12, 2017)

²⁴ DA 12-1342, ¶ 39.

association covenants to support a hobby activity would be a drastic action in the face of a competitive housing market that promotes and provides consumer choice.

Radio amateurs who purchase a home in a community association do so with the same knowledge and expectation as other homeowners that their property will be subject to the association's covenants. There is no sufficient public policy purpose that supports elevating one set of homeowner's concerns over those of all others.

IV. Conclusion

Based on the foregoing commentary, CAI urges the Commission—

- refrain from limiting or otherwise chilling a community association's opportunity to engage in meaningful negotiations with entities subject to the Commission's jurisdiction concerning access to rights of way that cross or abut community association common elements.
- take no action to preempt or otherwise degrade private property rights of community associations in communications facilities siting on association common property or property subject to a community association covenant.
- take no action to expand the Commission's orders preempting state and local laws and regulations concerning amateur service communications to community association covenants.

Respectfully submitted,

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