



LATE TESTIMONY

P.O. Box 976
Honolulu, Hawaii 96808

February 9, 2009

Honorable Chair Rep. Robert N. Herkes
and Members of the House Committee on
Consumer Protection & Commerce
State Capitol
415 South Beretania Street
Honolulu, Hawaii 96817

**Re. HB 58 – Relating to Condominium Property Regimes, HB 58 – Relating to Ham Radios,
Committee Hearing, February 09, 2009, Conference Room 325, 2:15PM**

Dear Representative Herkes and Committee Members:

My name is Philip L. Lahne and I am the Co-Chair of the Legislative Action Committee of the Community Associations Institute-Hawaii Chapter. Thank you for the opportunity to testify on Senate Bill 58. While CAI recognizes this is a better bill than has been previously submitted by these groups supporting invalidating deed restrictions, CAI opposes any attempt to completely invalidate deed restrictions for condominium projects. This proposed Bill is counter to the expressed intent of this and prior legislatures to encourage self governance of community associations absent a showing of substantial need for legislative interference. As described below, the federal government has repeatedly rejected attempts by these groups to invalidate deed restrictions.

This Bill Would Invalidate Private Deed Restrictions and is Unnecessary in light of Section 514B-140, HRS.

That Section already permits Boards to review applications for alterations and additions. In those projects where antennas are not outright prohibited in the By-laws, the Board could make a determination as to whether the proposal is material. If so, it would require the vote of the neighbors of the applicant. Moreover, an amendment to the governing documents (67%) would be necessary to amend the governing documents or to agree to a material change. That is the way that it should be. Thus, there is no need for this legislature to be enacting separate provisions for every group that feels their alteration is of more importance. If the legislature begins entertaining the desire for every group who wants to invalidate some of the restrictive covenants, it will be very busy. There is no reason why these folks cannot use the existing mechanisms in the law which give their neighbors a chance to vote for these issues. It is a private matter and should not be taking up the legislature's time.

The FCC Has Consistently Rejected the Preemption of Restrictive Covenants

Over the past 20 years, the American Radio Relay League, Inc. ("ARRL"), a major sponsor of the proposed amendment, has presented similar requests to the Federal Communications Commission ("FCC"). In each case, the FCC has rejected ARRL's petitions to have restrictive covenants in deeds preempted by the FCC rules on amateur radio facilities ("CC&Rs"). The FCC has consistently held that its rules do not preempt CC&Rs because, among other things:

- ✓ The interests of preserving the integrity of contractual relations is very important and the FCC is "reluctant to pre-empt private parties' freedom of contract unless it is shown that private agreements

will seriously disrupt the federal regulatory scheme or unless there is another strong countervailing reason to do so . . ."

- ✓ Amateur station antennas *may vary widely in size and shape. Amateur station antenna configurations depend on a variety of parameters, including the types of communications that the amateur operator desires to engage in, the intended distance of the communications, and the frequency band. Amateur station antennas, in order to achieve the particular objectives of the amateur radio operator, can be a whip attached to an automobile, mounted on a structure hundreds of feet in height, or a wire hundreds (or even more than a thousand) of feet in length. They can be constructed of various materials occupying completely an area the size of a typical backyard. In addition, there can be an array of different types of antennas.*
- ✓ ARRL has been unable to show *that CC&Rs prevent amateur radio operators from pursuing the basis and purpose of the amateur service.*
- ✓ Purchasers or lessees are free to choose whether they wish to reside where such restrictions on amateur antennas are in effect or settle elsewhere.

It should be noted that in the FCC proceedings ARRL was advocating an "intermediate" position of reasonable accommodation, *i.e.*, that homeowner associations should be required to grant reasonable accommodations to amateur communications and should impose the *minimum* practicable regulation to accomplish legitimate purposes. That is similar to what is proposed here and the FCC rejected it outright.

In 1984, ARRL petitioned to have the FCC declare state and local regulations and CC&Rs preempted by FCC rules on amateur radio facilities. In the 1985 FCC decision known as "PRB-1," the FCC ordered a limited preemption of state and local regulations affecting amateur radio facilities; however, the FCC refused to preempt CC&Rs noting that they are contractual agreements:

7. Amateur operators also oppose restrictions on their amateur operations which are contained in the deeds for their homes or in their apartment leases. *Since these restrictive covenants are contractual agreements between private parties, they are not generally a matter of concern to the Commission . . .*

9. The contrary belief held by housing subdivision communities and condominium or homeowner's associations is that amateur radio installations constitute *safety hazards, cause interference to other electronic equipment which may be operated in the home (televisions, radio, stereos) or are eyesores that detract from the aesthetic and tasteful appearance of the housing development or apartment complex.* To counteract these negative consequences, the subdivisions and associations include in their deeds, leases or by-laws restrictions and limitations on the location and height of antennas or, in some cases, prohibit them altogether. The restrictive covenants are contained in the contractual agreement entered into at the time of the sale or lease of the property. *Purchasers or lessees are free to choose whether they wish to reside where such restrictions on amateur antennas are in effect or settle elsewhere.*

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Memorandum Opinion and Order adopted September 16, 1985, released September 19, 1985 (FCC 85-506).

In a petition filed on February 7, 1996, the ARRL asked the FCC to review and modify its policies concerning CC&Rs. In an Order adopted November 18, 1999 and released November 19, 1999, the FCC Wireless Telecommunications Bureau ("Bureau") explained that in PRB-1 "the commission did not extend the limited preemption to covenants, conditions and restrictions (CC&Rs) in deeds and in condominium by-laws because they are ***contractual agreements between private parties***." The Bureau rejected ARRL's arguments finding it was neither necessary nor appropriate to preempt private restrictive covenants:

Although we do not hesitate to offer such encouragement, we are not persuaded by the Petition or the comments in support thereof that specific rule provisions bringing the private restrictive covenants within the ambit of PRB-1 are necessary or appropriate at this time.

Order Adopted, November 18, 1999, Released, November 19, 1999 (FCC 99-2569).

In a further Order on Reconsideration adopted November 13, 2000, released November 15, 2000, the Bureau held that the circumstances did not warrant "revisiting the exclusion of CC&Rs from the Commission's limited preemption policy in this context." ARRL argued that, since the Telecommunications Act of 1996 provided the FCC with "authority to address CC&Rs," the FCC should do the same with regard to amateur radio facilities. In response, the Bureau rejected ARRL's argument pointing out that over-the-air reception devices, *e.g.*, satellite dishes, are vastly different from amateur station antennas in size and appearance:

Unlike over-the-air reception devices (OTARDs), which are very limited in size in residential areas, ***amateur station antennas may vary widely in size and shape. Amateur station antenna configurations depend on a variety of parameters, including the types of communications that the amateur operator desires to engage in, the intended distance of the communications, and the frequency band. Amateur station antennas, in order to achieve the particular objectives of the amateur radio operator, can be a whip attached to an automobile, mounted on a structure hundreds of feet in height, or a wire hundreds (or even more than a thousand) of feet in length. They can be constructed of various materials occupying completely an area the size of a typical backyard. In addition, there can be an array of different types of antennas.*** Regardless of the extent of our discretion with respect to CC&Rs generally, we are not persuaded by ARRL's arguments that it is appropriate at this time to consider exercising such discretion with respect to amateur station antenna preemption. Moreover, we do not believe that ARRL has demonstrated that there has been a significant change in the underlying rationale of the PRB-1 decision, or that the facts and circumstances in support thereof, that would necessitate revisiting the issue.

Order on Reconsideration adopted November 13, 2000, released November 15, 2000 (RM 8763).

ARRL appealed the Bureau's decision to the FCC and in an Order on Reconsideration adopted December 18, 2001 and released December 26, 2001, the FCC denied the request for reconsideration based in part upon the concern that ARRL had not made a sufficient showing that CC&Rs prevent amateur radio operators from using their equipment as *alternative methods* of communication exist and, thus, preemption was unjustified:

In OTARD, for example, there was a strong statutory policy against restrictions that impaired a viewer's ability to receive over the air video services. *Here, there has not been a sufficient showing that CC&Rs prevent amateur radio operators from pursuing the basis and purpose of the amateur service.* In this regard, we note 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 operations, and use of a club station.*

Order on Reconsideration adopted December 18, 2001 and released December 26, 2001 (RM8763). The FCC also noted:

- ✓ Its decision regarding OTARD "does not support ARRL's request because the decision to preempt restrictions on OTARDs was based upon *significant policy objectives* that are not present in this case, and which could not be adequately accomplished without the Commission's intervention."
- ✓ "[T]he Commission does not exercise its preemption power lightly, and employs this power only as necessary to carry out the provisions of the Communications Act."
- ✓ It is not feasible for homeowner associations to process requests for reasonable accommodations by amateur radio operators: "We note that ARRL is proposing a policy of reasonable accommodation, as opposed to the total preemption imposed in the OTARD proceeding. *Nonetheless, given the great variance in the size and configuration of amateur antennas, we are concerned that such a policy would be considerably more complicated for HOAs and ACCs to administer.*"
- ✓ That "ARRL has submitted *no specific evidence that would persuade us to abandon our long-standing policy of excluding CC&Rs in private covenants from our ruling in PRB-1. We recognize the importance of preserving the integrity of contractual relations.* We are therefore reluctant to pre-empt private parties' *freedom of contract* unless it is shown that private agreements will *seriously disrupt* the federal regulatory scheme or unless there is another strong countervailing reason to do so, a showing that has not been made here.

The FCC concluded "that, in the instant case, while preemption is appropriate with respect to state and local regulations, it is not similarly appropriate with respect to CC&Rs." In a memorandum opinion and order adopted September 30, 2002, the Wireless Telecommunications Bureau dismissed ARRL's petition for reconsideration. I believe the concerns expressed by the FCC against preemption of CC&Rs apply as well to HB 58.

Concerns Regarding HB 58

1. HB 58 Will Preempt the Project's Governing Documents

The clear intent of HB 58 is to preempt the Project's Governing Documents and to permit owners to install HAM radio antennas when they would otherwise be prohibited from doing so. HB 58 would, for example, preempt provisions in roject document which prohibits owners from installing antennas visible from neighboring property unless the antenna is placed on the ground and does not exceed 10' in height above the ground.

The Governing Documents are contractual agreements between private parties. As recognized by the FCC, it is important to preserve the integrity of contractual relations, and private parties' freedom of contract should not be preempted unless such agreements will *seriously disrupt* the federal or other governmental agency regulatory scheme or there are other strong countervailing reasons to do so. The FCC has already declared that governing documents do not seriously disrupt the federal regulatory scheme and that there are no strong countervailing reasons to preempt CC&Rs. There is no basis for this committee to reach a different conclusion.

2. Aesthetics Problems

The Project's Governing Documents are drafted and adopted to enhance and preserve property values over time. The Project regulates alterations and additions through the Governing Documents and adoption and enforcement of architectural controls. If uncontrolled HAM radio antenna installations were to occur in the Project, these architectural controls would be vitiated. Some owners may be unwilling to accommodate the community's common interest because of their personal interest in installing HAM radio antennas in the most convenient location, regardless of aesthetic effects.

The proposed amendment raises special concerns as HAM radio antennas are highly visible and extremely unsightly and the proposed amendment imposes no limits on the number of antennas which may be installed in a particular location, no limits on the size of antennas, and no restrictions on where antennas may be placed or the appearance of antennas. It must be emphasized that the FCC has also expressed concerns regarding size and appearance of amateur radio facilities:

Unlike over-the-air reception devices (OTARDs), which are very limited in size in residential areas, amateur station antennas may vary widely in size and shape. Amateur station antenna configurations depend on a variety of parameters, including the types of communications that the amateur operator desires to engage in, the intended distance of the communications, and the frequency band. Amateur station antennas, in order to achieve the particular objectives of the amateur radio operator, can be a whip attached to an automobile, mounted on a structure hundreds of feet in height, or a wire hundreds (or even more than a thousand) of feet in length. They can be constructed of various materials occupying completely an area the size of a typical backyard. In addition, there can be an array of different types of antennas.

Order on Reconsideration adopted November 13, 2000, released November 15, 2000 (RM 8763).

Thus, there is ample evidence that HAM radio antennas will likely degrade the appearance of the Project and property values will likely decrease.

3. Safety

Installations of HAM radio antennas in the Project will pose safety risks. Improper installation could lead to the detachment of the equipment in a windstorm or hurricane, potentially causing personal injury and property damage. Injured persons may allege that the Project was liable for the injury or damage, even if the Project had no control over installation. The safety issues are compounded by the fact that, as discussed above, owners need not submit plans and specifications for approval by the Project; thus, owners may install antennas without any oversight by the Project. There

are also concerns regarding excessive signal leakage and/or interference with electronic devices. Community associations are not equipped to address these issues. However, if problems arise, owners will likely look to the Project to resolve such problems.

4. Interference with Use of Project

HAM radio antennas may interfere with electronic devices used by occupants of the Project homes. As the Project is charged with responsibility for administering the Project, owners will inevitably look to the Project to resolve problems associated with HAM radio antennas. The Project, however, lacks the expertise and/or capacity to resolve such problems. (See FCC Q&A attached.)

5. Conflict with § 514B-140 of the Hawai'i Revised Statutes

Many units within the Project are in condominium projects. Thus, even if the Project were a planned community association and not a condominium association, the Project benefits from the various restrictions on alterations and additions under Chapter 514B. The proposed amendment would permit owners to make alterations to the common elements of condominium projects without obtaining the approval of boards of directors and/or apartment owners, including directly affected apartment owners. Such a provision would preempt § 514B-140 of the Hawai'i Revised Statutes which requires apartment owners to obtain Board approval for nonmaterial structural additions to the common elements and 67% of apartment owners plus directly affected owners for material structural alterations:

§ 514B-140 Additions to and alterations of condominium. (a) No unit owner shall do any work that may jeopardize the soundness or safety of the property, reduce the value thereof, or impair any easement, as reasonably determined by the board.

(b) Subject to the provisions of the declaration, no unit owner may make or allow any material addition or alteration, or excavate an additional basement or cellar, without first obtaining the written consent of sixty-seven per cent of the unit owners, the consent of all unit owners whose units or appurtenant limited common elements are directly affected, and the approval of the board, which shall not unreasonably withhold such approval. The declaration may limit the board's ability to approve or condition a proposed addition or alteration; provided that the board shall always have the right to disapprove a proposed addition or alteration that the board reasonably determines could jeopardize the soundness or safety of the property, impair any easement, or interfere with or deprive any nonconsenting owner of the use or enjoyment of any part of the property.

(c) Subject to the provisions of the declaration, nonmaterial additions to or alterations of the common elements or units, including, without limitation, additions to or alterations of a unit made within the unit or within a limited common element appurtenant to and for the exclusive use of the unit, shall require approval only by the board, which shall not unreasonably withhold the approval, and such percentage, number, or group of unit owners as may be required by the declaration or bylaws; provided that the installation of solar energy devices shall be allowed on single-family residential dwellings or townhouses pursuant to the provisions in section 196-7.

As used in this subsection:

"Nonmaterial additions and alterations", means an addition to or alteration of the common elements or a unit that does not jeopardize the soundness or safety of the property, reduce the value

thereof, impair any easement, detract from the appearance of the project, interfere with or deprive any nonconsenting owner of the use or enjoyment of any part of property, or directly affect any nonconsenting owner.

"Solar energy device" means any new identifiable facility, equipment, apparatus, or the like which makes use of solar energy for heating, cooling, or reducing the use of other types of energy dependent upon fossil fuel for its generation; provided that if the equipment sold cannot be used as a solar device without its incorporation with other equipment, it shall be installed in place and be ready to be made operational in order to qualify as a "solar energy device"; provided further that "solar energy device" shall not include skylights or windows.

"Townhouse" means a series of individual houses, having architectural unity and a common wall between each unit, provided that each unit extends from the ground to the roof.

A HAM radio antenna would generally not constitute a "nonmaterial structural addition to the common elements" as it could, for example, jeopardize the soundness of the safety of the project. In heavy winds, an improperly installed antenna may collapse and injure an occupant. HAM radio antennas may reduce the value of apartments as they detract from the appearance of the project. HAM radio antennas may impair the condominium association's easement to repair and maintain the Project as they may block access to the common elements; the proposed amendment does not impose any requirement on owners to remove HAM radio antennas which prevent the condominium association from repairing and maintaining the project. HAM radio antennas may deprive nonconsenting owners from use or enjoyment of the project.

The clear intent of the proposed amendment is to circumvent the requirements under §514B-140 that owners obtain the consent of 67% of the common interest and directly affected owners before constructing material structural additions to the common elements. Under the proposed amendment, owners would have the ability to install HAM radio antennas without obtaining approval from the condominium members or even directly affected owners. This would constitute a major departure from existing requirements and adversely affect the interests of the Project and its members.

6. Approval Requirements Under Governing Documents

In addition to the requirements under §514B-140, the governing documents of condominium projects typically restrict owners from constructing alterations which affect the exterior appearance of the project. In most cases, the requirements include approval by the condominium associations' board of directors as well as a majority or in some cases as much as 67% of the common interest plus approval by directly affected owners. The proposed amendment preempts these requirements and permits owners to construct major alterations without obtaining approval by the condominium associations' boards of directors, a percentage of owners and/or directly affected owners.

Thank you for allowing me the opportunity to provide this testimony.

Sincerely,



CO-CHAIR

