Analysis Of Proposed "Compromise" To HR 1301

The proposed compromise bill is fatally flawed, in the following particulars:

(1) It establishes, as a matter of federal law a concept/principle that does not presently exist in either federal or state law: "*there are aesthetics considerations uniquely applicable to private land use restrictions*" [Findings (5)].

There is no present federal law that recognizes this concept.

There is neither state law (*all mandatory membership homeowner/property owner associations are creatures of, and exist subject to, state laws*) nor state judicial decisional law that recognizes this concept.

Inclusion of this "finding" would create a right to a heretofore never codified standard — to the detriment of all homeowners subject to the control of mandatory membership associations.

(2) It requires an Amateur to "*first seek approval*" from the "*homeowners' or community association*".

First, this creates a legal right for <u>*any*</u> association to require an Amateur to "*first seek approval*". That right does not presently exist for all associations in the United States. However, that right would universally exist if this language were to become law — the language creates a federal right, even if the "association" documents do not contain such a requirement.

Second, it grants regulatory rights to "associations" that presently do not have, and cannot obtain, under state laws, the right to adopt or enforce any mandatory use restrictions. There are many neighborhood/homeowner associations — both mandatory and voluntary membership — that have no mandatorily enforceable use restrictions; these associations may adopt voluntary restrictions, but under state laws they cannot compel any homeowner to abide by them.

However, the bill would — as a matter of federal law — create a federal right and would grant to all such voluntary associations the right to regulate a unique subset of homeowners — Amateurs. However, those associations would still have no regulatory authority over any other homeowners.

There is a difference between mandatory membership homeowner/property owner associations that have, by their creation documents, the right to enforce use restrictions and those homeowner/property owner associations that uniformly have no regulatory or enforcement rights against any homeowner that does not, in writing, agree to be subject to the voluntary associations rules or regulations [*this latter group includes both mandatory membership associations and voluntary membership associations*.]

(3) It permits the guilty, offending party to write — without any standard, limit or guideline — except the ones they draft — the "standards" that an Amateur must meet.

NO WHERE else in either federal or state law have homeowner/property owner associations been permitted to write their own rules or set their own standards when legislation has been passed mandating the modification, deletion or non-enforcement of existing land use restrictions.

Homeowner/property associations (*guided by CAI and other representative organizations*) for decades prohibited:

(a) the flying of flags and the erection of flagpoles;
(b) the installation of solar panels
(c) solar hot water heaters
(d) energy efficient roofing shingles
(e) rain water collection systems
(f) composting
(g) xeriscaping
(h) certain types of turf
(i) display of political signs
(j) standby electric generators
(k) satellite TV dishes
(l) exterior wireless internet masts/tower and antennas
(m) TV masts, towers and antennas.

State and/or federal laws now prohibit the enforcement or adoption of all the foregoing use restrictions.

None of the abolishing statutes — state or federal — permitted homeowner/property owner associations to set the standards or write the rules for what a homeowner could install or use the previously prohibited items.

All of the enabling statutes set or defined the standards and rules that would bind the associations with regard to the previously prohibited activities — for the simple reason that no one permits the fox to guard the hen house.

Some of the enabling statutes, in a dispute between a homeowner and an association regarding the now permitted activity, place the burden of proof on the association.

Many of the enabling statutes permit the homeowner to recover attorney fees from an association that violates the enabling statutes.

Some of the abolishing statutes even permit the recovery of civil penalties for violations of the abolishing statutes.

Not to worry, you say? The proposed replacement bill states that an association may not "preclude", must "permit"?

In every instance cited above [(a)-(m)], after the passage of the mandatory enabling legislation, CAI and other representative organizations immediately drafted and distributed instructions on how to avoid and evade the statutory prohibitions.

A fairly typical example is embodied in the October 23, 2014 letter of the Hancock County Prosecuting Attorney attached as Exhibit 1. Although 4 U.S.C. 5, the *Freedom to Display the American Flag Act*, is clear, note the efforts to which the Fieldstone HOA went to try to prevent the homeowners from erecting a flagpole and flag. This is typical, not unique — the newspapers and wire services are full of stories of HOAs creatively trying to prevent the erection of flagpoles and the flying of flags — 11 years after the passage of the Act.

The *Communications Act of 1996* mandated the rights of homeowners to install one-meter satellite dishes, to erect exterior wireless Internet masts/towers and antennas to install exterior TV antennas on masts and towers. Although the "OTARD Rules" defining these rights eliminated a homeowners obligation to seek permission from an HOA to install any of the permitted items and imposed neither height nor number limitations, the FCC database and court records are replete with attempts by HOAs to still require prior approval, to limit the number of antennas, to limit the height and number of antenna support structures — 20 years after the passage of the Act — and that is without the right to set any standards.

These efforts have been and still are guided by the lawyers for CAI and other representative organizations.

HOAs and CAI recognize no law and never accept any mandated restriction on their powers.

Granting associations (*which means CAI)* the right to dictate the standards — regardless of reliance on the words "preclude", "permit", "minimum practical restriction", "effective" or "efficient" fails to recognize the reality of HOAs, CAI, their creativity and doggedly persistent (*and effective*) evasion of all statutes that attempt to limit their iron control of homeowners.

Granting this right means that instead of relieving the prohibitions on Amateur Radio and Amateur Radio Operators the bill will effectively codify the right of HOAs to very effectively do what they have been doing for over 35 years — ban Amateur Radio operation.

(4) It permits associations to use "aesthetics" as the outcome determinative standard.

"Aesthetics" is a subjective standard and it is the most powerful tool currently used by associations to deny any requested improvement. It is fair to state that 99% of all declarations that create and govern associations permit, if not mandate, the use of "aesthetics" as the standard.

"Aesthetics" is also not a fixed standard in any HOA; it can change with a change in membership of the Architectural Control Committee or the Board of Directors. "Aesthetics" can be interpreted one way for Bill Smith on Green Street and another way for Jim Smithe across the street.

Courts have uniformly upheld "aesthetics" as a valid criteria for ACC/Board denial of a homeowner's request, if the governing documents permit "aesthetics" to be used as a standard. Courts also have not required uniformity of result because the "aesthetic" standard is intentionally broad, vague and unbounded by any objective limitation.

This means that a decision based on "aesthetics" will be deemed to be compliant with the language of this compromise and will not be appealable. Again the words "preclude", "permit", "minimum practical restriction", "effective" or "efficient" cannot trump "aesthetics".

Look at Page 11 of *CAI's Statement For The Record*, numbered Paragraph 4. The cited permissible judgment criteria — sight easements, interference with air, light and open space, permitted height of principal structures … or other apparatus — all fall under the "aesthetic" rubric. These criteria are not objective limitations and the courts will uphold a decision based on any of these as being within both the right of an HOA and CAI to use "aesthetics" as a standard.

Using "aesthetics" an HOA/CAI can permit only hidden, small wires, below roofline short verticals hidden from the eyes of an adjoining lot, "boulders", prohibit roof-mounted antennas of any kind, prohibit any tower, and prohibit any yagi or hex beam.

The concept of being permitted to use "aesthetics" is so far fetched that not even CAI requested the right to use "aesthetics" as a governing standard in its Committee Report.

GIVING HOAs/CAI the right to use "aesthetics" as a judging standard is for HOAs/CAI the regulatory equivalent of Br'er Rabbit begging Br'er Fox "*but please, Br'er Fox, don't fling me in dat brier-patch*."

It is the Holy Grail of HOA power — and this compromise codifies it into federal law as a federal standard.

(5) "Effective, efficient outdoor antenna" or "effective and efficient outdoor antennas" [*both are used and neither is equivalent to the other*] are not objective standards.

There is no Planck's Constant, Einstein Theory of Relativity, Newtonian Constant of Gravitation that establishes what is an "effective" or "efficient", "effective, efficient" or "effective and efficient" antenna.

Since the homeowner associations/CAI are granted the absolute right to establish standards, it is their definition that will control — not what a Ham believes is needed, not what physical laws dictate, not what actually would work.

(6) The use of the language "*minimum practical restriction*" coupled with "*permit[ting] communications … on frequencies allocated …*" permits associations/the FCC to find that access to any band would constitute compliance with the compromise bill — thus limiting the bands on which an Amateur may operate.

The language does not require that an Amateur have access to all bands or to the bands on which HE wants to operate; compliance with the compromise can be achieved if an association/the FCC rules that access to <u>any</u> band/frequency constitutes not "precluding" and the "minimum practical restriction".

Thus stating that access to certain bands — say 70 cm, 1.2 GHz — both of which require only very small antennas, would constitute "minimum practical restriction" and would not constitute "preclusion" would exclude the ability of an Amateur to operate on the HF bands and any VHF/UHF below 70 cm/1.2 GHz.

Amateurs already can hide these antennas — the compromise could forever eliminate residential operation on the real bands in which Amateurs have interest. The purpose of the legislation was to get access to all bands — and to grant an Amateur the right to operate on the bands in which he has an interest. Since access to those bands is already prohibited the compromise would forever codify they have no right operate on any band that cannot use a small, hidden antenna.

(7) It automatically excludes the majority, if not 95% of all associations from the law by the use of the language "where authorized by the applicable declaration of covenants".

Creation documents both prohibit the deletion of included use restrictions, the creation of new use restrictions and the modification of use restrictions.

This permits the FCC to write rules that exclude the applicability of the compromise law to any association that cannot adopt any standards. The argument that if an association cannot adopt standards, then no limiting standards will exist, ignores the consistent FCC rulings that private land use restrictions do not impede or hinder the operation of Amateur Radio — it is highly probable that the FCC would use this exclusion to not "burden" such associations with having to comply with the compromise law.

(8) Congress has already found and declared that "reasonable accommodation" is the standard for "effective operation of amateur radio from residences."

In 1994 Congress passed S.J. Resolution 90/H.J. Resolution 199:

SECTION 1. FINDINGS AND DECLARATIONS OF CONGRESS.

Congress finds and declares that—

(1) radio amateurs are hereby commended for their contributions to technical progress in electronics, and for their emergency radio communications in times of disaster;

(2) the Federal Communications Commission is urged to continue and enhance the development of the amateur radio service as a public benefit by adopting rules and regulations which encourage the use of new technologies within the amateur radio service; and

(3) reasonable accommodation should be made for the effective operation of amateur radio from residences, private vehicles and public areas, and that regulation at all levels of government should facilitate and encourage amateur radio operation as a public benefit. See attached Exhibit 2.

There is no reason to abandon, or to apologize for sticking to, a standard that Congress approved 22 years ago. There is no realistic chance that Congress would withdraw these resolutions — a Congressional standard should not be abandoned because the opposition does not like it.

Exhibit 1

HANCOCK COUNTY PROSECUTING ATTORNEY

27 AMERICAN LEGION PLACE
GREENFIELD, INDIANA 46140

MAIN TELEPHONE: (317) 477-1139
CHILD SUPPORT TELEPHONE: (317) 477-1713
FACSIMILE: (317) 477-1180

MICHAEL GRIFFIN
PROSECUTING ATTORNEY

TAMI NAPIER
CHIEF DEPUTY PROSECUTING ATTORNEY

NATALIE BENAVENTE
CHILD SUPPORT ADMINISTRATOR

SHELLI POPPINO
OFFICE MANAGER

October 23, 2014

Board of Directors, Fieldstone HOA
PO Box 71
Greenfield, IN 46140

Re: Mr. & Mrs. Robert Willits
1621 Stonewall Drive
Greenfield, IN 46140

Dear Board,

By this letter, I request that you rescind and make amends for the actions taken in your letter to Mr. & Mrs. Robert Willits ("the Willits") dated September 9, 2014 and reiterated in your letter to the Willits dated October 18, 2014.

You may do so by Saturday, November 1, 2014. After that date, I will have no choice but to file suit to enjoin the board from enforcing the actions taken in its letters dated September 9 and October 18.[1] If the suit is successful, state statute requires me to pursue further legal proceedings to collect costs from the board.[2]

This letter describes the prosecutor's jurisdiction, the way in which the board has exceeded its authority, and the actions the board needs to take to rescind and make amends.

[1] Indiana Code 34-17-2-1(a)(1)(A).
[2] Indiana Code 34-17-3-6(c).

Prosecutor's Jurisdiction

The prosecuting attorney is responsible to file suit against a corporation that "exceeds or abuses the authority conferred upon the corporation by law."[3]

According to records of the Indiana Secretary of State, Fieldstone Homeowners' Association, Inc. is a domestic corporation in good standing created on February 3, 1997.

Association's Authority

According to the board's letter dated October 18, the board takes the position that it has authority under the "time, place, or manner" provision of the Freedom to Display the American Flag Act of 2005 (the "Flag Act").[4] In relying on "time, place, or manner," the board interprets its authority much too broadly.

The "time, place, or manner" provision does not empower the association. Quite the opposite, the Flag Act prevents homeowners associations from enforcing most kinds of regulations regarding display of the American flag.[5] But if the Association has a "substantial interest" invoked by a display of the American flag, then the association may use its state law authority to regulate the display with respect to "time, place, or manner."[6] The Community Associations Institute, in particular, calls attention to the requirement of a "substantial interest" on its web site.[7]

The association apparently assumes that it has a legally-sufficient "substantial interest." However, the association has asserted its interests to be type of community and future outdoor maintenance. Every homeowners association has those interests. If those general interests were enough, the law would not require a "substantial interest," it would simply say that homeowners associations always have the right to regulate "time, place, or manner." But the

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[3] Indiana Code 34-17-1-1(6) and 34-17-2-1.
[4] Public Law 109-243 (2006).
[5] Section 3 of the Flag Act.
[6] Section 4 of the Flag Act.
[7] http://www.caionline.org/govt/news/Pages/GuidanceforComplyingwiththeFreedomto DisplaytheAmericanFlagActof2005.aspx (last visited on October 23, 2014).

law does not say that. The law requires a "substantial interest," something more than the usual interests of homeowners associations.

The example offered by the Community Associations Institute is large floodlights that would disturb the sleep of residents.[8] However, nothing like that is at stake here. After visiting the Willits' property and examining their display, we find that:

- the flags are in good condition and are of a size and material commonly found in Hancock County and throughout Indiana, and

- the type of flagpole, including its height, color, finish, finial, and surrounding decorations, are all within the bounds of flag displays commonly found in Hancock County and throughout Indiana.

We do not find any aspect of the Willits' display that invokes a legally-sufficient "substantial interest" of the association.

Our visit also revealed that a much taller flagpole and flag are posted on association property near the entrance to the Fieldstone neighborhood. With these already displayed in the Fieldstone neighborhood, the association cannot deny that these are acceptable. Any legal dispute about the Willits' display would invoke the association's display as a powerful example supporting the Willits.

In summary, the association does not have a legally-sufficient "substantial interest" invoked by the Willits' display. Under the Flag Act, without a "substantial interest," the association cannot regulate the Willits' flagpole and American flag.

Potential Responses

I expect the board's review will include consideration of counterpoints to the position taken in this letter. In the interests of time and resolving this matter, I will note and address the more expected counterpoints.

[8] Id.

One counterpoint may be that the Willits failed to follow procedures. This is easily overcome. Under the Flag Act, exercising the right to display the American flag does not require following any procedure unless the association has a legally-sufficient "substantial interest." As already concluded, the association does not have a legally-sufficient "substantial interest" with respect to the Willits' flag display. Without a "substantial interest" at stake, the Flag Act allows the Willits to exercise their right without following any procedure at all.

Another counterpoint may be that the association has to assert its authority now, otherwise, the association will not be able to enforce its covenants and restrictions in the future. But that attempts to pit the full range of future possibilities against the actual display today by the Willits. This dispute is not about possibilities. The Flag Act does not permit future possibilities to be an objection. This dispute concerns the actual flag display, now, by the Willits. In the future, if the Willits display a tattered flag, double the height of their flagpole, paint the flagpole bright pink, or do anything else that would render the display disrespectful,[9] the association could take enforcement action consistent with the "manner" provision of the Flag Act. But that is not today's situation. Today's situation is a well-maintained and respectful display of the American flag consistent with the Flag Act and Code.

Another counterpoint may be that the prosecuting attorney enforces state law, not federal law. However, this <u>is</u> an enforcement of state law. The association has no authority apart from state law. The association's authority to enforce covenants and restrictions is derived from state law. The association is attempting to use its authority under state law. The state authority of homeowners associations has been reduced by a federal law, the Flag Act. Regardless, the association continues to attempt using its state law authority as though it had not been reduced. State law makes me responsible to file suit against a corporation when it "exceeds or abuses the authority conferred upon the corporation by law."[10] Note that the reference to "law" in that provision is not limited. My position is that the association does not have the state law authority that it has asserted, and that the association has exceeded its state law authority.

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[9] See The Flag Code, 4 U.S.C. §§ 1-10.

[10] Indiana Code 34-17-1-1(6) and 34-17-2-1.

Another counterpoint may be that the association's free-standing flagpole is intended to be the only one in the neighborhood. However, display is an individual right under the Flag Act, not limited to a group like the association. If display by free-standing flagpole is already acceptable at one location in the neighborhood, logic does not dictate that it is unacceptable elsewhere in the neighborhood. What about restrictions on "manner" or "place" of display? As already addressed, those apply only if the association has a legally-sufficient "substantial interest." What "substantial interest" could the association have in prohibiting the Willits' free-standing flagpole? If the answer is aesthetics or exclusive use by the association, those are not legally-sufficient "substantial interests." Why not? This is exactly why the Flag Act became law. After the Flag Act, the usual, aesthetic-based interests of a homeowners association are simply not enough when it comes to display of the American flag. That's what the Flag Act means, and that's why the "substantial interest" standard was imposed.

Another counterpoint may be that only the American flag is covered by the Flag Act while the flagpole is not covered by the Flag Act. However, an interpretation like that would be totally inconsistent with the Flag Act. To display the flag, some means of display is necessary. There is no possible way for a flag to be displayed without it being attached to something. Flagpoles, whether free-standing or attached to the façade of a home, are the customary way of displaying a flag outdoors. Aesthetic preference is not a legally-sufficient "substantial interest" of the association with respect to American flag display, and I know of no other reason for an association to distinguish between flagpoles attached to the façade of a home and free-standing flagpoles.

Another counterpoint may be that the Willits are also flying a POW/MIA flag. The POW/MIA flag is not protected by the Flag Act. In your letter dated October 18, 2014, you take exception, to what you imagine to be an implication of Mr. Cone's letter, that you are not decent-minded people. As I read Mr. Cone's letter, I did not find that as an implication. I found Mr. Cone's letter to be a positive, reasonable and succinct appeal to your better sentiments. Obviously, that was not successful. I suggest that you permit the Willits to fly their POW/MIA flag as a gesture of goodwill. However, the decision about the POW/MIA flag, and the implications that will inevitably flow from it, are yours to choose. We are free to act legally, but we are not free from what people will think of us.

Remedies

The Willits may have been willing to accept some of the actions imposed by your letter dated September 9, 2014. I am not.

You may have until Saturday, November 1, 2014 to:

- rescind in writing all of the actions taken in your letter to the Willits dated September 9, 2014,
- acknowledge in writing that, due to the Flag Act, the board is unable to enforce its covenants and restrictions against the Willits with respect to their American flag and flagpole, and
- send a written and full letter of apology to the Willits.

After that date, I will have no choice but to file suit to enjoin the board from fulfilling the actions taken in its letters dated September 9, 2014 and October 18, 2014. If the suit is successful, state statute requires me to pursue further legal proceedings to collect costs from the board.

Sincerely,

Michael Griffin
Prosecuting Attorney

cc: C. Thomas Cone, Esq.
Mr. & Mrs. Robert Willits
Beverly Brammer
Kaye Eckert
Dick Kuhns
Andrew Mulligan
Pat Rickett
Richard Rogers
Judy Schiewer

Exhibit 2

S.J.Res. 90

One Hundred Third Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday, the twenty-fifth day of January, one thousand nine hundred and ninety-four

Joint Resolution

To recognize the achievements of radio amateurs, and to establish support for such amateurs as national policy.

Whereas Congress has expressed its determination in section 1 of the Communications Act of 1934 (47 U.S.C. 151) to promote safety of life and property through the use of radio communication;

Whereas Congress, in section 7 of the Communications Act of 1934 (47 U.S.C. 157), established a policy to encourage the provision of new technologies and services;

Whereas Congress, in section 3 of the Communications Act of 1934, defined radio stations to include amateur stations operated by persons interested in radio technique without pecuniary interest;

Whereas the Federal Communications Commission has created an effective regulatory framework through which the amateur radio service has been able to achieve the goals of the service;

Whereas these regulations, set forth in part 97 of title 47 of the Code of Federal Regulations clarify and extend the purposes of the amateur radio service as a—

(1) voluntary noncommercial communication service, particularly with respect to providing emergency communications;

(2) contributing service to the advancement of the telecommunications infrastructure;

(3) service which encourages improvement of an individual's technical and operating skills;

(4) service providing a national reservoir of trained operators, technicians and electronics experts; and

(5) service enhancing international good will;

Whereas Congress finds that members of the amateur radio service community has provided invaluable emergency communications services following such disasters as Hurricanes Hugo, Andrew, and Iniki, the Mt. St. Helens eruption, the Loma Prieta earthquake, tornadoes, floods, wild fires, and industrial accidents in great number and variety across the Nation; and

Whereas Congress finds that the amateur radio service has made a contribution to our Nation's communications by its crafting, in 1961, of the first Earth satellite licensed by the Federal Communications Commission, by its proof-of-concept for search and rescue satellites, by its continued exploration of the low Earth orbit in particular pointing the way to commercial use thereof in the 1990s, by its pioneering of communications using reflections from meteor trails, a technique now used for certain government and commercial communications, and by its leading role in development of low-cost, practical data transmission by

radio which increasingly is being put to extensive use in, for instance, the land mobile service: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. FINDINGS AND DECLARATIONS OF CONGRESS.

Congress finds and declares that—

(1) radio amateurs are hereby commended for their contributions to technical progress in electronics, and for their emergency radio communications in times of disaster;

(2) the Federal Communications Commission is urged to continue and enhance the development of the amateur radio service as a public benefit by adopting rules and regulations which encourage the use of new technologies within the amateur radio service; and

(3) reasonable accommodation should be made for the effective operation of amateur radio from residences, private vehicles and public areas, and that regulation at all levels of government should facilitate and encourage amateur radio operation as a public benefit.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.