

AMENDMENTS COMMENTS RESPONSES

In the material below “(page X)” refers to the page in the document on the website containing the proposed and existing covenants, and justifications. Questions and comments are in ordinary font while responses are in italics.

The abbreviation POAA refers to the Virginia Property Owners Association Act.

Article I, Section 5 (page 4)

Questions have been raised as to the meaning of the term “natural person” (“does that mean a biological person?”) and whether the wording restricts ownership by excluding legal entities (persons) that are not natural persons.

The definition has been changed to “Any natural person or authorized representative of a legal entity holding fee simple title to any lot as defined in Article I, Section 4 of the Declaration.”

The change will permit corporate or trust ownership of a lot and have the desired effect of removing the circularity from the existing definition.

Article I, Section 9 (page 5)

The term “natural” has been eliminated from new definition of the term “tenant” to permit rental/lease to a corporate or government (for example an embassy) tenant.

Changing the provision will permit owners to rent to legal entities other than living persons.

Article II, Section 3 (page 7)

With respect to keeping the HOA continuously informed as to the mortgage holder, if any, and insurance company for each property, numerous questions have been raised as to the meaning of “continuously,” how such a provision would be enforced, and whether the provision represents an unnecessary invasion of privacy. Objection was also raised that the Association does not have the means to adequately safeguard such personal information.

The proposed amendment is intended to promote administrative efficiency. Property liens are public documents so the source of the privacy concern is not clear: there can be no expectation of privacy relating to liens. The association is directed to provide notice to lenders and/or insurers under certain circumstances, and getting the necessary information is neither fast nor easy. Moreover, Section 55-515.1A of the POAA directs associations to consult land records and/or records in the local tax assessor’s office when obtaining such information is necessary: those records are also public documents. Continuous knowledge of the current lender and insurance company would be easily maintained by specifying who that was – if there was such – and then notifying the Association of changes which would be necessary only when a property was refinanced with a new mortgage company or bank, or the insurer changed (not often).

A recent easily observed instance of the desirability of the association knowing the identity of the lender and insurance company was the sudden, though not surprising, vacancy of 101 Connemara (house immediately behind the entrance sign). That sudden vacancy resulted in loss of power to the entrance sign when Virginia Power disconnected power to the house. It also left the house essentially unsecured. Had the association known who to contact, it could have contacted them immediately to arrange for power and for the house to be secured. Lacking the

information, the secretary of the association had to devote substantial time and effort (uncompensated) to finding the necessary information and then contacting the responsible firms.

Article IV, Section 1 (page 9)

Objection to mail balloting was raised. Specifically asserted was that “A mailed ballot deprives the entire membership of votes cast with full information” and “A vote cast by mail, by definition, is cast before [a full] discussion takes place.”

In effect, the objection is an objection to absentee voting and would disenfranchise all who were not in attendance at a meeting where a vote was taken, no matter how much discussion had taken place prior to the vote, or the circumstances in which it took place.

Moreover, in light of the fact that discussion can easily be extended almost indefinitely (in Congress it is called a filibuster) any vote necessarily is taken before a full discussion takes place as long as any participant can think of something else to say.

In those cases where 1/2 or 2/3 of the total membership would be required to vote the same way at a meeting for an action to be effective, the association likely would never be able to act for want of the necessary votes. The association has never had a meeting at which 2/3 of the properties were represented, let alone where all voted the same way. From September 7, 1988 to March 7, 2009, the association has held 23 meetings including 22 annual meetings and one special meeting: records of attendance exist for 21 of those meetings. The maximum number of lots ever represented either in person or by proxy at a meeting for which a record exists is 36 while the average number of lots represented is 24.2. A simple majority, one-half plus a fraction of the lots, is 28 while 2/3 is 37. Thus, for those actions requiring a 2/3 majority, no action could ever have been taken based only on the votes taken at a meeting of the association. For actions requiring a simple majority (28 votes), a sufficient number of lots were represented a total of five times, but for any action requiring a simple majority to be effective all or virtually all properties represented would have had to vote the same way. Annual meetings could (likely would) become nothing more than briefing sessions for members regarding actions that could be taken if meeting attendance included a sufficient number of represented lots and the specified majority voted as required, but otherwise would not.

Article V, Section 1 (page 10)

The opinion was expressed that “This Article should remain limited to Maintenance Assessments which by definition below (Article V Section I, subsections a through i and proposed subsection j), is sufficiently broad.”

The proposed restriction would prevent the association from ever making any improvements that were not merely repairs to existing facilities (no gate on the roadway to Amelia Street for example).

Such a restriction would also prevent the association from accumulating a reserve for legal actions. One obvious alternative in case of a legal action requiring defense or payment of a judgment would be imposition of a special assessment for extraordinary expenses, which assessment might not be discretionary, might not be small, and might be due on short notice. Such a special assessment also might not be discretionary in any way that would permit the operation of the provision requiring that special assessments have the assent of 2/3 of the properties in the Association (proposed to be amended to a simple majority): if the Association is required to pay, the views of its members are not likely to have much influence on whether the assessment is made in order to make the required payment

Article V, Section 1, Paragraph (f) (page 11)

A question was raised as to whether the county is now responsible for maintenance of the storm water detention basin (and related structures).

See Section 1096.02(b) Maintenance of the Stormwater Management System in the Codified Ordinances of Loudoun County, which states that Loudoun County assumes responsibility for maintenance of storm water management facilities.

Article V, Section 1, Paragraph (g) (page 12)

Multiple questions have been raised with respect to what the capital reserves fund represents, the uses to which it can be put, and whether it duplicates the reserve for replacements. Elimination of provision for a capital reserve was suggested on the ground that it duplicates the reserve for replacements.

That the two reserves are the same is not clear: one is for maintenance of existing facilities and one might be used for improvement of existing facilities or used for new/additional facilities.

Article V, Section 1, Paragraph (j) (page 15)

Leaving determination of an emergency repair situation to the fire marshal and the courts to decide was suggested. The question arises in cases when a house has obviously deteriorated, especially if it is empty.

Doing so would be nice, but the fire marshal will not make or authorize emergency repairs, and neither will the county without substantial delay. Court action could take years and any complaint would have to be filed by someone with standing to file, either the county after a likely relatively long delay, or the Association. In either case, actual repairs would be in the unknown future and the problems with the property and expense of legal proceedings in the present.

Article V, Section 1 (page 15)

The sentiment was expressed that a simple majority vote should not be sufficient to approve expenditures or increases in assessments.

Less than a simple majority routinely approves new association dues (the Board alone can increase the annual assessment by up to 10%) and new budgets. The provision in the existing covenants, referring to special assessments, says “any such assessment shall have the assent of two-thirds (2/3) of the then members of the Association” (see page 15 near the bottom – center column). The existing provision can be retained, though doing so is virtually certain to require mail balloting. The existing requirement is not 2/3 of those at a meeting voting in favor of such a special assessment: it is 2/3 of the total or 37 properties, which has never happened and likely will not happen without mail balloting because 37 properties all voting the same way at a meeting, special or otherwise, has never been possible at any meeting held by the Association.

Article V, Section 5 (page 16)

There was one comment questioning the meaning or significance of “non-recurring” in light of the fact that virtually all association expenses are recurring, though not necessarily annually.

Article V, Section 6 (third paragraph) and 10 (page

Elimination of Section 10 and inclusion of the import of Section 10 included in Section 6 was suggested.

Elimination of duplicate provisions, especially if there is any possibility of conflict, is desirable.

Article VI, Section 3 (page 26)

Procedures for the submission of requests to the ACC have been questioned.

The proposed amendments would require that those wishing to make changes submit their requests in writing (leaving evidence of such request with a member of the ACC) and that they keep evidence of receipt of such a request by the ACC in the form of a receipt from the post office, or what would amount to a receipt such as a copy of the proposal acknowledged by a member of the ACC.

Article VI Section 5 (new) (page 17)

The provisions regarding changes up or down in assessments should be rewritten to allow for changes up and down (has a decrease ever happened?). At the same time, 10% was viewed as clearly sufficient to cover all necessary increases in expenses under all but extraordinary circumstances.

The provision can be rewritten, but why anyone would object to a Board-approved and implemented reduction is unclear. The 10% provision may be adequate in most years, but an assumption that appears to be implicit in the objection to permitting bigger changes is that the assessment will automatically increase by 10% every year, which has not always been the case.

Article VI, Section 4 (page 27)

Elimination of the provision requiring that alterations be completed within six months in favor of the existing 12 was suggested on the grounds that the change would only slow the process – especially when working with slow contractors.

The proposed change appears to reflect the view that the existing provision is acceptable, for which reason complaints that a project on someone else's property is taking too long can be dismissed out of hand for up to a year. The change could result in less time with an unsightly project scene in view though, if there is no objection to unfinished projects in public view, the entire provision could be eliminated. A contractor that is taking six months to complete a project (about six times as long as building a house from scratch takes) probably is not merely slow and the home owner's interests would probably be better served by hiring someone to actually do the work.

Article VI, Section 6, Paragraph (a) (page 29)

Objection was raised to permitting the Board to determine whether a home business is prohibited.

Lack of this provision has already resulted in at least one home business being established against the vociferous objections of at least three of its neighbors (there are other home businesses). That business appears to be in compliance with all county, state, and federal law, so the only place a restriction could have been placed (but cannot be placed now without substantial legal effort and expense) is at the level of the Association.

Article VI, Section 6, Paragraph (b) (page 30)

Objection was raised to permitting the Board to determine whether a particular pet is a nuisance or source of annoyance.

The language in question duplicates exactly the language in the existing covenants. The proposed amendments would permit animals other than dogs and cats if they were not objectionable to others. The existing covenants do not explicitly permit animals other than dogs and cats.

Article VI, Section 6 (page 29)

Adoption of a limit on the sound output of mechanically and electrically actuated sound producing devices was suggested. One level suggested was 85db.

Adoption of such a limit for electrically or mechanically actuated sound producing devices would permit limited use of speakers, telephone bells, etc. out doors and likely would not present problems as long as users abided by the limit. Problems would arise, though they would be subject to a noise complaint to the police, when people exceeded the limit, which seems likely with respect to speakers – especially those operated by teens.

Article VI, Section 6 (page 31)

Adding a safety provision to the prohibition of junk piles that are out of sight was suggested (unsafe or unsanitary conditions may exist even if the pile cannot be seen from the street).

The provision can be rewritten to include all unsafe conditions. However, enforcement would require either that a neighbor report the problem or that a representative of the association trespass to investigate. Most members of the board likely will not willingly trespass unless they have good reason to do so, which would likely require more than a mere suspicion that some provision of the covenants was being violated.

Article VI, Section 6, Paragraph (page 32)

Objection was raised to requiring that garbage cans be out of sight prior to 4PM the day prior to collection and then out of sight again after collection.

The existing covenants specify that trash containers are permitted to be in public view (on the street) only on the day of collection – that is only midnight to midnight 12:01am to 11:59pm. There is no provision permitting them to be in public view at any time prior to the midnight immediately prior to collection or after the midnight immediately following collection. There is substantial and very obvious evidence that many, possibly most, members of the association do not intend to abide by the clear requirements of the existing covenants, so, they should be changed to reflect what most members appear to believe is reasonable.

Article VI, Section 6, Paragraph (g) (page 33)

A question has been raised as to whether cables (maybe other utilities) must necessarily be above the ground at some point.

As a practical matter, cables and pipes frequently have to be above ground level at some point. The intention is merely that utilities be as unobtrusive as possible, as is intended by the existing covenants.

Article VI, Section 6 Paragraph (i) (page 34)

Clarification of the provisions prohibiting the unapproved removal of sound trees was suggested, based on the observation that removing everything but the trunk could be argued as having not removed the tree. Incorporation of a provision governing “reasonable pruning” and approval of that term was suggested.

The provision can be rewritten to require that trees be preserved. However, anyone wishing to remove a sound tree could ask for approval, which most likely would be forthcoming except in unusual circumstances. A related problem is that a sound tree can be made unsound simply by girdling it, which would not be obvious except on fairly close inspection. “Reasonable pruning” would be difficult to define and would in any case be somewhat subjective.

Article VI, Section 6 Paragraph (j) (page 34)

The comment was made that the proposed provision says that a doghouse in the backyard is not permitted without ACC approval.

The proposed provision duplicates the provision in the existing covenants exactly, except that the amended version permits approval of such structures. All out buildings (sheds, doghouses, etc.) are violations of the existing covenants (see the first sentence of existing (j)). Those structures were approved in contravention of covenants provisions that clearly do not reflect the wishes of those who have such structures and do not appear to cause any distress to those who do not, hence the provision should be changed.

Article VI, Section 6 Paragraph (m) (page 37 –second bullet)

Objection on 1st Amendment grounds was expressed with respect to the number of political signs permitted (one per election instead of one per party – for example) and inserting a specific exception to the signs rules for political signs.

The proposed amendments permit signs prohibited by the existing covenants. If the membership has no objection, the amendments can be rewritten to accommodate as many political (and other special interest) signs as people want, though some may be offended at some of the results.

Article VI, Section 6 Paragraph (o) (new) (page 38)

Elimination of the provision that an antenna may have a maximum dimension in any direction of 6 feet was suggested because “we are in a fringe area,” the provision to be replaced by a provision specifying that antennas be permitted only for reception of local broadcast signals.

The existing covenants do not permit any external antenna, apparently for esthetic reasons. Thus, the proposed amendments would permit something the existing covenants do not. Restricting antennas by characterization of the broadcast signals they are intended to receive will not work unless there is some enforcement mechanism, such as snap inspection of the radio or TV attached to the antenna to determine whether it is used exclusively to receive “local”(an undefined term) signals. No one in the Association is likely to accept responsibility for any such enforcement activity and no resident of the United States could be required to tolerate such an inspection (actually a search) on Constitutional grounds.

Article VI, Section 9 (new) (page 40)

A suggestion that “Additions or modifications primarily designed to reduce energy consumption or to utilize solar energy for household use shall not be prohibited” was made.

The proposed change would permit a homeowner to staple plastic sheeting over windows in winter (very ugly) to save energy or to put primitive solar hot water heaters on the roof (also very ugly- they can be made from junk) as distinguished from installations that have little esthetic effect. The association probably does not want to permit absolutely any effort to save energy without exception.

Article VI, Section 13 (new) (page 43)

All of the provisions related to ACC enforcement efforts, sanctions in particular, drew objection on grounds that the association could not deal with the legal requirements and necessary procedural niceties: the suggestion was that the entire section be “dropped.”

The enforcement provisions can all be removed. However, without enforcement provisions, there is no point in having covenants related to the appearance of a property. Unfriendly comments and sour looks from neighbors are unlikely to cause those inclined to ignore un-enforceable/un-enforced covenants into compliance with them. Section 55-513.B.(ii) of the POAA says that the board of directors of an association has the power, to the extent the declaration or rules and regulation provide, to “assess charges against any member for any violation of the declaration or rules and regulations for which the member or his family members, tenants, guests, or other invitees are responsible.

TOPICS NOT ADDRESSED IN THE COVENANTS

A question was raised as to what mailboxes are acceptable.

The association has no control over mailboxes for two reasons: mailbox design is subject to approval by the USPS (the interior is legally federal property once the box is in place); and the planting strip where mail boxes are installed is right of way for the street, thus effectively county property. That is, the Association does not appear to have any jurisdiction.

A provision prohibiting on-street parking overnight was requested.

The association has no jurisdiction on a public street, so how parking on the street could be regulated by the association is not clear.

PROCEDURAL QUESTION

Does amending the covenants without amending the articles of incorporation and/or by-laws “break the linkage” between the documents that is necessary for the association to enforce the covenants?

This is a question for a real-estate attorney. The intention with respect to the amendments to the covenants is that the amendments not disturb the relationship between the governing documents.