

# Analysis of New Gunbarrel Green HOA Governing Documents

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## Introduction

The HOA just distributed proposed changes to our governing documents: Articles of Incorporation, Bylaws, and Covenants, which I'll refer to here as the "new documents." They replace what I'll call the "old documents," which are on the HOA website, at [gunbarrelgreen.com](http://gunbarrelgreen.com). The HOA is accepting comments until 7-November, and they've scheduled a 90-minute meeting for 11-November, at which they'll also take comments. The Board hasn't said if and when they'll respond to comments, or answer questions, and they alone will decide whether to make any changes before the vote, the date of which they haven't announced.

My guess is that they'll be no discussion at the meeting, because the time is short and because at other meetings the Board has disallowed discussion. It's unlikely that I'll have an opportunity to make my comments at the meeting, since the 90 minutes has to be divided among the members in the room who wish to speak. I certainly can't explain my concerns in the five or so minutes I'll be allotted.

Yet, the changes in the new documents are so extensive, so potentially expensive for homeowners, and so intrusive, that it's important for all members to know about them, and that's impossible to do by reading the cover letter or merely scanning the new documents. So, I've put in the work, written this memo, and am distributing it to HOA members at my expense.

Plot spoiler: The new documents need to be rejected, which can be accomplished if less than 60% of the membership votes for them. Perhaps the Board was hoping that just some tweaks would be needed during the review period, but no amount of tweaking will fix the problems I've found.

The whole project has gone off the rails, mostly because the drafting was assigned to a law firm with no input from HOA membership. I suggested on multiple occasions, both orally and in writing, that the way to proceed was: (1) tell the members what the problems with the old documents are, (2) engage in problem solving with the membership, via workshops, (3) put together a short summary of consensus changes, (4) get buy-in on the changes, and (5) only then turn the work product over to the lawyers. I tried to explain to the Board that there was no point in spending thousands of dollars and a year of time drafting something that the members don't want. Instead, the Board skipped Steps 1 through 4, and went directly to Step 5. So, here we are. The 2019 budget had something like \$17,000 for this project, and my guess is that much of it has been spent.

In spite of that wasted money, as I'll make clear in this analysis, this project needs to be stopped. We need to tell the Board that we don't want increased control over our lives, additional expenses, and more restrictions on what we can do with our homes. What we need is a few small amendments to the existing documents to fix whatever it is that the Board thinks needs fixing. If there are obsolete clauses, such as a prohibition on coal heating or the names of the original Board members, then I say leave it alone. It's not hurting anyone. If the Board needs authorization to collect a transfer fee when a house is sold, then that's a simple amendment. I told the Board that, but they didn't listen.

## Summary

The problems with the new documents fall into a few general categories:

1. Excessive new powers for the Board of undetermined scope.
2. Dues increases, assessments, financial penalties, and self-help via Board action alone.
3. Significantly more restrictive Covenants.
4. Inappropriate Board control over homeowners' privacy, lifestyle, and freedom.

I'll discuss each of these in the following sections, with reference to the various parts of the new documents. The notation I'll use to reference the new documents is:

**A-n** and **A-n(x)**: Article or paragraph in Articles of Incorporation.

**B-n.m**: Section in Bylaws.

**C-n.m** and **C-n.m(x)**: Section or paragraph in Covenants.

## Excessive and Undetermined New Board Powers

With the new documents, it's infeasible, perhaps impossible, to determine what the powers of the Board are.

This is because of A-5(c), which refers to "all powers and duties in accordance with" the part of the Colorado Common Interest Ownership Act that applies to HOAs formed prior to 1-July-1992. To discover what they are, you have to read and understand a complicated 73-page document. (Google "colorado common interest ownership act.") The page count includes annotations, but I'm guessing those are essential to understanding. But even that isn't enough, because the Act also grants these two powers:

- Exercise all other powers that may be exercised in this state by legal entities of the same type as the association; and
- Exercise any other powers necessary and proper for the governance and operation of the association.

So, if the Board does anything, good luck in trying to convince them that they've gone beyond their powers. All they have to do is state that what they've done is "necessary and proper."

There are other powers that are dangerous. Under B-11(a), the Board can change the Bylaws; we don't even get to vote. We don't even get to find out what the Board does. Only meetings need to be open (B-6.4), but "meeting" isn't defined. The Board can discuss whatever they want at a coffee shop, over email, or over the phone, and as long as they don't call it a "meeting," they can go ahead and vote. (This defect is in the old documents, too. The Board hasn't "met" for almost seven months, since 27-March-2019, yet they've taken some major votes, with no notice to the membership and no minutes. They've discovered yet another way to operate in secret!)

The Board can "provide education to Owners" [B-7.1(p)]. The topic of education appears in other places where it states that the focus is on HOA matters, but there's no such limitation here. If it wanted to, the Board could start sponsoring classes on gardening, child rearing, or comparative religion. If you think that's crazy, consider the new paragraph A-5(e), by which the Board can "promote, foster, and advance the health, safety, and welfare of the residents." Really, is that what we need from our HOA? (Keep in mind that this is a power given to the HOA, but all HOA powers may be exercised by the Board unless there's something specific that says the power is reserved to the members, and this one isn't.)

There's more here, but you get the idea.

## Dues, Assessments, Financial Penalties, and Self-Help

The old documents required that any dues increase be voted on by the membership, but the Board has several times violated this by conducting the vote at an annual meeting. They claimed that the old documents were ambiguous on this point. I have determined that they are not, but the issues at hand are in the new documents, not the old ones, so I won't get into that here.

With the new documents, there's no voting at all, according to C-4.3. A 10% increase can be incorporated into the annual budget. There's something out of *Alice in Wonderland*: The budget is submitted to the Owners for consideration, and, once presented, "the budget shall be deemed to be the [sic] approved by the Association." Give us a paper, tell us it's the budget, and it's approved. More than 10%, and it's majority vote of members present or represented by proxy. A quorum is 16, so it takes only 9 people to raise the dues to any amount at all.

Those 9 people are all it takes for a Special Assessment [C-4.4].

But C-4.5 has something much worse: The Board, "in its reasonable discretion," can levy an assessment against an individual member! The member gets an "opportunity for a hearing," which I assume means that he or she can speak before the Board. Once the speech is over, the hearing can then end, and the money becomes due.

There are yet more ways for the Board to take your money: Under C-8.1(c), if you “[fail] to comply with the Governing Documents,” the Board can levy a fine, as long as the Board thinks it’s “reasonable,” in the opinion of the Board, and after one of those hearings.

Or, if the Board decides your fence or lawn sculpture or home addition is out of compliance, they can exercise “self-help,” which is “without limitation” [C-8(iii)]. There’s no hearing when this happens. Here’s a scenario: You buy a sculpture for \$75,000 and put it on your front lawn. The Board sends you a letter saying you failed to get Architectural Committee approval and, besides, the sculpture violates the Covenant against advertising. You’re given 10 days to remove it. You write a letter back disagreeing, but on Day 11 you come home from work to find the sculpture gone. You go to a lawyer, and find out that the Board’s action is entirely legal, and there’s nothing you can do about it. If you sue, you’re advised that you’ll lose. You attempt to retrieve the sculpture, but nobody knows where it is. You call the Sheriff, but are told this is a civil matter.

## More Restrictive Covenants

The old documents say this about amending the Covenants: “any such amendment shall not have the effect of rendering said restrictions, covenants and conditions more difficult to comply with or of imposing more severe restrictions.” This is also in the new documents.

Amazingly, the new documents contain over 15 new restrictions. I would love to hear the legal theory under which approval of these would be allowable.

I think the original idea was this: A prospective owner can read the covenants before buying the property, proceeding with the purchase only if they’re OK with them. But it would be unfair if additional restrictions were imposed on them afterwards. Our old documents recognized this principle of fair play.

I spent a few hours comparing the new and old documents to find the new restrictions. Some of what I found:

C-5.3: “commercial manufacturing or fabrication of any kind” would no longer be allowed. I prepared photographs for my art shows in my basement, but under the new documents I could no longer do that.

C-5.6: “pets must be on a leash and/or under control.” This is, of course, something we all want, but it’s a new restriction from the HOA. If your child accidentally lets your dog out of the yard, you’re in violation of the Covenants, and I already explained how dire the consequences of that are.

C-5.9(b): new restrictions on what vehicles and other items can be parked, but now the restriction is not on your lot, as it was before, but “within the Community.” So, now the HOA has taken over the street. The old documents referred to “large objects,” which had its own problems, but now there’s no size specification at all. *All* camping trailers, golf carts, and boats are disallowed, no matter how unobtrusive. Again, we could argue about the merits of the new restrictions, but the point is that when we bought our homes, we were promised in writing that the Covenants would not get more restrictive, and the Board wants to break that agreement.

C-5.9(c): you can’t have an expired license plate.

C-5.9(d): no parked vehicle can impede the “safe and efficient use of the streets.” By C-8.8, the interpretation of this is up to the Board. So, if they don’t like your pickup truck on the street, they can levy a fine or just tow the truck away.

C-5.9(e): you can’t repair your vehicle or RV in your driveway or on the street. (I’ve repaired my RV while it’s on the street. It won’t fit in my garage, and I need access to electricity and to more tools than I can carry to the farm when I store it.)

C-5.14: new restrictions on clotheslines.

C-5.17: only one outbuilding per lot. If you have a golf-cart shed, you can’t have a greenhouse or tool shed.

C-5.18: you can’t put cuttings on the street.

C-5.19: you can’t have a buried tank. (Under the old documents, you could.)

C-5.20: lots of new restrictions related to rain barrels. Did you know this was a community problem?

C-5.21: you can’t grow or distribute marijuana except as allowed by law. This is a good example of the HOA wasting our time and money. It’s not necessary for the HOA to tell us to obey the law.

*Warning:* I’m not sure I’ve caught all the new restrictions, and, as some of them are fairly technical, I may not have understood the impact on, say, home additions. But I hope I’ve made my point.

## Privacy, Lifestyle, and Freedom

C-5.8 is so egregious that it deserves its own section.

There can't be any "use, activity or practice which is the source of unreasonable annoyance or embarrassment to, or which unreasonably offends or disturbs, any Owner or which may unreasonably interfere with the peaceful enjoyment or possession or the proper use of a Lot ..."

Again, there the dangerous use of the term "reasonable," which means whatever the Board wants it to mean. Here it's being used in an especially awkward way. Do they really mean to say "*unreasonably* offends or disturbs," or did they mean to say "*reasonably* offends or disturbs." You see, if someone is offended by your display of the American flag, you may say that offense is unreasonable. So you are in violation, as it specifically says *unreasonable*. Who knows?

The whole section is so broad that it very dangerously leads to control over our freedom to live in our homes the way we want to. The HOA Board should have no authority over any of this.

Here are a few things you might want to do that might offend or disturb one of your neighbors. Think about whether you want the Covenants to prohibit your "activity or practice."

- Living as a same-sex couple.
- Openly practicing Christianity or Judaism or Islam or whatever.
- Owning a gun, and being seen carrying it to your car.
- Parking a car with a bumper sticker that says "Jesus is My Co-Pilot" or "War is Terrorism with a Bigger Budget" or "American is for Americans" or "Trump Sucks."
- Having a party for 25 people.
- Playing music on your patio (at a lawful volume). Or speeches by Donald Trump or Elizabeth Warren.
- Displaying a campaign sign on your lawn.
- Walking around your yard wearing knee-length dress socks, plaid Bermuda shorts, and a Grateful Dead T-shirt.
- Having your visiting grandchildren running around the back yard making the racket that kids make.

## Conclusion

This isn't everything that I've discovered that's wrong with the new documents, just the highlights. Perhaps you'll agree with me that the new documents can't be fixed. They need to be rejected in total.

This is the third time in two years that our HOA has attempted to replace the documents. In August 2017 they sent out revised documents for voting (not review), with no prior notice at all. These documents were so poorly constructed that the vote was canceled, and the documents were shelved. A committee was formed to draft documents, but they eventually abandoned their work. Then a law firm was hired, and they produced the new documents we're looking at now.

Perhaps it would be a good idea for the membership to discuss the project generally and the problems with the new documents specifically, both the ones I've found, as well as those that others have found. Alas, the HOA has not planned for any such discussion.

My fear is that many members will simply vote approval without reading the new documents or, even if they read them, without understanding how inappropriate and dangerous they are. Probably very few members will send in comments or attend the November meeting.

My hope is that if this memo is reviewed, even with a cursory reading, the reader will decide at least that the new documents aren't fully baked, and that the safest thing to do is to vote them down. That gives us another chance to make the changes that the membership actually wants.

Thanks for your time!