

Results of Open Comment Period: View Protection Resolution

Background

In 2019 the Landscape Committee established procedures to follow when an owner files a landscape or view request. These were approved by the board. Over the next few years, new situations developed and by 2023 the board determined it was time to update and expand the policy that the Association will follow to determine whether landscaping materially interferes with a lot's ocean or bay view.

The result was the View Protection Resolution that set forth the definition of various terms that are used, the criteria and the procedures that the landscape committee (LSC) is to use in its evaluation, the establishment of a preliminary and final decision, owner review meetings, appeal procedures by either owner, as well as notice to all the owners involved. We believe that these policies and procedures more clearly outline how the landscape committee is to discharge its responsibility under section 6.11: "Disputes regarding whether landscaping violates this requirement shall be resolved by the Landscape Committee."

The board sent the proposed Resolution to all owners and conducted an open comment period prior to the final adoption of the Resolution. These comments were reviewed, and where appropriate, changes were made. These were incorporated into the final Resolution.

Response from Owners

Overall, there were 25 comments from 26 owners. That is approximately 16% of the households (adjusting for owners who own multiple lots) and 7.5% of all owners. 84% of the owner households did not comment which usually indicates that they are generally supportive and see no reason to comment.

Of those who did comment, the large majority were in favor of the Resolution and had suggestions or questions. There were a few who were clearly not in favor and had multiple objections.

All the comments were posted on the owner portal library. Some suggestions were incorporated into the final Resolution (noted below); questions/comments were reviewed and the board responded where appropriate.

Suggestions that were incorporated into the Final Resolution:

1. 10 days was not enough time to respond: The time period was increased to 14 days
2. Clarify how notices will be sent: The provision that notices will be sent via email as well as a "hard copy" mailed was added.
3. Add "virtual" to meeting types. Virtual was added
4. Offering of two dates restrictive. The meeting sections were modified to have the review/appeal meeting at either of the next two regularly scheduled committee or board meeting. If the owner cannot attend either one, then they are requested to send in a written statement with any documentation. This will become part of the review.

5. Did not like terms of “violating owner” and “complaining owner”. This was changed to “Landscape owner” and “Filing owner”.
6. Expand when a geological review may be required.
7. Modified 5 c to replace “are” with “may be deemed.”
8. Expanded number 5: “No committee member shall vote on or conduct the on-site review if the committee member is a Filing Owner or Landscape Owner (the Owner of the landscape).”
 - a. Added 11 (d): “No board member shall vote or conduct the on-site review if the member is a Filing Owner or Landscape Owner.”

Other comments:

Arborist: two commented that the LSC needs to provide an arborist. The board does not believe that the HOA should cover the expense of an arborist for private property. The owner needs to maintain their property so that it does not impact the views of others. If the owner wants to hire an arborist to accomplish that, fine.

One “wants the resolution to describe that actions should not be taken that will compromise the integrity of the slope.” The majority of the slope (tract B) is owned by the HOA. There is a part of the top that is owned by individual owners. As we have noted prior, Tillamook County has designated the Capes within a geological hazard area. Because of this, Tillamook County issued land use regulations which require that an owner obtain a geohazard report under certain circumstances. There are exceptions to this requirement. Tillamook County Land Use Ordinance Section 4.130(3) lists them. Here are the three (3) most relevant to The Capes:

6. Yard area vegetation maintenance and other vegetation removal on slopes less than 20%;
7. Removal of trees smaller than 8 inches dbh (diameter breast height);
8. Removal of trees larger than 8 inches dbh (diameter breast height) provided the canopy area of the trees that are removed in any one-year period is less than 25% of the lot or parcel area;

If the work is such that it does not qualify for one of the exemptions to the County Land Use ordinance listed above, a geo tech report is required. If it’s on private property, the owner is responsible. If it’s on HOA property, the HOA is responsible. The Resolution includes this requirement.

The ordinance also sets forth the standards of a geological hazard report which would address any slope issues. This report would guide any major changes to the slope. Please see section 4.130 of the Tillamook County Land Use Ordinance for further information.

LSC should notify an owner that a view request has been filed. The problem with this is that until an evaluation is done by the LSC, it cannot be determined if the landscaping in question is considered a material interference. There have been times where the committee has determined that there is no material interference and closed the request. In these cases, there is no reason to contact the owner and create issues unnecessarily.

A few owners commented that the resolution does not adequately define “material interference”. One owner commented that its “impossible to establish a numerical definition” and the “old” view pictures should be used. Another commented that there should be a 30% rule and nothing over the rooftops. We have found that “material interference” can only be determined by the on-site visit of the landscape committee and/or board member. A “one size fits all” does not work at the Capes with 185 lots all having different views of the ocean or bay. While it’s appreciated that a percentage rule such as suggested could make things easier, it actually would “rob” owners of a large part of their view and make it more difficult. A 30% rule would mean that owners views can be restricted to 70% of what they had before and effectively allow other owners to grow their landscaping another 30%. Here is a good example of what a % rule could mean: An owner commented: *“I note this “material” issue - If 5 homeowners in a row have trees that each one, obstructs 10% of my view by example, then I have 50% of my view obstructed. For a homeowner to argue his trees do not materially obstruct my view because his trees only obstruct 10% of my view, is a narcissist thought process. That homeowner would assume the other 4 obstructing lot owners should cut their landscape down, but he should not. We purchased our home for the ocean (and corridor to) views. Period. While I love trees, and they bring immense value to the overall landscape, I can purchase a home any [sic] many other places if I want a view of trees. We did not purchase our home for the view of the trees. It is the ocean. Would our community look the same void of trees? No. The trees help make this place beautiful. But this resolution does not ask all trees be cut. Lastly, if my trees are obstructing another homeowner's view per the guidelines set out in the resolution, then it is only fair and reasonable I address that, if I expect “my” views to be protected as well. To think I want my views protected, I want all my trees, but should not worry about others views, again, is a very narcissistic and troubling owner trait.*

Is the HOA considered an owner? Yes, for the property it owns.

Owner notification of HOA landscaping work: The HOA does use its best efforts to notify owners of adjacent property if tree work is done on HOA property. For Tract A, it’s part of the procedure. For large tracts, we sometimes hold ZOOM calls. If a tree request involves HOA property, the landscape committee will coordinate the work that is necessary to resolve the issue. Many times, property lines are not marked and we have surveyors to determine whose property it is. Recently, Tract G was surveyed, and the top of Tract B is being done this year.

Can an owner contact another owner? Sure. This Resolution applies only to view requests that are filed. An owner can always contact another owner and attempt to first resolve the issue prior to filing a view review request. However, we have found that this usually leads to more problems and disagreements.

Primary Living Area. An owner commented that this has always meant second-floor rooms and that first floor have never been protected. The Resolution defines what is considered a primary living area and purposely excluded those areas that are usually lower-level rooms. However, there are some single-family homes at the Capes where their family area is on the ground floor (generally on the west side of Fall Creek Drive).

The Resolution should require an owner discussion prior to filing a view request. This was the policy in the mid 2010's and was not successful in resolving view issues.

One suggested having exclusions from criteria used and requiring the review to determine "most advantageous and least advantageous" positions around a room. Exclude trees, limbs, or vegetation that obstructs less than 30% from the most advantageous position. The criteria to be considered by the landscape committee is detailed in the Resolution in making their decision. While we appreciate the suggestion, we feel that this criterion interjects more confusion, ambiguity, effectively causes the owner to relinquish 30% of their view and is really not workable.

Excluding board members from serving on the LSC. This would be detrimental to the Association to exclude owners from serving on committees who are well qualified, willing to spend more of their time in service to the Capes and are an informed board member as to the issues that the committee is dealing with.

Require that the LSC consist of owners from each of 5 zones. The board believes that the owners who are committee members fairly represent all the owners and to place another requirement is unnecessary. Additionally, with those kind of requirements in place, if you do not have any homeowners in each "zone" willing to volunteer, then you will not be able to have a functional committee.

One owner commented that the owner of the landscape be allowed to examine the view themselves. The board does not agree that owners should have the ability to go into another owner's home and see for themselves if their landscaping is interfering with the owners' view. Recently, there was an incident where the owner of the landscaping in question entered a home without the owner's permission to "examine the view for themselves". This action was reported to the board by the homeowner who was understandably upset. It resulted in the board sending a letter to the owner regarding this unwanted behavior. Besides, the Association has no authority to require one owner to allow another owner access. Furthermore, the decision on landscape obstruction is not up to the owner who owns the landscaping in question. If that were the case, we doubt that any views would be restored.

One owner commented that nowhere in the process is the HOA member allowed to present evidence or arguments that the complaining members view is not being materially interfered with. Under the procedures in the Resolution, owners are provided with pictures taken from the primary living area with markings highlighting the areas in question. The owner who owns the landscaping can in their meeting with the landscape committee present "evidence and arguments" that reflect their opinion. The Resolution also sets forth the ability of either owner to appeal to the board which would provide an additional forum for presentation of documents supporting their position.

Comment that Bylaw VI, section 1 reads "the same person may not hold more than one office" and noting that current board members are also committee members. The inference is that an officer of the corporation cannot serve on a committee as well. The board disagrees. "Office" is

construed to mean the office of the President, the Vice-President, Treasurer, and Secretary. A board member who is considered an officer of the corporation may not hold more than one office but may serve on a committee as a committee member. This has been the practice for the past 30 years. Here is Article VI Section 1 in its entirety:

ARTICLE VI: OFFICERS Section 1. Officers. The Officers shall be the President, the Vice-President, the Treasurer, and the Secretary, each of whom shall be Directors and Owners and shall be elected by the Board. The same person may not concurrently hold more than one office. The Board may designate such additional Officers as it deems appropriate.

Resolution or Amendment. This is a Resolution. It does not change any of the Capes governing documents. Its express purpose is to set out the criteria and procedures to use. Please refer to A-F of the Resolution.

Why not just go to an Amendment? Four owners commented that they think that an Amendment to the CC&R's is the better way to go. The board did discuss this option, along with others, and decided to pursue a Resolution at this time to establish specific procedures for the landscape committee to follow in fulfilling its role. This action does not preclude an amendment in the future.

Section 5.a, and 5.d should be removed. Section 5.c is inconsistent with the Declaration. It is unreasonable to expect the Landscape Committee to consider historical Protected Views. Removing two of the four criteria the committee is to use to consider is injecting more ambiguity to the process, not less. Historical views are an important consideration.

The Resolution should include an exception for trees that are approved or have been previously approved by the Association, whether through the Board or ARC. The board does not agree that landscaping that may have had a prior approval, is exempt from maintaining that landscaping so that the views of others are not impacted. The CC&R's do not provide for such waiver. It's clear that the owner must maintain their landscaping.

The Declaration and any resolution or other enforcement mechanism used by the Association should not be used to force an owner to remove landscaping that was previously approved. If the landscaping is found to be in violation of section 6.11, the board has the duty to enforce the CC&R's and its provisions.

The purpose of architectural and landscape approvals are to provide an owner with assurances that certain improvements can remain, regardless of what other covenants or restrictions may say. We disagree.

The Resolution should be revised to require the requesting owner to pay all costs associated with tree removal or trimming, including any required geological reports. This is consistent with other coastal properties that have view protections. The owner benefitting from the view should pay the costs. We disagree. First of all, a resolution can't do that. Secondly, the September 27, 2010 Amendment to the CC&R's clearly state that the cost is the responsibility of the owner. Thirdly, having owners to pay another owner to maintain their landscaping is, in our opinion, wrong. We do not endorse "pay for view". Chances are good that the owner requesting view restoration did not have any input in the planting or care of the landscape that has grown to block their view. We do not feel it is appropriate to require that owner to be perpetually forced to "buy back" their view from neighbors who plant trees and fail to maintain them.

The Resolution should require the recusal of a Landscape Committee member or Board member in the event of a conflict of interest, such as if a member submits a landscape review request, if a member's property is the subject of landscape review request, or if a landscape review request would have a material effect on the members. The Resolution does address this in Section II numbers 5 and 11d, as well as the Associations conflict of interest policy.

There were many comments in favor of the Resolution:

"Appreciate all you and the committee are doing to preserve views and enforce our covenants - it's why so many owners picked The Capes."

"I am definitely behind the Capes HOA Board proposed Resolution for view restoration and continued maintenance. I appreciate that the Landscape Committee duties are laid out in a clear and concise manner. This leaves no question as to what the majority of landowners want and how it will be handled moving forward."

"We strongly support the proposed resolution adopting view protection policies and procedures. All owners at The Capes purchased homes subject to existing CC&Rs which obligate each of us to preserve our neighbors' views of the ocean and bay. While the board and residents already operate under that legal obligation, the volunteers on the landscape committee will be greatly aided by having clear operating procedures and definitions. As the resolution adds practical and helpful guidance around our existing obligations as owners, we encourage adoption."

"I have reviewed the View Protection Resolution and find that it provides an excellent, well thought out resolution to any ambiguities that may exist in the CC&R's regarding view protection. I also find that the resolution provides for the due process necessary to have a successful resolution of conflicts."