Points to be made at MALA Board Meeting by the Fielding Covenant Committee, August 11, 2009

After having obtained considered legal opinion by specialists in property owners' association law, the Fielding Covenant Committee has reached the following conclusions based on that opinion. We would like to point out to the Board that each of its members has a legal and ethical duty to independently, fairly and in good faith arrive at his or her own decision in connection with any contemplated board action. This is the law. We would like to ask each member to fully consider the legal consequences of the proposed changes to the bylaws. They are severe.[1]

1. The MALA board has not moved to obtain any current legal opinion to back its justification for the proposed bylaw changes; nor has it consulted counsel regarding the legality of its proposed bylaw changes. Indeed, such sweeping bylaw changes should always be reviewed by an attorney and perhaps even written by one – expressly to avoid legal problems that may arise from such changes. We respectfully request that the MALA board obtain a fresh legal opinion before proceeding with these bylaw changes. We do not believe that these bylaw changes, as written, would pass scrutiny of a competent attorney, for reasons as we shall state.

2. The Merifield Inc. area covenants did not create[2] Merifield Acres Landover Association (MALA). MALA was originally created On 7 July 1973 by parties unrelated to Merifield Inc. and its sale of properties commencing in mid-1976. As such, Merifield Inc. property owners have no claim of ownership of MALA, its name, or to exclusive membership therein. At the time the first lots were sold, therefore, MALA was an already existing entity having members exclusively from the non-mandatory areas. It was indeed founded by these property owners. Therefore, you will understand that any exclusion of non-mandatory owners from full membership would be viewed by us as a "hijacking" of MALA, and defensive legal action on our part would become necessary in that event.

3. The MALA Articles of Incorporation state clearly that the "The membership shall be comprised of the Board of Directors[3] and all landowners of lots in Roanoke Point Subdivision who have paid the annual assessment made by the corporation, as may be required by the by-laws." There is no language restricting membership other than to those who pay dues. Indeed, the language is

[1] For example, the exclusion of existing members of MALA, before the new bylaws mandating such exclusion are voted upon by the current membership as specified in the bylaws, may be interpreted by a court as acting in bad faith sufficient to constitute willful misconduct and subjecting board members to monetary damages pursuant to Section 870.1 of the Virginia Nonstock Corporation Act. Such monetary penalties may be as much as $100,000.

[2] In order to create a homeowners' or property owners' association, covenants must (a) use the word "create" or similar language; and (b) must specify the structure of the organization, including board positions and length of terms. Merifield covenants do not specify either; they merely "link" to an existing entity.

[3] This refers to the existing Merifield Inc. board of directors at the time the Articles of Incorporation was written. It was expected (and normal) that the developers would control this until some portion of the lots were sold, and then the directorships would be turned over to the purchasers of the lots. Therefore, this specific membership provision is no longer applicable.

clearly designed to be inclusive to all landowners in the subdivision, and this is known to be the intent of MALA's founders at the time.

There is no conflict to be found with the Merifield Inc. covenants here, as Merifield Inc. covenants did not create MALA. Furthermore, relevant Virginia statutes do not define the word "assessment" anywhere, leaving the standard English definition to be applied.[4] Therefore, the word "assessment" does not carry with it any implications as to whether or not payment is voluntary or mandatory. Clearly "assessment" here means that payment is mandatory for voting membership; nothing else therein is either expressed or implied. A court would most likely conclude that had the writers of the Articles meant that only property owners having mandatory assessments should be members, they would have so stated.

4. If the Fielding transfer of rights and powers to MALA in 1983 is valid, then architectural control of the Fielding areas comes under the jurisdiction of MALA. This would mean under the proposed bylaw changes that Fielding property owners would be under direct control of MALA and without any representation whatsoever. A court would consider such an arrangement as counter to public policy, and would recognize the right of membership of all property owners. Furthermore, non-mandatory owners have now paid voluntary dues in good faith for more than three decades, and therefore MALA would be estopped from excluding voluntary members on this basis alone.

5. According to our obtained legal opinion, the Virginia Property Owners' Association Act (VPOAA) does not apply to any section of Merifield Acres. No section has covenants that are sufficiently binding to the association to qualify.

6. The Ombudsman act is set up for mediation of issues involving homeowners' association and their members, but as currently exists is a toothless organization. The Ombudsman as defined by the act cannot hold anyone legally liable for anything. Hence MALA officials need not worry about fines or subsequent actions by the Ombudsman.

7. The Merifield Inc. covenants set up the Architectural Committee (AC) as an entirely independent body from MALA, and the proposed bylaws to some degree bring the AC under control of the board and president of MALA. There is no basis in law to allow this attempt to control the AC, and we are concerned about this because the existing independence of architectural control of our properties may be adversely affected.

8. We are further concerned about the change to the bylaws that would allow MALA (or its president) to commit to long-term debt without requiring a two-thirds vote of the members. This could land MALA in real trouble on very short notice.

[4] 'An amount determined as payable; "The assessment for repairs outraged the club's membership."' Also refers to the act of determining what rate or amount will be levied.

9. The Fielding Covenant Committee does not wish to enter into litigation or any other court action with respect to MALA. We feel that this would be counterproductive in the extreme, as simple court action could cost MALA more than a year of its annual budget. We also feel that litigation would be a fruitless exercise for MALA as we would almost certainly prevail. We therefore respectfully request that MALA either request its own legal opinion or accept ours if they wish to avoid additional expense. Our attorneys are from a respectable firm that specializes in homeowners' associations and are clearly above issuing opinions based on client wishes. The Fielding Covenant Committee, upon majority agreement among its own members, will furnish to MALA our legal opinion upon written request by the MALA board.

10. It is our considered hope to work this situation out for once and for all, and to the satisfaction of all. It is difficult for us non-mandatory owners to repeatedly defend our rights within MALA. After going through all of the legal documents in detail, we have some fairly good ideas about some things that might work. However, changing Fielding covenants is not one of these options. Since VPOAA does not apply to Fielding, covenant change in this area can be accomplished only through unanimous consent of all (100%) property owners in Fielding (other areas may be similar in this respect). As you may guess, this will never happen, and it also means that some property owners will never pay. This fact of life does not mean that we do not want to arrive at an equitable solution. A considerable number of us voluntary lot owners always pay additional amounts, in part to make up for the non-payers, and to hopefully provide adequate amounts for critical road maintenance. We do not support in any way the owners who do not pay, but the means to make volunteer owners pay simply do not exist within the framework of our current legal system. Therefore, any viable solution must accept this fact and move onward.

Summary: We do not wish a legal fight with MALA but we cannot accept disenfranchisement as an option. We hope that cooler heads will prevail and allow us to proceed forward in an open venue suitable for general discussion among all parties involved. If this motion is tabled indefinitely, the Fielding Covenant Committee will stay active and participate in the discussion. We hold no malice to anyone in the Merifield Inc. areas; indeed, we are hopeful that we can reach a harmonious agreement to work together and live in peace, as we have done at most times in the past. We do not think exclusionary politics are the way to go, nor are they legal. Neither we nor our attorneys have found any major inconsistencies between the covenants, Articles of Incorporation, or bylaws as currently exist. There is no way that a suit alleging malfeasance for paving outside Merifield Inc. areas could reasonably be successful as the entire neighborhood is defined by the Articles of Incorporation. There are no urgencies requiring immediate action; therefore, we respectfully request that the members of the Board vote to table this request.

Thank you.

The Fielding Covenant Committee