I have reviewed the draft Bylaws that you sent to me. I have represented several HOAs and actively participated in one for more than a decade that governed a subdivision in which I lived. Based on my review, and comparison with the Articles of Incorporation, current Bylaws and Declaration of Covenants, my comments are below.

Initially, it should be noted that while the Bylaws can be amended, this is qualified by a limitation of “provided such amendment is not inconsistent with the Declaration or Articles of Incorporation”. These proposed new Bylaws would have the effect of amending the existing Bylaws, so they need to be reviewed in the context of the applicable limitation. Further, it should be noted that the proposed new Bylaws contain the same limitation.

My comments address the following specific items:

1. Article III, Section 2. This imposes an obligation on the Secretary to maintain a “Membership Directory” with the name, mailing address and email address of each Owner, which is more detailed than the current requirements to “keep appropriate current records showing the Members of the Association together with their addresses”. ***The form of this “Membership Directory” is not described but this proposed new provision removes discretion from the Secretary as to what information is obtained and states specific information that the Secretary must maintain.***
2. Article III, Section 2. A proposed new requirement, that “The Secretary shall, to the extent possible, not unnecessarily disclose such owner information to third parties or the general public.” ***This language strikes me as vague and leaves the Secretary with no defined standards. What does “to the extent possible” mean and who decides whether it has or has not been complied with? What does “unnecessarily disclose” mean and who decides if a disclosure is unnecessary?***
3. Article III, Section 5. The current Bylaws require notice of regular and special meetings of the Members to be given at least 10 days prior to the meeting. ***This is very typical. The proposed new Bylaws require at least 30 days prior notice, which is not typical and that could likely just bog down the process for holding meetings—particularly special meetings. There would not appear to be a compelling reason to require that much advance notice***.
4. Article III, Section 5. The current Bylaws only require notice of a Member meeting and in the case of a special meeting, the purpose of the meeting. ***The proposed new Bylaws require that the notice state the “primary” purpose of the meeting, an agenda, the date, time and place of the meeting and “any other or appropriate data, information and/or documents relevant thereto which shall be enclosed therewith or attached to said notice”. First, a notice of special meeting must state the actual purpose of the meeting. You cannot have a special meeting that only states a “primary purpose” and then essentially opens it up to whatever else anyone wants to bring up. A special meeting is for a special purpose. Second, imposing a requirement on the Secretary to have to include “any other or appropriate data, information and/or documents relevant thereto”, in my opinion, is ambiguous and leaves the Secretary to figure out what is “appropriate” or “relevant”. Also, who decides if the Secretary has met this ambiguous standard?***
5. Article III, Section 6.  ***Proposed new language would require all Member voting to be by written ballot, which creates a new administrative obligation on the Secretary. I have personally never seen a requirement for written ballots on all matters on which Members have a right to vote. I have seen written ballots on election of Directors (if there are even enough volunteering to serve to be voted on). Other matters are typically by a show of hands. It seems cumbersome to have written ballots for everything.***
6. Article III, Section 7.  ***The language regarding use of proxies would require the Secretary to provide a form of proxy to members who ask for one. This could be time consuming for the Secretary if he or she gets 100-200 individual email requests to have to respond to. The applicable Nebraska statute describes what a proxy needs to contain, and if a Member wants to use a proxy it seems like the burden should be on him or her to make the effort come up with one. As an alternative, a form could be posted on the website, rather than requiring the Secretary to respond to dozens of emails to provide one***.
7. Article III, Section 7. ***The requirements for the timing of delivery of a proxy are inconsistent. In one sentence a proxy has to be filed with the Secretary “prior to or at the commencement of the meeting”, but two sentences later the proxy must be filed with the Secretary “at any time prior to the start of the meeting***”.
8. Article IV, Section 2. ***The proposed new Bylaws provide for election of “new Directors to replace the Directors whose three-year terms have expired”. The term “new Directors” appears to imply that a Director whose term is up cannot be re-elected and can only serve a single three-year term. In my experience I have not seen term limits in a volunteer HOA Board—in fact, typically HOAs have a hard time getting enough volunteers who would be willing to serve.***
9. Article IV, Section 3***. In the current Bylaws, there is no advance notice requirement for someone to express a desire to serve on the Board. In fact, nominations may be made from the floor at the annual meeting. The proposed new Bylaws (a) require a person who desires to be considered for a Board position to submit his or her name at least 45 days before the meeting at which a vote is to be taken, and (b) would allow a floor nomination at the meeting only if “there be no Association Member candidates seeking election to serve as a Director”.  This change would be significant in that someone perceived as divisive or disruptive could give his or her name to the Secretary 45 days before the meeting, without other Members knowing, and there would be no opportunity to propose any other candidate or candidates for consideration. Because of a deadline, by default that divisive or disruptive candidate would be elected. For harmony among Members I would suggest no deadline and retaining the ability to nominate candidates from the floor at the annual meeting, without regard as to whether one or more candidates have previously put their name into contention.***
10. Article IV, Section 10. ***Currently, the persons who are willing to serve on the Board do so as a volunteer without compensation. Under the proposed new Bylaws, if the Board approves, a Director is eligible for compensation equal to the annual due otherwise payable by the Directors. The idea of Directors deciding to waive their own dues has the appearance of a conflict of interest. In addition, the “compensation” appears to be on a Director by Director basis, so a majority of the Board could give this compensation to one Board member but not another. In my experience, HOA Board members serve as unpaid volunteers***.
11. Article V, Section 1(a).  ***The current Bylaws give the Board the power to exercise all power, duties and authority vested in or to delegated to the association and not specifically reserved to the members under the Bylaws or Articles. The exercise under the Declaration and Bylaws is discretionary. The proposed new Bylaws give the Board the power to “implement any action directed by the Articles of Incorporation, these By-Laws, or as specified in the Covenants” (underline added) and that ”are necessary to govern [the] Association”. Under the Covenants, in Article III, Section 3, the powers and duties of the Directors “shall include but shall not be limited to” a list of 11 categories, including some generically described items. Thus, under the Covenants the Board has discretion in governing the Association (as does any other Board of Directors), which would include actions which it decides are appropriate, which is not the same as “necessary”. The proposed new Bylaws would force the Board to justify whether its act is “directed” and are “necessary to govern”. In my opinion, this is in conflict with the discretion vested in the Board under the Covenants.***
12. Article V, Section (c). ***There is an incomplete sentence in the draft of the proposed new Bylaws.***
13. Article V, Section 1(d). ***In the current Bylaws, the Board is given the discretion to enforce the provisions of the Covenants and to decide on the action to be taken. Under the proposed new Bylaws, the Board would be required to notify a member in writing of a violation, give at least 7 days to respond, “with the Board of Directors, in its entirety, to determine the appropriate corrective action…” (underlines added).  This proposed requirement would force an enforcement process on the Board, which otherwise has discretion under the Covenants to engage in “general administration and management of the Association” and “doing and performing such acts…as may be necessary or appropriate to accomplish the purposes of the Association.” The new language would handcuff the Board into how it addresses alleged Covenant violations. Further, by requiring the entire Board to determine appropriate corrective action, one Board member voting against a proposed corrective action would mean that nothing would get done. In my opinion, imposing these procedures and requiring unanimous agreement on corrective action conflicts with the discretionary authority vested in the Board.***
14. Article V, Section 2(b). ***The current Bylaws require the Board to supervise all officers, agents and employees of the Association and see that their duties are properly performed, but the proposed new Bylaws add the phrase “as well as ensure that the terms and duties of an independent contractor of the Association are enumerated in a contract, and that any termination of that contract is appropriate.” I do not know what the reason for this is, but it strikes me as a potentially troublesome. The Board is not required under the Covenants to have written contracts, and the discretion of the Board to terminate contracts is inherent in its duties as a governing body and without a written directive that the termination be “appropriate”. Would this language give individual members the right to armchair quarterback a decision by the Board as to what is appropriate? As the governing body, the Board should have discretion to act, and to act in the best interests of the Association.***
15. Article V, Section 2(c).  ***This appears only in the proposed new Bylaws and requires the Board to “Manage the Valley Shores Subdivision in accordance with the Articles of Incorporation, Covenants, these By-Laws and duly enacted actions and resolutions of the Association Members.” (Underlines added). First, requiring the Board to “manage the Valley Shores Subdivision” is clearly inconsistent with the language of the Declaration. Under the Declaration, the Board only manages the Homeowners Association. It has no legal authority over the subdivision. Second, the proposed requirement that the Board act in accordance with “duly enacted actions and resolutions of the Association Members” is also clearly inconsistent with the terms of the Declaration. The Declaration delegates specific authority and discretion to the Board, and does not give the Members the authority by “actions or resolution” to change or supersede those provisions. The Declaration would need to be amended by a 75% vote***.
16. Article V, Section 2(d).  ***This appears only in the proposed new Bylaws and requires that the Board document through minutes “any discussion or action of the Board and resolution of any Covenant violations.” This presumes that a meeting of the Board must occur and be documented by minutes whenever there is any discussion about possible Covenant violations. This seems to be an extra burden on the functioning of the Board and one that I have never seen in HOA Bylaws. Typically telephone conversations among Board members may occur without a formal Board meeting and decisions made on whether to go forward and how.***
17. Article V, Section 2(e). ***The added language in the proposed new Bylaws provides that “Said dues and assessments shall include an appropriate amount for duly enacted and authorized improvements as well as necessary repairs and maintenance.” The Covenants grant to the Board general authority to acquire, develop and maintain Common Facilities and to exercise control related to such things as landscaping and repair and replacement of parks and other public property. Further, the Board is given the sole authority to set the amount of dues (annual and for extraordinary costs), subject to member approval only if the maximums are proposed to be assessed. In my opinion, the proposed additional language is inconsistent with the Declaration in that it proposes to impose requirements where the Board now has discretion***.
18. Article V, Section 2(e)(2). ***This is new language that would require the Board to prepare and publish a “Request for Proposals” for any purchase over $20k, “or to solicit bids from qualified vendors to complete a specific project or to solve a particular problem.” Further, the language states “The RFP must include the scope of the project, deliverables, budget, milestones and deadlines.”  As discussed above, the Declaration delegates authority to the Board to handle the business affairs of the Association, which would include its processes for hiring contractors or vendors. In my opinion, imposing specific procedural requirements on how the Board operates is inconsistent with the discretion afforded to the Board under the Declaration. In addition, the proposed language is vague in that the concept of “qualified vendors” is not defined (who decides?) and the concept of “solve a particular problem” is so subjective that the Board is left guessing what would constitute a “particular problem”. Also, what would the concept of “publish” the RFP mean? All of these vague and undefined concepts could open up the Board to criticism (and possible liability claims, valid or not) if any member would decide that the Board is failing to comply with a particular vague concept.***
19. Article VI, Section 1. ***The current Bylaws only require that the President also be a Director. However, the proposed new Bylaws specifically require that all officers also be Directors. I have never seen this in non-profit Bylaws and do not know why this change would be proposed. There may be persons willing to serve as officers (such as a treasurer) who do not want to also bear the time cost of being a Director.***
20. Article VI, Section 6. ***In the proposed new Bylaws, this concept of filling any office vacancy with a Director, rather than anyone willing to serve, is brought up again***.
21. Article VI, Section 7(a). The current Bylaws require the President to “see that orders and resolutions of the Board are carried out”. ***The proposed new Bylaws require the President to see that orders and resolutions of the Board and Membership are carried out” (underlines added). This change would seem to give the members power to adopt whatever “orders and resolutions” that the President is obligated to see to are carried out. This addition, in my opinion, is inconsistent with the Declaration in that the operation of the Association is delegated to the Board, with specified circumstances providing for member consent***.
22. Article VI, Section 7(d). In the current Bylaws, this provision describes the duties of the Treasurer using typical Bylaw language. ***In the proposed new Bylaws, there is a new sentence inserted into this typical language which states “The Members will be allowed to approve the budget by vote requiring simple majority of Members at the annual meeting.” It is interesting that language like this would be inserted into what is otherwise typical language describing the duties of the Treasurer, but regardless, in my opinion this language is inconsistent with the Declaration in that under the Declaration the operation of the Association is delegated to the Board, which would include adoption of an annual budget. Certainly at an annual meeting the proposed budget can be “presented” to the members (per current language) to be a discussion item to get the input of members, but actual adoption of the budget would be part of the administrative duties of the Board.***
23. Article IX, Section 2.   ***In the proposed new Bylaws, this new provision states “Dues will be established and determined based on the total annual budget, projects duly authorized by Association Members and a contingency fund not exceeding $15,000.” In my opinion, this language is inconsistent with the Declaration in several respects. First, the setting of dues is delegated to the Board in carrying out its duties generally and not specifically tied to specific matters. Second, the Declaration does not provide for “projects” approved by the Members. Again, these are delegated to the authority of the Board. Third, in my opinion it is within the discretion of the Board to determine if and how much of a contingency fund should be maintained. Unexpected costs might arise at any time, particularly with respect to a lake, and it seems that the Board should have the discretion to decide what is an appropriate amount to hold in reserve.***
24. Article X.  ***This entirely new Article appears in the proposed new Bylaws. It proposes to require specific items, including a limit on the contingency fund and “any approved project of the Members”. It would allow any budget item to be subject to approval or rejection, and requires a simple majority of the Members to approve the budget. In my opinion, this entire Article is inconsistent with the Declaration in that it would take away the discretion delegated to the Board to establish a budget and carry out the duties described in the Declaration***.
25. Article XI.  ***This entirely new Article appears in the proposed new Bylaws. This would establish specific requirements for the form and substance of an agenda, which “will be prepared for every meeting”. It also would require that if an agenda item involves a contract a copy of the draft must be attached. It also requires that the agenda be distributed not later than 3 weeks before the meeting. This language is inconsistent with Article IV, Sections 6, 7 and 8 in that if*** ***these meetings are required to have a written agenda be distributed to the Directors three weeks in advance, then the 5-day notice of meeting to the Directors becomes meaningless. Second, since it is within the powers and duties of the Board to approve contracts, and not the members, it seems unnecessary to attach a copy of the draft contract to a Board agenda. The Board will review it at its meeting.***

***My overall opinion is that these proposed new Bylaws fail to comply with the requirement that they not be inconsistent with the Declaration or Articles of Incorporation, and that if there is a desire to change the discretionary and delegated authority of the Board of Directors that it be done through the process for amending the Declaration.***

***It seems to me that typically operations are delegated to representatives who are voted in by a majority, and if there is disagreement over the decisions being made by the Board, then under the Bylaws and the Nebraska Non-Profit Corporation Act, the Members can simply elect different Directors as terms expire and positions come up for election.***