F I S C A L I M P A C T R E P O R T

SPONSOR Fischmann **ORIGINAL DATE** 02/25/09 **LAST UPDATED** **HB**

SHORT TITLE Homeowner Participation Act **SB** 624

ANALYST Haug

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total			$0.1		Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From
Administrative Office of the Courts (AOC)
Attorney General (AGO)

SUMMARY

Synopsis of Bill

Senate Bill 624 enacts the "Homeowner Participation Act" which generally requires a developer to establish a homeowner's association as a 501(c)(3) or 501(c)(4) nonprofit organization as soon as a unit in a condominium, cooperative, or other planned community is sold.

The association shall elect officers; vote on matters affecting the financial status or the character of the community; establish, collect, and disburse dues collected by unit owners; produce a statement allocating financial interests and expenses for each unit; and be audited annually by an independent accountant. The association must release that audit upon request of a unit owner or purchaser.

The association is required to respond within ten days to a request for certain financial information from a unit owner.

The bill requires the association to provide a purchaser of a unit in the community with information regarding the name of its contact person, its bylaws, assessments, insurance, its cash reserves, whether alterations have been made to the unit which violate a covenant of the association, and a statement of pending litigation resulting from the owner, developer, or association.

A purchaser must sign and return to the association a declaration that they have read and understand the association's contract with the purchaser, and that if they fail to pay assessments, the association may foreclose on their property.

The bill allows a party aggrieved by an alleged violation of "the covenant" to sue for actual or punitive damages in the district court in the county in which the developer maintains an office or the district court in which a hearing on the matter was conducted. The bill contains references to an appeal to the district court from a "dismissal" by filing a notice of appeal within fifteen days after receiving service of the notice of dismissal, and states that the notice of appeal will be filed "in the district court in which the first appeal was properly filed".

The bill also provides for an appeal of the district court's decision to the Court of Appeals, and states that court "may exercise its discretion whether to grant review". A party may seek further review by filing a petition for writ of certiorari in the Supreme Court.

The bill provides that the developer shall no longer participate in the affairs of the association sixty days after three-fourths of the units in a community are completed and purchased by unit owners and shall turn over to the association all records, contracts and pending contracts that affect the community.

The bill states that it shall apply "to a person who develops a community and persons who purchase units in a community on or after July 1, 2010 and shall turn over to the association records. Contracts and pending contracts that affect the development."

FISCAL IMPLICATIONS

The AOC states that there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced actions and appeals in district court and beyond. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

There should be no financial impact for other state entities.

SIGNIFICANT ISSUES

The AGO states that:

> This bill requires a developer to establish a homeowner's association governing certain residential or mixed use real estate developments in which unit owners share an interest in common lands or facilities; and establishes requirements for those associations. It mandates the establishment of an association governing a "common-interest community", which is normally provided for in covenants implemented by the developer. See *Allen v. Timberlake Ranch Landowner's Association* 138 N.M. 318, 119 P.2d 743 (Ct. App. 2005).
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> Section 8 is entitled "Cost of Violating a Covenant", but appears to establish procedures for appeals, from some unknown action, to the district court. The first sentence of that section allows a suit for damages by a party aggrieved by an alleged violation of "the"

covenant in district court. The next sentence refers to an appellant whose appeal was dismissed without prejudice, presumably by the district court, and allows another "appeal" to that court. The contents of that section do not match its title, and it is unclear as to the "appeal" it is referring to. Actions commenced in district court are generally not considered "appeals", unless they are from decisions of administrative agencies or inferior courts. See NMSA Section 39-3-1.1 and NMRA 1-074 governing appeals from administrative agencies; and NMSA Section 39-3-1 governing appeals from inferior courts. There are no court rules or constitutional provisions allowing an appeal from a decision of a nonprofit corporation, if that is what the bill intends.

Further, the bill appears to restrict the filing of a second "appeal" to the district court to within fifteen days of receiving notice of a dismissal without prejudice of the first action from the district court. Suits dismissed without prejudice are generally subject to applicable statutes of limitations. *Bankers Trust Co. of California v. Baca*, 2007-NMCA-019, 151 P.3d 88 (Ct.App. 2006).See also NMRA Rule 1-041E governing reinstatement of actions dismissed without prejudice. Even if this bill is intended to alter those provisions, requiring the re-filing of another suit within fifteen days of dismissal without prejudice of the initial suit may unduly restrict a person's access to the courts in violation of the due process clause contained in Article II Section 18 of the New Mexico Constitution.

The language in Section 8 of the bill regarding the exercise of discretion by the Court of Appeals to review the case is oddly written and the Administrative Office of the Courts may argue granting a party the right to seek further review in the Supreme Court may implicate the "separation of powers" doctrine contained in Article III, Section 1 of the New Mexico Constitution as an unconstitutional intrusion by the legislative branch of government into the functions of the judicial branch. Further, Article VI Section 2 of the New Mexico Constitution governs appeals to the Supreme Court, provides that in civil cases appeals to that court are "as provided by law", and states that "an aggrieved party shall have an absolute right to one appeal". Article VI Section governs appeals to the Court of Appeals, and likewise states that its appellate jurisdiction is "as may be provided by law", or in certain cases, as provided by rules of the Supreme Court. NMSA Section 34-5-8 provides that the Court of Appeals has jurisdiction to review on appeal any civil action not specifically reserved to the jurisdiction of the Supreme Court. If the bill intends to alter that provision, it should clearly state which of those courts has original jurisdiction to consider an appeal from a decision of the district court regarding an action to "enforce the covenant", or rely on other state laws which make that determination.

TECHNICAL ISSUES

The AGO notes that:

Section 4, page 3, line 21 instead of dues collected "by" unit owners, the bill should refer to dues collected "from" unit owners.

The bill contains provisions regarding the association's annual audit in four different sections, each containing different requirements. Section 4E requires the association to submit its financial and other records for audit annually and make these audits available to a unit owner upon request. Section 5A(5) requires the association to make the most

recent financial audit of the association and the developer available within ten days of a request from a unit owner. Section 5B requires the association to release an annual financial audit completed no later than one hundred eighty days after the end of its fiscal year upon request. Section 7 requires an association to subject its books and records to audit using generally accepted auditing standards "at least" annually and shall make that audit available to a purchaser upon request. Those sections should be consolidated.

Section 10 relating to applicability of the act, on page 7, lines 6 and 7 contains the following language: "…and shall turn over to the association records. Contracts and pending contracts that affect the development." That language appears to be misplaced.

GH/svb