SENATE JUDICIARY COMMITTEE SUBSTITUTE FOR
SENATE BILL 497

51ST LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2013

AN ACT

RELATING TO REAL PROPERTY; ENACTING THE HOMEOWNER ASSOCIATION
ACT; PROVIDING FOR THE FORMATION AND MANAGEMENT OF HOMEOWNER
ASSOCIATIONS; PROVIDING FOR DISCLOSURE OF RECORDS; REQUIRING
DISCLOSURE OF HOMEOWNER ASSOCIATION INFORMATION TO PURCHASERS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. SHORT TITLE.--This act may be cited as the
"Homeowner Association Act".

SECTION 2. DEFINITIONS.--As used in the Homeowner
Association Act:

A. "articles of incorporation" means the articles
of incorporation, and all amendments thereto, of an association
on record in the office of the county clerk in the county or
counties in which the association is located;

B. "association" means a homeowner association;
C. "board" means the body, regardless of name, designated in the declaration or bylaws to act on behalf of the association;

D. "bylaws" means the code of rules adopted for the regulation or management of the affairs of the association, irrespective of the name by which such rules are designated;

E. "common area" means property within a development that is designated as a common area in the declaration and is required by the declaration to be maintained or operated by an association for use of the association's members;

F. "common expenses" means expenditures made by, or the financial liabilities of, the association, together with any allocations to reserves;

G. "community documents" means all documents governing the use of the lots and the creation and operation of the association, including the declaration, bylaws, articles of incorporation and rules of the association;

H. "declarant" means the person or group of persons designated in a declaration as declarant or, if no declarant is designated, the person or group of persons who sign the declaration and their successors or assigns who may submit property to a declaration;

I. "declaration" means an instrument, however denominated, including amendments or supplements to the...
instrument, that:

(1) imposes on the association maintenance or
operational responsibilities for common areas, easements or
portions of rights of way; and

(2) creates the authority in the association
to impose on lots or on the owners or occupants of such lots,
or on any other entity, any mandatory payment of money in
connection with the provision of maintenance or services for
the benefit of some or all of the lots, the owners or occupants
of the lots or the common areas. "Declaration" does not
include a like instrument for a condominium or time-share
project;

J. "development" means real property subject to a
declaration that contains residential lots and common areas
with respect to which any person, by virtue of ownership of a
lot, is a member of an association and is obligated to pay
assessments provided for in a declaration;

K. "development right" means a right or combination
of rights reserved by the declarant in a declaration;

L. "disclosure certificate" or "disclosure
statement" means:

(1) a statement disclosing the existence and
terms of any right of first refusal or other restraint on the
free alienability of the lot;

(2) a statement setting forth the amount of
the monthly common expense assessment and any unpaid common
expense or special assessment currently due and payable from
the selling lot owner;

(3) a statement of any other fees payable by
lot owners;

(4) a statement of any capital expenditures
anticipated by the association and approved by the board for
the current fiscal year and the two next succeeding fiscal
years;

(5) a statement of the amount of any reserves
for capital expenditures and of any portions of those reserves
designated by the association for any approved projects;

(6) the most recent regularly prepared balance
sheet and income and expense statement, if any, of the
association;

(7) the current operating budget of the
association;

(8) a statement of any unsatisfied judgments
or pending suits against the association and the status of any
pending suits material to the association of which the
association has actual knowledge;

(9) a statement describing any insurance
coverage provided for the benefit of lot owners and the board
of the association;

(10) a statement of the remaining term of any
leasehold estate affecting the association and the provisions
governing any extension or renewal thereof; and

(11) the contact person and contact
information for the association;

M. "homeowner association" means an incorporated or
unincorporated entity upon which maintenance and operational
responsibilities are imposed and to which authority is granted
in the declaration;

N. "lot" means a parcel of land designated for
separate ownership or occupancy shown on a recorded subdivision
plat for a development or the boundaries of which are described
in the declaration or in a recorded instrument referred to or
expressly contemplated by the declaration, other than a common
area;

O. "lot owner" means a person or group of persons
holding title to a lot, including a declarant;

P. "master planned community" means a large-scale
residential development that allows for a phasing of
development that will take place over a long period of time,
following comprehensive and coordinated planning review by a
local government and approval of design and development
standards beyond conventionally platted subdivisions; provided
that additional design and development standards approved by
the local government shall be included in a site plan, area
plan or master plan as required by the local government
approving the development; and

Q. "proxy" means a person authorized to act for
another.

SECTION 3. CREATION OF A HOMEOWNER ASSOCIATION.--An
association pursuant to the Homeowner Association Act shall be
organized in accordance with the laws of the state and be
identified in a recorded declaration. The membership of the
association shall consist exclusively of all lot owners in the
development.

SECTION 4. RECORDING OR FILING OF HOMEOWNER ASSOCIATION
NOTICE AND DECLARATION.--

A. An association organized after July 1, 2013
shall record a notice of homeowner association in the office of
the county clerk of the county or counties in which the real
property affected thereby is situated no later than thirty days
after the date on which the association's declaration is
recorded as provided in Section 3 of the Homeowner Association
Act.

B. An association organized prior to July 1, 2013
shall, before June 30, 2014, record a notice of homeowner
association in the office of the county clerk of the county or
counties in which the development is situated.

C. A notice of homeowner association pursuant to
Subsection A or B of this section shall fully and accurately
disclose the name and address of the association and any
management company charged with preparation of a disclosure certificate and shall contain the recording data for the subdivision plat and the declaration governing the lots within the development. A notice of homeowner association pursuant to Subsection A of this section shall also include the public regulation commission number, if any, of the association.

D. If an association fails to record a notice of homeowner association pursuant to this section, the association's authority to charge an assessment, levy a fine for late payment of an assessment or enforce a lien for nonpayment of an assessment shall be suspended until the notice of homeowner association is recorded.

SECTION 5. RECORD DISCLOSURE TO MEMBERS--UPDATED INFORMATION.--

A. All financial and other records of the association shall be made available for examination by a lot owner within ten business days of the request.

B. The association shall not charge a fee for making financial and other records available for review. The association may charge a reasonable fee for copies.

C. As used in this section, "financial and other records" includes:

   (1) the declaration of the association;

   (2) the name, address and telephone number of the association's designated agent;
(3) the bylaws of the association;
(4) the names of all association members;
(5) minutes of all meetings of the association's lot owners and board for the previous five years, other than executive sessions, and records of all actions taken by a committee in place of the board or on behalf of the association for the previous five years;
(6) the operating budget for the current fiscal year;
(7) current assessments, including both regular and special assessments;
(8) financial statements and accounts, including amounts held in reserve;
(9) the most recent financial audit or review, if any;
(10) all current contracts entered into by the association or the board on behalf of the association; and
(11) current insurance policies, including company names, policy limits, deductibles, additional named insureds and expiration dates for property, general liability and association director and officer professional liability, and fidelity policies.

SECTION 6. DUTIES OF A HOMEOWNER ASSOCIATION.--

A. The association shall exercise any powers conferred to the association in the community documents.
B. The association shall have a lien on a lot for
any assessment levied against that lot or for fines imposed
against that lot's owner from the time the assessment or fine
becomes due. If an assessment is payable in installments, the
full amount of the assessment shall be a lien from the time the
first installment becomes due. The association's lien may be
foreclosed in like manner as a mortgage on real estate.

C. Recording the declaration constitutes notice
recorded in the office of the county clerk in the county or
counties in which any part of the real property is located and
perfection of the lien.

D. Upon written request by a lot owner, the
association shall furnish a recordable statement setting forth
the amount of unpaid assessments against the lot owner's lot.
The statement shall be furnished within ten business days after
receipt of the request and is binding on the association and
the board.

SECTION 7. BOARD MEMBERS AND OFFICERS--DUTIES--BUDGET.--

A. Except as provided in the community documents or
other provisions of the Homeowner Association Act, the board
acts on behalf of the association. In the performance of their
duties, officers and members of the board shall exercise, if
appointed by the declarant, the degree of care and loyalty
required of a fiduciary of the lot owners and, if elected by
the lot owners, ordinary and reasonable care.
B. The board shall adopt a budget annually. Within thirty calendar days after adoption of any proposed budget for the association, the board shall provide a summary of the budget to all the lot owners or the lot owners' duly elected representatives.

SECTION 8. DECLARANT CONTROL OF BOARD.--

A. Subject to the provisions of this section, the declaration shall provide for a period of declarant control of the association, during which period a declarant, or persons designated by the declarant, may appoint and remove the officers and members of the board.

B. Regardless of the period provided in the declaration, the period of declarant control shall terminate no later than the earlier of:

1. sixty days after conveyance of seventy-five percent of the lots that are part of the development and any additional lots that may be added to the development to lot owners other than a declarant;

2. two years after all declarants have ceased to offer lots for sale in the ordinary course of business;

3. two years after a development right to add new lots was last exercised; or

4. the day that the declarant or the declarant's designee, after giving written notice to the association, records an instrument voluntarily terminating all
rights to declarant control.

C. Subsection B of this section does not apply to a
master planned community.

D. A declarant may voluntarily terminate the right
to appoint and remove officers and members of the board before
termination of the period of declarant control, but in that
event, the declarant may require, for the duration of the
period of declarant control, that specified actions of the
association or board, as described in a recorded instrument
executed by the declarant, be approved by the declarant or the
declarant's designee before they become effective.

E. Not later than sixty days after conveyance of
twenty-five percent of the lots that are part of the
development, and any additional lots that may be added to the
development, to lot owners other than a declarant, at least one
member and not less than twenty-five percent of the members of
the board shall be elected by lot owners.

F. Not later than sixty days after conveyance of
fifty percent of the lots that are part of the development, and
any additional lot that may be added to the development, to lot
owners other than the declarant, no less than thirty-three
percent of the members of the board shall be elected by lot
owners other than the declarant.

G. Not later than the termination of a period of
declarant control, the lot owners shall elect a board of at
least three members, at least a majority of whom shall be lot
owners. The board shall elect the officers. The board members
and officers shall take office upon election.

H. No amendment to the declaration that would
limit, prohibit or eliminate the exercise of a development
right shall be effective without the concurrence of the
declarant.

I. A declarant shall not utilize cumulative or
class voting for the purpose of evading any limitation imposed
on declarants by the Homeowner Association Act, nor shall lots
consist of a class because they are owned by a declarant.

SECTION 9. PROXY AND ABSENTEE VOTING--BALLOT COUNTING.--

A. The association shall provide for votes to be
cast in person, by absentee ballot or by proxy and may provide
for voting by some other form of delivery.

B. Vote by proxy is allowed for lot owner meetings.
The proxy vote shall:

   (1) be dated and executed by a lot owner, but
if a lot is owned by more than one person, each owner of the
lot may vote or register protest to the casting of votes by the
other owners of the lot through a duly executed proxy, but in
no case shall the total vote cast be more than that allocated
to the lot under the declaration;

   (2) allow for revocation if notice of
revocation is provided to the person presiding over a lot owner
meeting; and

(3) be valid only for the meeting at which it is cast.

C. If proxy voting is utilized at a lot owner meeting, a person shall not pay a company or person to collect proxy votes.

D. Where directors or officers are to be elected by members, the bylaws may provide that such elections may be conducted by mail.

E. Votes cast by proxy and by absentee ballot are valid for the purpose of establishing a quorum.

F. Ballots, if used, shall be counted by a neutral third party or by a committee of volunteers. The volunteers shall be selected or appointed at an open meeting, in a fair manner, by the chair of the board or another person presiding during that portion of the meeting. The volunteers shall not be board members and, in the case of a contested election for a board position, shall not be candidates.

SECTION 10. FINANCIAL AUDIT.--

A. Unless any provision in the community documents requires an annual audit by a certified public accountant, the board of directors of an association managing a master planned community or a development consisting of one hundred or more lots shall provide for an annual financial audit, review or compilation of the association. The audit, review or

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compilation shall be completed no later than one hundred eighty
days after the end of the association's fiscal year and shall
be made available upon request to the members within thirty
days after its completion.

B. Unless otherwise provided in the community
documents, in an association managing a development consisting
of fewer than one hundred lots, upon a majority vote of all of
the lot owners, the board shall provide for a financial audit,
review or compilation of the association's records and shall
provide that the cost thereof be assessed as a common expense.
The audit, review or compilation shall be made available to lot
owners within thirty calendar days of its completion.

SECTION 11. CONTRACT DISCLOSURE STATEMENT OR DISCLOSURE
CERTIFICATE--RIGHT OF CANCELLATION OF PURCHASE CONTRACT.--
Except as provided in Section 12 of the Homeowner Association
Act, a person selling a lot that is subject to an association
shall provide in writing a disclosure certificate that states
that the lot is located within a development that is subject to
an association. If the lot is located within a development
that is subject to an association and the association is
subject to the Homeowner Association Act:

A. A seller or the seller's agent shall obtain a
disclosure certificate from the association and provide it to
the purchaser no later than seven days before closing; and

B. A purchaser or the purchaser's agent has the
right to cancel the purchase contract within seven days after receiving the disclosure certificate.

SECTION 12. SALE OF LOTS--DISCLOSURE CERTIFICATE.--

A. Unless exempt pursuant to Subsection F of this section, prior to closing, a lot owner shall furnish to a purchaser copies of:

(1) the declaration of the association, other than the plats and plans;

(2) the bylaws of the association;

(3) any covenants, conditions and restrictions applicable to the lot;

(4) the rules of the association; and

(5) a disclosure certificate from the association.

B. Within ten business days after receipt of a written request from a lot owner, the association shall furnish a disclosure certificate containing the information necessary to enable the lot owner to comply with the provisions of this section. A lot owner providing a disclosure certificate pursuant to Subsection A of this section shall not be liable to the purchaser for any erroneous information provided by the association and included in the disclosure certificate.

C. A purchaser shall not be liable for any unpaid assessment or fee greater than the amount, prorated to the date of closing, set forth in the disclosure certificate prepared by

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the association.

D. A lot owner shall not be liable to a purchaser for the failure or delay of the association to provide the disclosure certificate in a timely manner.

E. The information contained in the disclosure certificate shall be current as of the date on which the disclosure certificate is furnished to the lot owner by the association.

F. A disclosure certificate shall not be required in the case of a disposition:
   
   (1) pursuant to court order;
   
   (2) by a government or governmental agency;
   
   (3) by foreclosure or deed in lieu of foreclosure; or
   
   (4) that may be canceled at any time and for any reason by the purchaser without penalty.

G. An association may impose reasonable charges for preparation of a disclosure certificate as required by the Homeowner Association Act.

SECTION 13. PURCHASER'S CANCELLATION OF A PURCHASE CONTRACT.--If a purchaser elects to cancel a purchase pursuant to Section 11 of the Homeowner Association Act, the purchaser may do so by hand delivering notice of the cancellation to the lot owner or by mailing notice of cancellation, by prepaid United States mail, to the lot owner, or to the lot owner's
agent for service of process. Cancellation shall be without penalty, and all payments made by the purchaser before cancellation shall be refunded within fifteen days.

SECTION 14. ATTORNEY FEES AND COSTS.--A court may award attorney fees and costs to any party that prevails in a civil action between a lot owner and the association or declarant based upon any provision of the declaration or bylaws; provided that the declaration or bylaws allow at least one party to recover attorney fees or costs.

SECTION 15. APPLICABILITY.--

A. Except as provided in Subsections B and C of this section, the Homeowner Association Act shall apply to all homeowner associations created and existing within this state.

B. Sections 9, 10 and 14 of the Homeowner Association Act do not apply to homeowner associations created before July 1, 2013; provided that any amendment to the community documents of an association created before July 1, 2013 shall comply with the Homeowner Association Act.

C. Except as provided in Sections 4 and 8 of the Homeowner Association Act, that act does not invalidate existing provisions of the articles of incorporation, declaration, bylaws or rules of a homeowner association created before July 1, 2013.

D. The Homeowner Association Act does not apply to a condominium governed by the Condominium Act.
SECTION 16. EFFECTIVE DATE.--The effective date of the provisions of this act is July 1, 2013.