

1 SENATE CORPORATIONS AND TRANSPORTATION COMMITTEE SUBSTITUTE FOR  
2 SENATE BILL 30

3 **51ST LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2013**

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10 AN ACT

11 RELATING TO REAL PROPERTY; ENACTING THE HOMEOWNER ASSOCIATION  
12 ACT; PROVIDING FOR THE FORMATION AND MANAGEMENT OF HOMEOWNER  
13 ASSOCIATIONS; PROVIDING FOR DISCLOSURE OF RECORDS; REQUIRING  
14 DISCLOSURE OF HOMEOWNER ASSOCIATION INFORMATION TO PURCHASERS.  
15

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

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

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

21 A. "articles of incorporation" means the original  
22 or restated articles of incorporation or articles of  
23 consolidation, and all amendments thereto, of a homeowner  
24 association;

25 B. "association" means a homeowner association;

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1 C. "board" means the body, regardless of name,  
2 designated in the declaration or bylaws to act on behalf of the  
3 association;

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

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

12 F. "community documents" means all documents  
13 governing the creation and operation of the association,  
14 including the declaration, bylaws, articles of incorporation  
15 and rules of the association;

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

21 H. "declaration" means an instrument, however  
22 denominated, including amendments or supplements to the  
23 instrument, that:

24 (1) imposes on the association maintenance or  
25 operational responsibilities for common areas, easements or

1 portions of rights of way; and

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

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

15 J. "disclosure certificate" means:

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

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

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

25 (4) a statement of any capital expenditures

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1 anticipated by the association and approved by the board for  
2 the current fiscal year and the two next succeeding fiscal  
3 years;

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

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

10 (7) the current operating budget of the  
11 association;

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

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

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

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

24 K. "homeowner association" means an incorporated or  
25 unincorporated entity upon which maintenance and operational

1 responsibilities are imposed and to which authority is granted  
2 in the declaration;

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

9 M. "lot owner" means a person or group of persons  
10 holding title to a lot, including a declarant; and

11 N. "proxy" means a person authorized to act for  
12 another.

13 SECTION 3. CREATION OF A HOMEOWNER ASSOCIATION.--An  
14 association created after July 1, 2013 shall be organized as a  
15 nonprofit corporation in accordance with the laws of the state.  
16 The membership of the association shall consist exclusively of  
17 all lot owners in the development.

18 SECTION 4. POWERS AND DUTIES OF A HOMEOWNER ASSOCIATION.--

19 A. Subject to the provisions of the declaration and  
20 this section, the association may:

21 (1) adopt and amend bylaws and rules;  
22 (2) adopt and amend budgets for revenues,  
23 expenditures and reserves, and collect assessments for common  
24 expenses from lot owners;

25 (3) hire and terminate the employment of

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1 managing agents and other employees, agents and independent  
2 contractors;

3 (4) institute, defend or intervene in  
4 litigation or administrative proceedings, or engage in  
5 arbitration or mediation, in the association's own name on  
6 behalf of itself or two or more lot owners on matters affecting  
7 the development;

8 (5) enter into contracts and incur  
9 liabilities;

10 (6) regulate the use, maintenance, repair,  
11 replacement and modification of common areas; maintain  
12 easements and portions of rights of way; and make reasonable  
13 accommodations or permit reasonable modifications to be made to  
14 lots or common areas to accommodate lot owners, residents,  
15 tenants, employees and people with disabilities, as defined by  
16 prevailing federal, state or local statute, rule, code or  
17 ordinance;

18 (7) cause additional improvements to be made  
19 as a part of the common areas; provided that the association  
20 does not materially impair a lot owner's quiet enjoyment of the  
21 lot;

22 (8) by a vote of no less than a majority of  
23 lot owners, annex real property into the development;

24 (9) acquire, hold, encumber and convey in the  
25 association's name any right, title or interest to real or

1 personal property other than common areas; provided that the  
2 association does not materially impair a lot owner's quiet  
3 enjoyment of the lot;

4 (10) grant easements, leases, licenses and  
5 concessions through or over the common areas; provided that the  
6 association does not materially impair a lot owner's quiet  
7 enjoyment of the lot;

8 (11) impose charges for late payment of  
9 assessments and, after notice and an opportunity to be heard,  
10 levy fines for violations of the declaration, bylaws and rules  
11 of the association;

12 (12) suspend a lot owner's right to use common  
13 areas because of late payment or nonpayment of assessments,  
14 following notice to the lot owner and an opportunity to be  
15 heard;

16 (13) impose reasonable charges for preparation  
17 and recording of amendments to the declaration or preparation  
18 of a disclosure certificate as required by the Homeowner  
19 Association Act;

20 (14) provide for the indemnification of its  
21 officers and board and maintain directors' and officers'  
22 liability insurance;

23 (15) exercise any powers conferred by the  
24 declaration, the bylaws or the articles of incorporation; and

25 (16) assign the association's right to future

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1 income, including the right to receive common expense  
2 assessments. Reserve funds held for future major repairs and  
3 replacements of common areas shall not be assigned or pledged.

4 B. Except as provided by the declaration, the  
5 association shall be responsible for maintenance, repair and  
6 replacement of the common areas and any improvements thereon,  
7 and the lot owner shall be responsible for the maintenance,  
8 repair and replacement of the lot owner's lot and any  
9 improvements thereon. A lot owner shall allow the association  
10 and other lot owners, and the association's and other lot  
11 owners' agents and employees, access through the lot owner's  
12 lot as is reasonably necessary for the maintenance, repair and  
13 replacement of the common areas and any improvements thereon.  
14 If damage is inflicted on the common areas or on any lot  
15 through which access is taken, the lot owner or the association  
16 responsible for the damage is liable for the prompt repair  
17 thereof.

18 C. The association shall have a lien on a lot for  
19 any assessment levied against that lot or for fines imposed  
20 against that lot's owner from the time the assessment or fine  
21 becomes due. If an assessment is payable in installments, the  
22 full amount of the assessment shall be a lien from the time the  
23 first installment becomes due.

24 D. Recording the declaration constitutes notice  
25 recorded in the office of the county clerk in the county or

1 counties in which any part of the real property is located and  
2 perfection of the lien.

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

9 SECTION 5. BOARD MEMBERS AND OFFICERS--DUTIES--REMOVAL--  
10 BUDGET.--

11 A. Except as provided in the community documents or  
12 other provisions of the Homeowner Association Act, the board  
13 acts on behalf of the association. In the performance of their  
14 duties, officers and members of the board shall exercise, if  
15 appointed by the declarant, the degree of care and loyalty  
16 required of a trustee of the lot owners and, if elected by the  
17 lot owners, ordinary and reasonable care.

18 B. The board shall not act on behalf of the  
19 association to amend the declaration, to terminate the planned  
20 community or to elect members of the board or determine the  
21 qualifications, powers and duties or terms of office of board  
22 members, but the board shall fill vacancies in its membership  
23 for the unexpired portion of any term.

24 C. Notwithstanding any provision of the community  
25 documents to the contrary, the lot owners, by a two-thirds'

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1 vote of all persons present and entitled to vote at any meeting  
2 of the lot owners at which a quorum is present, may remove any  
3 member of the board with or without cause other than a member  
4 appointed by the declarant.

5 D. Within thirty calendar days after adoption of  
6 any proposed budget for the association, the board shall  
7 provide a summary of the budget to all the lot owners or their  
8 duly elected representatives and shall set a date for a meeting  
9 of the lot owners or their duly elected representatives to  
10 consider ratification of the budget not less than fourteen nor  
11 more than thirty calendar days after mailing the summary.  
12 Unless at that meeting a majority of all the lot owners or  
13 their duly elected representatives or any larger vote specified  
14 in the declaration rejects the budget, the budget shall be  
15 ratified, whether or not a quorum is present. In the event the  
16 proposed budget is rejected, the periodic budget last ratified  
17 by the lot owners shall be continued until such time as the lot  
18 owners ratify a subsequent budget proposed by the board.

19 SECTION 6. DECLARANT CONTROL OF BOARD.--

20 A. Subject to the provisions of this section, the  
21 declaration may provide for a period of declarant control of  
22 the association, during which period a declarant, or persons  
23 designated by the declarant, may appoint and remove the  
24 officers and members of the board. Regardless of the period  
25 provided in the declaration, the period of declarant control

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1 shall be terminated no later than the earlier of:

2 (1) sixty days after conveyance of seventy-  
 3 five percent of the parcels that may be created to parcel  
 4 owners other than a declarant;

5 (2) two years after all declarants have ceased  
 6 to offer parcels for sale in the ordinary course of business;

7 (3) two years after any development right to  
 8 add new parcels was last exercised; or

9 (4) the day the declarant or the declarant's  
 10 designee, after giving written notice to parcel owners, records  
 11 an instrument voluntarily surrendering all rights to control  
 12 activities of the association.

13 B. Subsection A of this section does not apply to a  
 14 master planned community. As used in this subsection, "master  
 15 planned community" means a planned community that receives,  
 16 through a local government public hearing process, local  
 17 government review and approval of design and development  
 18 standards beyond those required for standard state or local  
 19 zoning and subdivision platting; provided that additional  
 20 design and development standards approved by the local  
 21 government shall be included in a site plan, area plan or  
 22 master plan as required by the local government approving the  
 23 community.

24 C. A declarant may voluntarily surrender the right  
 25 to appoint and remove officers and members of the board before

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1 termination of the period of declarant control, but in that  
2 event, the declarant may require, for the duration of the  
3 period of declarant control, that specified actions of the  
4 association or board, as described in a recorded instrument  
5 executed by the declarant, be approved by the declarant or the  
6 declarant's designee before they become effective.

7 D. Not later than sixty days after conveyance of  
8 twenty-five percent of the parcels that may be created to  
9 parcel owners other than a declarant, at least one member and  
10 not less than twenty-five percent of the members of the board  
11 shall be elected by parcel owners other than the declarant.

12 E. Not later than sixty days after conveyance of  
13 fifty percent of the parcels that may be created to parcel  
14 owners other than the declarant, no less than thirty-three  
15 percent of the members of the board shall be elected by parcel  
16 owners other than the declarant.

17 F. Not later than the termination of any period of  
18 declarant control, the parcel owners shall elect a board of at  
19 least three members, at least a majority of whom shall be  
20 parcel owners. The board shall elect the officers. The board  
21 members and officers shall take office upon election.

22 G. The board, during the period of declarant  
23 control and after termination of the period of declarant  
24 control, shall not act contrary to or in violation of any  
25 provision of any building code, zoning, subdivision or other

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1 real estate use law, ordinance, rule or regulation governing  
 2 the use of real estate.

3 SECTION 7. PROXY AND ABSENTEE VOTING--BALLOT COUNTING.--

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

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

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

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

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

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

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

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

3 F. Ballots shall be counted by a neutral third  
4 party or by a committee of volunteers. The volunteers shall be  
5 lot owners who are selected or appointed at an open meeting, in  
6 a fair manner, by the chair of the board or another person  
7 presiding during that portion of the meeting. The volunteers  
8 shall not be board members and, in the case of a contested  
9 election for a board position, shall not be candidates.

10 SECTION 8. RECORD DISCLOSURE TO MEMBERS--UPDATED  
11 INFORMATION.--

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

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

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

- 20 (1) the declaration of the association;  
21 (2) the name, address and telephone number of  
22 the association's designated agent;  
23 (3) the bylaws of the association;  
24 (4) the names of all association members;  
25 (5) minutes of all meetings of the

1 association's lot owners and board, other than executive  
2 sessions, and records of all actions taken by a committee in  
3 place of the board or on behalf of the association;

4 (6) the operating budget for the current  
5 fiscal year;

6 (7) current assessments, including both  
7 regular and special assessments;

8 (8) financial statements and accounts,  
9 including amounts held in reserve;

10 (9) the most recent financial audit or review,  
11 if any;

12 (10) all current contracts entered into by the  
13 association or the board on behalf of the association; and

14 (11) current insurance policies, including  
15 company names, policy limits, deductibles, additional named  
16 insureds and expiration dates for property, general liability  
17 and association director and officer professional liability,  
18 and fidelity policies.

19 **SECTION 9. FINANCIAL AUDIT.**--Unless any provision in the  
20 community documents requires an annual audit by a certified  
21 public accountant, the board of directors shall provide for an  
22 annual financial audit, review or compilation of the  
23 association. The audit, review or compilation shall be  
24 completed no later than one hundred eighty days after the end  
25 of the association's fiscal year and shall be made available

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1 upon request to the members within thirty days after its  
2 completion.

3 SECTION 10. RECORDING OR FILING OF HOMEOWNER ASSOCIATION  
4 NOTICE AND DECLARATION.--

5 A. An association organized after July 1, 2013  
6 shall record a "Notice of Homeowner Association" and a copy of  
7 the declaration in the office of the county clerk of the county  
8 or counties in which the real property affected thereby is  
9 situated no later than thirty days after the date on which the  
10 association's articles of incorporation are filed with the  
11 public regulation commission.

12 B. An association organized prior to July 1, 2013  
13 shall, before June 30, 2014, record a "Notice of Homeowner  
14 Association" and a copy of the declaration in the office of the  
15 county clerk of the county or counties in which the real  
16 property affected thereby is situated.

17 C. A "Notice of Homeowner Association" pursuant to  
18 Subsection A or B of this section shall fully and accurately  
19 disclose the name and address of the association and shall  
20 contain a legal description of the real property that is  
21 subject to the powers of the association. A "Notice of  
22 Homeowner Association" pursuant to Subsection A of this section  
23 shall also include the public regulation commission number of  
24 the association.

25 D. If an association fails to record a "Notice of

1 Homeowner Association" pursuant to this section, the  
2 association shall forfeit any authority to charge an  
3 assessment, levy a fine for late payment of an assessment or  
4 enforce a lien for nonpayment of an assessment until the  
5 "Notice of Homeowner Association" is recorded.

6 SECTION 11. CONTRACT DISCLOSURE STATEMENT OR DISCLOSURE  
7 CERTIFICATE--RIGHT OF CANCELLATION OF PURCHASE CONTRACT.--

8 A. Except as provided in Section 12 of the  
9 Homeowner Association Act, a person selling a lot that is  
10 subject to an association shall provide in writing a disclosure  
11 certificate that states that the lot is located within a  
12 development that is subject to an association. If the lot is  
13 located within a development that is subject to an association  
14 and the association is subject to the Homeowner Association  
15 Act:

16 (1) a seller shall obtain a disclosure  
17 certificate from the association and provide it to the  
18 purchaser;

19 (2) a purchaser has the right to cancel the  
20 purchase contract as provided for in the purchase agreement  
21 until closing and transfer of title; and

22 (3) the right to receive the disclosure  
23 certificate and the right to cancel the purchase contract are  
24 waived conclusively if not exercised before closing.

25 B. If the disclosure certificate pursuant to

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1 Subsection A of this section is not furnished to the purchaser,  
2 the purchaser's sole remedy is to cancel the contract prior to  
3 closing or settlement.

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

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

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

10 (2) the bylaws of the association;

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

13 (4) the rules of the association; and

14 (5) a disclosure certificate from the  
15 association.

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

24 C. A purchaser shall not be liable for any unpaid  
25 assessment or fee greater than the amount, prorated to the date

1 of closing, set forth in the disclosure certificate prepared by  
 2 the association.

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

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

10 F. A disclosure certificate shall not be required  
 11 in the case of a disposition:

- 12 (1) pursuant to court order;
- 13 (2) by a government or governmental agency;
- 14 (3) by foreclosure or deed in lieu of  
 15 foreclosure; or
- 16 (4) that may be canceled at any time and for  
 17 any reason by the purchaser without penalty.

18 G. A lot owner may impose reasonable charges for  
 19 preparation of a disclosure certificate as required by the  
 20 Homeowner Association Act.

21 **SECTION 13. PURCHASER'S CANCELLATION OF A PURCHASE**  
 22 **CONTRACT.--**

23 A. If a purchaser elects to cancel a purchase  
 24 pursuant to Section 11 of the Homeowner Association Act, the  
 25 purchaser may do so by hand delivering notice of the

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1 cancellation to the lot owner or by mailing notice of  
2 cancellation, by prepaid United States mail, to the lot owner,  
3 or to the lot owner's agent for service of process.  
4 Cancellation shall be without penalty, and all payments made by  
5 the purchaser before cancellation shall be refunded within  
6 fifteen days.

7 B. The purchaser's right to cancel the purchase  
8 contract shall be the purchaser's sole remedy.

9 SECTION 14. APPLICABILITY.--

10 A. The Homeowner Association Act shall apply to all  
11 associations created within this state on or after July 1,  
12 2013.

13 B. Sections 8 and 10 through 13 of the Homeowner  
14 Association Act shall apply to associations created before July  
15 1, 2013 only with respect to events and circumstances occurring  
16 after July 1, 2013. The Homeowner Association Act does not  
17 invalidate existing provisions of the articles of  
18 incorporation, declaration, bylaws or rules of an association  
19 created before July 1, 2013.

20 C. The Homeowner Association Act shall not apply to  
21 a condominium governed by the Condominium Act.

22 SECTION 15. EFFECTIVE DATE.--The effective date of the  
23 provisions of this act is July 1, 2013.