

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;

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

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

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

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

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1 instrument, that:

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

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

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

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

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

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

25 (2) a statement setting forth the amount of

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1 the monthly common expense assessment and any unpaid common
2 expense or special assessment currently due and payable from
3 the selling lot owner;

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

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

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

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

16 (7) the current operating budget of the
17 association;

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

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

25 (10) a statement of the remaining term of any

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1 leasehold estate affecting the association and the provisions
2 governing any extension or renewal thereof; and

3 (ll) the contact person and contact
4 information for the association;

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

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

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

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

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1 approving the development; and

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

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

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

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

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

23 C. A notice of homeowner association pursuant to
24 Subsection A or B of this section shall fully and accurately
25 disclose the name and address of the association and any

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1 management company charged with preparation of a disclosure
 2 certificate and shall contain the recording data for the
 3 subdivision plat and the declaration governing the lots within
 4 the development. A notice of homeowner association pursuant to
 5 Subsection A of this section shall also include the public
 6 regulation commission number, if any, of the association.

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

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

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

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

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

- 23 (1) the declaration of the association;
 24 (2) the name, address and telephone number of
 25 the association's designated agent;

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

23 SECTION 6. DUTIES OF A HOMEOWNER ASSOCIATION.--

24 A. The association shall exercise any powers
25 conferred to the association in the community documents.

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1 B. The association shall have a lien on a lot for
2 any assessment levied against that lot or for fines imposed
3 against that lot's owner from the time the assessment or fine
4 becomes due. If an assessment is payable in installments, the
5 full amount of the assessment shall be a lien from the time the
6 first installment becomes due. The association's lien may be
7 foreclosed in like manner as a mortgage on real estate.

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

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

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

19 A. Except as provided in the community documents or
20 other provisions of the Homeowner Association Act, the board
21 acts on behalf of the association. In the performance of their
22 duties, officers and members of the board shall exercise, if
23 appointed by the declarant, the degree of care and loyalty
24 required of a fiduciary of the lot owners and, if elected by
25 the lot owners, ordinary and reasonable care.

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1 B. The board shall adopt a budget annually. Within
2 thirty calendar days after adoption of any proposed budget for
3 the association, the board shall provide a summary of the
4 budget to all the lot owners or the lot owners' duly elected
5 representatives.

6 **SECTION 8. DECLARANT CONTROL OF BOARD.--**

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

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

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

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

21 (3) two years after a development right to add
22 new lots was last exercised; or

23 (4) the day that the declarant or the
24 declarant's designee, after giving written notice to the
25 association, records an instrument voluntarily terminating all

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1 rights to declarant control.

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

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

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

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

24 G. Not later than the termination of a period of
25 declarant control, the lot owners shall elect a board of at

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1 least three members, at least a majority of whom shall be lot
2 owners. The board shall elect the officers. The board members
3 and officers shall take office upon election.

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

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

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

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

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

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

24 (2) allow for revocation if notice of
25 revocation is provided to the person presiding over a lot owner

1 meeting; and

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

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

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

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

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

19 **SECTION 10. FINANCIAL AUDIT.--**

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

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

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

13 SECTION 11. CONTRACT DISCLOSURE STATEMENT OR DISCLOSURE
14 CERTIFICATE--RIGHT OF CANCELLATION OF PURCHASE CONTRACT.--

15 Except as provided in Section 12 of the Homeowner Association
16 Act, a person selling a lot that is subject to an association
17 shall provide in writing a disclosure certificate that states
18 that the lot is located within a development that is subject to
19 an association. If the lot is located within a development
20 that is subject to an association and the association is
21 subject to the Homeowner Association Act:

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

25 B. A purchaser or the purchaser's agent has the

1 right to cancel the purchase contract within seven days after
2 receiving the disclosure certificate.

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

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

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

9 (2) the bylaws of the association;

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

12 (4) the rules of the association; and

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

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

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

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1 the association.

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

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

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

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

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

20 SECTION 13. PURCHASER'S CANCELLATION OF A PURCHASE
21 CONTRACT.--If a purchaser elects to cancel a purchase pursuant
22 to Section 11 of the Homeowner Association Act, the purchaser
23 may do so by hand delivering notice of the cancellation to the
24 lot owner or by mailing notice of cancellation, by prepaid
25 United States mail, to the lot owner, or to the lot owner's

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1 agent for service of process. Cancellation shall be without
2 penalty, and all payments made by the purchaser before
3 cancellation shall be refunded within fifteen days.

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

10 **SECTION 15. APPLICABILITY.--**

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

14 B. Sections 9, 10 and 14 of the Homeowner
15 Association Act do not apply to homeowner associations created
16 before July 1, 2013; provided that any amendment to the
17 community documents of an association created before July 1,
18 2013 shall comply with the Homeowner Association Act.

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

24 D. The Homeowner Association Act does not apply to
25 a condominium governed by the Condominium Act.

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