

SENATE JUDICIARY COMMITTEE SUBSTITUTE FOR
SENATE BILL 244

53RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2017

AN ACT

RELATING TO HOMEOWNER ASSOCIATIONS; AMENDING DISCLOSURE
REQUIREMENTS; ALLOWING ALTERNATIVE DISPUTE RESOLUTION TO
RESOLVE CERTAIN DISAGREEMENTS RELATED TO HOMEOWNER
ASSOCIATIONS; BROADENING THE APPLICABILITY OF THE HOMEOWNER
ASSOCIATION ACT; ADDING A PENALTY.

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

SECTION 1. Section 47-16-2 NMSA 1978 (being Laws 2013,
Chapter 122, Section 2) is amended to read:

"47-16-2. 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;

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1 B. "association" means a homeowner association;

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

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

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

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

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

20 H. "conflict of interest" means that a person
21 accepts or is a beneficiary of a fee, brokerage, gift or other
22 thing of value, other than a fixed salary or compensation, as
23 consideration for an investment, loan, deposit, purchase, sale,
24 exchange, insurance, reinsurance or other transaction made by
25 or for the association, an officer of the board or the board;

1 or that a person is financially interested in any capacity in a
2 transaction for the association, except on behalf of the
3 association, an officer of the board or the board;

4 ~~[H.]~~ I. "declarant" means the person or group of
5 persons designated in a declaration as declarant or, if no
6 declarant is designated, the person or group of persons who
7 sign the declaration and their successors or assigns who may
8 submit property to a declaration;

9 ~~[I.]~~ J. "declaration" means an instrument, however
10 denominated, including amendments or supplements to the
11 instrument, that:

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

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

23 ~~[J.]~~ K. "development" means real property subject
24 to a declaration that contains residential lots and common
25 areas with respect to which any person, by virtue of ownership

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1 of a lot, is a member of an association and is obligated to pay
2 assessments provided for in a declaration;

3 ~~[K.]~~ L. "development right" means a right or
4 combination of rights reserved by the declarant in a
5 declaration;

6 ~~[H.]~~ M. "disclosure certificate" or "disclosure
7 statement" means:

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

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

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

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

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

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

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1 association;

2 (7) the current operating budget of the
3 association;

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

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

11 (10) if applicable, a statement stating that
12 the records of the association reflect alterations or
13 improvements to the lot that violate the declaration;

14 [~~(10)~~] (11) a statement of the remaining term
15 of any leasehold estate affecting the association and the
16 provisions governing any extension or renewal thereof; and

17 [~~(11)~~] (12) the contact person and contact
18 information for the association;

19 [M.] N. "homeowner association" means an
20 incorporated or unincorporated entity upon which maintenance
21 and operational responsibilities are imposed and to which
22 authority is granted in the declaration;

23 [N.] O. "lot" means a parcel of land designated for
24 separate ownership or occupancy shown on a recorded subdivision
25 plat for a development or the boundaries of which are described

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1 in the declaration or in a recorded instrument referred to or
2 expressly contemplated by the declaration, other than a common
3 area;

4 ~~[P.]~~ P. "lot owner" means a person or group of
5 persons holding title to a lot, including a declarant;

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

16 ~~[Q.]~~ R. "proxy" means a person authorized to act
17 for another."

18 **SECTION 2.** Section 47-16-5 NMSA 1978 (being Laws 2013,
19 Chapter 122, Section 5) is amended to read:

20 "47-16-5. RECORD DISCLOSURE TO MEMBERS--UPDATED
21 INFORMATION.--

22 A. All financial and other records of the
23 association shall be made available during regular business
24 hours for examination by a lot owner within ten business days
25 of ~~[the]~~ a written request.

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1 B. The association shall not charge a fee for
2 making financial and other records available for review. The
3 association may charge a [~~reasonable~~] fee of not more than ten
4 cents (\$.10) per page for copies.

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

- 7 (1) the declaration of the association;
- 8 (2) the name, address and telephone number of
9 the association's designated agent;
- 10 (3) the bylaws of the association;
- 11 (4) the names and addresses of all association
12 members;
- 13 (5) minutes of all meetings of the
14 association's lot owners and board for the previous five years,
15 other than executive sessions, and records of all actions taken
16 by a committee in place of the board or on behalf of the
17 association for the previous five years;
- 18 (6) the operating budget for the current
19 fiscal year;
- 20 (7) current assessments, including both
21 regular and special assessments;
- 22 (8) financial statements and accounts,
23 including bank account statements, transaction registers,
24 association-provided service or utility records and amounts
25 held in reserve;

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1 (9) the most recent financial audit or review,
2 if any;

3 (10) all current contracts entered into by the
4 association or the board on behalf of the association; ~~and~~

5 (11) current insurance policies, including
6 company names, policy limits, deductibles, additional named
7 insureds and expiration dates for property, general liability
8 and association director and officer professional liability,
9 and fidelity policies; and

10 (12) any electronic record of action taken by
11 the board.

12 D. The failure of an association to provide access
13 to the financial and other records within ten business days
14 after receipt of a written request creates a rebuttable
15 presumption that the association willfully failed to comply
16 with the Homeowner Association Act. A lot owner that is denied
17 access to financial and other records is entitled to the
18 greater of the actual damages incurred for the association's
19 willful failure to comply with this subsection or fifty dollars
20 (\$50.00) per calendar day, starting on the eleventh business
21 day after the association's receipt of the written request."

22 SECTION 3. Section 47-16-7 NMSA 1978 (being Laws 2013,
23 Chapter 122, Section 7) is amended to read:

24 "47-16-7. BOARD MEMBERS AND OFFICERS--DUTIES--
25 BUDGET.--

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1 A. Except as provided in the community documents or
2 other provisions of the Homeowner Association Act, the board
3 acts on behalf of the association. In the performance of their
4 duties, officers and members of the board shall exercise, if
5 appointed by the declarant, the degree of care and loyalty
6 required of a fiduciary of the lot owners and, if elected by
7 the lot owners, ordinary and reasonable care free from any
8 undisclosed conflict of interest.

9 B. Within ninety days after being elected or
10 appointed to the board, each board member shall certify in
11 writing to the secretary of the association that the member:

12 (1) has read the community documents;

13 (2) will work to uphold the community
14 documents and policies to the best of the member's ability; and

15 (3) will faithfully discharge the member's
16 duties to the association.

17 C. A board member who does not file the written
18 certification pursuant to Subsection B of this section shall be
19 suspended from the board until the member complies with
20 Subsection B of this section.

21 D. The association shall retain each board member's
22 written certification for inspection by lot owners for five
23 years after the board member's election or appointment. The
24 failure of an association to have a board member's written
25 certification on file does not affect the validity of any

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1 action taken by the board or any protections provided to board
2 members under the:

3 (1) Homeowner Association Act; or

4 (2) Nonprofit Corporation Act, if the
5 association is organized under the Nonprofit Corporation Act.

6 ~~[B-]~~ E. The board or the lot owners, as provided
7 for in the community documents, shall adopt a budget annually.
8 Within thirty calendar days after adoption of any proposed
9 budget for the association, the board shall provide a ~~[summary]~~
10 copy of the budget to all the lot owners.

11 F. The board of directors shall provide to all lot
12 owners a statement included with a copy of the annual budget
13 listing all fees and fines that may be charged to a lot owner
14 by the association or any management company retained by the
15 association to act on behalf of the association, including
16 charges for a disclosure certificate pursuant to Subsection H
17 of Section 47-16-12 NMSA 1978.

18 G. Any management contract negotiated between the
19 board and a management company retained by the association to
20 act on behalf of the association shall include:

21 (1) a disclosure to the board of any existing
22 relationships the management company has with any vendor or
23 contractor for the association from which a conflict of
24 interest may arise; and

25 (2) a list of all fees to be charged to the

1 association or lot owners by the management company during the
2 term of the contract."

3 SECTION 4. Section 47-16-9 NMSA 1978 (being Laws 2013,
4 Chapter 122, Section 9) is amended to read:

5 "47-16-9. PROXY AND ABSENTEE VOTING--BALLOT COUNTING.--

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

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

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

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

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

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

25 D. Where directors or officers are to be elected by

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1 members, the bylaws may provide that such elections may be
2 conducted by mail.

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

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

12 G. Nothing in this section shall be considered in
13 conflict with or a replacement of voting member councils or
14 representative voting systems created by the community
15 documents."

16 SECTION 5. Section 47-16-10 NMSA 1978 (being Laws 2013,
17 Chapter 122, Section 10) is amended to read:

18 "47-16-10. FINANCIAL AUDIT.--

19 ~~[A. Unless any provision in the community documents~~
20 ~~requires an annual audit by a certified public accountant, the~~
21 ~~board of directors of an association managing a master planned~~
22 ~~community or a development consisting of one hundred or more~~
23 ~~lots shall provide for an annual financial audit, review or~~
24 ~~compilation of the association. The audit, review or~~
25 ~~compilation shall be completed no later than one hundred eighty~~

1 ~~days after the end of the association's fiscal year and shall~~
 2 ~~be made available upon request to the members within thirty~~
 3 ~~days after its completion.~~

4 ~~B. Unless otherwise provided in the community~~
 5 ~~documents, in an association managing a development consisting~~
 6 ~~of fewer than one hundred lots, upon a majority vote of all of~~
 7 ~~the lot owners] At least every three years, the board shall~~
 8 provide for a financial audit, review or compilation of the
 9 association's records in accordance with generally accepted
 10 accounting principles by an independent certified public
 11 accountant and shall provide that the cost thereof be assessed
 12 as a common expense. The audit, review or compilation shall be
 13 made available to lot owners within thirty calendar days of its
 14 completion."

15 SECTION 6. Section 47-16-12 NMSA 1978 (being Laws 2013,
 16 Chapter 122, Section 12) is amended to read:

17 "47-16-12. SALE OF LOTS--DISCLOSURE CERTIFICATE.--

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

- 21 (1) the declaration of the association, other
 22 than the plats and plans;
 23 (2) the bylaws of the association;
 24 (3) any covenants, conditions and restrictions
 25 applicable to the lot;

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1 (4) the rules of the association; and

2 (5) a disclosure certificate from the
3 association.

4 B. Within ten business days after receipt of a
5 written request from a lot owner or the lot owner's
6 representative, the association shall furnish a disclosure
7 certificate containing the information necessary to enable the
8 lot owner to comply with the provisions of this section. A lot
9 owner providing a disclosure certificate pursuant to Subsection
10 A of this section shall not be liable to the purchaser for any
11 erroneous information provided by the association and included
12 in the disclosure certificate.

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

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

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

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

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

7 G. The statements contained in the disclosure
8 certificate pursuant to Paragraphs (2) and (3) of Subsection M
9 of Section 47-16-2 NMSA 1978 shall only be valid for sixty days
10 from their creation. Beginning sixty-one days after the
11 creation of the disclosure certificate, the lot owner may
12 request that the association update any changes to statements
13 contained in the disclosure certificate pursuant to Paragraphs
14 (2) and (3) of Subsection M of Section 47-16-2 NMSA 1978. Upon
15 a lot owner's request for changes to statements contained in
16 the disclosure certificate pursuant to this subsection, the
17 association shall provide the updated information within three
18 business days of the lot owner's request and may impose a
19 reasonable fee not to exceed fifty dollars (\$50.00). The
20 updated information shall only be valid for sixty days from the
21 update.

22 [~~G.~~] H. Notwithstanding any local ordinance or
23 ordinance enacted by a home rule municipality, an association
24 may impose reasonable charges not to exceed three hundred
25 dollars (\$300) for preparation of a disclosure certificate as

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1 required by the Homeowner Association Act, to be collected at
2 the time of closing; provided that the transaction closes."

3 SECTION 7. Section 47-16-15 NMSA 1978 (being Laws 2013,
4 Chapter 122, Section 15, as amended) is amended to read:

5 "47-16-15. APPLICABILITY.--

6 A. ~~[Except as provided in Subsections B and C of~~
7 ~~this section]~~ The Homeowner Association Act shall apply to all
8 homeowner associations created and existing within this state.

9 ~~[B. Sections 47-16-9, 47-16-10 and 47-16-14 NMSA~~
10 ~~1978 do not apply to homeowner associations created before July~~
11 ~~1, 2013; provided that any amendment to the community documents~~
12 ~~of an association created before July 1, 2013 shall comply with~~
13 ~~the Homeowner Association Act.~~

14 ~~C. Except as provided in Sections 47-16-4 and~~
15 ~~47-16-8 NMSA 1978 and Section 2 of this 2015 act the Homeowner~~
16 ~~Association Act does not invalidate existing provisions of the~~
17 ~~articles of incorporation, declaration, bylaws or rules of a~~
18 ~~homeowner association created before July 1, 2013.~~

19 ~~D.]~~ B. The Homeowner Association Act does not apply
20 to a condominium governed by the Condominium Act."

21 SECTION 8. A new section of the Homeowner Association Act
22 is enacted to read:

23 "[NEW MATERIAL] REMOVAL OF BOARD MEMBERS.--Unless a
24 process for removal of board members is provided for in the
25 community documents, the lot owners, by a two-thirds' vote of

1 all lot owners present and entitled to vote at a lot owner
2 meeting at which a quorum is present, may remove a member of
3 the board."

4 SECTION 9. A new section of the Homeowner Association Act
5 is enacted to read:

6 "[NEW MATERIAL] MEETINGS OF ASSOCIATION.--

7 A. The association shall hold an annual meeting at
8 least once every thirteen months.

9 B. Notwithstanding a provision to the contrary in
10 the community documents, written notice of the meeting stating
11 the time, date and location of the annual meeting and, in the
12 case of a special meeting, the purpose or purposes for which
13 the meeting is called, shall be delivered electronically, hand-
14 delivered or sent by mail not less than ten and no more than
15 fifty days before the meeting. If sent by mail, the notice
16 shall be deemed to be delivered when addressed to a lot owner
17 at the address as it appears in the association's records and
18 deposited in the United States mail, postage prepaid.

19 C. Unless a longer period of time is required by an
20 association's community documents, notice of the time, date and
21 location of board meetings and drafts of any proposed policy
22 resolutions shall be provided to lot owners at least
23 forty-eight hours in advance electronically, by conspicuous
24 posting, posting on the association's website or social media
25 or by any other reasonable means as determined by the board.

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1 D. All lot owners shall have the right to attend
2 and speak at all open meetings, but the board may place
3 reasonable time restrictions on those persons speaking.

4 E. Any portion of a meeting may be closed only if
5 that portion is limited to consideration of:

6 (1) legal advice from an attorney for the
7 board or association;

8 (2) pending or contemplated litigation; or

9 (3) personal, health or financial information
10 about an individual member of the association, an individual
11 employee of the association or an individual contractor for the
12 association.

13 F. The association shall maintain a written copy of
14 the minutes of all association meetings, including summaries of
15 all agenda items and formal actions taken."

16 **SECTION 10.** A new section of the Homeowner Association
17 Act is enacted to read:

18 "[NEW MATERIAL] ENFORCEMENT OF COVENANTS--DISPUTE
19 RESOLUTION.--

20 A. Each association and each lot owner and the
21 owner's tenants, guests and invitees shall comply with the
22 Homeowners Association Act and the association's community
23 documents.

24 B. Unless otherwise provided for in the community
25 documents, the association may, after providing written notice

1 and an opportunity to dispute an alleged violation other than
2 failure to pay assessments:

3 (1) levy reasonable fines for violations of or
4 failure to comply with any provision of the community
5 documents; and

6 (2) suspend, for a reasonable period of time,
7 the right of a lot owner or the lot owner's tenant, guest or
8 invitee to use common areas and facilities of the association.

9 C. Prior to imposition of a fine or suspension, the
10 board shall provide an opportunity to submit a written
11 statement or for a hearing before the board or a committee
12 appointed by the board by providing written notice to the
13 person sought to be fined or suspended fourteen days prior to
14 the hearing. Following the hearing or review of the written
15 statement, if the board or committee, by a majority vote, does
16 not approve a proposed fine or suspension, neither the fine nor
17 the suspension may be imposed. Notice and a hearing are not
18 required for violations that pose an imminent threat to public
19 health or safety.

20 D. If a person against whom a violation has been
21 alleged fails to request a hearing or submit a written
22 statement as provided for in Subsection C of this section, the
23 fine or suspension may be imposed, calculated from the date of
24 violation.

25 E. A lot owner or the association may use a process

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1 other than litigation used to prevent or resolve disputes,
2 including mediation, facilitation, regulatory negotiation,
3 settlement conferences, binding and nonbinding arbitration,
4 fact-finding, conciliation, early neutral evaluation and policy
5 dialogues, for complaints between the lot owner and the
6 association or if such services are required by the community
7 documents."

8 SECTION 11. TEMPORARY PROVISION.--All homeowner
9 associations created prior to July 1, 2013 shall comply with
10 the provisions of the Homeowner Association Act no later than
11 January 1, 2018.

12 SECTION 12. EFFECTIVE DATE.--The effective date of the
13 provisions of this act is July 1, 2017.