

HOUSE JUDICIARY COMMITTEE SUBSTITUTE FOR
HOUSE LOCAL GOVERNMENT, ELECTIONS, LAND GRANTS AND
CULTURAL AFFAIRS COMMITTEE SUBSTITUTE FOR
HOUSE BILL 374

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

AN ACT

RELATING TO PROPERTY; AMENDING DISCLOSURE REQUIREMENTS;
ALLOWING ALTERNATIVE DISPUTE RESOLUTION TO RESOLVE CERTAIN
DISAGREEMENTS RELATED TO HOMEOWNER ASSOCIATIONS; 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;

B. "association" means a homeowner association;

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

1 transaction for the association, except on behalf of the
2 association, an officer of the board or the board;

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

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

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

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

22 [J.] K. "development" means real property subject
23 to a declaration that contains residential lots and common
24 areas with respect to which any person, by virtue of ownership
25 of a lot, is a member of an association and is obligated to pay

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underscored material = new
[bracketed material] = delete

1 assessments provided for in a declaration;

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

5 ~~[L.]~~ M. "disclosure certificate" or "disclosure
6 statement" means:

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

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

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

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

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

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

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

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

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

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

13 [~~(10)~~] (11) a statement of the remaining term
14 of any leasehold estate affecting the association and the
15 provisions governing any extension or renewal thereof; and

16 [~~(11)~~] (12) the contact person and contact
17 information for the association;

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

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

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1 expressly contemplated by the declaration, other than a common
2 area;

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

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

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

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

19 "47-16-5. RECORD DISCLOSURE TO MEMBERS--UPDATED
20 INFORMATION.--

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

25 B. The association shall not charge a fee for

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

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

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

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1 if any;

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

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

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

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

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

23 "47-16-7. BOARD MEMBERS AND OFFICERS--DUTIES--
24 BUDGET.--

25 A. Except as provided in the community documents or

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

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

13 C. Any management contract negotiated between the
 14 board and a management company retained by the association to
 15 act on behalf of the association shall include:

16 (1) a disclosure to the board of any existing
 17 relationships the management company has with any vendor or
 18 contractor for the association from which a conflict of
 19 interest may arise; and

20 (2) a list of all fees to be charged to the
 21 association or lot owners by the management company during the
 22 term of the contract."

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

25 "47-16-9. PROXY AND ABSENTEE VOTING--BALLOT COUNTING.--

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

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

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

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

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

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

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

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

25 F. Ballots, if used, shall be counted by a neutral

1 third party or by a committee of volunteers. The volunteers
 2 shall be selected or appointed at an open meeting, in a fair
 3 manner, by the chair of the board or another person presiding
 4 during that portion of the meeting. The volunteers shall not
 5 be board members and, in the case of a contested election for a
 6 board position, shall not be candidates.

7 G. Nothing in this section shall be considered in
 8 conflict with or a replacement of voting member councils or
 9 representative voting systems created by the community
 10 documents."

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

13 "47-16-10. FINANCIAL AUDIT.--

14 ~~[A. Unless any provision in the community documents~~
 15 ~~requires an annual audit by a certified public accountant, the~~
 16 ~~board of directors of an association managing a master planned~~
 17 ~~community or a development consisting of one hundred or more~~
 18 ~~lots shall provide for an annual financial audit, review or~~
 19 ~~compilation of the association. The audit, review or~~
 20 ~~compilation shall be completed no later than one hundred eighty~~
 21 ~~days after the end of the association's fiscal year and shall~~
 22 ~~be made available upon request to the members within thirty~~
 23 ~~days after its completion.~~

24 ~~B. Unless otherwise provided in the community~~
 25 ~~documents, in an association managing a development consisting~~

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

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

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

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

- 16 (1) the declaration of the association, other
17 than the plats and plans;
18 (2) the bylaws of the association;
19 (3) any covenants, conditions and restrictions
20 applicable to the lot;
21 (4) the rules of the association; and
22 (5) a disclosure certificate from the
23 association.

24 B. Within ten business days after receipt of a
25 written request from a lot owner or the lot owner's

1 representative, the association shall furnish a disclosure
2 certificate containing the information necessary to enable the
3 lot owner to comply with the provisions of this section. A lot
4 owner providing a disclosure certificate pursuant to Subsection
5 A of this section shall not be liable to the purchaser for any
6 erroneous information provided by the association and included
7 in the disclosure certificate.

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

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

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

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

- 21 (1) pursuant to court order;
22 (2) by a government or governmental agency;
23 (3) by foreclosure or deed in lieu of
24 foreclosure; or
25 (4) that may be canceled at any time and for

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1 any reason by the purchaser without penalty.

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

17 [~~G.~~] H. Notwithstanding any local ordinance or
18 ordinance enacted by a home rule municipality, an association
19 may impose reasonable charges not to exceed three hundred
20 dollars (\$300) for preparation of a disclosure certificate as
21 required by the Homeowner Association Act, to be collected at
22 the time of closing; provided that the transaction closes."

23 SECTION 7. A new section of the Homeowner Association Act
24 is enacted to read:

25 "[NEW MATERIAL] REMOVAL OF BOARD MEMBERS.--Unless a

1 process for removal of board members is provided for in the
 2 community documents, the lot owners, by a two-thirds' vote of
 3 all lot owners present and entitled to vote at a lot owner
 4 meeting at which a quorum is present, may remove a member of
 5 the board."

6 **SECTION 8.** A new section of the Homeowner Association Act
 7 is enacted to read:

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

9 A. The association shall hold an annual meeting at
 10 least once every thirteen months.

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

21 C. Unless a longer period of time is required by an
 22 association's community documents, notice of the time, date and
 23 location of board meetings and drafts of any proposed policy
 24 resolutions shall be provided to lot owners at least
 25 forty-eight hours in advance electronically, by conspicuous

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1 posting, posting on the association's website or social media
2 or by any other reasonable means as determined by the board.

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

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

8 (1) legal advice from an attorney for the
9 board or association;

10 (2) pending or contemplated litigation; or

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

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

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

20 "[NEW MATERIAL] ENFORCEMENT OF COVENANTS--DISPUTE
21 RESOLUTION.--

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

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1 B. Unless otherwise provided for in the community
2 documents, the association may, after providing written notice
3 and an opportunity to dispute an alleged violation other than
4 failure to pay assessments:

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

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

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

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

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1 violation.

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

10 SECTION 10. EFFECTIVE DATE.--The effective date of the
11 provisions of this act is July 1, 2017.