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SENATE BILL 30

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

INTRODUCED BY

Timothy M. Keller and Alonzo Baldonado

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; REQUIRING FILING OF NONPROFIT CORPORATION BYLAWS WITH THE PUBLIC REGULATION COMMISSION.

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 original or restated articles of incorporation or articles of consolidation, and all amendments thereto, of a homeowner

1 association;

2 B. "association" means a homeowner association;

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

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

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

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

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

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

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

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

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

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

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

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1 area;

2 L. "lot owner" means a person or group of persons
3 holding title to a lot, including a declarant; and

4 M. "proxy" means a person authorized to act for
5 another.

6 SECTION 3. CREATION OF A HOMEOWNER ASSOCIATION.--An
7 association created after July 1, 2013 shall be organized as a
8 nonprofit corporation in accordance with the laws of the state.
9 The membership of the association shall consist exclusively of
10 all lot owners in the development.

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

12 A. Subject to the provisions of the declaration and
13 this section, the association may:

14 (1) adopt and amend bylaws and rules;

15 (2) adopt and amend budgets for revenues,
16 expenditures and reserves, and collect assessments for common
17 expenses from lot owners;

18 (3) hire and terminate the employment of
19 managing agents and other employees, agents and independent
20 contractors;

21 (4) institute, defend or intervene in
22 litigation or administrative proceedings, or engage in
23 arbitration or mediation, in the association's own name on
24 behalf of itself or two or more lot owners on matters affecting
25 the development;

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1 (5) enter into contracts and incur
2 liabilities;

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

11 (7) cause additional improvements to be made
12 as a part of the common areas; provided that the association
13 does not materially impair a lot owner's quiet enjoyment of the
14 lot;

15 (8) acquire, hold, encumber and convey in the
16 association's name any right, title or interest to real or
17 personal property other than common areas; provided that the
18 association does not materially impair a lot owner's quiet
19 enjoyment of the lot;

20 (9) grant easements, leases, licenses and
21 concessions through or over the common areas; provided that the
22 association does not materially impair a lot owner's quiet
23 enjoyment of the lot;

24 (10) impose charges for late payment of
25 assessments and, after notice and an opportunity to be heard,

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1 levy fines for violations of the declaration, bylaws and rules
2 of the association;

3 (11) suspend a lot owner's right to use common
4 areas because of late payment or nonpayment of assessments,
5 following notice to the lot owner and an opportunity to be
6 heard;

7 (12) impose reasonable charges for preparation
8 and recording of amendments to the declaration or preparation
9 of a disclosure certificate as required by the Homeowner
10 Association Act;

11 (13) provide for the indemnification of its
12 officers and board and maintain directors' and officers'
13 liability insurance;

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

16 (15) assign the association's right to future
17 income, including the right to receive common expense
18 assessments. Reserve funds held for future major repairs and
19 replacements of common areas shall not be assigned or pledged.

20 B. Except as provided by the declaration, the
21 association shall be responsible for maintenance, repair and
22 replacement of the common areas and any improvements thereon,
23 and the lot owner shall be responsible for the maintenance,
24 repair and replacement of the lot owner's lot and any
25 improvements thereon. A lot owner shall allow the association

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1 and other lot owners, and the association's and other lot
2 owners' agents and employees, access through the lot owner's
3 lot as is reasonably necessary for the maintenance, repair and
4 replacement of the common areas and any improvements thereon.
5 If damage is inflicted on the common areas or on any lot
6 through which access is taken, the lot owner or the association
7 responsible for the damage is liable for the prompt repair
8 thereof.

9 C. The association shall have a lien on a lot for
10 any assessment levied against that lot or for fines imposed
11 against that lot's owner from the time the assessment or fine
12 becomes due. If an assessment is payable in installments, the
13 full amount of the assessment shall be a lien from the time the
14 first installment becomes due.

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

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

25 F. A lien for assessments may be enforced by

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1 lawsuit against a lot owner but shall not result in an action
2 for foreclosure. A judgment or decree in any action brought
3 under the Homeowner Association Act may include costs and
4 reasonable attorney fees for the prevailing party.

5 G. Unless otherwise provided in the declaration,
6 the lien established pursuant to this section shall be
7 subordinate to other liens or encumbrances.

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

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

17 B. The board shall not act on behalf of the
18 association to amend the declaration, to terminate the planned
19 community, to approve the annual budget or to elect members of
20 the board or determine the qualifications, powers and duties or
21 terms of office of board members, but the board shall fill
22 vacancies in its membership for the unexpired portion of any
23 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 and shall
8 set a date for a meeting of the lot owners to consider
9 ratification of the budget not less than fourteen nor more than
10 thirty calendar days after mailing the summary. Unless at that
11 meeting a majority of all the lot owners or any larger vote
12 specified in the declaration rejects the budget, the budget
13 shall be ratified, whether or not a quorum is present. In the
14 event the proposed budget is rejected, the periodic budget last
15 ratified by the lot owners shall be continued until such time
16 as the lot owners ratify a subsequent budget proposed by the
17 board.

18 SECTION 6. PROXY AND ABSENTEE VOTING--BALLOT COUNTING.--

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

22 B. Vote by directed or undirected proxy is allowed
23 only for the annual lot owner meeting. The proxy vote shall:

24 (1) be dated and executed by a lot owner, but
25 if a lot is owned by more than one person, each owner of the

1 lot may vote or register protest to the casting of votes by the
2 other owners of the lot through a duly executed proxy;

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

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

8 C. If proxy voting is utilized at the annual lot
9 owner meeting, a person shall not:

10 (1) cast undirected proxies representing more
11 than fifteen percent of the votes of the association; and

12 (2) pay a company or person to collect proxy
13 votes.

14 D. If absentee ballots are used, the ballot for any
15 action taken at an annual, regular or special meeting of the
16 members shall:

17 (1) set forth each proposed action;

18 (2) provide an opportunity to vote for or
19 against each proposed action;

20 (3) be valid for only one specified election
21 or meeting of the members and expire automatically after the
22 completion of the election or meeting;

23 (4) indicate the number of responses needed to
24 meet the quorum requirements;

25 (5) state the percent of votes necessary to

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1 approve each matter, other than for election of directors;
2 (6) specify the time and date by which the
3 ballot shall be delivered to the board in order to be counted,
4 which shall be at least seven calendar days after the date the
5 ballot is delivered to the board; and

6 (7) authorize only the lot owner to vote.

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

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

16 SECTION 7. RECORD DISCLOSURE TO MEMBERS--UPDATED
17 INFORMATION.--

18 A. All financial and other records of the
19 association shall be made available for examination by a lot
20 owner at any reasonable time.

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

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

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- 1 (1) the declaration of the association;
- 2 (2) the name, address and telephone number of
- 3 the association's designated agent;
- 4 (3) the bylaws of the association;
- 5 (4) the names and addresses of all association
- 6 members;
- 7 (5) minutes of all meetings of the
- 8 association's lot owners and board, other than executive
- 9 sessions, records of all actions taken by the lot owners or
- 10 board without a meeting and records of all actions taken by a
- 11 committee in place of the board or on behalf of the
- 12 association;
- 13 (6) the operating budget for the current
- 14 fiscal year;
- 15 (7) current assessments, including both
- 16 regular and special assessments;
- 17 (8) financial statements and accounts,
- 18 including amounts held in reserve;
- 19 (9) the most recent financial audit or review,
- 20 if any;
- 21 (10) all contracts entered into by the
- 22 association or the board on behalf of the association;
- 23 (11) insurance policies, including company
- 24 names, policy limits, deductibles, additional named insureds
- 25 and expiration dates for property, general liability and

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1 association director and officer professional liability, and
2 fidelity policies; and

3 (12) other financial information of the
4 association.

5 SECTION 8. FINANCIAL AUDIT.--The association, upon a
6 majority vote of all of the lot owners, may request that the
7 board provide for a financial audit or review of the
8 association's records. The audit or review shall be made
9 available to lot owners within thirty calendar days of its
10 completion.

11 SECTION 9. RECORDING OR FILING OF HOMEOWNER ASSOCIATION
12 NOTICE AND DECLARATION.--

13 A. An association organized after July 1, 2013
14 shall record a "Notice of Homeowner Association" and a copy of
15 the declaration in the office of the county clerk of the county
16 or counties in which the real property affected thereby is
17 situated no later than thirty days after the date on which the
18 association's articles of incorporation are filed with the
19 public regulation commission.

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

25 C. A "Notice of Homeowner Association" pursuant to

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1 Subsection A or B of this section shall fully and accurately
2 disclose the name and address of the association and shall
3 contain a legal description of the real property that is
4 subject to the powers of the association. A "Notice of
5 Homeowner Association" pursuant to Subsection A of this section
6 shall also include the public regulation commission number of
7 the association.

8 D. If an association fails to record a "Notice of
9 Homeowner Association" pursuant to this section, the
10 association shall forfeit any authority to charge an
11 assessment, levy a fine for late payment of an assessment or
12 enforce a lien for nonpayment of an assessment until the
13 "Notice of Homeowner Association" is recorded.

14 **SECTION 10. DISCLOSURE CERTIFICATE--RIGHT OF CANCELLATION**
15 **OF PURCHASE CONTRACT.--**

16 A. Except as provided in Section 11 of the
17 Homeowner Association Act, a person selling a lot that is
18 subject to an association shall provide in writing a disclosure
19 certificate that states that the lot is located within a
20 development that is subject to an association. If the lot is
21 located within a development that is subject to an association:

22 (1) a seller shall obtain a disclosure
23 certificate from the association and provide it to the
24 purchaser;

25 (2) a purchaser has the right to cancel the

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1 purchase contract until closing and transfer of title; and
2 (3) the right to receive the disclosure
3 certificate and the right to cancel the purchase contract are
4 waived conclusively if not exercised before closing.

5 B. If the disclosure certificate pursuant to
6 Subsection A of this section is not furnished to the purchaser,
7 the purchaser's sole remedy is to cancel the contract prior to
8 closing.

9 SECTION 11. SALE OF LOTS--DISCLOSURE CERTIFICATE.--

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

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

15 (2) the bylaws of the association;

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

18 (4) the rules of the association; and

19 (5) a disclosure certificate from the
20 association containing:

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

24 (b) a statement setting forth the amount
25 of the monthly common expense assessment and any unpaid common

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1 expense or special assessment currently due and payable from
2 the selling lot owner;

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

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

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

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

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

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

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

25 (j) a statement of the remaining term of

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

3 (k) the contact person and contact
4 information for the association.

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

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

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

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

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

25 (1) pursuant to court order;

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1 (2) by a government or governmental agency;

2 (3) by foreclosure or deed in lieu of

3 foreclosure;

4 (4) that may be canceled at any time and for
5 any reason by the purchaser without penalty; or

6 (5) of a lot restricted to nonresidential use.

7 SECTION 12. PURCHASER'S CANCELLATION OF A PURCHASE

8 CONTRACT.--

9 A. If a purchaser elects to cancel a purchase, the
10 purchaser may do so by hand delivering notice of the
11 cancellation to the lot owner or by mailing notice of
12 cancellation, by prepaid United States mail, to the lot owner,
13 or to the lot owner's agent for service of process.
14 Cancellation shall be without penalty, and all payments made by
15 the purchaser before cancellation shall be refunded within
16 fifteen days.

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

19 SECTION 13. APPLICABILITY.--

20 A. The Homeowner Association Act shall apply, in
21 its entirety, to all homeowner associations created within this
22 state after July 1, 2013.

23 B. Except as provided in this subsection, Sections
24 5 through 12 of the Homeowner Association Act shall apply to
25 all homeowner associations created in this state before July 1,

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1 2013. Sections 5 through 12 of the Homeowner Association Act
2 shall apply only with respect to events and circumstances
3 occurring after July 1, 2013 and do not invalidate existing
4 provisions of the articles of incorporation, declaration,
5 bylaws or rules of an association created in this state before
6 July 1, 2013.

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

9 SECTION 14. EFFECTIVE DATE.--The effective date of the
10 provisions of this act is July 1, 2013.