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SENATE BILL 49

**54TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2019**

INTRODUCED BY

Mimi Stewart

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;

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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 [Ø-] 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--BUDGET.--

25 A. Except as provided in the community documents or



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

11 (1) has read the community documents;

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

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

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

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

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1 members under the:

2 (1) Homeowner Association Act; or

3 (2) Nonprofit Corporation Act, if the

4 association is organized under the Nonprofit Corporation Act.

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

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

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

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

24 (2) a list of all fees to be charged to the  
25 association or lot owners by the management company during the

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1 term of the contract."

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

4 "47-16-9. PROXY AND ABSENTEE VOTING--BALLOT COUNTING.--

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

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

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

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

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

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

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

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1 conducted by mail.

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

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

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

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

17 "47-16-10. FINANCIAL AUDIT.--

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

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1 ~~be made available upon request to the members within thirty~~  
2 ~~days after its completion.~~

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

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

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

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

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

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

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

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

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

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

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

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1 the time of closing; provided that the transaction closes."

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

4 "47-16-15. APPLICABILITY.--

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

9 B. Until January 1, 2020, Sections 47-16-9,  
10 47-16-10 and 47-16-14 NMSA 1978 do not apply to homeowner  
11 associations created before July 1, 2013 and that do not have  
12 fewer than thirty lots; provided that any amendment to the  
13 community documents of an association created before July 1,  
14 2013 shall comply with the Homeowner Association Act.

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

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

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

24 "[NEW MATERIAL] REMOVAL OF BOARD MEMBERS.--Unless a  
25 process for removal of board members is provided for in the



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

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

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

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

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

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

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1 or by any other reasonable means as determined by the board.

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

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

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

9 (2) pending or contemplated litigation; or

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

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

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

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

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

25 B. Unless otherwise provided for in the community

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1 documents, the association may, after providing written notice  
2 and an opportunity to dispute an alleged violation other than  
3 failure to pay assessments:

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

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

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

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

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