CHAPTER 47
Property Law

ARTICLE 1
Conveyances and General Provisions

47-1-1. "Real estate" defined.

The term "real estate", as used in Chapter 47 NMSA 1978, shall be so construed as to be applicable to lands, tenements and hereditaments, including all real movable property and leaseholds. As used in this section "leasehold" means an estate in real estate or real property held under a lease.

History: Laws 1851-1852, p. 372; C.L. 1865, ch. 44, § 2; C.L. 1884, § 2749; C.L. 1897, § 3940; Code 1915, § 4758; C.S. 1929, § 117-102; 1941 Comp., § 75-101; 1953 Comp., § 70-1-1; 1991, ch. 234, § 3.

ANNOTATIONS

Cross references. — For void indemnity agreements, *see* 56-7-1 NMSA 1978.

The 1991 amendment, effective April 4, 1991, added the section heading; added "and leaseholds" at the end of the first sentence; added the second sentence; and made a minor stylistic change.

Validating clauses. — Laws 1991, ch. 234, § 4 defined "leasehold" to mean an estate in real estate or real property held under a lease and validates as correct and legally effective filings or recordings to give constructive notice any actions taken prior to April 4, 1991 to file or record leases, memoranda, assignments or amendments thereto, leasehold mortgages or other writings affecting leaseholds or any interests in leaseholds in accordance with legal requirements for the filing or recording of writings affecting the title to real estate or real property.

Section not applicable to conveyance by decree or master. — The definition of "real estate" as contained in this section as originally enacted could not have been intended to control the meaning of the same word in Section 47-1-12 NMSA 1978, relating to conveyance by decree or master. *State ex rel. Truitt v. Dist. Court of Ninth Judicial Dist.*, 1939-NMSC-061, 44 N.M. 16, 96 P.2d 710.

Leaseholds conveyable as personalty. — Though inclusion of leaseholds under this section makes conveyances of leaseholds subject to the rules and procedures that pertain to the conveyance of real property, it does not change them from personal into real property. *Resolution Trust Corp. v. Binford*, 1992-NMSC-068, 114 N.M. 560, 844 P.2d 810.

Lease for a term of years is not real estate. *State ex rel. Truitt v. Dist. Court of Ninth Judicial Dist.*, 1939-NMSC-061, 44 N.M. 16, 96 P.2d 710 (decided prior to 1991 amendment including leaseholds within the definition).

Reformation of sublease deemed personal. — An action to reform a sublease with reference to rentals and renewals was strictly personal, and district court was without jurisdiction to enter decree adjudicating issues therein, in the absence of personal service of summons in state of nonresident defendant. *State ex rel. Truitt v. Dist. Court of Ninth Judicial Dist.*, 1939-NMSC-061, 44 N.M. 16, 96 P.2d 710, (decided prior to 1991 amendment including leaseholds within the definition).

Section does not attempt to convert what was personal property at common law into real estate, but only to bring leasehold estates within the compass of the conveyancing statutes. *Garrison Gen. Tire Serv., Inc. v. Montgomery*, 1965-NMSC-077, 75 N.M. 321, 404 P.2d 143 (decided prior to 1991 amendment including leaseholds within the definition).

Lis pendens held valid. — Because the legislature retroactively has validated the filing of interests in leaseholds for giving of constructive notice, and a notice of lis pendens may act merely as constructive notice to third persons of a fact open to public notoriety, the notice of lis pendens is valid. *Resolution Trust Corp. v. Binford*, 1992-NMSC-068, 114 N.M. 560, 844 P.2d 810.

Intention controls whether chattel considered realty. — Only three general tests have been subscribed to so be applied in determining whether an article used in connection with realty is to be considered a fixture. First, annexation to the realty, either actual or constructive; second, adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated; and third, intention to make the article a permanent accession to the freehold. In determining whether personal property loses or retains its identity as a chattel by being placed on land, the general intention of the parties is a controlling factor. *Garrison Gen. Tire Serv., Inc. v. Montgomery*, 1965-NMSC-077, 75 N.M. 321, 404 P.2d 143.

Townhouse is real estate. — Where plaintiffs purchased a new townhouse and the underlying lot from the builder; the purchase price included gross receipts taxes the builder paid on the value of the townhouse, the lot was realty and the townhouse was a tenement and plaintiff could not deduct the gross receipts taxes on their federal income tax returns on the theory that plaintiffs paid the tax on personal property in the form of the material used to construct the townhouse. *Casey v. Comm'r of Internal Revenue*, 830 F.2d 1092 (10th Cir. 1987).

Law reviews. — For article, "Toward Clarification of New Mexico's Real Property Statutes," see 1 Nat. Res. J. 163 (1961).

For note, "Vendor and Purchaser - Increased Risks of Forfeiture and Malpractice Resulting from the Use of Real Estate Contracts: Albuquerque National Bank v. Albuquerque Ranch Estates, Inc.," see 15 N.M.L. Rev. 99 (1985).

For comment, "Survey of New Mexico Law: Property Law," see 15 N.M.L. Rev. 345 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Property §§ 13 to 19, 48, 49, 51.

Solid mineral royalty as real or personal property, 68 A.L.R.2d 728.

Oil and gas royalty as real or personal property, 56 A.L.R.4th 539.

Air-conditioning appliance, equipment, or apparatus as fixture, 69 A.L.R.4th 359.

Mine tailings as real or personal property, 75 A.L.R.4th 965.

47-1-2. Monopolies; entailments; primogeniture.

Monopolies are contrary to the genius of a free government and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this state.

History: Laws 1851-1852, p. 154; C.L. 1865, ch. 95, § 17; C.L. 1884, § 2600; C.L. 1897, § 3774; Code 1915, § 4770; C.S. 1929, § 117-114; 1941 Comp., § 75-102; 1953 Comp., § 70-1-2; Laws 1992, ch. 66, § 70.

ANNOTATIONS

Cross references. — For constitutional provisions against privileges and monopolies, *see* N.M. Const., art. IV, §§ 26, 38.

The 1992 amendment, effective July 1, 1992, added the section heading and deleted "Perpetuities and" from the beginning of the section.

Restricted deed not monopoly. — The prohibition of this section of the creation of monopolies is not violated by restricted deeds (of an improvement company establishing a townsite) which restrict forever the sale of intoxicating liquors in the town to one block, by such persons as are designated by the company, such restriction being for the benefit of the community and without intent to create a monopoly. *Alamogordo Improvement Co. v. Prendergast*, 1940-NMSC-075, 45 N.M. 40, 109 P.2d 254.

Testamentary trust not violative of rule against perpetuities. — A testamentary trust complied with the rule against perpetuities where both the private and charitable portions of the trust were to terminate 21 years after the death of one of the beneficiaries. *In re Will of Coe*, 1992-NMCA-006, 113 N.M. 355, 826 P.2d 576.

Law reviews. — For article, "Toward Clarification of New Mexico's Real Property Statutes," see 1 Nat. Res. J. 163 (1961).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Accumulation of income as subject of governmental restraint in absence of explicit statute, 152 A.L.R. 657.

Restrictive covenants, conditions and agreements in respect of real property discriminating against persons on account of race, color or religion, 3 A.L.R.2d 466.

47-1-3. Repealed.

ANNOTATIONS

Repeals. — Laws 1992, ch. 66, § 71 repealed 47-1-3 NMSA 1978, as enacted by Laws 1959, ch. 46, § 1, relating to trust for benefit of employees not invalidated by rule against perpetuities, effective July 1, 1992. For provisions of former section, *see* the 1991 NMSA 1978 on *NMOneSource.com.* For present comparable provisions, *see* 45-2-1001 to 45-2-1006 NMSA 1978.

47-1-4. [Conveyances authorized.]

Any person or persons, or body politic, holding, or who may hold, any right or title to real estate in this state, be it absolute or limited, in possession, remainder or reversion, may convey the same in the manner and subject to the restrictions prescribed in this chapter.

History: Laws 1851-1852, p. 373; C.L. 1865, ch. 44, § 1; C.L. 1884, § 2748; C.L. 1897, § 3939; Code 1915, § 4757; C.S. 1929, § 117-101; 1941 Comp., § 75-103; 1953 Comp., § 70-1-3.

ANNOTATIONS

Cross references. — For transfer of interest in public land, *see* 19-3-3 NMSA 1978.

For rights gained by adverse possession, *see* 37-1-21 and 37-1-22 NMSA 1978.

For conveyances to and by married persons, *see* 40-3-12 and 40-3-13 NMSA 1978.

For joinder of minor spouse in conveyance, *see* 40-3-15 NMSA 1978.

For conveyance of realty when one spouse disappears, *see* 40-3-16 NMSA 1978.

For conveyance by unincorporated associations, *see* 53-10-3 NMSA 1978.

For presumed grant of use of irrigation ditches, *see* 73-2-5 NMSA 1978.

Compiler's notes. — The words "this chapter" were substituted for the words "this act" by the 1915 Code compilers and referred to ch. 96 of the 1915 Code, compiled herein as 48-7-4 to 48-7-6, 47-1-1, 47-1-2, 47-1-4 to 47-1-7, 47-1-12 to 47-1-15, 47-1-17 to 47-1-22 and 47-1-25 NMSA 1978. In light of the 1991 amendment to 47-1-1 NMSA 1978 by L. 1991, ch. 234, § 3, the reference probably should be to Chapter 47 NMSA 1978.

A voidable deed to a good-faith bona fide purchaser is not subject to cancellation. — Where plaintiffs purchased property that was the subject of ongoing probate litigation in which the decedent's estate sought to set aside a deed from the decedent to the decedent's nephew on the grounds that the deed had been obtained by undue influence; the estate filed a notice of lis pendens after two years of litigation when plaintiffs' grantor purchased the property and was joined as a party to the probate litigation; the estate voluntarily released the lis pendens prior to the conclusion of the litigation when plaintiffs' grantor was dismissed without prejudice as a party to the probate litigation for insufficiency of process; and plaintiffs purchased the property after the lis pendens had been released, but prior to the conclusion of the litigation; plaintiffs gave value for the property and did not have constructive notice of the probate litigation; after plaintiffs purchased the property, the district court found in the probate litigation that the deed from the decedent to the decedent's nephew had been fraudulently obtained, the deed to plaintiffs was merely voidable and if plaintiffs had no actual notice of the probate litigation, plaintiffs would be good-faith bona fide purchasers and the deed of the property to plaintiffs would not be subject to cancellation. *Kokoricha v. Estate of Keiner*, 2010-NMCA-053, 148 N.M. 322, 236 P.3d 41.

Elements of easement by necessity. — To establish an easement by necessity, there must be unity of title, indicating that the dominant and servient parcels were owned as a single parcel prior to the separation, that the dominant parcel had been severed from the servient parcel, thereby curtailing access of the owner of the dominant parcel to and from a public roadway, and that a reasonable necessity existed at the time the dominant parcel was severed from the servient parcel. *Ciolli v. McFarland Land & Cattle Co., Inc.*, 2017-NMCA-037, cert. denied.

Where plaintiffs, owners of a landlocked ranch in Quay County, sued an adjacent ranch to compel the recognition of an easement across that ranch to the public highway, the district court did not err in its judgment recognizing an implied easement by necessity for the benefit of plaintiffs' ranch, because it was undisputed that the two parcels of land were once owned as a single parcel prior to separation, that legal access to plaintiffs' landlocked property was curtailed by the severance of the original parcel of land, and that a reasonable necessity existed at the time the dominant parcel was severed from the servient parcel, because prior to the severance of the original parcel of land, there was only one legally enforceable access from the original parcel to the public highway, and the necessity for the easement existed at the time of severance. *Ciolli v. McFarland Land & Cattle Co., Inc.*, 2017-NMCA-037, cert. denied.

Easement of necessity. — Where property owned by plaintiffs and defendants originally constituted a portion of the Las Vegas land grant; plaintiffs sought to establish

an access easement to their property over a canyon road that ran through defendants' property; at the time of the severance of plaintiffs' property from the land grant, the only reasonable access that existed was from the canyon road; and the district court found that there was a necessity for the grantor to have reserved an easement through its former holdings, which were owned by defendants at the time of severance of plaintiffs' property, the canyon road was the only access available at the time of severance, plaintiffs did not have reasonable alternative access, and the canyon road had provided access to plaintiffs' property since time immemorial, plaintiffs were granted access easements over the canyon road by implication and necessity pursuant to and in conformity with the grants from the Las Vegas land grant. *Los Vigiles Land Grant v. Rebar Haygood Ranch, L.L.C.*, 2014-NMCA-017.

Implied easement by necessity. — To find an implied easement by necessity, the necessity must have arisen as a result of a severance of rights held by a single owner, such as where a single parcel of land is divided into two parcels. The easement by necessity rests heavily upon the intent of the grantor, and unless there is a clear indication to the contrary, the grantor is presumed to have intended to have conveyed to his grantees a means of access to the property in question, so that the land may be beneficially utilized. *Firstenberg v. Monribot*, 2015-NMCA-062, cert. denied, 2015-NMCERT-006.

Where plaintiff claimed that he had an implied easement by necessity to access his electrical meter on defendant's property, testimony from the former owner of the property, that the property originally constituted a single lot upon which the houses of both plaintiff and defendant were located, and that when the former owner split the single lot into two lots granted an express easement for all existing utilities, supported the district court's decision that plaintiff had an implied easement by necessity for the transmission of electricity and for access to the switch and meter attached to defendant's property. *Firstenberg v. Monribot*, 2015-NMCA-062, cert. denied, 2015-NMCERT-006.

Easement created by land ownership and well-sharing agreement. — Where the owners of adjoining ranches entered into a written land ownership and well-sharing agreement to clarify the ownership of certain property and to provide for sharing of water from two wells; in the agreement, each landowner quitclaimed certain land to the other landowner on which a water well was located, each landowner reserved the right to go over and across the other landowner's land to obtain water for livestock, and each landowner agreed to maintain the water well on the landowner's land; and the agreement did not state the duration the agreement would be effective or state that it would bind the landowners' successors-in-interest, the agreement created a reciprocal easement appurtenant that ran with the land and placed a duty on each landowner and their successors-in-interest to maintain the water well that was located on the landowners' land and supply water to the other landowner. *Skeen v. Boyles*, 2009-NMCA-080, 146 N.M. 627, 213 P.3d 531.

Existence and scope of an express easement. — The existence and scope of an express easement are determined according to the intent of the parties, and the intent of the parties is derived from language of the agreement. The written language of an easement should be conclusive, and consideration of extrinsic evidence is generally inappropriate, but if the easement language is ambiguous, the parties' intention must be determined from the language of the instrument as well as from the surrounding circumstances. *Mayer v. Smith*, 2015-NMCA-060, cert. denied, 2015-NMCERT-004.

Where plaintiff owned property burdened by an easement, but erected a fence that encroached onto the easement, the district court erred in using extrinsic evidence to determine the parties' intent when the easement agreement at issue was unambiguous in that it listed the purpose of the easement, clearly set out the dominant estate holders, unequivocally set forth the dimensions and location of the easement, and the agreement's duration was unlimited. The district court erred in restricting the scope and ownership of the easement and in allowing plaintiff's fence to stand. *Mayer v. Smith*, 2015-NMCA-060, cert. denied, 2015-NMCERT-004.

Easements cannot be expanded, changed, or modified to create an additional burden on the servient estate. — The owner of the dominant estate cannot change the extent of the easement or subject the servient estate to an additional burden not contemplated by the grant of easement. *Mayer v. Smith*, 2015-NMCA-060, cert. denied, 2015-NMCERT-004.

Where plaintiff owned property burdened by an easement, but erected a fence that encroached onto the easement, the fact that the dominant estate had been divided did not create an additional burden on the servient estate because an increase in the number of persons holding the benefit of the servitude alone does not constitute an unreasonable increase in the burden, and where evidence established that there had been no change to the use of the easement since it was purchased in 1979 and that the easement had not been modified by the division of the dominant estate, the district court's finding of an additional burden to the servient estate was not supported by the evidence. *Mayer v. Smith*, 2015-NMCA-060, cert. denied, 2015-NMCERT-004.

Easements cannot be used to benefit property that is not appurtenant to the easement. — Where plaintiff, a condominium association responsible for the administration, management, operation, and control of the common elements of the Acequia Compound Condominium property, which is property located at the southern end of a public street in Santa Fe, New Mexico and which contains a property easement that runs along the west side of the condominium property, filed a complaint for trespass and injunctive relief against defendant, alleging that defendant was trespassing and causing or permitting others to trespass on the condominium property, and where defendant claimed that the New Mexico Association of Counties (NMAC) had authorized defendant to use the condominium property easement which was next to the NMAC's property, and where the district court, in its partial grant of summary judgment, permanently prohibited defendant from using the condominium property easement across plaintiff's property, but denied plaintiff's request for an injunction requiring

defendant to erect a fence or other permanent barrier on the northern boundary of plaintiff's property, the district court did not err in partially granting plaintiff's motion for summary judgment on the trespass claim, because the general rule is that easements cannot be used to benefit property that is not appurtenant to the easement and defendant's property was not appurtenant to the condominium property easement. *Acequia Compound Owners' Ass'n v. Orchard Metal Cap. Corp.*, 2023-NMCA-006, cert. granted.

Admissibility of extrinsic evidence to resolve ambiguities in easements. — Extrinsic evidence has been allowed to resolve ambiguities in easements when necessary terms are omitted, when the terms of an easement are subject to more than a single reasonable construction, to resolve conflicting terms of an easement, and when the granting language is not itself technically accurate. *Dethlefsen v. Weddle*, 2012-NMCA-077, 284 P.3d 452.

Easement was ambiguous in scope. — Where plaintiffs' deed conveyed a tract of land subject to a "fifty foot wide road easement to and across the property as shown on" a recorded plat; the plat described the easement as a "road & 50' wide easement follows approx. c/l of Monument Creek" and "easement extends to forest service road"; the plat showed that the easement originated at a forest service road on property on the east side of plaintiffs' property, traversed that property and then plaintiffs' property, and connected with property on the west side of plaintiffs' property; because the use of the term "road" was not definitive as to the specific nature and purpose of the easement, the easement failed to disclose terms necessary to an understanding of precisely what was conveyed; the easement failed to identify each of the dominate estate holders and to state the duration of the easement; the descriptions of the easement in the deed and in the plat were subject to different interpretations as to exactly what had been reserved; the fifty foot width of the road in a rural setting was unusual; the easement was unclear as to whether the road, the easement, or both, followed the center line of Monument Creek; the ambiguities in plaintiffs' deed were not resolved by the recorded deeds to the adjoining property, neither of which located or referenced the easement in wording consistent with each other or with plaintiffs' deed or the plat, specified a width or consistent specific use for the road, or stated whether the easement was appurtenant or in gross; and the deeds that created and referenced the easement were silent as to the inclusion of a lockable gate on the easement at any location, the scope of the easement was ambiguous as a matter of law with respect to the width of the road, the location of the road within or separate from the fifty-foot wide easement, the use, nature, and purpose of the road, and the permissibility of a lockable gate. *Dethlefsen v. Weddle*, 2012-NMCA-077, 284 P.3d 452.

Sufficient evidence of the creation of an express easement. — Where plaintiffs' deed conveyed part of a larger tract of land subject to a "fifty foot wide road easement to and across the property as shown on" a recorded plat; the plat described the easement as "road & 50' wide easement follows approx. c/l of Monument Creek" and "easement extends to forest service road"; the plat showed that the easement originated at a forest service road on property on the east side of plaintiffs' property, traversed that property

and then plaintiffs' property, and connected with property on the west side of plaintiffs' property; plaintiffs' property and the property on the east side of plaintiffs' property were held by a common grantor at the time the plat was surveyed; and the language of plaintiff's deed indicated that the grantor intended to reserve an easement "across" plaintiff's property and to grant easement access "to" plaintiff's property, there was sufficient evidence of the grantors' intent to create an express easement over the property on the east side of plaintiffs' property where the easement originated. *Dethlefsen v. Weddle*, 2012-NMCA-077, 284 P.3d 452.

Timber reservation. — Where a deed reserved all timber measuring 18 inches in circumference measured 18 inches above the ground, together with the rights of ingress and egress for the purpose of harvesting and removing the timber for the benefit of the original grantors and their heirs and assigns, the reservation was a limited estate that terminated after a reasonable time. *Marrujo v. Sanderson*, 2008-NMCA-112, 144 N.M. 730, 191 P.3d 588.

An estate in timber is presumed to be of limited duration, unless the parties provide a clear expression of intent to establish a perpetual fee simple interest. *Marrujo v. Sanderson*, 2008-NMCA-112, 144 N.M. 730, 191 P.3d 588.

Provisions provide greater formality and certainty in the transfer of realty. *McBee v. O'Connell*, 1911-NMSC-049, 16 N.M. 469, 120 P. 734.

Writing affecting realty must conform to statutory requirements. — The effect of the language of this section is such - so restrictive - that any writing affecting real estate, in law or equity, is of force, or valuable, so far only as it may be in accordance with the requirements of the statute. If such writing does not conform to the requirements of the statute, it has no force and is valueless. *Edgar v. Baca*, 1875-NMSC-001, 1 N.M. 613.

Section not applicable to wills. — This section has to do only with conveyances inter vivos, and has no application to wills. *Plomteaux v. Solano*, 1918-NMSC-104, 25 N.M. 24, 176 P. 77.

Land received under United States grant alienable. — There is nothing in the language of a patent to indicate any intention that there should be any restraint upon alienation, where lands were described in a grant from the United States to named grantees, being "inhabitants of the town of Cevoletta, their successors and assigns," which was evidenced by a patent with the recital: to have and to hold such lands unto said inhabitants, their successors and assigns forever with the stipulations aforesaid, and lands so granted can be divested by voluntary or involuntary means and are subject to prescription, for title to common and unallotted lands of a community grant can be acquired by adverse possession. *L Bar Cattle Co. v. Board of Trustees*, 1941-NMSC-057, 46 N.M. 26, 120 P.2d 432, appeal dismissed, 316 U.S. 645, 62 S. Ct. 1108, 86 L. Ed. 1729 (1942).

Conveyance of fee with life estate in grantor. — If a deed is otherwise properly executed and acknowledged, contains words of conveyance ordinarily found in deeds, and delivered to the grantee, the fact that the deed recites that it is to take effect only upon death of grantor, does not render the deed testamentary in character, but rather conveys a fee title postponing possession during the life of the grantor. *Vigil v. Sandoval*, 1987-NMCA-101, 106 N.M. 233, 741 P.2d 836.

Equitable title acquired held unaffected by subsequent congressional actions. — The Alien Act of Congress approved March 3, 1887, did not apply to executory contracts for the sale of land under which equitable titles had been acquired in good faith. *Potter v. Rio Arriba Land & Cattle Co.*, 1888-NMSC-014, 4 N.M. (Gild.) 649, 17 P. 609.

Written instruments essential. — Under the civil law as it existed in New Mexico in 1868, written instruments were essential for the sale of land. *Maxwell Land Grant Co. v. Dawson*, 151 U.S. 586, 14 S. Ct. 458, 38 L. Ed. 279 (1894).

Substantially performed and satisfactorily proved oral agreement specifically enforceable. — An oral agreement to devise property in consideration of personal services, which is substantially performed and is established by satisfactory proof, may be enforced in equity by specific performance, notwithstanding the statute of frauds. *Estate of McGee*, 1942-NMSC-024, 46 N.M. 256, 127 P.2d 239; *Paulos v. Janetakos*, 1937-NMSC-067, 41 N.M. 534, 72 P.2d 1.

Possession, improvement and full payment constitute substantial performance. — Oral contracts, partly performed, stand on a parity with contracts in writing insofar as enforcement is concerned, and in this instance, the court being satisfied that inequity would not result from its enforcement, possession of the premises pursuant to the oral agreement, followed by the making of improvements and full payment of the consideration, is enough to take the contract out of the statute of frauds. *Shipp v. Thomas*, 1954-NMSC-034, 58 N.M. 190, 269 P.2d 741.

Option may be terminated by failing to perform the terms of the option. – Where the parties entered into a realtors form purchase agreement whereby plaintiffs agreed to sell a 25 acre tract to defendant for $750,000, with a down payment of $150,000 and a loan of $600,000; the word "Option" was hand written after the title of the form purchase agreement and under the heading "Cash or Financing Conditions and Obligations" the purchase agreement stated "Real Estate Option. For terms, see attached addendum"; the purchase agreement did not provide for a closing date; the parties subsequently entered into an option agreement, which provided that the consideration for the grant of the option was $750,000, with $150,000 down payment and annual payments of $100,000 plus interest and for a closing after defendant provided notice of intent to exercise the option; defendant failed to pay an annual payment; and plaintiffs sued defendant for breach of contract to recover the sales price on the grounds that plaintiffs had sold the property under an installment purchase agreement, because the original purchase agreement expressed the parties' intent to create an option and the option

agreement clarified their intent, defendant had the unilateral option to either make annual payments and exercise the option or cease making payments and thereby not exercise the option, plaintiffs were not entitled to enforce the option agreement, and defendant had the right to not exercise the option by making a payment. *Garcia v. Sonoma Ranch East II, L.L.C.*, 2013-NMCA-042, 298 P.3d 510.

Law reviews. — For article, "Toward Clarification of New Mexico's Real Property Statutes," see 1 Nat. Res. J. 163 (1961).

For note, "Vendor and Purchaser - Increased Risks of Forfeiture and Malpractice Resulting from the Use of Real Estate Contracts: Albuquerque National Bank v. Albuquerque Ranch Estates, Inc.," see 15 N.M.L. Rev. 99 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Deeds § 1.

Effect of designating grantee in deed by firm name, 1 A.L.R. 564, 8 A.L.R. 493.

Equitable relief from deed on ground of intoxication, 6 A.L.R. 331.

Validity and effect of deed executed in blank as to name of grantee, 32 A.L.R. 737, 75 A.L.R. 1108, 175 A.L.R. 1294.

Remedy of mortgagee in mortgage of wife's property by husband in which wife does not join, when proceeds are used to discharge valid lien, 43 A.L.R. 1406, 151 A.L.R. 407.

Lien of vendee for amount paid on purchase-price where contract of married woman to convey is invalid, 45 A.L.R. 360, 33 A.L.R.2d 1384.

Validity and effect of alienation or encumbrance of homestead without joinder or consent of wife, 45 A.L.R. 395.

Delivery of deed to third person to be delivered to grantee after grantor's death, 52 A.L.R. 1222.

Manual delivery of deed to grantee as an effective legal delivery, 56 A.L.R. 746.

Duress of third person as affecting validity of deed, 62 A.L.R. 1479.

Delivery as essential to gift by deed, 63 A.L.R. 553, 48 A.L.R.2d 1405.

Bank president's or vice-president's authority to execute deed, 67 A.L.R. 979.

Declaratory judgment as to deed, 68 A.L.R. 125, 87 A.L.R. 1205, 142 A.L.R. 8

Deed of spouse of vendor as meeting vendor's obligation, 109 A.L.R. 190.

Relation back of title or interest embraced in escrow instrument upon final delivery or performance of condition as affected by intervening marriage of feme sole grantor, 117 A.L.R. 80.

Conveyance of minerals as including minerals recoverable only by open pit mining, 1 A.L.R.2d 787.

Oil or gas "royalty" within language of conveyance, 4 A.L.R.2d 492.

Effect of supplying description of property conveyed after manual delivery of deed, 11 A.L.R.2d 1372.

Nature of estate conveyed by deed for park or playground purposes, 15 A.L.R.2d 975.

Commencement of running of statute of limitations respecting action by owners of right of re-entry, or actions against third persons by reversioners, 19 A.L.R.2d 729.

Effect on validity and character of instrument in form of deed of provisions therein indicating an intention to postpone or limit the rights of grantee until after the death of grantor, 31 A.L.R.2d 532.

Oil and gas as "minerals" within deed, 37 A.L.R.2d 1440.

Quantum or character of estate or interest created by language providing premises as a home, or giving or granting same for such use, 45 A.L.R.2d 699.

Validity of provisions of deed prohibiting, penalizing, or requiring marriage to one of a particular religious faith, 50 A.L.R.2d 740.

Conflict between granting and habendum clauses as to estate conveyed, 58 A.L.R.2d 1374.

What constitutes acceptance of deed by grantor, 74 A.L.R.2d 992.

Validity, construction and effect of restrictive covenant requiring consent of third person to construction on lot, 40 A.L.R.3d 864.

Conveyance of "right of way," in connection with conveyance of another tract, as passing fee or easement, 89 A.L.R.3d 767.

Which of conflicting descriptions in deeds or mortgages of fractional quantity of interest intended to be conveyed prevails, 12 A.L.R.4th 795.

Specificity of description of premises as affecting enforceability of contract to convey real property - modern cases, 73 A.L.R.4th 135.

Vendor's obligation to disclose to purchaser of land presence of contamination from hazardous substances or wastes, 12 A.L.R.5th 630.

26 C.J.S. Deeds § 12.

47-1-4.1. Actual authority; representatives of business entities; exception.

A. Except as provided in Subsections B and D of this section, the persons in the following offices or positions shall each have the authority to execute conveyancing instruments and contracts for the transfer or encumbrance of real property owned by a business entity:

(1) for a cooperative association: president and vice president;

(2) for a professional corporation: president and vice president;

(3) for a nonprofit corporation: president and vice president;

(4) for a business corporation: president and vice president;

(5) for a limited liability company: manager, member manager, president and vice president;

(6) for a general partnership: partner;

(7) for a limited liability partnership: general partner; and

(8) for a limited partnership: general partner.

B. A business entity may limit or expand the authority provided for in Subsection A of this section by filing with the county clerk, in the county where the real property is located, a statement reflecting limitations on the persons listed as having authority, requiring multiple persons to exercise such authority or authorizing other officers or positions to have the requisite authority to act to transfer or encumber real property owned by the business entity. The recorded statement shall be binding until the business entity revokes or amends the recorded statement and records the revocation or amendment with the county clerk.

C. A person may rely on the authority of the persons set forth in Subsection A of this section to act on behalf of a business entity, subject to limitations set forth in a previously recorded statement as provided in Subsection B of this section. Nothing in this section shall preclude a business entity from executing a power of attorney and empowering an attorney in fact to also act on its behalf pursuant to the Uniform Power of Attorney Act [45-5B-101 to 45-5B-403 NMSA 1978].

D. An instrument or contract for the transfer or encumbrance of real property by a person without the authority provided in Subsection A or B of this section may be relied upon as binding the business entity if the instrument or contract has been recorded for a period exceeding ten years. That recorded instrument or contract may not be relied upon as binding, however, if:

(1) prior to the execution of that instrument or contract, the business entity recorded another document reflecting that the person who executed the instrument or contract did not have the authority to bind the business entity; or

(2) the authority of the person who executed the instrument or contract has been successfully challenged or is in the process of being challenged in a court having jurisdiction.

E. As used in this section, "business entity" means a:

(1) cooperative association created pursuant to the Cooperative Association Act [Chapter 53, Article 4 NMSA 1978];

(2) professional corporation created pursuant to the Professional Corporation Act [53-6-1 to 53-6-13 NMSA 1978];

(3) nonprofit corporation created pursuant to the Nonprofit Corporation Act [Chapter 53, Article 8 NMSA 1978];

(4) business corporation created pursuant to the Business Corporation Act [Chapter 53, Articles 11 through 18 NMSA 1978];

(5) limited liability company created pursuant to the Limited Liability Company Act [Chapter 53, Article 19 NMSA 1978];

(6) partnership created pursuant to the Uniform Partnership Act (1994) [54-1A-101 to 54-1A-1206 NMSA 1978];

(7) limited liability partnership created pursuant to the Uniform Partnership Act (1994); or

(8) limited partnership created pursuant to the Uniform Revised Limited Partnership Act [Chapter 54, Article 2A NMSA 1978].

History: Laws 2019, ch. 130, § 3

ANNOTATIONS

Effective dates. – Laws 2019, ch. 130, § 5 made Laws 2019, ch. 130 effective July 1, 2019.

47-1-5. [Signing of conveyances.]

All conveyances of real estate shall be subscribed by the person transferring his title or interest in said real estate, or by his legal agent or attorney.

History: Laws 1851-1852, p. 374; C.L. 1865, ch. 44, § 4; C.L. 1884, § 2751; C.L. 1897, § 3942; Code 1915, § 4760; C.S. 1929, § 117-104; 1941 Comp., § 75-104; 1953 Comp., § 70-1-4.

ANNOTATIONS

Section provides greater formality and certainty in the transfer of realty. *McBee v. O'Connell*, 1911-NMSC-049, 16 N.M. 469, 120 P. 734.

Written instruments essential. — Under the civil law as it existed in New Mexico in 1868, written instruments were essential for the sale of land. *Maxwell Land Grant Co. v. Dawson*, 151 U.S. 586, 14 S. Ct. 458, 38 L. Ed. 279 (1894).

Making mark ineffective without assent or ratification. — A deed executed by using the hand of a person to make his mark thereon at the place of signature is void, where the grantor does not consciously assent to the signature so made, nor afterwards ratify the same, and a certificate of acknowledgment placed thereon under such circumstances does not render it valid. *Garcia v. Leal*, 1924-NMSC-078, 30 N.M. 249, 231 P. 631.

Acknowledgement necessary for recordation and protection of grants. — Statute of this state does not require deeds to be acknowledged, except for recordation, and for the protection of the grantee against subsequent purchasers in good faith and without notice. *Garcia v. Leal*, 1924-NMSC-078, 30 N.M. 249, 231 P. 631.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Deeds § 110.

Necessity of privy examination of wife to acknowledgment of conveyance, 1 A.L.R. 1089.

Exercise of duress by third person as affecting acknowledgment, 4 A.L.R. 869, 62 A.L.R. 1477.

Subscribing witness's denial or forgetfulness of signature by mark, 17 A.L.R. 1275.

Effect of filing affidavit of forgery against ancient deed, 18 A.L.R. 908.

Use of diminutive or nickname as affecting operation of record as notice, 45 A.L.R. 557.

Formal acknowledgment of instrument by one whose name is signed thereto by another as an adoption of the signature, 57 A.L.R. 525.

Alteration in deed or mortgage with consent of parties thereto after acknowledgment or attestation as affecting notice from record thereof, 67 A.L.R. 366, 369.

Improper insertion or omission of middle initial of one's name as affecting constructive notice from public records, 122 A.L.R. 909.

Joining in instrument as ratification of or estoppel as to prior ineffective instrument affecting real property, 7 A.L.R.2d 294.

Acknowledgment, record of instrument without acknowledgment or insufficiently acknowledged, as notice, 59 A.L.R.2d 1299.

Procuring signature by fraud as forgery, 11 A.L.R.3d 1074.

Check given in land transaction as sufficient writing to satisfy statute of frauds, 9 A.L.R.4th 1009.

Sufficiency of showing, in establishing boundary by parol agreement, that boundary was uncertain or in dispute before agreement, 72 A.L.R.4th 132.

26 C.J.S. Deeds § 34.

47-1-6. Seal unnecessary.

No seal or scroll is necessary to the validity of any contract, bond or conveyance, whether respecting real or personal property, or any other instrument of writing, nor does the addition or omission of a seal or scroll in any way affect the force or effect of the same.

History: Laws 1901, ch. 62, § 11; Code 1915, § 4761; C.S. 1929, § 117-105; 1941 Comp., § 75-105; Laws 1967, ch. 87, § 9; 1953 Comp., § 70-1-5.

ANNOTATIONS

Section abolished distinction between sealed and unsealed instruments. *Griffith v. Humble*, 1942-NMSC-006, 46 N.M. 113, 122 P.2d 134; *Parker v. Beasley*, 1936-NMSC-004, 40 N.M. 68, 54 P.2d 687; *Merchants Nat'l Bank v. Otero*, 1918-NMSC-080, 24 N.M. 598, 175 P. 781.

Recitation of seal immaterial to consideration. — The recitation at the close of a letter agreement that said agreement "shall be considered a sealed instrument by all parties signing" had no bearing on the question of lack of consideration. *Russell v. Texas Consol. Oils*, 120 F. Supp. 508 (D.N.M. 1954).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Deeds § 115; 68 Am. Jur. 2d Seals §§ 7 to 9.

26 C.J.S. Deeds §§ 34, 75.

47-1-7. [Powers of attorney and revocations thereof to be acknowledged and recorded.]

All powers of attorney or other writings containing authority to convey real estate, as agent or attorney of the owner of the same, or to execute, as agent for another, any conveyance of real estate, or by which real estate may be affected in law, or equity, shall be acknowledged, certified, filed and recorded, as other writings conveying or affecting real estate are required to be acknowledged. No such power of attorney, or other writing, filed and recorded in the manner prescribed in this section, shall be considered revoked by any act of the party executing the same, until the instrument of writing revoking the same, duly acknowledged and certified to, shall be filed for record and recorded in the office of the county clerk where said power of attorney or other writing is filed and recorded.

History: Laws 1901, ch. 62, § 21; Code 1915, § 4774; C.S. 1929, § 117-118; 1941 Comp., § 75-106; 1953 Comp., § 70-1-6.

ANNOTATIONS

Requirements for power to convey same as requirements for conveyance. — In order to give validity to a conveyance of lands under power of attorney, the power to convey must possess the same requisites and observe the same solemnities as are necessary in the deed directly conveying the land, and the only recognizable exception to the rule is where the execution by the agent or attorney is in the presence of and by the direction of the principal. *Miera v. Miera*, 1919-NMSC-016, 25 N.M. 299, 181 P. 583.

Law reviews. — For article, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," see 5 N.M. L. Rev. 1 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Sufficiency of execution of deed by agent or attorney in fact in name of principal without his own name appearing, 96 A.L.R. 1252.

Power of attorney under which deed or mortgage is executed, necessity of recording of, 114 A.L.R. 660.

2A C.J.S. Agency § 27.

47-1-8. [Conveyances under terminated power of attorney; validation.]

All conveyances or incumbrances of real or personal property heretofore or hereafter made in pursuance of a power of attorney valid when executed, are hereby declared

valid notwithstanding the revocation of such power or the death of the donor of such power where the person to whom such conveyance or incumbrance is made or granted is a bona fide purchaser or incumbrancer for value and without notice of such revocation or death.

History: 1941 Comp., § 75-106a, enacted by Laws 1945, ch. 69, § 1; 1953 Comp., § 70-1-7.

47-1-9. [Notice of revocation or death by means of affidavit.]

Notice of such revocation or death may be given so as to affect, with notice, all subsequent purchasers or incumbrancers within the meaning of Section 1 [47-1-8 NMSA 1978] hereof by the filing for record with the county clerk of the county where such real estate is located or where such personal property is usually situated, as the case may be, of the affidavit of any person declaring the facts. Such affidavit may be made on information and belief and such [shall] be duly acknowledged in the same manner as the instrument conveying real estate.

History: 1941 Comp., § 75-106b, enacted by Laws 1945, ch. 69, § 2; 1953 Comp., § 70-1-8.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 3 Am. Jur. 2d Affidavits §§ 12 to 15.

47-1-10. [Recordation of affidavit of termination of power of attorney.]

In the absence of the recordation of an affidavit as described in Section 2 [47-1-9 NMSA 1978] hereof, all subsequent bona fide purchasers or incumbrancers [incumbrances] without actual notice of the defects in such power of attorney as referred to in Section 1 [47-1-8 NMSA 1978] hereof, shall be entitled to the same interest and to the same extent as they would have been had such power of attorney not been subject to such defects.

History: 1941 Comp., § 75-106c, enacted by Laws 1945, ch. 69, § 3; 1953 Comp., § 70-1-9.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

47-1-11. [Instruments by agent authorized.]

All conveyances of real estate, mortgages, trust deeds, sales contracts and other instruments of writing affecting the title to real estate, subscribed and executed by the owner or owners thereof through his or her duly authorized agent under a duly executed and acknowledged power of attorney, shall have the same force and effect as though said conveyance, mortgage, trust deed, sales contract or other instrument affecting the title to real estate had been actually subscribed by the owner or owners thereof.

History: Laws 1937, ch. 147, § 1; 1941 Comp., § 75-107; 1953 Comp., § 70-1-10.

ANNOTATIONS

Validating clauses. — Laws 1937, ch. 147, § 2, provided that all written instruments affecting title to realty heretofore subscribed and executed under a power of attorney are valid.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 3 Am. Jur. 2d Agency §§ 73 to 77.

Authority of agent to endorse and transfer commercial paper, 37 A.L.R.2d 453.

Power of real-estate broker to execute contract of sale in behalf of principal, 43 A.L.R.2d 1014.

47-1-12. [Conveyance by decree or master.]

In all actions relating to real estate, where it becomes necessary for the conveyance of the same by either party to the action the court may enter a decree, which of itself shall operate as a good and sufficient conveyance of the real estate in question or may appoint any proper person to make such conveyance for and on behalf of the party.

History: Laws 1901, ch. 62, § 10; 1903, ch. 5, § 4; Code 1915, § 4773; C.S. 1929, § 117-117; 1941 Comp., § 75-108; 1953 Comp., § 70-1-11.

ANNOTATIONS

Cross references. — For bringing an action for specific performance, *see* 42-7-1 to 42-7-4 NMSA 1978.

For enforcement of decree for specific performance, *see* Rule 1-070 NMRA.

Proceeding in rem to be brought in county where land situated. — A suit in aid of execution to compel grantees of land to execute conveyances vesting title in judgment debtor so as to permit plaintiff to obtain execution on judgment is a proceeding in rem and must be brought in the county in which the land is situated. *Atler v. Stolz*, 1934-

NMSC-079, 38 N.M. 529, 37 P.2d 243, *overruled on other grounds by Kalosha v. Novick*, 1973-NMSC-010, 84 N.M. 502, 505 P.2d 845.

A suit to redeem lands from sale under decree of court must be brought in the county where the lands are situated. *Catron v. Gallup Fire Brick Co.*, 1929-NMSC-029, 34 N.M. 45, 277 P. 32, *overruled on other grounds by Kalosha v. Novick*, 1973-NMSC-010, 84 N.M. 502, 505 P.2d 845.

Venue may be waived. — The rights conferred by the venue statute are not jurisdictional and may be waived. *Kalosha v. Novick*, 1973-NMSC-010, 84 N.M. 502, 505 P.2d 845.

Constructive service of process is not sufficient in an action to reform a lease or sublease by decreasing rental payments, and allowing credit for excess payments. *State ex rel. Truitt v. Dist. Court of Ninth Judicial Dist.*, 1939-NMSC-061, 44 N.M. 16, 96 P.2d 710.

47-1-13. [Lineal and collateral securities; contracts binding realty as against heirs and legal claimants.]

Lineal and collateral securities in all cases are hereby forbidden, but the heirs and legal claimants of any person who may have made any written contract or agreement shall be responsible for said contract or agreement to the extent of the lands limited or bequeathed, in such case, and in the manner prescribed by law.

History: Laws 1851-1852, p. 376; C.L. 1865, ch. 44, § 27; C.L. 1884, § 1426; C.L. 1897, § 2046; Code 1915, § 4766; C.S. 1929, § 117-110; 1941 Comp., § 75-109; 1953 Comp., § 70-1-12.

ANNOTATIONS

Section does not prevent enforcement of oral contract to adopt children and leave them promisor's property on death of the latter. *Wooley v. Shell Petroleum Corp.*, 1935-NMSC-008, 39 N.M. 256, 45 P.2d 927.

Law reviews. — For article, "Toward Clarification of New Mexico's Real Property Statutes," see 1 Nat. Res. J. 163 (1961).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Descent and Distribution § 134.

Relative rights to real property as between purchasers from or through decedent's heirs and devisees under will subsequently sought to be established, 22 A.L.R.2d 1107.

26A C.J.S. Descent and Distribution § 124.

47-1-14. [Effect of words "bargained and sold".]

The words, bargained and sold, or words to the same effect, in all conveyances of hereditary real estate, unless restricted in express terms on the part of the person conveying the same, himself and his heirs, to the person to whom the property is conveyed, his heirs and assignees, shall be limited to the following effect:

A. that the grantor, at the time of the execution of said conveyance, is possessed of an irrevocable possession in fee simple to the property so conveyed;

B. that the said real estate, at the time of the execution of said conveyance, is free from all encumbrance made or suffered to be made by the grantor, or by any person claiming the same under him;

C. for the greater security of the person, his heirs and assignees, to whom said real estate is conveyed by the grantor and his heirs, suits may be instituted the same as if the conditions were stipulated in the said conveyance.

History: Laws 1851-1852, p. 374; C.L. 1865, ch. 44, § 3; C.L. 1884, § 2750; C.L. 1897, § 3941; Code 1915, § 4759; C.S. 1929, § 117-103; 1941 Comp., § 75-110; 1953 Comp., § 70-1-13.

ANNOTATIONS

Cross references. — For the effect of the word "grant," *see* 47-1-32 NMSA 1978.

"Hereditary real estate" means real estate of inheritance. *Douglass v. Lewis*, 131 U.S. 75, 9 S. Ct. 634, 33 L. Ed. 53 (1889).

Effect of express covenant. — When an express covenant of warranty is introduced into a deed, the purchaser is denied the benefits of statutory covenants. *Douglass v. Lewis*, 131 U.S. 75, 9 S. Ct. 634, 33 L. Ed. 53 (1889).

Covenants of warranty and seisin distinguished. — The covenant of warranty and that of seisin or of right to convey are not equivalent covenants. Defect of title will sustain an action upon the one, while disturbance of possession is requisite to recover upon the other. *Douglass v. Lewis*, 131 U.S. 75, 9 S. Ct. 634, 33 L. Ed. 53 (1889).

"Possessed of an irrevocable possession in fee simple" means seised of an indefeasible estate in fee simple. *Douglass v. Lewis*, 131 U.S. 75, 9 S. Ct. 634, 33 L. Ed. 53 (1889).

Law reviews. — For article, "Toward Clarification of New Mexico's Real Property Statutes," see 1 Nat. Res. J. 163 (1961).

For note, "Vendor and Purchaser - Increased Risks of Forfeiture and Malpractice Resulting from the Use of Real Estate Contracts: Albuquerque National Bank v. Albuquerque Ranch Estates, Inc.," see 15 N.M.L. Rev. 99 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Deeds §§ 13, 263, 264.

Risk of loss by casualty pending contract for conveyance of real property - modern cases, 85 A.L.R.4th 233.

Construction and effect of provision in contract for sale of realty by which purchaser agrees to take property "as is" or in its existing condition, 8 A.L.R.5th 312.

26 C.J.S. Deeds § 7.

47-1-15. [Joint grantees or devisees; tenancy in common.]

All interest in any real estate, either granted or bequeathed to two or more persons other than executors or trustees, shall be held in common, unless it be clearly expressed in said grant or bequest that it shall be held by both parties.

History: Laws 1851-1852, p. 374; C.L. 1865, ch. 44, § 17; C.L. 1884, § 2764; C.L. 1897, § 3961; Code 1915, § 4762; C.S. 1929, § 117-106; 1941 Comp., § 75-111; 1953 Comp., § 70-1-14.

ANNOTATIONS

Cross references. — For conveyance to two or more persons "as joint tenants," *see* 47-1-35 NMSA 1978.

For conveyances to married persons, *see* 40-3-12 NMSA 1978.

Joint tenancy held created. — A deed executed by a husband in 1908 conveying community real estate to his wife and their daughter, stating that it was the intention of the grantor that the estate conveyed should be held by the grantees as joint tenants, created a joint tenancy, and not a tenancy in common in the entire premises. *Brown v. Jackson*, 1931-NMSC-053, 35 N.M. 604, 4 P.2d 1081.

Real estate contract as evidence of transmutation of property. — Although a real estate contract is not conclusive and is not, by itself, substantial evidence on the issue of transmutation of property, it at least constitutes some evidence of intent to transmute. *Nichols v. Nichols*, 1982-NMSC-071, 98 N.M. 322, 648 P.2d 780.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Deeds §§ 35, 179, 185, 274 to 276, 333, 359; 28 Am. Jur. 2d Estates § 2.

Partnership, effect of designating by firm name grantee in deed to pass title to partners as tenants in common, 1 A.L.R. 564, 8 A.L.R. 493.

Contribution as between cotenants in remainder as affected by fact that one or more of them owns, or did own, the life estate or an interest therein, 98 A.L.R. 859.

Lease to two or more as creating a tenancy in common or a joint tenancy, 113 A.L.R. 573.

Validity of provision in deed or other instrument creating a cotenancy that neither tenant shall encumber or dispose of his interest without consent of the other, 124 A.L.R. 222.

Character of tenancy created by instrument purporting to convey one's title or interest to himself and another, 132 A.L.R. 632, 173 A.L.R. 1216, 44 A.L.R.2d 595.

Character of tenancy created by owner's conveyance to himself and another, or to another alone, of an undivided interest, 44 A.L.R.2d 595.

What constitutes a devise or bequest in joint tenancy notwithstanding statute raising a presumption against joint tenancy, 46 A.L.R.2d 523.

Construction of devise to persons as joint tenants and expressly to the survivor of them, or to them "with the right of survivorship," 69 A.L.R.2d 1058.

Regulation of time-share or interval ownership interests in real estate, 6 A.L.R.4th 1288.

Estate created by deed to persons described as husband and wife but not legally married, 9 A.L.R.4th 1189.

26 C.J.S. Deeds §§ 24, 119, 125, 127; 48A C.J.S. Joint Tenancy §§ 22, 23.

47-1-16. [Instrument of conveyance; prima facie evidence of joint tenancy.]

An instrument conveying or transferring title to real or personal property to two or more persons as joint tenants, to two or more persons and to the survivors of them and the heirs and assigns of the survivor, or to two or more persons with right of survivorship, shall be prima facie evidence that such property is held in a joint tenancy and shall be conclusive as to purchasers or encumbrancers for value. In any litigation involving the issue of such tenancy a preponderance of the evidence shall be sufficient to establish the same.

History: 1953 Comp., § 70-1-14.1, enacted by Laws 1955, ch. 174, § 1.

ANNOTATIONS

Section applies to bank accounts. *Kinney v. Ewing*, 1972-NMSC-001, 83 N.M. 365, 492 P.2d 636.

This statute is intended to do away with special proof requirement when there is a transmutation of community property into joint tenancy. *Estate of Fletcher v. Jackson*, 1980-NMCA-054, 94 N.M. 572, 613 P.2d 714, cert. denied, 94 N.M. 674, 615 P.2d 991.

Quantum of proof necessary to rebut or sustain prima facie evidence of joint tenancy is preponderance of the evidence, not clear, strong and convincing proof. *Blake v. Blake*, 1985-NMCA-009, 102 N.M. 354, 695 P.2d 838.

Joint tenancy created. — Execution of a joint tenancy deed by a husband, putting separate property in the names of the husband and wife, creates a joint tenancy, not community property. *Hughes v. Hughes*, 1981-NMSC-110, 96 N.M. 719, 634 P.2d 1271.

Parol evidence may be looked at to determine grantor's intent and the parties' understanding in establishing whether a deed created a joint tenancy, except where purchaser or encumbrancers for value are involved. *Ohl v. Ohl*, 1981-NMSC-128, 97 N.M. 175, 637 P.2d 1230.

Existence and nonexistence of joint tenancy both proved by preponderance. — The words "the same" in the last sentence of this section refer back to "the issue of such tenancy." If joint tenancy is "in issue," its existence is to be resolved, and the negative would seem to be as much included as the affirmative. If the legislature had intended the negative to require a greater quantum of proof than the affirmative, it is reasonable to suppose that it would have said so. *Kinney v. Ewing*, 1972-NMSC-001, 83 N.M. 365, 492 P.2d 636.

Community funds used with no intention to establish joint tenancy creates no such tenancy. — Because it was not the intention of husband and wife to hold the property as joint tenants, and because community funds were used to purchase the property, the trial court properly concluded that a joint tenancy was not created. *Wiggins v. Rush*, 1971-NMSC-092, 83 N.M. 133, 489 P.2d 641.

Presumption against joint tenancy. — If separate property has been so commingled or mixed with property acquired after marriage so that the separate property cannot be clearly traced or identified, then there is a presumption that the property acquired after marriage is community property, and not held in joint tenancy, unless this presumption can be overcome by proof. *Wiggins v. Rush*, 1971-NMSC-092, 83 N.M. 133, 489 P.2d 641.

Law reviews. — For symposium, "The Effects of an Equal Rights Amendment on the New Mexico System of Community Property: Problems of Characterization, Management and Control," see 3 N.M. L. Rev. 11 (1973).

For article, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," see 5 N.M. L. Rev. 1 (1974).

For comment, "In-Migration of Couples from Common Law Jurisdictions: Protecting the Wife at the Dissolution of the Marriage," see 9 N.M.L. Rev. 113 (1978-79).

For article, "Survey of New Mexico Law, 1979-80: Domestic Relations and Juvenile Law," see 11 N.M.L. Rev. 134 (1981).

For note, "Community Property - Transmutation of Community Property: A Preference for Joint Tenancy in New Mexico?" see 11 N.M.L. Rev. 421 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Ratification of prior ineffective deed by joining in instrument, 7 A.L.R.2d 294.

Capacity of cotenant to maintain suit to set aside conveyance of interest of another cotenant because of fraud, undue influence or incompetency, 7 A.L.R.2d 1317.

Deed as superseding or merging provisions of antecedent contract imposing obligations upon the vendor, 38 A.L.R.2d 1310.

Estate created by deed to persons described as husband and wife but not legally married, 9 A.L.R.4th 1189.

26 C.J.S. Deeds § 127.

47-1-17. [Entailed estates.]

Whenever a conveyance or bequest is made wherein the conveyor or testator shall hold possession of property, be it lands or tenements, in law or equity, as under the English Statute of Edward the First, styled the entail statute, and said property is to be perpetuated in the family, each one of said conveyances or bequests shall only invest the conveyors or testators with possession during their lifetime, who shall possess and hold the right and title to said premises, and no others, the same as a tenant for life is recognized by law; and at the death of said conveyor or testator said lands and tenements shall descend to the children of said conveyor or testator, to be equally divided among them as absolute tenants in common; and if there should be but one child, it shall descend absolutely to it; and if any child should die, the part which he or she should have received shall be given to his or her successor, and if there should be no such successor, then it shall descend to his or her legal heirs.

History: Laws 1851-1852, p. 376; C.L. 1865, ch. 44, § 24; C.L. 1884, § 1423; C.L. 1897, § 2043; Code 1915, § 4763; C.S. 1929, § 117-107; 1941 Comp., § 75-112; 1953 Comp., § 70-1-15.

ANNOTATIONS

Law reviews. — For article, "Toward Clarification of New Mexico's Real Property Statutes," see 1 Nat. Res. J. 163 (1961).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 28 Am. Jur. 2d Estates §§ 44 to 55.

Fee simple conditional as creating estate tail after enacting of statute de donis, 114 A.L.R. 606.

31 C.J.S. Estates § 23.

47-1-17.1. Repealed.

ANNOTATIONS

Repeals. — Laws 1992, ch. 66, § 71 repealed 47-1-17.1 NMSA 1978, as enacted by Laws 1983, ch. 246, § 1, relating to modification of the rule against perpetuities, effective July 1, 1992. For provisions of former section, *see* the 1991 NMSA 1978 on *NMOneSource.com.* For present comparable provisions, *see* 45-2-901 to 45-2-906 NMSA 1978.

47-1-18. [Reversion; "heirs" and "successors" defined.]

When a balance or residue, in lands or tenements, goods or property, is limited by writing or otherwise to take effect after the decease of any person without heirs, or bodily heirs, or succession, the words heirs and successors shall be so construed as to mean heirs or successors living, at the time of the decease of the person styled ancestor.

History: Laws 1851-1852, p. 376; C.L. 1865, ch. 44, § 25; C.L. 1884, § 1424; C.L. 1897, § 2044; Code 1915, § 4764; C.S. 1929, § 117-108; 1941 Comp., § 75-113; 1953 Comp., § 70-1-16.

ANNOTATIONS

Law reviews. — For article, "Toward Clarification of New Mexico's Real Property Statutes," see 1 Nat. Res. J. 163 (1961).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 28 Am. Jur. 2d Estates §§ 171 to 181, 286.

"Issue," meaning of term where used as a word of purchase, 2 A.L.R. 930, 117 A.L.R. 691.

Transfer of expectancy by prospective heir, 17 A.L.R. 597, 44 A.L.R. 1465, 121 A.L.R. 450.

"Heirs" of living person, validity and effect of deed to, 22 A.L.R. 713.

Release of possibility of reverter, 38 A.L.R. 1111, 114 A.L.R. 614.

Future estate or interest in property as asset in bankruptcy, 48 A.L.R. 784, 58 A.L.R. 773.

Questions arising in connection with possibility of reverter, 51 A.L.R. 1473.

Possibility of issue extinct as affecting property rights, 67 A.L.R. 538, 98 A.L.R.2d 1285.

Living members of class as excluding their children from the class under grant to issue, 83 A.L.R. 164.

Vested or contingent character of remainder which is subject to be defeated by death of remainderman without issue before termination of particular estate, 109 A.L.R. 136.

Possibility of reverter in case of fee simple conditional, 114 A.L.R. 612.

Remainder or reversion as resulting from grant to one for life, and in specified event to heirs or next of kin of grantor, 125 A.L.R. 548, 16 A.L.R.2d 691.

Taking per stirpes or per capita under deed, 13 A.L.R.2d 1023.

Grant to one for life, and afterwards, either absolutely or contingently, to grantor's heirs or next of kin, as leaving reversion or creating remainder, 16 A.L.R.2d 691.

Devise or bequest which does not state character or duration of estate, but purports to dispose of what remains at death of devisee or legatee, as creating a fee or life estate, 17 A.L.R.2d 7.

Gift to issue, children, wife, etc., as implied from a provision over in default of such persons, 22 A.L.R.2d 177.

Who are within gift or grant to "offspring," 23 A.L.R.2d 842.

Time as of which members of class described as grantor's "heirs," "next of kin," "relations," and the like, to whom a future gift is made, are to be ascertained, 38 A.L.R.2d 327.

Destruction of possibility of reverter by transfer, 53 A.L.R.2d 224.

Time of ascertaining persons to take where designated as the "heirs," "next of kin," "descendants," etc., of one other than the testator, trustor, grantor, life tenant, or remainderman, 60 A.L.R.2d 1394.

When is a gift by deed of trust one to a class, 61 A.L.R.2d 212.

Time of ascertaining persons to take under deed, where designated as the "heirs," "next of kin," "children," "relations," etc., of life tenant or remainderman, 65 A.L.R.2d 1408.

Person entitled to inter vivos grant to "husband," "wife," or "widow," 71 A.L.R.2d 1273.

Validity of statute canceling, destroying, nullifying, or limiting the enforcement of rights of re-entry for condition broken or possibilities of reverter, 87 A.L.R.3d 1011.

26 C.J.S. Deeds §§ 7, 115, 124, 126; 31 C.J.S. Estates § 103.

47-1-19. [Rights of heirs of life tenant when made remaindermen.]

When the remainder of a possession is limited to the heirs or heirs of the body of a person who holds said property as a life estate, in these premises the persons who at the termination of said life estate, are to be heirs or heirs of the body of said life estate, shall be authorized to purchase the same [take as purchasers] by virtue of the remainder of the possession so limited in them.

History: Laws 1851-1852, p. 376; C.L. 1865, ch. 44, § 26; C.L. 1884, § 1425; C.L. 1897, § 2045; Code 1915, § 4765; C.S. 1929, § 117-109; 1941 Comp., § 75-114; 1953 Comp., § 70-1-17.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler to clarify the meaning of the section, which was apparently intended to prevent the operation of the Rule in Shelley's Case, whereby an ancestor given a life estate with a remainder to his heirs was judicially determined to have a fee simple, with full right of alienation, so that the heirs might take nothing. The bracketed material is not part of the law.

Law reviews. — For article, "Toward Clarification of New Mexico's Real Property Statutes," see 1 Nat. Res. J. 163 (1961).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 28 Am. Jur. 2d Estates § 1.

Declaratory judgment as to rights and powers of life tenants, 12 A.L.R. 86, 19 A.L.R. 1124, 50 A.L.R. 42, 68 A.L.R. 110, 87 A.L.R. 1205, 114 A.L.R. 1361, 142 A.L.R. 8

Timber rights of life tenants, 21 A.L.R. 1002, 46 A.L.R. 1205, 51 A.L.R.2d 1374.

Conveyance by life tenant and remainderman in esse as cutting off interest of unborn persons under devise for life with remainder to a class, 25 A.L.R. 770.

Eminent domain, right of remaindermen to compensation for improvements made by the condemnor, before condemnation, relying on deed from life tenant, 34 A.L.R. 1095.

Rights of life tenant and remaindermen inter se as to oil and gas, 43 A.L.R. 811.

Subrogation of life tenant or remainderman paying taxes, 61 A.L.R. 612, 106 A.L.R. 1212.

Sale or exchange of property which is subject to life estate and remainder, where it is unproductive, or income is insufficient to pay taxes and upkeep, 76 A.L.R. 540.

Right to contribution from remainderman of life tenant who pays encumbrance on property, 87 A.L.R. 220.

Amount of income as affecting duty of life tenant in respect of repairs, 101 A.L.R. 681.

Provision of will that children of remainderman who dies before expiration of precedent estate or time fixed for distribution to remainderman shall take share to which he would have been entitled, as affecting character of remainder as vested or contingent, 109 A.L.R. 5, 47 A.L.R.2d 900.

Rights of life tenant (legal or equitable) and remaindermen in respect of amount paid by lessee in consideration of release, 121 A.L.R. 900.

Cost of property insurance as a charge against life tenant or remainderman, 126 A.L.R. 336.

Grant to one and his children, 161 A.L.R. 612.

Rights as between life tenant and remaindermen in respect of property, estates, or securities of a wasting, consumable, or perishable nature, 170 A.L.R. 133.

Nature of estates or interests created by grant to one and heirs if donee should have any heirs, 16 A.L.R.2d 670.

Grant in terms insufficient to carry the whole property absolutely as so operating where followed by a purported limitation over property not disposed of by the first taker, 17 A.L.R.2d 7.

Rights of tenant for life and remaindermen inter se in royalties or rents under oil, gas, coal, or other mineral lease, 18 A.L.R.2d 98.

Who are within gift or grant to "offspring," 23 A.L.R.2d 842.

Murder of life tenant by remainderman or reversioner as affecting latter's rights to remainder or reversion, 24 A.L.R.2d 1120.

Nontrust life estate expressly given for support and maintenance as limited thereto, 26 A.L.R.2d 1207.

Gift or grant to one upon marriage, if married, payable at marriage, or the like, as vested or contingent, 30 A.L.R.2d 127.

Life estate as created by language providing premises as a home, or giving or granting same for such use, 45 A.L.R.2d 699.

Life tenant's right of action for injury or damage to property, 49 A.L.R.2d 1117.

Character of remainder limited generally to the life tenant's children, 57 A.L.R.2d 103.

Nature of remainder created by inter vivos trust giving settlor, trustee, or life beneficiary power to exhaust trust fund or otherwise terminate trust, 61 A.L.R.2d 477.

Delivery or distribution to life tenant, or assent by executor to his possession or to the life interest, as inuring to the benefit of the remaindermen and operating to take the remainder out of the estate, absent a trust or will provision retaining it, 68 A.L.R.2d 1107.

Disposition of decedent's share of income or property during interval between deaths of life beneficiaries sharing therein, where remainder was given over after death of all life beneficiaries, 71 A.L.R.2d 1332.

Gift over by implication after estate during life or until marriage, where property is expressly given over at death and first taker marries, or vice versa, 73 A.L.R.2d 484.

Rights of life tenant and remaindermen inter se respecting increase, gains, and enhanced values of the estate, 76 A.L.R.2d 162.

Duty as between life tenant and remainderman as respects payment of improvement assessments, 10 A.L.R.3d 1309.

Life tenant's death as affecting rights under lease given by him, 14 A.L.R.4th 1054.

Duty as between life tenant and remainderman with respect to cost of improvements or repairs made under compulsion of governmental authority, 43 A.L.R.4th 1012.

31 C.J.S. Estates § 83.

47-1-20. [Remainder to unborn child.]

When any possession has been or shall be conveyed limiting the remainder of the possession to the son or daughter of any person, born after the death of its parent, possession shall be taken the same as if he or she was born during the life of the

parent, although no possession should have been conveyed to sustain the remainder of a contingent possession after his death, and after this an absolute possession or bequest may be made, commencing in the future, in writing in the same manner as by will.

History: Laws 1851-1852, p. 376; C.L. 1865, ch. 44, § 28; C.L. 1884, § 1427; C.L. 1897, § 2047; Code 1915, § 4767; C.S. 1929, § 117-111; 1941 Comp., § 75-115; 1953 Comp., § 70-1-18.

ANNOTATIONS

Law reviews. — For article, "Toward Clarification of New Mexico's Real Property Statutes," see 1 Nat. Res. J. 163 (1961).

For note, "Contingent Remainders; Rule of Destructibility Abolished in New Mexico," see 10 N.M.L. Rev. 471 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Deeds §§ 30, 289, 290, 214; 28 Am. Jur. 2d Estates § 132; 51 Am. Jur. 2d Life Tenants and Remaindermen §§ 5 to 13.

47-1-21. [Future possession dependent on death without heirs; effect of birth of posthumous child.]

A future possession depending upon the contingency of the death of a person without heirs shall be revoked by the birth of a posthumous son or daughter of said person capable of succeeding him.

History: Laws 1851-1852, p. 376; C.L. 1865, ch. 44, § 29; C.L. 1884, § 1428; C.L. 1897, § 2048; Code 1915, § 4768; C.S. 1929, § 117-112; 1941 Comp., § 75-116; 1953 Comp., § 70-1-19.

ANNOTATIONS

Law reviews. — For article, "Toward Clarification of New Mexico's Real Property Statutes," see 1 Nat. Res. J. 163 (1961).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 28 Am. Jur. 2d Estates §§ 200, 280, 310.

Afterborn children, conveyance by life tenant and remaindermen in esse as cutting off interest of, under devise for life with remainder to a class, 25 A.L.R. 770.

Right of child en ventre sa mere to take under a conveyance or devise of present interest to parent and children, 50 A.L.R. 619.

Who are within gift or grant to "offspring," 23 A.L.R.2d 842.

Rights as between estate of life tenant and remaindermen in respect of proceeds of sale or disposition made in exercise of power given life tenant, 47 A.L.R.3d 1078.

31 C.J.S. Estates § 92.

47-1-22. [Grants of rents, returns or remainders.]

Grants of rents, returns or remainders of possession shall be valid without the previous ceremonies of the tenants, but no tenant having paid any rent to the grantor before receiving notice of the transfer shall be injured thereby.

History: Laws 1851-1852, p. 376; C.L. 1865, ch. 44, § 30; C.L. 1884, § 1429; C.L. 1897, § 2049; Code 1915, § 4769; C.S. 1929, § 117-113; 1941 Comp., § 75-117; 1953 Comp., § 70-1-20.

ANNOTATIONS

Tenant protected by notice requirement. — After notice to the tenant that premises have been conveyed by the lessor, the tenant must pay accruing rents to the grantee. Until the tenant has notice of the conveyance, he is protected in paying rent to his original landlord. *Fletcher v. Bryan*, 1966-NMSC-078, 76 N.M. 221, 413 P.2d 885.

Law reviews. — For article, "Toward Clarification of New Mexico's Real Property Statutes," see 1 Nat. Res. J. 163 (1961).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Life tenant's liability for waste as affected by assignment or transfer of his interest, 71 A.L.R. 1187.

Reservation by deed of right to proceeds, or part of proceeds, of a future sale or condemnation of the property or part thereof, validity and effect of, where reversion exists, 123 A.L.R. 1475.

Nature of estates or interests created by grant to one and heirs if donee should have any heirs, 16 A.L.R.2d 670.

Rights as between life tenants and remaindermen to the increase in the value of the estate, 76 A.L.R.2d 162.

Divorce property distribution: treatment and method of valuation of future interest in real estate or trust property not realized during marriage, 62 A.L.R.4th 107.

26 C.J.S. Deeds §§ 1, 117, 136; 31 C.J.S. Estates § 92.

47-1-23. [Transfer of reversion authorized.]

That the possibility or right of reversion for breach or violation of condition or conditions subsequent contained in any deed or other instrument conveying real estate in the state of New Mexico, is hereby made assignable, and the grantor in any such instrument heretofore or hereafter made affecting real estate in the state of New Mexico, is given the right to assign and transfer such future contigent [contingent] right of reentry, forfeiture and reversion for violation or breach of such condition or conditions subsequent.

History: Laws 1937, ch. 4, § 1; 1941 Comp., § 75-118; 1953 Comp., § 70-1-21.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Possibility of reverter comes within section and is an alienable contingent reversionary interest. *Prince v. Charles Ilfeld Co.*, 1963-NMSC-135, 72 N.M. 351, 383 P.2d 827.

For purpose of triggering a reversionary clause in a deed for immoral purpose, an owner of a mobile home park was not "using" property for an immoral purpose when renting to cohabiting couples, or to tenants engaged in drug trafficking in the absence of a showing of knowledge of the drug trafficking. *Maloof v. Pierskorn*, 2004-NMCA-126, 136 N.M. 516, 101 P.3d 327, cert. denied, 2004-NMCERT-011, 136 N.M. 656, 103 P.3d 580.

Law reviews. — For article, "Toward Clarification of New Mexico's Real Property Statutes," see 1 Nat. Res. J. 163 (1961).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 28 Am. Jur. 2d Estates § 315.

Reversion of title upon abandonment or vacation of public street or highway, 18 A.L.R. 1008, 70 A.L.R. 564.

Reverter, release of possibility of, as vesting fee in grantee, 38 A.L.R. 1111.

Grant to one for life, and afterwards, either absolutely or contingently, to grantor's heirs or next of kin, as leaving reversion or creating remainder, 16 A.L.R.2d 691.

Validity and effect of transfer of possibility of reverter or right of re-entry, following conveyance of determinable fee or fee subject to condition subsequent, 53 A.L.R.2d 224.

Divorce property distribution: treatment and method of valuation of future interest in real estate or trust property not realized during marriage, 62 A.L.R.4th 107.

31 C.J.S. Estates § 106.

47-1-24. [Rights of transferee of reversion.]

The assignee of or any successor to the right of reentry, forfeiture and reversion for breach or violation of condition or conditions subsequent, is hereby given upon such assignment, all of the rights and privileges of the original grantor for the enforcement of reentry, forfeiture and reversion when any such condition or conditions subsequent shall have been breached or broken, including all legal and equitable remedies for the judicial enforcement of such right or rights.

History: Laws 1937, ch. 4, § 2; 1941 Comp., § 75-119; 1953 Comp., § 70-1-22.

ANNOTATIONS

Possibility of reverter comes within section and is an alienable contingent reversionary interest. *Prince v. Charles Ilfeld Co.*, 1963-NMSC-135, 72 N.M. 351, 383 P.2d 827.

Law reviews. — For article, "Toward Clarification of New Mexico's Real Property Statutes," see 1 Nat. Res. J. 163 (1961).

47-1-25. Repealed.

History: Laws 1863-1864, p. 54; C.L. 1865, ch. 101, § 8; C.L. 1884, § 1493; C.L. 1897, § 2143; Code 1915, § 4771; C.S. 1929, § 117-115; 1941 Comp., § 75-120; 1953 Comp., § 70-1-23; 1978 Comp., § 47-1-25, repealed by Laws 2007, ch. 266, § 1.

ANNOTATIONS

Repeals. — Laws 2007, ch. 266, § 2 repealed 47-1-25 NMSA 1978, as enacted by Laws 1863-1864, p. 54, relating to rights of persons in possession of property under Spanish and Mexican grants, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*

47-1-26. [Tax assessment or payment in name of nonowner is not cloud on title.]

That the entry of payment of taxes by any person, partnership, corporation or corporations upon tax rolls of any county opposite the assessment of any real estate on the said tax rolls or the entry upon the said tax rolls or any other official tax records in the office of the county assessor or treasurer that taxes upon real estate and improvements thereon have been paid by any person or persons, partnerships, corporations or associations, shall not in themselves without other record evidence of title be or constitute a cloud upon any real estate or improvements thereon, and no title

to real estate or improvements thereon shall be unmarketable solely because of the assessment in the name of or payment of taxes by any person or persons, partnership, corporation or association not having right, title or interest in or to such real estate or improvements as shown by the records of the county clerk in the county wherein such property is situate.

History: Laws 1937, ch. 140, § 1; 1941 Comp., § 75-122; 1953 Comp., § 70-1-25.

ANNOTATIONS

Cross references. — For quieting title, *see* 42-6-1 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 74 C.J.S. Quieting Title § 14.

47-1-27. ["Statutory forms" of conveyance and mortgage of real property.]

The forms set forth in the appendix to this act [47-1-44 NMSA 1978] may be used and shall be sufficient for their respective purposes. They shall be known as "statutory forms" and may be referred to as such. They may be altered as circumstances require, and the authorization of such forms shall not prevent the use of other forms.

History: 1941 Comp., § 75-126, enacted by Laws 1947, ch. 203, § 1; 1953 Comp., § 70-1-26.

ANNOTATIONS

Statutory form does not preclude others. — The legislature has approved the use of a concise statutory mortgage form in Section 47-1-44 NMSA 1978; however, this form does not preclude the use of others. *C & L Lumber & Supply, Inc. v. Texas Am. Bank/Galeria*, 1990-NMSC-056, 110 N.M. 291, 795 P.2d 502.

47-1-28. [Applicability from effective date of act.]

For the purpose of avoiding the unnecessary use of words in deeds or other instruments relating to real estate whether said statutory form or other form is used, the rules and definitions contained in this act [47-1-27 to 47-1-44 NMSA 1978] shall apply to all such instruments executed or delivered on or after the effective date of this act.

History: 1941 Comp., § 75-127, enacted by Laws 1947, ch. 203, § 2; 1953 Comp., § 70-1-27.

ANNOTATIONS

Compiler's notes. — The phrase "effective date of this act", means June 13, 1947, the effective date of Laws 1947, ch. 203.

47-1-29. ["Warranty deed" effective in fee simple.]

A deed in substance following the form entitled "warranty deed" in the appendix to this act [47-1-44 NMSA 1978] shall, when duly executed, have the force and effect of a deed in fee simple to the grantee, his heirs and assigns, to his and their own use, with covenants on the part of the grantor for himself, his heirs, executors, administrators and successors, with the grantee, his heirs, successors and assigns, as specified in the definition of "warranty covenants" in Section 10 [47-1-37 NMSA 1978] of this act.

History: 1941 Comp., § 75-128, enacted by Laws 1947, ch. 203, § 3; 1953 Comp., § 70-1-28.

ANNOTATIONS

Deed restrictions. — Where the defendant purchased a vacation cabin burdened with deed restrictions, which provided that the property shall be used for dwelling purposes only and that no part of the property shall be used for business or commercial purposes; the defendant rented the cabin for more days than the defendant used the cabin; the defendant received substantial rental fees; and the defendant contracted with a property management company to advertise and manage the rental of the cabin, the rental of the cabin for dwelling purposes was a permitted use under the deed restrictions and was not a use for business or commercial purposes. *Mason Family Trust v. DeVaney*, 2009-NMCA-048, 146 N.M. 199, 207 P.3d 1176.

Law reviews. — For note, "Vendor and Purchaser - Increased Risks of Forfeiture and Malpractice Resulting from the Use of Real Estate Contracts: Albuquerque National Bank v. Albuquerque Ranch Estates, Inc.," see 15 N.M.L. Rev. 99 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 26 C.J.S. Deeds §§ 1, 22.

47-1-30. ["Quitclaim deed" effective in fee simple without warranty.]

A deed in substance following the form entitled "quitclaim deed" shall, when duly executed, have the force and effect of a deed in fee simple to the grantee, his heirs and assigns, to his and their own use of any interest the grantor owns in the premises, without warranty.

History: 1941 Comp., § 75-129, enacted by Laws 1947, ch. 203, § 4; 1953 Comp., § 70-1-29.

ANNOTATIONS

Quitclaim deed conveys all grantor's interest. — In a quiet-title action, appellant's contention that a quitclaim deed executed to appellee by her, her husband and cograntees conveyed only her interest as a spouse in community property, that her individual interest as cotenant in common with her husband and the other cograntees

was not conveyed, was found to be erroneous. Appellant conveyed all of her interest in the property by the deed and not two separate and distinct estates in the mining property, to-wit, a community property interest and a separate and distinct interest given to married women by the statute. *Waddell v. Bow Corp.*, 408 F.2d 772 (10th Cir. 1969).

Recorded deed is notice that all interest conveyed. — A quitclaim deed of record, where there is nothing in the record to suggest that the deed is not absolute, nor is there anything which would give one notice that less than full consideration has been paid, is notice that the grantor conveys whatever interest he has in the property. A reasonably prudent person is justified in relying on the quitclaim deed. *Bingaman v. Cook*, 1968-NMSC-187, 79 N.M. 627, 447 P.2d 507.

Law reviews. — For note, "Vendor and Purchaser - Increased Risks of Forfeiture and Malpractice Resulting from the Use of Real Estate Contracts: Albuquerque National Bank v. Albuquerque Ranch Estates, Inc.," see 15 N.M.L. Rev. 99 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Deeds §§ 259 to 264, 272, 273, 338 to 340.

26 C.J.S. Deeds §§ 8, 22.

47-1-31. ["Special warranty deed"; effect.]

A deed in substance following the form entitled "special warranty deed" shall, when duly executed, have the force and effect of a deed in fee simple to the grantee, his heirs and assigns, to his and their own use, with covenants on the part of the grantor, for himself, his heirs, executors, administrators, and successors, with the grantee, his heirs, successors and assigns as specified in the definition of "special warranty covenants" in Section 11 [47-1-38 NMSA 1978] of this act.

History: 1941 Comp., § 75-130, enacted by Laws 1947, ch. 203, § 5; 1953 Comp., § 70-1-30.

ANNOTATIONS

Law reviews. — For note, "Vendor and Purchaser - Increased Risks of Forfeiture and Malpractice Resulting from the Use of Real Estate Contracts: Albuquerque National Bank v. Albuquerque Ranch Estates, Inc.," see 15 N.M.L. Rev. 99 (1985).

47-1-32. ["Grant" effective as a word of conveyance.]

In a conveyance of real estate the word "grant" shall be a sufficient word of conveyance without the use of the words "give, bargain, sell and convey" and no covenant shall be implied from the use of the word, "grant."

History: 1941 Comp., § 75-131, enacted by Laws 1947, ch. 203, § 6; 1953 Comp., § 70-1-31.

ANNOTATIONS

Cross references. — For the use of the words "bargained and sold," *see* 47-1-14 NMSA 1978.

Law reviews. — For article, "Toward Clarification of New Mexico's Real Property Statutes," see 1 Nat. Res. J. 163 (1961).

47-1-33. [Unnecessary terms; construction of deeds or reservations.]

In a conveyance or reservation of real estate the terms, "heirs," "assigns" or other technical words of inheritance shall not be necessary to convey or reserve an estate in fee. A deed or reservation of real estate shall be construed to convey or reserve an estate in fee simple, unless a different intention clearly appears in the deed.

History: 1941 Comp., § 75-132, enacted by Laws 1947, ch. 203, § 7; 1953 Comp., § 70-1-32.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Deeds §§ 221 to 320.

Reservation of minerals as including minerals recoverable only by open pit mining, 1 A.L.R.2d 787.

Oil or gas "royalty" within language of exception or reservation, 4 A.L.R.2d 492.

Sufficiency of description in exception or reservation as to standing timber, 35 A.L.R.2d 1422.

Written matter as controlling printed matter in construction of deed, 37 A.L.R.2d 820.

Oil and gas as "minerals" within reservation or exception in deed, 37 A.L.R.2d 1440.

Relative rights, under deed given to municipality, to minerals, oil, and gas underlying streets, alleys, or parks, 62 A.L.R.2d 1311.

Reservation or exception as creating separate and independent legal estate in solid minerals or as passing only incorporeal privilege or license, 66 A.L.R.2d 978.

Reservation or exception in deed in favor of stranger, 88 A.L.R.2d 1199.

Validity and effect of provision in deed attempting to make reservation or exception in favor of grantor's spouse, 52 A.L.R.3d 753.

47-1-34. [Rights included without enumeration.]

In a conveyance or mortgage of real estate all rights, easements, privileges and appurtenances belonging to the granted estate shall be included in the conveyance, unless the contrary shall be stated in the deed, and it shall be unnecessary to enumerate or mention them generally or specifically.

History: 1941 Comp., § 75-133, enacted by Laws 1947, ch. 203, § 8; 1953 Comp., § 70-1-33.

ANNOTATIONS

Water rights are appurtenant rights. — Where a deed for feed yard property did not contain any reservation of rights, title to the property, together with all appurtenant rights, including appurtenant water rights, passed to the grantee. *McCasland v. Miskell*,1994-NMCA-163, 119 N.M. 390, 890 P.2d 1322 , cert. denied, 119 N.M. 354, 890 P.2d 807 (1995).

Deed silent as to water rights. — Where grantor divided a parcel of land into fifteen adjoining lots and conveyed a lot to each of grantor’s children; each deed granted the grantee the right to water from a well located on one of the lots; defendant acquired title to one of the lots from an heir of grantor; the deed to defendant contained no language regarding water rights or the well; and there was no evidence that the land acquired by defendant was used for irrigation, defendant did not have a right to use water from the well because the deed to defendant did not expressly grant water rights. *Roybal v. Lujan de la Fuente*, 2009-NMCA-114, 147 N.M. 193, 218 P.3d 879.

Easements appurtenant to land are conveyed with a conveyance of the land. Where an easement is annexed as an appurtenance to land by an express or implied grant or reservation, or by prescription, it passes with a transfer of the land although not specifically mentioned in the instrument of transfer. *Sedillo Title Guar., Inc. v. Wagner*, 1969-NMSC-087, 80 N.M. 429, 457 P.2d 361.

Easement remains though not enumerated in deed. — Court held that under this section purchasers had notice of easement burdening property where warranty deed, recorded contract and title insurance policy referred to easement, although deed to land did not. *Sedillo Title Guar., Inc. v. Wagner*, 1969-NMSC-087, 80 N.M. 429, 457 P.2d 361.

Reformation of contract held improper. — Where vendor and purchaser of land failed to discuss or bargain over appurtenant water rights prior to land sale, evidence was insufficient to infer any agreement concerning such rights, and, therefore, trial court committed reversible error by reforming the parties' contract to include reservation of the

appurtenant water rights. *Twin Forks Ranch, Inc. v. Brooks*, 1998-NMCA-129, 125 N.M. 674, 964 P.2d 838, cert. denied, 126 N.M. 108, 967 P.2d 448.

Improvements part of real estate. — Improvements, such as homes, out buildings, etc., are considered a part of the real estate and the value of such improvements are considered in arriving at a determination of the value of such real property. 1969 Op. Att'y Gen. No. 69-86.

Law reviews. — For note, "Vendor and Purchaser - Increased Risks of Forfeiture and Malpractice Resulting from the Use of Real Estate Contracts: Albuquerque National Bank v. Albuquerque Ranch Estates, Inc.," see 15 N.M.L. Rev. 99 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 54A Am. Jur. 2d Mortgages § 102 et seq.

Restrictive covenants as affecting fences, or walls or hedges similar thereto, 23 A.L.R. 937, 138 A.L.R. 330.

Race, color or religion, restrictive covenants, conditions or agreements in respect of real property discriminating against persons on account of, 3 A.L.R.2d 466.

Controlling effect, as to building lines in restrictive covenants, as between provisions in deed and conflicting data on plat referred to therein, 21 A.L.R.2d 1262.

Restrictive covenant as affected by enforcement of assessment or improvement liens, 26 A.L.R.2d 873.

Covenant in conveyance requiring erection of dwelling as prohibiting use of property for business or other nonresidential purposes, 32 A.L.R.2d 1207.

Building side line restrictive covenants, 36 A.L.R.2d 861.

Law as to cats, 73 A.L.R.2d 1032, 8 A.L.R.4th 1287, 55 A.L.R.4th 1080, 68 A.L.R.4th 823.

Validity, construction and effect of restrictive covenant requiring consent of third person to construction on lot, 40 A.L.R.3d 864.

Validity and construction of restrictive covenant prohibiting or governing outside storage or parking of housetrailers, motor homes, campers, vans, and the like, in residential neighborhoods, 32 A.L.R.4th 651.

Conveyance of land as including mature but unharvested crops, 51 A.L.R.4th 1263.

47-1-35. [Conveyance or mortgage to joint tenants.]

In a conveyance or mortgage of real estate, the designation of two or more grantees "as joint tenants" shall be construed to mean that the conveyance is to the grantees as joint tenants, and not as tenants in common, and to the survivor of them and the heirs and assigns of the survivor.

History: 1941 Comp., § 75-134, enacted by Laws 1947, ch. 203, § 9; 1953 Comp., § 70-1-34.

ANNOTATIONS

Cross references. — For creation of a tenancy in common, *see* 47-1-15 NMSA 1978.

47-1-36. Joint tenancies defined; creation.

A joint tenancy in real property is one owned by two or more persons, each owning the whole and an equal undivided share, by a title created by a single devise or conveyance, when expressly declared in the will or conveyance to be a joint tenancy, or by conveyance from a sole owner to himself and others, or from tenants in common to themselves, or to themselves and others, or from husband and wife when holding as community property or otherwise to themselves or to themselves and others, when expressly declared in the conveyance to be a joint tenancy, or when granted or devised to executors or trustees.

History: 1953 Comp., § 70-1-34.1, enacted by Laws 1971, ch. 220, § 1.

ANNOTATIONS

Test for creation of a joint tenancy. — The test in New Mexico to determine whether a joint tenancy has been established is whether the requirements embodied by the doctrine of the four unities of time, title, interest, and possession have been satisfied. In addition, Section 47-1-36 NMSA 1978 requires that the document purporting to create the joint tenancy include express language that the real property is to be held jointly. *Edwin Smith, LLC v. Clark*, 2011-NMCA-003, 149 N.M. 249, 247 P.3d 1134, cert. granted, 2010-NMCERT-012, 150 N.M. 493, 263 P.3d 270.

Where siblings acquired property by intestate succession; the siblings conveyed the property to the spouse of one of the siblings; and the spouse, without the joinder of the spouse’s spouse, conveyed the property to the siblings as joint tenants, the siblings held the property, not as tenant in common, but as joint tenants because the siblings acquired the same interest in the property at the same time by the same conveyance and possessed an equal undivided share in the property and the deed clearly indicated that the siblings held the property as joint tenants. *Edwin Smith, LLC v. Clark*, 2011-NMCA-003, 149 N.M. 249, 247 P.3d 1134, cert. granted, 2010-NMCERT-012, 150 N.M. 493, 263 P.3d 270.

Termination of a joint tenancy. — As a matter of law, a joint tenancy in reality may be terminated and converted into a tenancy in common by a mutual course of conduct between the owners that demonstrates their intent to hold the property as tenants in common. *Edwin Smith, L.L.C. v. Synergy Operating, L.L.C.*, 2012-NMSC-034, 285 P.3d 656, *rev'g* 2011-NMCA-003, 149 N.M. 249, 247 P.3d 1134.

Severance of a joint tenancy. — A joint tenancy will be severed by the destruction of any one or more of the four unities of a joint tenancy. A conveyance by a joint tenant of the joint tenant's interest to a third party, an express agreement between all of the joint tenants, or any conduct or course of dealing sufficient to indicate that all parties have mutually treated their interests as belonging to them in common will sever a joint tenancy. *Edwin Smith, LLC v. Clark*, 2011-NMCA-003, 149 N.M. 249, 247 P.3d 1134, cert. granted, 2010-NMCERT-012, 150 N.M. 493, 263 P.3d 270.

Where siblings owned property as joint tenants; the siblings filed a quiet title action in which they described themselves as heirs at law of their predecessor in title and as owners in fee simple; the siblings granted power of attorney to the spouse of one of the siblings to develop mineral interests on the property; the siblings designated one sibling as agent to receive payments from a natural gas company operating on the property and the sibling, as agent, entered into leases to develop the mineral interest on the property; and the heirs of deceased siblings received royalties, the acts of the siblings did not destroy one of the four unities of the joint tenancy necessary to sever the joint tenancy. *Edwin Smith, LLC v. Clark*, 2011-NMCA-003, 149 N.M. 249, 247 P.3d 1134, cert. granted, 2010-NMCERT-012, 150 N.M. 493, 263 P.3d 270.

Real estate contract as evidence of transmutation of property. — Although a real estate contract is not conclusive and is not, by itself, substantial evidence on the issue of transmutation of property, it at least constitutes some evidence of intent to transmute. *Nichols v. Nichols*, 1982-NMSC-071, 98 N.M. 322, 648 P.2d 780.

Execution of mortgage by one joint tenant. — Joint tenant could not execute a mortgage which would encumber other joint tenant's interest in the property without her consent. *Texas Am. Bank/Levelland v. Morgan*, 1987-NMSC-014, 105 N.M. 416, 733 P.2d 864.

Execution of a mortgage which encumbers one joint tenant's interest in property does not sever the joint tenancy. *Texas Am. Bank/Levelland v. Morgan*, 1987-NMSC-014, 105 N.M. 416, 733 P.2d 864.

Law reviews. — For symposium, "The Effects of an Equal Rights Amendment on the New Mexico System of Community Property: Problems of Characterization, Management and Control," see 3 N.M. L. Rev. 11 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Lack of final settlement of intestate's estate as affecting heir's right to partition of realty, 92 A.L.R.3d 473.

Property rights arising from relationship of couple cohabiting without marriage, 3 A.L.R.4th 13.

Severance or termination of joint tenancy by conveyances of divided interest directly to self, 7 A.L.R.4th 1268.

Estate created by deed to persons described as husband and wife but not legally married, 9 A.L.R.4th 1189.

Contract of sale or granting of option to purchase, to third party, by both or all of joint tenants or tenants by entirety as severing or terminating tenancy, 39 A.L.R.4th 1068.

Judgment lien or levy of execution on one joint tenant's share or interest as severing joint tenancy, 51 A.L.R.4th 906.

Property rights arising from relationship of couple cohabiting without marriage, 69 A.L.R.5th 219.

47-1-37. [Effect of warranty covenants in conveyances.]

In a conveyance of real estate the words, "warranty covenants" shall have the full force, meaning and effect of the following words: "the grantor for himself, his heirs, executors, administrators and successors, covenants with the grantee, his heirs, successors and assigns, that he is lawfully seized in fee simple of the granted premises; that they are free from all former and other grants, bargains, sales, taxes, assessments and encumbrances of what kind and nature soever; that he has good right to sell and convey the same; and that he will, and his heirs, executors, administrators and successors shall warrant and defend the same to the grantee and his heirs, successors and assigns forever against the lawful claims and demands of all persons."

History: 1941 Comp., § 75-135, enacted by Laws 1947, ch. 203, § 10; 1953 Comp., § 70-1-35.

ANNOTATIONS

Typed paragraph took precedence over printed form language. — Typed paragraph, in which the vendee agreed to quiet title to the property at his own expense or opt to rescind the contract within six months, took precedence over printed contract form language which included the warranty that "the grantor . . . has good right to sell and convey" the property. *Lorentzen v. Sanchez*, 1990-NMSC-032, 109 N.M. 693, 789 P.2d 1260.

Breach of warranty of good title. Grantee's ejectment from property based on plaintiff's superior title, combined with grantor's apparent knowledge of the outstanding deed and failure to defend grantee, constituted a breach of the warranty of good title.

Garcia v. Herrera, 1998-NMCA-066, 125 N.M. 199, 959 P.2d 533, cert. denied, 125 N.M. 145, 958 P.2d 103.

Third-party claimant. — Grantee's voluntary settlement with plaintiff in ejectment action did not constitute a failure to defend against the action and did not prevent grantor from subsequently bringing a breach of warranty action against the grantor of the property. *Garcia v. Herrera*, 1998-NMCA-066, 125 N.M. 199, 959 P.2d 533, cert. denied, 125 N.M. 145, 958 P.2d 103.

Damages in breach of warranty action. — Successful claimant in breach of warranty of title action was entitled to recover damages for the lost value of the forfeited land, interest on this lost value, and attorney's fees for services in connection with claimant's defense of the original ejectment action as well as the breach of warranty action. *Garcia v. Herrera*, 1998-NMCA-066, 125 N.M. 199, 959 P.2d 533, cert. denied, 125 N.M. 145, 958 P.2d 103.

Grantor’s cognizable interest in water rights can be reserved and conveyed. — Where grantor owned land that included a water source, and thus had an inchoate right to pursue the development, establishment, and perfection of water rights for the water on his land, and conveyed the realty on which the water source existed, but reserved the right to pursue perfection of a water right equal to fifty percent of that right or opportunity to pursue the development, establishment, and perfection of water rights, the district court erred in determining that grantor did not have any rights to any water rights for the water source on the land, because even though grantor did not own a recognized water right in the sense that term is normally used in New Mexico, grantor had a cognizable interest in the water on the deeded property that he could enforce as to his buyers, and could sell and assign to others. *Christopher v. Owens*, 2016-NMCA-099.

Law reviews. — For article, "Toward Clarification of New Mexico's Real Property Statutes," see 1 Nat. Res. J. 163 (1961).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Personal covenant in recorded deed as enforceable against grantee, lessee or successor, 23 A.L.R.2d 520.

Affirmative covenants as running with the land, 68 A.L.R.2d 1022.

47-1-38. [Effect of special warranty covenants in conveyances.]

In a conveyance of real estate the words "special warranty covenants" shall have the full force, meaning and effect of the following words: "the grantor for himself, his heirs, executors, administrators and successors, covenants with the grantee, his heirs, successors and assigns that the granted premises are free from all enucumbrances [encumbrances] made by the grantor, and that he will, and his heirs, executors, administrators and successors shall warrant and defend the same to the grantee and

his heirs, successors and assigns forever against the lawful claims and demands of all persons claiming by, through or under the grantor, but against none other."

History: 1941 Comp., § 75-136, enacted by Laws 1947, ch. 203, § 11; 1953 Comp., § 70-1-36.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

47-1-39. [Mortgage or deed of trust provisions; effect.]

A deed in substance following the forms entitled "mortgage" or "deed of trust" shall when duly executed have the force and effect of a mortgage or deed of trust by way of mortgage to the use of the mortgagee and his heirs and assigns with mortgage covenants and upon statutory mortgage condition as defined in the following two sections to secure the payment of the money or the performance of any obligation therein specified. The parties may insert in such mortgage any other lawful agreement or condition.

History: 1941 Comp., § 75-137, enacted by Laws 1947, ch. 203, § 12; 1953 Comp., § 70-1-37.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 54A Am. Jur. 2d Mortgages § 146 et seq.

Priority as between vendor's lien and mortgage or deed of trust to third person furnishing purchase money, 55 A.L.R.2d 1119.

47-1-40. [Construction of "mortgage covenants".]

In a mortgage or deed of trust by way of mortgage of real estate "mortgage covenants" shall have the full force and meaning and effect of the following words and shall be applied and construed accordingly: "the mortgagor for himself, his heirs, executors, administrators and successors, covenants with the mortgagee and his heirs, successors and assigns that he is lawfully seized in fee simple of the granted premises; that they are free from all encumbrances; that the mortgagor has good right to sell and convey the same; and that he will, and his heirs, executors, administrators and successors shall, warrant and defend the same to the mortgagee and his heirs, successors and assigns forever against the lawful claims and demands of all persons."

History: 1941 Comp., § 75-138, enacted by Laws 1947, ch. 203, § 13; 1953 Comp., § 70-1-38.

ANNOTATIONS

Application of the doctrine of after-acquired title to mortgages. — As a general rule, the after-acquired title doctrine is applicable in favor of a mortgagee of property based on mortgage convenants unless particular circumstances warrant non-application. *Rabo Agrifinance, Inc. v. Terra XXI, Ltd.*, 2012-NMCA-038, 274 P.3d 127, cert. denied, 2012-NMCERT-003.

Where defendant granted plaintiff a mortgage on property at a time when defendant owned an undivided fifty percent interest in the property; the mortgage was granted with "mortgage covenants"; defendant later acquired the remaining undivided fifty percent interest in the property; and in its foreclosure action, plaintiff claimed that its mortgage lien covered one hundred percent interest in the property, the district court erred in ruling that the after-acquired title doctrine did not apply without considering whether defendant breached the mortgage covenant of ownership of the property by granting the mortgage on property to which defendant had a defective title that ought to be cured through an after-acquired title. *Rabo Agrifinance, Inc. v. Terra XXI, Ltd.*, 2012-NMCA-038, 274 P.3d 127, cert. denied, 2012-NMCERT-003.

Scope of the covenant "with mortgage covenants". — The language "with mortgage covenants" purports to convey the entirety of the mortgaged premises listed in the mortgage. The presumption can be overcome by an express statement in the mortgage to the contrary. *Rabo Agrifinance, Inc. v. Terra XXI, Ltd.*, 2014-NMCA-106, cert. denied, 2014-NMCERT-010.

Title conveyed by "with mortgage covenants" under the doctrine of after acquired title. — Where the landowner granted a mortgage on land in which the landowner owned an undivided fifty percent interest; five years later, the landowner received a warranty deed to the property that gave the landowner one hundred percent ownership in the land; the mortgage purported to convey the landowner’s interest in the land "with mortgage covenants"; and the lender sought to foreclose the mortgage on the landowner’s one hundred percent interest in the land on the basis of the after acquired title doctrine, the grant of the mortgage "with mortgage covenants" purported to convey a one hundred percent interest in the property and pursuant to the after acquired title doctrine, the undivided fifty percent in the land that the landowner acquired after the execution of the mortgage inured to the benefit of the lender. *Rabo Agrifinance, Inc. v. Terra XXI, Ltd.*, 2014-NMCA-106, cert. denied, 2014-NMCERT-010.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 59 C.J.S. Mortgages § 104.

47-1-41. Construction of "statutory mortgage condition".

In a mortgage or deed of trust by way of mortgage of real estate the words, "statutory mortgage condition" shall have the full force, meaning and effect of the following words and shall be applied and construed accordingly: "in the event any of the following terms, conditions or obligations are broken by the mortgagor, this mortgage (or

deed of trust) shall thereupon at the option of the mortgagee, be subject to foreclosure and the premises may be sold in the manner and form provided by law, and the proceeds arising from the sale thereof shall be applied to the payment of all indebtedness of every kind owing to the mortgagee by virtue of the terms of this mortgage or by virtue of the terms of the obligation or obligations secured hereby:

A. mortgagor shall pay or perform to mortgagee or his executors, administrators, successors or assigns all amounts and obligations as provided in the obligation secured hereby and in the manner, form, and at the time or times provided in the obligation or in any extension thereof;

B. mortgagor shall perform the conditions of any prior mortgage, encumbrance, condition or covenant;

C. mortgagor shall pay when due and payable all taxes, charges, and assessments to whomsoever and whenever laid or assessed upon the mortgaged premises or on any interest therein;

D. mortgagor shall, during the continuance of the indebtedness secured hereby keep all buildings on the mortgaged premises in good repair and shall not commit or suffer any strip or waste of the mortgaged premises;

E. mortgagor shall pay when due all state and federal grazing lease fees; and

F. mortgagor shall keep the buildings on the mortgaged premises insured in the sum specified and against the hazards specified in the mortgage for the benefit of the mortgagee and his executors, administrators, successors and assigns. The insurance shall be in such form and in such insurance companies as the mortgagee shall approve. Mortgagor shall deliver the policy or policies to the mortgagee and at least two days prior to the expiration of any policy on the premises shall deliver to mortgagee a new and sufficient policy to take the place of the one so expiring. In the event of the failure or refusal of the mortgagor to keep in repair the buildings on the mortgaged premises; or to keep the premises insured, or to deliver the policies of insurance, as provided; or to pay taxes and assessments, or to perform the conditions of any prior mortgage, encumbrance, covenant or condition, or to pay state and federal grazing lease fees, the mortgagee and its executors, administrators, successors or assigns may, at his option, make such repairs, or procure such insurance, or pay such taxes or assessments, or pay such state and federal grazing lease fees, or perform such conditions and all monies thus paid or expenses thus incurred shall be payable by the mortgagor on demand and shall be so much additional indebtedness secured by the mortgage."

History: 1941 Comp., § 75-139, enacted by Laws 1947, ch. 203, § 14; 1953 Comp., § 70-1-39; Laws 1969, ch. 108, § 1.

ANNOTATIONS

Compiler's notes. — The parentheses surrounding "or deed of trust" in the introductory paragraph appeared in the original enactment of this section.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 59 C.J.S. Mortgages § 106.

47-1-42. [Sheriff designated as successor trustee.]

It shall be unnecessary to recite in any deed of trust given by way of mortgage that in the case of the resignation, refusal, failure or inability of the trustee named therein at any time to act, the then acting sheriff of the county in which said real estate is situate shall be successor trustee with like powers to those of the named trustee; but the same shall be implied in any such deed of trust unless a contrary intention appears therefrom.

History: 1941 Comp., § 75-140, enacted by Laws 1947, ch. 203, § 15; 1953 Comp., § 70-1-40.

47-1-43. [Verb "assign" sufficient to transfer interest.]

In an assignment of a mortgage or deed of trust by way of mortgage of real estate the word "assign" shall be a sufficient word to transfer the mortgage or the beneficial interest under deed of trust, without the words, "transfer and set over."

History: 1941 Comp., § 75-141, enacted by Laws 1947, ch. 203, § 16; 1953 Comp., § 70-1-41.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Deeds § 295.

59 C.J.S. Mortgages § 355.

47-1-44. Conveyancing forms.

(1) WARRANTY DEED

....., for consideration paid, grant ..... to ....., whose address is ....., the following described real estate in ..... county, New Mexico:

(description)

with warranty covenants.

Witness ..... hand ..... and seal ..... this ..... day of ....., 19 ...

..... (Seal)

(Here add acknowledgment(s))

(2) WARRANTY DEED (JOINT TENANTS)

....., for consideration paid, grant ..... to ....., whose address is ....., and ....., whose address is ....., as joint tenants the following [described] real estate in ..... county, New Mexico:

(description)

with warranty covenants.

Witness ..... hand ..... and seal ..... this ..... day of ....., 19 ...

..... (Seal)

(Here add acknowledgment(s))

(3) QUITCLAIM DEED

....., for consideration paid, quitclaim ..... to ....., whose address is ....., the following described real estate in ..... county, New Mexico:

(description)

Witness ..... hand ..... and seal ..... this ..... day of ....., 19 ...

..... (Seal)

(Here add acknowledgment(s))

(4) QUITCLAIM DEED (JOINT TENANTS)

....., for consideration paid quitclaim ..... to ....., whose address is ....., and ....., whose address is ....., as joint tenants the following described real estate in ..... county, New Mexico:

(description)

Witness ..... hand ..... and seal ..... this ..... day of ....., 19 ...

..... (Seal)

(Here add acknowledgment(s))

(5) SPECIAL WARRANTY DEED

....., for consideration paid, grant ..... to ....., whose address is ....., the following described real estate in ..... county, New Mexico:

(description)

with special warranty covenants.

Witness ..... hand ..... and seal ..... this ..... day of ....., 19 ...

..... (Seal)

(Here add acknowledgment(s))

(6) MORTGAGE

....., for consideration paid, grant ..... to ....., whose address is ....., the following described real estate in ..... county, New Mexico:

(description)

with mortgage covenants.

This mortgage secures the performance of the following obligation:

(Here attach copy of or summarize note or other obligation)

and is upon the statutory mortgage condition for the breach of which it is subject to foreclosure as provided by law. The amount specified for insurance as provided in the statutory mortgage condition is $ ... and the hazard ..... to be insured against ..... fire ...

Witness ..... hand ..... and seal ..... this ..... day of ....., 19 ...

..... (Seal)

(Here add acknowledgment(s))

(7) DEED OF TRUST

....., for consideration paid, grant ..... to ....., whose address is ....., as trustee for ....., whose address is ....., beneficiary, the following described real estate in ..... county, New Mexico:

(description)

with mortgage covenants.

This deed of trust secures the performance of the following obligation:

(Here attach copy of or summarize note or other obligation)

and is upon the statutory mortgage condition for the breach of which it is subject to foreclosure as provided by law. The amount specified for insurance as provided in the statutory mortgage condition is $ ..., and the hazard ..... to be insured against ..... fire .....

Witness ..... hand ..... and seal ..... this ..... day of ....., 19 ...

..... (Seal)

(Here add acknowledgment(s))

(8) RELEASE OF MORTGAGE

....., mortgagee ..... under a certain mortgage executed by ....., on the ..... day of ....., 19 ..., and recorded in Book ... page ... of the records of ..... county, New Mexico, do ..... hereby discharge all of the real estate mentioned in said mortgage from the lien and operation thereof.

Witness ..... hand ..... and seal ..... this ..... day of ....., 19 ...

..... (Seal)

(Here add acknowledgment(s))

(9) PARTIAL RELEASE OF MORTGAGE

....., mortgagee ..... under a certain mortgage executed by ..... on the ..... day of ....., 19 ..., and recorded in Book ..., page ... of the records of ..... county, New Mexico, do ..... hereby discharge the following portion only of the real estate described in said mortgage:

(description)

from the lien and operation thereof.

Witness ..... hand ..... and seal ..... this ..... day of ....., 19 ...

..... (Seal)

(Here add acknowledgment(s))

(10) RELEASE OF DEED OF TRUST

....., trustee under a certain deed of trust executed by ..... on the ..... day of ....., 19 ..., and recorded in Book ... , page ... of the records of ..... county, New Mexico, does hereby, at the written request of the beneficiary of said deed of trust, discharge all of the real estate mentioned in said deed of trust from the lien and operation thereof.

Witness ..... hand ..... and seal ..... this ..... day of ....., 19 ...

..... (Seal)

(Here add acknowledgment(s))

(11) PARTIAL RELEASE OF DEED OF TRUST

....., trustee under a certain deed of trust executed by ..... on the ..... day of ....., 19 ..., and recorded in Book ... page ... of the records of ..... county, New Mexico does hereby, at the written request of the beneficiary of said deed of trust discharge the following portion only of the real estate described in said deed of trust.

(description)

from the lien and operation thereof.

Witness ..... hand ..... and seal ..... this ..... day of ....., 19 ...

..... (Seal)

(Here add acknowledgment(s))

(12) ASSIGNMENT OF MORTGAGE

....., holder ..... of a mortgage from ..... to ..... dated ..... and recorded in Book ... page ... of the records of ..... county, New Mexico, hereby assign ..... said mortgage and the obligation secured thereby to [.....], whose address is .....

Witness ..... hand ..... and seal ..... this ..... day of ....., 19 ...

..... (Seal)

(Here add acknowledgment(s))

(13) ASSIGNMENT OF DEED OF TRUST

....., beneficiary ..... of a deed of trust from ..... to ....., trustee for the undersigned dated ..... and recorded in Book ... page ... of the records of ..... county, New Mexico, hereby assign ..... the beneficial interest under said deed of trust and the obligation secured thereby to ....., whose address is .....

Witness ..... hand ..... and seal ..... this ..... day of ....., 19 ...

..... (Seal)

(Here add acknowledgment(s))

History: 1941 Comp., § 75-142, enacted by Laws 1947, ch. 203, Appx.; 1953 Comp., § 70-1-42; Laws 1975, ch. 135, § 1.

ANNOTATIONS

Statutory form does not preclude others. — The legislature has approved the use of a concise statutory mortgage form in this section; however, this form does not preclude the use of others. *C & L Lumber & Supply, Inc. v. Texas Am. Bank/Galeria*, 1990-NMSC-056, 110 N.M. 291, 795 P.2d 502.

Law reviews. — For note, "Vendor and Purchaser - Increased Risks of Forfeiture and Malpractice Resulting from the Use of Real Estate Contracts: Albuquerque National Bank v. Albuquerque Ranch Estates, Inc.," see 15 N.M.L. Rev. 99 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Specificity of description of premises as affecting enforceability of contract to convey real property - modern cases, 73 A.L.R.4th 135.

47-1-45. [Real estate brokerage agreements required to be in writing.]

Any agreement entered into subsequent to the first day of July, 1949, authorizing or employing an agent or broker to purchase or sell lands, tenements or hereditaments or any interest in or concerning them, for a commission or other compensation, shall be void unless the agreement, or some memorandum or note thereof shall be in writing and signed by the person to be charged therewith, or some other person thereunto by him lawfully authorized. No such agreement or employment shall be considered exclusive unless specifically so stated therein.

History: 1941 Comp., § 75-143, enacted by Laws 1949, ch. 19, § 1; 1953 Comp., § 70-1-43.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Purpose of section is to protect the owner-broker agreement to pay commissions but not to protect the brokers from themselves; therefore, this section is not applicable to agreements between brokers to share a commission. *Hapsas Realty, Inc. v. McCoun*, 1978-NMSC-037, 91 N.M. 659, 579 P.2d 785.

Section is extension of statute of frauds and may not be used as an instrument to perpetrate a fraud. *Lindsey v. Cranfill*, 1956-NMSC-055, 61 N.M. 228, 297 P.2d 1055, *rev'd in part on other grounds*, *Carney v. McGinnis*, 1961-NMSC-006, 68 N.M. 68, 358 P.2d 694; *Harris v. Dunn*, 1951-NMSC-061, 55 N.M. 434, 234 P.2d 821.

Noncomplying brokerage contracts void. — The legislature, having used the word "void" in contrast to the words of the original statute, has thereby shown an intention that noncomplying brokerage contracts should be treated differently than noncomplying contracts for an interest in realty or contracts not to be performed within a year; the latter types are merely unenforceable while the former is null and void. *Adams v. Thompson*, 1974-NMCA-133, 87 N.M. 113, 529 P.2d 1234, cert. denied, 87 N.M. 111, 529 P.2d 1232.

Noncomplying contract void as to all parties. — "Any agreement" for a commission is void if the agreement does not comply with the requirements set forth in this section. This section does not say that an agreement is void only when contrary to the interest of the owner; it applies equally to all who come within its provisions. *Yrisarri v. Wallis*, 1966-NMSC-177, 76 N.M. 776, 418 P.2d 852.

Writing requirement to prevent fraudulent claims. — This section is designed to prevent brokers from claiming commissions on transactions where they had never been authorized to sell - thus, the requirement that the same be in writing. *Carney v. McGinnis*, 1961-NMSC-006, 68 N.M. 68, 358 P.2d 694.

Section applies only to realty. — In view of the maxim "expressio unius est exclusio alterius" this section deals with contracts relating to things of permanent nature and things capable of being inherited with land, as distinguished from personal property. *Hart v. Warder*, 1953-NMSC-003, 57 N.M. 14, 252 P.2d 515.

Section cannot be extended to embrace contracts relating to personalty. *Hart v. Warder*, 57 N.M. 14, 252 P.2d 515.

Section applies to contract to negotiate lease. — While a lease is personalty, the leasehold estate is an interest in land; therefore, when the owner of real estate engages a broker to negotiate a lease of that real estate for a term of years the transaction is the sale of an "interest in or concerning" land. Therefore, this section applies to the commission arrangement between parties. *Yrisarri v. Wallis*, 1966-NMSC-177, 76 N.M. 776, 418 P.2d 852 (decided prior to 1991 amendment to Section 47-1-1 NMSA 1978 including leaseholds in the definition of real estate).

Broker's recovery not contingent on sale. — It is immaterial as between the real estate brokers and owners that no enforceable contract was ever consummated between the owner and the prospective purchaser. *Carney v. McGinnis*, 1958-NMSC-001, 63 N.M. 439, 321 P.2d 626.

Broker's recovery contingent when broker not employed by buyer or seller. — Where the binder agreement relied on by the broker did not grow out of any employment agreement between the seller and broker, there was no independent contract of employment with either the purchaser or the seller. Under such circumstances, the provision relating to the payment of a commission is not separable from the remainder of the contract, but contingent upon the consummation of the purpose for which the binder agreement was made. *Brown v. Horn*, 1962-NMSC-100, 70 N.M. 303, 373 P.2d 542.

Equitable remedy against fraud. — This section, declaring void, unless in writing, all agreements made subsequent to July 1, 1949, employing an agent to purchase or sell real estate does not bar equitable relief against one agreeing to purchase certain land for another but in violation of his promise and understanding purchases it for himself, taking title in the name of others in an effort to conceal the fraudulent breach of his agreement. *Harris v. Dunn*, 1951-NMSC-061, 55 N.M. 434, 234 P.2d 821.

Parol contract not removed by partial performance. — The part performance of services under a parol contract not to be performed within a year does not remove the contract from the operation of the statute of frauds. *Bosque Farms Home Ctr., Inc. v. Tabet Lumber Co.*, 1988-NMSC-027, 107 N.M. 115, 753 P.2d 894.

Conduct may cancel exclusive listing contract. — The real estate broker, through his actions, effectively consented to cancellation of the exclusive listing agreement pursuant to the cancellation provision provided for in the written agreement between broker and seller. Cancellation of written contracts are not required to be in writing where seller, via contract, has the ability to cancel the contract. *Dave Zerwas Co. v. James Hamilton Constr. Co.*, 1994-NMSC-068, 117 N.M. 724, 876 P.2d 653.

Constructive trust available. — Though section requires brokerage agreement to be in writing, a broker employed to purchase land under an oral contract who buys the land for himself, may be held accountable as a constructive trustee of the party by whom the broker was employed. *Harris v. Dunn*, 1951-NMSC-061, 55 N.M. 434, 234 P.2d 821.

Law reviews. — For note, "Vendor and Purchaser - Increased Risks of Forfeiture and Malpractice Resulting from the Use of Real Estate Contracts: Albuquerque National Bank v. Albuquerque Ranch Estates, Inc.," see 15 N.M.L. Rev. 99 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 12 Am. Jur. 2d Brokers §§ 38 to 53.

12 C.J.S. Brokers §§ 121 to 124.

II. WRITTEN CONTRACT OR MEMORANDUM.

Contract entered into must be in writing to support a recovery under this section. Nichols v. Sefcik, 66 N.M. 449, 349 P.2d 678 (1960).

Statement of compensation or commission to be paid is vital part of contract, and unless there is some memorandum in writing stating the amount of the commission, signed by the person to be charged or his agent, the contract cannot be enforced. Carney v. McGinnis, 68 N.M. 68, 358 P.2d 694 (1961).

Statement not necessary to specify amount in contract. — This section does not necessarily require that the amount of the commission be specifically set out in the contract itself, so long as this can be proven by some memorandum in writing, signed by the party or his agent, so as to be a protection against fraud. Carney v. McGinnis, 68 N.M. 68, 358 P.2d 694 (1961).

"Memorandum" includes all essential terms. — Where owner's written binder contained all the essential terms and conditions of their agreement with the real estate broker, including the commission to be paid and to whom, and the instrument was signed by both, it was a "memorandum or note" meeting fully the requirements of this section. Carney v. McGinnis, 63 N.M. 439, 321 P.2d 626 (1958).

Signed statement admitting oral contract sufficient. — Writings to be sufficient under the statute of frauds need not in themselves amount to a contract or be addressed to the other party, but are sufficient as evidence if the person to be bound signs any statement or document in which he admits that the parties made the oral contract, sufficiently stating therein its essential terms. Traub v. Nason & Childers, 57 N.M. 473, 260 P.2d 379 (1953).

Signature required. — Where memorandum relied upon as fixing liability for broker's commission was neither signed by wife in her name nor by anyone else thereunto duly authorized, the trial court was correct in dismissing complaint as against wife. Ginn v. MacAluso, 62 N.M. 375, 310 P.2d 1034 (1957).

Signature by agent valid. — Where memorandum relied upon as fixing liability for broker's commission is signed with the husband's name by his wife, with his express consent and direction, he alone is liable. Ginn v. MacAluso, 62 N.M. 375, 310 P.2d 1034 (1957).

Agency may be oral. — A real estate listing is binding on the principal if the purported agent was in fact an agent for such purpose under the general law of agency, and such an agency may be created by parol or estoppel, and proven by circumstantial evidence. Kennedy v. Justus, 64 N.M. 131, 325 P.2d 716 (1958).

Collateral papers must be referred to in faulty memorandum itself before they can become a part of it. Traub v. Nason & Childers, 57 N.M. 473, 260 P.2d 379 (1953).

Collateral papers not incorporated. — Where one paragraph of a sales contract specified that sellers would pay a commission on the sale to a broker whose written listing agreement had expired and with whom sellers had only an oral contract, it was held that the paragraph did not operate to take the oral agreement out of the statute of

frauds because it did not contain the amount of commission nor refer to the expired listing so as to incorporate it. Adams v. Thompson, 87 N.M. 113, 529 P.2d 1234 (Ct. App.), cert. denied, 87 N.M. 111, 529 P.2d 1232 (1974).

Oral contract not proved by previous writing. — A contract wholly oral, and within the statute of frauds, may not be proved by a writing made prior to the meeting of the minds of the parties. Bosque Farms Home Ctr., Inc. v. Tabet Lumber Co., 107 N.M. 115, 753 P.2d 894 (1988).

III. MODIFICATION.

Oral evidence is inadmissible to show subsequent modification of the written agreement. Yrisarri v. Wallis, 76 N.M. 776, 418 P.2d 852 (1966).

Extension must be written. — The contract attempted to be voided by oral agreement was a definite contract signed by the owner that he would pay a commission if the property was sold "before the expiration of the agreement." The oral agreement was a new contract affecting the time of performance, and, by substituting a new time of performance, varied an essential term of the written contract. This new contract concerning the commission would be subject to the provisions of this section and such an agreement must be in writing. Yrisarri v. Wallis, 76 N.M. 776, 418 P.2d 852 (1966).

No ratification of oral extension. — As this section is an extension of the statute of frauds its rationale is equally applicable here. A contract within the statute of frauds, that has expired by its terms, cannot be revived and extended by parol agreement. Thus, there could be no ratification of an oral extension of a listing agreement. Adams v. Thompson, 87 N.M. 113, 529 P.2d 1234 (Ct. App.), cert. denied, 87 N.M. 111, 529 P.2d 1232 (1974).

Acceptance of lower price not modification. — Where the written agreement between parties provides for payment of a commission of a percentage of the "selling price" on any acceptable selling price, the completion of the sale at a lower price does not change the terms or conditions of the written agreement, and the broker is entitled to full recovery. Herrell v. Piner, 78 N.M. 664, 437 P.2d 125 (1968); Taylor v. Unger, 65 N.M. 3, 330 P.2d 965 (1958).

Price modification not exclusiveness modification. — Fact that there was a modification of the $100,000 sale price as expressed in the written agreement does not modify the exclusiveness of the listing. Herrell v. Piner, 78 N.M. 664, 437 P.2d 125 (1968).

47-1-46. [Real estate descriptions by reference to recorded instruments.]

Any deed, mortgage, pleading in court or other instrument affecting real estate may describe such real estate by reference to the description thereof contained in or shown

by one or more maps, plats, descriptions, deeds, mortgages or other instruments of record in the office of the county clerk of the county in which the affected real estate is located, and such instrument containing such description or descriptions by reference shall be legally sufficient for all purposes to the same extent as if the description or descriptions referred to therein had been fully set forth therein; provided, that the instrument containing any such description by reference must show the time and place of filing or recordation of the instrument containing the description referred to, or other similar information, so that said instrument containing the description referred to can be located and identified.

History: 1941 Comp., § 75-123, enacted by Laws 1943, ch. 90, § 1; 1953 Comp., § 70-1-44.

ANNOTATIONS

Section is applicable to tax deeds. *Hughes v. Meem*, 1962-NMSC-039, 70 N.M. 122, 371 P.2d 235.

Description may appear in separate instrument referred to in deed. — It is not necessary that the description of the land be contained in the body of the deed. It is sufficient if it refers for identification to some other instrument or document, but the description must be contained in the instrument or its reference, express or implied, with such certainty that the locality of the land can be ascertained. This rule has also been held to apply to maps and plats, including surveys, and to an assessor's plan. The deed is not void because the instrument referred to is incomplete, not official, unacknowledged, unrecorded or unattached, or is misdescribed in some particular, or even invalid. *Hughes v. Meem*, 1962-NMSC-039, 70 N.M. 122, 371 P.2d 235.

Description enables identification of land. — The purpose of a description of the land, which is the subject matter of a deed of conveyance, is to identify such subject matter; and it may be laid down as a broad general principle that a deed will not be declared void for uncertainty in description if it is possible by any reasonable rules of construction to ascertain from the description, aided by extrinsic evidence, what property is intended to be conveyed. It is sufficient if the description in the deed or conveyance furnishes a means of identification of the land or by which the property conveyed can be located. So, if a surveyor with the deed before him can, with the aid of extrinsic evidence if necessary, locate the land and establish its boundaries, the description therein is sufficient. *Hughes v. Meem*, 1962-NMSC-039, 70 N.M. 122, 371 P.2d 235.

Extrinsic evidence allowed. — This section is permissive. A deed may describe real estate by reference but the section is not mandatory. Its purpose is not to preclude extrinsic evidence. Whether the map was filed in the clerk's office is wholly immaterial. *Hughes v. Meem*, 1962-NMSC-039, 70 N.M. 122, 371 P.2d 235.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Deeds §§ 48, 50, 61 to 64, 312, 313, 315, 316, 319.

47-1-47. [Recovery of realty donated to state or municipality for specific purposes.]

Whenever real estate has been deeded to the state of New Mexico or any municipality thereof as a gift or donation, and without payment by the state or municipality of any money consideration, said real estate to be used for a specific purpose, and said real estate has not been used for the specific purpose for which it was conveyed, for a period of five years from the date of the original deed, or for a period of five years next preceding the time of the filing of the action herein provided for, it shall be lawful for the donor or donors, or their successors in interest, to institute an action in state district court of the county in which said real estate is situate, against the state of New Mexico or said municipality, for the recovery of said real estate by said donors or their successors in interest, or for the cancellation of said deed or deeds whereby the state or municipality took title, and if the court shall determine that said real estate has not been used for the specific purpose for which it was donated as hereinbefore provided, it shall render judgment decreeing ownership of said real estate in the donors or their successors in interest, or for cancellation of the deeds to said state or municipality.

History: 1941 Comp., § 75-124, enacted by Laws 1947, ch. 123, § 1; 1953 Comp., § 70-1-45.

ANNOTATIONS

Limited to conveyance to be used for specific state purpose. — Section has reference to conveyances of property to be used for state or municipal purposes, the title to remain in the state or municipality. *Lord v. City of Santa Fe*, 1950-NMSC-035, 54 N.M. 244, 220 P.2d 709.

Section not applicable to dedication offers. — This section does not apply to a situation where a plat or map has been filed in the office of the county clerk by the owner of real property which has been subdivided, in which he offers to dedicate the streets shown on the map to the use of the public which offer is subject to acceptance before the dedication is complete. *City of Carlsbad v. Neal*, 1952-NMSC-063, 56 N.M. 465, 245 P.2d 384.

47-1-48. [Rules applicable; service of process.]

Such an action as provided for in Section 1 [47-1-47 NMSA 1978] hereof shall be governed by the rules of pleading, practice and procedure applying to civil actions. Service of process therein shall be made upon the attorney general of the state of New Mexico for the state of New Mexico, and upon the mayor of the municipality for the municipality, as the case may be.

History: 1941 Comp., § 75-125, enacted by Laws 1947, ch. 123, § 2; 1953 Comp., § 70-1-46.

ANNOTATIONS

Cross references. — For service of process in the district courts, *see* Rule 1-004 NMRA and Civil Forms 4-206, 4-209, 4-209A, and 4-209B NMRA.

47-1-49. New Mexico coordinate system; zones.

The system of plane coordinates which has been established by the national ocean survey and national geodetic survey for defining and stating the positions or locations of points on the surface of the earth within the state of New Mexico shall be known and designated as the "New Mexico coordinate system". As used in Section 47-1-49 through 47-1-56 NMSA 1978, the term "New Mexico coordinate system" includes both the New Mexico coordinate system of 1927 and the New Mexico coordinate system of 1983.

For the purpose of the use of this system, the state is divided into an "east zone", "central zone" and a "west zone".

The area now included in the following counties shall constitute the east zone: Chaves, Colfax, Curry, DeBaca, Eddy, Guadalupe, Harding, Lea, Mora, Quay, Roosevelt, San Miguel and Union.

The area now included in the following counties shall constitute the central zone: Bernalillo, Dona Ana, Lincoln, Otero, Rio Arriba, Sandoval, Santa Fe, Los Alamos, Socorro, Taos, Torrance and Valencia.

The area now included in the following counties shall constitute the west zone: Catron, Cibola, Grant, Hidalgo, Luna, McKinley, San Juan and Sierra.

History: 1953 Comp., § 70-1-47, enacted by Laws 1957, ch. 147, § 1; 1989, ch. 104, § 1.

47-1-50. Zone designations.

As established for use in the east zone, the New Mexico coordinate system shall be named and in any land description in which it is used it shall be designated the "New Mexico coordinate system of 1927, east zone" or the "New Mexico coordinate system of 1983, east zone".

As established for use in the central zone, the New Mexico coordinate system shall be named and in any land description in which it is used it shall be designated the "New Mexico coordinate system of 1927, central zone" or the "New Mexico coordinate system of 1983, central zone".

As established for use in the west zone, the New Mexico coordinate system shall be named and in any land description in which it is used it shall be designated the "New Mexico coordinate system of 1927, west zone [zone"] or the "New Mexico coordinate system of 1983, west zone".

History: 1953 Comp., § 70-1-48, enacted by Laws 1957, ch. 147, § 2; 1989, ch. 104, § 2.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

47-1-51. Plane coordinates, x and y; definition.

The plane coordinates of a point on the earth's surface, to be used in expressing the position or location of the point in the appropriate zone of this system, shall consist of two distances, expressed in feet and decimals of a foot when using the New Mexico coordinate system of 1927 and expressed in meters and decimals of a meter when using the New Mexico coordinate system of 1983. One of these distances, to be known as the "x-coordinate", shall give the position in an east-and-west direction; the other, to be known as the "y-coordinate", shall give the position in a north-and-south direction. These coordinates shall be made to depend upon and conform to the coordinates, on the New Mexico coordinate system, of the horizontal control stations of the national ocean survey and national geodetic survey within the state, as those coordinates have been determined by the survey. The length of one foot expressed in meters is equal to 1200 divided by 3937 exactly.

History: 1953 Comp., § 70-1-49, enacted by Laws 1957, ch. 147, § 3; 1989, ch. 104, § 3.

47-1-52. Description of land located in more than one zone.

When any tract of land to be defined by a single description extends from one into another of the coordinate zones as provided in Section 47-1-49 NMSA 1978, the positions of all points on its boundaries may be referred to either of the zones; the zone which is used shall be specifically named in the description.

History: 1953 Comp., § 70-1-50, enacted by Laws 1957, ch. 147, § 4; 1989, ch. 104, § 4.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 26 C.J.S. Deeds § 29.

47-1-53. Definition of coordinate system according to U.S. coast and geodetic survey [national ocean survey and national geodetic survey].

A. For purposes of more precisely defining the New Mexico coordinate system, the following definition by the national ocean survey and national geodetic survey is adopted:

(1) the New Mexico coordinate system, east zone, is a transverse mercator projection having a central meridian 104° 20' west of Greenwich, on which meridian the scale is set at one part in 11,000 too small. The origin of coordinates is at the intersection of the meridian 104° 20' west of Greenwich and the parallel 31° 00' north latitude;

(2) the New Mexico coordinate system, central zone, is a transverse mercator projection having a central meridian 106° 15' west of Greenwich, on which meridian the scale is set at one part in 10,000 too small. The origin of coordinates is at the intersection of the meridian 106° 15' west of Greenwich and the parallel 31° 00' north latitude;

(3) the New Mexico coordinate system, west zone, is a transverse mercator projection having a central meridian 107° 50' west of Greenwich, on which meridian the scale is set at one part in 12,000 too small. The origin of coordinates is at the intersection of the meridian 107° 50' west of Greenwich and the parallel 31° 00' north latitude; and

(4) the origin for each zone is assigned the coordinates: x = 500,000 feet and y = 0 feet for the New Mexico coordinate system of 1927. The origin for the east zone is assigned to the coordinates: x = 165,000 meters and y = 0 meters, for the central zone x = 500,000 meters and y = 0 meters and for the west zone x = 830,000 meters and y = 0 meters for the New Mexico coordinate system of 1983.

B. The position of the New Mexico coordinate system shall be as marked on the ground by horizontal control stations established in conformity with standards adopted by the national ocean survey and national geodetic survey for first-order, second-order and third-order work, whose geodetic positions have been rigidly adjusted on the North American datum of 1927 or of 1983, and whose coordinates have been computed on the system defined in this section. Any such station may be used for establishing a survey connection with the New Mexico coordinate system.

History: 1953 Comp., § 70-1-51, enacted by Laws 1957, ch. 147, § 5; 1989, ch. 104, § 5.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Description in deed as relating to magnetic or true meridian, 70 A.L.R.3d 1220.

47-1-54. Recordation of land description based on coordinate system; limitation.

No coordinates based on the New Mexico coordinate system, purporting to define the position of a point on a land boundary, shall be presented to be recorded in any public land records or deed records unless such point is within eight kilometers of a monumented horizontal control station established by and for and for which coordinate data has been published by an agency of the state of New Mexico or a political subdivision of the state or established in conformity with the standards of accuracy and specifications for first-, second- or third- order geodetic surveying as prepared and published by the federal geodetic control committee of the United States department of commerce. Standards and specifications of the federal geodetic control committee or its successor in force on the date of the geodetic survey shall apply. The publication of the existing control stations, or the acceptance with intent to publish the newly established control stations by the national ocean survey and national geodetic survey, shall constitute evidence of adherence to the federal geodetic control committee's specifications. The limitations of this section may be further modified by the secretary of highway and transportation.

History: 1953 Comp., § 70-1-52, enacted by Laws 1957, ch. 147, § 6; 1970, ch. 36, § 1; 1977, ch. 247, § 180; 1989, ch. 104, § 6.

47-1-55. [Use on maps, reports of survey or other documents.]

The use of the term "New Mexico coordinate system" on any map, report of survey or other document, shall be limited to coordinates based on the New Mexico coordinate system as defined.

History: 1953 Comp., § 70-1-53, enacted by Laws 1957, ch. 147, § 7.

ANNOTATIONS

Cross references. — For void indemnity agreements, *see* 56-7-1 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Conveyance of lot with reference to map or plat as giving purchaser rights in indicated streets, alleys or areas not abutting his lot, 7 A.L.R.2d 607.

47-1-56. Use of coordinate system.

For the purpose of describing the location of any survey station or land boundary corner in the state of New Mexico, it shall be considered a complete, legal and satisfactory description of such location to give the position of said survey state or land boundary corner on the system of coordinates defined in Sections 47-1-49 through 47-1-56 NMSA 1978.

Nothing contained in those sections shall require a purchaser or mortgagee of real property to rely wholly on a land description, any part of which depends exclusively upon the New Mexico coordinate system.

Where conflicts arise in the location of a corner or other boundary element when such corner or element's location is described in both the conventional system and the New Mexico coordinate system, the description providing the most certain location shall be used.

History: 1978 Comp., § 47-1-56, enacted by Laws 1989, ch. 104, § 7.

ANNOTATIONS

Repeals and reenactments. — Laws 1989, ch. 104, § 7 repealed former 47-1-56 NMSA 1978, as enacted by Laws 1957, ch. 147, § 8, relating to construction of description by coordinates as supplemental, and enacted a new section, effective June 16, 1989.

Severability. — Laws 1989, ch. 104, § 8 provided for the severability of the act if any part or application thereof is held invalid.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Description of land conveyed by reference to river or stream as carrying to thread or center or only to bank thereof - modern status, 78 A.L.R.3d 604.

47-1-57. Use of scrivener's-error affidavits.

A. As used in this section, "scrivener's-error affidavit" means an affidavit to correct a minor drafting or clerical error or omission in a recorded instrument, including:

(1) a legal description, such as the omission of one or more words;

(2) the name of a subdivision;

(3) the recording information for a plat;

(4) a metes and bounds description or sectionalized legal description; provided that the description shall reference a recorded instrument reflecting the correct description, if available;

(5) the spelling of a name;

(6) a middle initial, if incorrect or missing;

(7) a grantor's or grantee's address, if omitted in a recorded instrument;

(8) a party's marital status;

(9) a missing exhibit or addendum; or

(10) the legal type or state of domicile of a corporation or other legal entity.

B. A scrivener's-error affidavit shall be executed by only the following:

(1) for an error or omission on a recorded instrument involving real property:

(a) the licensed attorney who prepared the original instrument;

(b) the employee of the title insurer or title insurance agent who completed the form of the original instrument;

(c) an employee of a title insurer or title insurance agent licensed pursuant to the New Mexico Title Insurance Law [Chapter 59A, Article 30 NMSA 1978];

(d) a land professional who is certified or registered by a nationally recognized land professional organization and who filled in the form or provided the description for the original instrument; or

(e) a licensed attorney who has examined title to the property and discovered discrepancies in the description in a chain of title that are reasonably apparent to the attorney to be a minor drafting or clerical error or omission; and

(2) for an error on a power of attorney:

(a) a licensed attorney who represents the principal or grantor of the original instrument; or

(b) the principal or grantor of the original instrument.

C. A scrivener's-error affidavit shall:

(1) state that the affiant has actual knowledge of and is competent to testify to the facts in the affidavit and contain an acknowledgment that the affiant is testifying under the penalty of perjury;

(2) be sworn to and acknowledged by the affiant before a person authorized to administer an oath under New Mexico law;

(3) conspicuously identify in its title that it is a "scrivener's affidavit" or "scrivener's-error affidavit"; and

(4) contain the following information concerning the original instrument being corrected:

(a) the name of the person who or entity that prepared, completed or was associated with the original instrument;

(b) the names and capacities of all parties to the original instrument;

(c) the recording information, including the recording date and document, instrument or reception number, if available, of the original instrument;

(d) a brief description of each error in the original instrument that the affidavit is designed to correct; and

(e) the correct information to be inserted or reflected in or the information to be removed from the original instrument.

D. A scrivener's-error affidavit that substantially complies with this section as to form and execution shall be:

(1) recorded by the county clerk in the land records of the county in which the real property is located;

(2) indexed by the county clerk in the general index under the names of the original parties to the instrument as they are identified in the affidavit;

(3) admissible as evidence to the same extent as a deed or other recorded instrument in an action involving the original instrument to which it relates or the title to the real property affected by the original instrument; and

(4) effective as of the date of the original instrument being corrected.

E. Nothing contained in this section shall be deemed to:

(1) prohibit any other manner of correcting errors in any writings affecting title to real estate by any other lawful means such as corrective deeds, additional deeds to correct errors or modifications to mortgages or deeds of trust; or

(2) require a change to the records of the county assessor or the county treasurer.

F. A scrivener's-error affidavit shall be prepared in substantially the following form:

"SCRIVENER'S-ERROR AFFIDAVIT

I, _____ ("Affiant"), being first duly sworn, state under oath:

1. I am duly authorized to execute this Affidavit, have actual knowledge of the matters set forth within this Affidavit and am competent to testify in a court of law about the facts stated in this Affidavit.

2. I am eligible and qualified under New Mexico law to be the Affiant of this Scrivener's-Error Affidavit because of the following facts:

[Explain qualifications for eligibility]

3. The instrument containing the error that this Affidavit intends to correct is as follows:

"Original Instrument" [Describe the instrument containing the error]

4. The purpose of this Affidavit is to provide notice of the scrivener's error described in this Affidavit and to correct the Original Instrument.

5. The Original Instrument was prepared by, completed by or associated with: _____.

6. The names and capacities of the parties to the Original Instrument are:
_____
_____

7. The recording information, including the recording date and document, instrument or reception number for the Original Instrument, is as follows: Date of Recording _____

Recording information

_____, in the real property records of _____ County, New Mexico.

8. A brief description of each error in the Original Instrument that this Affidavit is designed to correct:
_____
_____

9. The correct information to be inserted or reflected in or the information to be removed from the Original Instrument is as follows:

_____

_____

10. This Affidavit is made under penalty of perjury.

FURTHER AFFIANT SAYETH NAUGHT.

Dated this _____ day of _____, 20___.

_____

Name: _____

Company Name: _____

Title: _____

STATE OF _____

COUNTY OF _____

This instrument was subscribed, sworn to and acknowledged on this _____ day of _____, 20___ by _____, as _____ of _____.

_____

Notary Public

(Seal)

My commission number: _____

My commission expires: _____".

History: Laws 2016, ch. 67, § 1; 2023, ch. 153, § 1.

ANNOTATIONS

The 2023 amendment, effective June 16, 2023, revised provisions that authorize corrections of minor drafting or clerical errors or omissions in recorded instruments of real property; in Subsection A, in the introductory clause, added "minor" preceding "drafting", after "clerical error", added "or omission", and added "a recorded instrument, including"; in Paragraph A(4), deleted "if bearings or distances are omitted and as long

as the correction does not add or remove land to the land being described" and added "or sectionalized legal description; provided that the descriptions shall reference a recorded instrument reflecting the correct description, if available"; in Paragraph A(7), added "grantor's or" preceding "grantee's", and after "omitted in a", deleted "deed" and added "recorded "instrument"; and added new Paragraphs A(8) and A(9) and redesignated former Paragraph A(8) as Paragraph A(10); in Subsection B, Paragraph B(1), deleted "on a deed or other legal document prepared in conjunction with the closing of a transaction affecting the title to" and added "or omission on a recorded instrument involving"; in Subparagraph B(1)(b), after "original instrument", deleted "if still employed by that"; in Subparagraph B(1)(c), added "an employee of a title", after "insurer or", added "title insurance", and after "agent", deleted "and if"; deleted former Paragraph B(2); added Subparagraphs B(1)(d) and B(1)(e) and redesignated former Paragraph B(3) as Paragraph B(2); in Paragraph B(2), in the introductory clause, after "power of attorney", deleted "or an easement"; deleted former Paragraph B(4); in Subsection D, added Paragraph D(4); and in Subsection F, in the Scrivener's Error Affidavit, added "My commission number: _____" preceding "My commission expires:".

ARTICLE 1A
Uniform Vendor and Purchaser Risk Act

47-1A-1. Short title.

This act [47-1A-1 to 47-1A-2 NMSA 1978] may be cited as the "Uniform Vendor and Purchaser Risk Act".

History: Laws 1997, ch. 36, § 1.

ANNOTATIONS

Effective dates. — Laws 1997, ch. 36, § 3 made the Uniform Vendor and Purchaser Risk Act effective July 1, 1997.

47-1A-2. Risk of loss.

A contract made after the effective date of the Uniform Vendor and Purchaser Risk Act for the purchase and sale of real estate shall be interpreted as including an agreement that the parties shall have the following rights and duties, unless the contract expressly provides otherwise:

A. if, when neither the legal title nor the possession of the subject matter of the contract have been transferred, all or a material part thereof is destroyed without fault of the purchaser or is taken by eminent domain, the vendor cannot enforce the contract, and the purchaser is entitled to recover any portion of the price that has been paid; or

B. if, when either the legal title or the possession of the subject matter of the contract has been transferred, all or any part thereof is destroyed without fault of the vendor or is taken by eminent domain, the purchaser is not thereby relieved from a duty to pay the price, nor is he entitled to recover any portion thereof that has been paid.

History: Laws 1997, ch. 36, § 2.

ANNOTATIONS

Effective dates. — Laws 1997, ch. 36, § 3 made the Uniform Vendor and Purchaser Risk Act effective July 1, 1997.

ARTICLE 2
Real Estate Trusts

47-2-1. Short title.

Sections 1 through 6 [47-2-1 to 47-2-6 NMSA 1978] of this act may be cited as the "Real Estate Trust Act".

History: 1953 Comp., § 70-6-1, enacted by Laws 1973, ch. 390, § 1.

ANNOTATIONS

Effective dates. — Laws 1997, ch. 36, § 3 made the Uniform Vendor and Purchaser Risk Act effective July 1, 1997.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Adverse possession by third party or stranger of property held in trust, 2 A.L.R. 41.

Creation of express trust in property to be acquired in future, 3 A.L.R.3d 1416.

47-2-2. Definitions.

As used in the Real Estate Trust Act:

A. "real estate trust" means an unincorporated business trust organized and operated in conformity with the Real Estate Trust Act;

B. "declaration" means the written document establishing the real estate trust and all subsequent amendments to that document;

C. "trustees" means those natural persons designated as trustees in the declaration, and their successors in office;

D. "beneficial owners" means those persons who hold the beneficial interest in the real estate trust;

E. "real estate assets" means real property, real estate mortgages, real estate contracts, leasehold interests in real property and shares of beneficial interests in other real estate trusts, foreign or domestic, whether or not organized under the Real Estate Trust Act;

F. "real estate mortgages" includes all forms of liens on real property and all transfers of real property for security purposes, including deeds of trust;

G. "real estate contracts" means any contractual obligation for the sale and conveyance, or purchase and receipt of conveyance, of real property, subject to the terms and conditions of the contract; and

H. "trust estate" means the money, property and assets of a real estate trust.

History: 1953 Comp., § 70-6-2, enacted by Laws 1973, ch. 390, § 2.

47-2-3. Organization of real estate trusts.

A real estate trust is established by filing for record with the clerk of the county in which its principal office in this state is located a declaration signed by all of its trustees, which must be at least three in number, and acknowledged before a notary public, which states:

A. that the real estate trust is organized and will be operated in conformity with the Real Estate Trust Act;

B. that the real estate trust has been established to invest in real estate assets and to pay over the net income and profits of the trust estate to the beneficial owners;

C. the location of the principal office of the real estate trust in this state and its mailing address;

D. the name, business address and the residential address of each trustee;

E. the period during which trustees shall hold office and the manner in which they shall be succeeded in office;

F. the number of units into which the beneficial ownership of the trust estate is to be divided and a description of the rights and privileges inuring to the holder of each unit;

G. that the real estate trust will not invest in any asset or take any other investment action unless its beneficial owners number more than one hundred persons, nor while

any five of its beneficial owners own, directly or indirectly, an aggregate of more than fifty percent of the real estate trust; and

H. any other provisions for the regulation of the affairs of the real estate trust that the trustees elect to set forth in the declaration.

History: 1953 Comp., § 70-6-3, enacted by Laws 1973, ch. 390, § 3.

47-2-4. Operation of real estate trusts.

A. Except as limited or reserved to the beneficial owners by the declaration, the trustees are vested with the authority for the control, operation, disposition, investment, reinvestment and management of the trust estate.

B. The action of a majority of the trustees is the action of the real estate trust except as otherwise provided by the declaration.

C. Trustees shall hold office and be succeeded in office as provided by the declaration, but no successor may act as trustee until he has filed for record with the clerk of the county in which the principal office of the real estate trust is located a document, signed by him and acknowledged before a notary public, by which he assumes the obligations of trustee as provided in the declaration.

D. Any legal process, notice or demand required or permitted by law to be served upon a real estate trust may be served upon any trustee currently in office, or upon the person in charge of the principal office of the trust in this state.

E. The trustees shall cause the real estate trust to maintain complete books of account, records, and memoranda reflecting the financial and other activities of the real estate trust, the decisions of the trustees, the name and address of persons who are beneficial owners of the trust, and the number of units held by each. These documents shall be open for inspection and copying by any beneficial owner at any reasonable time for any good faith purpose related to the interest of the beneficial owner. The trustees shall cause current financial statements of the real estate trust to be transmitted annually to the beneficial owners. These statements shall reflect the assets, liabilities and operations of the real estate trust and be prepared in accordance with generally accepted accounting principles.

History: 1953 Comp., § 70-6-4, enacted by Laws 1973, ch. 390, § 4.

ANNOTATIONS

Effective dates. — Laws 1997, ch. 36, § 3 made the Uniform Vendor and Purchaser Risk Act effective July 1, 1997.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 76 Am. Jur. 2d Trusts §§ 280, 410, 546, 547.

90 C.J.S. Trusts §§ 160, 172.

47-2-5. Powers of real estate trusts.

Unless specifically limited by the declaration, a real estate trust has the power, exercisable in the trust name to:

A. have perpetual succession;

B. sue, be sued, complain and defend;

C. purchase, receive, lease or otherwise acquire, own, hold, improve, use and otherwise deal in and with any real or personal property or any interest therein, wherever situated;

D. sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of the trust estate;

E. purchase, receive, subscribe for, or otherwise acquire, own, hold, vote, use, employ, mortgage, lend, pledge, sell or otherwise dispose of, and otherwise use and deal in and with securities, shares, or other interests in, or obligations of, individuals, domestic or foreign corporations, associations, partnerships, other real estate trusts, direct or indirect obligations of the United States or of any other government, state, territory, government district or municipality, or of any instrumentality thereof;

F. issue units of beneficial ownership in the real estate trust in exchange for money, property or services; evidence the units by certificates; and to purchase, redeem or otherwise reacquire the units;

G. make contracts and incur liabilities, borrow money, issue its notes, bonds and other obligations, and secure any of its obligations by mortgage or pledge of all or any of the trust estate;

H. conduct its business, carry on its operations, and have offices and exercise the powers granted by the Real Estate Trust Act in any state, territory, district or possession of the United States, or in any foreign country;

I. make and amend bylaws, not inconsistent with its declaration or with the laws of this state, for the administration and regulation of the affairs of the real estate trust;

J. amend or restate its declaration in conformity with the Real Estate Trust Act by having the amendment or restatement signed by all of the trustees and acknowledged

before a notary public, and by filing it for record with the clerk of the county in which the principal office of the real estate trust in this state is located;

K. appoint officers, agents and employees to administer the trust estate; and

L. take any action necessary or appropriate to exercise the powers granted to a real estate trust.

History: 1953 Comp., § 70-6-5, enacted by Laws 1973, ch. 390, § 5.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61 Am. Jur. 2d Perpetuities §§ 71 to 74; 76 Am. Jur. 2d Trusts §§ 568, 569, 571, 595, 596.

Power of trustee and court as regards term of lease of trust property, 61 A.L.R. 1368, 67 A.L.R.2d 978.

Power of trustee and court as regards modification of lease of trust property, 93 A.L.R. 603.

Remedies in event of executor's or testamentary trustee's delay in exercise of power to sell real estate conferred by will, 132 A.L.R. 1473.

Implied power of executor or testamentary trustee to sell real property, 134 A.L.R. 378, 23 A.L.R.2d 1000.

Enforceability, as regards proceeds of sale of property, of real estate trust that does not satisfy statute of frauds, 154 A.L.R. 385.

Implied power of testamentary trustee to sell real estate, 23 A.L.R.2d 1000.

Power of trustee with power to sell or to lease real property, or to do both, to give an option to purchase, 83 A.L.R.2d 1310.

Validity and construction of trust provision authorizing trustee to purchase trust property, 39 A.L.R.3d 836.

89 C.J.S. Trusts § 90.

47-2-6. Real estate trusts; general provisions.

A. A real estate trust is a separate legal entity and solely responsible for its debts and obligations. No trustee or beneficial owner, solely because of that status, shall be individually liable for the acts, omissions, debts or obligations of the real estate trust,

except for his own bad faith, willful misfeasance, gross negligence, or reckless disregard of his duties.

B. Certificates evidencing units of beneficial ownership in a real estate trust are investment securities within the meaning of the Uniform Commercial Code [Chapter 55 NMSA 1978] and within the meaning of state and federal securities laws.

C. The conduct of the trustees in relation to the real estate trust, to the trust estate, and to the beneficial owners, shall be judged by the fiduciary responsibilities of trustees of a business trust.

D. Any existing trust and a real estate trust having its principal place of business in another state may, but need not, adopt the provisions of the Real Estate Trust Act by filing for record a document conforming to the act with the clerk of the county in which the principal office of the real estate trust in this state is located.

History: 1953 Comp., § 70-6-6, enacted by Laws 1973, ch. 390, § 6.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 76 Am. Jur. 2d Trusts § 410.

ARTICLE 3
Solar Rights

47-3-1. Short title.

Sections 47-3-1 through 47-3-5 NMSA 1978 may be cited as the "Solar Rights Act".

History: 1953 Comp., § 70-8-1, enacted by Laws 1977, ch. 169, § 1; 2007, ch. 232, § 2.

ANNOTATIONS

The 2007 amendment, effective June 15, 2007, changed the statutory reference to the act.

Law reviews. — For note, "Access to Sunlight: New Mexico's Solar Rights Act," see 19 Nat. Res. J. 957 (1979); 10 N.M.L. Rev. 169 (1979-80).

For article, "Access to Solar Energy: The Problem and Its Current Status," see 22 Nat. Res. J. 21 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Solar energy: landowner's rights against interference with sunlight desired for purposes of solar energy, 29 A.L.R.4th 349.

47-3-2. Declaration and findings.

The legislature declares that the state of New Mexico recognizes that economic benefits can be derived for the people of the state from the use of solar energy. Operations, research, experimentation and development in the field of solar energy use shall therefore be encouraged. While recognizing the value of research and development of solar energy use techniques and devices by governmental agencies, the legislature finds and declares that the actual construction and use of solar devices, whether at public or private expense, is properly a commercial activity which the law should encourage to be carried out, whenever practicable, by private enterprise.

History: 1953 Comp., § 70-8-2, enacted by Laws 1977, ch. 169, § 2.

47-3-3. Definitions.

As used in the Solar Rights Act:

A. "solar collector" means a device, substance or element, or a combination of devices, substances or elements, that relies upon sunshine as an energy source and that is capable of collecting not less than twenty-five thousand British thermal units on a clear winter solstice day or that is used for the conveyance of light to the interior of a building. The term also includes any device, substance or element that collects solar energy for use in:

(1) the heating or cooling of a structure or building;

(2) the heating or pumping of water;

(3) industrial, commercial or agricultural processes; or

(4) the generation of electricity. A solar collector may be used for purposes in addition to the collection of solar energy. These uses include, but are not limited to, serving as a structural member or part of a roof of a building or structure and serving as a window or wall; and

B. "solar right" means a right to an unobstructed line-of-sight path from a solar collector to the sun, which permits radiation from the sun to impinge directly on the solar collector.

History: 1953 Comp., § 70-8-3, enacted by Laws 1977, ch. 169, § 3; 2007, ch. 232, § 3.

ANNOTATIONS

The 2007 amendment, effective June 15, 2007, expanded the definition of "solar collector" to include devices that convey light to the interior of a building.

Law reviews. — For note, "Access to Sunlight: New Mexico's Solar Rights Act," see 19 Nat. Res. J. 957 (1979); 10 N.M.L. Rev. 169 (1979-80).

47-3-4. Declaration of solar rights.

A. The legislature declares that the right to use the natural resource of solar energy is a property right, the exercise of which is to be encouraged and regulated by the laws of this state. Such property right shall be known as a solar right.

B. The following concepts shall be applicable to the regulation of disputes over the use of solar energy where practicable:

(1) "beneficial use." Beneficial use shall be the basis, the measure and the limit of the solar right, except as otherwise provided by written contract. If the amount of solar energy which a solar collector user can beneficially use varies with the season of the year, then the extent of the solar right shall vary likewise;

(2) "prior appropriation." In disputes involving solar rights, priority in time shall have the better right except that the state and its political subdivisions may legislate, or ordain that a solar collector user has a solar right even though a structure or building located on neighborhood property blocks the sunshine from the proposed solar collector site. Nothing in this paragraph shall be construed to diminish in any way the right of eminent domain of the state or any of its political subdivisions or any other entity that currently has such a right; and

(3) "transferability." Solar rights shall be freely transferable within the bounds of such regulation as the legislature may impose. The transfer of a solar right shall be recorded in accordance with Chapter 14, Article 9 NMSA 1978.

C. Unless a singular overriding state concerns occur which significantly affect the health and welfare of the citizens of this state, permit systems for the use and application of solar energy shall reside with county and municipal zoning authorities.

History: 1953 Comp., § 70-8-4, enacted by Laws 1977, ch. 169, § 4.

ANNOTATIONS

Law reviews. — For note, "Rate Structure and Energy Conservation in the 1977 New Mexico Legislative Session," see 8 N.M.L. Rev. 99 (1978).

For note, "Access to Sunlight: New Mexico's Solar Rights Act," see 19 Nat. Res. J. 957 (1979); 10 N.M.L. Rev. 169 (1979-80).

For article, "Access to Solar Energy: The Problem and Its Current Status," see 22 Nat. Res. J. 21 (1982).

47-3-5. Prior rights unaffected.

Nothing in the Solar Rights Act shall be construed to alter, amend, deny, impair or modify any solar right, lease, easement or contract right which has vested prior to the effective date of the Solar Rights Act.

History: 1953 Comp., § 70-8-5, enacted by Laws 1977, ch. 169, § 5.

47-3-6. Short title.

This act [47-3-6 to 47-3-12 NMSA 1978] may be cited as the "Solar Recordation Act".

History: Laws 1983, ch. 233, § 1.

47-3-7. Legislative findings and declaration.

The legislature finds that in view of the present energy crisis, all renewable energy sources must be encouraged for the benefit of the state as a whole. The legislature further finds that solar energy is a viable energy source in New Mexico, and as such, its development should be encouraged. Since solar energy may be used in small-scale installations and one of the ways to accomplish such encouragement is by protection of rights necessary for small-scale installations, the legislature declares such protection to be the purpose of the Solar Recordation Act and necessary to the public interest.

History: Laws 1983, ch. 233, § 2.

47-3-8. Method of claiming; effect; limitations.

A solar right may be claimed by an owner of real property upon which a solar collector, as defined in Subsection A of Section 47-3-3 NMSA 1978, has been placed. Once vested, the right shall be enforceable against any person who constructs or plans to construct any structure, in violation of the terms of the Solar Rights Act [47-3-1 to 47-3-5 NMSA 1978] or the Solar Recordation Act [47-3-6 to 47-3-12 NMSA 1978]. A solar right shall be considered an easement appurtenant, and a suit to enforce a solar right may be brought at law or in equity. The solar right shall be subject to the provisions of the Solar Recordation Act and the Solar Rights Act.

History: Laws 1983, ch. 233, § 3.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Solar energy: landowner's rights against interference with sunlight desired for purposes of solar energy, 29 A.L.R.4th 349.

47-3-9. Recordation; effect of failure to record; contest.

A. Any person claiming a solar right shall record that right by filing a declaration in substantially the following form with the county clerk of each county in which is located any portion of the properties burdened by a solar right or any portion of the properties on which a solar right is claimed:

SOLAR RIGHT DECLARATION

..., owner of the real property described below, claims a solar right in favor of the following described real estate in ..... county, New Mexico:

(Description either by metes and bounds, if in a platted subdivision, by lot and block subdivision name, by middle Rio Grande conservancy district tract number or other adequate legal description.)

The following named persons have each received notification by certified mail evidenced by a return receipt signed by the named person, or if the address of any person was not known and could not be ascertained by reasonable diligence, or if a return receipt signed by the named person could not be obtained, then notification to that person shall be made by publication of a copy of this declaration, with the intended date of filing, at least once a week for two consecutive weeks in a newspaper of general circulation in the county in which the property for which the solar right is being claimed is located, the last publication of which was no less than ten days prior to the filing of this declaration:

(A listing of the names of the holders as shown in the records of the county clerk of any interest in property burdened by a claimed solar right, including owners, mortgagors, mortgagees, lessors, lessees, contract purchasers and contract owners or sellers, and a description, either by metes and bounds if in a platted subdivision, by lot and block and subdivision name, by middle Rio Grande conservancy district tract number or other adequate legal description, of that burdened property.)

The claimant has placed improvements on the land in the form of a solar collector, as shown by the attached survey or plot plan setting forth distances from lot lines and height from ground level of all solar collectors entitled to be recorded under the provisions of the Solar Recordation Act, Chapter ..., Article .. NMSA 1978 and setting forth the maximum height of a theoretical fence located at the property lines of the property on which the solar collector is located which will not interfere with the solar easement.

Notice is hereby given that by virtue of the Solar Recordation Act, Chapter ..., Article ... NMSA 1978, the holders of any interest in property described above as having been mailed notice must record a declaration, with the county clerk in each county in which solar right recordation has been filed, contesting the claimed solar right within sixty

days, or the solar right shall be fully vested. Witness ..... hand and seal this ... day of ....., 19 ...

.....
(here add acknowledgment).

B. Any person desiring to claim a solar right must record that right and give notice to affected property owners as provided in the Solar Recordation Act as a necessary condition precedent to enforcing a solar right. Failure to so record and give notice shall constitute a jurisdictional defect and deprive any court of subject matter jurisdiction to enforce the solar right. However, nothing in this subsection shall apply to any solar right, lease, easement or contract right which has vested prior to the effective date of this subsection.

C. Any person who receives notice of the recordation may, within sixty days after receiving notice, file a declaration contesting the right, in the same manner and at the same place as the recordation was filed. If a declaration is filed contesting the claimed solar right, then the solar right shall not be enforceable against the property covered by the declaration unless agreed to by contract or ordered by a court of competent jurisdiction, and any claim of a solar right shall expire one year from the date of declaration unless the parties agree by contract to settle the solar rights dispute or unless court action has commenced by that date to establish the claim of the solar right.

History: Laws 1983, ch. 233, § 4.

47-3-10. Transfer.

Unless the document of conveyance otherwise specifies, upon the transfer of any realty on which a solar right exists or upon the transfer of any realty benefited by a filed declaration contesting a solar right, that solar right or declaration contesting the solar right shall be transferred with the realty and shall be enforceable by the vendee in the same manner and to the same extent to which it was enforceable by the vendor. A solar right is appurtenant to the real property upon which the solar collector is situated. Nothing in this section shall be construed to prevent a person from agreeing to relinquish a solar right or a potential solar right. Nothing in this section shall affect any transfer of solar rights made prior to the effective date of the Solar Recordation Act pursuant to Paragraph (3) of Subsection B of Section 47-3-4 NMSA 1978 or any local solar rights ordinance.

History: Laws 1983, ch. 233, § 5.

47-3-11. Local authority.

A. Notwithstanding any other provisions of the Solar Recordation Act [47-3-6 to 47-3-12 NMSA 1978] or the Solar Rights Act [47-3-1 to 47-3-5 NMSA 1978], the governing

body of a county or municipality may by ordinance regulate in whole or in part the claiming of solar rights in accordance with its powers to regulate zoning, planning and platting, and subdivisions; except that any solar right claimed pursuant to such local ordinance shall vest with respect to any property benefited or burdened by the solar right only after recordation as provided in Section 4 [47-3-9 NMSA 1978] of the Solar Recordation Act. Such local regulation shall not affect any solar right vested before the effective date of such ordinance, nor shall the local regulation affect any solar rights transfer which vested prior to the effective date of such ordinance. In the absence of the local regulation of solar rights, the following principles shall apply in addition to those set forth in the Solar Rights Act. If the property burdened by a solar right has or could have improvements constructed to a maximum height of twenty-four feet, then the solar right shall be limited, as to that burdened property, to protecting an unobstructed line-of-sight path from the solar collector to the sun only as to obstructions located on the burdened property which cast a shadow greater than the shadow cast by a hypothetical fence ten feet in height located on the property line of the property on which the solar collector is located. If the property burdened by a solar right has or could have improvements constructed in excess of twenty-four feet in height, but no greater than thirty-six feet, then the solar right shall be limited, as to that burdened property, to protecting an unobstructed line-of-sight path from the solar collector to the sun only as to obstructions located on the burdened property which cast a shadow greater than the shadow cast by a hypothetical fence fifteen feet in height located on the property line of the property on which the solar collector is located. No solar right shall be obtained against property which has or could have improvements constructed in excess of thirty-six feet in height unless so provided in a local ordinance or agreed to by contract. Unless otherwise provided by contract or local ordinance, a person may allow vegetation to grow or construct or plan to construct any improvement which obstructs the protected solar right so long as such obstruction does not block more than ten percent of the collectible solar energy between the hours of 9:00 a.m. and 3:00 p.m. Unless otherwise provided by contract or local ordinance, solar rights shall be protected between 9:00 a.m. and 3:00 p.m.

B. Nothing in the Solar Recordation Act shall be construed to limit any county or municipal ordinances concerning solar rights in effect prior to the effective date of this section.

History: Laws 1983, ch. 233, § 6.

47-3-12. Indexing.

A declaration filed pursuant to Section 4 [47-3-9 NMSA 1978] of the Solar Recordation Act shall be indexed by the county clerk in the grantees index under the names of the persons receiving notice in the declaration and in the grantors index under the name of the person filing the declaration.

History: Laws 1983, ch. 233, § 7.

ARTICLE 4
Abstracters

47-4-1. Definitions.

As used in this act [47-4-1 to 47-4-9 NMSA 1978]:

A. "person" includes individuals, firms, partnerships, associations, cooperatives and corporations; and

B. "abstracter's business" means the business of compiling or furnishing abstracts of title to any real estate within this state.

History: 1953 Comp., § 70-2-5, enacted by Laws 1963, ch. 307, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 1 Am. Jur. 2d Abstracts of Title § 1 et seq.

Negligence in preparing abstract of title as ground of liability to one other than person ordering abstract, 50 A.L.R.4th 314.

1 C.J.S. Abstracts of Title §§ 3, 5, 6 to 12.

47-4-2. Requirements for bond.

A. No person shall conduct an abstracter's business without first entering into a bond to the state of New Mexico for the use and benefit of any person who shall sustain any loss or damage by reason of the failure of the abstracter to set out, or record, properly, any instrument, or other item of record, affecting the title to the real estate covered by the abstract.

B. The bond shall be with a surety company authorized to do business in this state and shall be in the penal sum of $7,500.00.

C. The bond shall be approved, as to the statutory amount, by the county clerk of the county in which the abstract business is to be conducted, and the county clerk shall record the bond. If an abstracter's business is to be conducted in more than one county, a separate bond, in the proper amount, shall be filed in each county.

History: 1953 Comp., § 70-2-6, enacted by Laws 1963, ch. 307, § 2.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 1 Am. Jur. 2d Abstracts of Title § 1 et seq.

Liability of attorney for negligence in connection with investigation or certification of title to real estate, 59 A.L.R.3d 1176.

1 C.J.S. Abstracts of Title §§ 8, 11, 13.

47-4-3. Limitation of action on bond.

No suit shall be brought upon the bond, or against the surety, after six years from the date of the last certificate contained in the abstract.

History: 1953 Comp., § 70-2-7, enacted by Laws 1963, ch. 307, § 3.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 1 Am. Jur. 2d Abstracts of Title § 1 et seq.

47-4-4. Requirement of abstract plant.

No person shall conduct an abstracter's business unless the person owns, operates or controls an abstract plant consisting of tract indexes and other records, showing in brief comprehensive form, or full copy, all instruments of record or on file, affecting real estate in the county where he is bonded to transact business. The plant shall include an index, by name, covering district court and probate court records, transcripts of judgments, federal and state tax liens and other required information for the proper preparation of an abstract. The abstract plant may be maintained in bound books, looseleaf books, jackets, folders, on card files or film, or any other form or system, whether manual, mechanical, electronic or otherwise, or in any combination of such forms or systems. The abstract plant shall cover the period from twenty years prior to July 1, 1963, or twenty years prior to the date the abstracter commences business, whichever is later, up to date. The plant must also be currently maintained to include all daily filings in the county affecting real property.

History: 1953 Comp., § 70-2-8, enacted by Laws 1963, ch. 307, § 4.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 1 C.J.S. Abstracts of Title §§ 1, 4.

47-4-5. Exemption from requirement of abstract plant for certain abstracters.

A. Every person who, on January 1, 1963, was actively engaged in the business of compiling or furnishing abstracts of title to real estate within any county in this state, shall be exempt from the requirement of having a twenty-year abstract plant in order to conduct an abstracters [abstracter's] business in such county, provided that an abstract plant is maintained on a current basis, commencing July 1, 1963.

B. There shall be excluded from the provisions of Section 4 [47-4-4 NMSA 1978] all persons exclusively engaged in the preparation of abstracts using only the records of the bureau of land management, commissioner of public lands, and/or bureau of Indian affairs.

History: 1953 Comp., § 70-2-9, enacted by Laws 1963, ch. 307, § 5.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Abstracter's employee not engaged in compiling or furnishing abstracts. — An employee of a bonded abstracter on January 1, 1963, who was compiling abstracts for the bonded abstracter and which abstracts were furnished under the name and bond of his employer was not a person actively engaged in the business of compiling or furnishing abstracts within the meaning of this section so as to be exempt from the 20-year plant requirement, even though he might comply with the requirement that he has maintained an abstract plant on a current basis commencing July 1, 1963. 1966 Op. Att'y Gen. No. 66-86.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 1 Am. Jur. 2d Abstracts of Title § 1 et seq.

Right of abstracter to inspect or make copies of public records, 80 A.L.R. 760.

47-4-6. Affidavit of requirement of compliance with requirement of abstract plant.

No person shall conduct an abstracter's business without first filing with the county clerk of the county where the business shall be conducted, an affidavit that such person has complied, and is complying, with the requirements for an abstract plant. The affidavit shall be filed on or before July 1 of each year and abstracter is required to file such an affidavit yearly.

History: 1953 Comp., § 70-2-10, enacted by Laws 1963, ch. 307, § 6.

47-4-7. Territorial limit on abstracters [abstracter's] business.

An abstracter who has filed the necessary bond and affidavit shall receive a certificate from the county clerk to the effect that the bond and affidavit have been recorded, and this certificate shall be evidence of the right and authority of the abstracter to conduct business in the county so long as he maintains, unimpaired, the surety on the bond and the necessary abstract plant. The certificate shall permit the abstracter to compile and furnish abstracts of title on property located in the county or counties for which the abstracter has the necessary abstract plant, provided that a bonded abstracter may compile and furnish abstracts for any county where there is no bonded abstracter.

History: 1953 Comp., § 70-2-11, enacted by Laws 1963, ch. 307, § 7.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

47-4-8. Penalty for violation of act.

Any person found guilty of violating the provisions of this act [47-4-1 to 47-4-9 NMSA 1978], including, but not limited to the filing of a false affidavit, shall, upon conviction, be fined not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000) for each offense.

History: 1953 Comp., § 70-2-12, enacted by Laws 1963, ch. 307, § 8.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Negligence in preparing abstract of title as ground of liability to one other than person ordering abstract, 50 A.L.R.4th 314.

47-4-9. [Application of act.]

The provisions of Sections 4, 6 and 7 [47-4-4, 47-4-6, 47-4-7 NMSA 1978] of this act do not apply to mineral abstracting.

History: 1953 Comp., § 70-2-13, enacted by Laws 1963, ch. 307, § 9.

47-4-10. Real estate sales; disclosure of certain attorney's fees required; provisions for civil liability.

A. No abstract company or other person regularly engaged in the business of handling the closing of real estate sales shall collect attorney's fees imposed by the abstract company or other person regularly engaged in the business of handling the closing of real estate upon the vendor or vendee of the real estate in a real estate

closing unless the name of the attorney is disclosed on the vendor's and vendee's closing statement or, if there is no closing statement prepared, the statement shall be disclosed in the other closing documents.

B. The attorney's fees required to be disclosed by Subsection A of this section shall be limited to the actual reasonable attorney's fees incurred for professional services rendered and expenses incurred by an attorney not a salaried employee of the abstract company or a salaried employee of any other person regularly engaged in the business of handling the closing of real estate sales.

C. Any person aggrieved by a violation of Subsection A or B of this section may sue for the amount of money wrongfully collected and upon proof of the violation in a court of competent jurisdiction an award equal to the amount of money collected in violation of Section [Subsection] A or B of this section shall be awarded.

History: Laws 1979, ch. 271, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

ARTICLE 5
Subdivisions Generally

47-5-1. Short title.

This act [47-5-1 to 47-5-8 NMSA 1978] may be cited as the "Land Subdivision Act."

History: 1953 Comp., § 70-3-1, enacted by Laws 1963, ch. 217, § 1.

ANNOTATIONS

Cross references. — For applicability of Land Subdivision Act, *see* 47-5-9 NMSA 1978.

For the New Mexico Subdivision Act, *see* 47-6-1 NMSA 1978 et seq.

Amendment procedures of restrictive covenants were ambiguous. — Where plaintiffs attempted to enforce a subdivision’s restrictive covenants that prohibited trees in the subdivision from interfering with homeowners’ views; the majority of owners amended the restrictive covenants to eliminate the foliage restriction that plaintiffs sought to enforce; the duration clause of the restrictive covenants required that seventy-five percent of the owners approve revisions of the covenants during the term of the covenants; and the amendment clause required that fifty-one percent of the owners approve amendments, the covenants were ambiguous as to the majority required to

amend the covenants so that the validity of the amendment of the foliage restriction could not be determined as a matter of law. *Lawton v. Schwartz*, 2013-NMCA-086.

Rules for construing restrictive covenants. — In construing restrictive covenants, words in a restrictive covenant will be given their ordinary and intended meaning; the language will be construed strictly in favor of the free enjoyment of the property and against restrictions, but not so strictly as to create an illogical, unnatural, or strained construction; and restrictions will not be read into covenants by implication. *Sabatini v. Roybal*, 2011-NMCA-086, 150 N.M. 478, 261 P.3d 1110, cert. denied, 2011-NMCERT-007, 268 P.3d 46.

Meaning of the term "private garage" was ambiguous. — Where restrictive covenants allowed a "private garage" to be built on a subdivision lot and the covenants did not define the term or include an explicit limitation on the size of a garage, the term was ambiguous with respect to size. *Sabatini v. Roybal*, 2011-NMCA-086, 150 N.M. 478, 261 P.3d 1110, cert. denied, 2011-NMCERT-007, 268 P.3d 46.

Meaning of the term "private garage". — The term "private garage" means a structure or area whose essential purpose is the storage of motor vehicles by the owners and not by the general public. *Sabatini v. Roybal*, 2011-NMCA-086, 150 N.M. 478, 261 P.3d 1110, cert. denied, 2011-NMCERT-007, 268 P.3d 46.

Structure was a "private garage". — Where restrictive covenants allowed a "private garage" to be built on a subdivision lot; the covenants did not define the term or include an explicit limitation on the size of a garage; the owner of the lot, who was a car collector, built a 50 x 10 garage to store the owner's car collection; and the garage had three doors capable of admitting two cars side-by-side and a taller, more narrow door allowing entrance into a bay containing a hydraulic lift and a small room for an office; the garage was a "private garage" within the meaning of the covenants. *Sabatini v. Roybal*, 2011-NMCA-086, 150 N.M. 478, 261 P.3d 1110, cert. denied, 2011-NMCERT-007, 268 P.3d 46.

Restrictive covenant disallowing poultry was ambiguous. — Where subdivision association sued defendant hen owners to rid their properties of hens, claiming that a subdivision covenant disallowed "animals, birds, or poultry" on residents' lots unless kept as recognized household pets, summary judgment in favor of the subdivision association was improper where the district court found that the covenant language was unclear and ambiguous, but failed to resolve the restrictive covenant in favor of the free enjoyment of the property and against the restrictions; failure to apply the rules of construction of restrictive covenants is an error of law. *Eldorado Cmty. Improvement Ass'n v. Billings*, 2016-NMCA-057.

Elements of covenants running with the land. — To establish an enforceable covenant running with the land, the covenant must touch and concern the land, the original covenanting parties must intend the covenant to run with the land, and the successor to the burden must have knowledge of the covenant. *Dunning v. Buending*,

2011-NMCA-010, 149 N.M. 260, 247 P.3d 1145, cert. denied, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

General plan of development may establish the existence of a covenant running with the land. — A general plan of development can be relevant to the determination of whether an enforceable covenant running with the land exists by proving that the covenanting parties intended a covenant to run with the land and that a purchaser had notice of the covenant, and by imposing restrictions on parcels of land in a common development even if the restrictions have been omitted from the deeds of the property against which a party seeks to enforce the restrictions. While the existence of a common development plan can be used to determine whether a covenant is enforceable and whether a restriction applies to property in a subdivision that is not expressly restricted, a covenant running with the land does not require a common scheme or plan. *Dunning v. Buending*, 2011-NMCA-010, 149 N.M. 260, 247 P.3d 1145, cert. denied, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

Amendment of restrictive covenants. — Where restrictive covenants that were recorded in 1936 provided that the covenants would remain in force until July 1, 1960, and thereafter until such time as the covenants were modified or abrogated by a vote of two-thirds of the owners of lots within the subdivision; the unanimous agreement in 1940 of all the then-owners of the property in the subdivision was effective to amend the 1936 covenants and replaced them with the 1940 covenants. *Heltman v. Catanach*, 2010-NMCA-016, 148 N.M. 67, 229 P.3d 1239, cert. denied, 2010-NMCERT-001, 147 N.M. 673, 227 P.3d 1055.

Where restrictive covenants provided that the covenants would be binding until January 1, 1965, at which time the covenants would be automatically extended for successive periods of ten years unless by a vote of the majority of the then-owners of lots it was agreed to change the covenants, and in May 2005, a majority of the owners of lots in the subdivision recorded an agreement to modify the covenants, the amendments would not go into effect until January 1, 2015. *Heltman v. Catanach*, 2010-NMCA-016, 148 N.M. 67, 229 P.3d 1239, cert. denied, 2010-NMCERT-001, 147 N.M. 673, 227 P.3d 1055.

Clear language of restrictive covenants prohibited subdivision of lot. — Where the landowner’s lot was .511 acres; the landowner proposed to subdivide the lot into a .215-acre lot and a .294-acre lot, each with a single-family home on it; and the restrictive covenants of the subdivision provided that "no residential structure shall be erected or placed on any building plot, which plot has an area of less than one-half acre", the landowner was prohibited from dividing the landowner’s lot into two lots that are less than one-half acre and maintaining a residential structure on each lot. *Heltman v. Catanach*, 2010-NMCA-016, 148 N.M. 67, 229 P.3d 1239, cert. denied, 2010-NMCERT-001, 147 N.M. 673, 227 P.3d 1055.

Relevant evidence of changed conditions and acquiescence. — Where defendant proposed to subdivide a lot into two lots with a single-family home on each lot; each of

the proposed lots was less than one-half acre; the restrictive covenants of the subdivision prohibited defendant from dividing the lot into lots that were less than one-half acre and maintaining a residential structure on each lot; and defendant raised equitable defenses to enforcement of the restrictive covenants, evidence that a significant number of lots in the subdivision contained multifamily residences, that guest houses associated with primary single-family residences were being used as additional single-family residences, and that non-residential structures had been built on residential lots in violation of the covenants was relevant to the question of whether changed conditions and plaintiff's acquiescence in covenant violations prevented enforcement of the restrictive covenants. *Heltman v. Catanach*, 2010-NMCA-016, 148 N.M. 67, 229 P.3d 1239, cert. denied, 2010-NMCERT-001, 147 N.M. 673, 227 P.3d 1055.

Short term rental did not violate restrictive covenant limiting use to single-family residential purposes. — Where the restrictive covenants of the subdivision provided that lots could be used only for single-family purposes; defendant rented defendant's home to families for a minimum rental term of three nights; defendant did not rent individual rooms or rent to more than eight people; and defendant charged renters a lodger's tax but did not have a business license for defendant's rental activity, an economic benefit accruing to defendant from the rental of defendant's home, whether long-or-short term, did not by itself constitute an impermissible business or commercial activity under the "single-family residential purposes" restrictive covenant. *Estates at Desert Ridge Trails v. Vasquez*, 2013-NMCA-051, 300 P.3d 736.

Scope of homeowners' association's rule-making authority. — Under a general grant of rule-making authority, a homeowners' association's authority to impose restrictions on individually owned property pursuant to the homeowners' association's rules is limited to protecting common property and individually owned lots from any unreasonable interference by another lot owner's use of that owner's property. *Estates at Desert Ridge Trails v. Vasquez*, 2013-NMCA-051, 300 P.3d 736.

Homeowners' association exceeded its rule-making authority in adopting rules prohibiting short term rentals. — Where the restrict covenants of a subdivision did not prohibit short-term rental of property in the subdivision; the initial rules for the subdivision contained design principles for the subdivision and granted the homeowners' association authority to adopt further rules to govern the conduct of all persons occupying any part of the subdivision; the homeowners' association promulgated a rule that prohibited owners from renting their homes for less than a thirty day term; and defendant rented defendant's home to families for a minimum rental term of three nights, the homeowners' association had no authority under the general grant of authority to promulgate rules to restrict rental activity in the subdivision and the rule was an unreasonable and invalid restriction on defendant's use of defendant's property. *Estates at Desert Ridge Trails v. Vasquez*, 2013-NMCA-051, 300 P.3d 736.

Amendment of restrictive covenants was invalid. — Where the duration clause of the declaration of covenants of a subdivision provided that the declaration would run for

twenty-five years, after which the declaration would be extended for additional successive periods of ten years unless owners of two-thirds of the lots in the subdivision approved amendments to the declaration and during the initial twenty-five year term of the declaration, more than two-thirds, but not all, of the owners of lots approved an amendment of the declaration that prohibited rentals of property in the subdivision for less than ninety days, the amendment was void because the unanimous approval of the homeowner's association's members was required to amend the declaration during the initial twenty-five-year term. *Estates at Desert Ridge Trails v. Vasquez*, 2013-NMCA-051, 300 P.3d 736.

Federal preemption of state subdivision provisions. — Congress intended to and has accomplished a preemption by the United States of all control over the leasing of Indian lands, and this includes the subdivision, planning and platting of these lands. There is no room for the state or its political subdivisions to impose additional or conflicting controls. *Sangre de Cristo Dev. Corp. v. City of Santa Fe*, 1972-NMSC-076, 84 N.M. 343, 503 P.2d 323, cert. denied, 411 U.S. 938, 93 S. Ct. 1900, 36 L. Ed. 2d 400 (1973).

Where non-Indians entered into long-term lease with an Indian tribe under which the non-Indians were to develop the land as a subdivision, state laws concerning subdivision control, construction, licensing and water could not be held inapplicable to the lessee because of federal preemption. *Norvell v. Sangre de Cristo Dev. Co.*, 372 F. Supp. 348 (D.N.M. 1974), *rev'd on jurisdictional grounds*, 519 F.2d 370 (10th Cir. 1975).

Subdivision originally approved under Land Subdivision Act. — As long as a subdivision originally approved under the Land Subdivision Act and 3-20-6 NMSA 1978 continues to comply with all of the statutory requirements of those laws, the approval of the subdivision cannot be revoked or suspended, nor can additional requirements be imposed by the county for maintaining such approval. 1977 Op. Att'y Gen. No. 77-24.

When resubdivision must comply with current subdivision standards. — The later resubdivision or alteration of or amendment to pre-1973 subdivisions must comply with the new, current subdivision standards if such resubdivision activity substantially affects the new regulated areas of concern which are addressed by the new 1973 New Mexico Subdivision Act (i.e., sufficiency of water, quality of water, roads, etc.). 1982 Op. Att'y Gen. No. 82-11.

If the county commission determines that amendments to a pre-1973 plat are merely minor adjustments of boundaries, the amendments fall within the scope of the 47-6-2 I(7) NMSA 1978 exemption from the 1973 definition of "subdivision" and no reevaluation under the 1973 New Mexico Subdivision Act is triggered. If the commission concludes, on the other hand, that the plat amendments constitute a major revision of the original subdivision, the 1973 standards apply. In either event, the county commission must examine the proposed amendments to the old plats to make such a determination. 1982 Op. Att'y Gen. No. 82-11.

Application of act. — The Land Subdivision Act was intended to apply to those developers who, for the purpose of sale, pursue a regular plan of dividing a tract into 25 specific parcels, or more. Therefore, until a developer actually divides or frames a definite proposal to divide land into at least 25 specific parcels, the Land Subdivision Act cannot apply. 1963 Op. Att'y Gen. No. 63-154.

Law reviews. — For note, "Subdivision Planning Through Water Regulation in New Mexico," see 12 Nat. Res. J. 286 (1972). For note, "Need for a Federal Policy in Indian Economic Development," see 2 N.M.L. Rev. 71 (1972).

For comment on Sangre de Cristo Dev. Corp. v. City of Santa Fe, 84 N.M. 343, 503 P.2d 323 (1972), cert. denied, 411 U.S. 938, 93 S. Ct. 1900, 36 L. Ed. 400 (1973), see 13 Nat. Res. J. 535 (1973).

For comment, "A Rebuttal to 'The Pre-emption Doctrine and Colonias de Santa Fe' " see 14 Nat. Res. J. 283 (1974).

For note, "Definitional Loopholes Limit New Mexico Counties' Authority to Regulate Subdivisions," see 24 Nat. Res. J. 1083 (1984).

47-5-2. Definitions.

As used in the Land Subdivision Act:

A. "subdivided land" and "subdivision" means improved or unimproved land divided, or proposed to be divided, into twenty-five or more lots or parcels for the purpose of sale or lease, but does not include the leasing of apartments, offices, stores or similar space within a building unless an undivided interest in the land is granted as a condition precedent to occupying space within the building and does not include subdivisions approved by an agency of the United States or by a municipality, and does not include any subdivision where the primary business of the developer is the construction of home improvements;

B. "blanket encumbrance" means a trust deed, mortgage or any other lien or encumbrance, including mechanics' liens, securing or evidencing the payment of money or the furnishing of services or materials and affecting land to be subdivided or affecting more than one lot or parcel of subdivided land, or an agreement affecting more than one lot or parcel by which the owner or subdivider holds the subdivision under an option, contract to sell or trust agreement. Taxes and assessments levied by public authority are not included.

History: 1953 Comp., § 70-3-2, enacted by Laws 1963, ch. 217, § 2.

ANNOTATIONS

Characterization of particular tract of land. — Whether or not a particular tract of land is a "subdivision" depends on the facts of each particular case. 1964 Op. Att'y Gen. No. 64-05.

Question of proposed division. — When the question is whether or not a developer has proposed to divide a tract into at least 25 parcels, the enforcing authority should determine the question from the method of operation and all the facts in each particular case. 1963 Op. Att'y Gen. No. 63-154.

Subdivision within municipality. — The Land Subdivision Act does not apply to a subdivision within a municipality. 1970 Op. Att'y Gen. No. 70-84, overruled by 1976 Op. Att'y Gen. No. 76-09.

Law reviews. — For note, "Need for a Federal Policy in Indian Economic Development," see 2 N.M.L. Rev. 71 (1972).

47-5-3. [Approval of plat by county commission prior to sale.]

It shall be unlawful to sell, offer to sell, lease or offer to lease to the public subdivided land as defined hereinabove until a plat of such subdivided land being sold has been approved by the county commission wherein such land is situate; and

Until legal access from an existing public way and to each lot offered for sale or lease has been dedicated and accepted by the appropriate county commission.

History: 1953 Comp., § 70-3-3, enacted by Laws 1963, ch. 217, § 3.

ANNOTATIONS

Implied duty to approve plat meeting statutory requirements. — While statutory provisions did not expressly impose a duty to approve a plat for a rural subdivision when the requirements of Section 3-20-6 NMSA 1978 were met, the duty existed by necessary implication, since no other requirements were laid down as a prerequisite for approval, and recording and sale were prohibited absent such approval. *El Dorado at Santa Fe, Inc. v. Bd. of Cnty. Comm'rs*, 1976-NMSC-029, 89 N.M. 313, 551 P.2d 1360.

Mandamus proper remedy when duty not done. — Before the passage of the New Mexico Subdivision Act (Sections 47-5-9, 47-6-1 to 47-6-25, 47-6-26, 47-6-27, 47-6-28 NMSA 1978) the board of county commissioners had nothing to do but the ministerial act of endorsing its approval on plats which complied with all statutory requirements for rural subdivisions, and mandamus was a proper remedy when it refused to do so. *El Dorado at Santa Fe, Inc. v. Bd. of Cnty. Comm'rs*, 1976-NMSC-029, 89 N.M. 313, 551 P.2d 1360.

Subdivision with sold mobile homes upon leased parcels. — Where a large parcel of land has been subdivided into smaller parcels, and mobile homes are placed on each

parcel to be sold outright, but the land is leased on a periodic year-to-year basis, then it is unlawful for this subdivision to lease the parcels if there are 25 or more parcels without having a plat approved by the county commission. 1970 Op. Att'y Gen. No. 70-84, overruled by 1976 Op. Att'y Gen. No. 76-09.

Meaning of "legal access". — The condition of "legal access" found in this section requires that the owner or prospective owner of each lot should have the unrestricted opportunity to go and return, by automobile, from his lot to an existing public way. 1964 Op. Att'y Gen. No. 64-05.

Access shown on plat and dedicated when plat approved. — This section contemplates that the road furnishing legal access be shown on the plat of the subdivision and become a dedicated road when the plat is approved by the county commission. 1964 Op. Att'y Gen. No. 64-05.

No waiver of dedication requirement. — The requirement found in this section that the road providing access to the subdivided land be dedicated prior to sale of any lot may not be waived by the county commission. 1964 Op. Att'y Gen. No. 64-05.

Law reviews. — For note, "Need for a Federal Policy in Indian Economic Development," see 2 N.M.L. Rev. 71 (1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 83 Am. Jur. 2d Zoning and Planning §§ 529 to 534, 541 to 576.

Constitutionality, construction and application of statutes regulating the subdivision or development of land for sale in lots or parcels, 122 A.L.R. 501.

Subdivision maps or plats, validity and construction of regulations as to, 11 A.L.R.2d 524.

Failure of vendor to comply with statute or ordinance requiring approval or recording of plat prior to conveyance of property as rendering sale void or voidable, 77 A.L.R.3d 1058.

62 C.J.S. Municipal Corporations § 83.

47-5-4. [Conditions affecting use or occupancy of subdivided land; written disclosure prior to sale.]

It shall be unlawful to sell or lease until there has been disclosed in writing to the purchaser or lessee of a lot or parcel in the subdivided land, the following:

A. all restrictions or reservations of record which subject the subdivided land to any unusual conditions affecting its use or occupancy;

B. the fact that any street or road facilities have not been accepted for maintenance by a governmental agency when such is the case;

C. availability of public utilities in the subdivision including water, electricity, gas and telephone facilities;

D. if water is available only from subterranean sources the average depth of such water within the subdivision;

E. the complete price and financing terms or rental; and

F. the existence of blanket encumbrances, if any, on such subdivision, unless such blanket encumbrances provide for a proper release or subordination of said blanket encumbrances to such lot or parcel.

History: 1953 Comp., § 70-3-4, enacted by Laws 1963, ch. 217, § 4.

ANNOTATIONS

Acceptance is prerequisite to obligation to maintain. — The specific requirement of disclosure to a buyer regarding whether the county has accepted subdivision roads for maintenance confirms that the legislature intended county acceptance of roads for maintenance to be a prerequisite to a county obligation to maintain the subdivision roads. *McGarry v. Scott*, 2003-NMSC-016, 134 N.M. 32, 72 P.3d 608.

Statement that subdivider does not know average depth of subterranean water is not in compliance with the mandate of Subdivision D. 1964 Op. Att'y Gen. No. 64-05.

Expert opinion on water depth more appropriate than subdivider's drilling experience. — In order to comply with Subdivision D, the opinion of a qualified expert such as a qualified groundwater hydrologist would be more appropriate than the estimate of the subdivider based on the actual drilling of a well. 1964 Op. Att'y Gen. No. 64-05.

Law reviews. — For note, "Subdivision Planning Through Water Regulation in New Mexico," see 12 Nat. Res. J. 286 (1972).

For note, "Need for a Federal Policy in Indian Economic Development," see 2 N.M.L. Rev. 71 (1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 83 Am. Jur. 2d Zoning and Planning §§ 518 to 520.

Enforceability, by landowner, of subdivision developer's oral promise to construct or improve roads, 41 A.L.R.4th 573.

Waiver of right to enforce restrictive covenant by failure to object to other violations, 25 A.L.R.5th 123.

Laches or delay in bringing suit as affecting right to enforce restrictive building covenant, 25 A.L.R.5th 233.

91 C.J.S. Vendor and Purchaser § 65.

47-5-5. Advertising standards.

Brochures, publications and advertising of any form relating to subdivided land shall:

A. not misrepresent or contain false or misleading statements of fact;

B. not describe deeds, title insurance or other items included in a transaction as "free," and shall not state that any lot or parcel is "free" or given as an "award" or "prize" if any consideration is required for any reason;

C. not describe lots or parcels available for "closing costs only" or similar terms unless all such costs are accurately and completely itemized or when additional lots must be purchased at a higher price;

D. not include an asterisk or other reference symbol as a means of contradicting or substantially changing any statement;

E. disclose that individual lots or parcels are not identifiable when such is the case;

F. if illustrations of the subdivision are used, accurately portray the subdivision in its present state, and if illustrations are used portraying points of interest outside the subdivision, state the actual road miles from the subdivision;

G. not contain artists' conceptions of the subdivision or any facilities within it unless clearly described as such, and shall not contain maps unless accurately drawn to scale and the scale indicated;

H. not contain references to any facilities, points of interest or municipalities located outside the subdivision unless the distances from the subdivision are stated in the advertisement in actual road miles.

History: 1953 Comp., § 70-3-5, enacted by Laws 1963, ch. 217, § 5.

ANNOTATIONS

Cross references. — For Real Estate Disclosure Act, *see* 47-13-1 NMSA 1978 et seq.

Law reviews. — For note, "Subdivision Planning Through Water Regulation in New Mexico," see 12 Nat. Res. J. 286 (1972).

For note, "Need for a Federal Policy in Indian Economic Development," see 2 N.M.L. Rev. 71 (1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 12 Am. Jur. 2d Brokers § 20.

Validity, construction and application of statutes or ordinances directed against false or fraudulent statements in advertisements, 89 A.L.R. 1004.

35 C.J.S. False Pretenses § 30.

47-5-6. Fraud; penalty.

Any officer, agent or employee of any firm or corporation, or any other person who knowingly authorizes or assists in the publication, advertising, distribution or circulation of any false statement or representation concerning any subdivided land offered for sale or lease, and any person, firm or corporation who, with knowledge that any written statement relating to the subdivided land is false or fraudulent, issues, circulates, publishes or distributes it in this state, is guilty of a felony and shall be puinshed [punished] by imprisonment for not more than five years, or by a fine of not more than one hundred thousand dollars ($100,000), or both.

History: 1953 Comp., § 70-3-6, enacted by Laws 1963, ch. 217, § 6.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 77 Am. Jur. 2d Vendor and Purchaser § 2.

Validity, construction and application of statutes or ordinances directed against false or fraudulent statements in advertisements, 89 A.L.R. 1004.

What constitutes false, misleading or deceptive advertising or promotional practices subject to action by Federal Trade Commission, 65 A.L.R.2d 225, 34 A.L.R. Fed. 507.

35 C.J.S. False Pretenses §§ 30, 49; 37 C.J.S. Fraud § 154.

47-5-7. Other violations; penalty.

A. It is unlawful to:

(1) willfully violate or fail to comply with any provisions of the Land Subdivision Act; or

(2) advertise or publish, or assist in advertising and publishing in this state the sale or lease of any lot or parcel of subdivided land located in another state, territory or foreign country unless the advertisement or publication complies with the requirements of the Land Subdivision Act with respect to subdivisions located in this state.

B. Any person, firm or corporation violating any provision of this section is guilty of a misdemeanor and shall be punished by a fine of not more than one hundred thousand dollars ($100,000).

History: 1953 Comp., § 70-3-7, enacted by Laws 1963, ch. 217, § 7.

ANNOTATIONS

Refusal to bring criminal charges. — So long as the district attorney acts in good faith and not arbitrarily, he may refuse to bring criminal charges for violation of the Land Subdivision Act. 1964 Op. Att'y Gen. No. 64-05.

47-5-8. [Injunction.]

Whenever the attorney general of the state of New Mexico or any district attorney of a judicial district of the state of New Mexico, after a complaint has been filed by any individual alleging injury hereunder, or upon his own initiative, after investigation made, believes any officer, agent or employee of any firm or corporation or other person is knowingly violating or authorizing violation of any part of this act [47-5-1 to 47-5-8 NMSA 1978], he shall bring an action to enjoin the violation in any district court regardless of whether criminal charges are filed.

History: 1953 Comp., § 70-3-8, enacted by Laws 1963, ch. 217, § 8.

ANNOTATIONS

Compiler's notes. — For refusal to bring criminal charges, *see* same catchline in notes to 47-5-7 NMSA 1978.

Enjoining violation of the Land Subdivision Act appears to be mandatory. 1964 Op. Att'y Gen. No. 64-05.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 42 Am. Jur. 2d Injunctions §§ 23, 38, 296.

Jurisdiction, at the instance of governmental agency, to enjoin an act amounting to a crime, 40 A.L.R. 1145, 91 A.L.R. 315.

43A C.J.S. Injunctions § 133.

47-5-9. Application.

The Land Subdivision Act applies to all subdivisions except where the subdivision is located within a county for which subdivision regulations have been adopted as provided in the New Mexico Subdivision Act [Chapter 47, Article 6 NMSA 1978].

History: 1953 Comp., § 70-3-9, enacted by Laws 1973, ch. 348, § 37.

ANNOTATIONS

Repeals and reenactments. — Laws 1973, ch. 348, § 37, repealed 70-3-9, 1953 Comp., relating to applicability of the Land Subdivision Act, and enacted the above section.

Compliance required for land presently offered for sale or lease. — This section requires compliance only from those owners or subdividers of subdivided land presently being offered for sale or lease. 1964 Op. Att'y Gen. No. 64-05.

Where a subdivision was completed and all lots were sold before the effective date of the Land Subdivision Act, the owner or subdivider does not have to comply with the act. 1964 Op. Att'y Gen. No. 64-05.

Number of parcels — The Land Subdivision Act applies to those situations where the land was divided into 25 or more parcels before the effective date of the act and portions of it were being offered for sale or lease at the time of the effective date of the act. 1964 Op. Att'y Gen. No. 64-05.

Law reviews. — For note, "Gabaldon v. Sanchez: New Developments in the Law of Nuisance, Negligence and Trespass," see 9 N.M.L. Rev. 367 (1979).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations § 102.

ARTICLE 6
County Subdivisions

47-6-1. Short title.

Chapter 47, Article 6 NMSA 1978 may be cited as the "New Mexico Subdivision Act".

History: 1953 Comp., § 70-5-1, enacted by Laws 1973, ch. 348, § 1; 1995, ch. 212, § 1.

ANNOTATIONS

Cross references. — For Land Subdivision Act, *see* 47-5-1 to 47-5-8 NMSA 1978.

The 1995 amendment, effective July 1, 1996, substituted "Chapter 47, Article 6, NMSA 1978" for "Sections 1 through 30 and Sections 37 and 42 of this act".

Strict construction. — The subdivision statute is an enactment in derogation of the common law constituting restrictions upon the free use of property and must be strictly construed against the state in its attempt to enforce the statute. *State v. Heck*, 1991-NMCA-076, 112 N.M. 513, 817 P.2d 247.

Article was not designed to protect landowners owning land adjoining land being subdivided. *Gabaldon v. Sanchez*, 1978-NMCA-103, 92 N.M. 224, 585 P.2d 1105.

Plat approval a ministerial act under prior law. — Before the passage of the New Mexico Subdivision Act, the board of county commissioners had nothing to do but the ministerial act of endorsing its approval on plats which complied with all statutory requirements for rural subdivisions, and mandamus was a proper remedy when it refused to do so. *El Dorado at Santa Fe, Inc. v. Board of Cnty. Comm'rs*, 1976-NMSC-029, 89 N.M. 313, 551 P.2d 1360.

Tracts forming part of the same land area. — Tracts need not be contiguous to form part of the same area of land for purposes of the New Mexico Subdivision Act. Physical distances, common streets and utilities, and historical unity are considerations that might be evaluated in an appropriate case. *State v. Heck*, 1991-NMCA-076, 112 N.M. 513, 817 P.2d 247.

Effect of city's summary approval of subdivision plans. — Summary approval of subdivision plans by the city of Las Cruces did not obviate the need for compliance with the New Mexico Subdivision Act and approval by the Dona Ana County board of commissioners. *State v. Heck*, 1991-NMCA-076, 112 N.M. 513, 817 P.2d 247.

Purchasers defaulting on agreements. — The fact that certain purchasers defaulted on their agreements did not change the fact that the act of subdividing land for the purpose of sale triggered the New Mexico Subdivision Act. *State v. Heck*, 1991-NMCA-076, 112 N.M. 513, 817 P.2d 247.

Sufficient evidence to support finding of violation. *State ex rel. Stratton v. Alto Land & Cattle Co.*, 1991-NMCA-146, 113 N.M. 276, 824 P.2d 1078.

Law reviews. — For note, "State Securities Law: A Valuable Tool for Regulating Investment Land Sales," see 7 N.M.L. Rev. 265 (1977).

For note, "Gabaldon v. Sanchez: New Developments in the Law of Nuisance, Negligence and Trespass," see 9 N.M.L. Rev. 367 (1979).

For annual survey of New Mexico law relating to property, see 12 N.M.L. Rev. 459 (1982).

For note, "Definitional Loopholes Limit New Mexico Counties' Authority to Regulate Subdivisions," see 24 Nat. Res. J. 1083 (1984).

For article, "Memories and Miracles Housing the Rural Poor along the United States-Mexico Border: A Comparative Discussion of Colonia Formation and Remediation in El Paso County, Texas, and Dona Ana County, New Mexico," see 27 N.M.L. Rev. 33 (1997).

For article, "Rural Development Considerations for Growth Management," see 43 Nat. Res. J. 781 (2003).

47-6-2. Definitions.

As used in the New Mexico Subdivision Act:

A. "board of county commissioners" means the governing board of a county;

B. "common promotional plan" means a plan or scheme of operation, undertaken by a single subdivider or a group of subdividers acting in concert, to offer for sale or lease parcels of land where the land is either contiguous or part of the same area of land or is known, designated or advertised as a common unit or by a common name;

C. "final plat" means a map, chart, survey, plan or replat certified by a licensed, registered land surveyor containing a description of the subdivided land with ties to permanent monuments prepared in a form suitable for filing of record;

D. "immediate family member" means a husband, wife, father, stepfather, mother, stepmother, brother, stepbrother, sister, stepsister, son, stepson, daughter, stepdaughter, grandson, stepgrandson, granddaughter, stepgranddaughter, nephew and niece, whether related by natural birth or adoption;

E. "Indian nation, tribe or pueblo" means any federally recognized Indian nation, tribe or pueblo located wholly or partially in New Mexico;

F. "lease" means to lease or offer to lease land;

G. "parcel" means land capable of being described by location and boundaries and not dedicated for public or common use;

H. "person" means any individual, estate, trust, receiver, cooperative association, club, corporation, company, firm, partnership, joint venture, syndicate or other entity;

I. "preliminary plat" means a map of a proposed subdivision showing the character and proposed layout of the subdivision and the existing conditions in and around it, and need not be based upon an accurate and detailed survey of the land;

J. "sell" means to sell or offer to sell land;

K. "subdivide" means to divide a surface area of land into a subdivision;

L. "subdivider" means any person who creates or who has created a subdivision individually or as part of a common promotional plan or any person engaged in the sale, lease or other conveyance of subdivided land; however, "subdivider" does not include any duly licensed real estate broker or salesperson acting on another's account;

M. "subdivision" means the division of a surface area of land, including land within a previously approved subdivision, into two or more parcels for the purpose of sale, lease or other conveyance or for building development, whether immediate or future; but "subdivision" does not include:

(1) the sale, lease or other conveyance of any parcel that is thirty-five acres or larger in size within any twelve-month period; provided that the land has been used primarily and continuously for agricultural purposes, in accordance with Section 7-36-20 NMSA 1978, for the preceding three years;

(2) the sale or lease of apartments, offices, stores or similar space within a building;

(3) the division of land within the boundaries of a municipality;

(4) the division of land in which only gas, oil, mineral or water rights are severed from the surface ownership of the land;

(5) the division of land created by court order where the order creates no more than one parcel per party;

(6) the division of land for grazing or farming activities; provided the land continues to be used for grazing or farming activities;

(7) the division of land resulting only in the alteration of parcel boundaries where parcels are altered for the purpose of increasing or reducing the size of contiguous parcels and where the number of parcels is not increased;

(8) the division of land to create burial plots in a cemetery;

(9) the division of land to create a parcel that is sold or donated as a gift to an immediate family member; however, this exception shall be limited to allow the seller or

donor to sell or give no more than one parcel per tract of land per immediate family member;

(10) the division of land created to provide security for mortgages, liens or deeds of trust; provided that the division of land is not the result of a seller-financed transaction;

(11) the sale, lease or other conveyance of land that creates no parcel smaller than one hundred forty acres;

(12) the division of land to create a parcel that is donated to any trust or nonprofit corporation granted an exemption from federal income tax, as described in Section 501(c)(3) of the United States Internal Revenue Code of 1986, as amended; school, college or other institution with a defined curriculum and a student body and faculty that conducts classes on a regular basis; or church or group organized for the purpose of divine worship, religious teaching or other specifically religious activity; or

(13) the division of a tract of land into two parcels that conform with applicable zoning ordinances; provided that a second or subsequent division of either of the two parcels within five years of the date of the division of the original tract of land shall be subject to the provisions of the New Mexico Subdivision Act; provided further that a survey, and a deed if a parcel is subsequently conveyed, shall be filed with the county clerk indicating that the parcel shall be subject to the provisions of the New Mexico Subdivision Act if the parcel is further divided within five years of the date of the division of the original tract of land;

N. "terrain management" means the control of floods, drainage and erosion and measures required for adapting proposed development to existing soil characteristics and topography;

O. "time of purchase, lease or other conveyance" means the time of signing any document obligating the person signing the document to purchase, lease or otherwise acquire a legal interest in land;

P. "type-one subdivision" means any subdivision containing five hundred or more parcels, any one of which is less than ten acres in size;

Q. "type-two subdivision" means any subdivision containing not fewer than twenty-five but not more than four hundred ninety-nine parcels, any one of which is less than ten acres in size;

R. "type-three subdivision" means any subdivision containing not more than twenty-four parcels, any one of which is less than ten acres in size;

S. "type-four subdivision" means any subdivision containing twenty-five or more parcels, each of which is ten acres or more in size; and

T. "type-five subdivision" means any subdivision containing not more than twenty-four parcels, each of which is ten acres or more in size.

History: 1953 Comp., § 70-5-2, enacted by Laws 1973, ch. 348, § 2; 1979, ch. 172, § 1; 1981, ch. 148, § 1; 1995, ch. 212, § 2; 2005, ch. 139, § 1; 2009, ch. 65, § 1; 2013, ch. 96, § 1.

ANNOTATIONS

The 2013 amendment, effective June 14, 2013, clarified an exception to the definition of "subdivision", deleted former Paragraph 13 of Subsection M, which excepted the conveyance of a single tract of land within a five-year period; and added Paragraph (13) of Subsection M.

The 2009 amendment, effective June 19, 2009, added Subsection E.

The 2005 amendment, effective June 17, 2005, added a definition of "board of county commissioners", moved the definition of "common promotional plan" in former Subsection M to Subsection B and moved the definition of "final plat" in former Subsection E to Subsection C.

The 1995 amendment, effective July 1, 1996, rewrote the section to such an extent that a detailed comparison would be impracticable.

Family transfer. — Where a partnership of two families divided eighty acres into four twenty-acre parcels and deeded two twenty-acre parcels to each family; each husband then deeded to his wife one twenty-acre tract; the parties then filed a family transfer application pursuant to the Santa Fe County Land Development Code to allow each landowner to deed his or her spouse one-half of each twenty-acre parcel which, if approved, would have resulted in eight ten-acre lots with each lot separately owned by one of the landowners; the Code provided for minimum lot size family transfers and for small lot family transfers; the minimum lot size family transfer provisions had no intent or purpose requirements; the small lot family transfer provisions provided that the purpose of the small lot family transfer was to maintain local cultural values by perpetuating and protecting a traditional method of land transfer within families and imposed requirements to achieve that purpose; and the County Development Review Board denied the landowners' minimum size lot family transfer application on the ground that the transfer did not meet the intent and purpose of the small lot family transfer provisions of the Code, the Board's decision was unreasonable and unlawful. *Kirkpatrick v. Santa Fe Cnty. Bd. of Comm'rs*, 2009-NMCA-110, 147 N.M. 127, 217 P.3d 613.

Mobile home park. — Mobile home park project was a "subdivision" as contemplated by the county's planning and platting ordinance, the New Mexico Subdivision Act, and the village's subdivision ordinances. *Sandoval Cnty. Bd. of Comm'rs v. Ruiz*, 1995-NMCA-023, 119 N.M. 586, 893 P.2d 482.

Mere division of land is not subdivision: there must be proof that at some time prior to alienation, there has been a division of one parcel into five or more, and that the dividing was done so that the smaller parcels could be sold or leased. *State ex rel. Anaya v. Select W. Lands, Inc.*, 1979-NMCA-161, 94 N.M. 555, 613 P.2d 425, cert. quashed, 94 N.M. 675, 615 P.2d 992 (1980).

Owner must manifest fact of division before parcels offered for sale. — The owner must manifest by some overt conduct a clear indication that a division has already taken place before the parcels are offered for sale. *State ex rel. Anaya v. Select W. Lands, Inc.*, 1979-NMCA-161, 94 N.M. 555, 613 P.2d 425, cert. quashed, 94 N.M. 675, 615 P.2d 992 (1980).

Division of lot into two lots was "subdivision". — Seller's division of twenty-acre plot into two ten-acre plots, although allegedly made in order to help buyer acquire financing, was nonetheless a "subdivision" of the property; because seller, as a result, had subdivided the land five times in three years, seller became a "subdivider" within the meaning of former Subsection I, and was therefore subject under this act to the state's action for costs of platting and basic infrastructure. *State ex rel. Udall v. Cresswell*, 1998-NMCA-072, 125 N.M. 276, 960 P.2d 818, cert. denied, 125 N.M. 147, 958 P.2d 105.

Order not authorized. — Order obtained by attorney general compelling performance by defendant subdividers of a duty that the Act imposes only on a subdivider of a larger subdivision was not authorized under the Act. *State ex rel. Stratton v. Alto Land & Cattle Co.*, 1991-NMCA-146, 113 N.M. 276, 824 P.2d 1078.

County subdivision ordinance applies to RV parks. — New Mexico courts have held that a mobile home park is a subdivision as contemplated by the New Mexico Subdivision Act, 47-6-1 to 47-6-29 NMSA 1978, and other states that have considered the issue have similarly concluded that RV parks and mobile home communities constitute subdivisions; the definition of a "subdivision" in the Eddy County Subdivision Ordinance is almost identical to the one found in the New Mexico Subdivision Act, and therefore the Eddy county subdivision ordinance applies to RV parks and man camps where spaces are leased to members of the public. *Applicability of the Eddy County Subdivision Ordinance to RV Parks or Man Camps* (11/30/2022), Att'y Gen. Adv. Ltr. 2022-09.

Party dividing land need not own the land outright in fee simple in order to be subdivider; he need only be creating a subdivision. 1978 Op. Att'y Gen. No. 78-19.

Subdivider includes purchaser under executory real estate contract. — The definition of a "subdivider" includes an individual who is a purchaser under an executory real estate contract which provides for rescission or forfeiture for a breach of certain covenants. 1978 Op. Att'y Gen. No. 78-19.

When resubdivision must comply with current subdivision standards. — The later resubdivision or alteration of or amendment to pre-1973 subdivisions must comply with the new, current subdivision standards if such resubdivision activity substantially affects the new regulated areas of concern which are addressed by the new 1973 New Mexico Subdivision Act (i.e., sufficiency of water, quality of water, roads, etc.). 1982 Op. Att'y Gen. No. 82-11.

If the county commission determines that amendments to a pre-1973 plat are merely minor adjustments of boundaries, the amendments fall within the scope of the Subsection I(7) exemption, and no reevaluation under the 1973 New Mexico Subdivision Act is triggered. If the commission concludes, on the other hand, that the plat amendments constitute a major revision of the original subdivision, the 1973 standards apply. In either event, the county commission must examine the proposed amendments to the old plats to make such a determination. 1982 Op. Att'y Gen. No. 82-11.

If proposed alterations to a pre-1973 subdivision involve a wholesale vacating of an entire platted area and subsequent transfer of those vacated lots into a previously unplatted area, such resubdivision efforts rise to the level of an entirely new subdivision which would require the subdivider to apply for subdivision approval under the 1973 New Mexico Subdivision Act as a "new" subdivision. 1982 Op. Att'y Gen. No. 82-11.

Division of lot into four lots not "subdivision". — The division of a lot in an approved subdivision into four or fewer lots by a purchaser does not constitute a "subdivision" under the New Mexico Subdivision Act. 1982 Op. Att'y Gen. No. 82-04.

Division of land upon dissolution of partnership not a subdivision. — A partnership of two individuals subdivided and sold four parcels from within an original tract and retained ownership over the remaining acreage in the name of the partnership. Thereafter the partnership dissolved and the remaining property was divided between the two former partners through an exchange of quit claim deeds. The existing divisions and sales do not now constitute a "subdivision" within the meaning of the act. Only four parcels have been subdivided and sold. Although a further division took place into two parcels upon dissolution of the partnership, such a subdivision would not be for the purpose of sale or lease so long as the parcels are retained by the owners of the original tract. 1977 Op. Att'y Gen. No. 77-22.

Partnership's subdivisions are added to subsequent individual transfers. — However, if either former partner subdivides and sells or leases one more parcel from within the original tract, the entire tract would become a "subdivision" within the meaning of this section. 1977 Op. Att'y Gen. No. 77-22.

County cannot extend "subdivision" time limit beyond three years. — Since this section sets forth a three-year time limit, a county commission cannot, by regulation, extend the definition of "subdivision" to divisions of land over five years. 1981 Op. Att'y Gen. No. 81-02.

47-6-3. Final plat; description.

A. Any person desiring to subdivide land shall have a final plat of the proposed subdivision certified by a surveyor registered in New Mexico. The final plat shall:

(1) define the subdivision and all roads by reference to permanent monuments;

(2) accurately describe legal access to, roads to and utility easements for each parcel, and if the access or easements are based upon an agreement, the recording data in the land records for the agreement;

(3) number each parcel in progression, give its dimensions and the dimensions of all land dedicated for public use or for the use of the owners of parcels fronting or adjacent to the land; and

(4) delineate those portions of the subdivision that are located in a flood plain.

B. Descriptions of parcels by number and plat designation are valid in conveyances and valid for the purpose of taxation.

History: 1953 Comp., § 70-5-3, enacted by Laws 1973, ch. 348, § 3; 1995, ch. 212, § 3.

ANNOTATIONS

The 1995 amendment, effective July 1, 1996, substituted "Final plat" for "Subdivision" in the section heading; added the subsection and paragraph designations; in Subsection A, substituted "final plat" for "plat" in two places in the introductory paragraph, substituted the language beginning "legal access to" for "each parcel" at the end of Paragraph (2), added Paragraph (4) and made related and minor stylistic changes.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 83 Am. Jur. 2d Zoning and Planning §§ 521 to 527.

91 C.J.S. Vendor and Purchaser § 39.

47-6-4. Final plat acknowledgment; affidavit.

Every final plat shall contain a statement that the land being subdivided is subdivided in accordance with the final plat. The final plat shall be acknowledged by the owner and subdivider or their authorized agents in the manner required for the acknowledgment of deeds. Every final plat submitted to the county clerk shall be accompanied by an affidavit of the owner and subdivider or their authorized agents stating whether or not the proposed subdivision lies within the subdivision regulation jurisdiction of the county. A copy of the final plat shall be provided to every purchaser,

lessee or other person acquiring an interest in the subdivided land prior to sale, lease or other conveyance.

History: 1953 Comp., § 70-5-4, enacted by Laws 1973, ch. 348, § 4; 1995, ch. 212, § 4.

ANNOTATIONS

The 1995 amendment, effective July 1, 1996, substituted "Final plat" for "Plat" in the section heading and "final plat" for "plat" throughout the section; substituted "final plat" for "desire of the owner of the land" at the end of the first sentence; substituted "subdivider" for "owner" in the second and third sentences; and added the final sentence.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 83 Am. Jur. 2d Zoning and Planning §§ 529 to 534, 546 to 574.

62 C.J.S. Municipal Corporations § 83.

47-6-5. Dedication for public use; maintenance.

The final plat shall contain a certificate stating that the board of county commissioners accepted, accepted subject to improvement or rejected, on behalf of the public, any land offered for dedication for public use in conformity with the terms of the offer of dedication. Upon full conformance with the county road construction standards, the roads may be accepted for maintenance by the county. Acceptance of offers of dedication on a final plat shall not be effective until the final plat is filed in the office of the county clerk or a resolution of acceptance by the board of county commissioners is filed in such office.

History: 1953 Comp., § 70-5-5, enacted by Laws 1973, ch. 348, § 5; 1981, ch. 148, § 2; 1995, ch. 212, § 5.

ANNOTATIONS

Cross references. — For record of survey requirements, *see* 61-23-28.2 NMSA 1978.

The 1995 amendment, effective July 1, 1996, rewrote the section to such an extent that a detailed comparison would be impracticable.

The 1981 amendment added "maintenance" at the end of the section heading and added the last two sentences in the section.

Formal county acceptance is required under the Subdivision Act to obligate the county for road maintenance and such acceptance cannot be satisfied through the common law doctrines of prescriptive acquisition or implied dedication. *McGarry v. Scott*, 2003-NMSC-016, 134 N.M. 32, 72 P.3d 608.

Public use of a road, school bus routes, and postal service do not establish an acceptance by a county of road maintenance obligations; such acts do not unequivocally show intent to assume jurisdiction, particularly in the face of filed disclosure forms that clearly show county rejection of maintenance obligations. *McGarry v. Scott*, 2003-NMSC-016, 134 N.M. 32, 72 P.3d 608.

The specific requirement under Section 47-5-4 NMSA 1978 of disclosure to a buyer regarding whether the county has accepted subdivision roads for maintenance confirms that the legislature intended county acceptance of roads for maintenance to be a prerequisite to a county obligation to maintain the subdivision roads. *McGarry v. Scott*, 2003-NMSC-016, 134 N.M. 32, 72 P.3d 608.

Specificity of road and road maintenance provisions. — The Subdivision Act deals with the subject of subdivision roads and county road maintenance in a much more detailed way than Sections 67-2-1 and 67-2-2 NMSA 1978; therefore, the Subdivision Act controls over the more general statutes. *McGarry v. Scott*, 2003-NMSC-016, 134 N.M. 32, 72 P.3d 608.

Law reviews. — For annual survey of New Mexico law relating to property, see 12 N.M.L. Rev. 459 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Dedication §§ 30, 43, 44, 47, 48, 60, 61.

Sales of lots with reference to plats as conferring, in absence of effective dedication to public, rights upon others than lots owners in respect to streets shown by plat, 172 A.L.R. 167.

Validity and construction of regulations as to subdivision maps and plats, 11 A.L.R.2d 524.

26 C.J.S. Dedication §§ 26, 40.

47-6-6. Filing with county clerk; duties of county clerk.

The county clerk shall not accept for filing any final plat subject to the New Mexico Subdivision Act that has not been approved as provided in the New Mexico Subdivision Act. Whenever separate documents are to be recorded concurrently with the final plat, the county clerk shall cross-reference such documents. Preliminary plats shall not be filed with the county clerk.

History: 1953 Comp., § 70-5-6, enacted by Laws 1973, ch. 348, § 6; 1979, ch. 172, § 2; 1995, ch. 212, § 6.

ANNOTATIONS

The 1995 amendment, effective July 1, 1996, rewrote the section to such an extent that a detailed comparison would be impracticable.

Duties of clerk. — A county clerk's authority to conduct a substantive review of the contents of a survey plat is limited to the threshold question of whether a plat accomplishes a subdivision of land. *Valdez v. Vigil*, 2007-NMCA-031, 141 N.M. 316, 154 P.3d 691, cert. denied, 2006-NMCERT-011, 140 N.M. 846, 149 P.3d 943.

Law reviews. — For note, "Definitional Loopholes Limit New Mexico Counties' Authority to Regulate Subdivisions," see 24 Nat. Res. J. 1083 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Dedication §§ 26, 27, 37, 38, 40.

26 C.J.S. Dedication § 22.

47-6-7. Vacation of plats; approval; duties of county clerk; effect.

A. Any final plat filed in the office of the county clerk may be vacated or a portion of the final plat may be vacated if:

(1) the owners of the land proposed to be vacated sign an acknowledged statement, declaring the final plat or a portion of the final plat to be vacated; and

(2) the statement is approved by the board of county commissioners of the county within whose platting authority the vacated portion of the subdivision is located.

B. In approving the vacation of all or a part of a final plat, the board of county commissioners shall determine whether or not the vacation will adversely affect the interests of persons on contiguous land or persons within the subdivision being vacated. In approving the vacation of all or a portion of a final plat, the board of county commissioners may require that streets dedicated to the county in the final plat continue to be dedicated to the county. The owners of parcels on the vacated portion of the final plat may enclose in equal proportions the adjoining streets and alleys that are authorized to be abandoned.

C. The approved statement declaring the vacation of a portion or all of a final plat shall be filed in the office of the county clerk in which the final plat is filed. The county clerk shall mark the final plat with the words "Vacated" or "Partially Vacated" and refer on the final plat to the volume and page on which the statement of vacation is recorded.

D. The rights of any utility existing prior to the vacation, total or partial, of any final plat are not affected by the vacation of a final plat.

History: 1953 Comp., § 70-5-7, enacted by Laws 1973, ch. 348, § 7; 1995, ch. 212, § 7.

ANNOTATIONS

The 1995 amendment, effective July 1, 1996, substituted "final plat" for "plat" throughout the section; substituted "final plat" for "original plat" in the second sentence of Subsection B and in two places in Subsection C; substituted "parcels" for "lot" in the third sentence of Subsection B; and made minor stylistic changes.

Law reviews. — For note, "Gabaldon v. Sanchez: New Developments in the Law of Nuisance, Negligence and Trespass," see 9 N.M.L. Rev. 367 (1979).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 62 C.J.S. Municipal Corporations § 84.

47-6-8. Requirements prior to sale, lease or other conveyance.

It is unlawful to sell, lease or otherwise convey land within a subdivision before the following conditions have been met:

A. the final plat has been approved by the board of county commissioners and has been filed with the clerk of the county in which the subdivision is located. Where a subdivision lies within more than one county, the final plat shall be approved by the board of county commissioners of each county in which the subdivision is located and shall be filed with the county clerk of each county in which the subdivision is located;

B. the subdivider has furnished the board of county commissioners a sample copy of his sales contracts, leases and any other documents that will be used to convey an interest in the subdivided land; and

C. all corners of all parcels and blocks within a subdivision have been permanently marked with metal stakes in the ground and a reference stake placed beside one corner of each parcel.

History: 1953 Comp., § 70-5-8, enacted by Laws 1973, ch. 348, § 8; 1995, ch. 212, § 8.

ANNOTATIONS

The 1995 amendment, effective July 1, 1996, added "or other conveyance" at the end of the section heading; inserted "or otherwise convey" and "before the following conditions have been met" in the introductory paragraph; substituted "final plat" for "subdivision plat" in two places in Subsection A; in Subsection B, deleted "It is unlawful to sell or lease land in a type-one, type-two or type-four subdivision until" at the beginning and inserted "sample"; deleted "Prior to the sale or lease of any parcel within a type-one, type-two or type-four subdivision by a subdivider in the ordinary course of business" at the beginning in Subsection C; and made related and other stylistic changes.

Individual, sporadic sales of less than five parcels not subdivision. — Sales of individual parcels from large tract, on a sporadic and spontaneous basis, never resulting in a division of the remaining tract into five or more parcels at any given time, is not included in the definition of "subdivision." *State ex rel. Anaya v. Select W. Lands, Inc.*, 1979-NMCA-161, 94 N.M. 555, 613 P.2d 425 (Ct. App. 1979), cert. quashed, 94 N.M. 675, 615 P.2d 992.

Landowner not subject to criminal sanctions. — A landowner would not be subject to criminal sanctions as a subdivider if, over the entire period of his lifetime, he sold off five or more smaller portions of his much larger ranch holdings to neighboring ranchers or to persons seeking isolated retreats, because such an interpretation gives no effect whatever to the exception of retained land from the classification of subdivision lands. *State ex rel. Anaya v. Select W. Lands, Inc.*, 1979-NMCA-161, 94 N.M. 555, 613 P.2d 425 (Ct. App. 1979), cert. quashed, 94 N.M. 675, 615 P.2d 992.

Purpose of subdivision laws in general, and the 1973 New Mexico Subdivision Act in particular, is to guide land development through the power to withhold the privilege of filing subdivision plats and amendments thereto that do not conform to the established and current minimum requirements and standards. 1982 Op. Att'y Gen. No. 82-11.

Law reviews. — For note, "Gabaldon v. Sanchez: New Developments in the Law of Nuisance, Negligence and Trespass," see 9 N.M.L. Rev. 367 (1979).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 83 Am. Jur. 2d Zoning and Planning §§ 529 to 535, 540, 546 to 574, 1026.

Failure of vendor to comply with statute or ordinance requiring approval or recording of plat prior to conveyance of property as rendering sale void or voidable, 77 A.L.R.3d 1058.

62 C.J.S. Municipal Corporations § 83.

47-6-9. Subdivision regulation; county authority.

A. The board of county commissioners of each county shall regulate subdivisions within the county's boundaries. In regulating subdivisions, the board of county commissioners of each county shall adopt regulations setting forth the county's requirements for:

(1) preliminary and final subdivision plats, including their content and format;

(2) quantifying the maximum annual water requirements of subdivisions, including water for indoor and outdoor domestic uses;

(3) assessing water availability to meet the maximum annual water requirements of subdivisions;

(4) water conservation measures;

(5) water of an acceptable quality for human consumption and for protecting the water supply from contamination;

(6) liquid waste disposal;

(7) solid waste disposal;

(8) legal access to each parcel;

(9) sufficient and adequate roads to each parcel, including ingress and egress for emergency vehicles;

(10) utility easements to each parcel;

(11) terrain management;

(12) phased development;

(13) protecting cultural properties, archaeological sites and unmarked burials, as required by the Cultural Properties Act [18-6-1 to 18-6-17 NMSA 1978];

(14) specific information to be contained in a subdivider's disclosure statement in addition to that required in Section 47-6-17 NMSA 1978;

(15) reasonable fees approximating the cost to the county of determining compliance with the New Mexico Subdivision Act and county subdivision regulations while passing upon subdivision plats;

(16) a summary procedure for reviewing certain type-three and all type-five subdivisions as provided in Section 47-6-11 NMSA 1978;

(17) recording all conveyances of parcels with the county clerk;

(18) financial security to assure the completion of all improvements that the subdivider proposes to build or to maintain;

(19) fencing subdivided land, where appropriate, in conformity with Section 77-16-1 NMSA 1978, which places the duty on the purchaser, lessee or other person acquiring an interest in the subdivided land to fence out livestock; and

(20) any other matter relating to subdivisions that the board of county commissioners feels is necessary to promote health, safety or the general welfare.

B. Subsection A of this section does not preempt the authority of any state agency to regulate or perform any activity that it is required or authorized by law to perform.

C. Nothing in the New Mexico Subdivision Act shall be construed to limit the authority of counties to adopt subdivision regulations with requirements that are more stringent than the requirements set forth in the New Mexico Subdivision Act, provided that:

(1) the county has adopted a comprehensive plan in accordance with Section 3-21-5 NMSA 1978;

(2) the comprehensive plan contains goals, objectives and policies that identify and explain the need for requirements that are more stringent; and

(3) the more stringent regulations are specifically identified in the comprehensive plan.

D. The board of county commissioners of a class A county with a population according to the most recent federal decennial census of greater than three hundred thousand may delegate the authority to review and approve preliminary plats and final plats to a county administrative officer or to the planning commission; provided that the delegation complies with the public hearing requirements contained in Section 47-6-14 NMSA 1978.

History: 1953 Comp., § 70-5-9, enacted by Laws 1973, ch. 348, § 9; 1981, ch. 148, § 3; 1995, ch. 212, § 9; 2003, ch. 322, § 1; 2005, ch. 139, § 2.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, added Subsection D to provide that the board of county commissioners of a class A county with a population greater that three hundred thousand may delegate authority to review and approve plats to an administrative officer or to the planning commission.

The 2003 amendment, effective June 20, 2003, deleted former Subsections C and D, concerning when counties shall adopt regulations pursuant to the section, and redesignated former Subsection E as present Subsection C; rewrote present Subsection C to create present Subsection C and Paragraph C(1) and added Paragraphs C(2) and C(3).

The 1995 amendment, effective July 1, 1996, rewrote the section to such an extent that a detailed comparison would be impracticable.

Formerly, board without power to regulate development. — Prior to enactment of the New Mexico Subdivision Act, the power to adopt, promulgate and enforce subdivision regulations had not been delegated to the board of county commissioners,

and regulations which purported to empower it to order a phased development were utterly void. *El Dorado at Santa Fe, Inc. v. Bd. of Cnty. Comm'rs*, 1976-NMSC-029, 89 N.M. 313, 551 P.2d 1360.

Standards may be broad. — Standards adopted pursuant to the New Mexico Subdivision Act may be broad, general standards, so long as they are capable of reasonable application and are sufficient to limit and define the board's discretionary powers. *Parker v. Bd. of Cnty. Comm'rs*, 1979-NMSC-101, 93 N.M. 641, 603 P.2d 1098.

Effect of noncompliance with plat approval prerequisites. — Where the subdivider fails to meet the conditions he agreed to accomplish and which were required by the county as a prerequisite to plat approval, suspension or revocation of plat approval remain realities for the developer until the subdivider complies with the reasonable conditions imposed by the county within its authority. *Parker v. Bd. of Cnty. Comm'rs*, 1979-NMSC-101, 93 N.M. 641, 603 P.2d 1098.

When resubdivision must comply with current subdivision standards. — The later resubdivision or alteration of or amendment to pre-1973 subdivisions must comply with the new, current subdivision standards if such resubdivision activity substantially affects the new regulated areas of concern which are addressed by the new 1973 New Mexico Subdivision Act (i.e., sufficiency of water, quality of water, roads, etc.). 1982 Op. Att'y Gen. No. 82-11.

If proposed alterations to a pre-1973 subdivision involve a wholesale vacating of an entire platted area and subsequent transfer of those vacated lots into a previously unplatted area, such resubdivision efforts rise to the level of an entirely new subdivision which would require the subdivider to apply for subdivision approval under the 1973 New Mexico Subdivision Act as a "new" subdivision. 1982 Op. Att'y Gen. No. 82-11.

Duties of county commission relating to plat amendments. — If the county commission determines that amendments to a pre-1973 plat are merely minor adjustments of boundaries, the amendments fall within the scope of the 47-6-2 I(7) NMSA 1978 exemption from the 1973 definition of "subdivision" and no reevaluation under the 1973 New Mexico Subdivision Act is triggered. If the commission concludes, on the other hand, that the plat amendments constitute a major revision of the original subdivision, the 1973 standards apply. In either event, the county commission must examine the proposed amendments to the old plats to make such a determination. 1982 Op. Att'y Gen. No. 82-11.

Selective compliance with current regulations permitted. — The county commission may require compliance, on a selective basis, with only those current subdivision regulations and minimum standards that are, or may be, actually affected by a proposed resubdivision. 1982 Op. Att'y Gen. No. 82-11.

Law reviews. — For note, "*Gabaldon v. Sanchez* : New Developments in the Law of Nuisance, Negligence and Trespass," see 9 N.M.L. Rev. 367 (1979).

For article, "Access to Solar Energy: The Problem and its Current Status," see 22 Nat. Res. J. 21 (1982).

For note, "Definitional Loopholes Limit New Mexico Counties' Authority to Regulate Subdivisions," see 24 Nat. Res. J. 1083 (1984).

For article, "Rural Development Considerations for Growth Management," see 43 Nat. Res. J. 781 (2003).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 83 Am. Jur. 2d Zoning and Planning §§ 518 to 527, 531 to 534, 562 to 574.

Constitutionality, construction, and application of statutes regulating the subdivision or development of land for sale or lease in lots or parcels, 122 A.L.R. 501.

63 C.J.S. Municipal Corporations §§ 1049, 1051, 1061, 1064.

47-6-9.1. Merger of contiguous parcels; prohibition.

A. Contiguous parcels that are owned by a single owner shall not be required by a board of county commissioners to be merged into one parcel if:

(1) each of the contiguous parcels:

(a) is shown on the official plat map of the county; or

(b) was created by a deed or survey recorded with the office of the county clerk;

(2) the chain of title to the contiguous parcels clearly demonstrates that the parcels have been considered separate prior to transfer into common ownership; and

(3) the owner of the contiguous parcels has taken no action to consolidate the parcels.

B. Nothing in this section limits a board of county commissioners, pursuant to notice and public hearing, from requiring consolidation of contiguous parcels in common ownership for the purpose of enforcing minimum zoning or subdivision standards on the parcels.

History: Laws 2003, ch. 326, § 1.

ANNOTATIONS

Effective dates. — Laws 2003, ch. 326 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 20, 2003, 90 days after adjournment of the legislature.

47-6-10. County subdivision regulations; hearings; appeal.

In promulgating subdivision regulations, the board of county commissioners shall adhere to the following procedures.

A. Prior to adopting, amending or repealing any regulation, the board of county commissioners shall consult with representatives of the office of the state engineer, the department of environment, the cultural affairs department, all soil and water conservation districts within the county, the department of transportation and the attorney general about the subjects within their respective expertise for which the board of county commissioners is considering promulgating a regulation. In the process of the consultation, the representatives of each of the state agencies shall give consideration to the conditions peculiar to the county and shall submit written guidelines to the board of county commissioners for its consideration in formulating regulations. The guidelines:

(1) shall be given consideration by the board of county commissioners in the formulation of the county's subdivision regulations;

(2) shall become a part of the record of any hearing in which regulations are adopted, amended or repealed; and

(3) may be in such detail as the agency involved desires.

B. A regulation may not be adopted, amended or repealed until after a public hearing held by the board of county commissioners. Notice of the hearing shall be given at least thirty days prior to the hearing date and shall state:

(1) the subject of the regulation;

(2) the time and place of the hearing;

(3) the manner in which interested persons may present their views; and

(4) the place and manner in which interested persons may secure copies of any proposed regulation. The board of county commissioners may impose a reasonable charge for the costs of reproducing and mailing of the proposed regulations.

C. The notice shall be published in a newspaper of general circulation in the county.

D. Reasonable effort shall be made to give notice to all persons who have made a written request to the board of county commissioners for advance notice of its hearings.

E. The board of county commissioners shall give the state engineer, the department of environment, the cultural affairs department, the department of transportation, all soil and water conservation districts within the county and the attorney general thirty days' notice of its regulation hearings.

F. At the hearing, the board of county commissioners shall allow all interested persons reasonable opportunity to submit data, views or arguments, orally or in writing, and to examine witnesses testifying at the hearing. The board shall keep a complete record of the hearing proceedings.

G. Representatives from the office of the state engineer, the department of environment, the cultural affairs department, all soil and water conservation districts within the county, the department of transportation and the attorney general shall be given the opportunity to make an oral statement at the hearing and to enter into the record of the hearing a written statement setting forth any comments that they may have about the proposed regulation, whether favorable or unfavorable, when the proposed regulation relates to an issue that is within the agencies' respective areas of expertise.

H. A regulation is not invalid because of the failure of a state agency to submit a guideline prior to the promulgation of the regulation or because the representative of a state agency did not appear at a public hearing on the regulation or did not make any comment for entry in the hearing record.

I. The board of county commissioners shall act on the proposed regulations at the regulation hearings or at a public meeting to be held within thirty days of the hearing on the proposed regulations. Upon adopting, amending or repealing the regulations, the board of county commissioners shall include in the record a short statement setting forth the board's reasoning and the basis of the board's decision, including the facts and circumstances considered and the weight given to those facts and circumstances.

J. Any person heard or represented at the hearing shall be given written notice of the board's decision, including the facts and circumstances considered, if the person makes a written request to the board for notice of its decision.

K. A regulation, amendment or repeal is not effective until thirty days after it is filed with the county clerk.

L. Any person who is or may be adversely affected by a decision of the board of county commissioners to adopt, amend or repeal a regulation may appeal that decision to the district court. All appeals shall be upon the record made at the hearing and shall be filed in the district court within thirty days after the board of county commissioners votes to adopt, amend or repeal the regulation.

M. An appeal is perfected by filing a notice of appeal in the district court of the county that has adopted, amended or repealed the regulation. The appellant shall certify in the notice of appeal that arrangements have been made with the board of

county commissioners for preparation of a sufficient number of transcripts of the record of the hearing to support the appeal, including one copy that the appellant shall furnish at the appellant's own expense to the board of county commissioners. A copy of the notice of appeal shall also be served upon the board of county commissioners.

N. Upon appeal, the district court shall set aside the regulation only if it is found to be:

(1) arbitrary, capricious or an abuse of discretion;

(2) not supported by substantial evidence; or

(3) otherwise not in accordance with law.

O. Any party to the action in district court may appeal to the court of appeals for further relief.

History: 1953 Comp., § 70-5-10, enacted by Laws 1973, ch. 348, § 10; 1977, ch. 253, § 71; 1995, ch. 212, § 10; 2019, ch. 9, § 1.

ANNOTATIONS

Cross references. — For procedures governing administrative appeals to the district court, *see* Rule 1-074 NMRA.

The 2019 amendment, effective July 1, 2019, removed the requirement that county subdivision regulations be filed with the state records administrator, and made certain technical amendments; and in Subsection K, after "county clerk", deleted "and the state records administrator".

The 1995 amendment, effective July 1, 1996, rewrote the section to such an extent that a detailed comparison would be impracticable.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 83 Am. Jur. 2d Zoning and Planning §§ 765, 768, 769, 779, 780, 1026.

Validity and construction of statutory notice requirements prerequisite to adoption or amendment of zoning ordinance or regulation, 96 A.L.R.2d 449.

62 C.J.S. Municipal Corporations §§ 226(11), (12), 228(4).

47-6-11. Preliminary plat approval; summary review.

A. Preliminary plats shall be submitted for type-one, type-two, type-three, except type-three subdivisions that are subject to review under summary procedure as set forth in Subsection I of this section, and type-four subdivisions.

B. Prior to approving the preliminary plat, the board of county commissioners of the county in which the subdivision is located shall require that the subdivider furnish documentation of:

(1) water sufficient in quantity to fulfill the maximum annual water requirements of the subdivision, including water for indoor and outdoor domestic uses;

(2) water of an acceptable quality for human consumption and measures to protect the water supply from contamination;

(3) the means of liquid waste disposal for the subdivision;

(4) the means of solid waste disposal for the subdivision;

(5) satisfactory roads to each parcel, including ingress and egress for emergency vehicles, and utility easements to each parcel;

(6) terrain management to protect against flooding, inadequate drainage and erosion; and

(7) protections for cultural properties, archaeological sites and unmarked burials that may be affected directly by the subdivision, as required by the Cultural Properties Act [18-6-1 to 18-6-17 NMSA 1978].

C. In addition to the requirements of Subsection B of this section, prior to approving the preliminary plat, the board of county commissioners of the county in which the subdivision is located shall:

(1) determine whether the subdivider can fulfill the proposals contained in the subdivider's disclosure statement required by Section 47-6-17 NMSA 1978; and

(2) determine whether the subdivision will conform with the New Mexico Subdivision Act and the county's subdivision regulations.

D. The board of county commissioners shall not approve the preliminary plat if the subdivider cannot reasonably demonstrate that the subdivider can fulfill the requirements of Subsections B and C of this section.

E. Any subdivider submitting a preliminary plat for approval shall submit sufficient information to the board of county commissioners to permit the board to determine whether the subdivider can fulfill the requirements of Subsections B and C of this section.

F. In determining whether a subdivider can fulfill the requirements of Subsections B and C of this section, the board of county commissioners shall, within ten days after the preliminary plat is deemed complete, request opinions from:

(1) the state engineer to determine:

(a) whether the subdivider can furnish water sufficient in quantity to fulfill the maximum annual water requirements of the subdivision, including water for indoor and outdoor domestic uses; and

(b) whether the subdivider can fulfill the proposals in the subdivider's disclosure statement concerning water, excepting water quality;

(2) the department of environment to determine:

(a) whether the subdivider can furnish water of an acceptable quality for human consumption and measures to protect the water supply from contamination in conformity with state regulations promulgated pursuant to the Environmental Improvement Act [Chapter 74, Article 1 NMSA 1978];

(b) whether there are sufficient liquid and solid waste disposal facilities to fulfill the requirements of the subdivision in conformity with state regulations promulgated pursuant to the Environmental Improvement Act, the Water Quality Act [Chapter 74, Article 6 NMSA 1978] and the Solid Waste Act [74-9-1 to 74-9-42 NMSA 1978]; and

(c) whether the subdivider can fulfill the proposals contained in the subdivider's disclosure statement concerning water quality and concerning liquid and solid waste disposal facilities;

(3) the department of transportation to determine whether the subdivider can fulfill the state highway access requirements for the subdivision in conformity with state regulations promulgated pursuant to Section 67-3-16 NMSA 1978;

(4) the soil and water conservation district to determine:

(a) whether the subdivider can furnish terrain management sufficient to protect against flooding, inadequate drainage and erosion; and

(b) whether the subdivider can fulfill the proposals contained in the subdivider's disclosure statement concerning terrain management;

(5) each Indian nation, tribe or pueblo with a historical, cultural or resource tie with the county that submits at least annually, via certified mail, return receipt requested, a written request for notification to the board of county commissioners, which request indicates the Indian nation, tribe or pueblo's historical, cultural or resource tie with the county, its contact information and a listing of the types of documentation required to be submitted by a subdivider to the county that may be necessary for its review to determine:

(a) whether the subdivider can furnish, fulfill or otherwise meet the requirements set forth in Paragraphs (1) through (4) of this subsection; and

(b) how the subdivider's proposed plat may directly affect cultural properties, archaeological sites and unmarked burials; and

(6) such other public agencies as the county deems necessary, such as local school districts and fire districts, to determine whether there are adequate facilities to accommodate the proposed subdivision.

G. If, in the opinion of each appropriate public agency or an Indian nation, tribe or pueblo, a subdivider can fulfill the requirements of Subsection F of this section, the board of county commissioners shall weigh these opinions in determining whether to approve the preliminary plat at a public hearing to be held in accordance with Section 47-6-14 NMSA 1978.

H. If, in the opinion of the appropriate public agency or an Indian nation, tribe or pueblo, a subdivider cannot fulfill the requirements of Subsection F of this section or, if the appropriate public agency or the Indian nation, tribe or pueblo does not have sufficient information upon which to base an opinion on any one of these subjects, the subdivider shall be notified of this fact by the board of county commissioners, and the procedure set out below shall be followed:

(1) if the appropriate public agency or the Indian nation, tribe or pueblo has rendered an adverse opinion, the board of county commissioners shall give the subdivider a copy of the opinion;

(2) the subdivider shall be given thirty days from the date of notification to submit additional information to the public agency or the Indian nation, tribe or pueblo through the board of county commissioners; and

(3) the public agency or the Indian nation, tribe or pueblo shall have thirty days from the date the subdivider submits additional information to change its opinion or issue a favorable opinion when it has withheld one because of insufficient information. No more than thirty days following the date of the expiration of the thirty-day period, during which the public agency or the Indian nation, tribe or pueblo reviews any additional information submitted by the subdivider, the board of county commissioners shall hold a public hearing in accordance with Section 47-6-14 NMSA 1978 to determine whether to approve the preliminary plat. Where the public agency has rendered an adverse opinion, the subdivider has the burden of showing that the adverse opinion is incorrect either as to factual or legal matters. Where the Indian nation, tribe or pueblo has rendered an adverse opinion, the subdivider may submit additional information to the board of county commissioners. If a public agency disagrees with an adverse opinion rendered by an Indian nation, tribe or pueblo, that agency shall submit a response to the board of county commissioners.

I. If a type-three subdivision contains five or fewer parcels of land, and unless the land within the subdivision has been previously identified in the county's comprehensive plan, as amended or supplemented, or zoning ordinances as an area subject to unique circumstances or conditions that require additional review:

(1) if the smallest parcel is not less than three acres in size, the board of county commissioners shall use the same summary procedure for reviewing the subdivision as the board uses for reviewing type-five subdivisions; or

(2) if the smallest parcel is less than three acres in size, the board of county commissioners may use the same summary procedure for reviewing the subdivision as the board uses for reviewing type-five subdivisions.

J. Prior to approving the final plat of a type-five subdivision, the board of county commissioners of the county in which the subdivision is located shall:

(1) determine whether the subdivider can fulfill the proposals contained in the subdivider's disclosure statement required by Section 47-6-17 NMSA 1978; and

(2) determine whether the subdivision conforms with the New Mexico Subdivision Act and the county's subdivision regulations.

K. The board of county commissioners shall not approve the final plat of any type-five subdivision if the subdivider cannot reasonably demonstrate that the subdivider can fulfill the requirements of Subsection J of this section.

L. Any subdivider submitting a plat of a type-five subdivision shall submit sufficient information to the board of county commissioners to permit the board to determine whether the subdivider can fulfill the requirements of Subsection J of this section.

M. The board of county commissioners shall by regulation establish a procedure for summary review for certain type-three subdivisions, as provided in Subsection I of this section, and all type-five subdivisions. If the board of county commissioners fails to adopt criteria for summary review, the board of county commissioners shall approve the plat if it complies with Sections 47-6-3 and 47-6-4 NMSA 1978 within the time limitation set forth in Section 47-6-22 NMSA 1978. The board of county commissioners may delegate to any county administrative officer or planning commission member the authority to approve any subdivision under summary review. Approval by summary review is conclusive evidence of the approval of the board of county commissioners.

History: 1953 Comp., § 70-5-11, enacted by Laws 1973, ch. 348, § 11; 1977, ch. 253, § 72; 1995, ch. 212, § 11; 2009, ch. 65, § 2.

ANNOTATIONS

The 2009 amendment, effective June 19, 2009, added Paragraph (5) of Subsection F; and in Subsections G and H, added "or an Indian nation, tribe or pueblo".

The 1995 amendment, effective July 1, 1996, rewrote the section to such an extent that a detailed comparison would be impracticable.

Standards may be broad. — Standards adopted pursuant to the New Mexico Subdivision Act may be broad, general standards, so long as they are capable of reasonable application and are sufficient to limit and define the board's discretionary powers. *Parker v. Bd. of Cnty. Comm'rs*, 1979-NMSC-101, 93 N.M. 641, 603 P.2d 1098.

Constitutionality of retroactive application of zoning ordinances. — The retroactive application of a new zoning ordinance to an administrative action in which the plaintiff only submitted an application for preliminary plat approval of its subdivision did not violate N.M. Const., art. IV, § 34 because plaintiff did not establish a "vested right" under the vested rights approach. There are two prongs which must be met for a vested right to exist. First, there must be approval by the regulatory body, and second, there must be a substantial change in position in reliance thereon. *Brazos Land, Inc. v. Bd. of Cnty. Comm'rs*, 1993-NMCA-013, 115 N.M. 168, 848 P.2d 1095.

Final decision rests with county. — The final decision whether or not to approve a proposal to construct a subdivision clearly rests with county governments, and county governments may apply their own discretion in weighing state agency opinions along with other evidence when making that decision consistent with the requirements of both county regulations and the Subdivision Act (Chapter 47, Article 6 NMSA 1978). *C.F.T. Dev., LLC v. Board. of Cnty. Comm'rs*, 2001-NMCA-069, 130 N.M. 775, 32 P.3d 784.

County determines "sufficient information". — Because the Subsection B (now Subsection E) requirement of submission of "sufficient information" is general, the county is left to determine what quantum of information amounts to "sufficient information" and to specify the form for acquiring it. *Parker v. Bd. of Cnty. Comm'rs*, 1979-NMSC-101, 93 N.M. 641, 603 P.2d 1098.

Claim for relief not provided. — The legislature did not provide that a landowner owning adjoining land to a subdivider have a claim for relief against a subdivider for violating Subsection A(6) (now B(6)). *Gabaldon v. Sanchez*, 1978-NMCA-103, 92 N.M. 224, 585 P.2d 1105.

When resubdivision must comply with current subdivision standards. — The later resubdivision or alteration of or amendment to pre-1973 subdivisions must comply with the new, current subdivision standards if such resubdivision activity substantially affects the new regulated areas of concern which are addressed by the new 1973 New Mexico Subdivision Act (i.e., sufficiency of water, quality of water, roads, etc.). 1982 Op. Att'y Gen. No. 82-11.

Law reviews. — For note, "Gabaldon v. Sanchez: New Developments in the Law of Nuisance, Negligence and Trespass," see 9 N.M.L. Rev. 367 (1979).

For note, "Definitional Loopholes Limit New Mexico Counties' Authority to Regulate Subdivisions," see 24 Nat. Res. J. 1083 (1984).

For article, "Rural Development Considerations for Growth Management," see 43 Nat. Res. J. 781 (2003).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 83 Am. Jur. 2d Zoning and Planning §§ 518 to 527, 531 to 534, 562 to 574.

Constitutionality, construction and application of statutes regulating the subdivision or development of land for sale or lease in lots or parcels, 122 A.L.R. 501.

63 C.J.S. Municipal Corporations §§ 1049, 1051, 1061, 1064.

47-6-11.1. Expiration of preliminary plat.

A. An approved or conditionally approved preliminary plat shall expire twenty-four months after its approval or conditional approval, or after any additional period of time as may be prescribed by county regulation, not to exceed an additional twelve months. However, if the subdivider proposes to file multiple final plats as provided for under county regulations governing phased development, each filing of a final plat shall extend the expiration of the approved or conditionally approved preliminary plat for an additional thirty-six months from the date of its expiration or the date of the previously filed final plat, whichever is later. The number of phased final plats shall be determined by the board of county commissioners at the time of the approval or conditional approval of the preliminary plat.

B. Prior to the expiration of the approved or conditionally approved preliminary plat, the subdivider may submit an application for extension of the preliminary plat for a period of time not exceeding a total of three years. The period of time specified in this subsection shall be in addition to the period of time provided in Subsection A of this section.

C. The expiration of the approved or conditionally approved preliminary plat shall terminate all proceedings on the subdivision, and no final plat shall be filed without first processing a new preliminary plat.

History: Laws 1995, ch. 212, § 12.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 212, § 34 made Laws 1995, ch. 212, § 12 effective July 1, 1996.

47-6-11.2. Water permit required for final plat approval.

Before approving the final plat for a subdivision containing ten or more parcels, any one of which is two acres or less in size, the board of county commissioners shall require that the subdivider provide proof of a service commitment from a water provider and an opinion from the state engineer that the subdivider can fulfill the requirements of Paragraph (1) of Subsection F of Section 47-6-11 NMSA 1978 or provide a copy of a permit obtained from the state engineer, issued pursuant to Section 72-5-1, 72-5-23, 72-5-24, 72-12-3 or 72-12-7 NMSA 1978 for the subdivision water use. In acting on the permit application, the state engineer shall determine whether the amount of water permitted is sufficient in quantity to fulfill the maximum annual water requirements of the subdivision, including water for indoor and outdoor domestic uses. The board of county commissioners shall not approve the final plat unless the state engineer has so issued a permit for the subdivision water use or the subdivider has provided proof of a service commitment from a water provider and the state engineer has provided an opinion that the subdivider can fulfill the requirements of Paragraph (1) of Subsection F of Section 47-6-11 NMSA 1978. The board of county commissioners shall not approve the final plat based on the use of water from any permit issued pursuant to Section 72-12-1.1 NMSA 1978.

History: Laws 1995, ch. 212, § 13; 2013, ch. 224, § 1.

ANNOTATIONS

The 2013 amendment, effective June 14, 2013, required subdividers of land to possess a permit for or proof of access to a sufficient amount of water to meet the needs of a proposed subdivision before final plat approval; in the first sentence, deleted the subsection letter for Subsection A and "Until July 1, 1997"; after "subdivision containing" deleted "twenty" and added "ten", after "require that the subdivider", added "provide proof of a service commitment from a water provider and an opinion from the state engineer that the subdivider can fulfill the requirements of Paragraph (1) of Subsection F of Section 47-6-11 NMSA 1978", and after "72-5-24", deleted "NMSA 1978, or if the subdivision is located within a declared underground water basin, provide a copy of a permit obtained from the state engineer issued pursuant to those sections or to Section"; in the third sentence, after "subdivision water use", added the remainder of the sentence, and added the fourth sentence; and deleted former Subsection B, which authorized the board of county commissioners to require the subdivider of land containing twenty or more parcels to provide a permit from the state engineer for the subdivision water use and which required the state engineer to determine if the water was sufficient for the subdivision’s requirements.

Law reviews. — For article, "Water Supply and Urban Growth in New Mexico: Same Old, Same Old or a New Era," see 43 Nat. Res. J. 803 (2003).

47-6-11.3. Approval of final plats.

A. After the approval or conditional approval of a preliminary plat and prior to the expiration of such plat, the subdivider may prepare a final plat in accordance with the approved or conditionally approved preliminary plat.

B. The board of county commissioners shall not deny a final plat if it has previously approved a preliminary plat for the proposed subdivision and it finds that the final plat is in substantial compliance with the previously approved preliminary plat. Denial of a final plat shall be accompanied by a finding identifying the requirements that have not been met.

C. If, at the time of approval of the final plat, any public improvements have not been completed by the subdivider as required by the board of county commissioners pursuant to the New Mexico Subdivision Act or county subdivision regulations, the board of county commissioners shall, as a condition precedent to the approval of the final plat, require the subdivider to enter into an agreement with the county upon mutually agreeable terms to thereafter complete the improvements at the subdivider's expense.

History: Laws 1995, ch. 212, § 14.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 212, § 34 made Laws 1995, ch. 212, § 14 effective July 1, 1996.

No vested rights. — Where a property owner purchased undeveloped property seventeen years after the board of county commissioners granted final plat approval; the owner was aware that the county considered the subdivision to be invalid and that the county had imposed a moratorium on development of the property to deal with a water emergency; and the conditions of plat approval had not been met, the owner's reliance on the validity of the subdivision was not reasonable and the owner did not have vested rights in the subdivision. *Miller v. Board of Cnty. Comm'rs.*, 2008-NMCA-124, 144 N.M. 841, 192 P.3d 1218, cert. denied, 2008-NMCERT-008, 145 N.M. 254, 195 P.3d 1266.

47-6-11.4. Plat approval; proof of adequate water supply on lands from which irrigation water rights have been severed.

A. Before approving the final plat for a subdivision of land from which irrigation water rights appurtenant to the land have been severed, the board of county commissioners shall require that the subdivider provide proof of a service commitment from a water provider and an opinion from the state engineer that the subdivider can fulfill the requirements of Paragraph (1) of Subsection F of Section 47-6-11 NMSA 1978 or acquire sufficient water rights through a permit issued pursuant to Section 72-5-1, 72-5-23, 72-5-24, 72-12-3 or 72-12-7 NMSA 1978 for subdivision water use. In acting on the permit application, the state engineer shall determine whether the amount of water

permitted is sufficient in quantity to fulfill the maximum annual water requirements of the subdivision, including water for indoor and outdoor domestic uses. The board of county commissioners shall not approve the final plat unless the state engineer has so issued a permit for the subdivision water use or the subdivider has provided proof of a service commitment from a water provider and the state engineer has provided an opinion that the subdivider can fulfill the requirements of Paragraph (1) of Subsection F of Section 47-6-11 NMSA 1978. The board of county commissioners shall not approve the final plat based on the use of water from any permit issued pursuant to Section 72-12-1.1 NMSA 1978.

B. The provisions of this section shall only apply to land from which irrigation water rights that are appurtenant to that land are severed after the effective date of this section.

History: Laws 2013, ch. 173, § 2.

ANNOTATIONS

Emergency clauses. — Laws 2013, ch. 173, § 3, contained an emergency clause and was approved April 4, 2013.

47-6-12, 47-6-13. Repealed.

ANNOTATIONS

Repeals. — Laws 1995, ch. 212, § 32 repealed 47-6-12 and 47-6-13 NMSA 1978, as enacted by Laws 1973, ch. 348, § 12 and as amended by Laws 1981, ch. 148, § 4, relating to approval for type-three, type-four and type-five subdivisions, effective July 1, 1996. For provisions of former sections, *see* the 1994 NMSA 1978 on *NMOneSource.com.*

47-6-14. Public hearings on preliminary plats.

The board of county commissioners shall adhere to the following requirements concerning public hearings on preliminary plats.

A. Notice of the hearing shall be given at least twenty-one days prior to the hearing date and shall state:

(1) the subject of the hearing;

(2) the time and place of the hearing;

(3) the manner for interested persons to present their views; and

(4) the place and manner for interested persons to secure copies of any favorable or adverse opinion and of the subdivider's proposal. The board of county commissioners may impose a reasonable charge for the costs of reproducing and mailing the opinions and proposals.

B. The notice shall be published in a newspaper of general circulation in the county.

C. Reasonable effort shall be made to give notice to all persons who have made a written request to the board of county commissioners for advance notice of its hearings. Notice shall also be given to any public agency that issued an opinion or withheld an opinion on the basis of insufficient information.

D. Public hearings on preliminary plats shall be held within thirty days from the receipt of all requested public agency opinions where all such opinions are favorable, or within thirty days from the date all public agencies complete their review of any additional information submitted by the subdivider pursuant to Section 47-6-11 NMSA 1978. If the board of county commissioners does not receive a requested opinion within the thirty-day period, the board shall proceed.

E. At the hearing, the board of county commissioners shall allow all interested persons a reasonable opportunity to submit data, views or arguments, orally or in writing, and to examine witnesses testifying at the hearing.

F. The board of county commissioners shall approve, approve with conditions or disapprove the preliminary plat within thirty days of the public hearing at a public meeting of the board of county commissioners.

History: 1953 Comp., § 70-5-14, enacted by Laws 1973, ch. 348, § 14; 1995, ch. 212, § 15.

ANNOTATIONS

The 1995 amendment, effective July 1, 1996, rewrote the section to such an extent that a detailed comparison would be impracticable.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 83 Am. Jur. 2d Zoning and Planning §§ 765, 768, 769, 779, 780.

Validity and construction of statutory notice requirements prerequisite to adoption or amendment of zoning ordinance or regulation, 96 A.L.R.2d 449.

62 C.J.S. Municipal Corporations § 226(11).

47-6-15. Appeals.

A. A party who is or may be adversely affected by a decision of a delegate of the board of county commissioners shall appeal the delegate's decision to the board of county commissioners within thirty days of the date of the delegate's decision. The board of county commissioners shall hear the appeal and shall render a decision within thirty days of the date the board receives notice of the appeal. Thereafter, the procedure for appealing the decision of the board of county commissioners set out in Subsection B of this section shall apply.

B. A party who is or may be adversely affected by a decision of the board of county commissioners may appeal to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

History: 1953 Comp., § 70-5-15, enacted by Laws 1973, ch. 348, § 15; 1995, ch. 212, § 16; 1998, ch. 55, § 46; 1999, ch. 265, § 48; 2005, ch. 139, § 3.

ANNOTATIONS

Cross references. — For procedures governing administrative appeals to the district court, *see* Rule 1-074 NMRA.

The 2005 amendment, effective June 17, 2005, deleted the former qualification in Subsections A and B that appeals are from approving or disapproving a plat.

The 1999 amendment, effective July 1, 1999, substituted "Section 39-3-1.1" for "Section 12-8A-1" in Subsection B.

The 1998 amendment, effective September 1, 1998, rewrote this section to the extent that a detailed comparison is impracticable.

The 1995 amendment, effective July 1, 1996, deleted "or its delegate" following "commissioners" in Subsection A and in the introductory paragraph of Subsection C; substituted "preliminary or final plat" for "subdivision plat" in Subsection A; and added Subsection E.

A county's approval or disapproval of a preliminary plat is a final, appealable decision for purposes of Section 47-6-15 NMSA 1978. *Zuni Indian Tribe v. McKinley Cnty. Bd. of Cnty. Comm'rs*, 2013-NMCA-041, 300 P.3d 133.

A county's decision on a preliminary plat is appealable. — Where the county disapproved the applicant's preliminary plat in the form of a written resolution which incorporated the final findings and recommendations of the county planning commission; the resolution followed input by state agencies and other interested parties and public hearings before the planning commission; interested parties submitted proposed findings and recommendations after the hearings; and the findings and recommendations adopted by the county commission included important aspects of the subdivision development and review process, such as water availability, waste disposal

and access, given the nature of the county commission's resolution and the procedural history that preceded its passage, the county commission's resolution constituted a "decision" under Section 47-6-15 NMSA 1978 and was appealable. *Zuni Indian Tribe v. McKinley Cnty. Bd. of Cnty. Comm'rs*, 2013-NMCA-041, 300 P.3d 133.

A timely filed appeal from a decision on a preliminary plat application is not rendered moot by the county's decision to approve the final subdivision plat application during the pendency of the appeal. *Zuni Indian Tribe v. McKinley Cnty. Bd. of Cnty. Comm'rs*, 2013-NMCA-041, 300 P.3d 133.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 83 Am. Jur. 2d Zoning and Planning § 1026.

62 C.J.S. Municipal Corporations § 228(4).

47-6-16. Succeeding subdivisions.

Any proposed subdivision may be combined and upgraded for classification purposes by the board of county commissioners with a previous subdivision if the proposed subdivision includes:

A. a part of a previous subdivision that has been created in the preceding seven-year period; or

B. any land retained by a subdivider after creating a previous subdivision when the previous subdivision was created in the preceding seven-year period.

History: 1953 Comp., § 70-5-16, enacted by Laws 1973, ch. 348, § 16; 1995, ch. 212, § 17.

ANNOTATIONS

The 1995 amendment, effective July 1, 1996, deleted "either" at the end of the introductory paragraph; and substituted "created in the preceeding ten-year period" for "approved in the preceeding three-year period" in Subsections A and B.

47-6-17. Disclosure.

A. Prior to selling, leasing or otherwise conveying any land in a subdivision, the subdivider shall disclose in writing such information as the board of county commissioners requires, by regulation, to permit the prospective purchaser, lessee or other person acquiring an interest in subdivided land to make an informed decision about the purchase, lease or other conveyance of the land.

B. The disclosure statement for subdivisions with not fewer than five and not more than one hundred parcels shall contain at least the following information:

(1) the name of the subdivision;

(2) name and address of the subdivider and the name and address of the person in charge of sales or leasing in New Mexico;

(3) total acreage of the subdivision, both present and anticipated;

(4) size of the largest and smallest parcels offered for sale, lease or other conveyance within the subdivision and the proposed range of selling or leasing prices including financing terms;

(5) distance from the nearest town to the subdivision and the route over which this distance is computed;

(6) name and address of the person who is recorded as having legal and equitable title to the land offered for sale, lease or other conveyance;

(7) a statement of the condition of title including any encumbrances;

(8) a statement of all restrictions or reservations of record that subject the subdivided land to any conditions affecting its use or occupancy;

(9) name and address of the escrow agent, if any;

(10) a statement as to availability and cost of public utilities;

(11) a statement describing the maximum annual water requirements of the subdivision, including water for indoor and outdoor domestic uses, and describing the availability of water to meet the maximum annual water requirements;

(12) a statement describing the quality of water in the subdivision available for human consumption;

(13) a description of the means of liquid waste disposal for the subdivision;

(14) a description of the means of solid waste disposal for the subdivision;

(15) a description of the means of water delivery within the subdivision;

(16) the average depth to water within the subdivision if water is available only from subterranean sources;

(17) a description of access to the subdivision;

(18) a statement disclosing whether the roads and other improvements within the subdivision will be maintained by the county, the subdivider or an association of lot

owners and what measures have been taken to ensure that maintenance will take place;

(19) a description of the subdivider's provisions for terrain management;

(20) a summary, approved by the issuing state agency, of the opinions, if any, whether favorable or adverse, provided by state agencies to the board of county commissioners concerning any one of the points listed above;

(21) a statement that the subdivider shall record the deed, real estate contract, lease or other instrument conveying an interest in subdivided land with the appropriate county clerk within thirty days of the signing of such instrument by the purchaser, lessee or other person acquiring an interest in the land;

(22) a statement advising the purchaser, lessee or other person acquiring an interest in subdivided land that building permits, wastewater permits or other use permits are required to be issued by state or county officials before improvements are constructed; and that further, he is advised to investigate the availability of such permits before purchase, lease or other conveyance and whether these are requirements for construction of additional improvements before he may occupy the property; and

(23) such other information as the board of county commissioners may require.

C. The disclosure statement for subdivisions with one hundred or more parcels shall contain all of the information required in Subsection B of this section as well as the following information:

(1) a statement of any activities or conditions adjacent to or nearby the subdivision that would subject the subdivided land to any unusual conditions affecting its use or occupancy;

(2) a description of all recreational facilities, actual and proposed, in the subdivision;

(3) a statement as to the availability of:

(a) fire protection;

(b) police protection;

(c) public schools for the inhabitants of the subdivision, including a statement concerning the proximity of the nearest elementary and secondary schools;

(d) hospital facilities;

(e) shopping facilities; and

(f) public transportation; and

(4) a statement setting forth the projected dates upon which any of the items mentioned in this section for which the subdivider has responsibility will be completed if they are not yet completed.

D. Disclosure statements shall be in the form that the board of county commissioners, after consultation with the attorney general, may require by regulation. The board of county commissioners may require by regulation that disclosure statements be printed in both English and Spanish. The form of disclosure statements, insofar as possible, shall be uniform for all counties.

E. Any subdivider who has satisfied the disclosure requirement of the Interstate Land Sales Full Disclosure Act may submit his approved statement of record in lieu of the disclosure statement required by the New Mexico Subdivision Act. However, any information required in the New Mexico Subdivision Act and not covered in the subdivider's statement of record shall be attached to the statement of record.

F. It is unlawful to sell, lease or otherwise convey land in a subdivision until:

(1) the required disclosure statement has been filed with the county clerk, the board of county commissioners and the attorney general's office; and

(2) the prospective purchaser, lessee or other person acquiring an interest in the subdivided land has been given a copy of the disclosure statement.

History: 1953 Comp., § 70-5-17, enacted by Laws 1973, ch. 348, § 17; 1995, ch. 212, § 18.

ANNOTATIONS

Cross references. — For the Interstate Land Sales Full Disclosure Act, *see* 15 U.S.C. 1701 et seq.

The 1995 amendment, effective July 1, 1996, rewrote the section to such an extent that a detailed comparison would be impracticable.

Acceptance is prerequisite to obligation to maintain. — The specific requirement of disclosure to a buyer regarding whether the county has accepted subdivision roads for maintenance confirms that the legislature intended county acceptance of roads for maintenance to be a prerequisite to a county obligation to maintain the subdivision roads. *McGarry v. Scott*, 2003-NMSC-016, 134 N.M. 32, 72 P.3d 608.

Law reviews. — For note, "Gabaldon v. Sanchez: New Developments in the Law of Nuisance, Negligence and Trespass," see 9 N.M.L. Rev. 367 (1979).

For note, "Definitional Loopholes Limit New Mexico Counties' Authority to Regulate Subdivisions," see 24 Nat. Res. J. 1083 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 83 Am. Jur. 2d Zoning and Planning §§ 518 to 520.

Waiver of right to enforce restrictive covenant by failure to object to other violations, 25 A.L.R.5th 123.

Laches or delay in bringing suit as affecting right to enforce restrictive building covenant, 25 A.L.R.5th 233.

91 C.J.S. Vendor and Purchaser § 65.

47-6-18. Advertising standards.

A. Brochures, disclosure statements, publications and advertising of any form relating to subdivided land shall:

(1) not misrepresent or contain false or misleading statements of fact;

(2) not describe deeds, title insurance or other items included in a transaction as "free" and shall not state that any parcel is "free" or given as an "award" or "prize" if any consideration is required for any reason;

(3) not describe parcels available for "closing costs only" or similar terms unless all such costs are accurately and completely itemized or when additional parcels must be purchased at a higher price;

(4) not include an asterisk or other reference symbol as a means of contradicting or substantially changing any statement;

(5) if subdivision illustrations are used, accurately portray the subdivision in its present state, and if illustrations are used portraying points of interest outside the subdivision, state the actual road miles from the subdivision;

(6) not contain artists' conceptions of the subdivision or any facilities within it unless clearly described as such and shall not contain maps unless accurately drawn to scale with the scale indicated;

(7) not contain references to any facilities, points of interest or municipalities located outside the subdivision unless the distances from the subdivision are stated in the advertisement in actual road miles; and

(8) refer to where the subdivider's disclosure statement may be obtained.

B. Copies of all brochures, publications and advertising relating to subdivided land shall be filed with the board of county commissioners of the county in which the subdivision is located and with the attorney general within fifteen days after initial use by the subdivider.

History: 1953 Comp., § 70-5-18, enacted by Laws 1973, ch. 348, § 18; 1995, ch. 212, § 19.

ANNOTATIONS

The 1995 amendment, effective July 1, 1996, deleted "if a disclosure statement is required for the subdivision" at the end of Paragraph A(8).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 12 Am. Jur. 2d Brokers § 20.

Validity, construction and application of statutes or ordinances directed against false or fraudulent statements in advertisements, 89 A.L.R. 1004.

Broker's liability for fraud or misrepresentation concerning development or nondevelopment of nearby property, 71 A.L.R.4th 511.

35 C.J.S. False Pretenses § 30.

47-6-19. Road development.

A. Roads within a subdivision shall be constructed only on a schedule approved by the board of county commissioners. In approving or disapproving a subdivider's road construction schedule, the board of county commissioners shall consider:

(1) the proposed use of the subdivision;

(2) the period of time before the roads will receive substantial use;

(3) the period of time before construction of homes will commence on the portion of the subdivision serviced by the road;

(4) the county regulations governing phased development; and

(5) the needs of prospective purchasers, lessees and other persons acquiring an interest in subdivided land in viewing the land within the subdivision.

B. All proposed roads shall conform to minimum county safety standards.

C. The board of county commissioners shall not approve the grading or construction of roads unless and until the subdivider can reasonably demonstrate that the roads to be constructed will receive use and that the roads are required to provide access to

parcels or improvements within twenty-four months from the date of construction of the road.

D. It is unlawful for the subdivider to grade or otherwise commence construction of roads unless the construction conforms to the schedule of road development approved by the board of county commissioners.

History: 1953 Comp., § 70-5-19, enacted by Laws 1973, ch. 348, § 19; 1981, ch. 148, § 5; 1995, ch. 212, § 20.

ANNOTATIONS

The 1995 amendment, effective July 1, 1996, inserted "and other persons acquiring an interest in subdivided land" in Paragraph A(5) and made minor stylistic changes.

Law reviews. — For annual survey of New Mexico law relating to property, see 12 N.M.L. Rev. 459 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 83 Am. Jur. 2d Zoning and Planning §§ 518 to 528, 531 to 534, 564 to 567.

Constitutionality, construction, and application of statutes regulating the subdivision or development of land for sale or lease in lots or parcels, 122 A.L.R. 501.

Enforceability, by landowner, of subdivision developer's oral promise to construct or improve roads, 41 A.L.R.4th 573.

63 C.J.S. Municipal Corporations §§ 1042, 1044.

47-6-20. Public agencies required to provide counties with information.

A. Any public agency receiving a request from the board of county commissioners for an opinion and any Indian nation, tribe or pueblo that chooses to submit an opinion pursuant to Section 47-6-11 NMSA 1978 shall furnish the board with the requested opinion within the time period set forth in Subsection A of Section 47-6-22 NMSA 1978. The board of county commissioners shall furnish the appropriate public agency and Indian nation, tribe or pueblo with all relevant information that the board has received from the subdivider on the subject for which the board is seeking an opinion. If the public agency or Indian nation, tribe or pueblo does not have sufficient information upon which to base an opinion, the public agency or Indian nation, tribe or pueblo shall notify the board of this fact.

B. All opinion requests mailed by the board of county commissioners shall be by certified mail, return receipt requested. Boards of county commissioners delivering

opinion requests shall obtain receipts showing the day the opinion request was received by the particular public agency or Indian nation, tribe or pueblo.

History: 1953 Comp., § 70-5-20, enacted by Laws 1973, ch. 348, § 20; 1995, ch. 212, § 21; 2009, ch. 65, § 3.

ANNOTATIONS

The 2009 amendment, effective June 19, 2009, in Subsection A, added "and any Indian nation, tribe or pueblo that chooses to submit an opinion"; and in Subsections A and B, added “and Indian nation, tribe or pueblo".

The 1995 amendment, effective July 1, 1996, substituted "Public" for "State" in the section heading and throughout the section and substituted the language beginning "pursuant to" for "on water, water quality, liquid or solid waste disposal adequacy, terrain management or highway access shall furnish the board with the requested opinion" at the end of the first sentence in Subsection A.

47-6-21. Information reports.

In determining whether the subdivider can fulfill the requirements of the subdivision and the proposals contained in his disclosure statement, the appropriate public agency may request, through the board of county commissioners, that the subdivider submit such information as the agency may feel necessary to permit it to make that determination.

History: 1953 Comp., § 70-5-21, enacted by Laws 1973, ch. 348, § 21; 1995, ch. 212, § 22.

ANNOTATIONS

The 1995 amendment, effective July 1, 1996, inserted "requirements of the subdivision and the" near the beginning; deleted "and in determining whether or not the subdivision will conform with county regulations" preceding "the appropriate"; substituted "public agency" for "state agency" near the middle; and made a minor stylistic change.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 2 Am. Jur. 2d Administrative Law § 129 et seq.

73 C.J.S. Public Administrative Law and Procedure §§ 81 to 83.

47-6-22. Time limit on administrative action.

A. All opinions required of public agencies or submitted by an Indian nation, tribe or pueblo shall be furnished to the board of county commissioners within thirty days after the public agencies or Indian nation, tribe or pueblo receives the written request and

accompanying information from the board of county commissioners. If the board of county commissioners does not receive a requested opinion within the thirty-day period, the board shall proceed in accordance with its own best judgment concerning the subject of the opinion request. The failure of a public agency or Indian nation, tribe or pueblo to provide an opinion when requested by the board of county commissioners does not indicate that the subdivider's provisions concerning the subject of the opinion request were acceptable or unacceptable or adequate or inadequate.

B. Final plats submitted to the board of county commissioners for approval shall be approved or disapproved at a public meeting of the board of county commissioners within thirty days of the date the final plat is deemed complete.

C. If the board of county commissioners does not act upon a final plat within the required period of time, the subdivider shall give the board of county commissioners written notice of its failure to act. If the board of county commissioners fails to approve or reject the final plat within thirty days, the board of county commissioners shall, upon demand by the subdivider, issue a certificate stating that the final plat has been approved.

History: 1953 Comp., § 70-5-22, enacted by Laws 1973, ch. 348, § 22; 1981, ch. 148, § 6; 1995, ch. 212, § 23; 2009, ch. 65, § 4.

ANNOTATIONS

The 2009 amendment, effective June 19, 2009, in Subsection A, added "or submitted by an Indian nation, tribe or pueblo" and "or Indian nation, tribe or pueblo".

The 1995 amendment, effective July 1, 1996, rewrote the section to such an extent that a detailed comparison would be impracticable.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 2 Am. Jur. 2d Administrative Law § 129 et seq.

73 C.J.S. Public Administrative Law and Procedure § 151.

47-6-23. Right of inspection; rescission.

If the purchaser, lessee or other person acquiring an interest in the subdivided land has not inspected his parcel prior to the time of purchase, lease or other conveyance, the purchase, lease or other conveyancing agreement shall contain a provision giving the purchaser, lessee or other person acquiring an interest in the subdivided land six months within which to personally inspect his parcel. After making the personal inspection within the six-month period, the purchaser, lessee or other person acquiring an interest in the subdivided land has the right to rescind the purchase, lease or other conveyancing agreement and receive a refund of all funds paid on the transaction to the seller, lessor or other conveyor of subdivided land when merchantable title is revested

in the seller, lessor or other conveyor of subdivided land. Notice of such rescission to the seller, lessor or other conveyor of subdivided land shall be made in writing and shall be given within three days of the date of personal inspection.

History: 1953 Comp., § 70-5-23, enacted by Laws 1973, ch. 348, § 23; 1995, ch. 212, § 24.

ANNOTATIONS

The 1995 amendment, effective July 1, 1996, rewrote the section to such an extent that a detailed comparison would be impracticable.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 17A Am. Jur. 2d Contracts §§ 565 to 605.

91 C.J.S. Vendor and Purchaser § 156.

47-6-24. Schedule of compliance.

In approving subdivision plats, the board of county commissioners may require the subdivider to set forth a schedule of compliance with county subdivision regulations that is acceptable to the board of county commissioners.

History: 1953 Comp., § 70-5-24, enacted by Laws 1973, ch. 348, § 24.

ANNOTATIONS

Law reviews. — For note, "Definitional Loopholes Limit New Mexico Counties' Authority to Regulate Subdivisions," see 24 Nat. Res. J. 1083 (1984).

47-6-25. Suspension of right of sale.

The board of county commissioners may suspend or revoke approval of a plat as to the unsold, unleased or otherwise unconveyed portions of a subdivider's plat if the subdivider does not meet the schedule of compliance approved by the board.

History: 1953 Comp., § 70-5-25, enacted by Laws 1973, ch. 348, § 25; 1995, ch. 212, § 26.

ANNOTATIONS

The 1995 amendment, effective July 1, 1996, inserted "or otherwise unconveyed".

Failure to comply with conditions of plat approval. — The board of county commissioners had authority to revoke plat approval when the owners of the property failed to comply with the conditions of final approval for a period of eighteen years after

final approval. *Miller v. Board of Cnty. Comm'rs*, 2008-NMCA-124, 144 N.M. 841, 192 P.3d 1218, cert. denied, 2008-NMCERT-008, 145 N.M. 254, 195 P.3d 1266.

Effect of noncompliance with plat approval prerequisites. — Where the subdivider fails to meet the conditions he agreed to accomplish and which were required by the county as a prerequisite to plat approval, suspension or revocation of plat approval remain realities for the developer until the subdivider complies with the reasonable conditions imposed by the county within its authority. *Parker v. Bd. of Cnty. Comm'rs*, 1979-NMSC-101, 93 N.M. 641, 603 P.2d 1098.

Law reviews. — For note, "State Securities Law: A Valuable Tool for Regulating Investment Land Sales," see 7 N.M.L. Rev. 265 (1977).

47-6-25.1. Attorney general; district attorneys; investigation.

A. If the attorney general or a district attorney has reasonable cause to believe that a person has information or may be in possession, custody or control of any document or other tangible object relevant to a civil investigation for violation of the New Mexico Subdivision Act, the attorney general or the district attorney, or both, may before bringing any action apply to the district court of Santa Fe county, or any county where the district attorney has his office, for approval of a civil investigative demand, demanding, in writing, such person to appear and be examined under oath, to answer written interrogatories under oath or to produce the document or object for inspection and copying. The demand shall:

(1) be served upon the person in the manner required for service of process in this state or, if the person cannot be found or does not reside or maintain a principal place of business within this state, in the manner required for service of process in the state in which the person resides, maintains a principal place of business or can be found;

(2) describe the nature of the conduct under investigation;

(3) describe the class of documents or objects with sufficient definiteness to permit it to be fairly identified if the production of documents or objects is requested;

(4) contain a copy of the written interrogatories if answers to written interrogatories are sought;

(5) prescribe a reasonable time at which the person shall appear to testify or within which the document or object must be produced;

(6) specify a place for the taking of testimony or for production of the document or object and designate a person who may be an authorized employee of the attorney general or district attorney to be custodian of the document or object; and

(7) contain a copy of Subsections C through E of this section.

B. No demand to produce a document or object for inspection and copying shall contain any requirement that would be unreasonable or improper if contained in a subpoena duces tecum issued in a civil proceeding by a district court of this state. The district court shall approve the demand if it finds that the attorney general or district attorney has reasonable cause to believe that a person has information or may be in possession, custody or control of any document or other tangible object relevant to a civil investigation for violation of the New Mexico Subdivision Act and that the demand is proper in form. A demand shall not be issued without approval of the district court.

C. If a person fails to comply with the written demand served upon him under the provisions of Subsection A of this section, the attorney general or district attorney may file a petition for an order to enforce the demand in the district court of the county in which the person resides or in which he maintains a principal place of business within this state or of the county of Santa Fe if the person neither resides nor has a principal place of business in this state. Notice of hearing on the petition and a copy of the petition shall be served upon the person, who may appear in opposition to the petition. If the court finds that the demand is proper in form and there is reasonable cause to believe that the person has information or may be in possession, custody or control of any document or other tangible object relevant to a civil investigation for violation of the New Mexico Subdivision Act, the court shall order the person to comply with the demand, subject to any modification that the court may prescribe. Upon motion by the person and for good cause shown, the court may make any further protective order in the proceedings that justice requires.

D. Prior to the filing of an action under the provisions of the New Mexico Subdivision Act for the violation under investigation, any testimony taken or material produced under this section shall be kept confidential by the attorney general or district attorney unless confidentiality is waived by the person being investigated and the person who has testified, answered interrogatories or produced material, or unless disclosure is authorized by the court. Any testimony taken or material produced under this section shall be open to inspection only to the attorney general or district attorney and the person upon whom the demand for which inspection is sought has been served, unless otherwise ordered by the court.

E. Any person compelled to appear under this section and required to testify under oath may be accompanied, represented and advised by counsel. An objection may properly be made, received and entered upon the record when it is claimed that the person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege.

History: 1978 Comp., § 47-6-25.1, enacted by Laws 1981, ch. 148, § 7; 1995, ch. 212, § 27.

ANNOTATIONS

Bracketed material. — The bracketed words "this article" In Subsection A were added by the compiler and are not part of the law.

The 1995 amendment, effective July 1, 1996, substituted "Subsections C through E" for "Subsections B through D" in Paragraph (A)(7); designated the former second paragraph of Subsection A as Subsection B; redesignated former Subsections B through E as Subsections C through E; and made minor stylistic changes.

47-6-26. Injunctive relief; mandamus.

A. The board of county commissioners, the district attorney or the attorney general may apply to the district court for any one or more of the following remedies in connection with violations of the New Mexico Subdivision Act and county subdivision regulations:

(1) injunctive relief to prohibit a subdivider from selling, leasing or otherwise conveying an interest in subdivided land until he complies with the terms of the New Mexico Subdivision Act and county subdivision regulations;

(2) mandatory injunctive relief to compel compliance by any person with the provisions of the New Mexico Subdivision Act and county subdivision regulations;

(3) rescission and restitution for persons who have purchased, leased or otherwise acquired an interest in subdivided land that was divided, sold, leased or otherwise conveyed in material violation of the New Mexico Subdivision Act or county subdivision regulations; or

(4) a civil penalty of up to five thousand dollars ($5,000) for each parcel created in knowing, intentional or willful material violation of the New Mexico Subdivision Act or county subdivision regulations.

B. The board of county commissioners, the district attorney and the attorney general shall not be required to post bond when seeking a temporary or permanent injunction or mandamus pursuant to the provisions of the New Mexico Subdivision Act.

C. In any action by the attorney general pursuant to the New Mexico Subdivision Act, venue shall be proper in the district court of any county where all or part of the land is situated or the district court of the county where the defendant resides.

D. Nothing in this section shall be construed as limiting any common-law right of any person in any court relating to subdivisions.

History: 1953 Comp., § 70-5-26, enacted by Laws 1973, ch. 348, § 26; 1979, ch. 172, § 3; 1995, ch. 212, § 28.

ANNOTATIONS

Bracketed material. — The bracketed words "this article" In Subsection A were added by the compiler and are not part of the law.

Cross references. — For mandamus, *see* 44-2-1 NMSA 1978 et seq.

The 1995 amendment, effective July 1, 1996, rewrote the section to such an extent that a detailed comparison would be impracticable.

Retroactive application. — This section could be applied retrospectively to authorize the attorney general to seek injunctive relief to compel the defendants to comply with this act as a result of activity engaged in prior to the 1979 amendment of this section. *State ex rel. Stratton v. Alto Land & Cattle Co.*, 1991-NMCA-146, 113 N.M. 276, 824 P.2d 1078.

Common-law rights not extended to enforcement. — The legislature did not provide, through this section, that a person's common-law rights shall extend to the enforcement of the New Mexico Subdivision Act. *Gabaldon v. Sanchez*, 1978-NMCA-103, 92 N.M. 224, 585 P.2d 1105.

Order not authorized. — Order obtained by attorney general compelling performance by defendant subdividers of an act imposed only on a subdivider of a larger subdivision was not authorized under the Act. *State ex rel. Stratton v. Alto Land & Cattle Co.*, 1991-NMCA-146, 113 N.M. 276, 824 P.2d 1078.

Law reviews. — For note, "State Securities Law: A Valuable Tool for Regulating Investment Land Sales," see 7 N.M.L. Rev. 265 (1977).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 42 Am. Jur. 2d Injunctions § 296; 52 Am. Jur. 2d Mandamus § 131.

Injunction as a remedy for violation of zoning ordinance, 54 A.L.R. 366, 129 A.L.R. 885.

43A C.J.S. Injunctions § 133; 55 C.J.S. Mandamus § 210.

47-6-27. Criminal penalties.

A. Any person who knowingly, intentionally or willfully commits a material violation of the New Mexico Subdivision Act is guilty of a misdemeanor, punishable by a fine of not more than ten thousand dollars ($10,000) per violation, or by imprisonment for not more than one year, or both.

B. Any person who is convicted of a second or subsequent knowing, intentional or willful violation of the New Mexico Subdivision Act is guilty of a fourth degree felony, punishable by a fine of not more than twenty-five thousand dollars ($25,000) per violation or by imprisonment for not more than eighteen months, or both.

History: 1953 Comp., § 70-5-27, enacted by Laws 1973, ch. 348, § 27; 1981, ch. 148, § 8; 1995, ch. 212, § 29.

ANNOTATIONS

Bracketed material. — The bracketed words "this article" In Subsection A were added by the compiler and are not part of the law.

The 1995 amendment, effective July 1, 1996, rewrote the section to such an extent that a detailed comparison would be impracticable.

Law reviews. — For note, "State Securities Law: A Valuable Tool for Regulating Investment Land Sales," see 7 N.M.L. Rev. 265 (1977).

For annual survey of New Mexico law relating to property, see 12 N.M.L. Rev. 459 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 83 Am. Jur. 2d Zoning and Planning §§ 1099 to 1104.

36A C.J.S. Fines § 2.

47-6-27.1. Private remedies.

A. Any sale, lease or other conveyance of land within a subdivision subject to the New Mexico Subdivision Act, which subdivision has not been approved by the board of county commissioners, shall be voidable at the option of the purchaser, lessee or other person acquiring an interest in the subdivided land. The purchaser, lessee or other person acquiring an interest in the subdivided land may recover restitution of all money, property or other things paid to or received by the seller, lessor or other conveyor of the subdivided land. The action shall be brought within six years from the time of purchase, lease or other conveyance, in accordance with Section 37-1-3 NMSA 1978.

B. Any purchaser, lessee or other person acquiring an interest in the subdivided land who suffers any loss of money or property, real or personal, as a result of any violation of the New Mexico Subdivision Act or any county subdivision regulation may bring an action to recover actual damages. The action shall be brought within six years from the time of purchase, lease or other conveyance, in accordance with Section 37-1-3 NMSA 1978.

C. Any purchaser, lessee or other person acquiring an interest in the subdivided land who has purchased, leased or otherwise acquired an interest in land within an approved subdivision may bring an action in district court to compel specific performance of any proposed improvement set forth in a subdivider's disclosure statement or in any document obligating the person signing the document to purchase, lease or otherwise acquire an interest in subdivided land or set forth in any advertising

or promotional materials relating to the subdivided land. The action shall be brought within six years from the time of purchase, lease or other conveyance, in accordance with Section 37-1-3 NMSA 1978.

D. Costs shall be allowed to the prevailing party unless the court otherwise directs. The court, in its discretion, may award reasonable attorneys' fees to the prevailing party.

E. The remedies provided in this section are in addition to remedies otherwise available under common law or other statutes of this state.

F. This section shall apply to all purchases, leases or other conveyances of subdivided land in approved or unapproved subdivisions that occur after the effective date of this section.

History: 1978 Comp., § 47-6-27.1, enacted by Laws 1981, ch. 148, § 9; 1995, ch. 212, § 30.

ANNOTATIONS

Bracketed material. — The bracketed words "this article" In Subsection A were added by the compiler and are not part of the law.

The 1995 amendment, effective July 1, 1996, rewrote the section to such an extent that a detailed comparison would be impracticable.

Law reviews. — For annual survey of New Mexico law relating to property, see 12 N.M.L. Rev. 459 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Enforceability, by landowner, of subdivision developer's oral promise to construct or improve roads, 41 A.L.R.4th 573.

47-6-27.2. Approval necessary for utility connection.

Any water, sewer, electric or gas utility that connects service to individual parcels within a subdivision, before a final plat for the subdivision has been approved by the board of county commissioners or before the landowner holds a valid building permit, may be fined a civil penalty of up to five hundred dollars ($500) by the board of county commissioners. The board of county commissioners may also require any utility connected in violation of this section to be disconnected.

History: Laws 1995, ch. 212, § 25.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 212, § 34 made Laws 1995, ch. 212, § 25 effective July 1, 1996.

47-6-28. Use of fees.

All fees collected by a county for passing upon subdivision plats shall be deposited in the county general fund.

History: 1953 Comp., § 70-5-28, enacted by Laws 1973, ch. 348, § 28.

47-6-29. Jurisdiction.

Nothing in the New Mexico Subdivision Act shall be construed as limiting the municipal extraterritorial subdivision and platting jurisdiction provided for in Sections 3-20-1 through 3-20-15 NMSA 1978.

History: 1953 Comp., § 70-5-29, enacted by Laws 1973, ch. 348, § 41; 1979, ch. 172, § 4; 1995, ch. 212, § 31.

ANNOTATIONS

The 1995 amendment, effective July 1, 1996, deleted "as presently enforced or as hereafter amended" following "New Mexico Subdivision Act".

Severability. — Laws 1995, ch. 212, § 33 provides for the severability of the act if any part or application thereof is held invalid.

Temporary provisions. — Laws 1973, ch. 348, § 29A, provided that the New Mexico Subdivision Act applies to subdivision approved after the act's effective date when approval occurs in a county with regulations adopted pursuant to the act. Subsection B provides that 47-6-18 NMSA 1978 applies to sales and leases of subdivided land commencing six months after the act's effective date.

Effect of this section is that a plat of a proposed subdivision in an area within a municipality's extraterritorial subdivision and platting jurisdiction must be approved by both the appropriate municipal authority and the appropriate county authority. 1973 Op. Att'y Gen. No. 73-68.

ARTICLE 7
Building Unit Ownership

47-7-1. Short title.

This act [47-7-1 to 47-7-25, 47-7-26 to 47-7-28 NMSA 1978] may be cited as the "Building Unit Ownership Act."

History: 1953 Comp., § 70-4-1, enacted by Laws 1963, ch. 221, § 1; 1975, ch. 318, § 1.

47-7-2. Definitions.

As used in the Building Unit Ownership Act:

A. "unit" means a part of the property intended for residential, professional, commercial, industrial or any type of independent use, including one or more rooms or enclosed spaces located on one or more floors in a building, and with a direct exit to a public street or highway or to a common area leading to a public street or highway;

B. "unit owner" means the person or persons owning a unit in fee simple absolute and undivided interest in the fee simple or leasehold estate of the common areas and facilities in the percentage established by the declaration;

C. "association of unit owners" means all of the unit owners acting as a group in accordance with the bylaws and declarations;

D. "blanket encumbrance" means a trust deed, mortgage or any other lien or encumbrance, including mechanics' liens, securing or evidencing the payment of money or the furnishing of services or materials and affecting the entire property or affecting more than one unit but does not include taxes and assessments levied by a public authority;

E. "building" means a building or group of buildings having a total of two or more units and comprising a part of the property;

F. "common areas and facilities," unless otherwise provided in the declaration, includes:

(1) the land on which the building is located;

(2) the foundations, columns, girders, beams, supports, main walls, roofs, halls, corridors, lobbies, stairs, stairways, fire escapes and entrances and exits of the building;

(3) the basements, yards, gardens, parking areas and storage spaces;

(4) the premises for the lodging of persons in charge of the property;

(5) installations of central services including power, light, gas, water, heating, refrigeration, air conditioning and incinerating;

(6) the elevators, tanks, pumps, motors, fans, compressors, ducts and all apparatus and installations existing for common use;

(7) the community and commercial facilities provided in the declaration; and

(8) all other parts of the property necessarily in common use or convenient to its existence, maintenance and safety;

G. "common expenses" includes:

(1) all sums lawfully assessed against the unit owners by the association of unit owners;

(2) expenses of administration, maintenance, repair or replacement of the common areas and facilities; and

(3) expenses declared common expenses;

H. "common profits" means the balance of income, rents, profits and revenues from the common areas and facilities remaining after the deduction of common expenses;

I. "declaration" means the instrument by which the property is submitted to the provisions of the Building Unit Ownership Act and its lawful amendments;

J. "limited common areas and facilities" means common areas and facilities designated in the declaration as reserved for use of certain units to the exclusion of the others;

K. "majority" or "majority of unit owners" means the majority of voting unit owners;

L. "person" means individual, corporation, partnership, combination, association, trustee or other legal entity;

M. "property" means the land, the building, improvements and structures owned in fee simple absolute or long term ground lease, all easements, servitude, rights and appurtenances belonging thereto, and all chattels intended for use in connection therewith, which have been or are intended to be submitted to the provisions of the Building Unit Ownership Act; and

N. "condominium" means any property which is submitted to the provisions of the Building Unit Ownership Act.

History: 1953 Comp., § 70-4-2, enacted by Laws 1963, ch. 221, § 2; 1965, ch. 6, § 1; 1967, ch. 57, § 1; 1975, ch. 318, § 2; 1981, ch. 282, § 1.

ANNOTATIONS

The 1981 amendment deleted "and" at the end of Subsection L, added "and" at the end of Subsection M and added Subsection N.

47-7-3. Application of act.

The Building Unit Ownership Act shall apply to property, the sole owner or all of the owners of which submit it to the provisions of the act by duly executing and recording a declaration.

History: 1953 Comp., § 70-4-3, enacted by Laws 1963, ch. 221, § 3; 1975, ch. 318, § 3.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments § 10.

31 C.J.S. Estates § 153 et seq.

47-7-4. Status of the units.

Each unit together with its undivided interest in the common areas and facilities, shall constitute real property.

History: 1953 Comp., § 70-4-4, enacted by Laws 1963, ch. 221, § 4; 1975, ch. 318, § 4.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 18, 19, 38.

31 C.J.S. Estates § 153 et seq.

47-7-5. Ownership of units.

Each unit owner shall be entitled to sole ownership and possession of his unit.

History: 1953 Comp., § 70-4-5, enacted by Laws 1963, ch. 221, § 5; 1975, ch. 318, § 5.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 8 to 11.

Regulation of time-share or interval ownership interests in real estate, 6 A.L.R.4th 1288.

Standing to bring action relating to real property of condominium, 74 A.L.R.4th 165.

31 C.J.S. Estates § 153 et seq.

47-7-6. Common areas and facilities.

A. Each unit owner shall be entitled to an undivided interest in the common areas and facilities in the percentage established by the declaration. The percentage shall be computed by taking as a basis the value of the particular unit in relation to the value of the whole property.

B. The percentage of the undivided interest of each unit owner in the common areas and facilities as established by the declaration shall be permanent and shall not be altered without the consent of all of the unit owners expressed in an amended declaration duly recorded. The percentage of the undivided interest in the common areas and facilities shall not be separated from the unit to which it is appurtenant and shall be deemed to be conveyed or encumbered with the unit even though the interest is not expressly mentioned or described in a conveyance or other instrument.

C. The common areas and facilities shall remain undivided, and no unit owner or any other person shall bring any action for partition or division, unless the property has been removed from the provisions of the Building Unit Ownership Act as provided in Sections 47-7-17 and 47-7-27 NMSA 1978. Any covenant to the contrary is unenforceable.

D. Each unit owner may use the common areas and facilities, in accordance with the purpose for which they were intended, without hindering or encroaching upon the lawful rights of the other unit owners.

E. The necessary work of maintenance, repair and replacement of the common areas and facilities and the making of any additions or improvements thereto shall be carried out only as provided in the Building Unit Ownership Act and in the bylaws.

F. The association of unit owners shall have the irrevocable right, exercisable by the manager or board of directors, of access to each unit from time to time during reasonable hours as may be necessary for the maintenance, repair or replacement of any of the common areas and facilities therein or accessible therefrom, and for making emergency repairs necessary to prevent damage to the common areas and facilities or to another unit.

History: 1953 Comp., § 70-4-6, enacted by Laws 1963, ch. 221, § 6; 1975, ch. 318, § 6.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments § 9.

Validity and construction of condominium association's regulations governing members' use of common facilities, 72 A.L.R.3d 308.

31 C.J.S. Estates § 153 et seq.

47-7-7. Compliance with covenants; bylaws; administrative provisions.

Each unit owner shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto and shall comply with the covenants, conditions and restrictions set forth in the declaration or in the deed to his unit. Failure to comply shall be grounds for an action to recover sums due, for damages or injunctive relief, or both, maintainable by the manager or board of directors for the use of the association of unit owners or maintainable in a proper case by an aggrieved unit owner.

History: 1953 Comp., § 70-4-7, enacted by Laws 1963, ch. 221, § 7; 1975, ch. 318, § 7.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 9, 39.

Validity and construction of condominium association's regulations governing members' use of common facilities, 72 A.L.R.3d 308.

Use of property for multiple dwellings as violating restrictive covenant permitting property to be used for residential purposes only, 99 A.L.R.3d 985.

Enforceability of bylaw or other rule of condominium or cooperative association restricting occupancy by children, 100 A.L.R.3d 241.

Validity and construction of regulations of governing body of condominium or cooperative apartment pertaining to parking, 60 A.L.R.5th 647.

Change in character of neighborhood as affecting validity or enforceability of restrictive covenant, 76 A.L.R.5th 337.

31 C.J.S. Estates § 153 et seq.

47-7-8. Certain work prohibited.

No unit owner shall undertake any work which would jeopardize the soundness or safety of the property, reduce the value or impair an easement or hereditament without the unanimous consent of all the other unit owners. Structural alterations shall not be made by a unit owner to the building or in the water, gas or steam pipes, electric conduits, plumbing or other fixtures connected therewith; nor shall a unit owner remove any additions, improvements or fixtures from the building without the written consent of the board of directors.

History: 1953 Comp., § 70-4-8, enacted by Laws 1963, ch. 221, § 8; 1975, ch. 318, § 8.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments § 18.

31 C.J.S. Estates § 153 et seq.

47-7-9. Liens against units; removal from lien; effect of part payment.

A. Subsequent to recording the declaration as provided in the Building Unit Ownership Act, and while the property remains subject to the act, no lien shall arise or be effective against the property. During the period, liens or encumbrances shall only arise or be created against each unit and the percentage of undivided interest in the common areas and facilities, appurtenant to the unit, in the same manner and under the same conditions as liens and encumbrances may arise or be created upon any other parcel of real property subject to individual ownership; provided, however, that no labor performed or materials furnished, with the consent or at the request of a unit owner or his agent or his contractor or subcontractor, shall be the basis for the filing of a lien pursuant to law against the unit or other property of another unit owner not expressly consenting to or requesting the same; except that express consent shall be deemed to be given by the owner of any unit in the case of emergency repairs. Labor performed or materials furnished for the common areas and facilities, if duly authorized by the association of unit owners, the manager or board of directors in accordance with the Building Unit Ownership Act, the declaration or bylaws, shall be deemed to be performed or furnished with the express consent of each unit owner and shall be the basis for the filing of a lien pursuant to law against each of the units.

B. In the event a lien is effected against two or more units, the unit owners of the separate units may remove their unit and the percentage of undivided interest in the common areas and facilities appurtenant to the unit from the lien by payment of the fractional or proportional amount attributable to each of the units affected. Individual payment shall be computed by reference to the percentages established by the declaration. Subsequent to payment, discharge or other satisfaction, the unit and the percentage of undivided interest in the appurtenant common areas and facilities shall be released from the lien paid, satisfied or discharged. Partial payment, satisfaction or discharge shall not prevent the lienor from proceeding to enforce his rights against any unit and the percentage of undivided interest in the appurtenant common areas and facilities not released or discharged.

History: 1953 Comp., § 70-4-9, enacted by Laws 1963, ch. 221, § 9; 1975, ch. 318, § 9.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 9, 45 to 47.

47-7-10. Common profits and expenses.

The common profits of the property shall be distributed among, and the common expenses shall be charged to, each unit owner according to the percentage of his undivided interest in the common areas and facilities.

History: 1953 Comp., § 70-4-10, enacted by Laws 1963, ch. 221, § 10; 1975, ch. 318, § 10.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 35, 36.

Expenses for which condominium association may assess unit owners, 77 A.L.R.3d 1290.

31 C.J.S. Estates § 153 et seq.

47-7-11. Contents of declaration.

The declaration shall contain:

A. a description of the land on which the building and improvements are or will be located;

B. a description of the building, stating the number of stories and basements, the number of units and the principal materials of which it is, or will be, constructed;

C. the number of each unit, and a statement of its location, approximate area, number of rooms and immediate common area to which it has access, and any other data necessary for its proper identification;

D. a description of the common areas and facilities;

E. a description of the limited common areas and facilities, stating to which units their use is reserved;

F. the value of the property and of each unit, and the percentage of undivided interest in the common areas and facilities appertaining to each unit and its owner for all purposes including voting. In the case of any building consisting of separate units not substantially sharing any common structural elements, the value of each unit shall be computed on the basis of the square footage contained within its exterior dimensions;

G. a statement of the purposes for which the building and the units are intended and restricted;

H. the name and address of agent for service;

I. a provision as to the percentage of votes by the unit owners which shall be determinative of whether to rebuild, repair, restore or sell the property in the event of damage or destruction;

J. any further details in connection with the property which the person executing the declaration may deem desirable to set forth consistent with the Building Unit Ownership Act; and

K. the method by which the declaration may be amended.

History: 1953 Comp., § 70-4-11, enacted by Laws 1963, ch. 221, § 11; 1971, ch. 148, § 1; 1975, ch. 318, § 11.

ANNOTATIONS

Failure to abide by declaration as fraud. — Where, pursuant to this section, builder prepared a "Declaration of Covenants, Conditions, and Restrictions Relative to Carson-Grande Addition," but, in spite of the stipulations set forth therein, builder never constructed a pool, never activated the homeowners association, did not transfer the common areas to the association, and amended the declaration so as to eliminate the planned construction of a pool, there was sufficient evidence to support the trial court's findings of fact and conclusions of law establishing a pattern of commission and omission amounting to fraud. *Register v. Roberson Constr. Co.*, 1987-NMSC-072, 106 N.M. 243, 741 P.2d 1364.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 14, 15, 33, 57.

31 C.J.S. Estates § 153 et seq.

47-7-12. Declaration; apportionment of interest.

The declaration shall specify a method by which the interest attributable to each unit shall be apportioned. The apportionment may be based upon:

A. the square or cubic footage in the unit as a percentage of the square or cubic footage in all of the units;

B. the value, as that term is defined in the declaration, of the unit as a percentage of the value of all of the units; or

C. the unit itself as a percentage of all of the units in the property. The percentage interest shall change if additional units are added after the filing of the declaration.

History: 1953 Comp., § 70-4-11.1, enacted by Laws 1975, ch. 318, § 12.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments § 33.

31 C.J.S. Estates § 153 et seq.

47-7-13. Contents of deeds of units.

Deeds of units shall include:

A. a description of the land as provided in Section 47-7-11 NMSA 1978, or the post-office address of the property, including in either case the book, page and date of recording of the declaration;

B. any other data necessary for proper identification of that unit;

C. a statement of the use for which the unit is intended, and restrictions on its use;

D. the percentage of undivided interest appertaining to the unit in the common areas and facilities; and

E. any other details which the grantor and grantee may deem desirable to set forth and which shall be consistent with the declaration and the Building Unit Ownership Act.

History: 1953 Comp., § 70-4-12, enacted by Laws 1963, ch. 221, § 12; 1975, ch. 318, § 13.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 9, 18.

31 C.J.S. Estates § 153 et seq.

47-7-14. Copy of the floor plans to be filed.

Simultaneously with the recording of the declaration, there shall be filed in the office of the county clerk a set of the floor plans of the building showing:

A. the layout, location and dimensions of the units, stating the name of the building or that it has no name, and bearing the verified statement of a registered architect or licensed professional engineer certifying that it is an accurate copy of portions of the

plans of the building as filed with, and approved by, the governmental subdivision having jurisdiction over the issuance of permits for the construction of buildings; or

B. if the building consists of separate units not substantially sharing any common structural elements, the exterior dimensions of the units, their location and the common areas, and bearing the verified statement of a registered architect or licensed professional engineer certifying that it is an accurate copy of portions of the plans of the building as filed with, and approved by, the governmental subdivision having jurisdiction over the approval of plats for real estate.

The plans shall be kept by the county clerk in a separate file for each building, indexed in the same manner as a conveyance entitled to record, numbered serially in the order of receipt, each designated "unit ownership," a reference to the book, page and date of recording of the declaration. The record of the declaration shall contain a reference to the file number of the floor plans of the building affected.

History: 1953 Comp., § 70-4-13, enacted by Laws 1963, ch. 221, § 13; 1971, ch. 148, § 2; 1975, ch. 318, § 14.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments § 15.

31 C.J.S. Estates § 153 et seq.

47-7-15. Blanket encumbrances affecting a unit at time of first conveyance.

At the time of the first conveyance of each unit, every blanket encumbrance affecting the unit shall be paid and satisfied of record, or the unit being conveyed shall be released therefrom by partial release duly recorded.

History: 1953 Comp., § 70-4-14, enacted by Laws 1963, ch. 221, § 14; 1975, ch. 318, § 15.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments § 46.

31 C.J.S. Estates § 153 et seq.

47-7-16. Recording.

A. The declaration, any amendment thereof, any instrument by which the provisions of the Building Unit Ownership Act may be waived and every instrument affecting the property or any unit shall be entitled to be recorded. Neither the declaration nor any amendment thereof shall be valid unless duly recorded.

B. In addition to the records and indexes required to be maintained by the county clerk, the county clerk shall maintain an index whereby the record of each conveyance of a unit affected by the declaration, and the record of each conveyance of a unit contains a reference to the declaration of the building of which the unit is a part.

History: 1953 Comp., § 70-4-15, enacted by Laws 1963, ch. 221, § 15; 1975, ch. 318, § 16.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 15 to 18.

31 C.J.S. Estates § 153 et seq.

47-7-17. Removal from provisions of the Building Unit Ownership Act.

A. All unit owners may remove a property from the provisions of the Building Unit Ownership Act by an instrument to that effect, duly recorded; provided that the holders of liens affecting any unit shall consent or agree by instrument duly recorded, provided that their liens be transferred to the percentage of the undivided interest of the debtor unit owner in the property as hereinbefore provided.

B. Upon removal of the property from the provisions of the Building Unit Ownership Act, the property shall be deemed to be owned in common by the unit owners. The undivided interest in the property owned in common which shall appertain to each unit owner shall be the percentage of undivided interest previously owned by an owner in the common areas and facilities.

History: 1953 Comp., § 70-4-16, enacted by Laws 1963, ch. 221, § 16; 1975, ch. 318, § 17.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments § 52.

47-7-18. Removal no bar to subsequent resubmission.

The removal provided in Section 47-7-17 NMSA 1978 shall not bar the subsequent resubmission of the property to the provisions of the Building Unit Ownership Act.

History: 1953 Comp., § 70-4-17, enacted by Laws 1963, ch. 221, § 17; 1975, ch. 318, § 18.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments § 52.

47-7-19. Bylaws.

The administration of every property shall be governed by bylaws, a true copy of which shall be annexed to the declaration and shall be a part thereof. No modification of or amendment to the bylaws shall be valid unless set forth in an amendment to the declaration and the amendment be duly recorded.

History: 1953 Comp., § 70-4-18, enacted by Laws 1963, ch. 221, § 18; 1975, ch. 318, § 19.

ANNOTATIONS

Law reviews. — For article, "Child Welfare Under the Indian Child Welfare Act of 1978: A New Mexico Focus," see 10 N.M.L. Rev. 413 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 13, 15 to 17.

31 C.J.S. Estates § 153 et seq.

47-7-20. Contents of bylaws.

The bylaws may provide for:

A. the election from among the unit owners of a board of directors, the number of persons constituting the board, and that the terms of at least one-third of the directors shall expire annually; the powers and duties of the board; the compensation of the directors; and the authority of the board to engage the services of a manager or managing agent;

B. the method of calling meetings of the unit owners; what number of unit owners shall constitute a quorum;

C. the election of a president from among the board of directors who shall preside over the meetings of the board of directors and of the association of unit owners;

D. the election of a secretary who shall keep the minute book in which resolutions shall be recorded;

E. the election of a treasurer who shall keep the financial records and books of account;

F. the maintenance, repair and replacement of the method of approving payment vouchers;

G. the manner of collecting from each unit owner his share of the common expenses;

H. the designation and removal of personnel necessary for the maintenance, repair and replacement of the common areas and facilities; designation, and any changes, of agent for process;

I. the method of adopting and of amending administrative rules and regulations governing the details of the operation and the use of the common areas and facilities;

J. the restrictions on and requirements of the use and maintenance of the units and the use of the common areas and facilities, not set forth in the declaration, which are designed to prevent unreasonable interference with the use of units and of the common areas and facilities by the several unit owners;

K. a method by which the manager, the board of directors or the association of unit owners may lease or rent unsold units; provided, that nothing in the Building Unit Ownership Act shall be construed to prevent the lease or rental of unsold units by the proper authorities before bylaws are adopted or before the declaration is executed;

L. the percentage of votes required to amend the bylaws; and

M. other provisions as may be deemed necessary for the administration of the property consistent with the Building Unit Ownership Act.

History: 1953 Comp., § 70-4-19, enacted by Laws 1963, ch. 221, § 19; 1975, ch. 318, § 20.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 9, 13, 15 to 17, 22, 28 to 31, 34, 36 to 39.

Validity and construction of regulations of governing body of condominium or cooperative apartment pertaining to parking, 60 A.L.R.5th 647.

31 C.J.S. Estates § 153 et seq.

47-7-21. Books of receipts and expenditures; availability for examination.

The manager or board of directors, shall keep detailed, accurate records in chronological order, of the receipts and expenditures affecting the common areas and facilities, specifying and itemizing the maintenance and repair expenses of the common areas and facilities and any other expenses incurred. The records and the vouchers authorizing payments shall be available for examination by any unit owner at convenient hours of weekdays.

History: 1953 Comp., § 70-4-20, enacted by Laws 1963, ch. 221, § 20; 1975, ch. 318, § 21.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 16, 29.

31 C.J.S. Estates § 153 et seq.

47-7-22. Waiver of use of common areas and facilities; abandonment of unit.

No unit owner may exempt himself from liability for his contribution toward the common expenses by waiver of the use or enjoyment of any of the common areas and facilities or by abandonment of his unit.

History: 1953 Comp., § 70-4-21, enacted by Laws 1963, ch. 221, § 21; 1975, ch. 318, § 22.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments § 36.

Expenses for which condominium association may assess unit owners, 77 A.L.R.3d 1290.

31 C.J.S. Estates § 153 et seq.

47-7-23. Taxation.

The association of unit owners shall elect whether:

A. the entire property shall be deemed a single parcel for the purposes of assessment and taxation, in which event the association shall promptly notify the unit owners of the payment of the taxes. For purposes of assessment or valuation and taxation under this paragraph, the association shall be deemed to be the owner as defined in Section 7-35-2 NMSA 1978; or

B. each unit and its percentage of undivided interest in the common areas and facilities shall be deemed to be a parcel and shall be subject to separate assessment and taxation by each assessing unit and special district for all types of taxes authorized by law, including ad valorem levies and special assessments.

History: 1953 Comp., § 70-4-22, enacted by Laws 1963, ch. 221, § 22; 1975, ch. 318, § 23.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 5, 9, 29, 48 to 50.

Real estate taxation of condominiums, 71 A.L.R.3d 952.

31 C.J.S. Estates § 153 et seq.

47-7-24. Priority of lien.

A. All sums, assessed by the association of unit owners but unpaid, for the share of the common expenses chargeable to any unit shall constitute a lien on the unit prior to all other liens except:

(1) tax liens on the unit in favor of any assessing unit and special district; and

(2) all sums unpaid on a first mortgage of record. The lien may be foreclosed by suit by the manager or board of directors, acting on behalf of the unit owners, in like manner as a foreclosure of mortgage or real property. In any foreclosure the unit owner shall be required to pay a reasonable rental for the unit if so provided in the bylaws, and the plaintiff in the foreclosure shall be entitled to the appointment of a receiver to collect the rent paid. The manager or board of directors, acting on behalf of the unit owners shall have power, unless prohibited by the declaration, to bid on the unit at foreclosure sale, and to acquire and hold, lease, mortgage and convey. Suit to recover a money judgment for unpaid common expenses shall be maintainable without foreclosing or waiving the lien securing the same.

B. Where the mortgagee of a first mortgage of record or other purchaser of a unit obtains title to the unit as a result of foreclosure of mortgage, the acquirer of title, his successors and assigns, shall not be liable for the share of the common expenses or assessments by the association of unit owners chargeable to the unit which became

due prior to the acquisition of title to the unit by the acquirer. The unpaid share of common expenses or assessments shall be deemed to be common expenses collectible from all of the unit owners including the acquirer, his successors and assigns.

History: 1953 Comp., § 70-4-23, enacted by Laws 1963, ch. 221, § 23; 1975, ch. 318, § 24.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments § 37.

31 C.J.S. Estates § 153 et seq.

47-7-25. Joint and several liability of grantor and grantee for unpaid common expenses.

In a voluntary conveyance the grantee of a unit shall be jointly and severally liable with the grantor for all unpaid assessments against the grantor for his share of the common expenses to the time of grant or conveyance, without prejudice to the grantee's right to recover from the grantor the amounts paid by the grantee. However, any grantee shall be entitled to a statement from the manager or board of directors, setting forth the amount of the unpaid assessments against the grantor and the grantee shall not be liable for, nor shall the unit conveyed by [be] subject to a lien for, any unpaid assessments against the grantor in excess of the amount therein set forth.

History: 1953 Comp., § 70-4-24, enacted by Laws 1963, ch. 221, § 24; 1975, ch. 318, § 25.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments § 37.

Expenses for which condominium association may assess unit owners, 77 A.L.R.3d 1290.

31 C.J.S. Estates § 153 et seq.

47-7-25.1. Merger or consolidation of condominiums.

A. By agreement of the unit owners, any two or more condominiums may be merged or consolidated into a single condominium. Unless the agreement provides

otherwise, the combined condominium is, for all purposes, the legal successor to the preexisting condominiums. The associations of the preexisting condominiums shall also be merged or consolidated into a single association which shall hold all powers, rights, obligations, assets and liabilities of the preexisting associations.

B. An agreement of two or more condominiums to merge or consolidate pursuant to Subsection A of this section shall be evidenced by an agreement prepared, executed, recorded and certified by the president of the association of each of the preexisting condominiums following approval by owners of units to which are allocated the precentage [percentage] of votes in each condominium required to terminate that condominium. Any such agreement shall be recorded in each county in which a portion of the condominium is located and is not effective until recorded.

C. Every merger or consolidation agreement shall provide for the reallocation of the allocated interests in the new association among the units of the resultant condominium either by stating the reallocations or the formulas upon which they are based or by stating the percentage of overall allocated interests of the new condominium which are [is] allocated to all of the units comprising each of the preexisting condominiums; providing that the portion of the percentages allocated to each unit formerly comprising a part of the preexisting condominium shall be equal to the percentages of allocated interests allocated to that unit by the declaration of the preexisting condominium.

History: 1978 Comp., § 47-7-25.1, enacted by Laws 1981, ch. 282, § 2.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

47-7-26. Actions.

Without limiting the rights of any unit owner, actions may be brought by the manager or board of directors, in either case in the discretion of the board of directors, on behalf of two or more of the unit owners, as their respective interests may appear, with respect to any claim relating to the common areas and facilities or more than one unit. Service of process on two or more unit owners in any action relating to the common areas and facilities or more than one unit may be made on the person designated in the declaration to receive service of process.

History: 1953 Comp., § 70-4-25, enacted by Laws 1963, ch. 221, § 25; 1975, ch. 318, § 26.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 57, 58.

Proper party plaintiff in action for injury to common areas of condominium development, 69 A.L.R.3d 1148.

Standing to bring action relating to title in real property of condominium, 74 A.L.R.4th 165.

31 C.J.S. Estates § 153 et seq.

47-7-27. Personal application.

A. All unit owners, tenants of owners, employees of owners and tenants, or any other persons that may in any manner use property or any part thereof submitted to the provisions of the Building Unit Ownership Act shall be subject to the act and to the declaration and bylaws of the association of unit owners adopted pursuant to the provisions of the act.

B. All agreements, decisions and determinations lawfully made by the association of unit owners in accordance with the voting percentages established in the Building Unit Ownership Act, declaration or bylaws, shall be deemed to be binding on all unit owners.

History: 1953 Comp., § 70-4-26, enacted by Laws 1963, ch. 221, § 26; 1975, ch. 318, § 27.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments § 16.

31 C.J.S. Estates § 153 et seq.

47-7-28. Insurance.

A. The manager or the board of directors if required by the declaration, bylaws or by a majority of the unit owners shall insure the property against the risks and under the terms required. The insurance coverage shall be written in the name of the manager, board of directors or the association of unit owners as trustees for each unit owner in the percentage established in the declaration. Insurance premiums shall be common expenses. The requirement of common insurance coverage shall not prejudice the right of each unit owner to insure separately his own unit.

B. In the case of fire or other disaster, the insurance indemnity shall be applied to reconstruct the building unless the damage comprises more than two-thirds of the building, in which case the indemnity may be delivered pro rata to the co-owners in accordance with the decision of three-fourths of the co-owners.

History: 1953 Comp., § 70-4-27, enacted by Laws 1963, ch. 221, § 27; 1975, ch. 318, § 28.

ANNOTATIONS

Severability. — Laws 1975, ch. 318, § 29, provided for the severability of the act if any part or application was held invalid.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 5, 29, 30, 44, 54, 55.

31 C.J.S. Estates § 153 et seq.

ARTICLE 7A
Condominium Act - General Provisions

47-7A-1. Short title.

This act [47-7A-1 to 47-7D-20 NMSA 1978] may be cited as the "Condominium Act."

History: Laws 1982, ch. 27, § 1.

ANNOTATIONS

Compiler's notes. — Laws 1982, ch. 27, enacted New Mexico's version of the Uniform Condominium Act, as amended in 1980. Those sections of the uniform act not adopted by New Mexico are §§ 1-110 (Uniformity), 4-113 to 4-116 (Warranties) and Article 5, §§ 5-101 to 5-110 (Administration and Registration). Where applicable, the parallel New Mexico sections are designated as "Reserved."

Included following each section of the New Mexico act are the official commissioners' comments to the uniform act. Compiler's notes following each section indicate the similar uniform act provision and its differences, if any, with the New Mexico provision. Where possible, references to the uniform act in the comments have been translated to the parallel New Mexico provisions.

Section 47-7A-1 NMSA 1978 is substantially similar to § 1-101 of the Uniform Condominium Act.

COMMISSIONERS' PREFATORY NOTE

This act contains comprehensive provisions designed to unify and modernize the law of condominiums, which has undergone great change in the last 16 years. As a result of the increasing usefulness and flexibility of the condominium concept, condominiums

have become one of the most common forms of community ownership of property in the United States.

All states have statutes which provide for the creation of condominiums and establish some rules concerning their governance. The first statute in the United States was adopted in 1958 in Puerto Rico, and most of the present state statutes are patterned after that 1958 statute, or after the 1962 federal housing administration model condominium statute. As the condominium form of ownership became widespread, however, many states realized that these early statutes were inadequate to deal with the growing condominium industry. In particular, many states perceived a need for additional consumer protection, as well as a need for more flexibility in the creation and use of condominiums. As a result, some states have recently enacted more detailed and comprehensive "second generation" statutes.

The statutes governing condominiums in the various states use varying and sometimes inappropriate terminology, and differ in numerous details, all of which make it difficult for a national lender to assess the appropriateness of condominium documents and of condominium financing arrangements in those states. Moreover, the varying statutes, creating different "bundles of rights" for purchasers of condominiums in the various states, also make it difficult for the increasingly mobile consumer to become educated in this very complex area. Finally, many actual or potential problems involving such matters as termination of condominiums, eminent domain, insurance and the rights and obligations of lenders upon foreclosure of a condominium project, have not been satisfactorily addressed by any existing statute. It is primarily to resolve these various problems that the Uniform Condominium Act was drafted.

Article 1 [this article] of the act contains definitions and general provisions applicable throughout the act. The article deals with such matters as applicability, separate titles and taxation, eminent domain, applicability of other statutes and other general matters.

Article 2 [Article 7B, Chapter 47 NMSA 1978] provides for the creation, alteration and termination of the condominium. The article provides great flexibility to a developer in creating a condominium project designed to meet the needs of a modern real estate market, while imposing reasonable restrictions on developers' practices which have a potential for harm to unit purchasers.

Article 3 [Article 7C, Chapter 47 NMSA 1978] concerns the administration of the unit owners' association, a matter which has received very limited attention in the statutes of the various states. This article provides broad-ranging powers to the association, and covers such matters as insurance, tort and contract liability of the association and other matters often not dealt with in current statutes.

Article 4 [Article 7D, Chapter 47 NMSA 1978] deals with consumer protection for condominium unit purchasers. In addition to treating specific abuses which have developed in the condominium industry in the past, the article requires very substantial disclosure by developers, which must be made available to consumers before

conveyance of a unit. To further promote disclosure, the article also requires that all owners of units in residential condominiums provide resale certificates to subsequent purchasers, regardless of when the condominium was created.

Article 5 is an optional article which establishes an administrative agency to supervise a developer's activities. The article is so drafted that it may be included in the act in those states where an agency is thought desirable, and deleted from the act in those states which desire to have the act enforced by private action. In the event that a state determines to delete Article 5 from the act, other provisions of the act, indicated in the text by brackets, should also be deleted. A list of these sections appears in the prefatory note to Article 5.

The Uniform Condominium Act was originally a part of the Uniform Land Transactions Act, but was separated from that act for further consideration at the 1975 annual meeting of the National Conference of Commissioners on Uniform State Laws. This act was approved at the annual meeting of the conference in Vail, Colorado in August 1977.

Since promulgation of the act in 1977, and approval by the American Bar Association in 1978, the act has received widespread legislative attention. The Act was enacted in its uniform version in Minnesota, Pennsylvania, and West Virginia during the 1979-80 legislative year, and was enacted with substantial amendments in Louisiana in 1978-79. By 1980, it had also been introduced in the legislatures of Arizona, Colorado, Connecticut, Idaho, Illinois, Massachusetts, Missouri, Tennessee, Vermont and Wyoming.

During this same period, the national conference appointed a drafting committee to draft a Uniform Planned Community Act (UPCA), and that act was promulgated by the conference at its 1980 annual meeting. UPCA applies to a wide variety of other forms of multiple ownership real estate regimes which are similar in legal structure to condominiums, but do not meet the definition of "condominium" either, under present state law or the Uniform Condominium Act.

As a result of the legislative process in the various states considering the act, and review of the act by the drafting committee on UPCA, a large number of amendments to the 1977 Act were proposed to the conference.

Many of these amendments were adopted at the 1980 annual meeting of the conference, and have been included in this edition of the act. Most of them are of a minor non-substantial nature; they are intended to resolve insignificant technical questions, or to clarify the meaning of provisions susceptible to misinterpretation. A few amendments were adopted which result in more significant changes, either on particular matters of substance, or in the use of terms throughout the act which simplify the structure and readability of the act. A summary of the more significant amendments can be obtained from the headquarters office of the NCCUSL, Suite 510, 645 North Michigan Avenue, Chicago, Illinois 60611.

A second category of changes results from a decision of the conference at its 1978 annual meeting that the Condominium and Planned Community Acts should contain identical provisions wherever possible, in order to facilitate the consolidation of the two acts in those states desiring a single uniform act covering both forms of multiple ownership developments. This required a large number of textual changes with no substantive effect. As a result, however, there are very few differences between the two acts, and consolidation would be a simple and desirable approach in states desiring uniform coverage of both forms of ownership. An analysis of the differences between the acts, and a general description of how the acts might be consolidated, appear in the prefatory note to UPCA. However, at this time, the conference has not prepared a consolidated text, because of its continuing consideration of the co-operative form of ownership, and the possibility that a consolidated act might be applicable to co-operatives as well.

Law reviews. — For annual survey of New Mexico law relating to property, see 13 N.M.L. Rev. 435 (1983).

For comment, "Survey of New Mexico Law: Condominium Law: The New Mexico Condominium Act," see 15 N.M.L. Rev. 203 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 7, 9, 10.

31 C.J.S. Estates § 153 et seq.

47-7A-2. Applicability.

A. The Condominium Act applies to all condominiums created within this state after the effective date of that act.

B. The provisions of the Building Unit Ownership Act do not apply to condominiums created after the effective date of the Condominium Act. Any provisions of the declaration, bylaws, plats or plans of a condominium created before the effective date of the Condominium Act, which provisions are not expressly authorized by the Building Unit Ownership Act [47-7-1 to 47-7-25, 47-7-26 to 47-7-28 NMSA 1978] but which would have been authorized by the Condominium Act, had it been in effect, are hereby ratified. A condominium subject to the provisions of the Building Unit Ownership Act shall become subject to the Condominium Act and not the Building Unit Ownership Act if a resolution to that effect is approved by a majority of the unit owners and is then recorded as are instruments creating interests in real property. The declaration, bylaws, plats or plans of a condominium created before the effective date of the Condominium Act shall be amended in conformity with the procedures and requirements specified by those instruments and by the Building Unit Ownership Act. If the amendment grants to any person any rights, powers or privileges not expressly authorized by the Building Unit Ownership Act but permitted by the Condominium Act, all correlative obligations, liabilities and restrictions in the Condominium Act also apply to that person.

History: Laws 1982, ch. 27, § 69.

ANNOTATIONS

Compiler's notes. — This section is similar to § 1-102 of the Uniform Condominium Act, with the following main exceptions: Subsection A of this section does not set forth the detailed three-step approach of subsection (a) of § 1-102 of the Uniform Condominium Act, as to condominiums created before the effective date of the state Condominium Act; Subsection B of this section expands upon the procedure by which unit owners of a pre-existing condominium may elect to subject their association to the provisions of the state Condominium Act; the state Condominium Act does not include subsection (c) of § 1-102 of the Uniform Condominium Act, which deals with out-of-state condominiums.

COMMISSIONERS' COMMENT

1. The question of the extent to which a state statute should apply to particular condominiums involves two problems: first, the extent to which the statute should require or permit different results for condominiums created before and after the statute becomes effective; and second, whether the statute should impose any or all of its substantive requirements on condominiums located outside the state.

Two conflicting policies are proposed when considering the applicability of this act to "old" and "new" condominiums located in the enacting state. On the one hand, it is desirable, for reasons of uniformity, for the act to apply to all condominiums located in a particular state, regardless of whether the condominium was created before or after adoption of the act in that state. To the extent that different laws apply within the same state to different condominiums, confusion results in the minds of both lenders and consumers. Moreover, because of the inadequacies and uncertainties of condominiums created under old law, and because of the requirements placed on declarants and unit owners' associations by this act which might increase the costs of new condominiums, different markets might tend to develop for condominiums created before and after adoption of the act.

On the other hand, to make all provisions of this act automatically apply to "old" condominiums might violate the constitutional prohibition of impairment of contracts. In addition, aside from the constitutional issue, automatic applicability of the entire act almost certainly would unduly alter the legitimate expectations of some present unit owners and declarants.

Accordingly, the philosophy of this section reflects a desire to maximize the uniform applicability of the act to all condominiums in the enacting state, while avoiding the difficulties raised by automatic application of the entire act to pre-existing condominiums.

2. In carrying out this philosophy with respect to "new" condominiums, the act applies to all condominiums "created" within the state after the act's effective date. This is the effect of the first sentence of subsection (a) [Subsection A]. The first sentence of subsection (b) [Subsection B] makes clear that the provisions of old statutes expressly applicable to condominiums do not apply to condominiums created after the effective date of this act.

"Creation" of a condominium pursuant to this act occurs upon recordation of a declaration pursuant to § 2-101 [47-7B-1 NMSA 1978]; however, the definition of "condominium" in § 1-103(7) [47-7A-3G NMSA 1978] contemplates that de facto condominiums may exist, if the nature of the ownership interest fits the definition, and the act would apply to such a condominium. Any real estate project which includes individually owned units and common elements owned by the unit owners as tenants in common is therefore subject to the act if created within the state after the act's effective date. No intent to subject the condominium to the act is required, and an express intention to the contrary would be invalid and ineffective.

3. The section adopts a novel three-step approach to condominiums created before the effective date of the act. First, certain provisions of the act automatically apply to "old" condominiums, but only prospectively, and only in a manner which does not invalidate provisions of condominium declarations and bylaws valid under "old" law. Second, "old" law remains applicable to previously created condominiums where not automatically displaced by the act. Third, owners of "old" condominiums may amend any provisions of their declaration or bylaws, even if the amendment would not be permitted by "old" law, so long as (a) the amendment is adopted in accordance with the procedure required by "old" law and the existing declaration and bylaws, and (b) the substance of the amendment does not violate this act.

4. Elaboration of the principles described in Comment 3 may be helpful.

First, the second sentence of subsection (a) [Subsection A] provides that the enumerated provisions automatically apply to condominiums created under pre-existing law, even though no action is taken by the unit owners. Many of the sections which do apply should measurably increase the ability of the unit owners to effectively manage the association, and should help to encourage the marketability of condominiums created under early condominium statutes. To avoid possible constitutional challenges, these provisions, as applied to "old" condominiums, apply only to "events and circumstances occurring after the effective date of this act"; moreover, the provisions of this act are subject to the provisions of the instruments creating the condominium, and this act does not invalidate those instruments.

EXAMPLE 1:

Under subsection (a) [Subsection A], § 4-109 [47-7D-9 NMSA 1978] (Resale Certificates) automatically applies to "old" condominiums. Accordingly, unit owners in condominiums established prior to adoption of the act would be obligated after the act's

effective date to provide resale certificates to future purchasers of units in "old" condominiums. However, the failure of a unit owner to provide such a certificate to a purchaser who acquired the unit before the effective date of the act would not create a cause of action in the purchaser, because the conveyance was an event occurring before the effective date of the act.

EXAMPLE 2:

Under subsection (a) [Subsection A], § 3-118 [47-7C-18 NMSA 1978] (Association Records) automatically applies to "old" condominiums. As a result, a unit owners' association of an "old" condominium must maintain certain financial records, and all the records of the association "shall be made reasonably available for examination by any unit owner and his authorized agents", even if the "old" law did not require that records be kept, or access provided. If the declaration or bylaws, however, provided that unit owners could not inspect the records of the association without permission of the president of the association, the restriction in the declaration would continue to be valid and enforceable.

Second, the prior laws of the state relating to condominiums are not repealed by this act because those laws will still apply to previously-created condominiums, except when displaced. Some states, such as Connecticut and Florida, have made certain provisions of their condominium statutes automatically applicable to pre-existing condominiums. In certain instances, this attempted retroactive application has raised serious constitutional questions, has caused doubts to arise as to the continued validity of those condominiums, and has created general confusion as to what statutory rules should be applied.

Third, the act seeks to alleviate any undesirable consequences of "old" law, by a limited "opt-in" provision. More specifically, subsection (b) [Subsection B] permits the owners of a pre-existing condominium to take advantage of the salutary provisions of this statute to the extent that can be accomplished consistent with the procedures for amending the condominium instruments as specified in those instruments and in the pre-existing statute.

EXAMPLE 3:

Under most "first generation" condominium statutes, unit owners have no power to relocate boundaries between adjoining units. Under § 2-112 [47-7B-12 NMSA 1978] of this act, unit owners have such power, unless limited by the declaration. While § 2-112 [47-7B-12 NMSA 1978] does not automatically apply to "old" condominiums, if the unit owners of a pre-existing condominium amend their condominium instruments in the manner permitted by the old statute and their existing instruments to permit unit owners to relocate boundaries, this section would validate that amendment, even if it were invalid under old law.

5. In considering the permissible amendments under subsection (b) [Subsection B], it is important to distinguish between the law governing the procedure for amending declarations, and the substance of the amendments themselves. An amendment to the declaration of the condominium created under "old" law, even if permissible under this act, must nevertheless be adopted "in conformity with the procedures and requirements specified" by the original condominium instruments, and in compliance with the old law.

EXAMPLE:

Suppose an "old" condominium declaration and "old" state law both provide that approval by 100% of the unit owners is required to amend the declaration, but the unit owners wish to amend the declaration to provide for only 67% of the unit owners' approval of future amendments, as permitted by § 2-117 [47-7B-17 NMSA 1978] of this act. The amendment would not be valid unless 100% of the unit owners approved it, because of the procedural requirement of the declaration and "old" law. Once approved, however, only 67% would be required for subsequent amendments.

6. The last sentence of subsection (b) [Subsection B] addresses the potential problem of a declarant seeking to take undue advantage of the amendment provisions to assume a power granted by the act without being subject to the act's limitations on the power. The last sentence insures that, if declarants or other persons assume any of the powers and rights which the act grants, the correlative obligations, liabilities, and restrictions of the act also apply to that person, even if the amendment itself does not require that result.

EXAMPLE:

Assume that, pursuant to the provisions of the "old" law, the declarant may exercise control over the association for only three years from the date the condominium is created, but the control may be maintained during that period for so long as declarant owns any units. In the absence of any amendment, a provision in the declaration taking full advantage of the "old" law would be valid and enforceable. Assume further that, in the second year following creation of the condominium in question, this act is adopted. The declarant then properly amends the declaration pursuant to subsection (b) [Subsection B] to extend the period of declarant control for five years from the date of creation. The amendment would effectively extend control for two additional years, because § 3-103(d) [47-7C-3D NMSA 1978] does not limit the number of the years the declarant may specify as a control period.

Nevertheless, if the declarant, before that extended time limit has expired, conveys 75 percent of the units that may ever be a part of the condominium, or fails for two years to exercise development rights or offer units for sale in the ordinary course of business, the period of declarant control would terminate by virtue of the limitations in § 3-103(d) [47-7C-3D NMSA 1978]. That limitation is imposed on the declarant even if the amendment called for retaining control for so long as any units were owned by declarant, and despite the provision in the "old" law permitting such a restriction.

7. The reference in subsection (b) [Subsection B] to "all present statutes expressly applicable to condominiums or horizontal property regimes" is intended to distinguish between a state's condominium enabling statutes and those statutes which apply not only to condominiums but to other forms of real estate, such as taxation statutes or subdivision statutes. Thus, reference to the state's condominium or horizontal property regime enabling statutes should be included here, while references to taxation, subdivision or other statutes which are not restricted solely to condominiums should not be included.

8. In place of the words "declaration, bylaws, and plats and plans", each state should insert the appropriate terminology for those documents under the present state law, e.g., "master deed, rules and regulations", etc.

9. This section does not permit a pre-existing condominium to elect to come entirely within the provisions of the act, disregarding old law. However, the owners of a pre-existing condominium may elect to terminate the condominium under pre-existing law and create a new condominium which would be subject to all the provisions of this act.

10. Subsection (c) reflects the fact that there are practical as well as constitutional limits regarding the extent to which a state should or may extend its jurisdiction to out-of-state transactions. A state may, of course, properly exercise its authority to protect its citizens from false or misleading information relating to condominiums located in other states but sold in that state. However, where sales contracts are executed wholly outside the enacting state and relate to condominiums located outside the state, it seems more appropriate for the courts of the jurisdiction(s) in which the condominium is located and where the transaction occurs to have jurisdiction over the transaction.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 9, 10, 12, 14 to 17.

31 C.J.S. Estates § 153 et seq.

47-7A-3. Definitions.

As used in the Condominium Act and declaration and bylaws, unless the context otherwise requires or otherwise specifically provided:

A. "affiliate of a declarant" means any person who controls, is controlled by or is under common control with a declarant. For the purpose of this subsection:

(1) a person "controls" a declarant if the person is a general partner, officer, director or employer of the declarant; directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than twenty percent of the voting interest in the declarant; controls in any manner the election of a majority of the

directors of the declarant; or has contributed more than twenty percent of the capital of the declarant; and

(2) a person "is controlled by" a declarant if the declarant is a general partner, officer, director or employer of the person; directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than twenty percent of the voting interest in the person; controls in any manner the election of a majority of the directors of the person; or has contributed more than twenty percent of the capital of the person. Control does not exist if the powers described in this subsection are held solely as security for an obligation and are not exercised;

B. "allocated interests" means the undivided interest in the common elements, the common expense liability and votes in the association allocated to each unit;

C. "association" or "unit owners' association" means the unit owners' association organized under Section 34 [47-7C-1 NMSA 1978] of the Condominium Act;

D. "common elements" means all portions of a condominium other than the units;

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

F. "common expense liability" means the liability for common expenses allocated to each unit pursuant to Section 19 [47-7B-7 NMSA 1978] of the Condominium Act;

G. "condominium" means real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions. Real estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners;

H. "conversion building" means a building that at any time before creation of the condominium was occupied wholly or partially by persons other than purchasers or persons who occupy with the consent of purchasers, and shall for the purposes of Sections 64 and 65 [47-7D-12, 47-7D-17 NMSA 1978] only of the Condominium Act include mobile housing parks;

I. "declarant" means any person or group of persons acting in concert who:

(1) as part of a common promotional plan, offers to dispose of its interest in a unit not previously disposed of;

(2) reserves or succeeds to any special declarant right; or

(3) executes and records a declaration;

J. "declaration" means any instruments, however denominated, that create a condominium, and any amendments to such instruments;

K. "development rights" means any right or combination of rights reserved by a declarant in the declaration to:

(1) add real estate to a condominium;

(2) create units, common elements or limited common elements within a condominium;

(3) subdivide units or convert units into common elements; or

(4) withdraw real estate from a condominium;

L. "dispose" or "disposition" means a voluntary transfer to a purchaser of any legal or equitable interest in a unit, but such term does not include the transfer or release of a security interest;

M. "executive board" means the body, regardless of name, designated in the declaration to act on behalf of the association;

N. "identifying number" means a symbol or address that identifies only one unit in a condominium;

O. "leasehold condominium" means a condominium in which all or a portion of the real estate is subject to a lease the expiration or termination of which will terminate the condominium or reduce its size;

P. "limited common element" means a portion of the common elements allocated by the declaration or by operation of Subsections B and D of Section 14 [47-7B-2 NMSA 1978] of the Condominium Act for the exclusive use of one or more but fewer than all of the units;

Q. "master association" means an organization described in Section 32 [47-7B-20 NMSA 1978] of the Condominium Act, whether or not it is also an association described in Section 34 [47-7C-1 NMSA 1978] of the Condominium Act;

R. "mobile housing park" means any site used for the business of renting, leasing or providing, for any form of compensation, a mobile housing unit for occupancy on property not owned by the mobile housing unit's occupant or providing space and facilities for a mobile housing unit owned by the occupant;

S. "mobile housing unit" means a movable or portable housing structure over thirty-two feet in length or over eight feet in width, constructed to be towed on its own chassis and designed so as to be installed without a permanent foundation for human

occupancy as a residence which may include one or more components that can be retracted for towing purposes and subsequently expanded for additional capacity, or two or more units separately towable but designed to be joined into one integral unit, as well as a single unit; except that the definition does not include recreational vehicles or modular or premanufactured homes, built to Uniform Building Code standards, designed to be permanently affixed to real property;

T. "offering" means any advertisement, inducement, solicitation or attempt to encourage any person to acquire any interest in a unit, other than as security for an obligation. An advertisement in a newspaper or other periodical of general circulation or in any broadcast medium to the general public of a condominium not located in New Mexico is not an offering if the advertisement states that an offering may be made only in compliance with the law of the jurisdiction in which the condominium is located;

U. "person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, governmental entity or other legal or commercial entity;

V. "purchaser" means any person other than a declarant or a person in the business of selling real estate for his own account who by means of a voluntary transfer acquires a legal or equitable interest in a unit other than:

(1) a leasehold interest, including renewal options, of less than twenty years; or

(2) as security for obligation;

W. "real estate" means any leasehold or other estate or interest in, over or under land, including structures, fixtures and other improvements and interests which by custom, usage or law pass with a conveyance of land though not described in the contract of sale or instrument of conveyance, and includes parcels with or without upper or lower boundaries and spaces that may be filled with air or water;

X. "residential purposes" means use for dwelling or recreational purposes, or both;

Y. "special declarant rights" means rights reserved for the benefit of a declarant to:

(1) complete improvements indicated on plats and plans filed with the declaration;

(2) exercise any development right;

(3) maintain sales offices, management offices, signs advertising the condominium and models;

(4) use easements through the common elements for the purpose of making improvements within the condominium or within real estate which may be added to the condominium;

(5) make the condominium part of a larger condominium or a planned community;

(6) make the condominium subject to a master association; or

(7) appoint or remove any officer of the association or any master association or any executive board member during any period of declarant control;

Z. "time share" means a right to occupy a unit or any of several units during five or more separated time periods over a period of at least five years, including renewal options, whether or not coupled with an estate or interest in a condominium or a specified portion thereof;

AA. "unit" means a physical portion of the condominium designated for separate ownership or occupancy, the boundaries of which are described pursuant to Section 17 [14] [47-7B-2 NMSA 1978] of the Condominium Act; and

BB. "unit owner" means a declarant or other person who owns a unit, or a lessee of a unit in a leasehold condominium whose lease expires simultaneously with any lease the expiration or termination of which will remove the unit from the condominium, but does not include a person having an interest in a unit solely as security for an obligation.

History: Laws 1982, ch. 27, § 2.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — This section is similar to § 1-103 of the Uniform Condominium Act, with the following main exception: Subsections R and S of this section were not set forth in the Uniform Condominium Act.

COMMISSIONERS' COMMENT

1. The first clause of this section permits the defined terms used in the act to be defined differently in the declaration and bylaws. Regardless of how terms are used in those documents, however, terms have an unvarying meaning in the act, and any restricted practice which depends on the definition of a term is not affected by a changed term in the documents.

EXAMPLE:

A declarant might vary the definition of "unit owner" in the declaration to exclude himself in an attempt to avoid assessments for units which he owns. The attempt would be futile, since the act defines a declarant who owns a unit as a unit owner and defines the liabilities of a unit owner.

2. The definition of "affiliate of a declarant" (§ 1-103(1)) [Subsection A] is similar to the definitions in 12 U.S.C. § 1730(a) [§ 1730a], which prescribes the authority of the federal savings and loan insurance corporation to regulate the activities of savings and loan holding companies, and in 15 U.S.C. § 78(c)(18) [§ 78c(18)], which defines persons deemed to be associated with a broker or dealer for purposes of the federal securities laws.

The objective standards of the definition permit a ready determination of the existence of affiliate status to be made. Unlike 12 U.S.C. § 1730(a)(2)B [§ 1730a(a)(2)(D)], no power is vested in an agency to subjectively determine the existence of "control" necessary to establish affiliate status. Thus, affiliate status does not exist under the act unless these objective criteria are met.

3. Definition (2) [Subsection B], "allocated interests," refers to all of the interests which this act requires the declaration to allocate. See § 2-107 [47-7B-7 NMSA 1978].

4. Definitions (4) and (25) [Subsections D and AA], treating "common elements" and "units," should be examined in light of § 2-102 [47-7B-2 NMSA 1978], which specifies in detail how the precise differentiation between units and common elements is to be determined in any given condominium to the extent that the declaration does not provide a different scheme. No exhaustive list of items comprising the common elements is necessary in this act or in the declaration; as long as the boundaries between units and common elements can be ascertained with certainty, the common elements include by definition all of the real estate in the condominium not designated as part of the units.

5. Definition (7) [Subsection G], "condominium," makes clear that, unless the ownership interest in the common elements is vested in the owners of the units, the project is not a condominium. Thus, for example, if the common elements were owned by an association in which each unit owner was a member, the project would not be a condominium. Similarly, if a declarant sold units in a building but retained title to the common areas, granting easements over them to unit owners, no condominium would have been created. Such projects have many of the attributes of condominiums, but they are not covered by this act.

6. Definition (8) [Subsection H], "conversion building," is important because of the protection which the act provides in § 1-112 [47-7A-12 NMSA 1978] for tenants of buildings which are being converted into a condominium. The definition distinguishes between buildings which have never been occupied by any person before the time that

the building is submitted to the condominium form of ownership, and buildings, whether new or old, which have been previously occupied by tenants. In the former case, because there have been no tenants in the building, the building would not be a conversion building, and no protection of tenants is necessary.

7. Definition (9) [Subsection I], "declarant," is designed to exclude persons who may be called upon to execute the declaration in order to ratify the creation of the condominium, but who are not intended to be charged with the responsibilities imposed on declarants by this act if that is all they do. Examples of such persons include holders of pre-existing liens and, in the case of leasehold condominiums, ground lessors. (Of course, such a person could become a declarant by subsequently succeeding to a special declarant right.) Other persons similarly protected by the narrow wording of this definition include real estate brokers, because they do not offer to dispose of their own interest in a unit. Similarly, unit owners reselling their units are not declarants because their units were "previously disposed of" when originally conveyed.

The last bracketed clause in this definition must be deleted in any state which chooses not to enact Article 5 of the act.

8. Definition (11) [Subsection K], "development rights," includes a panoply of sophisticated development techniques that have evolved over time throughout the United States and which have been expressly recognized (and regulated) in an increasing number of jurisdictions, beginning with Virginia in 1974.

Some of these techniques relate to the phased (or incremental) development of condominiums which the declarant hopes, but cannot be sure, will be successful enough to grow to include more land than he is initially willing to commit to the condominium. For example, a declarant may be building (or converting) a 50-unit building on parcel A with the intention, if all goes well, to "expand" the condominium by adding an additional building on parcel B, containing additional units, as part of the same condominium. If he reserves the right to do so, i. e., to "add real estate to a condominium," he has reserved a "development right."

In certain cases, however, the declarant may desire, for a variety of reasons, to include both parcels in the condominium from the outset, even though he may subsequently be obliged to withdraw all or part of one parcel. Assume, for example, that in the example just given the declarant intends to build an underground parking garage that will extend into both parcels. If the project is a success, his documentation will be simpler if both parcels were included in the condominium from the beginning. If his hopes are not realized, however, and it becomes necessary to withdraw all or part of parcel B from the condominium and devote it to some other use, he may do so if he has reserved such a development right "to withdraw real estate from a condominium." The portion of the garage which extends into parcel B may be left in the condominium (separated from the remainder of parcel B by a horizontal boundary), or the garage may be divided between parcels A and B with appropriate cross-easement agreements.

The right "to create units, common elements, or limited common elements" is frequently useful in commercial or mixed-use condominiums where the declarant needs to retain a high degree of flexibility to meet the space requirements of prospective purchasers who may not approach him until the condominium has already been created. For example, an entire floor of a high-rise building may be intended for commercial buyers, but the declarant may not know in advance whether one purchaser will want to buy the whole floor as a single unit or whether several purchasers will want the floor divided into several units, separated by common element walls and served by a limited common element corridor. This development right is sometimes useful even in purely residential condominiums, especially those designed to appeal to affluent buyers. Similarly, the development rights "to subdivide units or convert units into common elements" is most often of value in commercial condominiums, but can occasionally be useful in certain kinds of residential condominiums as well.

9. Definition (12) [Subsection L], "dispose" or "disposition," includes voluntary transfers to purchasers of any interest in a unit, other than as security for an obligation. Consequently, the grant of a mortgage or other security interest is not a "disposition," nor is any transfer of any interest to a person who is excluded from the definition of "purchaser," infra. However, the term includes more than conveyances and would, for example, cover contracts of sale.

10. Definition (15) [Subsection O], "leasehold condominium," should be distinguished from land which is leased to a condominium but not subjected to the condominium regime. A leasehold condominium means, by definition, real estate which has been subjected to the condominium form of ownership. In such a case, units located on the leasehold real estate are typically leased for long terms. At the expiration of such a lease, the condominium unit or the real estate underlying the unit would be removed from the condominium if the lease were not extended or renewed. On the other hand, real estate may not be subjected to condominium ownership, but may be leased directly to the association or to one or more unit owners for a term of years.

This distinction is very significant. Under § 3-105 [47-7C-5 NMSA 1978], the unit owners' association is empowered, following expiration of a period of declarant control, to cancel any lease or recreational or parking areas or facilities to which it is a party, regardless of who the lessor is. The association also has the power to cancel any lease for any land if the declarant or an affiliate of the declarant is a party to that lease. If the leased real estate, however, is subjected by the declarant to condominium form of ownership, that lease may not be cancelled unless it is unconscionable or unless the real estate was submitted to the condominium regime for the purpose of avoiding the right to terminate the lease. See § 3-105 [47-7C-5 NMSA 1978].

While the subjective test of declarant's "purpose" may not always be clear, the rights of the association to cancel a lease depend upon the test. Thus, for example, a declarant who wishes to lease a swimming pool to the unit owners would have a choice of subjecting the pool for, say, a term of 20 years to the condominium form of ownership as a common element. At the end of the term, the lease would terminate and the real

estate containing the pool would be automatically removed from the condominium unless there were a right to renew the lease. During the 20-year term, the lease would not be cancellable, regardless of the terms, unless it were found to be unconscionable under § 1-112 [47-7A-12 NMSA 1978], or cancellable because submitted for the purpose of avoiding the right to cancel. On the other hand, if the pool were not submitted to the condominium form of ownership and was leased directly to the association for a 20-year term, the association could cancel that lease 90 days after the period of declarant control expired, even if, for example, 18 years remained of the term.

In either case, the terms of the lease would have to be disclosed in the public offering statement.

11. Definition (20) [Subsection V], "purchaser," includes a person who acquires any interest in a unit, even as a tenant, if his tenancy entitles him to occupy the premises for more [less] than 20 years. This would include a tenant who holds a lease of a unit in a fee simple condominium for one year, if the lease entitles the tenant to renew the lease for more than four additional years. Excluded from the definition, however, are mortgagees, declarants and people in the business of selling real estate for their account. Persons excluded from the definition of "purchaser" do not receive certain benefits under Article 4 [Article 7D], such as the right to a public offering statement (§ 4-102(c) [47-7D-2C NMSA 1978]) and the right to rescind (§ 4-108 [47-7D-8 NMSA 1978]).

12. Definition (21) [Subsection W], "real estate," is very broad, and is very similar to the definition of "real estate" in § 1-201(16) of the Uniform Land Transactions Act.

Although often thought of in two-dimensional terms, real estate is a three-dimensional concept and the third dimension is unusually important in the condominium context. Where real estate is described in only two dimensions (length and width), it is correctly assumed that the property extends indefinitely above the earth's surface and downwards toward a point in the center of the planet. In most condominiums, however, as in so-called "air rights" projects, ownership does not extend ab solo usque ad coelum, because units are stacked on top of units or units and common elements are interstratified. In such cases the upper and lower boundaries must be identified with the same precision as the other boundaries.

13. Definition (23) [Subsection Y], "special declarant rights," seeks to isolate those rights reserved for the benefit of a declarant which are unique to the declarant and not shared in common with other unit owners. The list, while short, encompasses virtually every significant right which a declarant might seek in the course of creating or expanding a condominium.

Any person who possesses a special declarant right would be a "declarant", including any who succeed under § 3-104 [47-7C-4 NMSA 1978] to any of those rights. Thus, the concept of special declarant rights triggers the imposition of obligations on those who possess the rights. Under § 3-104 [47-7C-4 NMSA 1978], those obligations vary

significantly, depending upon the particular special declarant rights possessed by a particular declarant. These circumstances are described more fully in the comments to § 3-104 [47-7C-4 NMSA 1978].

14. Definition (24) [Subsection Z], "time share," is based on § 1-102(14) and (18) of the Uniform Law Commissioners' Model Real Estate Time-Share Act.

15. Definition (25) [Subsection AA], "unit," describes a tangible, physical part of the project, rather than a right in, or claim to, a tangible physical part of the property. Therefore, for example, a "time-share" arrangement in which a unit is sold to 12 different persons each of whom has the right to occupy the unit for one month does not create 12 new units - there are, rather, 12 owners of the unit. (Under the section on voting (§ 2-110 [§ 3-110] [47-7C-10 NMSA 1978]), a majority of the time-share owners of a unit are entitled to cast the votes assigned to that unit.)

While a separately described part of the project is not a unit unless it is designed for, and is subject to, separate ownership by persons other than the association, the association developer can hold or acquire units unless otherwise provided in the declaration. See, also, Comment 4.

16. Definition (26) [Subsection BB], "unit owners," contemplates that a seller under a land installment contract would remain the unit owner until the contract is fulfilled. As between the seller and the buyer, various rights and responsibilities might be assigned to the buyer by the contract itself, but the association would continue to look to the seller (for payment of any arrears in common expense assessments, for example) as long as the seller holds title.

The definition makes it clear that declarants, so long as they own units in the condominium, are unit owners and are therefore subject to all of the obligations imposed on other unit owners, including the obligation to pay common expense assessments against those units. This provision is designed to resolve ambiguities on this point which have risen under several existing state statutes.

Compiler's notes. — The reference to Section 17 of the Condominium Act in Subsection AA is seemingly incorrect. Section 14 of the Condominium Act, compiled as 47-7B-2 NMSA 1978, describes the boundaries of condominium units.

The references to 12 U.S.C. § 1730 and 15 U.S.C. § 78 throughout Comment 2 seem incorrect, as the subject matter described is not contained in these provisions. Corrections, in brackets, were made to refer to the seemingly correct provisions.

The reference to § 2-110 of the uniform act in the last sentence of the first paragraph of Comment 15 seems incorrect, as § 2-110 deals with the exercise of development rights. Section 3-110 of the uniform act deals with voting.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 1-4, 12, 13.

Owners: expenses for which condominium association may assess unit owners, 77 A.L.R.3d 1290.

Time-share or interval ownership interests: regulation of time-share or interval ownership interests in real estate, 6 A.L.R.4th 1288.

Standing to bring action relating to real property of condominium, 74 A.L.R.4th 165.

31 C.J.S. Estates § 153 et seq.

47-7A-4. Variation by agreement.

Except as expressly provided in the Condominium Act, the provisions of that act shall not be varied by agreement, and the rights conferred by the Condominium Act shall not be waived. A declarant shall not evade the limitations or prohibitions of that act or the declaration by use of a power of attorney or any other device.

History: Laws 1982, ch. 27, § 3.

ANNOTATIONS

Compiler's notes. — This section is similar to § 1-104 of the Uniform Condominium Act, with the following main exception: "shall not" is substituted for "may not" where it appears in the Uniform Condominium Act.

COMMISSIONERS' COMMENT

1. The act is generally designed to provide great flexibility in the creation of condominiums and, to that end, the act permits the parties to vary many of it provisions. In many instances, however, provisions of the act may not be varied, because of the need to protect purchasers, lenders and declarants. Accordingly, this section adopts the approach of prohibiting variation by agreement except in those cases where it is expressly permitted by the terms of the act itself.

2. One of the consumer protections in this act is the requirement for consent by specified percentages of unit owners to particular actions or changes in the declaration. In order to prevent declarants from evading these requirements by obtaining powers of attorney from all unit owners, or in some other fashion controlling the votes of unit owners, this section forbids the use by a declarant of any device to evade the limitations or prohibitions of the act or of the declaration.

3. The following sections permit variation:

Section 1-102 [47-7A-2 NMSA 1978]. [Applicability.] Preexisting condominiums may elect to conform to the act.

Section 1-103 [47-7A-3 NMSA 1978]. [Definitions.] All definitions used in the declaration and bylaws may be varied in the declaration, but not in interpretation of the act.

Section 1-107 [47-7A-7 NMSA 1978]. [Eminent Domain.] The formulas for reallocation upon taking a part of a unit, and for allocation of proceeds attributable to limited common elements, may be varied.

Section 2-102 [47-7B-2 NMSA 1978]. [Unit Boundaries.] The declaration may vary the distinctions as to what constitutes the units and common elements.

Section 2-105 [47-7B-5 NMSA 1978]. [Contents of Declaration.] A declarant may add any information he desires to the required content of the declaration.

Section 2-107 [47-7B-7 NMSA 1978]. [Allocation of Common Element Interests, Votes and Common Expense Liabilities.] A declarant may allocate the interests in any way desired, subject to certain limitations.

Section 2-108 [47-7B-8 NMSA 1978]. [Limited Common Elements.] The act permits reallocation of limited common elements unless prohibited by the declaration.

Section 2-109 [47-7B-9 NMSA 1978]. [Plats and Plans.] There is a presumption regarding horizontal boundaries of units, unless the declaration provides otherwise.

Section 2-111 [47-7B-11 NMSA 1978]. [Alterations Within Units.] Subject to the provisions of the declaration, unit owners may make alterations and improvements to units.

Section 2-112 [47-7B-12 NMSA 1978]. [Relocation of Boundaries Between Adjoining Units.] Subject to the provisions of the declaration, boundaries between adjoining units may be relocated by affected unit owners.

Section 2-113 [47-7B-13 NMSA 1978]. [Subdivision of Units.] If the declaration expressly so permits, a unit may be subdivided into two or more units.

Section 2-115 [47-7B-15 NMSA 1978]. [Use for Sales Purposes.] The declarant may maintain sales offices, management offices and model units only if the declaration so provides. Unless the declaration provides otherwise, the declarant may maintain advertising on the common elements.

Section 2-116 [47-7B-16 NMSA 1978]. [Easement to Facilitate Exercise of Special Declarant Rights.] Subject to the provisions of the declaration, the declarant has an easement for these purposes.

Section 2-117 [47-7B-17 NMSA 1978]. [Amendment of Declaration]. The declaration of a non-residential condominium may specify less than a two-thirds vote to amend the declaration. Any declaration may require a larger majority.

Section 2-118 [47-7B-18 NMSA 1978]. [Termination of Condominium.] The declaration may specify a majority larger than 80 percent to terminate and, in a non-residential condominium, a smaller majority. The declarant may require that the units be sold following termination even though none of them have horizontal boundaries.

Section 2-120 [47-7B-20 NMSA 1978]. [Master Associations.] The declaration may provide for some of the powers of the executive board to be exercised by a master association.

Section 3-102 [47-7C-2 NMSA 1978]. [Powers of the Association.] The declaration may limit the right of the association to exercise any of the listed powers, except in a manner which discriminates in favor of a declarant. The declaration may authorize the association to assign its rights to future income.

Section 3-103 [47-7C-3 NMSA 1978]. [Executive Board Members and Officers.] Except as limited by the declaration or bylaws, the executive board may act for the association.

Section 3-106 [47-7C-6 NMSA 1978]. [Bylaws.] Subject to the provisions of the declaration, the bylaws may contain any matter in addition to that required by the act.

Section 3-107 [47-7C-7 NMSA 1978]. [Upkeep of the Condominium.] Except to the extent otherwise provided by the declaration, maintenance responsibilities are set forth in this section, and income from real estate subject to development rights inures to the declarant.

Section 3-108 [47-7C-8 NMSA 1978]. [Meetings.] The bylaws may provide for special meetings at the call of less than 20 percent of the executive board or the unit owners.

Section 3-109 [47-7C-9 NMSA 1978]. [Quorums.] This section permits statutory quorum requirements to be varied by the bylaws.

Section 3-110 [47-7C-10 NMSA 1978]. [Voting; Proxies.] A majority in interest of the multiple owners of a single unit determine how that unit's vote is to be cast unless the declaration provides otherwise. The declaration may require that lessees vote on specified matters.

Section 3-113 [47-7C-13 NMSA 1978]. [Insurance.] The declaration may vary the provisions of this section in non-residential condominiums, and may require additional insurance in any condominium.

Section 3-114 [47-7C-14 NMSA 1978]. [Surplus Funds.] Unless otherwise provided in the declaration, surplus funds are paid or credited to unit owners in proportion to common expense liability.

Section 3-115 [47-7C-15 NMSA 1978]. [Assessments for Common Expenses.] To the extent otherwise provided in the declaration, common expenses for limited common elements must be assessed against the units to which they are assigned, common expenses benefiting fewer than all the units must be assessed only against the units benefited, insurance costs must be assessed in proportion to risk, and utility costs must be assessed in proportion to usage.

Section 4-101 [47-7D-1 NMSA 1978]. [Applicability;Waiver.] All of Article 4 [Article 7D] is modifiable or waivable by agreement in a condominium restricted to non-residential use.

Section 4-115 [not adopted]. [Warranties.] Implied warranties of quality may be excluded or modified by agreement.

Section 4-116 [not adopted.] [Statute of Limitations on Warranties.] The six-year limitation may be modified by agreement of the parties.

4. The second sentence of the section is an important limitation upon the rights of a declarant. It is the practice in many jurisdictions today, particularly jurisdictions which do not permit expansion of a condominium by statute, for a declarant to secure powers of attorney from all unit purchasers permitting the declarant unilaterally to expand the condominium by "unanimous consent" to include new units and to reallocate common element interests, common expense liability and votes. With such powers of attorney, many declarants have purported to comply with the typical provision of "first generation" condominium statutes requiring unanimous consent for amendments of the declaration concerning such matters.

Section 2-117 [47-7B-17 NMSA 1978] requires unanimous consent to make certain amendments to the declaration and bylaws. If a declarant were permitted to use powers of attorney to accomplish such changes, the substantial protection which § 2-117(d) [47-7B-17D NMSA 1978] provides to unit owners would be illusory. Section 1-104 [this section] prohibits the declarant from using powers of attorney for such purposes.

5. While freedom of contract is a principle of this act, and variation by agreement is accordingly widely available, freedom of contract does not extend so far as to permit parties to disclaim obligations of good faith, see § 1-113 [47-7A-13 NMSA 1978], or to enter into contracts which are unconscionable when viewed as a whole, or which contain unconscionable terms. See § 1-112 [47-7A-12 NMSA 1978]. This section derives from § 1-102(3) of the Uniform Commercial Code [55-1-102 NMSA 1978].

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments § 9.

31 C.J.S. Estates § 153 et seq.

47-7A-5. Taxation.

A. The association of unit owners shall elect whether:

(1) the entire property shall be deemed a single parcel for the purposes of assessment and taxation, in which event the association shall promptly notify the unit owners of the payment of the taxes. For purposes of assessment or valuation and taxation under this paragraph, the association shall be deemed to be the owner as defined in Section 7-35-2 NMSA 1978; or

(2) each unit and its percentage of undivided interest in the common elements shall be deemed to be a parcel and shall be subject to separate assessment and taxation by each assessing unit and special district for all types of taxes authorized by law, including ad valorem levies and special assessments.

B. Any portion of the common elements for which the declarant has reserved any development right must be separately taxed and assessed against the declarant, and only the declarant is liable for payment of such taxes.

C. If there is no unit owner other than a declarant, the real estate comprising the condominium may be taxed and assessed in any manner provided by the Property Tax Code [Chapter 7, Articles 35 to 38 NMSA 1978].

History: Laws 1982, ch. 27, § 4; 1983, ch. 245, § 1.

ANNOTATIONS

Compiler's notes. — This section is similar to § 1-105 of the Uniform Condominium Act, with the following main exceptions: subsections (a) and (b) of the Uniform Condominium Act have been substantially subsumed within Subsection A of the state Condominium Act, which allows unit owners to choose between two methods of treating the property for purposes of assessment and taxation.

The 1983 amendment substituted "elements" for "areas" in Subsection A(2).

COMMISSIONERS' COMMENT

1. A condominium may be created, by the recordation of a declaration, long before the first unit is conveyed. This happens frequently with existing rental apartment projects which are converted into condominiums. Subsection (d) [Subsection C] spares the local taxing authorities from having to assess each unit separately until such time as the declarant begins conveying units, although separate assessment from the date the condominium is created may be permitted under other law. See subsection (d) [Subsection C]. When separate tax assessments become mandatory under this section,

the assessment for each unit must include the value of that unit's common element interest, and no separate tax bill on the common elements is to be rendered to the association or the unit owners collectively. Any common elements subject to development rights, however, are separately taxed to the declarant.

2. Even if real estate subject to development rights is a part of the condominium and lawfully "owned" by the unit owners in common, it is in fact an asset of the declarant, and must not be taxed and assessed against unit owners. Under subsection (c) [Subsection B], the declarant is exclusively liable for those taxes.

3. If there is any question in a particular state that a unit occupied as a residential dwelling is not entitled to treatment as any other residential single-family detached dwelling under the homestead statutes, this section should be modified to insure that units are similarly treated.

4. Unlike the law of New York and perhaps other states, this section imposes no limitation on the power of a jurisdiction to tax the condominium unit based on its fair market value. In most jurisdictions, experience has shown that the conversion of an apartment building to the condominium form of ownership greatly increases the fair market value of that building. Accordingly, a jurisdiction under this act may impose real estate taxes on condominium units which reflect the fair market value of those units in the same way that the jurisdiction taxes other forms of real estate.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 48 to 50.

Real estate taxation of condominiums, 71 A.L.R.3d 952.

31 C.J.S. Estates § 153 et seq.; 84 C.J.S. Taxation §§ 94, 95.

47-7A-6. Applicability of local ordinances, regulations and building codes.

No provision of the Condominium Act invalidates or modifies any provision of any zoning, subdivision, building code or other real estate use law, ordinance or regulation; provided, however, a zoning, subdivision, building code or other real estate use law, ordinance or regulation may not prohibit the condominium form of ownership or impose any requirement upon a condominium which it would not impose upon the same development under a different form of ownership.

History: Laws 1982, ch. 27, § 5.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 1-106 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

1. The first sentence of this section prohibits discrimination against condominiums by local law-making authorities. Thus, if a local law, ordinance or regulation imposes a requirement which cannot be met if property is subdivided as a condominium but which would not be violated if all of the property constituting the condominium were owned by a single owner, this section makes it unlawful to apply that requirement or restriction to the condominium. For example, in the case of a high-rise apartment building, if a local requirement imposing a minimum number of parking spaces per apartment would not prevent a rental apartment building from being built, this act would override any requirement that might impose a higher number of spaces per apartment merely by virtue of the same building being owned as a condominium.

2. The second sentence makes clear that, except for the prohibition on discrimination against condominiums, the act has no effect on real estate use laws. For example, a particular piece of real estate submitted to the condominium form of ownership might be of such size that all of the real estate is required to support a proposed density of units or to satisfy minimum setback requirements. Under this act, part of the submitted real estate might be subject to a development right entitling the declarant to withdraw it from the condominium, but the mere reservation of this right would not constitute a subdivision of the parcel into separate ownership. If a declarant or foreclosing lender at a later time sought to exercise the option to withdraw the real estate, however, withdrawal would constitute a subdivision and would be illegal if the effect of withdrawal would be to violate setback requirements, or to exceed the density of units permitted on the remaining parcel.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 23 to 25.

Erection of condominium as violation of restrictive covenant forbidding erection of apartment houses, 65 A.L.R.3d 1212.

Zoning or building regulations as applied to condominiums, 71 A.L.R.3d 866.

31 C.J.S. Estates § 153 et seq.; 62 C.J.S. Municipal Corporations § 106.

47-7A-7. Eminent domain.

A. If a unit is acquired by eminent domain, or if part of a unit is acquired by eminent domain leaving the unit owner with a remnant which may not practically or lawfully be used for any purpose permitted by the declaration, the award shall compensate the unit owner for his unit and his interest in the common elements, whether or not any common elements are acquired. Upon acquisition, unless the decree otherwise provides, that unit's allocated interests are automatically reallocated to the remaining units in proportion to the respective allocated interests of those units before the taking, and the association shall prepare, execute and record an amendment to the declaration

reflecting the reallocations. Any remnant of a unit remaining after part of a unit is taken under this subsection is thereafter a common element.

B. Except as provided in Subsection A of this section, if part of a unit is acquired by eminent domain, the award shall compensate the unit owner for the reduction in value of the unit and the unit's interest in the common elements, whether or not any common elements are acquired. Upon acquisition, unless the decree otherwise provides, that unit's allocated interests are reduced in proportion to the reduction in the size of the unit, or on any other basis specified in the declaration, and the portion of the allocated interests divested from the partially acquired unit are automatically reallocated to that unit and the remaining units in proportion to the respective allocated interests of those units before the taking, with the partially acquired unit participating in the reallocation on the basis of the unit's reduced allocated interests.

C. Unless the declaration provides otherwise, if part of the common elements is acquired by eminent domain, the portion of the award attributable to the common elements taken shall be paid to the association. Unless the declaration provides otherwise, any portion of the award attributable to the acquisition of a limited common element shall be equally divided among the owners of the units to which that limited common element was allocated at the time of acquisition.

D. The court decree shall be recorded in each county in which any portion of the condominium is located.

History: Laws 1982, ch. 27, § 6.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 1-107 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

1. The provisions of this statute are not intended to supplant the usual rules of eminent domain but merely to supplement the rules to address the unique problems which eminent domain raises in the context of a condominium. Nevertheless, because the law of eminent domain differs widely among the various states, the law of each state should be reviewed to ensure that the eminent domain code and this section are properly integrated.

2. When a unit is taken or partially taken by eminent domain, this section provides for a recalculation of the allocated interests of all units.

EXAMPLE 1:

Suppose that all allocated interests in a nine-unit condominium were originally allocated to the units on the basis of size. If eight of the units are equal in size and one is twice as large as the others, the allocated interests would be 20% for the largest unit and 10% for each of the other eight units.

Suppose that one of the smaller units is taken out of the condominium by a condemning authority. Subsection (a) [Subsection A] provides that the allocated interests would automatically shift, at the time of the taking, so that the larger unit would have 22 2/9% while each of the small units would have 11 1/9%.

EXAMPLE 2:

Suppose, in Example 1, that the condemnation only reduced the size of one of the smaller units by 50%, leaving the remaining half of the unit usable. Subsection (b) [Subsection B] provides that the allocated interests would automatically shift to 5 5/19% for the partially taken unit, 21 1/19% for the largest unit, and 10 10/19% for each of the other units. Note that the fact that the partially taken unit was reduced to half its former size does not mean that its allocated interests are only half as large as before the taking. Rather, that unit participates in the reallocation in proportion to its reduced size. That is why the partially taken unit's reallocated interests are 5 5/19% rather than 5%.

3. An important issue raised by this section is whether or not a governmental body acquiring a unit by eminent domain has a right to also take that unit's allocated interests and thereby assume membership in the association by virtue of its power of eminent domain. While there is no question that a governmental body may acquire any real property by eminent domain, there is no case law on the question of whether or not the governmental body may take a condominium unit as a part of the condominium or must take the unit and have the unit excluded from the condominium.

Subsection (a) [Subsection A] merely requires that the taking body compensate the unit owner for all of his unit and its interest in the common elements, whether or not the common element interest is acquired. The act also requires that the allocated interests are automatically reallocated upon taking to the remaining units unless the decree provides otherwise. Whether or not the decree may constitutionally provide otherwise in the case of a particular taking (for example, by allocating the common element interest, votes and common expense liability to the government) is an unanswered question.

4. In the circumstances of a taking of part of a unit, it is important to have some objective test by which to measure the portion of allocated interest to be reallocated. Subsection (b) [Subsection B] sets forth a formula based on relative size, but permits the declaration to vary that formula to some other more appropriate formula in a particular circumstance. This right to vary the formula in the declaration is important, since it is clear that the formula set forth in the statute may in some instances result in gross inequities.

EXAMPLE 1:

Suppose, in a commercial condominium consisting of four units, each unit consists of a factory and parking lot, and that the declaration provides that each unit's common expense liability, including utilities, is equal. Suppose further that the area of the factory building and parking lot in unit # 1 are equal, and that 1/2 the parking lot is taken by eminent domain, leaving the factory and 1/2 the lot intact. Under the formula set out in the statute, unit # 1's common expense liability would be reduced even though its utilities might not be reduced at all, thus resulting in a windfall for the unit owner.

EXAMPLE 2:

Suppose that a condominium contains ten units, each of which is allocated at 1/10 undivided interest in the common elements. Suppose further that a taking by eminent domain reduces the size of one of the units by 50%. In such case, the common element interest of all the units will be reallocated so that the partially-taken unit has a 1/19 undivided interest in the common elements and the remaining nine units each a 2/19 undivided interest in the common elements. Thus, the partially-taken unit has a common element interest equal to 1/2 of the common element interest allocated to each of the other units. Note that this is not equivalent to the partially-taken unit having a 5% undivided interest and the remaining nine units each having a 10% undivided interest.

5. Even before the amendment formally acknowledging the reallocation of percentages required by this section is recorded, the reallocation is deemed to have occurred simultaneously with the taking. This rule is necessary to avoid the hiatus that otherwise could occur between the taking and reallocation of interests, votes and liabilities.

6. Subsection (c) [Subsection C] provides that, if part of the common elements is acquired, the award is paid to the association. This would not normally be the rule in the absence of such a provision.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 26 Am. Jur. 2d Eminent Domain § 171 et seq.; 27 Am. Jur. 2d Eminent Domain § 310.

Necessity of trial or proceeding, separate from main condemnation trial or proceeding, to determine divided interest in state condemnation award, 94 A.L.R.3d 696.

Eminent Domain: compensability of loss of visibility of owner's property, 7 A.L.R.5th 113.

29A C.J.S. Eminent Domain §§ 58, 59, 87 et seq.

47-7A-8. Supplemental general principles of law applicable.

Except to the extent inconsistent with the Condominium Act, the principles of law and equity, including the law of corporations, the law of real property and the law relative to capacity to contract, principal and agent, eminent domain, estoppel, fraud,

misrepresentation, duress, coercion, mistake, receivership, substantial performance or other validating or invalidating cause supplement the provisions of that act.

History: Laws 1982, ch. 27, § 7.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 1-108 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

1. This act displaces existing law relating to condominiums and other law only as stated by specific sections and by reasonable implication therefrom. Moreover, unless specifically displaced by this statute, common-law rights are retained. The listing given in this section is merely an illustration: no listing could be exhaustive.

2. The bracketed language concerning unincorporated associations should be deleted in the event the enacting state requires incorporation of a unit owners' association. See the parallel language contained in § 3-101 [47-7C-1 NMSA 1978].

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 9, 11.

Erection of condominium as violation of restrictive covenant forbidding erection of apartment houses, 65 A.L.R.3d 1212.

31 C.J.S. Estates § 153 et seq.

47-7A-9. Construction against implicit repeal, amendment or expansion.

The Condominium Act is a general act intended as a unified coverage of its subject matter; no part of it shall be deemed impliedly repealed, amended or expanded by subsequent legislation if that construction can reasonably be avoided.

History: Laws 1982, ch. 27, § 8.

ANNOTATIONS

Compiler's notes. — This section is similar to § 1-109 of the Uniform Condominium Act, with the following main exception: the language of § 1-109 of the Uniform Condominium Act does not include "amended or expanded" following "impliedly repealed."

COMMISSIONERS' COMMENT

This section derives from § 1-104 of the Uniform Commercial Code [55-1-104 NMSA 1978].

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments § 9.

31 C.J.S. Estates § 153 et seq.

47-7A-10. Reserved.

ANNOTATIONS

Compiler's notes. — Section 1-110 of the Uniform Condominium Act, which would have been compiled as 47-7A-10 NMSA 1978, was not adopted by New Mexico. *See* 47-7A-1 NMSA 1978 and notes thereto.

47-7A-11. Severability.

If any part or application of the Condominium Act is held invalid, the remainder, or its application to other situations or persons, shall not be affected.

History: Laws 1982, ch. 27, § 9.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 1-111 of the Uniform Condominium Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Statutes §§ 191, 383.

82 C.J.S. Statutes §§ 92 to 94.

47-7A-12. Unconscionable agreement or term of contract.

A. The court, upon finding as a matter of law that a contract or contract clause was unconscionable at the time the contract was made, may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause or limit the application of any unconscionable clause in order to avoid an unconscionable result.

B. Whenever it is claimed, or appears to the court, that a contract or any contract clause is or may be unconscionable, the parties, in order to aid the court in making the determination, shall be afforded a reasonable opportunity to present evidence as to unconscionability, including:

(1) the commercial setting of the negotiations;

(2) whether a party has knowingly taken advantage of the inability of the other party reasonably to protect his interests by reason of physical or mental infirmity, illiteracy or inability to understand the language of the agreement or similar factors; and

(3) the effect and purpose of the contract or clause.

History: Laws 1982, ch. 27, § 10.

ANNOTATIONS

Compiler's notes. — This section is similar to § 1-112 of the Uniform Condominium Act, with the following main exception: paragraph (4) of subsection (b) of § 1-112 of the Uniform Condominium Act is not included in the state Condominium Act.

COMMISSIONERS' COMMENT

This section is similar to § 2-302 of the Uniform Commercial Code [55-2-302 NMSA 1978] and § 1-311 of the Uniform Land Transactions Act. The rationale and comments provided in those sections are equally applicable to this section.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments § 22.

31 C.J.S. Estates § 153 et seq.

47-7A-13. Obligation of good faith.

Every contract or duty governed by the Condominium Act imposes an obligation of good faith in its performance or enforcement.

History: Laws 1982, ch. 27, § 11.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 1-113 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

This section sets forth a basic principle running throughout this act: in condominium transactions, good faith is required in the performance and enforcement of all agreements and duties. Good faith, as used in this act, means observance of two standards, "honesty in fact" and observance of reasonable standards of fair dealing. While the term is not defined, the term is derived from and used in the same manner as in § 1-201 of the Uniform Simplification of Land Transfers Act, and §§ 2-103(i) (b) and 7-404 of the Uniform Commercial Code [55-2-103(1)(b) and 55-7-404 NMSA 1978].

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments § 26.

47-7A-14. Remedies to be liberally administered.

A. The remedies provided by the Condominium Act shall be liberally administered in order that the aggrieved party is placed in as good a position as if the other party had fully performed. However, consequential, special or punitive damages shall not be awarded except as specifically provided in the Condominium Act or by other law.

B. Any right or obligation declared by the Condominium Act is enforceable by judicial proceeding.

History: Laws 1982, ch. 27, § 12.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 1-114 of the Uniform Condominium Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 26, 42.

Liability of vendor of condominiums for damage occasioned by defective condition thereof, 50 A.L.R.3d 1071.

31 C.J.S. Estates § 153 et seq.

ARTICLE 7B
Condominium Act - Creation, Alteration and Termination of Condominiums

47-7B-1. Creation of condominium.

A. A condominium may be created pursuant to the Condominium Act only by recording a declaration executed in the same manner as a deed. The declaration shall be recorded in each county in which any portion of the condominium is located and shall be indexed in the grantee's index in the name of the condominium and the association and in the grantor's index in the name of each person executing the declaration.

B. A declaration or an amendment to a declaration adding units to a condominium shall not be recorded unless all structural components and mechanical systems of all buildings containing or comprising any units created are substantially completed in accordance with the plans, as evidenced by a recorded certificate of completion

executed by a licensed engineer, architect, the appropriate building inspection authority or by the declarant. This section does not apply to a conversion building restricted in its entirety to uses other than for residential purposes.

History: Laws 1982, ch. 27, § 13.

ANNOTATIONS

Compiler's notes. — This section is similar to § 2-101 of the Uniform Condominium Act, with the following main exceptions: Subsection B of the state Condominium Act changes the requirements set forth in subsection (b) of the Uniform Condominium Act by specifying that a licensed, rather than independent (registered), engineer, architect, appropriate building inspection authority or the declarant execute a certificate of completion; the latter two authorized persons are not specified in subsection (b) of the Uniform Condominium Act, but that subsection does specify that a surveyor may execute the document, whereas Subsection B of the state Condominium Act omits "surveyor"; Subsection B of the state Condominium Act omits the parenthetical phrase at the end of subsection (b) of the Uniform Condominium Act, which deals with approval of the declaration or amendment by a state agency, and adds the second sentence.

COMMISSIONERS' COMMENT

1. A condominium is created pursuant to this act only by recording a declaration. As with any instrument affecting real estate, the declaration must be recorded in every recording district in which any portion of the condominium is located and must be indexed in the manner described in subsection (a) [Subsection A]. Specific indexing rules are suggested in brackets and should be used in those states where this result would not otherwise occur. For example, the declaration commonly has not been indexed in the grantee's index in the name of the condominium. Moreover, when multiple persons execute the declaration, the declaration has often been indexed solely in the name of the declarant and not in the name, for example, of lenders and other persons who might have executed the declaration. Because it is important that the names of the association and all persons executing the declaration appear in the index in order to locate all instruments in the land records, that language is not included in brackets.

2. In § 1-103 [47-7A-3 NMSA 1978], the act defines the term "declaration" as any instruments, however denominated, which create a condominium, and any amendments to those instruments. "Condominium," in turn, is defined as "real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions." It is important to emphasize that other covenants, conditions or restrictions applicable to the real estate in the condominium might be recorded before or after the instruments are recorded which divide the real estate into units and common elements, thereby creating the condominium.

Until the actual recordation of the document which accomplished that result, however, the condominium has not been created.

3. A condominium has not been lawfully created unless the requirements of this section have been complied with. Nevertheless, a project which meets the definition of "condominium" in § 1-103(7) [47-7A-3G NMSA 1978] is subject to this act even if this or other sections of the act have not been complied with.

4. Mortgagees and other lienholders need not execute the declaration, and foreclosure of a mortgage or other lien will not, of itself, terminate the condominium. However, if that lien is prior to the declaration itself, the lienholder may exclude that real estate from the condominium. See § 2-118(i) and (j) [47-7B-18I and J NMSA 1978]. Moreover, the declarant may wish to obtain agreements from mortgagees or other lienholders that they will give partial releases permitting lien-free conveyance of the condominium units. See § 4-111(a) [47-7D-11A NMSA 1978].

5. Except when development proceeds pursuant to § 5-103 [not adopted], this act contemplates that two different stages of construction must be reached before (1) a condominium may be created or (2) a unit in the condominium may be conveyed. These stages are described, respectively, in subsection (b) [Subsection B] and § 4-120 [47-7D-20 NMSA 1978]. The purpose of imposing these requirements is to insure that a purchaser will in fact take title to a unit which may be used for its intended purpose.

If a condominium were said to consist from the beginning of a certain number of units, even though some of those units had not yet been completed or even begun, serious problems would arise if the remaining units were never constructed and if no obligation to complete the construction could be enforced against any solvent person. If the insolvent owner of the unbuilt units failed to pay his common expense assessments for example, the unit owners' association might be left with no remedy except a lien of doubtful value against mere cubicles of airspace. Moreover, votes in the unit owners' association could be assigned to units, and those votes could be cast, even though the units were never built. The act therefore requires that significant construction take place before units are assigned an interest in the common elements, a vote in the association and a share of the common expense liabilities, and before units are conveyed. This requirement of substantial completion [or the alternative bonding procedure and other assurances required by § 5-103 [not adopted__ reduces the possibility that a failure to complete will upset the expectations of purchasers or otherwise harm their interests in case the declarant becomes insolvent and no solvent person has the obligation to complete the unit.

6. Section 2-101(b) [Subsection B] requires that "all structural components and mechanical systems of all buildings containing or comprising any units" which will be created by recording a declaration, must be substantially completed in accordance with the plans. The intent of subsection (b) [Subsection B] is that if any buildings are depicted on the plats and plans which are required by § 2-109 [47-7B-9 NMSA 1978], and these buildings contain or comprise spaces which become units by virtue of

recording the declaration, the structural components and mechanical systems of these buildings must be substantially complete before the declaration is recorded. This is required even though the plats and plans recorded pursuant to § 2-109 [47-7B-9 NMSA 1978] depict only the boundaries of the buildings and the units created in those buildings, and not the structural components or mechanical systems (which need not be shown). If the boundaries of units are not depicted, of course, then no units are created. If the declarant fails to comply with this section, title is not affected. See Comment 8, below.

The concept of "structural components and mechanical systems" is one commonly understood in the construction field and this comment is not intended as a comprehensive list of those components. For example, however, the term "structural components" is generally understood to include those portions of a building necessary to keep any part of the building from collapsing, and to maintain the building in a weathertight condition. This would include the foundations, bearing walls and columns, exterior walls, roof, floors and similar components. It would clearly not include such components as interior non-bearing partitions, surface finishes, interior doors, carpeting and the like. Similarly, typical examples of "mechanical systems" include the plumbing, heating, air conditioning and other like systems. Whether or not "electrical systems" are included within the meaning of the term depends on local practice.

7. Section 4-120 [47-7D-20 NMSA 1978], requires that, before an individual unit is conveyed, the unit must be "substantially completed." "Substantial completion" is a well understood term in the construction industry. For example, the American Institute of Architects Document A201, General Conditions of the Contract for Construction (1976 Ed.) at para. 8.1.3, states:

The Date of Substantial Completion of the Work . . . is the date certified by the Architect when construction is sufficiently complete, in accordance with the Contract Documents (that is, the owner-contractor agreement, the conditions of the contract, and the specifications and all addenda and modifications), so the Owner can occupy or utilize the Work . . . for the use for which it is intended.

This standard is also one often used by building officials in issuing certificates of occupancy. It does not suggest that the unit is "entirely completed" as that term is understood in the construction industry; lesser details, such as sticking doors, leaking windows or some decorative items, might still remain, and the act contemplates that they need not be completed prior to lawful conveyance.

8. Section 2-101(b) [Subsection B] and 4-120 [47-7D-20 NMSA 1978] require that completion certificates be recorded, or local certificates of occupancy be issued, as evidence of the fact that the required levels of construction have been met. In the case of "substantial completion," issuance of "a certificate of occupancy authorized by law," as is commonly required by local ordinance or state building codes, will suffice. Once the certificates have been recorded, or issued, as the case may be, good title to the units may be conveyed in reliance on the record. It is possible, of course, that the

declarant may have failed to complete the required levels of construction; the architect, surveyor or engineer (whichever is appropriate in a particular jurisdiction) may have filed a false certificate. Such acts would create a cause of action in the purchaser under § 4-115 [not adopted], but would not affect the validity of the purchasers' title to the condominium.

9. The requirement of "substantial completion" does not mean that the declarant must complete all buildings in which all possible units would be located before creating the condominium. If only some of the buildings in which units which may ultimately be located have been "structurally" completed, the declarant may create a condominium in which he reserves particular development rights (§ 2-105(a)(8) [47-7B-5A(5) NMSA 1978]). In such a project, only the completed units might be treated as units from the outset, and the development rights would be reserved to create additional units, either by adding additional real estate and units to the condominium, by creating new units on common elements or by subdividing units previously created. The optional units may never be completed or added to the condominium; however, this will not affect the integrity of the condominium as originally created.

10. Requiring "substantial completion" of the structural components and mechanical systems in the buildings containing or comprising the units in a condominium may encourage creation of more phased condominiums under § 2-105 [47-7B-5 NMSA 1978] in projects which once were in fact built in phases, but under a single nonexpandable declaration. Experience in the several states where significantly more rigorous requirements are imposed by statute, however, has shown that this does not create a difficult situation either for the developer or the lender. Moreover, it appears likely that the size of the initial phase of a multi-building project will be dictated largely by economics, as occurs in most jurisdictions today, rather than this act. Finally, many lenders and developers are increasingly sensitive to the secondary mortgage market requirements particularly those of the federal national mortgage association (FNMA) and the federal home loan mortgage corporation (FHLMC). Experience indicates that the pre-sale requirements imposed by FNMA and FHLMC frequently dictate that multi-building condominium projects be structured on a phased or expandable condominium basis.

11. The requirement of completion would be irrelevant in some types of condominiums, such as campsite condominiums or some subdivision condominiums where the units might consist of unimproved lots, and the airspace above them, within which each purchaser would be free to construct or not construct a residence. Any residence actually constructed would ordinarily become a part of the "unit" by the doctrine of fixtures, but nothing in this act would require any residence to be built before the lots could be treated as units.

12. The term "independent" architect, surveyor or engineer in subsection (b) [Subsection B] and elsewhere in the act distinguishes any such professional person who acts as an independent contractor in his relationship to the declarant or lender.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 12 to 15.

31 C.J.S. Estates § 153 et seq.

47-7B-2. Unit boundaries.

Except as provided by the declaration:

A. if walls, floors or ceilings are designated as boundaries of a unit, all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring and any other materials constituting any part of the finished surfaces thereof are a part of the unit, and all other portions of the walls, floors or ceilings are a part of the common elements;

B. if any chute, flue, duct, wire, conduit, bearing wall, bearing column or any other fixture lies partially within and partially outside the designated boundaries of a unit, any portion thereof serving only that unit is a limited common element allocated solely to that unit, and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements;

C. subject to the provisions of Subsection B of this section, all spaces, interior partitions and other fixtures and improvements within the boundaries of a unit are a part of the unit;

D. any shutters, awnings, window boxes, doorsteps or stoops and all exterior doors and windows or other fixtures designed to serve a single unit, but located outside the unit's boundaries, are limited common elements allocated exclusively to that unit; and

E. any porches, balconies or patios designed to serve a single unit, but located outside the unit's boundaries, are limited common elements allocated exclusively to that unit.

History: Laws 1982, ch. 27, § 14.

ANNOTATIONS

Compiler's notes. — This section is similar to § 2-102 of the Uniform Condominium Act, with the following main exception: subsection (4) of the Uniform Condominium Act is encompassed in Subsections D and E of the state Condominium Act.

COMMISSIONERS' COMMENT

1. It is important for title purposes and other reasons to have a clear guide as to precisely which parts of a condominium constitute the units and which parts constitute

the common elements. This section fills the gap left when the declaration merely defines unit boundaries in terms of floors, ceilings and perimetric walls.

The provisions of this section may be varied, of course, to the extent that the declarant wishes to modify the details for a particular condominium.

For example, in a townhouse project structured as a condominium, it may be desirable that the boundaries of the unit constitute the exterior surfaces of the roof and exterior walls, with the center line of the party walls constituting the perimetric boundaries of the units in that plane, and the undersurface of the bottom slab dividing the unit itself from the underlying land. Alternatively, the boundaries of the units at the party walls might be extended to include actual division of underlying land itself. In those cases it would not be appropriate for walls, floors and ceilings to be designated as boundaries, and the declaration would describe the boundaries in the above manner. The differentiations made clear here, in conjunction with the provisions of § 3-107 [47-7C-7 NMSA 1978], will assist in minimizing disputes which have historically arisen in association administration with respect to liability for repair of such things as pipes, porches and other components of a building which unit owners may expect the association to pay for and which the association may wish to have repaired by unit owners. Problems which may arise as a result of negligence in the use of components - such as stoops and pipes - are resolved by § 3-107 [47-7C-7 NMSA 1978], which imposes liability on the unit owner who causes damage to common elements, or under the broader provisions of § 3-115(e) [47-7C-15 NMSA 1978], which permits the association to assess common expenses "caused by the misconduct of any unit owner" exclusively against that owner. This would include, of course, not only damages to common elements, but fines or unusual service fees, such as clean-up costs, incurred as a result of the unit owner's misuse of common elements.

2. The differentiation between components constituting common elements and components which are part of the units is particularly important in light of § 3-107(a) [47-7C-7A NMSA 1978], which (subject to the exceptions therein mentioned) makes the association responsible for upkeep of common elements and each unit owner individually responsible for upkeep of his unit.

3. The differentiation between unit components and common element components may or may not be important for insurance purposes under this act. While the common elements in a project must always be insured, the units themselves need not be insured by the association unless the project contains units divided by horizontal boundaries; see § 3-113(b) [47-7C-13B NMSA 1978]. In a "high rise" configuration, however, § 3-113(a) [47-7C-13A NMSA 1978] contemplates that both will normally be insured by the association (exclusive of improvements and betterments in individual units) and that the cost of such insurance will be a common expense. That common expense may be allocated, however, on the basis of risk if the declaration so requires. See § 3-115(c)(3) [47-7C-15C NMSA 1978].

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 12, 18, 32, 33, 38.

Proper party plaintiff in action for injury to common areas of condominium development, 69 A.L.R.3d 1148.

Validity and construction of condominium association's regulations governing members' use of common facilities, 72 A.L.R.3d 308.

31 C.J.S. Estates § 153 et seq.

47-7B-3. Construction and validity of declaration and bylaws.

A. All provisions of the declaration and bylaws are severable.

B. The rule against perpetuities shall not be applied to defeat any provision of the declaration, bylaws, rules or regulations adopted pursuant to Section 35 [47-7C-2 NMSA 1978] of the Condominium Act.

C. In the event of a conflict between the provisions of the declaration and the bylaws, the declaration prevails except to the extent the declaration is inconsistent with the Condominium Act.

D. Title to a unit and common elements is not rendered unmarketable or otherwise affected by reason of an insubstantial failure of the declaration to comply with the Condominium Act. Whether a substantial failure impairs marketability is not affected by that act.

History: Laws 1982, ch. 27, § 15.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 2-103 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

1. Subsection (b) [Subsection B] does not totally invalidate the rule against perpetuities as applied to condominiums. The language does provide that the rule against perpetuities is ineffective as to documents which would govern the condominium during the entire life of the project, regardless of how long that should be. With respect to deeds or devises of units, however, the policies underlying the rule against perpetuities continue to have validity and remain applicable under this act.

2. In considering the effect of failures to comply with this act on title matters, subsection (d) [Subsection D] refers only to defects in the declaration - which includes the plats and

plans - because the declaration is the instrument which creates and defines the units and common elements. No reference is made to other instruments, such as bylaws, because these instruments have no impact on title, whether or not recorded. However, in all cases of violations of the act, a failure of the bylaws - or any other instrument - to comply with the act, would entitle any affected persons to appropriate relief under § 4-117 [47-7D-17 NMSA 1978].

3. No special prohibition against racial or other forms of discrimination is included in this act because the provisions of generally applicable federal and state law apply as much to condominiums as to other forms of real estate.

4. Some examples may help to clarify what sorts of defects in the declaration are to be regarded as "insubstantial" within the meaning of the first sentence of subsection (d) [Subsection D].

Suppose the declaration allocates common element interests to all the units, but fails to indicate the formula for the allocation as required by § 2-107 [47-7B-7 NMSA 1978]. This would be a substantial defect if the assigned interests were unequal, but if all units were assigned identical interests if would be possible to infer that the basis of allocation was equality - and the failure of the declaration to say so would be an insubstantial defect. Were this to happen in a condominium where the right to add new units is reserved, however, it should be noted that a subsequent amendment to the declaration adding new units could not use any formula other than equality for reallocating the common element interests unless a different formula were specified pursuant to § 2-107(b) [47-7B-7B NMSA 1978].

Other examples of insubstantial defects that might occur include failure of the declaration to include the word "condominium" in the name of the project, as required by § 2-105(1) [47-7B-5A NMSA 1978], or failure of the plats and plans to comply satisfactorily with the requirement of § 2-109(a) [47-7B-9A NMSA 1978] that they be "clear and legible," so long as they can at least be deciphered by persons with proper expertise. Failure to organize the unit owners' association at the time specified in § 3-101 [47-7C-1 NMSA 1978] would not be a defect in the declaration at all, and would not affect the validity or marketability of titles in the condominium. It would, however, be a violation of this act, and create a claim for relief under § 4-117 [47-7D-17 NMSA 1978].

5. Each state has case or statutory law dealing with marketability of titles, and the question of whether substantial failures of the declaration to comply with the act affect marketability of title should be determined by that law and not by this act.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 14 to 17, 31, 40.

Validity and construction of condominium association's regulations governing members' use of common facilities, 72 A.L.R.3d 308.

Enforceability of bylaw or other rule of condominium or cooperative association restricting occupancy by children, 100 A.L.R.3d 241.

Validity and construction of regulations of governing body of condominium or cooperative apartment pertaining to parking, 60 A.L.R.5th 647.

31 C.J.S. Estates § 153 et seq.

47-7B-4. Description of units.

A description of a unit which sets forth the name of the condominium, the recording data for the declaration, the county in which the condominium is located and the identifying number of the unit is a sufficient legal description of that unit and all rights, obligations and interests appurtenant to that unit which were created by the declaration or bylaws.

History: Laws 1982, ch. 27, § 16.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 2-104 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

1. The intent of this section is that no description of a unit in a deed, lease, deed of trust, mortgage or any other instrument or document shall be subject to challenge for failure to meet any common law or other requirements so long as the requirements of this section are satisfied, and so long as the declaration itself, together with the plats and plans which are a part of the declaration, provides a legally sufficient description.

2. The last sentence makes clear that an instrument which does meet those requirements includes all interest appurtenant to the unit. As a result, it will not be necessary under this act to continue the practice, common in some jurisdictions, of describing the common element interests, or limited common elements, that are appurtenant to a unit in the instrument conveying title to that unit.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments § 18.

31 C.J.S. Estates § 153 et seq.

47-7B-5. Contents of declaration.

A. The declaration for a condominium shall contain:

(1) the names of the condominium, which shall include the word "condominium" or be followed by the words "a condominium", and the association;

(2) the name of every county in which any part of the condominium is situated;

(3) a description, legally sufficient for conveyance, of the real estate included in the condominium;

(4) a statement of the maximum number of units that the declarant reserves the right to create;

(5) a description of the boundaries of each unit created by the declaration, including the unit's identifying number;

(6) a description of any limited common elements, other than those specified in Subsections B, D and E of Section 47-7B-2 NMSA 1978, as provided in Section 47-7B-9 NMSA 1978;

(7) a description of any real estate, except real estate subject to development rights, that may be allocated subsequently as limited common elements, other than limited common elements specified in Subsections B, D and E of Section 47-7B-2 NMSA 1978, together with a statement that they may be so allocated;

(8) a description of any development rights and other special declarant rights reserved by the declarant, together with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those rights must be exercised;

(9) if any development right may be exercised with respect to different parcels of real estate at different times, a statement to that effect together with either a statement fixing the boundaries of those portions and regulating the order in which those portions may be subjected to the exercise of each development right, or a statement that no assurances are made in those regards, and a statement as to whether, if any development right is exercised in any portion of the real estate subject to that development right, that development right must be exercised in all or in any other portion of the remainder of that real estate;

(10) any other conditions or limitations under which the rights described in Paragraph (8) of this subsection shall be exercised or they shall lapse;

(11) an allocation to each unit of the allocated interests in the manner described in Section 47-7B-7 NMSA 1978;

(12) any restrictions on use, occupancy and alienation of the units;

(13) if required by local ordinance, written confirmation from the local zoning official that the condominium complies with the zoning density requirements of local zoning and subdivision ordinances or regulations as required in Section 47-7A-6 NMSA 1978; and

(14) all matters required by Sections 47-7B-6 through 47-7B-9, 47-7B-15, 47-7B-16 and Subsection D of Section 47-7C-3 NMSA 1978.

B. The declaration may contain any other matters that the declarant deems appropriate.

History: Laws 1982, ch. 27, § 17; 1983, ch. 245, § 2; 2012, ch. 43, § 1.

ANNOTATIONS

The 2012 amendment, effective May 16, 2012, required confirmation that the condominium complies with local zoning and subdivision laws, and in Subsection A, added a new Paragraph (13) and renumbered former Paragraph (13) as Paragraph (14).

The 1983 amendment substituted New Mexico citations for Uniform Condominium Act citations throughout the section.

COMMISSIONERS' COMMENT

1. Many statutes and other regulatory schemes in the multi-owner project field do not separate the functions of a recorded declaration and unrecorded public offering statements or disclosure documents. As a result, many of the developer's representations and assurances concerning his future plans must appear in the declaration as well as the public offering statement, even though they may have nothing to do with the legal structure or title of the project. See e. g., § 47-70, Conn. Gen. Stat. (1980). This results in duplicative requirements and unnecessarily complex declarations.

This act seeks functionally to distinguish between the declaration and the public offering statement. It requires the declaration to contain only those matters which affect the legal structure or title of the condominium. This includes the reserved powers of the declarant to exercise development rights within the condominium. A narrative description of those rights, however, and the possible consequences flowing from their exercise, are required to be disclosed only in the public offering statement and not in the declaration.

2. This section requires a statement of the name of the association for the condominium as well as the name of the condominium itself, in order that the declaration may be indexed in the name of the association. See § 2-101 [47-7B-1 NMSA 1978].

3. The act requires that the declaration for a condominium situated in two or more recording districts be recorded in each of those districts. While the bracketed language refers to the "county" as the recording district in which the declaration is to be recorded, it would be appropriate in states where recording is done at the city, town or parish level to amend the bracketed language accordingly.

4. Paragraph (a)(5) [(a)(4)] [Subsection A(4)] requires the declarant to state the largest number of units he reserves the right to build. Unlike many current condominium statutes, this act imposes no time limit, measured by an absolute number of years, at the expiration of which the declarant must relinquish control of the association. Instead, declarant control ends when 75% of the maximum number of units which may be created by the declarant have been sold, or at the end of a two-year period during which development is not proceeding. See § 3-103(d) [47-7C-3D NMSA 1978]. The flexibility afforded by this section may be important to a declarant as he responds to unanticipated future changes in his market.

In theory, a declarant might overstate the maximum number of units in an attempt to artificially extend the period of declarant control, since the time might never come when a declarant had sold 75% of that number of units. As a practical matter, however, such a practice would not likely achieve long-term control.

EXAMPLE:

A declarant reserves the right to build 100 units, even though zoning would permit only 75 units on the site, and the declarant actually plans on building only 50 units. As a result of the reservation, the declarant would not lose control of the association under the 75% rule stated in § 3-103(d)(i) [47-7C-3D NMSA 1978] even when all 50 units had been built and sold, because that percentage applies to all potential units, not units actually built. See § 3-103(d)(i) [47-7C-3D NMSA 1978].

However, there are practical constraints on the declarant's decision in this matter. Substantial exaggeration of the future density of the development might tend to impede sales of units in that project. Moreover, such a statement might also produce negative governmental reaction to proposals which might require local approval.

Even if the declarant did overstate the number of units to retain control, however, other limitations imposed by § 3-103(d) [47-7C-3D NMSA 1978] will require turnover at an appropriate time. In the example, once the declarant had exercised the right to add the last of the 50 units which he intends to build, the two-year period imposed by § 3-103(d)(ii) and (iii) [47-7C-3D NMSA 1978] would begin to run, and the declarant would lose the right to control the association two years from the time the last units were added, even though he had reserved the right to add more units.

5. Paragraph (a)(5) [Subsection A(5)] requires that the boundaries of each unit created by the declaration be identified. The words "created by the declaration" emphasize that in an expandable project, new units may be created in the future by amendments to the

declaration. Until those new units are actually added to the project by amending the declaration, however, they are not units within the meaning of that defined term, and they need not be described.

6. Section 2-102 [47-7B-2 1978] makes it possible in many projects to satisfy paragraph (a)(5) [Subsection A(5)] of this section by merely providing the identifying number of the units and stating that each unit is bounded by its ceiling, floor and walls. The plats and plans will show where those ceilings, floors and perimetric walls are located, and § 2-102 [47-7B-2 NMSA 1978] provides all other details, except to the extent the declaration may make additional or contradictory specifications because of the unique nature of the project.

7. Paragraph (a)(6) [Subsection A(6)] makes clear that the limited common elements described in § 2-102(2) and (4) [47-7B-2B and D NMSA 1978] need not be described in the declaration. These limited common elements are typically porches, balconies, patios or other amenities which may be included in a project. Such improvements are treated by the act as limited common elements, rather than either common elements or parts of units, in order to minimize the attention which the documents need to give them, and to secure the result that would be desired in the usual case. Thus, if these improvements remain limited common elements, and no special provisions concerning them are included in the declaration, they may be used only by the units to which they are physically attached; maintenance of those improvements must be paid for by the association; and such improvements need not be specially referred to in the declaration. Porches, balconies and patios must be shown on the plats and plans (see § 2-109(b)(10) [47-7B-9B(10) NMSA 1978]), but other limited common elements described in § 2-102(2) and (4) [47-7B-2B and D NMSA 1978] need not be shown.

8. Paragraph (a)(7) [Subsection A(7)] contemplates that the common elements in the project may be allocated as limited common elements at some future time, either by the declarant or the association. For example, a swimming pool might serve an entire project during early phases of development. At the outset, that pool might be a common element which all the unit owners may use. At a later time, with more units and additional pools built in subsequent phases, either the declarant or the association might determine that the first pool should become a limited common element reserved for the use only of units in the first phase, while the other pools should be reserved exclusively for units in the subsequent phases. Such a potential allocation should be described in the declaration pursuant to this section.

9. Paragraph (a)(8) [Subsection A(8)] requires the declaration to describe all development rights and other special declarant rights which the declarant reserves. The declaration must describe the real estate to which each right applies, and state the time limit within which each of those rights must be exercised. The act imposes no maximum time limit for the exercise of those rights, and the particular language of a declaration will vary from project to project depending on the requirements of each project. This act contemplates that those rights may be exercised after the period of declarant control terminates.

10. Plats and plans are made a part of the declaration for legal purposes by § 2-110 [§ 2-109] [47-7B-9 NMSA 1978], and their content may in part provide some of the information required by this section.

11. Paragraph (a)(14) [Subsection A(13)] is a cross-reference to other sections of the act which require the declaration to contain particular matters. Some of these sections, such as 2-107 [47-7B-7 NMSA 1978] on the allocations of allocated interests or 2-109 [47-7B-9 NMSA 1978] on plats and plans, will affect all projects. Others, such as 2-106 [47-7B-6 NMSA 1978] on leasehold condominiums, will apply only to particular kinds of projects.

12. Subsection (b) [Subsection B] contemplates that, in addition to the content required by subsection (a) [Subsection A], other matters may also be included in the declaration if the declarant or lender feel they are appropriate to the particular project. In particular, the draftsman should carefully consider any desired provisions which would vary any of the many sections of the act where variation is permitted, including such matters as expanding or restricting the association's powers. A list of sections which may be varied appears in the comment to § 1-104 [47-7A-4 NMSA 1978].

Compiler's notes. — The reference to paragraph (a)(5) of the uniform act in the first sentence in the first paragraph of Comment 4 seems incorrect, as that paragraph deals with the description of the boundaries. Paragraph (a)(4) deals with the maximum number of units.

The reference to § 2-110 of the uniform act in Comment 10 seems incorrect, as that section deals with the exercise of development rights. Section 2-109 deals with plats and plans.

This section is similar to § 2-105 of the Uniform Condominium Act, with the following main exception: the state Condominium Act omits paragraph (13) of subsection (a) of § 2-105 of the Uniform Condominium Act, which deals with recorded data for recorded easements and licenses.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 12 to 15.

31 C.J.S. Estates § 153 et seq.

47-7B-6. Leasehold condominiums.

A. With respect to any condominium created on a leasehold estate, the declaration shall state:

(1) the recording data for the lease, or a copy of the lease shall be attached as an exhibit;

(2) the date on which the lease is scheduled to expire;

(3) a legally sufficient description of the real estate subject to the lease;

(4) any right of the unit owners to redeem the reversion and the manner whereby those rights may be exercised, or a statement that they do not have those rights;

(5) any right of the unit owners to remove any improvements within a reasonable time after the expiration or termination of the lease, or a statement that they do not have those rights; and

(6) any rights of the unit owners to renew the lease and the conditions of any renewal, or a statement that they do not have those rights.

B. Acquisition of the leasehold interest of any unit owner by the owner of the reversion or remainder does not merge the leasehold and fee simple interests.

C. If the expiration or termination of a lease decreases the number of units in a condominium, the allocated interests shall be reallocated in accordance with Subsection A of Section 6 [47-7A-7 NMSA 1978] of the Condominium Act as though those units had been taken by eminent domain. Reallocations shall be confirmed by an amendment to the declaration prepared, executed and recorded by the association.

History: Laws 1982, ch. 27, § 18.

ANNOTATIONS

Compiler's notes. — This section is similar to § 2-106 of the Uniform Condominium Act, with the following main exceptions: Subsection A of the state Condominium Act omits the requirement of subsection (a) of the Uniform Condominium Act that the lessor of any lease which upon termination will terminate or reduce the size of the condominium must sign the declaration; subsection (b) of the Uniform Condominium Act is omitted; Subsection B of the state Condominium Act encompasses subsection (c) of the Uniform Condominium Act, with the exception of the last clause of the latter subsection, which provides for merger under certain circumstances.

COMMISSIONERS' COMMENT

1. Subsection (a) [Subsection A] requires that the lessor of any lease, which upon termination will terminate the condominium or reduce its size, must sign the declaration. This requirement insures that the lessor has consented to use of his land as a condominium.

2. Subsection (a)(1) [Subsection A(1)] provides alternative bracketed language which should be considered by each state based on its practice. In any state where the

recording acts do not specify the essential terms which must be included in a memorandum of lease, either this section should be supplemented to specify the essential terms or else the bracketed language relating to such memoranda should be deleted.

3. This section sets out requirements concerning leasehold condominiums which are not typically contained in the statutes of most states. In particular, it requires that the declaration describe the rights of the unit owners, or state that they have no rights concerning a variety of significant matters. The section also contains a number of other consumer protection provisions. However, in contrast to the result under some states' laws, unit owners have no statutory right to renewal of a lease upon termination.

4. The most significant matter of consumer protection in this section is subsection (b), which provides that unit owners who pay their share of the rent of the underlying lease may not be deprived of their enjoyment of the leasehold premises.

Subsection (b) is intended to protect the "unit owner" regardless of whether he is a lessee, sublessee or even further down in a chain of transfer of leasehold interests. Thus, for example, if the "unit owner" is a sublessee, the term "lessor (or) his successor in interest" includes not only the lessor, but also the lessee.

Subsection (b) further protects the unit owner by assuring that he will not share with his fellow unit owners any collective obligation toward their common lessor. All obligations are instead fractionalized so that no unit owner can be made liable or otherwise penalized for a default by any of his fellows. Thus, a default by the association in payment of the rent due the lessor, in a case where the lease of common elements ran to the association, would not permit the lessor to terminate continued use of those common elements by those unit owners who then pay their share of the rent.

5. Subsection (d) [Subsection C] considers the problems created when termination of a lease reduces the size of a condominium. In the event that some units are thereby withdrawn from the condominium, reallocation of the allocated interests would be required; the section describes how that reallocation would occur.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 13, 18.

31 C.J.S. Estates § 153 et seq.

47-7B-7. Allocation of common element interests; votes; common expense liabilities.

A. The declaration shall allocate a fraction or percentage of undivided interests in the common elements and in the common expenses of the association and a portion of the votes in the association to each unit and state the formulas used to establish those

allocations. Those allocations may not discriminate in favor of units owned by the declarant.

B. If units may be added to or withdrawn from the condominium, the declaration must state the formulas to be used to reallocate the allocated interests among all units included in the condominium after the addition or withdrawal.

C. The declaration may provide:

(1) that different allocations of votes shall be made to the units on particular matters specified in the declaration;

(2) for cumulative voting only for the purpose of electing members of the executive board; and

(3) for class voting on specified issues affecting the class if necessary to protect valid interests of the class.

A declarant may not utilize cumulative or class voting for the purpose of evading any limitation imposed on declarants by the Condominium Act, nor may units constitute a class because they are owned by a declarant.

D. Except for minor variations due to rounding, the sum of the undivided interests in the common elements and common expense liabilities allocated at any time to all the units shall each equal one if stated as fractions or one hundred percent if stated as percentages. In the event of discrepancy between an allocated interest and the result derived from application of the pertinent formula, the allocated interest prevails.

E. The common elements are not subject to partition, and any purported conveyance, encumbrance, judicial sale or other voluntary or involuntary transfer of an undivided interest in the common elements made without the unit to which that interest is allocated, is void.

History: Laws 1982, ch. 27, § 19.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 2-107 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

1. Most existing condominium statutes require a single common basis, usually related to the "value" of the units, to be used in the allocation of common element interests, votes in the association and common expense liabilities. This act departs radically from such

requirements by permitting each of these allocations to be made on different bases, and by permitting allocations which are unrelated to value.

Thus, all three allocations might be made equally among all units, or in proportion to the relative size of each unit, or on the basis of any other formula the declarant may select, regardless of the values of those units. Moreover, "size" might be used, for example, in allocating common expenses and common element interests, while equality is used in allocating votes in the association. This section does not require that the formulas used by the declarant be justified, but it does require that the formulas be explained. The sole restriction on the formulas to be used in these allocations is that they not discriminate in favor of the units owned by the declarant. Otherwise, each of the separate allocations may be made on any basis which the declarant chooses, and none of the allocations need be tied to any other allocation.

2. While the flexibility permitted in allocations is broader than that permitted by any present statutes, it is likely that the traditional bases for allocation will continue to be used, and that the allocations for all allocated interests will often be based on the same formulas. Most commonly, those bases include size, equality or value of units. Each of these is discussed below.

3. If size is chosen as a basis of allocation, the declarant must choose between reliance on area or volume, and the choice must be indicated in the declaration. The declarant might further refine the formula by, for example, excluding unheated areas from the calculation or by partially discounting such areas by means of a ratio. Again, the declarant must indicate the choices he has made and explain the formulas he has chosen.

4. Most existing condominium statutes require that "value" be used as the basis of all allocations. Under this act a declarant is free to select such a basis if he wishes to do so. For example, he might designate the "par value" of each unit as a stated number of dollars or points. However, the formula used to develop the par values of the various units would have to be explained in the declaration. For example, the declaration for a high-rise condominium might disclose that the par value of each unit is based on the relative area of each unit on the lower floors, but increases by specified percentages at designated higher levels. The formula for determining area in this example could be further refined in the manner suggested in Comment 2, above, and any other factors (such as the direction in which a unit faces) could also be given weight so long as the weight given to each factor is explained in the declaration.

5. The purpose of subsection (b) [Subsection B] is to afford some advance disclosure to purchasers of units in the first phase of a flexible condominium of how common element interests, votes and common expense liabilities will be reallocated if additional units are added.

6. Subsection (e) [Subsection E] means what it says when it states that a lien or encumbrance on a common element interest without the unit to which that common

element interest is allocated is void. Thus, consider the case of a flexible condominium in which there are 50 units in the first phase, each of which initially has a 2 percent undivided interest in the common elements. The declarant borrows money by mortgaging additional real estate. When the declarant expands the condominium by adding phase 2 containing an additional 50 units, he reallocates the common element interests in the manner described in his original declaration, to give each of the 100 units a 1 percent undivided interest in the common elements in both phases of the condominium. At this point, the construction lender cannot have a lien on the undivided interest of phase-1 owners in the common elements of phase 2 because of the wording of the statute. Thus, the most that the construction lender can have is a lien on the phase-2 units together with their common element interests. The mortgage documents may be written to reflect the fact that upon the addition of phase 2 of the condominium, the lien on the additional real estate will be converted into a lien on the phase-2 units and on the common element interest as they pertain to those units in both phase 1 and phase 2; however, see comment to § 2-110 [47-7B-10 NMSA 1978].

Unless the lender also requires phase 2 to be designated as withdrawable real estate, the phase-2 portion may not be foreclosed upon other than as condominium units and the construction lender may not dispose of phase 2 other than as units which are a part of the condominium. In the event that phase 2 is designated as withdrawable land, then the construction lender may force withdrawal of phase 2 and dispose of it as he wishes, subject to the provisions of the declaration. If one unit in phase 2, however, has been sold to anyone other than the declarant, then phase 2 ceases to be withdrawable land by operation of § 2-110(d)(2) [47-7B-10D(2)].

7. If a unit owned only by the declarant - as opposed to the same unit if owned by another person - may be subdivided into two or more units but cannot be converted in whole or in part into common elements, it is still a unit that may be subdivided or converted into two or more units or common elements, within the meaning of the definition of development rights, and is not governed by § 2-113 [47-7B-13 NMSA 1978] (Subdivision of Units).

8. Subsection (c) [Subsection C] represents a significant departure from practice in most states concerning the allocation of votes. The usual rule is that a single allocation of votes is made to each unit, and that allocation applies to all matters on which those votes may be cast. This section recognizes that the increasingly complex nature of some projects requires different allocation on particular questions. It may be appropriate, for example, in a project where common expense liabilities, or questions concerning rules and regulations, affect different units differently.

EXAMPLE:

In a mixed commercial and residential project, the declaration might provide that each unit owner would have an equal vote for the election of the board of directors. However, on matters concerning ratification of the common expense budget, where the commercial unit owners paid a much larger share than their proportion of the total units,

the vote of commercial unit owners would be increased to three times the number of votes the residential owners held. Alternatively, of course, it might be possible to treat this question as a class voting matter, but the draftsman is provided flexibility in this section to choose the most appropriate solution.

9. This section recognizes that there may be certain instances in which class voting in the association would be desirable. For example, in a mixed-use condominium consisting of both residential and commercial units, there may be certain kinds of issues upon which the residential or commercial unit owners should have a special voice, and the device described in Comment 9 [8] was not desired. To prevent abuse of class voting by the declarant, subsection (c) [Subsection C] permits class voting only with respect to specified issues directly affecting the designated class and only insofar as necessary to protect valid interests of the designated class.

EXAMPLE:

Owners of town house units, in a single project consisting of both town house and high-rise buildings, might properly constitute a separate class for purposes of voting on expenditures affecting just the town house units, but they might not be permitted to vote by class on rules for the use of facilities used by all the units.

The subsection further provides that the declarant may not use the class voting device for the purpose of evading any limitation imposed on declarants by this act (e. g., to maintain declarant control beyond the period permitted by § 3-103 [47-7C-3 NMSA 1978]).

10. The last clause of subsection (c) [Subsection C] prohibits a practice common in the planned community or other non-condominium multi-ownership projects, where units owned by declarant constitute a separate class of units for voting and other purposes. Upon transfer of title, those units lose these more favorable voting rights. This section makes clear that the votes and other attributes of ownership of a unit may not change by virtue of the identity of the owner. In those circumstances which such classes were legitimately intended to address, principally control of the association, the act provides other, more balanced devices for declarant control. See § 3-103(d) [47-7C-3D NMSA 1978].

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 14, 32 to 38.

Proper party plaintiff in action for injury to common areas of condominium development, 69 A.L.R.3d 1148.

Validity and construction of condominium association's regulation governing members' use of common facilities, 72 A.L.R.3d 308.

31 C.J.S. Estates § 153 et seq.

47-7B-8. Limited common elements.

A. Except for the limited common elements described in Subsections B, D and E of Section 47-7B-2 NMSA 1978, the declaration shall specify to which unit or units each limited common element is allocated. That allocation shall not be altered without the consent of the unit owners whose units are affected.

B. Except as the declaration otherwise provides, a limited common element may be reallocated by an amendment to the declaration executed by the unit owners between or among whose units the reallocation is made. The persons executing the amendment shall provide a copy of the amendment to the association, which shall record it. The amendment shall be recorded in the names of the parties and the condominium.

C. A common element not previously allocated as a limited common element may not be so allocated except pursuant to provisions in the declaration made in accordance with Paragraph (7) of Subsection A of Section 47-7B-5 NMSA 1978. The allocations shall be made by amendments to the declaration.

History: Laws 1982, ch. 27, § 20; 1983, ch. 245, § 3.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 2-108 of the Uniform Condominium Act.

The 1983 amendment substituted New Mexico citations for Uniform Condominium Act citations in the first sentences in Subsections A and C and "of the amendment" for "thereof" in the second sentence in Subsection B.

COMMISSIONERS' COMMENT

1. Like all other common elements, limited common elements are owned in common by all unit owners. The use of a limited common element, however, is reserved to less than all of the unit owners. Unless the declaration provides otherwise, the association is responsible for the upkeep of a limited common element and the cost of such upkeep is assessed against all the units. See §§ 3-107(a) and 3-115(c)(1) [47-7C-7A and 47-7C-15C(1) NMSA 1978]. This might include the costs of repainting all shutters, or balconies, for example, which are limited common elements pursuant to § 2-102(4) [47-7B-2D NMSA 1978]. Accordingly, there may be occasions where, to meet the expectations of owners and to have costs borne directly by those who benefit from those amenities, the declaration might provide that the costs will be borne, not by all unit owners as part of their common expense assessments, but only by the owners to which the limited common elements are assigned.

2. Even common elements which are not "limited" within the meaning of this act may nevertheless be restricted by the unit owners' association pursuant to the powers set

forth in § 3-102[(a)](6) and (10) [47-7C-2A(6) and (10) NMSA 1978], unless that power is limited in the declaration. For example, the association might assign reserved parking spaces to designated unit owners, or even to persons who are not unit owners. Such a parking space would differ from a limited common element in that its use would be merely a personal right of the person to whom it is assigned and this section would not have to be complied with to allocate it or to reallocate it.

3. Because a mortgage or deed of trust may restrict the borrower's right to transfer the use of a limited common element without the lender's consent, the terms of the encumbrance should be examined to determine whether the lender's consent or release is needed to transfer that right of use to another person.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 32 to 38.

Proper party plaintiff in action for injury to common areas of condominium development, 69 A.L.R.3d 1148.

Validity and construction of condominium association's regulations governing members' use of common facilities, 72 A.L.R.3d 308.

31 C.J.S. Estates § 153 et seq.

47-7B-9. Plats and plans.

A. Plats and plans are a part of the declaration. Separate plats and plans are not required by the Condominium Act [47-7A-1 to 47-7D-20 NMSA 1978] if all the information required by this section is contained in either a plat or plan. Each plat and plan shall be clear and legible and contain a certification that the plat or plan contains all information required by this section.

B. Each plat shall show:

(1) the name of the condominium and a survey or a general schematic map of the condominium;

(2) the location and dimensions of all real estate not subject to development rights, or subject only to the development right to withdraw, and the location and dimensions of all existing improvements within that real estate;

(3) a legally sufficient description of any real estate subject to development rights, labeled to identify the rights applicable to each parcel;

(4) the extent of any encroachments by or upon any portion of the condominium;

(5) to the extent feasible, a legally sufficient description of all easements serving or burdening any portion of the condominium;

(6) the location and dimensions of any vertical unit boundaries not shown or projected on plans recorded pursuant to Subsection D of this section and that unit's identifying number;

(7) the location with reference to an established datum of any horizontal unit boundaries not shown or projected on plans recorded pursuant to Subsection D of this section and that unit's identifying number;

(8) a legally sufficient description of any real estate in which the unit owners will own only an estate for years, labeled as "leasehold real estate";

(9) the distance between noncontiguous parcels of real estate comprising the condominium;

(10) the location and dimensions of limited common elements, other than the limited common elements described in Subsections B and D of Section 14 [47-7B-2 NMSA 1978] of the Condominium Act; and

(11) in the case of real estate not subject to development rights, all other matters customarily shown on land surveys.

C. A plat may also show the intended location and dimensions of any contemplated improvement to be constructed anywhere within the condominium. Any contemplated improvement shown shall be labeled either "MUST BE BUILT" or "NEED NOT BE BUILT." Any certification of a plat required by this section shall be made by a licensed surveyor.

D. To the extent not shown or projected on the plats, plans of the units must show or project:

(1) the location and dimensions of the vertical boundaries of each unit and that unit's identifying number;

(2) any horizontal unit boundaries, with reference to an established datum, and that unit's identifying number; and

(3) any units in which the declarant has reserved the right to create additional units or common elements, identified appropriately.

E. Unless the declaration provides otherwise, the horizontal boundaries of part of a unit located outside of a building have the same elevation as the horizontal boundaries of the inside part and need not be depicted on the plats and plans.

F. Upon exercising any development right, the declarant shall record either new plats and plans necessary to conform to the requirements of Subsections A, B and D of this section or new certifications of plats and plans previously recorded if those plats and plans otherwise conform to the requirements of those subsections.

G. Any certification of a plan required by this section shall be made by a licensed surveyor, architect or engineer.

History: Laws 1982, ch. 27, § 21.

ANNOTATIONS

Compiler's notes. — This section is similar to § 2-109 of the Uniform Condominium Act, with the following main exceptions: Paragraph (10) of Subsection B of the state Condominium Act substitutes "other than the" for "including porches, balconies and patios, other than parking spaces and the other"; the last sentence of Subsection C of the state Condominium Act does not appear in subsection (c) of § 2-109 of the Uniform Condominium Act; Subsection G of the state Condominium Act substitutes "licensed" for "independent (registered)."

COMMISSIONERS' COMMENT

1. The terms "plat" or "plan" have been given a variety of meanings by custom and usage in the various jurisdictions. Under this act, it is important to recognize that a "plat" need not mean a "survey" of the entire real estate constituting a project at the time the initial plat is recorded, although, through amendments to the plat as development proceeds, it ultimately becomes a survey of the entire project.

As to "plan," the act does not use that term to mean the actual building plans used for construction of the project. Instead, the required content of the plans in this act is described in subsection (d) [Subsection D]. Essentially, the plans constitute a boundary survey of each unit. Typically, the walls will be the vertical ("up and down" or "perimetric") boundaries, and the floors and ceilings will be the horizontal boundaries. Importantly, these boundaries need not be physically measured, but may instead be projected from the plat or from actual building construction plans. Thus, the plans under this act are not conceived to be "as built" plans.

2. Subsection (c) [Subsection C] permits, but does not require, the plats to show the location of contemplated improvements. Since construction of contemplated improvements by a declarant involves the exercise of development rights, a declarant may not create any improvement within real estate where no development rights have been reserved, unless the plats actually show that proposed improvement or unless the association (which the declarant may control) makes the improvement pursuant to § 3-102[a](7) [47-7C-2A(7) NMSA 1978]. Should the association attempt that improvement, in the face of unit owner's objections, it may involve risk of challenge. Within land subject to development rights, of course, construction may take place in accordance

with the reserved rights, even if no contemplated improvements are shown on the plats. As to the declarant's obligation to complete an improvement that is shown, see § 4-118(a) [§ 4-119(a)] [47-7D-18A NMSA 1978].

3. As noted in the comments to § 2-101 [47-7B-1 NMSA 1978], a condominium unit may consist of unenclosed ground and/or airspace, with no "building" involved. If this were true of all units in a particular condominium, the provisions of § 2-109 [this section] relating to plans (but not plats) would be inapplicable.

4. In detailing the required contents of the plats, two different types of legal description are contemplated. First, in subsection (b)(1) [Subsection B(1)], the plat must show at least a general schematic map of the entire project. While this may be by survey, the act recognizes that a survey may be unduly expensive or impractical in a large project, and accordingly permits a general schematic map of the entire project at the commencement of development. With respect to those portions of the project, however, where no future development may take place, the flexibility of a general schematic map is not necessary. At the same time, it becomes important for title purposes to be able to identify precisely that portion of the project which is essentially completed. Accordingly, as development ceases in particular phases, subsection (b)(2) [Subsection B(2)] contemplates that the locations and dimensions of that real estate will be identified. As this process continues, all of the real estate originally shown in a general schematic map will have been surveyed, and the location and dimensions of that real estate identified, at the expiration of development rights. In addition, subsection [(b)](2) [Subsection B(2)] contemplates that existing improvements must be shown within real estate where no further development will take place. This does not mean the units which may be within each building, but it does mean the external physical dimensions of the buildings themselves. As implied by subsection [(b)](11) [Subsection B(11)], the nature of "existing improvements" required to be surveyed under subsection [(b)](2) should be determined by local practices in the particular state.

5. Subsection (b)(3) [Subsection B(3)] requires that the real estate which is subject to development rights must be identified with a legally sufficient description, that is, either a metes and bounds description, or reference to the deeds of that real estate. Since different portions of the real estate may be subject to differing development rights - for example, only a portion of the total real estate may be added as well as withdrawn from the project - the plat must identify the rights applicable to each portion of that real estate. The same reasoning applies to the legally sufficient description of easements affecting the condominium and any leasehold real estate.

6. Subsection (f) [Subsection F] describes the amendments to the plats and plans which must be made as development rights are exercised. This section requires that the plats and plans be amended at each stage of development to reflect actual progress to date. If an original schematic map was initially recorded as required by subsection (b)(1) [Subsection B(1)], the survey required by (b)(2) [Subsection B(2)] would also constitute the amendments required by subsection (f) [Subsection F].

7. The terms "horizontal" and "vertical" are now commonly understood in condominium parlance to refer, respectively, to "upper and lower" and "lateral or perimetric." Thus, § 2-102 [47-7B-1 NMSA 1978] contemplates that the perimetric walls may be designated as the "vertical" boundaries of a unit and the floor and ceiling as its "horizontal" boundaries. That is the sense in which the words "horizontal" and "vertical" are to be understood in this section and throughout this act.

8. Sections 4-118 and 4-119 [47-7D-18, 47-7D-19 NMSA 1978] reveal the effect of labeling an improvement "MUST BE BUILT" or "NEED NOT BE BUILT," as required by subsection (b)(3)[(c)] [Subsection C].

Compiler's notes. — The reference to § 4-118 of the uniform act in the last sentence in Comment 2 seems incorrect, as that section deals with labeling of promotional materials. Section 4-119 deals with the declarant's obligation to complete an improvement.

The reference to subsection (b)(3) of the uniform act in Comment 8 seems incorrect, as that subsection deals with the description of development rights. Subsection (c) deals with labeling an improvement.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 14, 15.

31 C.J.S. Estates § 153 et seq.

47-7B-10. Exercise of development rights.

A. To exercise any development right reserved under Paragraph (8) of Subsection A of Section 17 [47-7B-5 NMSA 1978] of the Condominium Act, the declarant shall prepare, execute and record an amendment to the declaration and comply with Section 21 [47-7B-9 NMSA 1978] of the Condominium Act. The declarant is the unit owner of any units thereby created. The amendment to the declaration shall assign an identifying number to each new unit created, and, except in the case of subdivision or conversion of units described in Subsection C of this section, reallocate the allocated interests among all units. The amendment must describe any common elements and any limited common elements thereby created and, in the case of limited common elements, designate the unit to which each is allocated to the extent required by Section 20 [47-7B-8 NMSA 1978] of the Condominium Act.

B. Development rights may be reserved within any real estate added to the condominium if the amendment adding that real estate includes all matters required by Section 17 or 18 [47-7B-5, 47-7B-6 NMSA 1978] of the Condominium Act as the case may be, and the plats and plans include all matters required by Section 21 [47-7B-9 NMSA 1978] of that act. This provision does not extend the time limit on the exercise of development rights imposed by the declaration pursuant to Paragraph (8) of Subsection A of Section 17 [47-7B-5 NMSA 1978] of that act.

C. Whenever a declarant exercises a development right to subdivide or convert a unit previously created into additional units, common elements or both:

(1) if the declarant converts the unit entirely to common elements, the amendment to the declaration shall reallocate all the allocated interests of that unit among the other units as if that unit had been taken by eminent domain; and

(2) if the declarant subdivides the unit into two or more units, whether or not any part of the unit is converted into common elements, the amendment to the declaration shall reallocate all the allocated interests of the unit among the units created by the subdivision in any reasonable manner prescribed by the declarant.

D. If the declaration provides, pursuant to Paragraph (8) of Subsection A of Section 17 [47-7B-5 NMSA 1978] of the Condominium Act, that all or a portion of the real estate is subject to the development right of withdrawal:

(1) if all the real estate is subject to withdrawal, and the declaration does not describe separate portions of real estate subject to that right, none of the real estate may be withdrawn after a unit has been conveyed to a purchaser; and

(2) if a portion or portions are subject to withdrawal, no portion shall be withdrawn after a unit in that portion has been conveyed to a purchaser.

History: Laws 1982, ch. 27, § 22.

ANNOTATIONS

Compiler's notes. — This section is similar to § 2-110 of the Uniform Condominium Act, with the following main exception: the third sentence of subsection A of this section of the state Condominium Act refers to "Subsection C of this section," while subsection (a) of § 2-110 of the Uniform Condominium Act refers to "subsection (b)."

COMMISSIONERS' COMMENT

1. This section generally describes the method by which any development right may be exercised. Importantly, while new development rights may be reserved within new real estate which is added to the condominium, the original time limits on the exercise of these rights which the declarant must include in the original declaration may not be extended. Thus, the development process may continue only with the self-determined constraints originally described by the declarant.

2. The reservation and exercise of development rights is and must be closely co-ordinated with financing for the project. As a result, lender review and control of that process is common, and the financing documents should reflect the proposed development process.

A typical construction loan mortgage on a portion of a phased condominium might provide that as soon as new units are built on new land to be added (or, if the portion is also designated withdrawable land, as soon thereafter as anyone other than the declarant becomes the unit owner of a unit in the withdrawable land) the mortgage on that land converts into a mortgage on all of the units located within that portion, together with their respective common element interests. The common element interest of those units will, of course, extend to the common elements in other sections of the condominium. However, failure of a construction loan mortgage to so provide is inconsequential, because conveyance of the units in that phase to the lender or to a purchaser at a foreclosure sale would automatically transfer all of those units' common element interests, as a result of the requirements of §§ 2-108(d) [2-107(e)] and 2-111(a) [2-110(a)] [47-7B-8E NMSA 1978 and Subsection A of this section].

3. A lender who holds a mortgage lien on one portion of a condominium may not cause that portion to be withdrawn from the condominium unless the portion constitutes withdrawable real estate in which there is no unit owner other than the declarant. Even then, the amendment effectuating the withdrawal must be executed by the declarant. Consequently, unless the lender wishes to become a declarant subsequent to foreclosure or a deed in lieu of foreclosure in order to execute the amendment, or forecloses in order to require an amendment from the association under § 2-118(i) [47-7B-18I NMSA 1978], a lender might require that the signed amendment be deposited in escrow at the time the loan is made in order to protect against a recalcitrant borrower.

4. As indicated in the comments to §§ 1-103(24) and 1-106 [47-7A-3, 47-7A-6 NMSA 1978], the withdrawal of real estate from a condominium may constitute a subdivision of land under the applicable subdivision ordinance. Under most subdivision ordinances, the owner of the real estate is regarded as the "subdivider." In the event of a withdrawal under this section, however, the declarant is in fact the subdivider because of his unique interest in and control over the real estate, even though the real estate, for title purposes, is a common element until withdrawn. Accordingly, he would bear the cost of compliance with any subdivision ordinance required to withdraw a part of the real estate from the condominium.

5. Subsection (c) [Subsection C] deals with special problems surrounding allocated interests when the declarant subdivides or converts units which were originally created in the declaration into additional units, common elements or both. This development right permits the declarant to defer a final decision as to the size of certain units by permitting the subdivision of larger interior spaces into smaller units. The declarant may thus "build to suit" for purchasers' needs or to meet changing market demand. The concept is called "convertible space" in several existing state statutes.

For example, a declarant of a five-story office building condominium may have purchasers committed at the time of the filing of the condominium declaration but a lack of purchasers for the upper two floors. In such a circumstance, the declarant could designate the upper two floors as a unit, reserving to himself the right to subdivide or

convert that unit into additional units, common elements of a combination of units and common elements as needed to suit the requirements of ultimate purchasers.

If, at a later time, a purchaser wishes to purchase half of one floor as a unit, the declarant could exercise the development right to subdivide his two-floor unit into two or more units. He may also wish to reserve a portion of the divided floor as a corridor which will constitute common elements. In that case, he would proceed pursuant to this subsection to reallocate the allocated interests among the units in the manner described in this section.

Alternatively, the declarant may ultimately decide that the entire two floors should be turned over to the unit owners' association not as a unit but as common elements to be used perhaps as a cafeteria serving the balance of the building, or for retail space to be rented by the association. In that case, should he choose to make the entire two floors common elements, the provisions of paragraph (c) (1) [Subsection C (1)] would apply.

Compiler's notes. — The reference to § 2-108(d) of the uniform act in the last sentence of the second paragraph of Comment 2 seems incorrect, as § 2-108 does not have a subsection (d). Section 2-107(e) seems to be the correct reference.

The reference to § 2-111(a) of the uniform act in the last sentence in the second paragraph of Comment 2 seems incorrect, as § 2-111 has no subsection (a). Section 2-110(a) seems to be the correct reference.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 14, 15, 18.

31 C.J.S. Estates § 153 et seq.

47-7B-11. Alterations of units.

Subject to the provisions of the declaration and other provisions of law, a unit owner:

A. may make any improvements or alterations to his unit that do not impair the structural integrity or mechanical systems or lessen the support of any portion of the condominium;

B. may not change the appearance of the common elements, or the exterior appearance of a unit or any other portion of the condominium, without permission of the association; and

C. after acquiring an adjoining unit or an adjoining part of an adjoining unit, may remove or alter any intervening partition or create apertures therein, even if the partition in whole or in part is a common element, if those acts do not impair the structural integrity or mechanical systems or lessen the support of any portion of the

condominium. Removal of partitions or creation of apertures under this subsection is not an alteration of boundaries.

History: Laws 1982, ch. 27, § 23.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 2-111 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

1. This section deals with permissible alterations of the interior of a unit, and impermissible alterations of the exterior of a unit and the common elements, in ways which reflect common practice. The stated rules, of course, may be varied by the declaration where desired.

2. Subsection (3) [Subsection C] deals in a unique manner with the problem of creating access between adjoining units owned by the same person. The subsection provides a specific rule which would permit a door, stairwell, or removal of a partition wall between those units, so long as structural integrity is not impaired. That alteration would not be an alteration of boundaries, but would be an exception to the basic rule stated in subsection (2) [Subsection B].

3. In considering permissible alteration of the interior of a unit, an example may be useful. A nail driven by a unit owner to hang a picture might enter a portion of the wall designated as part of the common elements, but this section would not be violated because structural integrity would not be impaired. Moreover, no trespass would be committed because each unit owner, as a part owner of the common elements, has a right to utilize them subject only to such restrictions as may be created by the act, the declaration, bylaws and the unit owners' association pursuant to § 3-102 [47-7C-1 NMSA 1978].

4. Removal of a partition or the creation of an aperture between adjoining units would permit the units to be used as one, but they would not become one unit. They would continue to be separate units within the meaning of § 1-104 [47-7A-4 NMSA 1978] and would continue to be treated separately for the purposes of this act.

5. In addition to the restrictions placed on unit owners by this section, the declaration or bylaws may restrict a unit owner from altering the interior appearance of his unit. Although this might be an undue restriction if imposed upon the primary residence of a unit owner, it may be appropriate in the case of time-share or other condominiums.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 32 to 34, 38, 39, 41.

Proper party plaintiff in action for inquiry to common areas of condominium development, 69 A.L.R.3d 1148.

31 C.J.S. Estates § 153 et seq.

47-7B-12. Relocation of boundaries between adjoining units.

A. Subject to the provisions of the declaration and other provisions of law, the boundaries between adjoining units may be relocated by an amendment to the declaration upon application to the association by the owners of those units. If the owners of the adjoining units have specified a reallocation between their units of their allocated interests, the application shall state the proposed reallocations. Unless the executive board determines, within thirty days, that the reallocations are unreasonable, the association shall prepare an amendment that identifies the units involved, states the reallocations, is executed by those unit owners, contains words of conveyance between them and, upon recordation, is indexed in the name of the grantor and the grantee.

B. The association shall prepare and record plats or plans necessary to show the altered boundaries between adjoining units and their dimensions and identifying numbers.

History: Laws 1982, ch. 27, § 24.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 2-112 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

1. This section changes the effect of most current condominium statutes, under which the boundaries between units may not be altered without unanimous or nearly unanimous consent of the unit owners. As the section makes clear, this result may be varied by the restrictions in the declaration.

2. This section contemplates that, upon relocation of the unit boundaries, no reallocation of allocated interests will occur if none is specified in the application. If a reallocation is specified but the executive board deems it unreasonable, then the applicants have the choice of resubmitting the application with a reallocation more acceptable to the board, or going to court to challenge the board's finding as unreasonable.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 14, 15, 38, 41.

31 C.J.S. Estates § 153 et seq.

47-7B-13. Subdivision of units.

A. If the declaration expressly so permits, a unit may be subdivided into two or more units. Subject to the provisions of the declaration and other provisions of law, upon application of a unit owner to subdivide a unit, the association shall prepare, execute and record an amendment to the declaration, including the plats and plans, subdividing that unit.

B. The amendment to the declaration must be executed by the owner of the unit to be subdivided, assign an identifying number to each unit created and reallocate the allocated interests formerly allocated to the subdivided unit to the new units in any reasonable manner prescribed by the owner of the subdivided unit.

History: Laws 1982, ch. 27, § 25.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 2-113 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

1. This section provides for subdivision of units by unit owners, thereby creating more and smaller units than were originally created. The underlying policy of this section is that the original development plan of the project must be followed, and the expectations of unit owners realized. Accordingly, unless subdivision of the units is expressly permitted by the original declaration, a unit may not be subdivided into two or more units unless the declaration is amended to permit it. A subdivision itself is accomplished by an amendment to the declaration.

2. At the same time, situations will often occur where future subdivision is appropriate, and this section permits the declaration to provide for it. Most state statutes do not presently provide for subdivision of units.

An analogous concept in the context of development rights is subdivision of units by a declarant. The development right is described in § 2-110 [47-7B-10 NMSA 1978].

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 38, 39, 41.

31 C.J.S. Estates § 153 et seq.

47-7B-14. Easement for encroachments.

To the extent that any unit or common element encroaches on any other unit or common element, a valid easement for the encroachment exists. The easement does

not relieve a unit owner of liability in case of his willful misconduct nor relieve a declarant or any other person of liability for failure to adhere to the plats and plans.

History: Laws 1982, ch. 27, § 26.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 2-114 [Alternative A] of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

Two approaches are presented here as alternatives, since uniformity on this issue is not essential, and various states have adopted one approach or the other. Both theories recognize the fact that the actual physical boundaries may differ somewhat from what is shown on the plats and plans, and the practical effect of both is the same.

The easement approach of Alternative A creates easements for whatever discrepancies may arise, while the "monuments as boundaries" approach of Alternative B would make the title lines move to follow movement of the physical boundaries caused by such discrepancies or subsequent setting or shifting.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 15, 38.

31 C.J.S. Estates § 153 et seq.

47-7B-15. Use for sales purposes.

A declarant may maintain sales offices, management offices and models in units or on common elements in the condominium if the declaration so provides. Subject to any limitations in the declaration, a declarant may maintain signs on the common elements advertising the condominium. The provisions of this section are subject to the provisions of other state law and to local ordinances.

History: Laws 1982, ch. 27, § 27.

ANNOTATIONS

Compiler's notes. — This section is similar to § 2-115 of the Uniform Condominium Act, with the following main exceptions: this section of the state Condominium Act deletes "only" which appears after "condominium" in § 2-115 of the Uniform Condominium Act; this section deletes "and specifies the rights of a declarant with regard to the number, size, location, and relocation thereof," which appears after "provides" in the first sentence of § 2-115 of the Uniform Condominium Act; this section

deletes the entire second sentence of § 2-115 as it appears in the Uniform Condominium Act, which deals with the designation of sales offices by the declaration.

COMMISSIONERS' COMMENT

1. This section prescribes the circumstances under which portions of the condominium - either units or common elements - may be used for sales offices, management offices or models. The basic requirements is that the declarant must describe his rights to maintain such offices in the declaration. There are no limitations on that right, so that either units owned by the declarant or other persons, or the common elements themselves, may be used for that purpose. Typical common element uses might include a sales booth in the lobby of the building, or a trailer or temporary building located outside the buildings on the grounds of the property.

2. In addition, this section contains a permissive provision permitting advertising on the common elements. The declarant may choose to limit his rights in terms of the size, location or other matters affecting the advertising. The act, however, imposes no limitation. At the same time, the last sentence of the section recognizes that state or local zoning or other laws may limit advertising, both in terms of size and content of the advertising, or the use of the units or common elements for such purposes. This section makes it clear that local law would apply in those cases.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 14, 26 to 29.

31 C.J.S. Estates § 153 et seq.

47-7B-16. Easement rights.

Subject to the provisions of the declaration, a declarant has an easement through the common elements as may be reasonably necessary for the purpose of discharging a declarant's obligations or exercising special declarant rights, whether arising under the Condominium Act or reserved in the declaration.

History: Laws 1982, ch. 27, § 28.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 2-116 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

1. This section grants to declarant an easement across the common elements, subject to any self-imposed restrictions on that easement contained in the declaration. At the same time, the easement is not an easement for all purposes and under all

circumstances, but only a grant of such rights as may be reasonably necessary for the purpose of exercising the declarant's rights. Thus, for example, if other access were equally available to the land where new units are being created, which did not require the declarant's construction equipment to pass and repass over the common elements in a manner which significantly inconvenienced the unit owners, a court might apply the "reasonably necessary" test contained in this section to consider limitations on the declarant's easement. The rights granted by this section may be enlarged by a specific reservation in the declaration.

2. The declarant is also required to repair and restore any portion of the condominium used for the easement granted under this section. See § 4-119(b) [47-7D-19B NMSA 1978].

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 14, 26, 34.

Proper party plaintiff in action for injury to common areas of condominium development, 69 A.L.R.3d 1148.

31 C.J.S. Estates § 153 et seq.

47-7B-17. Amendment of declaration.

A. Except in cases of amendments that may be executed by a declarant under Section 47-7B-9 or 47-7B-10 NMSA 1978, the association under Section 47-7B-6, 47-7B-7, 47-7B-8, 47-7B-12 or 47-7B-13 NMSA 1978 or certain unit owners under Section 47-7B-8, 47-7B-12, 47-7B-13 or 47-7B-18 NMSA 1978 and except as limited by Subsection D of this section, the declaration, including the plats and plans, may be amended only by vote or agreement of unit owners of units to which at least sixty-seven percent of the votes in the association are allocated or any larger majority the declaration specifies. The declaration may specify a smaller number only if all of the units are restricted exclusively to nonresidential use.

B. No action to challenge the validity of an amendment adopted by the association pursuant to this section may be brought more than one year after the amendment is recorded.

C. Every amendment to the declaration shall be recorded in each county in which any portion of the condominium is located and is effective only upon recordation. An amendment shall be indexed in the grantee's index in the name of the condominium and the association and in the grantor's index in the name of the parties executing the amendment.

D. Except to the extent expressly permitted or required by other provisions of the Condominium Act, no amendment shall create or increase special declarant rights, increase the number of units or change the boundaries of any unit, the allocated

interests of a unit or the uses to which any unit is restricted in the absence of unanimous consent of the unit owners.

E. Amendments to the declaration required by the Condominium Act to be recorded by the association shall be prepared, executed, recorded and certified on behalf of the association by any officer of the association designated for that purpose or, in the absence of designation, by the president of the association.

F. No amendment to the declaration which would limit, prohibit or eliminate the exercise of a special declarant right shall be effective, during the period of the reservation, without the concurrence of the declarant.

History: Laws 1982, ch. 27, § 29; 1983, ch. 245, § 4.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 2-117 of the Uniform Condominium Act, with the main exception that New Mexico has added Subsection F.

The 1983 amendment substituted New Mexico citations for Uniform Condominium Act citations in the first sentence in Subsection A and added Subsection F.

COMMISSIONERS' COMMENT

1. This section recognizes that the declaration, as the perpetual governing instrument for the condominium, may be amended by various parties at various times in the life of the project. The basic rule, stated in subsection (a) [Subsection A], is that the declaration, including the plats and plans, may only be amended by vote of 67% of the unit owners. The section permits a larger percentage to be required by the declaration, and also recognizes that, in an entirely non-residential condominium, a smaller percentage might be appropriate.

In addition to that basic rule, subsection (a) [Subsection A] lists those other instances where the declaration may be amended by the declarant alone without association approval, or by the association acting through its board of directors.

2. Section 1-104 [47-7A-4 NMSA 1978] does not permit the declarant to use any device, such as powers of attorney executed by purchasers at closings, to circumvent subsection (d)'s [Subsection D's] requirement of unanimous consent. This section does not supplant any requirements of common law or of other statutes with respect to conveyancing if title to real property is to be affected.

3. Subsection (e) [Subsection E] describes the mechanics by which amendments recorded by the association are filed, and resolves a number of matters often neglected by bylaws.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 14 to 17.

31 C.J.S. Estates § 153 et seq.

47-7B-18. Termination of condominium.

A. Except in the case of a taking of all the units by eminent domain, a condominium may be terminated only by agreement of unit owners of units to which at least eighty percent of the votes in the association are allocated or any larger percentage the declaration specifies. The declaration may specify a smaller percentage only if all of the units in the condominium are restricted exclusively to nonresidential uses.

B. An agreement to terminate shall be evidenced by the execution of a termination agreement, or ratifications thereof, in the same manner as a deed, by the requisite number of unit owners. The termination agreement must specify a date after which the agreement will be void unless it is recorded before that date. A termination agreement and all ratifications thereof shall be recorded in each county in which a portion of the condominium is situated and is effective only upon recordation.

C. In the case of a condominium containing only units having horizontal boundaries described in the declaration, a termination agreement may provide that all the common elements and units of the condominium shall be sold following termination. If, pursuant to the agreement, any real estate in the condominium is to be sold following termination, the termination agreement shall set forth the minimum terms of the sale.

D. In the case of a condominium containing any units not having horizontal boundaries described in the declaration, a termination agreement may provide for sale of the common elements, but may not require that the units be sold following termination, unless the declaration as originally recorded provided otherwise or unless all the unit owners consent to the sale.

E. The association, on behalf of the unit owners, may contract for the sale of real estate in the condominium, but the contract is not binding on the unit owners until approved pursuant to Subsections A and B of this section. If any real estate in the condominium is to be sold following termination, title to that real estate, upon termination, vests in the association as trustee for the holders of all interests in the units. Thereafter, the association has all powers necessary and appropriate to effect the sale. Until the sale has been concluded and the proceeds thereof distributed, the association continues in existence with all powers it had before termination. Proceeds of the sale shall be distributed to unit owners and lienholders as their interests may appear, in proportion to the respective interests of unit owners as provided in Subsection H of this section. Unless otherwise specified in the termination agreement, as long as the association holds title to the real estate, each unit owner and his successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted their unit. During the period of that occupancy, each unit

owner and his successors in interest remain liable for all assessments and other obligations imposed on unit owners by the Condominium Act or the declaration.

F. If the real estate constituting the condominium is not to be sold following termination, title to the common elements and, in a condominium containing only units having horizontal boundaries described in the declaration, title to all the real estate in the condominium vests in the unit owners upon termination as tenants in common in proportion to their respective interests as provided in Subsection H of this section, and liens on the units shift accordingly. While the tenancy in common exists, each unit owner and his successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted their unit.

G. Following termination of the condominium, the proceeds of any sale of real estate, together with the assets of the association, are held by the association as trustee for unit owners and holders of liens on the units as their interests may appear. Following termination, creditors of the association holding liens on the units, which were recorded before termination, may enforce those liens in the same manner as any lienholder.

H. The respective interests of unit owners referred to in Subsections E, F and G of this section are as follows:

(1) except as provided in Paragraph (2) of this subsection, the respective interests of unit owners are the fair market values of their units, limited common elements and common element interests immediately before the termination, as determined by one or more independent appraisers selected by the association. The decision of the independent appraisers shall be distributed to the unit owners and becomes final unless disapproved within thirty days after distribution by unit owners of units to which twenty-five percent of the votes in the association are allocated. The proportion of any unit owner's interest to that of all unit owners is determined by dividing the fair market value of that unit owner's unit and common element interest by the total fair market values of all the units and common elements; and

(2) if any unit or any limited common element is destroyed to the extent that an appraisal of the fair market value thereof before destruction cannot be made, the interests of all unit owners are their respective common element interests immediately before the termination.

I. Except as provided in Subsection J of this section, foreclosure or enforcement of a lien or encumbrance against the entire condominium does not of itself terminate the condominium, and foreclosure or enforcement of a lien or encumbrance against a portion of the condominium, other than withdrawable real estate, does not withdraw that portion from the condominium. Foreclosure or enforcement of a lien or encumbrance against withdrawable real estate does not of itself withdraw that real estate from the condominium, but the person taking title thereto has the right to require from the

association, upon request, an amendment excluding the real estate from the condominium.

J. If a lien or encumbrance against a portion of the real estate comprising the condominium has priority over the declaration, and the lien or encumbrance has not been partially released, the parties foreclosing the lien or encumbrance may upon foreclosure record an instrument excluding the real estate subject to that lien or encumbrance from the condominium.

History: Laws 1982, ch. 27, § 30.

ANNOTATIONS

Compiler's notes. — This section is similar to § 2-118 of the Uniform Condominium Act, with the following main exception: the third sentence of subsection (g) of § 2-118 of the Uniform Condominium Act, relating to treatment of any other creditors of the association as perfected lienholders on the units immediately before termination, is deleted.

COMMISSIONERS' COMMENT

1. While few condominiums have yet been terminated under present state law, a number of problems are certain to arise upon termination which have not been adequately addressed by most of those statutes. These include such matters as the percentage of unit owners which should be required for termination; the time frame within which written consents from all unit owners must be secured; the manner in which common elements and units should be disposed of following termination, both in the case of sale and non-sale of all of the real estate; the circumstances under which sale of units may be imposed on dissenting owners; the powers held by the board of directors on behalf of the association to negotiate a sales agreement; the practical consequences to the project from the time the unit owners approve the termination until the transfer of title and occupancy actually occurs; the impact of termination on liens on the units and common elements; distribution of sales proceeds; the effect of foreclosure or enforcement of liens against the entire condominium with respect to the validity of the project; and other matters.

2. Recognizing that unanimous consent from all unit owners would be impossible to secure as a practical matter on a project of any size, subsection (a) [Subsection A] states a general rule that 80% consent of the unit owners would be required for termination of a project. The declaration may require a larger percentage of the unit owners and, in a non-residential project, it may also require a smaller percentage. Pursuant to § 2-119 [47-7B-19 NMSA 1978] (Rights of Secured Lenders), lenders may require that the declaration specify a larger percentage of unit owner consent or, more typically, will require the consent of a percentage of the lenders before the project may be terminated.

3. As a result of subsection (d) [(a)] [Subsection A], unless the declaration requires unanimous consent for termination, the declarant may be able to terminate the condominium despite the unanimous opposition of other unit owners if the declarant owns units to which the requisite number of votes are allocated. Such a result might occur, for example, should a declarant be unable to continue sales in a project where some sales have been made.

4. Subsection (a) [(b)] [Subsection B] describes the procedure for execution of the termination agreement. It recognizes that not all unit owners will be able to execute the same instrument, and permits execution or ratification of the master termination agreement. Since the transfer of an interest in real estate is being accomplished by the agreements, each of the ratifications must be executed in the same manner as a deed. Importantly, the agreement must specify the time within which it will be effective; otherwise, the project might be indefinitely in "limbo" if ratifications had been signed by some, but not all, required unit owners, and the signing unit owners fail to revoke their agreements. Importantly, the agreement becomes effective only when it is recorded.

5. Subsections (c) and (d) [Subsections C and D] deal with the question of when all the real estate in the condominium, or the common elements, may be sold without unanimous consent of the unit owners. The section reaches a different result based on the physical configuration of the project.

Subsection (c) [Subsection C] states that if a condominium contains only units having horizontal boundaries - a typical high rise building - the unit owners may be required to sell their units upon termination despite objection. Under subsection (d) [Subsection D], however, if the project contains any units which do not have horizontal boundaries - for example, a single family home project where some of the units include title to land and could theoretically continue apart from a condominium as a title matter - then the termination agreement may not force dissenting unit owners to sell their units unless the declaration as originally recorded provided otherwise. Obviously, of course, if all the unit owners consent to the sale of the units, sale of the entire development would be possible.

6. Subsection (e) [Subsection E] describes the powers of the association during the pendency of the termination proceedings. It empowers the association to negotiate for the sale, but makes the validity of any contract dependent on unit owner approval. This section also makes clear that, upon termination, title to the real estate shall be held by the association, so that the association may convey title without the necessity of each unit owner signing the deed. Finally, this section makes clear that, until the association delivers title to the condominium property, the project will continue to operate as it had prior to the termination, thus insuring that the practical necessities of operation of the real estate will not be impaired.

7. Subsection (f) [Subsection F] contemplates the possibility that a condominium might be terminated but the real estate not sold. While this is not likely to be the usual case, it is important to provide for the possibility.

8. A complex series of creditors' rights questions may arise upon termination. Those questions involve competing claims of first mortgage holders on individual units, other secured and unsecured creditors of individual unit owners, judgment creditors of the association, creditors of the association to whom a security interest in the common elements has been granted and unsecured creditors of the association. Subsection (g) [Subsection G] attempts to establish general rules with respect to these competing claims, but leaves to state law the resolution of the priorities of those competing claims.

The examples which follow illustrate the relative effects of several provisions set out in the act, based on application of an assumed state lien priority rule of "first in time, first in right." In those instances, particularly involving mechanics' liens, where state law often establishes priorities at variance with that rule, that result is also indicated.

EXAMPLE 1:

HYPOTHETICAL FOR EXAMPLES 1A-1H: A condominium consists of five detached single family homes on five individually owned lots, together with a sixth lot which is undeveloped but intended for future construction of a swimming pool serving all units. The development is served by a private road. Lot 6 and the private road are common elements owned on an undivided interest basis by the unit owners.

The declaration provides that: (1) upon termination, all units and the common elements must be sold; (2) the association is permitted to encumber lot 6, and to grant a security interest in that lot for any purpose; and (3) common element interest votes and common expense liabilities are allocated equally among the units. For purposes of the example, we have assumed that the documents do not require the consent of first mortgage holders before the unit owners may vote to terminate.

The five units were originally sold at equal prices of $50,000. Common expenses in the project are $100 per unit, per month, and are used for a variety of purposes, including insurance and upkeep of the units and common elements. At the time the units were conveyed, each of them was released from all liens affecting the condominium which were senior to the declaration.

A shopping center developer has offered $380,000 for the purchase of the entire condominium. The association's members unanimously vote in favor of termination, and otherwise comply with § 2-118 [this section]. The appraisal required by § 2-118(h) [Subsection H] shows that the units are still of equal value.

EXAMPLE 1A:

At the time of termination, the 5 units were financed as follows:

Unit 1: The owner's first mortgage had an unpaid balance of $50,000.

Unit 2: The owner's first mortgage had an unpaid balance of $40,000.

Unit 3: The owner's first mortgage had an unpaid balance of $25,000.

Units 4 and 5: The owners paid cash, and there is no mortgage on either unit.

In addition, all common expenses had been paid when due. The other assets of the association, including reserves, bank account and all other personal property, total $20,000.

Under the act (§ 2-118(e) [Subsection E]), the association, following sale, holds the proceeds of sale together with the assets of the association, "as trustee for the holders of all interests in the units." In these circumstances, the interests of each party in the total value of $400,000 would be as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due First Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Owners	30,000	40,000	55,000	80,000	80,000

EXAMPLE 1B

The facts stated in Example 1A remain true. However, at termination, unit 1 has failed to pay its common expenses for 12 months. In these circumstances, the interests of each party would be as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming First Mortgage)	600	-0-	-0-	-0-	-0-
Due First Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming First Mortgage)	600	-0-	-0-	-0-	-0-
Due Owners	28,000	40,000	55,000	80,000	80,000

In this example, both the lenders and the association are fully paid because the sales proceeds exceed the liens on the units. Note, however, that six months of the unpaid assessments prime the first mortgage pursuant to § 3-116(b) [47-7C-16 NMSA 1978].

Thus, if the sales proceeds had been only $50,000 per unit, rather than $80,000, the results with respect to unit 1 would have been as follows:

Sales Proceeds	$50,000
Six-Month Assessment Due Association	600
Balance	$49,400
Paid to First Mortgage Holder	$49,400
Loss to First Mortgage Lender	(600)
Loss to Association	(600)

Of course, the association has, and the lender may have, a claim against the unit owner, personally, for the unpaid sums due them. Importantly, however, neither the other unit owners nor their units are subject to any liability for those claims.

Because the lien of the first mortgage holder, at termination or foreclosure, is junior to the first six months of unpaid assessments due the association, lenders may protect themselves under the act by requiring the escrow of six months' common expense assessments, as they often do for real property taxes.

EXAMPLE 1C:

The facts stated in Example 1B remain true. However, after all the units were initially sold, but before termination, 80% of the unit owners agree to build a swimming pool on lot 6. The association contracts with XYZ pool company to build the pool for $100,000. XYZ does not take a security interest in the common elements, as it might have done under § 3-112 [47-7C-12 NMSA 1978], and does not act to perfect any available mechanics' lien under state law. The pool is properly completed. When the association fails to pay, XYZ sues the association, secures a judgment, and properly perfects its judgment pursuant to § 3-111 [47-7C-11 NMSA 1978] (Tort and Contract Liability). As provided in § 3-111 [47-7C-11 NMSA 1978], liens resulting from judgments against the association are governed by § 3-117 [47-7C-17 NMSA 1978]. At the time of termination, XYZ has not been paid, and its claim amounts to $100,000.

Section 3-117(a) [47-7C-17A NMSA 1978] provides that a "judgment for money against the association," if perfected as a lien on real property under state law, "is a lien in favor of the judgment lienholder against all of the units." However, the last sentence also provides that the judgment is not a lien on the common elements. Accordingly, XYZ holds a $20,000 lien on each of the units as of the date the lien is perfected. In these circumstances, the interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds Due Association	80,000	80,000	80,000	80,000	80,000

(Priming First Mortgage)	600	-0-	-0-	-0-	-0-
Due First Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming First Mortgage)	600	-0-	-0-	-0-	-0-
Due XYZ	20,000	20,000	20,000	20,000	20,000
Due Owners	8,800	20,000	35,000	60,000	60,000

EXAMPLE 1D:

All facts stated in Example 1C remain true, except that XYZ pool company, at the time it contracts to build the pool, takes a security interest in lot 6, pursuant to § 3-112 [47-7C-12 NMSA 1978], and that security interest includes a release of that real estate, upon default, from all restrictions imposed on the real estate by the declaration. At termination, XYZ has not instituted any action against the association to enforce its claim.

In these circumstances, XYZ, as a secured creditor with respect to lot 6, holds an interest superior to the declaration, and would have the right to exclude that real estate from the project. Any sale of the entire condominium would be subject to the superior interest of XYZ. For that reason, in the normal circumstances, the association would not be able to secure a release of that lien unless XYZ were paid in full from the proceeds of the sale, which would have the effect of reducing the value of the sale to $280,000. Note that this has the economic effect of placing the XYZ claim, at termination, ahead of prior first mortgages. For this reason, first mortgage holders will typically require their consent before common elements may be subjected to a lien.

EXAMPLE 1E:

The facts stated in Example 1C remain true so that XYZ holds only a perfected judgment lien, not a security interest in the common elements.

After the XYZ lien was perfected, a $50,000 uninsured judgment is entered against the owner of unit 4, resulting from his personal business. The lien is perfected, and rests only against unit 4. In these circumstances, the interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming First					

Mortgage)	600	-0-	-0-	-0-	-0-
Due First Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming First Mortgage)	600	-0-	-0-	-0-	-0-
Due XYZ	20,000	20,000	20,000	20,000	20,000
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
Due Owners	8,800	20,000	35,000	10,000	60,000

EXAMPLE 1F:

The facts stated in Example 1E remain true. After the swimming pool is built, a neighbor's child falls into the untended and unfenced pool, and is injured. The child sues the association. One month after the personal judgment against unit 4 is perfected, the child secures a judgment against the association for $100,000 more than the association's insurance. Under state law, the tort judgment, when perfected, constitutes a lien only from the date judgment is entered, and does not enjoy a higher priority. In these circumstances, the interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming First Mortgage)	600	-0-	-0-	-0-	-0-
Due First Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming First Mortgage)	600	-0-	-0-	-0-	-0-
Due XYZ	20,000	20,000	20,000	20,000	20,000
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
Tort Lien	8,800	20,000	20,000	10,000	20,000
Due Owners	-0-	-0-	15,000	-0-	40,000

Note that the child's lien realizes only $78,800; the estate is not entitled to participate in the proceeds available to units 3 and 5 to satisfy the unmet claims against units 1 and 4,

because those units are liable only for their pro rata share of the claim, which is the same amount any of those units would have had to pay prior to termination in order to secure a partial release. Thus, if unit 5, prior to termination, had secured a partial release for $20,000 from the estate, the result would be the same.

Note also that the value of the common elements is not segregated from the values of the units, since the sales' values of the units reflect all of the value of the real estate. Similarly, note that, after termination, the tort claimant is not entitled to reach or segregate the personal property of the corporation, valued before termination at $20,000, even though he could have reached the bank account or other assets prior to termination. Any other rule would create enormous complexity, would impose arbitrary losses on creditors out of priority, and would tend to shift economic losses to unit owners who had paid their share of claims.

EXAMPLE 1G:

The facts stated in Example 1F remain true. After the unit 4 personal lien is perfected, but, one week before the tort judgment against the association is perfected, P paving company begins repaving the private road. Work is completed one week after the tort judgment is perfected. The association fails to pay P $50,000 upon completion as agreed, and P immediately records its mechanics' lien. Under state law, a mechanics' lien, if recorded within 60 days of the time work is completed, holds priority as of the day work began. State law does not, however, grant the mechanics' lien priority over any liens perfected before work began. P paving sues on its lien, and secures a judgment. In these circumstances, the interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming First Mortgage)	600	-0-	-0-	-0-	-0-
Due First Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming First Mortgage)	600	-0-	-0-	-0-	-0-
XYZ Pool Lien	20,000	20,000	20,000	20,000	20,000
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	8,800	10,000	10,000	10,000	10,000
Tort Lien	-0-	10,000	20,000	-0-	20,000

Due Owners	-0-	-0-	5,000	-0-	30,000

Note that, just as in the case of the tort lien, when unit 1 could not contribute its share of the mechanics' lien, the remaining units were not liable for the balance.

In the example, the common expense lien arises before the P paving lien had arisen. If the common expense lien arose after the P paving lien, we would be faced with circular liens, where: (a) the P paving lien would prime the common expense lien; (b) six months of the common expense lien would prime the mortgage; and (c) the mortgage would prime the P paving lien. Such circular lien problems, however, are not unique in the law.

EXAMPLE 1H:

The facts stated in Example 1G remain true. Assume unit 5, before termination, paid its pro rata share of both the P paving lien and the tort lien. This reduces the P paving lien to $40,000, and the tort lien to $80,000. Under § 3-117 [47-7C-17 NMSA 1978], this entitles unit 5 to a partial release of both claims, and neither P paving nor the child has a further claim against unit 5. The interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Common Expense Lien	600	-0-	-0-	-0-	-0-
First Mortgage Liens	50,000	40,000	25,000	-0-	-0-
Common Expense Lien	600	-0-	-0-	-0-	-0-
XYZ Pool Lien	20,000	20,000	20,000	20,000	-0-
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	8,800	10,000	10,000	10,000	-0-
Tort Lien	-0-	10,000	20,000	-0-	-0-
Due Owners	-0-	-0-	5,000	-0-	80,000

EXAMPLE 2:

The facts stated in Example 1G remain true. Assume, however, that, at the outset, unit 5 was twice as large as the others, sold for $100,000, or twice as much as the others, and twice the common expense liability was allocated to it. At termination, it remains twice as valuable. In those circumstances, the results on sale are as follows:

UNIT #	1	2	3	4	5
Sale Proceeds	66,666	66,666	66,666	66,666	133,332
Common Expense Lien	600	-0-	-0-	-0-	-0-
First Mortgage Lien	50,000	40,000	25,000	-0-	-0-
Common Expense Lien	600	-0-	-0-	-0-	-0-
XYZ Pool Lien	15,466	16,666	16,666	16,666	33,333
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	-0-	10,000	13,333	-0-	26,666
Tort Lien	-0-	1,667	16,666	-0-	33,333
Due Owners	-0-	-0-	-0-	-0-	50,000

Note that all the liens are allocated in accordance with each unit's common expense liability, since no special provision was made for allocating the costs of the pool, the paving or the tort claim. Unit 5 probably did not contemplate the size of its exposure: nevertheless, fewer dollars were available to creditors upon termination than in Example 1G.

EXAMPLE 3:

The facts stated in Example 1G remain true, including the fact that unit 5 was originally sold at the same price ($50,000) as the remaining units. Upon appraisal, however, assume that, because of improvements, unit 5 is now worth $75,000. Three other units have remained at $50,000, while unit 1 was neglected, and is now worth only $40,000. Common expense liabilities never changed. In this example, the total value of the units is now $265,000. Since sales proceeds are distributed in accordance with fair market values, the following distribution of proceeds would apply:

Unit 1:	(15.09433%)	$ 60,377
Unit 2:	(18.86793%)	$ 75,472
Unit 3:	(18.86793%)	$ 75,472
Unit 4:	(18.86793%)	$ 75,472
Unit 5:	(28.30188%)	$113,207
	100.00000%	$400,000

UNIT #	1	2	3	4	5
Sales Proceeds	60,377	75,472	75,472	75,472	113,207
Common					

Expense Lien	600	-0-	-0-	-0-	-0-
First Mortgage Lien	50,000	40,000	25,000	-0-	-0-
Common Expense Lien	600	-0-	-0-	-0-	-0-
XYZ Pool Lien	9,177	20,000	20,000	20,000	20,000
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	-0-	10,000	10,000	5,472	10,000
Tort Lien	-0-	5,472	20,000	-0-	20,000
Due Owners	-0-	-0-	472	-0-	63,207

In this example, the equal distribution of common expense liability coupled with the "fair value" distribution of sales proceeds create the greatest losses for the creditors of the association.

9. Subsection (h) [Subsection H] departs significantly from the usual result under most condominium acts. Under those acts the proceeds of the sale of the entire project are distributed upon termination to each unit owner in accordance with the common element interest which was allocated at the outset of the project. Of course, in an older development, those original allocations will bear little resemblance to the actual value of the units. For that reason, the act adopts an appraisal procedure for distribution of the sales proceeds. As suggested in the examples on the distribution of proceeds, this appraisal may dramatically affect the amount of dollars actually received by unit owners. Accordingly, it is likely the appraisal will be required to be distributed prior to the time the termination agreement is approved, so that unit owners may understand the likely financial consequences of the termination.

10. Subsection (h)(2) [Subsection H(2)] is an exception to the "fair market value" rule. It provides that, if appraisal of any unit cannot be made, either through pictures or comparison with other units, so that any unit's appropriate share in the overall proceeds cannot be calculated, then the distribution will fall back on the only objective, albeit artificial, standard available, which is the common element interest allocated to each unit.

11. Foreclosure of a mortgage or other lien or encumbrance does not automatically terminate the condominium, but, if a mortgagee or other lienholder (or any other party) acquires units with a sufficient number of votes, that party can cause the condominium to be terminated pursuant to subsection (a) [Subsection A] of this section.

12. A mortgage or deed of trust on a condominium unit may provide for the lien to shift, upon termination, to become a lien on what will then be the borrower's undivided interest in the whole property. However, such a shift would be deemed to occur even in

the absence of express language, pursuant to the first sentence of subsection (d) [(f)] [Subsection F].

13. With respect to the association's role as trustee under subsection (c) [(e)] [Subsection E], see § 3-117 [§ 3-119] [47-7C-19 NMSA 1978].

14. If an initial appraisal made pursuant to subsection (f) [(h)] [Subsection H] were rejected by vote of the unit owners, the association would be obligated to secure a new appraisal.

15. "Foreclosure" in subsection (i) [Subsection I] includes deeds in lieu of foreclosure, and "liens" includes tax and other liens on real estate which may be converted or withdrawn from the project.

16. The termination agreement should adopt or contain any restrictions, covenants and other provisions for the governance and operation of the property formerly constituting the condominium which the owners deem appropriate. These might closely parallel the provisions of the declaration and bylaws. This is particularly important in the case of a condominium which is not to be sold pursuant to the terms of the termination agreement. In the absence of such provisions, the general law of the state governing tenancies in common would apply.

17. Subsection (j) [Subsection J] recognizes the possibility that a pre-existing lien might not have been released prior to the time the condominium declaration was recorded. In the absence of a provision such as subsection (j) [Subsection J], recordation of the declaration would constitute a changing of the priority of those liens; and it is contrary to all expectations that a prior lienholder may be involuntarily subjected to the condominium documents. For that reason, this section permits the nonconsenting prior lienholder upon foreclosure to exclude the real estate subject to his lien from the condominium.

Compiler's notes. — Throughout the comment, there are a number of seemingly incorrect references to various subsections of § 2-118 of the uniform act. References to the apparently correct subsections have been inserted in brackets.

The reference to § 3-117 of the uniform act in Comment 13 seems incorrect, as that section deals with other liens. Section 3-119 of the uniform act deals with the association as a trustee.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 14, 51 to 56.

31 C.J.S. Estates § 153 et seq.

47-7B-19. Rights of secured lenders.

The declaration may require that all or a specified number or percentage of the mortgagees or beneficiaries of deeds of trust encumbering the units or vendors of units under installment sales contracts approve specified actions of the unit owners or the association as a condition to the effectiveness of those actions, but no requirement for approval may operate to deny or delegate control over the general administrative affairs of the association by the unit owners or the executive board or prevent the association or the executive board from commencing, intervening in or settling any litigation or proceeding or receiving and distributing any insurance proceeds except pursuant to Section 46 [47-7C-13 NMSA 1978] of the Condominium Act.

History: Laws 1982, ch. 27, § 31.

ANNOTATIONS

Compiler's notes. — This section is similar to § 2-119 of the Uniform Condominium Act, with the following main exception: the language, "or vendors of units under installment sales contracts," does not appear in § 2-119 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

1. In a number of instances, particularly sale or encumbrance of common elements, or termination of a condominium, a lender's security may be dramatically affected by acts of the association. For that reason, this section permits ratification of those acts of the association which are specified in that declaration as a condition of their effectiveness.

2. There are three important limitations on the rights of lender consent. They are: (1) a prohibition on control over the general administrative affairs of the association; (2) restrictions on control over the association's powers during litigation or other proceedings; and (3) prohibition of receipt or distribution of insurance proceeds prior to application of those proceeds for rebuilding.

3. It is important that lenders not be able to step in and unilaterally act as receiver or trustee of the association. There may, of course, be occasions when a court of competent jurisdiction would order appointment of a receiver for an association. While this would be possible in a court proceeding, the act prohibits private contractual granting of such a power.

4. Since it may well be that the association might find itself involved in litigation which would be adverse to the interests of the lender or the declarant, it is inappropriate for a secured party to be able to control the course of litigation in the absence of the consent of the other parties. In an appropriate case, of course, where the lenders' interests are affected, a lender might seek to intervene as a party in that proceeding.

5. Section 3-113 [47-7C-13 NMSA 1978] provides for the distribution of insurance proceeds in a particular manner. In particular, it prevents distribution of those proceeds

to lenders until the intended purpose of the insurance has been met. For that reason, under this section the declaration may not provide the lender a right to receive insurance proceeds in any manner except the manner provided in 3-113 [47-7C-13 NMSA 1978].

6. In addition to the provision of the declaration, the provisions of individual deeds to units may require that unit owner to secure his lender's consent before taking particular actions.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 9, 28, 30, 45 to 47, 52, 54.

31 C.J.S. Estates § 153 et seq.

47-7B-20. Master associations.

A. If the declaration for a condominium provides that any of the powers described in Section 35 [47-7C-2 NMSA 1978] of the Condominium Act are to be exercised by or may be delegated to a profit or nonprofit corporation or unincorporated association which exercises those or other powers on behalf of one or more condominiums or for the benefit of the unit owners of one or more condominiums, all provisions of that act [47-7A-1 to 47-7D-20 NMSA 1978] applicable to unit owners' associations apply to any such corporation or unincorporated association, except as modified by this section.

B. Unless a master association is acting in the capacity of an association described in Section 34 [47-7C-1 NMSA 1978] of the Condominium Act, it may exercise the powers set forth in Section 35 [47-7C-2 NMSA 1978] of that act only to the extent expressly permitted in the declarations of condominiums which are part of the master association or expressly described in the delegations of power from those condominiums to the master association.

C. If the declaration of any condominium provides that the executive board may delegate certain powers to a master association, the members of the executive board have no liability for the acts or omissions of the master association with respect to those powers following delegation.

D. The rights and responsibilities of unit owners with respect to the unit owners' association set forth in Sections 36, 41, 42, 43 and 45 [47-7C-3, 47-7C-8 to 47-7C-10, 47-7C-12 NMSA 1978] of the Condominium Act apply in the conduct of the affairs of a master association only to those persons who elect the board of a master association, whether or not those persons are otherwise unit owners within the meaning of that act.

E. Notwithstanding the provisions of Section 36 [47-7C-3 NMSA 1978] of the Condominium Act with respect to the election of the executive board of an association by all unit owners after the period of declarant control ends and even if a master association is also an association described in Section 34 [47-7C-1 NMSA 1978] of that

act, the certificate of incorporation or other instrument creating the master association and the declaration of each condominium the powers of which are assigned by the declaration or delegated to the master association may provide that the executive board of the master association shall be elected after the period of declarant control in any of the following ways:

(1) all unit owners of all condominiums subject to the master association shall elect all members of that executive board;

(2) all members of the executive boards of all condominiums subject to the master association shall elect all members of that executive board;

(3) all unit owners of each condominium subject to the master association shall elect specified members of that executive board; and

(4) all members of the executive board of each condominium subject to the master association shall elect specified members of that executive board.

History: Laws 1982, ch. 27, § 32.

ANNOTATIONS

Compiler's notes. — This section is similar to § 2-120 of the Uniform Condominium Act, with the following main exception: the state Condominium Act substitutes "shall" for "may" in Paragraphs (1) to (4) of Subsection E.

COMMISSIONERS' COMMENT

1. It is very common in large or multi-phased condominiums, particularly those developed under existing laws, for the declarant to create a master or umbrella association which provides management services or decision-making function for a series of smaller condominiums. While it is expected that this phenomenon will be less necessary under this act because of the permissible period of time for declarant control over the project, it is nonetheless possible in larger developments that this form of management will continue. Moreover, this section should be of significant benefit to the large number of condominiums created under prior law which have need for the benefits of a provision on master associations.

2. Subsection (a) [Subsection A] states the general rule that the powers of a unit owners' association may only be exercised by, or delegated to, a master association if the declaration for the condominium permits that result. The declaration may have originally provided for a master association; alternatively, the unit owners of several condominiums may amend their declarations in similar fashion to provide for this power. Subsection (a) [Subsection A] makes it clear that, if any of the powers of the unit owners' association may be exercised by, or delegated to, a master association, all other provisions of this act which apply to a unit owners' association apply to that master

association except as modified by this section. Accordingly, such provisions on notice, voting, quorums, records, meetings and other matters which apply to the unit owners' association would apply with equal validity to such a master association.

3. Subsection (b) [Subsection B] changes the usual presumption with respect to the powers of the unit owners' association, except in those cases where the master association is actually acting as the only association for one or more condominiums. In those cases where it is not so acting. [,] However, the only powers of the unit owners' association which the master association may exercise are the ones expressly permitted in the declaration or in the delegation of power. This is in significant contrast with the rule of § 3-102 [47-7C-2 NMSA 1978] that all of the powers described in that section may be exercised unless limited by the declaration.

4. Subsection (c) [Subsection C] clarifies the liability of the members of the executive board of a unit owners' association when the condominium for which the unit owners' association acts has delegated some of its powers to a master association. In that instance, subsection (c) [Subsection C] makes it clear that the members of the executive board of the unit owners' association have no liability for acts and omissions of the master association board; under subsection (a) [Subsection A], that liability lies with the members of the master association.

5. Subsection (d) [Subsection D] addresses the question of the rights and responsibilities of the unit owners in their dealings with the master board. A variety of sections enumerated in subsection (d) [Subsection D] provide certain rights and powers to unit owners in their dealings with their association. In the affairs of the master association, however, it would be incongruous for the unit owners to maintain those same rights if those unit owners were not in fact electing the master board. Thus, for example, the question of election of directors, meetings, notice of meetings, quorums and other matters enumerated in those sections would have little meaning if those sections were read literally when applied to a master board which was not elected by all members of the condominiums subject to the master board. For that reason, the rights of notice, voting and other rights enumerated in the act are available only to the persons who actually elect the board.

6. Subsection (e) [Subsection E] recognizes that there may be reasons for a representative form of election of directors of the master association. Alternatively, there may be cases where at-large election is reasonable. For that reason, subsection (e) [Subsection E] provides that, after the period of declarant control has terminated, there may be four ways of electing the master association board. Those four ways are: (1) at-large election of the master board among all the condominiums subject to the master association; (2) at-large election of the master board only among the members of the executive boards of all condominiums subject to the master association; (3) each condominium might have designated positions on the master board, and those spaces could be filled by an at-large election among all the members of each condominium; or (4) the designated positions could be filled by an election only among the members of the executive board of the unit owners' association for each condominium. It would only

be in the case of an at-large election of the master board among all condominiums that subsection (d) [Subsection D] would have no relevance.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 13, 14, 16, 17, 28, 29.

Standing to bring action relating to real property of condominium, 74 A.L.R.4th 165.

31 C.J.S. Estates § 153 et seq.

47-7B-21. Merger or consolidation of condominiums.

A. Any two or more condominiums, by agreement of the unit owners as provided in Subsection B of this section, may be merged or consolidated into a single condominium. In the event of a merger or consolidation, unless the agreement otherwise provides, the resultant condominium is, for all purposes, the legal successor of all of the preexisting condominiums, and the operations and activities of all associations of the preexisting condominiums shall be merged or consolidated into a single association which shall hold all powers, rights, obligations, assets and liabilities of all preexisting associations.

B. An agreement of two or more condominiums to merge or consolidate pursuant to Subsection A of this section shall be evidenced by an agreement prepared, executed, recorded and certified by the president of the association of each of the preexisting condominiums following approval by owners of units to which are allocated the percentage of votes in each condominium required to terminate that condominium. Any such agreement shall be recorded in each county in which a portion of the condominium is located and is not effective until recorded.

C. Every merger or consolidation agreement shall provide for the reallocation of the allocated interests in the new association among the units of the resultant condominium either by stating the reallocations or the formulas upon which they are based or by stating the percentage of overall allocated interests of the new condominium which is allocated to all of the units comprising each of the preexisting condominiums, and providing that the portion of the percentages allocated to each unit formerly comprising a part of the preexisting condominium shall be equal to the percentages of allocated interests allocated to that unit by the declaration of the preexisting condominium.

History: Laws 1982, ch. 27, § 33.

ANNOTATIONS

Compiler's notes. — This section is similar to § 2-121 of the Uniform Condominium Act, with the following main exception: the alternatives listed in Subsection C of the state Condominium Act are designated paragraphs (i) and (ii), respectively, in subsection (c) of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

1. There may be circumstances where condominiums may wish to merge or consolidate their activities by the creation of a single condominium; this section provides for that possibility.

Subsection (a) [Subsection A] makes it clear that a merger or consolidation may occur by the same vote of the unit owners necessary to terminate the condominium. If two or more condominiums are merged or consolidated, the resulting condominium is for all purposes the legal successor of the pre-existing condominiums, with a single association for all purposes. In the event condominiums did not wish to completely merge or consolidate their affairs, it would also be possible for them to create a master association pursuant to § 2-120 [47-7B-20 NMSA 1978].

2. Under subsection (b) [Subsection B], the merger or consolidation agreement is treated for recording purposes as an amendment to the declaration, and the same requirements for approval are mandated as for termination.

3. Subsection (c) [Subsection C] does not state a minimum requirement for the contents of a merger or consolidation agreement, and any additional clauses not inconsistent with subsection (c) [Subsection C] may be included. The important point that subsection (c) [Subsection C] makes is that the reallocation of the common element interests common expense liabilities and votes in the new association must be carefully stated.

Subsection (c) [Subsection C] states two alternative rules in this respect. First, the reallocations may be accomplished by stating specifically the allocation of common element interests, common expense liability and votes in the association to each unit, or by stating the formulas by which those interests may be allocated to each unit in all of the pre-existing condominiums.

Alternatively, the merger or consolidation agreement may state the percentage of overall common element interests, common expense liabilities and votes in the association allocated to "all of the units comprising each of the pre-existing condominiums." The agreement might then also provide that the portion of the percentage allocated to each condominium will be equal to the percentage of common expense liability and votes in the association allocated to that unit by the declaration of the pre-existing condominium. An example of how this alternative formulation would operate may be useful.

EXAMPLE:

Assume that two adjoining condominiums wish to merge their activities into one condominium. Assume that the first condominium consists of 10 one-bedroom units, with an annual budget of $10,000. Assume further that each of the units, being identical, has a common element interest of 10%, equal common expense liability of 10% and one vote per unit.

The second condominium consists of 40 units, with 20 two-bedroom units and 20 three-bedroom units. The budget of the second condominium consists of $70,000 per year. Each of the two-bedroom units has been allocated a 2% interest in the common elements and a 2% common expense liability, while each of the three-bedroom units has been allocated a 3% interest in the common elements, and a 3% common expense liability. Finally, each of the units in the second condominium also has an equal vote.

There is no provision in the act which mandates a particular allocation among condominiums 1 and 2 as to either common element interest, common expense liabilities or votes. Should the unit owners wish to retain as much similarity to their previous common element interests and common expense liabilities, however, and should they wish to retain equal voting in a merged project, it would be possible for them, pursuant to subsection (c)(ii) [Subsection C], to state "the percentage of overall allocated interests of the new condominium" as follows: as to common element interests and common expense liabilities, they might allocate 12.5% of those interests in the merged project to condominium 1, and 87.5% thereof to condominium 2. If the agreement further provided that "the portion of the percentages allocated to each unit formerly comprising a part of the pre-existing condominium must be equal to the percentages of allocated interests allocated to that unit by the declaration of the pre-existing condominium" as required by subsection (c) [Subsection C], each unit in condominium 1 would then have allocated to it 1.25% of both the common element interests and common expense liabilities in the new condominium. It happens that 1.25% of the common expenses of a merged condominium which has a budget of $80,000 equals $1,000.

Under the same rationale, if each of the two-bedroom units in the second condominium, to which were formerly allocated 2% of the common element interests and common expense liabilities, now has allocated 2% of the 87.5% allocated to the second condominium, each of those units would then have allocated to it 1.75% of the common element interest and common expense liabilities of the new condominium. 1.75% of $80,000 is $1,400. Similarly, each of the three-bedroom units would then have allocated to it 2.625% of the common element interest and common expense liabilities in the merged condominium. That percentage of the common expense liabilities of $80,000 would yield an annual cost of $2,100, the same cost as previously obtained in this condominium.

Further, the unit owners are free to allocate votes among the units in any way which they see fit. Of course, if they choose to allocate equal votes to all the units, which was the method previously used in both condominiums, this would have the effect of giving 20% of the votes to condominium 1, even though condominium 1 had only 12.5% of the common expense liabilities. It may be, however, that this tracks with the expectations of the unit owners in both condominiums. Alternatively, condominium 1 might be allocated 12.5% of the votes, which, when divided up among the 10 units, would give each one-bedroom unit a .125 vote. If 87.5% of the votes were allocated equally among the unit owners in the second condominium, then each of the unit owners in condominium 2 would have .21875 votes.

If some other configuration was to be desired, then the allocations would of necessity be made pursuant to paragraphs [paragraph] (c)(i) rather than (c)(ii) [Subsection C].

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 16, 17, 28, 29, 52.

31 C.J.S. Estates § 153 et seq.

ARTICLE 7C
Condominium Act - Management of Condominium

47-7C-1. Organization of unit owners' association.

A unit owners' association shall be organized no later than the date the first unit in the condominium is conveyed. The membership of the association at all times shall consist exclusively of all the unit owners or, following termination of the condominium, of all former unit owners entitled to distributions of proceeds under Section 30 [47-7B-18 NMSA 1978] of the Condominium Act or their heirs, successors or assigns. The association shall be organized as a profit or nonprofit corporation or as an unincorporated association.

History: Laws 1982, ch. 27, § 34.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 3-101 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

1. The first purchaser of a unit is entitled to have in place the legal structure of the unit owners' association. The existence of the structure clarifies the relationship between the developer and other unit owners and makes it easy for the developer to involve unit owners in the governance of the condominium even during a period of declarant control reserved pursuant to § 3103(d) [47-7C-3D NMSA 1978].

2. The bracketed language preserves the flexibility existing under the vast majority of present condominium statutes to organize the association as a profit or non-profit corporation or as an unincorporated association. Although at least one state (Georgia) requires the organization of the association in corporate form, it is not desirable to mandate this result in a uniform act. If a state wishes to mandate incorporation, it should delete the bracketed language.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 13 to 16, 28.

Construction of contractual or state regulatory provisions respecting formation, composition and powers of governing body of condominium association, 13 A.L.R.4th 598.

31 C.J.S. Estates § 153 et seq.

47-7C-2. Powers of unit owners' association.

A. Except as provided in Subsection B of this section, and subject to the provisions of the declaration, the association may:

(1) adopt and amend bylaws and rules and regulations;

(2) adopt and amend budgets for revenues, expenditures and reserves and collect assessments for common expenses from unit owners;

(3) hire and discharge managing agents and other employees, agents and independent contractors;

(4) institute, defend or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium;

(5) make contracts and incur liabilities;

(6) regulate the use, maintenance, repair, replacement and modification of common elements;

(7) cause additional improvements to be made as a part of the common elements;

(8) acquire, hold, encumber and convey in its own name any right, title or interest to real or personal property, but common elements shall be conveyed or subjected to a security interest only pursuant to Section 45 [47-7C-12 NMSA 1978] of the Condominium Act;

(9) grant easements, leases, licenses and concessions through or over the common elements;

(10) impose and receive any payments, fees or charges for the use, rental or operation of the common elements, other than limited common elements described in Subsections B and D of Section 14 [47-7B-2 NMSA 1978] of the Condominium Act, and for services provided to the unit owners;

(11) impose charges for late payment of assessments and, after notice and an opportunity to be heard, levy reasonable fines for violations of the declaration, bylaws and rules and regulations of the association;

(12) impose reasonable charges for the preparation and recordation of amendments to the declaration, resale certificates required by Section 61 [47-7D-9 NMSA 1978] of the Condominium Act or statements of unpaid assessments;

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

(14) assign its right to future income, including the right to receive common expense assessments, but only to the extent the declaration expressly so provides;

(15) exercise any other powers conferred by the declaration or bylaws;

(16) exercise all other powers that may be exercised in this state by legal entities of the same type as the association; and

(17) exercise any other powers necessary and proper for the governance and operation of the association.

B. The declaration shall not impose limitations on the power of the association to deal with the declarant which are more restrictive than the limitations imposed on the power of the association to deal with other persons.

History: Laws 1982, ch. 27, § 35.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 3-102 of the Uniform Condominium Act, with the following main exception: the introductory paragraph of subsection (a) of § 3-102 of the Uniform Condominium Act includes the bracketed language "even if unincorporated" following "the association."

COMMISSIONERS' COMMENT

1. This section permits the declaration, subject to the limitations of subsection (b) [Subsection B], to include limitations on the exercise of any of the enumerated powers. The bracketed language making a specific reference to unincorporated associations is not intended to exclude other forms of association; the unincorporated association would have such powers, subject to the declaration, regardless of the legal status of an unincorporated association in the state. If a state wishes to permit the association to be unincorporated and the law of the state is unclear whether an unincorporated association would have such powers in the absence of the language, the bracketed language should be retained and the brackets removed.

2. Required provisions of the bylaws of the association, referenced in paragraph [(a)] (1) [Subsection A(1)], are set forth in § 3-106 [47-7C-6 NMSA 1978].

3. Many state condominium statutes give the association the power to sue and be sued in its own name. In the absence of a statutory grant of standing such as that set forth in paragraph [(a)] (4) [Subsection A(4)], some courts have held that the association, because it has no ownership interest in the condominium, has no standing to bring, defend or to intervene in litigation or administrative proceedings in its own name.

4. Paragraph [(a)] (8) [Subsection A(8)] refers to the power granted by § 3-112 [47-7C-12 NMSA 1978] to sell or encumber common elements without a termination of the condominium upon a vote of the requisite number of unit owners. Paragraph [(a)] (9) [Subsection A(9)] permits the association to grant easements, leases, licenses and concessions with respect to the common elements without a vote of the unit owners.

5. The powers granted the association in paragraph [(a)] (11) [Subsection A(11)] to impose charges for late payment of assessments and to levy reasonable fines for violations of the association's rules reflect the need to provide the association with sufficient powers to exercise its "governmental" functions as the ruling body of the condominium community. These powers are intended to be in addition to any rights which the association may have under other law.

6. Under paragraph [(a)] (14) [Subsection A(14)], the declaration may provide for the assignment of income of the association, including common expense assessment income, as security for, or payment of, debts of the association. The power may be limited in any manner specified in the declaration - for example, the power might be limited to specified purposes such as repair of existing structures, or to income from particular sources such as income from tenants, or to a specified percentage of common expense assessments. The power, in many instances, should help materially in securing credit for the association at favorable interest rates. The inability of associations to borrow because of a lack of assets, in spite of its income stream, has been a significant problem.

7. If the association is incorporated, it may, pursuant to paragraph [(a)] (16) [Subsection A(16)], exercise all other powers of a corporation. Similarly, if the association is unincorporated, the association may, by virtue of paragraph [(a)] (16) [Subsection A(16)], exercise all other powers of an unincorporated association. Inconsistent provisions of state corporation or unincorporated association law are subject to the provisions of this act, as provided in § 1-108 [47-7A-8 NMSA 1978].

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 28, 29, 37.

Liability of condominium association or corporation for injury allegedly caused by condition of premises, 45 A.L.R.3d 1171.

Proper party plaintiff in action for injury to common areas of condominium development, 69 A.L.R.3d 1148.

Construction of contractual or state regulatory provisions respecting formation, composition and powers of governing body of condominium association, 13 A.L.R.4th 598.

Adequacy and application of guidelines relating to condominium association's requisite approval of individual unit owner's improvements or decoration, 25 A.L.R.4th 1059.

Right of condominium association's management or governing body to inspect individual units, 41 A.L.R.4th 730.

Standing to bring action relating to real property of condominium, 74 A.L.R.4th 165.

31 C.J.S. Estates § 153 et seq.

47-7C-3. Executive board members and officers.

A. Except as provided in the declaration, the bylaws or other provisions of the Condominium Act, the executive board may act in all instances on behalf of the association. In the performance of their duties, the officers and members of the executive board are required to exercise, if appointed by the declarant, the care required of fiduciaries of the unit owners and, if elected by the unit owners, ordinary and reasonable care.

B. The executive board shall not act on behalf of the association to amend the declaration, to terminate the condominium or to elect members of the executive board or determine the qualifications, powers and duties or terms of office of executive board members, but the executive board shall fill vacancies in its membership for the unexpired portion of any term.

C. Within thirty days after adoption of any proposed budget for the condominium, the executive board shall provide a summary of the budget to all the unit owners, and shall set a date for a meeting of the unit owners to consider ratification of the budget not less than fourteen nor more than thirty days after mailing of the summary. Unless at that meeting a majority of all the unit owners or any larger vote specified in the declaration reject the budget, the budget is ratified, whether or not a quorum is present. In the event the proposed budget is rejected, the periodic budget last ratified by the unit owners shall be continued until such time as the unit owners ratify a subsequent budget proposed by the executive board.

D. Subject to Subsection E of this section, the declaration may provide for a period of declarant control of the association, during which period a declarant, or persons designated by him, may appoint and remove the officers and members of the executive

board. Regardless of the period provided in the declaration, a period of declarant control terminates no later than the earlier of:

(1) one hundred eighty days after conveyance of ninety percent of the units which may be created to unit owners other than a declarant;

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

(3) five years after any development right to add new units was last exercised.

A declarant may voluntarily surrender the right to appoint and remove officers and members of the executive board before termination of that period, but in that event he may require, for the duration of the period of declarant control, that specified actions of the association or executive board, as described in a recorded instrument executed by the declarant, be approved by the declarant before they become effective.

E. Not later than sixty days after conveyance of fifty percent of the units which may be created to unit owners other than a declarant, at least one member and not less than twenty-five percent of the members of the executive board shall be appointed by the declarant from among the unit owners. No member so appointed shall be an affiliate of the declarant if such persons are available.

F. Not later than the termination of any period of declarant control, the unit owners shall elect an executive board of at least three members, at least a majority of whom shall be unit owners. The executive board shall elect the officers. The executive board members and officers shall take office upon election.

G. Notwithstanding any provision of the declaration or bylaws to the contrary, the unit owners, by a two-thirds' vote of all persons present and entitled to vote at any meeting of the unit owners at which a quorum is present, may remove any member of the executive board with or without cause, other than a member appointed by the declarant.

History: Laws 1982, ch. 27, § 36.

ANNOTATIONS

Compiler's notes. — This section is similar to § 3-103 of the Uniform Condominium Act, with the following main exceptions: Subsection D(1) of this section of the state Condominium Act substitutes "one hundred eighty days after conveyance of ninety percent" for "[60] days after conveyance of [75] percent," as it appears in subsection (d)(i) of § 3-103 of the Uniform Condominium Act; Subsection E of this section of the state Condominium Act, designed to act in conjunction with Subsection D to provide for the gradual transfer of control from the declarant to the unit owners, is comparable to

subsection (e) of § 3-103 of the Uniform Condominium Act, but changes have been made as to the timing and extent of the transition from declarant to unit owner control.

COMMISSIONERS' COMMENT

1. Subsection (a) [Subsection A] makes members of the executive board appointed by the declarant liable as fiduciaries of the unit owners with respect to their actions or omissions as members of the board. This provision imposes a very high standard of duty because the board is vested with great power over the property interests of unit owners, and because there is a great potential for conflicts of interest between the unit owners and the declarant.

Officers and board members elected by the unit owners are required only to exercise ordinary and reasonable care. This lower standard of care should increase the willingness of unit owners to serve as officers and members of the board.

2. The provisions of paragraph (c) [Subsection C] permit the unit owners to disapprove any proposed budget, but a rejection of the budget does not result in cessation of assessments until a budget is approved. Rather, assessments continue on the basis of the last approved periodic budget until the new budget is in effect.

3. Subsections (d) and (e) [Subsections D and E] recognize the practical necessity for the declarant to control the association during the developmental phases of a condominium project. However, any executive board member appointed by the declarant pursuant to subsection (d) [Subsection D] is liable as a fiduciary to any unit owner for his acts or omissions in such capacity.

4. Subsection (d) [Subsection D] permits a declarant to surrender his right to appoint and remove officers and executive board members prior to the termination of the period of declarant control in exchange for a veto right over certain actions of the association or its executive board. This provision is designed to encourage transfer of control by declarants to unit owners as early as possible, without impinging upon the declarant's rights (for the duration of the period of declarant control) to maintain ultimate control of those matters which he may deem particularly important to him. It might be noted that the declarant at all times (even after the expiration of the period of declarant control) is entitled to cast the votes allocated to his units in the same manner as any other unit owner.

5. Subsection (e) [Subsection E], in combination with subsection (d) [Subsection D], provides for a gradual transfer of control of the association to the unit owners from the declarant. Such a gradual transfer is preferable to a one-time turnover of control since it assures that the unit owners will be involved, to some extent, in the affairs of the association from a relatively early date and that some unit owners will acquire experience in dealing with association matters.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 14, 16, 28, 29.

31 C.J.S. Estates § 153 et seq.

47-7C-4. Transfer of special declarant rights.

A. No special declarant right created or reserved under the Condominium Act shall be transferred except by an instrument evidencing the transfer recorded in each county in which any portion of the condominium is located. The instrument is not effective unless executed by the transferee.

B. Upon tranfer [transfer] of any special declarant right, the liability of a transferor declarant is as follows:

(1) a transferor is not relieved of any obligation or liability arising before the transfer. Lack of privity does not deprive any unit owner of standing to maintain an action to enforce any obligation of the transferor;

(2) if a successor to any special declarant right is an affiliate of a declarant, the transferor is jointly and severally liable with the successor for any obligations or liabilities of the successor relating to the condominium;

(3) if a transferor retains any special declarant right but transfers other special declarant rights to a successor who is not an affiliate of the declarant, the transferor is liable for any obligations or liabilities imposed on a declarant by the Condominium Act or by the declaration relating to the retained special declarant rights and arising after the transfer; and

(4) a transferor has no liability for any act or omission or any breach of a contractual or warranty obligation arising from the exercise of a special declarant right by a successor declarant who is not an affiliate of the transferor.

C. Unless otherwise provided in a mortgage instrument or deed of trust, in case of foreclosure of a mortgage, tax sale, judicial sale or sale under bankruptcy laws or receivership proceedings, of any units owned by a declarant or real estate in a condominium subject to development rights, a person acquiring title to all the real estate being foreclosed or sold, but only upon his request, succeeds to all special declarant rights related to that real estate held by that declarant, or only to any rights reserved in the declaration pursuant to Section 27 [47-7B-15 NMSA 1978] of the Condominium Act and held by that declarant to maintain models, sales offices and signs. The judgment or instrument conveying title shall provide for transfer of only the special declarant rights requested.

D. Upon foreclosure, tax sale, judicial sale, sale by a trustee under a deed of trust or sale under bankruptcy laws or receivership proceedings, of all units and other real estate in a condominium owned by a declarant:

(1) the declarant ceases to have any special declarant rights; and

(2) the period of declarant control terminates unless the judgment of instrument conveying title provides for transfer of all special declarant rights held by that declarant to a successor declarant.

E. The obligations and liabilities of a person who succeeds to special declarant rights are as follows:

(1) a successor to any special declarant right who is an affiliate of a declarant is subject to all obligations and liabilities imposed on the transferor by the Condominium Act or by the declaration;

(2) a successor to any special declarant right, other than a successor described in Paragraph (3) or (4) of this subsection, who is not an affiliate of a declarant, is subject to all obligations and liabilities imposed by the Condominium Act or the declaration:

(a) on a declarant which relate to his exercise or nonexercise of special declarant rights; or

(b) on his transferor, other than:

1) misrepresentations by any previous declarant;

2) warranty obligations on improvements made by any previous declarant, or made before the condominium was created;

3) breach of any fiduciary obligation by any previous declarant or his appointees to the executive board; or

4) any liability or obligation imposed on the transferor as a result of the transferor's acts or omissions after the transfer;

(3) a successor to only a right reserved in the declaration to maintain models, sales offices and signs, if he is not an affiliate of a declarant, may not exercise any other special declarant right and is not subject to any liability or obligation as a declarant, except the obligations to provide a disclosure statement; and

(4) a successor to all special declarant rights held by his transferor who is not an affiliate of that declarant and who succeeded to those rights pursuant to a deed in lieu of foreclosure or a judgment or instrument conveying title to units under Subsection

C of this section may declare his intention in a recorded instrument to hold those rights solely for transfer to another person. Thereafter, until transferring all special declarant rights to any person acquiring title to any unit owned by the successor or until recording an instrument permitting exercise of all those rights, that successor shall not exercise any of those rights other than any right held by his transferor to control the executive board in accordance with the provisions of Section 36 [47-7C-3 NMSA 1978] of the Condominium Act for the duration of any period of declarant control, and any attempted exercise of those rights is void. So long as a successor declarant may not exercise special declarant rights under this subsection, he is not subject to any obligation or liability as a declarant other than liability for his acts and omissions under Section 36 of the Condominium Act.

F. Nothing in this section subjects any successor to a special declarant right to any claims against or other obligations of a transferor declarant, other than claims and obligations arising under the Condominium Act or the declaration.'

History: Laws 1982, ch. 27, § 37.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — This section is similar to § 3-104 of the Uniform Condominium Act, with the following main exceptions: Subsection B(1) of this section of the state Condominium Act deleted "and remains liable for warranty obligations imposed upon him by this Act" as it appears preceding "Lack of privity" in subsection (b)(1) of § 3-104 of the Uniform Condominium Act; Subsection C of this section of the state Condominium Act deletes "sale by a trustee under a deed of trust" as it appears following "judicial sale" in subsection (c) of § 3-104 of the Uniform Condominium Act; and Subsection E(3) of this section of the state Condominium Act substitutes "disclosure statement" for "public offering statement" and deletes "[and] any liability arising as a result thereof [and obligations under Article 5.]" as it appears at the end of subsection (e)(3) of § 3-104 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

1. This section deals with the issue of the extent to which obligations and liabilities imposed upon a declarant by this act are transferred to a third party by a transfer of the declarant's interest in a condominium. There are two parts to the problem. First, what obligations and liabilities to unit owners (both existing unit owners and persons who become unit owners in the future) should a declarant retain, notwithstanding his transfer of interests. Second, what obligations and liabilities may fairly be imposed upon the declarant's successor in interest. No present condominium statute adequately addresses these issues.

2. This section strikes a balance between the obvious need to protect the interests of the unit owners and the equally important need to protect innocent successors to a declarant's rights, especially persons such as mortgagees whose only interest in the condominium project is to protect their debt security. The general scheme of the section is to impose upon a declarant continuing obligations and liabilities for promises, acts or omissions undertaken during the period that he was in control of the condominium, while relieving a declarant who transfers all or part of his special declarant rights in a project of such responsibilities with respect to the promises, acts or omissions of a successor over whom he has no control. Similarly, the section imposes obligations and liabilities arising after the transfer upon a non-affiliated successor to a declarant's interests, but absolves such a transferee of responsibility for the promises, acts or omissions of a transferor declarant over which he had no control. Finally, the section makes special provision for the interests of certain successor declarants (*e. g.,* a mortgagee who succeeds to the rights of the declarant pursuant to a "deed in lieu of foreclosure" and who holds the project solely for transfer to another person) by relieving such persons of virtually all of the obligations and liabilities imposed upon declarants by this act.

3. Subsection (a) [Subsection A] provides that a successor in interest to a declarant may acquire the special rights of the declarant only by recording an instrument which reflects a transfer of those rights. This recordation requirement is important to determine the duration of the period of declarant control pursuant to § 3-103(d) and (e) [47-7C-3 D and E NMSA 1978], as well as to place unit owners on notice of all persons entitled to exercise the special rights of a declarant under this act. The transfer by a declarant of all of his interest in a condominium project to a successor, without a concomitant transfer of the special rights of a declarant pursuant to this subsection, results in the automatic termination of such special declarant rights and of any period of declarant control.

4. Under subsection (b) [Subsection B], a transferor declarant remains liable to unit owners (both existing unit owners and persons who subsequently become unit owners) for all obligations and liabilities, including warranty obligations on all improvements made by him, arising prior to the transfer. If a declarant transfers any special declarant right to an affiliate (as defined in § 1-103(1)) [47-7A-3 A NMSA 1978], the transferor remains subject to all liabilities specified in paragraph (1) of subsection (b) [Subsection B(1)] and, in addition, is jointly and severally liable with his successor in interest for all obligations and liabilities of the successor.

5. The obligations and liabilities imposed upon transferee declarants under the act are set forth in subsection (e) [Subsection E]. In general, a transferee declarant (other than an affiliate of the original declarant and other than a successor whose interest in the project is solely for the protection of debt security) becomes subject to all obligations and liabilities imposed upon a declarant by the act or by the declaration with respect to any promises, acts or omissions undertaken subsequent to the transfer which relate to the rights he holds. Such a transferee is liable for the promises, acts or omissions of the original declarant undertaken prior to the transfer, except as set forth in paragraph (e)(2)

(ii) [Subsection E(2)(b)]. For example, a successor declarant would not be liable for the warranty obligations of the original declarant with respect to improvements to the project made by the original declarant. Similarly, a successor would not be liable, under normal circumstances, for any misrepresentation or breach of fiduciary duty by the original declarant prior to the transfer. The successor is liable, however, to complete improvements labeled "MUST BE BUILT" on the original plans.

6. To preclude declarants from evading their obligations and liabilities under this act by transferring their interests to affiliated companies, paragraph (1) of subsection (e) [Subsection E(1)] makes clear that any successor declarant who is an affiliate of the original declarant is subject to all obligations and liabilities imposed upon the original declarant by the act or by the declaration. Similarly, as previously noted, paragraph (2) of subsection (b) [Subsection B(2)] provides that an original declarant who transfers his rights to an affiliate remains jointly and severally liable with his successor for all obligations and liabilities imposed upon declarants by the act or by the declaration.

7. The section handles the problem of certain successor declarants (i.e., persons whose sole interest in the condominium project is the protection of debt security) in three ways. First, subsection (c) [Subsection C] provides that, in the case of a foreclosure of a mortgage, a sale by a trustee under a deed of trust or a sale by a trustee in bankruptcy of any units owned by a declarant, any person acquiring title to all of the units being foreclosed or sold may request the transfer of special declarant rights. In that event, and only upon such request, such rights will be transferred in the instrument conveying title to the units and such transferee will thereafter become a successor declarant subject to the other provisions of this section. In the event of a foreclosure, sale by a trustee under a deed of trust or sale by a trustee in bankruptcy of all units owned by a declarant, if the transferee of such units does not request the transfer of special declarant rights, then, under subsection (d) [Subsection D], such special declarant rights cease to exist and any period of declarant control terminates.

Second, any person who succeeds to special declarant rights as a result of the transfers just described or by deed in lieu of foreclosure, may, pursuant to paragraph (4) of subsection (e) [Subsection E(4)], declare his intention (in a recorded instrument) to hold those rights solely for transfer to another person. Thereafter, such a successor may transfer all special declarant rights to a third party acquiring title to any units owned by the successor but may not, prior to such transfer, exercise any special declarant rights other than the right to control the executive board of the association in accordance with the provisions of § 3-103(c)[(d)] [47-7C-3D NMSA 1978]. A successor declarant who exercises such a right is relieved of any liability under the act except liability for any acts or omissions related to his control of the executive board of the association. This provision is designed to deal with the typical problem of a foreclosing mortgage lender who opts to bid in and obtain the project at the foreclosure sale solely for the purpose of subsequent resale. It permits such a foreclosing lender to undertake such a transaction without incurring the full burden of declarant obligations and liabilities. At the same time, the provision recognizes the need for continuing operation of the association and, to

that end, permits a foreclosing lender to assume control of the association for the purpose of ensuring a smooth transition.

Third, paragraph (3) of subsection (e) [Subsection E(3)] provides that a successor who has only the right to maintain model units sales offices and signs does not thereby become subject to any obligations or liabilities as a declarant except for the obligation to provide a public offering statement and any liability resulting therefrom. This provision also is designed to protect mortgage lenders and contemplates the situation where a lender takes over a condominium project and desires to sell out existing units without making any additional improvements to the project. This provision facilitates such a transaction by relieving the mortgage lender, in that instance, from the full burden of obligations and liabilities ordinarily imposed upon a declarant under the act.

Under § 2-110 [47-7B-10 NMSA 1978], a declarant may reserve the right to create additional units in portions of the condominium which were originally designated as common elements. The declarant becomes the owner of any units created, but, prior to creation of units, the title to those portions of the condominium is in the unit owners. The right to create the units is an interest in land in which a security interest might be granted. If the mortgagee of that interest forecloses, the purchaser at the foreclosure sale has the choices concerning development rights and resulting liability which are described in the preceding paragraph. That is, under subsections (c) and (d) [Subsections C and D], the purchaser may limit his liability by agreeing to hold the developments only for the purpose of transfer as provided by paragraph (e)(4) [Subsection E(4)] or may buy the rights under paragraph (c) [Subsection C].

Compiler's notes. — The reference to § 3-103(c) of the uniform act in the second sentence in the second paragraph of Comment 7 seems incorrect, as subsection (c) of § 3-103 deals with the adoption of the budget. Subsection (d) of § 3-103 deals with control of the executive board by the declarant.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 14, 16, 26, 28.

31 C.J.S. Estates § 153 et seq.

47-7C-5. Termination of contracts and leases of declarant.

If entered into before the executive board elected by the unit owners pursuant to Section 36 [47-7C-3 NMSA 1978] of the Condominium Act takes office, any management contract, employment contract or lease of recreational or parking areas or facilities, any other contract or lease between the association and a declarant or an affiliate of a declarant or any contract or lease that is not bona fide or was unconscionable to the unit owners at the time entered into under the circumstances then prevailing may be terminated without penalty by the association at any time after the executive board elected by the unit owners pursuant to Section 36 of that act takes office, upon not less than ninety days' notice to the other party. This section does not

apply to any lease the termination of which would terminate the condominium or reduce its size, unless the real estate subject to that lease was included in the condominium for the purpose of avoiding the right of the association to terminate a lease under this section.

History: Laws 1982, ch. 27, § 38.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 3-105 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

1. This section deals with a common problem in the development of condominium projects: the temptation on the part of the developer, while in control of the association, to enter into, on behalf of the association, long-term contracts and leases with himself or with an affiliated entity.

The act deals with this problem in two ways. First, § 3-103(a) [47-7C-3A NMSA 1978] imposes upon all executive board members appointed by the declarant liability as fiduciaries of the unit owners for all of their acts or omissions as members of the board. Second, § 3-105 [this section] provides for the termination of certain contracts and leases made during a period of declarant control.

2. In addition to contracts or leases made by a declarant with himself or with an affiliated entity, there are also certain contracts and leases so critical to the operation of the condominium and to the unit owners' full enjoyment of their rights of ownership that they too should be voidable by the unit owners upon the expiration of any period of declarant control. At the same time, a statutorily sanctioned right of cancellation should not be applicable to all contracts or leases which a declarant may enter into in the course of developing a condominium project. For example, a commercial tenant would not be willing to invest substantial amounts in equipment and other improvements for the operation of his business if the lease could unilaterally be cancelled by the association. Accordingly, this section provides that (subject to the exception set forth in the last sentence thereof), upon the expiration of any period of declarant control, the association may terminate without penalty, any "critical" contract (i. e., any management contract, employment contract or lease of recreational or parking areas or facilities) entered into during a period of declarant control, any contract or lease to which the declarant or an affiliate of the declarant is a party or any contract or lease previously entered into by the declarant which is not bona fide or which was unconscionable to the unit owners at the time entered into under the circumstances then prevailing.

3. The last sentence of the section addresses to usual leasehold condominium situation where the underlying real estate is subject to a long-term ground lease which is then submitted to the act. Because termination of the ground lease would terminate the

condominium, this sentence prevents cancellation. However, in order to avoid the possibility that recreation and other leases otherwise cancellable under subsection (a) [Subsection A] will be restructured to come within the exception, a subjective test of "intent" is imposed. Under the test, if a declarant's principal purpose in subjecting the leased real estate to the condominium was to prevent termination of the lease, the lease may nevertheless be terminated.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 26, 27.

Self dealing by developers of condominium project as affecting contracts or leases with condominium association, 73 A.L.R.3d 613.

31 C.J.S. Estates § 153 et seq.

47-7C-6. Bylaws.

A. The bylaws of the association shall provide for:

(1) the number of members of the executive board and the titles of the officers of the association;

(2) election by the executive board of a president, treasurer, secretary and any other officers of the association the bylaws specify;

(3) the qualifications, powers and duties, terms of office and manner of electing and removing executive board members and officers and filling vacancies;

(4) which, if any, of its powers the executive board or officers may delegate to other persons or to a managing agent;

(5) which of its officers may prepare, execute, certify and record amendments to the declaration on behalf of the association; and

(6) the method of amending the bylaws.

B. Subject to the provisions of the declaration, the bylaws may provide for any other matters the association deems necessary and appropriate.

History: Laws 1982, ch. 27, § 39.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 3-106 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

1. Because the act does not require the recordation of bylaws, it is contemplated that unrecorded bylaws will set forth only matters relating to the internal operations of the association and various "housekeeping" matters with respect to the condominium. The act requires specific matters to be set forth in the recorded declaration and not in the bylaws, unless the bylaws are to be recorded as an exhibit to the declaration.

2. The requirement, set forth in subsection (a)(5) [Subsection A(5)], that the bylaws designate which of the officers of the association has the responsibility to prepare, execute, certify and record amendments to the declaration reflects the obligation imposed upon the association by several provisions of this act to record such amendments in certain circumstances. These provisions include § 1-107 [47-7A-7 NMSA 1978] (Eminent Domain), § 2-106 [47-7B-6 NMSA 1978] (expiration of certain leases), § 2-112 [47-7B-12 NMSA 1978] (Relocation of Boundaries Between Adjoining Units), and § 2-113 [47-7B-13 NMSA 1978] (subdivision or conversion of units). Section 2-117(e) [47-7B-17E NMSA 1978] provides that, if no officer is designated for this purpose, it shall be the duty of the president.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 16, 17.

Validity and construction of condominium association's regulations governing members' use of common facilities, 72 A.L.R.3d 308.

Enforceability of bylaw or other rule of condominium or cooperative association restricting occupancy by children, 100 A.L.R.3d 241.

Validity, construction, and application of statutes, or of condominium association's by laws or regulations, restricting number of units that may be owned by single individual or entity, 39 A.L.R.4th 88.

Validity and construction of condominium bylaws or regulations placing special regulations, burdens, or restrictions on nonresident unit owners, 76 A.L.R.4th 295.

31 C.J.S. Estates § 153 et seq.

47-7C-7. Upkeep of condominium.

A. Except to the extent provided by the declaration, Subsection B of this section or Section 46 [47-7C-13 NMSA 1978] of the Condominium Act, the association is responsible for maintenance, repair and replacement of the common elements, and each unit owner is responsible for maintenance, repair and replacement of his unit. Each unit owner shall afford to the association and the other unit owners, and to their agents or employees, access through his unit reasonably necessary for those purposes. If damage is inflicted on the common elements or on any unit through which access is

taken, the unit owner responsible for the damage, or the association if it is responsible, is liable for the prompt repair thereof.

B. In addition to the liability that a declarant as a unit owner has under the Condominium Act, the declarant alone is liable for all expenses in connection with real estate subject to development rights. No other unit owner and no other portion of the condominium is subject to a claim for payment of those expenses. Unless the declaration provides otherwise, any income or proceeds from real estate subject to development rights inures to the declarant.

History: Laws 1982, ch. 27, § 40.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 3-107 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

1. The act permits the declaration to separate maintenance responsibility from ownership. This is commonly done in practice. In the absence of any provision in the declaration, maintenance responsibility follows ownership of the unit or rests with the association in the case of common elements. Under this act, limited common elements (which might include, for example, patios, balconies and parking spaces) are common elements. See § 1-103(16) [47-7A-3P NMSA 1978]. As a result, under subsection (a) [Subsection A], unless the declaration requires that unit owners are responsible for the upkeep of such limited common elements, the association will be responsible for their maintenance. Under § 3-115(c) [47-7C-15C NMSA 1978], the cost of maintenance, repair and replacement for such limited common elements is assessed against all the units in the condominium, unless the declaration provides for such expenses to be paid only by the units benefited. See Comment 1 to § 2-108 [47-7B-8 NMSA 1978].

2. Under § 2-110 [47-7B-10 NMSA 1978], a declarant may reserve the right to create units in portions of the condominium originally designated as common elements. Prior to creation of the units, title to those portions of the condominium is in the unit owners. However, under § 3-107(b) [47-7C-7B NMSA 1978], the developer is obligated to pay all of the expenses of (including real estate taxes properly apportionable to) that real estate. As to real estate taxes, see § 1-105(c) [47-7A-5C NMSA 1978].

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 16, 26, 29, 34, 38.

Liability of condominium association or corporation for injury allegedly caused by condition of premises, 45 A.L.R.3d 1171.

Validity and enforceability of condominium owner's covenant to pay dues or fees to sports or recreational facility, 39 A.L.R.4th 129.

Right of condominium association's management or governing body to inspect individual units, 41 A.L.R.4th 730.

31 C.J.S. Estates § 153 et seq.

47-7C-8. Meetings.

A meeting of the association shall be held at least once each year. Special meetings of the association may be called by the president, a majority of the executive board or by unit owners having twenty percent, or any lower percentage specified in the bylaws, of the votes in the association. Not less than ten days nor more than sixty days in advance of any meeting, the secretary or other officer specified in the bylaws shall cause notice to be hand-delivered or sent prepaid by United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit owner. The notice of any meeting shall state the time and place of the meeting and the items on the agenda, including the general nature of any proposed amendment to the declaration or bylaws, any budget changes and any proposal to remove a director or officer.

History: Laws 1982, ch. 27, § 41.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 3-108 of the Uniform Condominium Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 14, 16.

31 C.J.S. Estates § 153 et seq.

47-7C-9. Quorums.

A. Unless the bylaws provide otherwise, a quorum is present throughout any meeting of the association if persons entitled to cast twenty percent of the votes which may be cast for election of the executive board are present in person or by proxy at the beginning of the meeting.

B. Unless the bylaws specify a larger percentage, a quorum is deemed present throughout any meeting of the executive board if persons entitled to cast fifty percent of the votes on that board are present at the beginning of the meeting.

History: Laws 1982, ch. 27, § 42.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 3-109 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

Mandatory quorum requirements lower than 50 percent for meetings of the association are often justified because of the common difficulty of inducing unit owners to attend meetings. The problem is particularly acute in the case of resort condominiums where many owners may reside elsewhere, often at considerable distances, for most of the year.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 14, 16.

31 C.J.S. Estates § 153 et seq.

47-7C-10. Voting; proxies.

A. If only one of the multiple owners of a unit is present at a meeting of the association, he is entitled to cast all the votes allocated to that unit. If more than one of the multiple owners are present, the votes allocated to that unit may be cast only in accordance with the agreement of a majority in interest of the multiple owners, unless the declaration expressly provides otherwise. There is a majority agreement if any one of the multiple owners casts the votes allocated to that unit without protest being made promptly to the person presiding over the meeting by any of the other owners of the unit.

B. Votes allocated to a unit may be cast pursuant to a proxy duly executed by a unit owner. If a unit is owned by more than one person, each owner of the unit may vote or register protest to the casting of votes by the other owners of the unit through a duly executed proxy. A unit owner may not revoke a proxy given pursuant to this section except by actual notice of revocation to the person presiding over a meeting of the association. A proxy is void if it is not dated or purports to be revocable without notice. A proxy terminates one year after its date, unless it specifies a shorter term.

C. If the declaration requires that votes on specified matters affecting the condominium be cast by lessees rather than unit owners of leased units:

(1) the provisions of Subsections A and B of this section apply to lessees as if they were unit owners;

(2) unit owners who have leased their units to other persons may not cast votes on those specified matters; and

(3) lessees are entitled to notice of meetings, access to records and other rights respecting those matters as if they were unit owners. Unit owners shall also be given notice, in the manner provided in Section 41 [47-7C-8 NMSA 1978] of the Condominium Act, of all meetings at which lessees may be entitled to vote.

D. No votes allocated to a unit owned by the association may be cast.

History: Laws 1982, ch. 27, § 43.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 3-110 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

Subsection (c) [Subsection C] addresses an increasingly important matter in the governance of condominiums: the role of tenants occupying units owned by investors or other persons. Most present statutes require voting by owners in the association. However, it may be desirable to give lessees, rather than lessors, of units the right to vote on issues involving day-to-day operation both because the lessees may have a greater interest than the lessors and because it is desirable to have lessees feel they are an integral part of the condominium community.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 14, 16.

31 C.J.S. Estates § 153 et seq.

47-7C-11. Tort and contract liability.

Neither the association nor any unit owner except the declarant is liable for that declarant's torts in connection with any part of the condominium which that declarant has the responsibility to maintain. Otherwise, any action alleging a wrong done by the association shall be brought against the association and not against any unit owner. If the wrong occurred during any period of declarant control and the association gives the declarant reasonable notice of and an opportunity to defend against the action, the declarant who then controlled the association shall indemnify the association or any unit owner other than an affiliate of the declarant for all judgments paid which are not covered by insurance, which judgments resulted from a breach of control or other wrongful act or omission on the part of the declarant. Whenever the declarant is liable under this section, the declarant is also liable for all litigation expenses, including reasonable attorney's fees. Any statute of limitation affecting the association's right of indemnification under this section is tolled until the period of declarant control terminates. A unit owner is not precluded from bringing an action contemplated by this section because he is a unit owner or a member or officer of the association. Liens

resulting from judgments against the association are governed by Section 50 [47-7C-17 NMSA 1978] of the Condominium Act.

History: Laws 1982, ch. 27, § 44.

ANNOTATIONS

Compiler's notes. — This section is similar to § 3-111 of the Uniform Condominium Act, with the following main exceptions: in the third sentence of this section of the state Condominium Act "shall indemnify" is substituted for "is liable to," "other than an affiliate of the declarant" is inserted and "judgments" is substituted for "tort losses"; with minor changes the third sentence of this section of the state Condominium Act encompasses the substance of items (i) and (ii) of the third sentence of § 3-111 of the Uniform Condominium Act; and "incurred by the association" has been deleted at the end of the fourth sentence of this section of the state Condominium Act. Note that this section of the state Condominium Act speaks of "breach of control" near the end of the third sentence; the drafters probably intended to state "breach of contract," as set forth in the comparable provision of § 3-111 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

1. This section provides that any action in tort or contract arising out of acts or omissions of the association shall be brought against the association and not against the individual unit owners. This changes the law in states where plaintiffs are forced to name individual unit owners as the real parties in interest to any action brought against the association. The subsection also provides that a unit owner is not precluded from bringing an action in tort or contract against the association solely because he is a unit owner or a member or officer of the association.

2. In recognition of the practical control that can (and in most cases will) be exercised by a declarant over the affairs of the association during any period of declarant control permitted pursuant to § 3-103 [47-7C-3 NMSA 1978], subsection (a) [this section] provides that the association or any unit owner shall have a right of action against the declarant for any losses (including both payment of damages and attorneys' fees) suffered by the association or any unit owner as a result of an action based upon a tort or breach of contract arising during any period of declarant control. To assure that the decision to bring such an action can be made by an executive board free from the influence of the declarant, the subsection also provides that any statute of limitations affecting such a right of action by the association shall be tolled until the expiration of any period of declarant control.

3. If a suit based on a claim which accrued during the period of developer control is brought against the association after control of the association has passed from the developer, reasonable notice to, and grant of an opportunity to the developer to defend, are conditions to developer liability. If, however, suit is brought against the association

while the developer is still in control, obviously the developer cannot later resist a suit by the association for reimbursement on the grounds of failure to notify.

Compiler's notes. — The reference to subsection (a) of § 3-111 of the uniform act in the first sentence in Comment 2 is obviously incorrect, as § 3-111 has no subsection (a).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 26, 43, 57, 58.

Liability of condominium association or corporation for injury allegedly caused by condition of premises, 45 A.L.R.3d 1171.

Personal liability of owner of condominium unit to one sustaining personal injuries or property damage by condition of common areas, 39 A.L.R.4th 98.

Condominium association's liability to unit owner for injuries caused by third person's criminal conduct, 59 A.L.R.4th 489.

31 C.J.S. Estates § 153 et seq.

47-7C-12. Conveyance or encumbrance of common elements.

A. Portions of the common elements may be conveyed or subjected to a security interest by the association if persons entitled to cast at least eighty percent of the votes in the association, including eighty percent of the votes allocated to units not owned by a declarant, or any larger percentage the declaration specifies, agree to that action, but all the owners of units to which any limited common element is allocated shall agree in order to convey that limited common element or subject it to a security interest. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to nonresidential uses. Proceeds of the sale are an asset of the association.

B. An agreement to convey common elements or subject them to a security interest shall be evidenced by the execution of an agreement, or ratifications thereof, in the same manner as a deed, by the requisite number of unit owners. The agreement shall specify a date after which the agreement will be void unless recorded before that date. The agreement and all ratifications thereof shall be recorded in each county in which a portion of the condominium is situated, and is effective only upon recordation.

C. The association, on behalf of the unit owners, may contract to convey common elements or subject them to a security interest, but the contract is not enforceable against the association until approved pursuant to Subsections A and B of this section. Thereafter, the association has all powers necessary and appropriate to effect the conveyance or encumbrance, including the power to execute deeds or other instruments.

D. Any purported conveyance, encumbrance, judicial sale or other voluntary transfer of common elements, unless made pursuant to this section, is void.

E. A conveyance or encumbrance of common elements pursuant to this section does not deprive any unit of its rights of access and support.

F. A conveyance or encumbrance of common elements pursuant to this section does not affect the priority or validity of preexisting encumbrances.

History: Laws 1982, ch. 27, § 45.

ANNOTATIONS

Compiler's notes. — This section is similar to § 3-112 of the Uniform Condominium Act, with the following main exception: Subsection F of this section of the state Condominium Act does not include the bracketed optional language, "[unless the declaration otherwise provides]," which appears at the beginning of subsection (f) of § 3-112 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

1. Subsection (a) [Subsection A] provides that, on agreement of unit owners holding 80% of the votes in the association, parts of the common elements may be sold or encumbered. (80% is the percentage required for termination of the condominium under § 2-118 [47-7B-18 NMSA 1978].) This power may be exercised during the period of declarant control, but, in order to be effective, 80% of non-declarant unit owners must approve the action.

The ability to sell a portion of the common elements without termination of the condominium gives the condominium regime desirable flexibility. For example, the unit owners, some years after the initial creation of the condominium, may decide to convey away a portion of the open space which has been reserved as a part of the common elements because they no longer find the area useful or because they wish to use sale proceeds to make other improvements. Similarly, the ability to encumber common elements gives the association power to raise money for improvements through the device of mortgaging the improvements themselves. Of course, recreational improvements will frequently not be sufficient security for a loan for their construction. Nevertheless, the ability to take a security interest in such improvements may lead lenders to be more favorably disposed toward making a loan in larger amounts and at lower interest rates.

2. Subsection (b) [Subsection B] requires that the agreement for sale or encumbrance be evidenced by the execution of an agreement in the same manner as a deed by the requisite majority of the unit owners. The agreement then must be recorded in the land records. The recorded agreement signed by the unit owners is not the conveyance itself, but is rather a supporting document which shows that the association has full

power to execute a deed or mortgage. Under subsection (c) [Subsection C], it is contemplated that the association will execute the actual instrument of conveyance. Under subsection (e) [Subsection E], a conveyance or encumbrance of common elements may not deprive a unit owner of rights of access and support.

3. Under the condominium form of ownership, each unit owner owns a share of the common elements as an appurtenant interest to his unit and, when the unit owner mortgages his unit, he also mortgages his appurtenant interest. The unit owner himself cannot convey his unit separately from its interest in the common elements nor can he convey his common element interest separately from the unit. Therefore, if there is a mortgage or other lien against any unit, the problem arises as to whether the association under this section can convey a part of the common elements free from the mortgage interest of the unit mortgagee. Subsection (f) [Subsection F] answers that question no. Therefore, a sale or encumbrance of common elements under this section would be subject to the superior priority of any prior mortgagee on the unit unless the mortgagee releases his interest therein.

The bracketed introductory language to subsection (f) [Subsection F] is intended to permit an enacting state to choose whether or not the declaration could vary the rule of subsection (f) [Subsection F]. If the bracketed language is included, the declaration might provide, for example, that any subsequent conveyance of specified portions of the common elements would be free of prior security interests. In that case, the security interest in the common elements held by unit mortgagees would be cut off. Since the loss of the security interest in the common elements could significantly affect mortgagees, states considering inclusion of the bracketed language probably should consult mortgagee groups. If limited to particular common element real estate such as portions of recreational area land, and if protections are provided for lender interests, the ability to convey free of prior security interests could contribute significantly to the continued economic viability of a project. Therefore, lenders may be favorable to inclusion of the bracketed language.

The declaration could protect lender interests in connection with a conveyance free of the security interests in a number of ways. For example, the declaration might provide for payment of a specified percentage of the sales price to unit mortgagees or it might provide that a specified percentage of the mortgage debt be paid to them. Also, the declaration might provide that no sale or encumbrance of common elements would be effective without the approval of a specified percentage of lenders. There are, no doubt, other devices which could afford substantial protection to lenders.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 14, 16, 29, 33, 38, 40, 41.

31 C.J.S. Estates § 153 et seq.

47-7C-13. Insurance.

A. Commencing not later than the time of the first conveyance of a unit to a person other than a declarant, the association shall maintain, to the extent reasonably available:

(1) property insurance on the common elements insuring against all risks of direct physical loss commonly insured against or, in the case of a conversion building, against fire and extended coverage perils. The total amount of insurance after application of any deductibles shall be not less than eighty percent of the actual cash value of the insured property at the time the insurance is purchased and at each renewal date, exclusive of land, excavations, foundations and other items normally excluded from property policies; and

(2) liability insurance, including medical payments insurance, in an amount determined by the executive board but not less than any amount specified in the declaration, covering all occurrences commonly insured against for death, bodily injury and property damage arising out of or in connection with the use, ownership or maintenance of the common elements.

B. In the case of a building containing units having horizontal boundaries described in the declaration, the insurance maintained under Paragraph (1) of Subsection A of this section, to the extent reasonably available, shall include the units, but need not include improvements and betterments installed by unit owners.

C. If the insurance described in Subsections A and B of this section is not reasonably available, the association promptly shall cause notice of that fact to be hand-delivered or sent prepaid by United States mail to all unit owners. The declaration may require the association to carry any other insurance, and the association in any event may carry any other insurance it deems appropriate to protect the association or the unit owners.

D. Insurance policies carried pursuant to Subsection A of this section must provide that:

(1) each unit owner is an insured person under the policy with respect to liability arising out of his interest in the common elements or membership in the association;

(2) the insurer waives its right to subrogation under the policy against any unit owner or member of his household;

(3) no act or omission by any unit owner, unless acting within the scope of his authority on behalf of the association, shall void the policy or be a condition to recovery under the policy; and

(4) if, at the time of a loss under the policy, there is other insurance in the name of the unit owner covering the same risk covered by the policy, the association's policy provides primary insurance.

E. Any loss covered by the property policy under Paragraph (1) of Subsection A and Subsection B of this section must be adjusted with the association, but the insurance proceeds for that loss are payable to any insurance trustee designated for that purpose, or otherwise to the association, and not to any mortgagee or beneficiary under a deed of trust. The insurance trustee or the association shall hold any insurance proceeds in trust for unit owners and lienholders as their interests may appear. Subject to the provisions of Subsection H of this section, the proceeds shall be disbursed first for the repair or restoration of the damaged property, and unit owners and lienholders are not entitled to receive payment of any portion of the proceeds unless there is a surplus of proceeds after the property has been completely repaired or restored or the condominium is terminated.

F. An insurance policy issued to the association does not prevent a unit owner from obtaining insurance for his own benefit.

G. An insurer that has issued an insurance policy under this section shall issue certificates or memoranda of insurance to the association and, upon written request, to any unit owner, mortgagee or beneficiary under a deed of trust. The insurer issuing the policy may not cancel or refuse to renew it until thirty days after notice of the proposed cancellation or nonrenewal has been mailed to the association, each unit owner and each mortgagee or beneficiary under a deed of trust to whom a certificate or memorandum of insurance has been issued at his last known address.

H. Any portion of the condominium for which insurance is required under this section which is damaged or destroyed shall be repaired or replaced promptly by the association unless the condominium is terminated, repair or replacement would be illegal under any state or local health or safety statute or ordinance or eighty percent of the unit owners, including every owner of a unit or assigned limited common element which will not be rebuilt, vote not to rebuild. The cost of repair or replacement in excess of insurance proceeds and reserves is a common expense. If the entire condominium is not repaired or replaced, the insurance proceeds attributable to the damaged common elements shall be used to restore the damaged area to a condition compatible with the remainder of the condominium, and the insurance proceeds attributable to units and limited common elements which are not rebuilt must be distributed to the owners of those units and the owners of the units to which those limited common elements were allocated, or to lienholders, as their interests may appear, and the remainder of the proceeds shall be distributed to all the unit owners or lienholders, as their interests may appear, in proportion to the common element interests of all the units. If the unit owners vote not to rebuild any unit, that unit's allocated interests are automatically reallocated upon the vote as if the unit had been condemned under Subsection A of Section 6 [47-7A-7 NMSA 1978] of the Condominium Act, and the association promptly shall prepare, execute and record an amendment to the declaration reflecting the reallocations.

I. Notwithstanding the provisions of Subsection H of this Section, Section 30 [47-7B-18 NMSA 1978] of the Condominium Act governs the distribution of insurance proceeds if the condominium is terminated.

J. Unless the declaration otherwise provides, the provisions of this section do not apply to a condominium all of whose units are restricted to nonresidential use.

History: Laws 1982, ch. 27, § 46.

ANNOTATIONS

Compiler's notes. — This section is similar to § 3-113 of the Uniform Condominium Act, with the following main exceptions: Subsection I of this section of the state Condominium Act is not contained in § 3-113 of the Uniform Condominium Act; and Subsection J of this section of the state Condominium Act substitutes "Unless the declaration otherwise provides, the provisions of this section do not apply to" for "The provisions of this section may be varied or waived in the case of" appearing in subsection (i) of the § 3-113 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

1. Subsections (a) and (b) [Subsections A and B] provide that the required insurance must be maintained only to the extent reasonably available. This permits the association to comply with the insurance requirements even if certain coverages are unavailable or unreasonably expensive.

(2) Subsection (b) [Subsection B] represents a significant departure from the present law in virtually all states by requiring that the association obtain and maintain property insurance on both the common elements and the units within buildings with "stacked" units. See Comment 3. While it has been common practice in many parts of the country (either by custom or as mandated by statute) for associations to maintain property insurance on the common elements, it has generally not been the practice for the property insurance policy to cover individual units as well. However, given the great interdependence of the unit owners in the stacked unit condominium situation, mandating property insurance for the entire building is the preferable approach. Moreover, such an approach will greatly simplify claims procedures, particularly where both common elements and portions of a unit have been destroyed. If common elements and units are insured separately, the insurers could be involved in disputes as to the coverage provided by each policy.

The act does not mandate association insurance on units in town house or other arrangements in which there are no stacked units. However, if the developer wishes, the declaration may require association insurance as to units having shared walls or as to all units in the development. Many developments will have some units with horizontal boundaries and other units with no horizontal boundaries. In that case, association

insurance as to the units having horizontal boundaries is required, but it is not necessary as to other units.

3. The distinction between what is a common element and what is a unit with respect to the insurance coverage required by this section is complex. The definitions of common elements and a unit in § 1-103(4) and (25) [47-7A-3D and AA NMSA 1978] are not sufficient for this purpose. To determine the distinction between the common elements and units, one must refer first to the declaration's section on unit boundaries. That section will define the unit boundaries. If the declaration fails to do so, the provisions of § 2-102 [47-7B-2 NMSA 1978] apply.

In summary, § 2-102 [47-7B-2 NMSA 1978] provides that, if the declaration is silent, all non-loadbearing and non-structural portions of the walls, floors and ceilings are part of the unit, while all loadbearing and structural portions of the walls, floors and ceilings are common elements. Further, with respect to any structure partially within and partially outside of the boundaries of a unit, any portion thereof serving only that unit is a limited common element (see definition in § 103(16) [47-7A-3P NMSA 1978]), and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements. This treats and defines ownership of all portions of the electrical, plumbing and mechanical systems serving the building not entirely within the boundaries of a unit.

All spaces, interior partitions, electrical, plumbing and mechanical systems and all other items within the boundaries of the unit which are attached to the unit boundaries, whether or not deemed fixtures under state law, are part of the unit.

Put simply, if any item is installed, constructed, repaired or replaced by the declarant or his successor in connection with the original sale of a stacked unit, the item is insured by the association. Clearly, this does not include items of personal property easily movable within the unit or easily removable from the unit (whether or not deemed a fixture under state law), such as a vase, table or other furnishings. If installed by the unit owner, the item should be insured by the unit owner. Those items, installed by the unit owner and not covered by the association policy, are called "improvements and betterments."

4. Although "all risk" coverage is not required as to conversion buildings, but merely fire and extended coverage, this is not intended to imply that such coverage is unnecessary. "All risk" coverage is not required because it may not be appropriate in the case of an unrenovated conversion where cost is a critical factor.

5. The minimum requirement as to the amount of insurance, which is 80% of the actual cash value, should not be viewed as a recommendation; rather, the 80% is a floor. Typically, many condominium documents require insurance in an amount equal to 100% of the replacement cost of the insured property. The act permits greater flexibility, however, inasmuch as different types of construction and varieties of projects may not require such total coverage with its attendant higher premium cost.

6. Subsection (a) (2) [Subsection A(2)] covers only the liability of the association, and unit owners as members, but does not cover the unit owner's individual liability for his acts or omissions or liability for occurrences within his unit.

7. Clause (i) of the third sentence of subsection (h) [Subsection H] would operate as follows: (1) if the condominium consists of campsites, restoration after fire damage might consist of merely resodding the area damaged; (2) if the condominium consists of separate garden-type buildings, restoration after fire damage might consist of demolishing the remaining structure and paving or landscaping the area; and (3) if the condominium consists of a single highrise building, restoration may not be required (if the building is substantially destroyed) inasmuch as "a condition compatible with the remainder of the condominium" would be damaged and unrestored.

8. The scheme of this section, as set forth in subsection (h) [Subsection H], is that any damage or destruction to any portion of the condominium must be repaired (if repairs can be made consistent with applicable safety and health laws) absent a decision to terminate the condominium or a decision by 80% of the unit owners (including the owners of any damaged units) not to rebuild. Unless a decision is made not to rebuild, any available insurance proceeds must be used to effectuate such repairs. For this reason, subsection (e) [Subsection E] provides that any loss covered by the association's property insurance policy shall be adjusted with the association and that the proceeds for any loss shall be payable to the association or to any insurance trustee that may be designated for such purpose. Significantly, such insurance proceeds may not be paid to any mortgagee or other outside party. This provision is necessary to insure that insurance proceeds are available to effectuate any repairs or restoration to the condominium that may be required.

9. In the case of commercial or industrial condominiums, unit owners may prefer to act as self-insurers or make other arrangements with respect to property insurance. Accordingly, subsection (i) [Subsection J] provides that the insurance requirements of this section may be varied or waived in the case of a condominium all of the units of which are reserved exclusively for non-residential use. Such waiver or modification is not possible in the case of a mixed-use condominium, some of the units of which are used for residential purposes.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments § 30.

31 C.J.S. Estates § 153 et seq.; 44 C.J.S. Insurance § 218 et seq.

47-7C-14. Surplus funds.

Unless otherwise provided in the declaration, any surplus funds of the association remaining after payment of or provision for common expenses and any prepayment of reserves shall be paid to the unit owners in proportion to their common expense liabilities or credited to them to reduce their future common expense assessments.

History: Laws 1982, ch. 27, § 47.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 3-114 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

Surplus funds of the association are generally used first for the pre-payment of reserves, and remaining funds are thereafter credited to the account of unit owners or paid to them. In some cases, however, unit owners might prefer that surplus funds be used for other purposes (e.g., the purchase of recreational equipment). Accordingly, this section permits the declaration to specify any other use of surplus funds.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 35, 36.

31 C.J.S. Estates § 153 et seq.

47-7C-15. Assessments for common expenses.

A. Until the association makes a common expense assessment, the declarant shall pay all common expenses. After any assessment has been made by the association, assessments shall be made at least annually, based on a budget adopted at least annually by the association.

B. Except for assessments under Subsections C, D and E of this section, all common expenses shall be assessed against all the units in accordance with the allocations set forth in the declaration pursuant to Subsection A of Section 19 [47-7B-7 NMSA 1978] of the Condominium Act. Any past-due common expense assessment or installment thereof bears interest at the rate established by the association not exceeding eighteen percent per year.

C. To the extent required by the declaration:

(1) any common expense associated with the maintenance, repair or replacement of a limited common element shall be assessed against the units to which that limited common element is assigned, equally, or in any other proportion that the declaration provides;

(2) any common expense or portion thereof benefiting fewer than all of the units shall be assessed exclusively against the units benefited; and

(3) the costs of insurance shall be assessed in proportion to risk and the costs of utilities shall be assessed in proportion to usage.

D. Assessments to pay a judgment against the association shall be made only against the units in the condominium at the time the judgment was entered, in proportion to their common expense liabilities.

E. If any common expense is caused by the misconduct of any unit owner, the association may assess that expense exclusively against his unit.

F. If common expense liabilities are reallocated, common expense assessments and any installment thereof not yet due shall be recalculated in accordance with the reallocated common expense liabilities.

History: Laws 1982, ch. 27, § 48.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 3-115 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

1. This section contemplates that a declarant might find it advantageous, particularly in the early stages of condominium development, to pay all of the expenses of the condominium himself rather than assessing each unit individually. Such a situation might arise, for example, where a declarant owns most of the units in the condominium and wishes to avoid billing the costs of each unit separately and crediting payment to each unit. It might also arise in the case of a declarant who, although willing to assume all expenses of the condominium, is unwilling to make payments for replacement reserves or for other expenses which he expects will ultimately be part of the association's budget. Subsection (a) [Subsection A] grants the declarant such flexibility while at the same time providing that once an assessment is made against any unit, all units, including those owned by the declarant, must be assessed for their full portion of the common expense liability.

2. Under subsection (c) [Subsection C], the declaration may provide for assessment on a basis other than the allocation made in § 2-107 [47-7B-7 NMSA 1978] as to limited common elements, other expenses benefiting less than all units, insurance costs and utility costs.

3. If additional units are added to a condominium after a judgment has been entered against the association, the new units are not assessed any part of the judgment debt. Since unit owners will know the assessment, and since such unpaid judgment assessments would affect the price paid by purchasers of units, it would be complicated and unnecessary to fairness to reallocate judgment assessments when new units are added.

4. Subsection (f) [Subsection F] refers to those instances in which various provisions of this act require that common expense liabilities be reallocated among the units of a condominium by amendment to the declaration. These provisions include § 1-107 [47-7A-7 NMSA 1978] (eminent domain), § 2-106(d) [47-7B-6C NMSA 1978] (expiration of certain leases), § 2-110 [47-7B-10 NMSA 1978] (exercise of development rights) and § 2-113(b) [47-7B-13B NMSA 1978] (subdivision or conversion of units).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 34 to 37.

Expenses for which condominium association may assess unit owners, 77 A.L.R.3d 1290.

31 C.J.S. Estates § 153 et seq.

47-7C-16. Lien for assessments.

A. The association has a lien on a unit for any assesssment [assessment] levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due. The association's lien may be foreclosed in like manner as a mortgage on real estate. Unless the declaration otherwise provides, fees, charges, late charges, fines and interest charged pursuant to Section 47-7C-2 NMSA 1978 are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment becomes due.

B. Unless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same real estate, those liens have equal priority.

C. Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of the claim of lien for assessment under this section is required.

D. A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within three years after the full amount of the assessments becomes due.

E. This section does not prohibit actions to recover sums for which Subsection A of this section creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

F. A judgment or decree in any action brought under this section may include costs and reasonable attorney's fees for the prevailing party.

G. The association upon written request shall furnish at a unit owner's request a recordable statement setting forth the amount of unpaid assessments against his unit.

The statement shall be furnished within ten business days after receipt of the request and is binding on the association, the executive board and every unit owner.

H. To the extent provided in the declaration, the lien established by this section shall be subordinate to other liens or encumbrances.

History: Laws 1982, ch. 27, § 49; 1983, ch. 245, § 5.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — This section is similar to § 3-116 of the Uniform Condominium Act, with the following main exceptions: Subsection A of this section of the state Condominium Act does not incorporate the bracketed optional language in subsection (a) of § 3-116 of the Uniform Condominium Act; subsection (b) of § 3-116 of the Uniform Condominium Act, relating to priority of a lien for assessments over all other liens and encumbrances except mechanics' or materialmen's liens or liens for other assessments made by the association, is not incorporated by this section of the state Condominium Act; and New Mexico has added Subsection H.

The 1983 amendment substituted a New Mexico citation for a Uniform Condominium Act citation in the second sentence in Subsection A and added Subsection H.

COMMISSIONERS' COMMENT

1. Subsection (a) [Subsection A] provides that the association's lien on a unit for unpaid assessments shall be enforceable in the same manner as mortgage liens. In addition, if the use of a power of sale pursuant to a mortgage is permitted in a particular state, the bracketed language (with an appropriate statutory citation inserted) may be used to ensure that the association's lien for unpaid assessments may also be enforced through the power of sale device. The bracketed language requiring notice of foreclosure should be adopted only in states in which the power of sale statute does not require notice to junior lienholders.

2. To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (a) [(b)] provides that the association's lien takes priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and first mortgages recorded before the date the assessment became delinquent. However, as to prior first mortgages, the association's lien does have priority for six months' assessments based on the periodic budget. A significant departure from existing practice, the six months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments

and the obvious necessity for protecting the priority of the security interests of mortgage lenders. As a practical matter, mortgage lenders will most likely pay the six months' assessments demanded by the association rather than having the association foreclose on the unit. If the mortgage lender wishes, an escrow for assessments can be required. Since this provision may conflict with the provisions of some state statutes which forbid some lending institutions from making loans not required by first priority liens, the law of each state should be reviewed and amended when necessary.

3. Subsection (e) [Subsection E] makes clear that the association may have remedies short of foreclosure of its lien that can be used to collect unpaid assessments. The association, for example, might bring an action in debt or breach of contract against a recalcitrant unit owner rather than resorting to foreclosure.

4. In view of the association's powers to enforce its lien for unpaid assessments, subsection (f) [(h)] [Subsection G] provides unit owners with a method to determine the amount presently due and owing. A unit owner may obtain a statement of any unpaid assessment, including fines and other charges enforceable as assessments under subsection (a) [Subsection A], currently levied against his unit. The statement is binding on the association, the executive board and every unit owner in any subsequent action to collect such unpaid assessments.

5. Units may be part of a condominium and of a larger real estate regime (see the Uniform Planned Community Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 1980, which would govern most associations with assessment powers). For example, a large real estate development may consist of a larger planned community which contains detached single family dwellings and town houses which are not part of any condominium and a highrise building which is organized as a condominium within the planned community. In that case, the planned community association might assess the condominium units for the general maintenance expenses of the planned community and the condominium association would assess for the direct maintenance expenses of the building itself. In such a situation, subsection (c) [Subsection B] provides that unpaid liens of the two associations have equal priority regardless of the relative time of creation of the two regimes and regardless of the time the assessments were made or become delinquent.

Compiler's notes. — The reference to subsection (a) of § 3-116 of the uniform act in the second sentence in Comment 2 seems incorrect, as that subsection deals with the creation and foreclosure of liens. Subsection (b) of § 3-116 deals with priority of liens.

The reference to subsection (f) of § 3-116 of the uniform act in the first sentence in Comment 4 seems incorrect, as that subsection deals with other remedies. Subsection (h) of § 3-116 deals with assessment statements furnished to unit owners.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 36, 37, 47.

Expenses for which condominium association may assess unit owners, 77 A.L.R.3d 1290.

31 C.J.S. Estates § 149.

47-7C-17. Other liens affecting the condominium.

A. Except as provided in Subsection B of this section, a judgment for money against the association is not a lien on the common elements but is a lien in favor of the judgment lienholder against all of the units in the condominium at the time the transcript of judgment was recorded. No other property of a unit owner is subject to the claims of creditors of the association.

B. If the association has granted a security interest in the common elements to a creditor of the association pursuant to Section 47-7C-12 NMSA 1978, the holder of that security interest shall exercise its right against the common elements before its judgment lien on any unit may be enforced.

C. Whether perfected before or after the creation of the condominium, if a lien other than a deed of trust or mortgage, including a judgment lien or lien attributable to work performed or materials supplied before creation of the condominium, becomes effective against two or more units, the unit owner of an affected unit may pay to the lienholder the amount of the lien attributable to his unit, and the lienholder, upon receipt of payment, shall promptly deliver a release of the lien covering that unit. The amount of the payment shall be proportionate to the ratio which that unit owner's common expense liability bears to the common expense liabilities of all unit owners whose units are subject to the lien. After payment, the association shall not assess or have a lien against that unit owner's unit for any portion of the common expenses incurred in connection with that lien.

D. Subsequent to recording the declaration as provided in the Condominium Act and while the real estate remains subject to that act, no lien shall arise or be effective against the real estate. During the period, liens or encumbrances shall only arise or be created against each unit and the percentage of undivided interest in the common elements, appurtenant to the unit, in the same manner and under the same conditions as liens and encumbrances may arise or be created upon any other parcel of real property subject to individual ownership; provided, however, that no labor performed or materials furnished, with the consent or at the request of a unit owner or his agent or his contractor or subcontractor, shall be the basis for the filing of a lien pursuant to law against the unit or other property of another unit owner not expressly consenting to or requesting the same; except that express consent shall be deemed to be given by the owner of any unit in the case of emergency repairs. Labor performed or materials furnished for the common elements, if duly authorized by the association of unit owners, the manager or board of directors in accordance with the Condominium Act, the declaration or bylaws, shall be deemed to be performed or furnished with the express

consent of each unit owner and shall be the basis for the filing of a lien pursuant to law against each of the units.

E. A judgment against the association must be indexed in the name of the condominium and the association and, when so indexed, is notice of the lien against the units.

History: Laws 1982, ch. 27, § 50; 1983, ch. 245, § 6.

ANNOTATIONS

Compiler's notes. — This section is similar to § 3-117 of the Uniform Condominium Act, with the following main exceptions: Subsection A of this section of the state Condominium Act substituted "recorded" for "entered" at the end of the first sentence; Subsection C of this section of the state Condominium Act substituted "shall" for "may" in the third sentence; and Subsection D of this section of the state Condominium Act does not appear in § 3-117 of the Uniform Condominium Act.

The 1983 amendment substituted a New Mexico citation for a Uniform Condominium Act citation in Subsection B, and substituted "elements" for "areas and facilities" in the last sentence in Subsection D.

COMMISSIONERS' COMMENT

1. This section deals with the effect on unit owners of judgments against the association. The issue is not free from difficulty. Presently, in most states, if the association is organized as a corporation, the unit owners are likely to receive the insulation from liability given shareholders of a corporation, so that the judgment lienholder can satisfy his judgment only against the property of the association. On the other hand, if the association is organized as an unincorporated association, under the law of most states each unit owner would have joint and several liability on the judgment. This act strikes a balance between the two extremes, making the judgment lien a direct lien against each individual unit, but allowing the individual unit owner to discharge the lien by payment of his pro-rata share of the judgment. The judgment would also be a lien against any property owned by the association.

2. It should be noted that, while the judgment lien runs directly against unit owners, the actual liability of the unit owner is almost identical with what it would be if the ordinary corporation rule insulating the unit owner from direct liability were applied. If the incorporated association only is liable for a judgment, it will, of course, have no assets to satisfy the judgment except whatever personal property and real estate not a part of the common elements it owns. If a checking account or other cash funds of the association are attached or garnisheed by the creditor, the association, in order to maintain its operations and fulfill its other obligations, will be obliged to make an additional assessment against the unit owners to cover the judgment. The same result follows if the association is to prevent the sale of other assets at an execution sale. That

additional assessment would be in precisely the amount for which this act gives a direct lien against the individual unit owners. Further, if an association which is without sufficient assets to satisfy a judgment refuses to make assessments from which the creditor can have his claim satisfied, it is very likely that a court, in a supplemental proceeding on the judgment, would direct the association to make the necessary assessments against the unit owners. Unpaid assessments made by the association constitute liens against units just as to judgments.

Therefore, whether the lien of the judgment creditor runs against the units directly, or whether the lien is only against the association which finds it necessary to make additional assessments to satisfy the judgment, the unit owner who does not pay his proportionate share will end up with a lien against his unit.

The differences, therefore, between the lien system established by § 3-117 [this section] and the system which would be applicable if ordinary corporation rules were applied are these:

(1) The unit owner can discharge his unit from the lien and free it from the possibility of being subsequently assessed by the association for the judgment by making a payment directly to the lienholder. This ability may be valuable to a unit owner who is in the process of selling or securing a mortgage on his unit during the period between the time the judgment is entered and the time the association makes a formal assessment against individual unit owners for the amount of the judgment lien.

(2) The judgment creditor through his ability to threaten to foreclose the lien on an individual unit if the judgment is not paid is given some leverage over individual unit owners to encourage them to see that the association pays the judgment. Procuring an assessment through pressure on individual unit owners may be quicker and cheaper for the judgment creditor than using supplemental proceedings and having a judge order that the board of directors make the necessary assessment.

In the rare case where, under corporation law an association could avoid payment of a judgment by dissolution of the association and vesting of title to the units in the unit owners as tenants-in-common or otherwise, the National Conference of Commissioners on Uniform State Laws believes that that result is inappropriate, and that the unit in the condominium itself should be viewed as equity property of the association capable of being reached by judgment creditors in satisfaction of the judgment. As a matter of social policy the condominium association is in quite a different position than the ordinary corporation. The corporation statutes provide shareholders immunity from liability for debts of the corporation to encourage investment in corporations whose entrepreneurial activities in the marketplace contribute to the general wealth and well-being of society. The condominium association, in managing the affairs of the homeowners, does not serve the same entrepreneurial function. It seems reasonable, as a matter of social policy, that an individual homeowner who would be fully liable for debts incurred in the renovation and maintenance of his home or for torts caused by his failure to adequately maintain the premises should not be able to entirely avoid that

liability through the device of organizing with other homeowners into a condominium association. On the other hand, it is perhaps not fair to a unit owner in a condominium regime to have all of his assets at risk based on the contracts of the association over which he has little control and as to which he has only a fractional interest or benefit.

It should be noted that, except for situations in which the association has given a mortgage or deed of trust on common elements, the judgment creditor cannot assert a lien against common elements, but is rather left to a lien against the units. That is, the judgment creditor has no power to levy on the golf course or on the swimming pool or other open spaces and sell them independently of the units to satisfy the judgment.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 36, 37, 47.

31 C.J.S. Estates § 153 et seq.

47-7C-18. Association records.

The association shall keep financial records sufficiently detailed to enable the association to comply with Section 61 [47-7D-9 NMSA 1978] of the Condominium Act. All financial and other records shall be made reasonably available for examination by any unit owner and his authorized agents.

History: Laws 1982, ch. 27, § 51.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 3-118 of the Uniform Condominium Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 14, 16, 22, 29.

31 C.J.S. Estates § 153 et seq.

47-7C-19. Association as trustee.

With respect to a third person dealing with the association in the association's capacity as a trustee, the existence of trust powers and their proper exercise by the association may be assumed without inquiry. A third person is not bound to inquire whether the association has power to act as trustee or is properly exercising trust powers. A third person, without actual knowledge that the association is exceeding or improperly exercising its powers, is fully protected in dealing with the association as if it possessed and properly exercised the powers it purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the association in its capacity as trustee.

History: Laws 1982, ch. 27, § 52.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 3-119 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

Based on § 7 of the Uniform Trustees' Powers Act, this section is intended to protect an innocent third party in its dealings with the association only when the association is acting as a trustee for the unit owners, either under § 3-113 [47-7C-13 NMSA 1978] for insurance proceeds, or § 2-118 [47-7B-18 NMSA 1978] following termination.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments § 28.

31 C.J.S. Estates § 153 et seq.

ARTICLE 7D
Condominium Act - Protection of Condominium Purchasers

47-7D-1. Requirement for disclosure statement.

A. Except as provided in Subsection B of this section, Sections 53 through 72 of the Condominium Act apply to all units restricted to residential use subject to that act [47-7A-1 through 47-7D-20 NMSA 1978].

B. Neither a disclosure statement nor a resale certificate need be prepared or delivered in the case of:

(1) a gratuitous disposition of a unit;

(2) a disposition pursuant to court order;

(3) a disposition by a government or governmental agency;

(4) a disposition by foreclosure or deed in lieu of foreclosure;

(5) a disposition to a person in the business of selling real estate who intends to offer those units to purchasers;

(6) a disposition that may be canceled at any time and for any reason by the purchaser without penalty;

(7) a disposition to a nonresident alien; or

(8) a disposition of a unit restricted to nonresidential use.

History: Laws 1982, ch. 27, § 53.

ANNOTATIONS

Compiler's notes. — This section is similar to § 4-101 of the Uniform Condominium Act, with the following main exceptions: Subsection A of this section of the state Condominium Act deletes the language of subsection (a) of § 4-101 of the Uniform Condominium Act, providing for waiver or modification of the protections of this article in condominiums where all units are restricted to nonresidential use; "disclosure" is substituted for "public offering" in the introductory paragraph of Subsection B of this section of the state Condominium Act; and Paragraphs (7) and (8) of Subsection B of this section of the state Condominium Act are not contained in subsection (b) of § 4-101 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

In the case of commercial and industrial condominiums, the purchaser is often more sophisticated than the purchaser of residential units and thus better able to bargain for the protections he believes necessary. While this may not always be true, no objective test can be developed which easily distinguishes those commercial purchasers who are able to protect themselves from those who, in the ordinary course of business, have not developed such sophistication. At the same time, the cost of protection imposed by Article 4 [this article] may be substantial. Accordingly, subsection (a) [Subsection A] permits waiver or modification of Article 4 [this article] protections in condominiums where all units are restricted to non-residential use, e.g., in the case of most commercial and industrial condominiums. However, except for certain waivers of implied warranties of quality (see § 4-115 [not adopted]) and certain exemptions from public offering statement and resale certificate requirements (see subsection (b) [Subsection B]), no express waiver of the protections of this article with respect to the purchasers of residential units is permitted by this subsection. Accordingly, by operation of § 1-104 [47-7A-4 NMSA 1978], the rights provided by this article may not be waived in the case of residential purchasers. Moreover, because of the interrelated rights of residential and commercial owners in mixed-use condominiums, waiver or modification of rights conferred by this article is restricted to purchasers in wholly nonresidential condominiums.

Compiler's notes. — The reference to "Sections 53 through 72 of the Condominium Act" in Subsection A seems incorrect, as the Condominium Act contains only 69 sections. Sections 53 to 69 of the Condominium Act are compiled as 47-7A-2, 47-7D-1 to 47-7D-12, 47-7D-17 to 47-7D-20 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 14, 16, 22.

31 C.J.S. Estates § 153 et seq.

47-7D-2. Liability for disclosure statement requirements.

A. Except as provided in Subsection B of this section, prior to the offering of any interest in a unit to the public, a declarant shall prepare a disclosure statement conforming to the requirements of Sections 55 through 58 [47-7D-3 to 47-7D-6 NMSA 1978] of the Condominium Act.

B. A declarant may transfer responsibility for preparation of all or part of the disclosure statement to a successor declarant or to a person in the business of selling real estate who intends to offer units in the condominium for his own account. In the event of any such transfer, the transferor shall provide the transferee with any information necessary to enable the transferee to fulfill the requirements of Subsection A of this section. The transferor is not liable for insuring that the transferee complies with the requirements of Sections 55 through 58 [47-7D-3 to 47-7D-6 NMSA 1978] of the Condominium Act.

C. Any declarant or other person in the business of selling real estate who offers a unit for his own account to a purchaser shall deliver a disclosure statement in the manner prescribed in Subsection A of Section 60 [47-7D-8 NMSA 1978] of the Condominium Act. The declarant or any other person specified in Subsection B of this section who prepared all or part of the disclosure statement is liable under Sections 60 and 69 [65] [47-7D-8, 47-7D-17 NMSA 1978] of that act for any false or misleading statement set forth therein or for any omission of material fact therefrom with respect to that portion of the disclosure statement which he prepared. If a declarant did not prepare any part of a disclosure statement that he delivers, he is not liable for any false or misleading statement set forth therein or for any omission of material fact therefrom unless he had actual knowledge of the statement or omission or, in the exercise of reasonable care, should have known of the statement or omission.

D. If a unit is part of a condominium and is part of any other real estate regime in connection with the sale of which the delivery of a disclosure statement is required under the laws of this state, a single disclosure statement conforming to the requirements of Sections 55 through 58 [47-7D-3 to 47-7D-6 NMSA 1978] of the Condominium Act as those requirements relate to all real estate regimes in which the unit is located, and to any other requirements imposed under the laws of this state, may be prepared and delivered in lieu of providing two or more disclosure statements.

History: Laws 1982, ch. 27, § 54.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For Real Estate Disclosure Act, see ch. 47, art. 13 NMSA 1978.

Compiler's notes. — This section is similar to § 4-102 of the Uniform Condominium Act, with the following main exceptions: "disclosure" is substituted for "public offering" throughout the section; the third sentence of Subsection B of this section of the state Condominium Act has been added; and "declarant or any other person specified in Subsection B of this section" is substituted for "person" in the second sentence of Subsection C of this section of the state Condominium Act.

COMMISSIONERS' COMMENT

This section permits declarants to transfer responsibility for preparation of a public offering statement to successor declarants or dealers, provided the declarant furnishes the information needed by the successor or dealer to complete the statement. The person who prepares the public offering statement is liable for his own misrepresentations and material omissions. A person who delivers a public offering statement prepared by others is responsible for any such deficiencies only to the extent he knows or reasonably should have known of them.

Compiler's notes. — The reference to "Sections . . . 69 of that act" in the second sentence in Subsection C seems incorrect, as that section of the Condominium Act appears as 47-7A-2 NMSA 1978, which deals with applicability. Section 65 of the Condominium Act, which appears as 47-7D-17 NMSA 1978, deals with the effect of violations.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 14, 16, 22, 26.

31 C.J.S. Estates § 153 et seq.

47-7D-3. Disclosure statement; general provisions.

A. Except as provided in Subsection B of this section, a disclosure statement must contain or fully and accurately disclose:

(1) the name and principal address of the declarant and of the condominium;

(2) a general description of the condominium, including to the extent possible the types, number and declarant's schedule of commencement and completion of construction of buildings and amenities that the declarant anticipates including in the condominium;

(3) the number of units in the condominium;

(4) copies of the declaration, other than the plats and plans, and any other recorded covenants, conditions, restrictions and reservations affecting the condominium; the bylaws and any rules or regulations of the association; copies of any contracts and leases to be signed by purchasers at closing; and a brief narrative description of any contracts or leases that will or may be subject to cancellation by the association under Section 38 [47-7C-5 NMSA 1978] of the Condominium Act;

(5) any current balance sheet and a projected budget for the association, either within or as an exhibit to the disclosure statement, for one year after the date of the first conveyance to a purchaser, and thereafter the current budget of the association, a statement of who prepared the budget and a statement of the budget's assumptions concerning occupancy and inflation factors. The budget shall include without limitation:

(a) a statement of the amount or a statement that there is no amount included in the budget as a reserve for repairs and replacement;

(b) a statement of any other reserves;

(c) the projected common expense assessment by category of expenditures for the association; and

(d) the projected monthly common expense assessment for each type of unit;

(6) any services not reflected in the budget that the declarant provides, or expenses that he pays, and that he expects may become at any subsequent time a common expense of the association and the projected common expense assessment attributable to each of those services or expenses for the association and for each type of unit;

(7) any initial or special fee due from the purchaser at closing, together with a description of the purpose and method of calculating the fee;

(8) a description of any liens, defects or encumbrances on or affecting the title to the condominium;

(9) a description of any financing offered or arranged by the declarant;

(10) the terms and significant limitations of any warranties provided by the declarant and limitations on the enforcement thereof or on damages;

(11) a statement that:

(a) within seven days after receipt of a disclosure statement a purchaser, before conveyance, may cancel any contract for purchase of a unit from a declarant;

(b) if a declarant fails to provide a disclosure statement to a purchaser before conveying a unit, that purchaser may rescind the purchase within six months from the date of conveyance;

(c) shall set forth the procedures set forth in Subsection C of Section 60 [47-7D-8 NMSA 1978] of the Condominium Act; and

(d) if a purchaser receives the disclosure statement more than seven days before signing a contract to purchase a unit, he cannot cancel the contract;

(12) a statement of any unsatisfied judgments or pending suits against the association and the status of any pending suits material to the condominium of which a declarant has actual knowledge;

(13) a statement that any deposit made in connection with the purchase of a unit shall be held in an escrow account until closing and shall be returned to the purchaser if the purchaser cancels the contract pursuant to Section 60 [47-7D-8 NMSA 1978] of the Condominium Act, together with the name and address of the escrow agent;

(14) any restraints on alienation of any portion of the condominium;

(15) a description of the insurance coverage provided for the benefit of unit owners;

(16) any current or expected fees or charges to be paid by unit owners for the use of the common elements and other facilities related to the condominium; and

(17) the extent to which financial arrangements have been provided for completion of all improvements labeled "MUST BE BUILT" pursuant to Section 21 [47-7B-9 NMSA 1978] of the Condominium Act.

B. If a condominium composed of not more than twenty-five units is not subject to any development rights and no power is reserved to a declarant to make the condominium part of a larger condominium, group of condominiums or other real estate, a public offering statement may but need not include the information otherwise required by Paragraphs (9), (10) and (15) through (17) of Subsection A of this section.

C. A declarant promptly shall amend the disclosure statement to report any material change in the information required by this section.

History: Laws 1982, ch. 27, § 55.

ANNOTATIONS

Compiler's notes. — This section is similar to § 4-103 of the Uniform Condominium Act, with the following main exceptions: "disclosure" is substituted for "public offering" throughout Subsections A and C of this section of the state Condominium Act; "and a brief narrative description of the significant features" is deleted following "copies" near the beginning of Subsection A(4) of this section of the state Condominium Act; "seven" is substituted for "15" in Paragraphs (11)(a) and (11)(d) of Subsection A of this section of the state Condominium Act; Paragraph (11)(b) of Subsection A of this section of the state Condominium Act substitutes "rescind the purchase within six months from the date of conveyance" for "recover from the declarant (10) percent of the sales price of the unit," as it appears in paragraph (11)(ii) of subsection (a) of § 4-103 of the Uniform Condominium Act; Paragraph (11)(c) of Subsection A of this section of the state Condominium Act is inserted; Paragraph (17) of that same subsection refers to "Section 21 [47-7B-9 NMSA 1978] of the Condominium Act," which is comparable to § 2-109 of the Uniform Condominium Act, while paragraph (17) of subsection (a) of § 4-103 of the Uniform Condominium Act refers to "Section 4-119" of that act; paragraphs (18) and (19) of subsection (a) of § 4-103 of the Uniform Condominium Act, relating to zoning descriptions and other material circumstances, respectively, are deleted, as are references thereto in subsection (b) of § 4-103 of that act; "twenty-five" is substituted for "12" in Subsection B of this section of the state Condominium Act; and "and the narrative descriptions of documents required by paragraph (a)(4)" is deleted at the end of Subsection B of this section of the state Condominium Act.

COMMISSIONERS' COMMENT

1. The best "consumer protection" that the law can provide to any purchaser is to insure that he has an opportunity to acquire an understanding of the nature of the products which he is purchasing. Such a result is difficult to achieve, however, in the case of the condominium purchaser because of the complex nature of the bundle of rights and obligations which each unit owner obtains. For this reason, the act, adopting the approach of many so-called "second generation" condominium statutes, sets forth a lengthy list of information which must be provided to each purchaser before he contracts for a unit. This list includes a number of important matters not typically required in public offering statements under existing law. The requirement for providing the public offering statement appears in § 4-102(c) [47-7D-2C NMSA 1978], and § 4-108 [47-7D-8 NMSA 1978] provides purchasers with cancellation rights and imposes civil penalties upon declarants not complying with the public offering statement requirements of the act.

2. Paragraph (a)(2) [Subsection A(2)] requires a general description of the condominium and, to the extent possible, the declarant's schedule for commencement and completion of construction for all building amenities that will comprise portions of the condominium. Under § 2-109 [47-7B-9 NMSA 1978], the declarant is obligated to label all improvements which may be made in the condominium as either "MUST BE BUILT" or "NEED NOT BE BUILT." Under § 4-119 [47-7D-19 NMSA 1978], the declarant is obligated to complete all improvements labeled "MUST BE BUILT." The estimated schedule of commencement and completion of construction dates provides a standard

for judging whether a declarant has complied with the requirements of § 4-119 [47-7D-19 NMSA 1978].

3. Paragraph [(a)] (4) [Subsection A(4)] requires the public offering statement to include copies of the declaration, bylaws and any rules and regulations of the condominium, as well as copies of any contracts or leases to be executed by the purchaser. In addition, the paragraph requires the public offering statement to include a brief narrative description of the significant features of those documents, as well as of any management contract, leases of recreational facilities and other sorts of contracts which may be subject to cancellation by the association after the period of declarant control expires, as provided in § 3-105 [47-7C-5 NMSA 1978]. This latter requirement is intended to encourage the preparation of brief summaries of all condominium documents in laymen's terms, i.e., the "brief narrative description" should be more than a simple explanation of what a declaration (or other document) is, but less than an extended legal analysis duplicating the contents of the documents themselves. The summary requirement is intended to alleviate the common problem of public offering statements being drafted in lawyers' terms and being no more comprehensible to laymen than the documents themselves.

4. The disclosure requirement of paragraph [(a)] (6) [Subsection A(6)] is intended to eliminate the common deceptive sales practice known as "lowballing," a practice by which a declarant intentionally underestimates the budget for the association by providing many of the services himself during the initial sales period. In such a circumstance, the declarant commonly intends that, after a certain time, these services (which might include lawn maintenance, painting, security, bookkeeping or other services) will become expenses of the association, thereby substantially increasing the periodic common expense assessments which association members must ultimately bear. By requiring the disclosure of these services (including the projected common expense assessment attributable to each) in paragraph [(a)] (6) [Subsection A(6)], the act seeks to minimize "lowballing". In order to comply fully with the provisions of paragraph [(a)] (5) [Subsection A(5)], the declarant must calculate the budget on the basis of his best estimate of the number of units which will be part of the condominium during that budget year. This requirement as well operates to negate the effects of any attempted "lowballing."

5. Paragraph [(a)] (9) [Subsection A(9)] requires disclosure of any financing "offered" by the declarant. The paragraph contemplates that a declarant disclose any arrangements for financing that may have been made, including arrangements with any unaffiliated lender to provide mortgages to qualified purchasers.

6. Under paragraph [(a)] (10) [Subsection A(10)], the declarant is required to disclose the terms of all warranties provided by the declarant (including the statutory warranties set forth in § 4-114 [not adopted]) and to describe any significant limitations on such warranties, the enforcement thereof or damages which may be collectible as a result of a breach thereof. This latter requirement would necessitate a description by the declarant of any exclusions or modifications of statutory warranties undertaken pursuant

to § 4-115 [not adopted]. The statute of limitations for warranties set forth in § 4-116 [not adopted], together with any separate written agreement (as required by § 4-116 [not adopted]) providing for reduction of the period of such statute of limitations, must also be disclosed.

7. Paragraph [(a)] (14) [Subsection A(14)] requires that the declarant disclose the existence of any right of first refusal or other restrictions on the uses for which or classes of persons to whom units may be sold.

8. Paragraph [(a)] (15) [Subsection A(15)] corrects a defect common to many condominium statutes by requiring the declarant to describe the insurance coverage provided for the benefit of unit owners. See § 3-113 [47-7C-13 NMSA 1978].

9. Under paragraph [(a)] (16) [Subsection A(16)], the declarant is obligated to disclose any current or expected fees or charges which unit owners may be required to pay for the use of the common elements and other facilities related to the condominium. Such fees or charges might include swimming pool fees, golf course fees or required membership fees for recreation associations. Such fees are often not disclosed to condominium purchasers and can represent a substantial addition to their monthly assessments.

10. The "financial arrangements" required to be disclosed pursuant to paragraph [(a)] (17) [Subsection A(17)] may vary substantially from one condominium development to another. It is the intent of the paragraph to give purchasers as much information as possible with which to assess the declarant's ability to carry out his obligations to complete the improvements. For example, if a declarant has a commitment from a bank to provide construction financing for a swimming pool when 50% of the units in the condominium are completed, that fact should be disclosed to potential purchasers.

11. In addition to the information required to be disclosed by paragraphs [(a)] (1) through (18) [Subsections A(1) to A(17)], paragraph [(a)] (19) requires that the declarant disclose all other "unusual and material circumstances, features, and characteristics" of the condominium and all units therein. This requires only information which is both "unusual and material." Thus, the provision does not require the disclosure of "material" factors which are commonly understood to be part of the condominium, e.g., the fact that a condominium has a roof, walls, doors and windows. Similarly, the provision does not require the disclosure of "unusual" information about the condominium which is not also "material," e.g., the fact that a condominium is the first condominium in a particular community. Information which would normally be required to be disclosed pursuant to paragraph [(a)] (19) might include, to the extent that they are unusual and material, environmental conditions affecting the use or enjoyment of the condominium, features of the location of the condominium, e.g., near the end of an airport runway or a planned rendering plant and the like.

12. The cost of preparing a public offering statement can be substantial and may, particularly in the case of small condominiums, represent a significant portion of the cost

of a unit. For that reason, subsection (b) [Subsection B] permits a declarant to exclude from a public offering statement certain information in the case of a small condominium (i.e., less than 12 units) which is not subject to development rights and which is not potentially part of a larger condominium or group of condominiums. Essentially, subsection (b) [Subsection B] permits a declarant to exclude from a public offering statement those materials which, as a practical matter, require extended preparation effort by an attorney or engineer in addition to the normal effort which must be exerted to provide the declaration, bylaws, plats and plans or other documents required by the act.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 14, 16, 22, 26.

31 C.J.S. Estates § 153 et seq.

47-7D-4. Condominiums subject to development rights.

If the declaration provides that a condominium is subject to any development rights, the disclosure statement shall disclose, in addition to the information required by Section 55 [47-7D-3 NMSA 1978] of the Condominium Act:

A. the maximum number of units and the maximum number of units per acre that may be created;

B. a statement of how many or what percentage of the units which may be created shall be restricted exclusively to residential use, or a statement that no representations are made regarding use restrictions;

C. if any of the units that may be built within real estate subject to development rights are not to be restricted exclusively to residential use, a statement, with respect to each portion of that real estate, of the maximum percentage of the real estate areas and the maximum percentage of the floor areas of all units that may be created therein, that are not restricted exclusively to residential use;

D. a brief narrative description of any development rights reserved by a declarant and of any conditions relating to or limitations upon the exercise of development rights;

E. a statement of the maximum extent to which each unit's allocated interests may be changed by the exercise of any development right described in Subsection C of this section;

F. a statement of the extent to which any buildings or other improvements that may be erected pursuant to any development right in any part of the condominium shall be compatible with existing buildings and improvements in the condominium in terms of architectural style, quality of construction and size, or a statement that no assurances are made in that regard;

G. general descriptions of all other improvements that may be made and limited common elements that may be created within any part of the condominium pursuant to any development right reserved by the declarant, or a statement that no assurances are made in that regard;

H. a statement of any limitations as to the locations of any building or other improvement that may be made within any part of the condominium pursuant to any development right reserved by the declarant, or a statement that no assurances are made in that regard;

I. a statement that any limited common elements created pursuant to any development right reserved by the declarant shall be of the same general types and sizes as the limited common elements within other parts of the condominium, or a statement of the types and sizes planned, or a statement that no assurances are made in that regard;

J. a statement that all restrictions in the declaration affecting use, occupancy and alienation of units shall apply to any units created pursuant to any development right reserved by the declarant, or a statement of any differentiations that may be made as to those units, or a statement that no assurances are made in that regard; and

K. a statement of the extent to which any assurances made pursuant to this section apply or do not apply in the event that any development right is not exercised by the declarant.

History: Laws 1982, ch. 27, § 56.

ANNOTATIONS

Compiler's notes. — This section is similar to § 4-104 of the Uniform Condominium Act, with the following main exceptions: "disclosure" is substituted for "public offering" in the introductory paragraph of this section of the state Condominium Act; and paragraph (10) of § 4-104 of the Uniform Condominium Act, relating to a required statement as to the proportion of limited common elements to units created pursuant to any development right reserved by the declarant, is deleted.

COMMISSIONERS' COMMENT

This section requires disclosure in the public offering statement of the manner in which the declarant's exercise of development rights may affect purchasers who acquire units before those rights have been fully exercised. The purpose is to put the purchaser on notice of the extent to which the exercise of those rights may alter, sometimes quite dramatically, both the physical and the legal aspects of the project. For example, the prospective purchaser may be contemplating the acquisition of a particular unit because it enjoys a view of open, undeveloped land over which the declarant has, however, reserved development rights. It may be that the boundary of the parcel as to which

development rights have been reserved actually coincides with, or runs quite close to, the outer wall of the unit in question. The disclosures or statements made pursuant to paragraphs (8) and (12) [Subsections H and K] of this section will indicate to the prospective purchaser the extent (if any) to which he can rely on the declarant not to do anything which would radically alter the view from the unit which he now finds so appealing.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 14, 16, 22, 26.

31 C.J.S. Estates § 153 et seq.

47-7D-5. Time shares.

If the declaration provides that ownership or occupancy of any units is or may be in time shares, the disclosure statement shall disclose, in addition to the information required by Section 55 [47-7D-3 NMSA 1978] of the Condominium Act:

A. a description of the time share interest that may be created;

B. the number and identity of units in which time shares may be created;

C. the total number of time shares that may be created;

D. the minimum duration of any time shares that may be created; and

E. the extent to which the creation of time shares will or may affect the enforceability of the association's lien for assessments provided in Section 49 [47-7C-16 NMSA 1978] of the Condominium Act.

History: Laws 1982, ch. 27, § 57.

ANNOTATIONS

Compiler's notes. — This section is similar to § 4-105 of the Uniform Condominium Act, with the following main exceptions: "disclosure" is substituted for "public offering" in the introductory paragraph of this section of the state Condominium Act; and Subsection A of this section of the state Condominium Act is added.

COMMISSIONERS' COMMENT

1. Time sharing has become increasingly important in recent years, particularly with respect to resort condominiums. In recognition of this fact, this section requires the disclosure of certain information with respect to time sharing.

2. Virtually all existing state condominium statutes are silent with respect to time-share ownership. The inclusion of disclosure provisions for certain forms of time sharing in this act, however, does not imply that other law regulating time sharing is affected in any way in a state merely because that state enacts this act.

The Uniform Law Commissioners' Model Real Estate Time-Share Act specifies more extensive disclosures for time-share properties. A "time-share property" may include part or all of the condominium, and § 1-109 of the model act governs conflicts between this act and time-share legislation.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 14, 16, 22.

Regulation of time-share or interval ownership interests in real estate, 6 A.L.R.4th 1288.

31 C.J.S. Estates § 153 et seq.

47-7D-6. Condominiums containing conversion buildings.

A. The disclosure statement of a condominium containing any conversion building shall contain, in addition to the information required by Section 54 [55] [47-7D-3 NMSA 1978] of the Condominium Act:

(1) a statement by the declarant, based on a report prepared by a licensed architect or engineer, describing the present condition of all structural components and mechanical and electrical installations material to the use and enjoyment of the building; and

(2) a list of any outstanding notices of uncured violations of building codes or other municipal regulations, together with the estimated cost of curing those violations.

B. Paragraph (1) of Subsection A of this section applies only to buildings containing more than fifteen units that shall be occupied for residential use.

History: Laws 1982, ch. 27, § 58.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — This section is similar to § 4-106 of the Uniform Condominium Act, with the following main exceptions: "disclosure" is substituted for "public offering" in Subsection A of this section of the state Condominium Act; "licensed" is substituted for "independent (registered)" in Paragraph (1) of Subsection A of this section of the state Condominium Act; paragraph (2) of subsection (a) of § 4-106 of the Uniform

Condominium Act, relating to the expected useful life of certain items, is deleted; and Subsection B of this section of the state Condominium Act is substituted for subsection (b) of § 4-106 of the Uniform Condominium Act, which reads "This section applies only to buildings containing units that may be occupied for residential use."

COMMISSIONERS' COMMENT

1. In the case of a condominium containing one or more conversion buildings, the disclosure of additional information relating to the condition of those buildings is required in the public offering statement because of the difficulty inherent in a single purchaser attempting to determine the condition of what is likely to be an older building being renovated for the purpose of condominium sales.

2. Paragraph (a)(1) [Subsection A(1)] requires the person who gives the public offering statement to retain an independent architect or engineer to report on the present condition of all structural components and fixed mechanical and electrical installations in the conversion building. Such information is as useful to declarant as to the purchaser since, under the implied warranty provisions of § 4-114 [not adopted], a declarant impliedly warrants all improvements made by any person to the building "before creation of the condominium" unless such improvements are specifically excluded from the implied warranty of quality pursuant to § 4-115(b) [not adopted].

3. See Comment 6 to § 2-101 [47-7B-1 NMSA 1978] concerning the meaning of "structural components" as used in paragraph (a)(1) [Subsection A(1)]. Any material changes in the "present condition" of these systems must be reported by an amendment to the public offering statement.

4. Under paragraph (a)(3) [Subsection A(2)], the person required to give the public offering statement is required to provide purchasers with a list of all outstanding notices of uncured violations of building codes or other municipal regulations. The literal wording of this provision does not require disclosure of known violations of such building codes or municipal regulations (at least violations having no effect upon the structural components or fixed mechanical and electrical installations of the condominium) unless actual "notices" of such violations have been received. To the extent that outstanding notices of uncured violations do exist, the cost of curing such violations would become a liability of the unit owners or the association following transfer of the unit to a purchaser. For that reason, the estimated cost of curing any outstanding violations must also be disclosed.

5. For the same reasons set forth in the Comment to § 4-101(a) [47-7D-1A NMSA 1978], this section does not apply to units which are restricted exclusively to nonresidential use.

Compiler's notes. — The reference to "Section 54 of the Condominium Act" in Subsection A seems incorrect, as § 54, which appears as 47-7D-2 NMSA 1978, deals with liability for disclosure statement requirements. Section 55 of the Condominium Act,

which appears as 47-7D-3 NMSA 1978, deals with the general information required in a disclosure statement.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 14, 16, 22.

31 C.J.S. Estates § 153 et seq.

47-7D-7. Condominium securities.

If an interest in a condominium is currently registered with the securities and exchange commission of the United States, a declarant satisfies all requirements relating to the preparation of a disclosure statement of the Condominium Act if he delivers to the purchaser a copy of the prospectus approved by the securities and exchange commission.

History: Laws 1982, ch. 27, § 59.

ANNOTATIONS

Compiler's notes. — This section is similar to § 4-107 of the Uniform Condominium Act, with the following main exceptions: "disclosure" is substituted for "public offering" and "prospectus approved by" is substituted for "public offering statement filed with"; neither the bracketed language in the first sentence, nor the bracketed second sentence of § 4-107 of the Uniform Condominium Act, are incorporated in this section of the state Condominium Act.

COMMISSIONERS' COMMENT

1. Some condominiums are regarded as "investment contracts" or other "securities"under federal law because they exhibit certain investment features such as mandatory rental pools. See SEC Securities Act Release No. 5347 (January 1973). The purpose of this section is to permit the declarant to file or deliver, in lieu of a public offering statement specifically prepared to comply with the provisions of this act, the prospectus filed with and distributed pursuant to the regulations of the United States securities and exchange commission. Absent this provision, prospective purchasers of condominiums classified by the SEC as "securities" would have to be given two public offering statements, one prepared pursuant to this act and the other prepared pursuant to the Securities Act of 1933 [15 U.S.C. § 77a et seq.]. Not only would this result increase the declarant's costs (and thus the price) of units, it might also reduce the likelihood of either public offering statement actually being read by prospective purchasers.

2. The bracketed language in the first sentence of this section should be inserted by states which choose to adopt the agency provisions of Article 5 [not adopted] of the act. The second sentence should also be inserted by states opting to incorporate Article 5

[not adopted] of the act to avoid duplicative regulation of condominiums by the agency administering the state's securities regulation statutes.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 11, 19 to 21; 69 Am. Jur. 2d Securities Regulation - Federal § 138 et seq.

31 C.J.S. Estates § 153 et seq.; 79A C.J.S. Securities Regulation § 10 et seq.

47-7D-8. Purchaser's right to cancel.

A. A person required to deliver a disclosure statement pursuant to Subsection C of Section 54 [47-7D-2 NMSA 1978] of the Condominium Act shall provide a purchaser of a unit with a copy of the disclosure statement and all amendments thereto before conveyance of that unit and not later than the date of any contract of sale. Unless a purchaser is given the disclosure statement more than seven days before execution of a contract for the purchase of a unit, the purchaser, before conveyance, may cancel the contract within seven days after first receiving the disclosure statement.

B. If a purchaser elects to cancel a contract pursuant to Subsection A of this section, he may do so by hand-delivering notice thereof to the offerer or by mailing notice thereof by prepaid United States mail to the offerer or to his agent for service of process. Cancellation is without penalty, and all payments made by the purchaser before cancellation shall be refunded promptly.

C. If a person required to deliver a disclosure statement pursuant to Subsection C of Section 54 of the Condominium Act fails to provide a purchaser to whom a unit is conveyed with that disclosure statement and all amendments thereto as required by Subsection A of this section, the purchaser is entitled to rescind the purchase within six months from the date of conveyance upon delivery to the seller of a deed subject to no encumbrance attaching to the property suffered or caused by the purchaser.

History: Laws 1982, ch. 27, § 60.

ANNOTATIONS

Compiler's notes. — This section is similar to § 4-108 of the Uniform Condominium Act, with the following main exceptions: "disclosure" is substituted for "public offering" throughout the section; "seven" is substituted for "15" in Subsection A of this section of the state Condominium Act; and at the end of Subsection C of this section of the state Condominium Act, the language beginning with "is entitled to rescind" is substituted for "in addition to any rights to damages or other relief, is entitled to receive from that person an amount equal to [10] percent of the sales price of the unit," as it appears at the end of subsection (c) of § 4-108 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

1. The "cooling off" period provided to a purchaser in this section is similar to provisions in many current state condominium statutes.

2. Subsection (a) [Subsection A] requires that each purchaser be provided with both the public offering statement and all amendments thereto prior to the time that the unit is conveyed. If there is a contract for the sale of the unit, these documents must be provided not later than the date of the contract. The section makes clear that any amendments to the public offering statement prepared between the date of any contract and the date of conveyance must also be provided to the purchaser.

3. This section does not require the delivery of a public offering statement prior to the execution by the purchaser of an agreement pursuant to which the purchaser reserves the right to buy a unit but is not contractually bound to do so. Because such agreements (frequently referred to as "non-binding reservation agreements") may be unilaterally cancelled at any time by a prospective purchaser without penalty, they do not constitute "contract[s] of sale" within the meaning of the section.

4. The requirement set forth in subsection (a) [Subsection A] that a purchaser be provided with subsequent amendments to the public offering statement during the period between execution of the contract for purchase and conveyance of the unit does not, in itself, extend the "cooling off" period. Indeed, the delivery of such amendments is required even if the "cooling off" period has expired. The purpose of this requirement is to assure that purchasers of units are advised of any material change in the condominium which may affect their sales contracts under general law. While many such amendments will be merely technical and will not affect the bargain that the purchaser and declarant entered into, each purchaser should be permitted to judge for himself the materiality of any change in the nature of the condominium.

5. Under the scheme set forth in this section, it is at least theoretically possible that there will be a contract for sale of the unit, and that a public offering statement will be given to the purchaser at closing just prior to conveyance. However, the available evidence suggests that such practice would be rare, and that the provision of a public offering statement moments prior to conveyance would, in itself, tend to dampen the enthusiasm of the purchaser for immediate closing. In such circumstances, under subsection (a) [Subsection A], the purchaser would, as a matter of right, be able to extend the date of closing for 15 days from the time the public offering statement was provided. This fact, together with the generally unsatisfactory experience with mandatory "cooling off" periods such as that imposed under the federal Real Estate Settlement Procedures Act [12 U.S.C. § 2601 et seq.], supports the conclusion that it is inappropriate to require a minimum period of delay between delivery of a public offering statement and conveyance.

6. Under subsection (a) [Subsection A], the failure to deliver a public offering statement before conveyance does not result in a statutory right by the purchaser to cancel the conveyance or to reconvey the unit once conveyance has occurred. Any such cancellation or reconveyance right following an actual conveyance could create serious

mechanical and title problems that could not be easily resolved. The failure of the act to provide for such cancellation or reconveyance is not, however, intended to diminish any right which a purchaser may otherwise have under general state law. For example, where it appears that a seller, by deliberately failing to disclose certain material information with respect to a transaction, substantially changed the bargain which he and the purchaser entered into, it is possible under the common law in some states that reconveyance would be an available remedy.

Even absent such resort to general law, however, the penalty provisions of subsection (c) [Subsection C] are designed to provide a sufficient incentive to the seller to insure that the public offering statement is provided in the timely fashion required by the act. The penalty so specified in the subsection is in addition to any right a prevailing purchaser may have under § 4-117 [47-7D-17 NMSA 1978] to collect punitive damages and attorney's fees in connection with his action against the declarant.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 14, 19 to 22, 26.

Plaintiff's rights to punitive or multiple damages when cause of action renders both available, 2 A.L.R.5th 449.

31 C.J.S. Estates § 153 et seq.

47-7D-9. Resales of units.

A. Except in the case of a sale where delivery of a disclosure statement is required, or unless exempt under Subsection B of Section 53 [47-7D-1 NMSA 1978] of the Condominium Act, a unit owner shall furnish to a purchaser before conveyance a copy of the declaration, other than the plats and plans, the bylaws, the rules or regulations of the association and a resale certificate from the association containing:

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

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

(3) a statement of any other fees payable by unit owners;

(4) a statement of any capital expenditures anticipated by the association for the current and two next succeeding fiscal years;

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

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

(7) the current operating budget of the association;

(8) a statement of any unsatisfied judgments against the association;

(9) a statement describing any insurance coverage provided for the benefit of unit owners; and

(10) a statement of the remaining term of any leasehold estate affecting the condominium and the provisions governing any extension or renewal thereof.

B. The association, within ten working days after receipt of a request by a unit owner, shall furnish a certificate containing the information necessary to enable the unit owner to comply with this section. A unit owner providing a certificate pursuant to Subsection A of this section is not liable to the purchaser for any erroneous information provided by the association and included in the certificate.

C. A purchaser is not liable for any unpaid assessment or fee greater than the amount set forth in the certificate prepared by the association. A unit owner is not liable to a purchaser for the failure or delay of the association to provide the certificate in a timely manner, but the purchase contract is voidable by the purchaser until the certificate has been provided and for seven days thereafter or until conveyance, whichever first occurs.

History: Laws 1982, ch. 27, § 61.

ANNOTATIONS

Compiler's notes. — This section is similar to § 4-109 of the Uniform Condominium Act, with the following main exceptions: in the introductory paragraph of Subsection A of this section of the state Condominium Act, "disclosure" is substituted for "public offering," "before execution of any contract for sale of a unit, or otherwise" is deleted preceding "before conveyance," and "resale certificate from the association" is substituted for "certificate"; "existence and terms" is substituted for "effect on the proposed disposition" in Paragraph (1) of Subsection A of this section of the state Condominium Act; "and the status of any pending suits in which the association is a defendant" is deleted at the end of Paragraph (8) of Subsection A of this section of the state Condominium Act; paragraphs (10) and (11) of subsection (a) of § 4-109 of the Uniform Condominium Act, relating to statements of the executive board as to knowledge of alterations or improvements to the unit or to limited common elements and as to knowledge of any health or building code violations with respect to the unit or any limited common elements assigned thereto or any other portion of the condominium, respectively, are deleted; "receipt of" is inserted in the first sentence of

Subsection B of this section of the state Condominium Act; and "seven" is substituted for "(5)" near the end of Subsection C of this section of the state Condominium Act.

COMMISSIONERS' COMMENT

1. In the case of the resale of a unit by a private unit owner who is not a declarant or a person in the business of selling real estate for his own account, a public offering statement need not be provided. See § 4-102(c) [47-7D-2C NMSA 1978]. Nevertheless, there are important facts which a purchaser should have in order to make a rational judgment about the advisability of purchasing the particular condominium unit. Accordingly, each unit owner not required to furnish a public offering statement under § 4-102(c) [47-7D-2C NMSA 1978] and not exempt under § 4-101(b) [47-7D-1B NMSA 1978] is required to furnish to a resale purchaser, before the execution of any contract of sale, a copy of the declaration, bylaws and rules and regulations of the association and a variety of fiscal, insurance and other information concerning the condominium and the unit.

2. While the obligation to provide the information required by this section rests upon each unit owner (since the purchaser is in privity only with that unit owner), the association has an obligation to provide the information to the unit owner within 10 days after a request for such information. Under § 3-102(a)(12) [47-7C-2A(12) NMSA 1978], the association is entitled to charge the unit owner a reasonable fee for the preparation of the certificate. Should the association fail to provide the certificate as required, the unit owner would have a right to action against the association pursuant to § 4-117 [47-7D-17 NMSA 1978].

3. Under subsection (c) [Subsection C], if a purchaser receives a resale certificate which fails to state the proper amount of the unpaid assessments due from the purchased unit, the purchaser is not liable for any amount greater than that disclosed in the resale certificate. Because a resale purchaser is dependent upon the association for information with respect to the outstanding assessments against the unit which he contemplates buying, it is altogether appropriate that the association should be prohibited from later collecting greater assessments than those disclosed prior to the time of the resale purchase.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 38, 40.

Validity, construction and application of statutes, or of condominium association's bylaws or regulations, restricting sale, transfer or lease of condominium units, 17 A.L.R.4th 1247.

Liability of owner of unit in condominium, recreational development, time-share property, or the like, for assessment in support of common facilities levied against and unpaid by prior owner, 39 A.L.R.4th 114.

31 C.J.S. Estates § 153 et seq.

47-7D-10. Escrow of deposits.

Any deposit made in connection with the purchase or reservation of a unit from a person required to deliver a disclosure statement pursuant to Subsection C of Section 54 [47-7D-2 NMSA 1978] of the Condominium Act shall be placed in escrow and held either in this state or in the state where the unit is located in an account designated solely for that purpose until:

A. delivered to the declarant at closing;

B. delivered to the declarant because of the purchaser's default under a contract to purchase the unit; or

C. refunded to the purchaser.

History: Laws 1982, ch. 27, § 62.

ANNOTATIONS

Compiler's notes. — This section is similar to § 4-110 of the Uniform Condominium Act, with the following main exceptions: "disclosure" is substituted for "public offering" in this section of the state Condominium Act; and both the unbracketed and bracketed language, relating to permissible escrow agents, is deleted, preceding "until" near the end of the introductory paragraph of this section of the state Condominium Act.

COMMISSIONERS' COMMENT

1. This section applies to the sale by persons required to furnish public offering statements of residential units and of non-residential units unless waived pursuant to the provisions of § 4-101 [47-7D-1 NMSA 1978]. It does not apply, however, to resales of units between private parties. Escrow provisions are not part of the law in several jurisdictions.

2. This section provides declarant a number of choices as to the appropriate escrow agent. Whether the escrow agent must deposit the funds in an insured institutional depository, or in a particular type of account, depends on state law or the agreement of the parties. To minimize record keeping, of course, the institutional depository could itself be the escrow agent. The section does not require a separate account for each unit, so that mingling of funds in a single escrow account would be permitted. The account may be held whether in the state where the unit is located, or in the enacting state, in recognition that buyers are often from outside the state where the unit is located.

3. The escrow requirements of this section apply in connection with any deposit made by a purchaser, whether such deposit is made pursuant to a binding contract or pursuant to a nonbinding reservation agreement (with respect to which no public offering statement is required under § 4-101(b)(6) [47-7D-1B(6) NMSA 1978]).

4. In some states current practice permits escrows to be held by certain title insurance or escrow companies, attorneys or real estate brokers. Accordingly, the bracketed language should be included or deleted in accordance with local practice.

5. Under this section, any interest earned on an escrow deposit may, but need not, be credited to the purchaser at closing, added to any deposit forfeited to the seller or added to any deposit refunded to the purchaser. In short, disposition of any interest is left to agreement of the parties.

6. In some states, such as New York, the substitution of a bond in place of a deposit escrow is permitted. The evidence indicates, however, that in many instances the use of the bonding device has forced purchasers to incur substantial costs and delay prior to obtaining refunds to which they are entitled. For this reason, this act does not include bonding as an alternative to the required escrow of deposits.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 21, 22.

31 C.J.S. Estates § 153 et seq.

47-7D-11. Release of liens.

A. In the case of a sale of a unit where delivery of a disclosure statement is required pursuant to Subsection C of Section 54 [47-7D-2 NMSA 1978] of the Condominium Act, a seller shall, before conveying a unit, record or furnish to the purchaser releases of all liens affecting that unit and its common element interest which the purchaser does not expressly agree to take subject to or assume. This subsection does not apply to any real estate which a declarant has the right to withdraw.

B. Before conveying real estate to the association, the declarant shall have that real estate released from all liens the foreclosure of which would deprive unit owners of any right of access to or easement of support of their units, and all other liens on that real estate unless the disclosure statement describes certain real estate which may be conveyed subject to liens in specified amounts.

History: Laws 1982, ch. 27, § 63.

ANNOTATIONS

Compiler's notes. — This section is similar to § 4-111 of the Uniform Condominium Act, with the following main exceptions: "disclosure" is substituted for "public offering"

throughout this section of the state Condominium Act; and the bracketed language in subsection (a) of § 4-111 of the Uniform Condominium Act, relating to the provision of a surety bond or substitute collateral for or insurance against a lien, is deleted.

COMMISSIONERS' COMMENT

The exemption for withdrawable real estate set forth in subsection (a) [Subsection A] is designed to preserve flexibility for the declarant in terms of financing arrangements. Theoretically, a developer might partially avoid the lien release requirement of subsection (a) [Subsection A] by placing part of the common element improvements such as a swimming pool or tennis court on withdrawable real estate. By doing so, it could separately mortgage that part of the common elements without being obligated to discharge the mortgage or secure partial releases when individual units are sold. (However, even if there were no withdrawable real estate exemption from the release-of-lien requirement, developers could still separately mortgage such improvements as pools and tennis courts without having to discharge the mortgage on sale of units. All they would have to do is leave the particular real estate out of the condominium and then convey it directly to the association subject to the mortgage.)

If a mortgage or other lien created by or arising against the developer attaches to withdrawable real estate after the declaration has been recorded, a lapse of the developer's right to withdraw the real estate would also terminate the rights of the lienor, since the lien would attach only to the developer's interest (the right to withdraw). However, an alert lienor would not permit the right to withdraw to lapse without taking steps to see that the right to withdraw is exercised. If the mortgage or other lien attached to the real estate and was perfected before the condominium declaration was recorded, lapse of the right to withdraw would not affect the lienor's rights and it could foreclose on the real estate whether or not the developer had lost the right to withdraw. As a practical matter, whether the mortgage or other lien against withdrawable real estate arises before or after the declaration is recorded, unit owners may find that, if the association does not release liens on withdrawable real estate containing common elements, the lienor will be able to withdraw the land and deprive the unit owners of its use. Therefore, unit purchasers and their counsel should be alert to that possibility.

If units are created in withdrawable real estate, the units, when sold, are subject to the release-of-lien rule of subsection (b)(1) [Subsection B] and after a unit in a particular withdrawable parcel is sold, that parcel can no longer be withdrawn. In that case, any lien created by or arising against the developer which attached to the real estate and is subordinate to the condominium declaration would automatically expire.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 18, 21, 22, 26, 38.

31 C.J.S. Estates § 153 et seq.

47-7D-12. Conversion buildings.

A. A declarant of a condominium containing conversion buildings and any person in the business of selling real estate for his own account who intends to offer units in such a condominium shall give each of the residential tenants and residential subtenants in possession of a portion of a conversion building notice of the conversion and provide those persons with the disclosure statement no later than sixty days before the tenants and subtenants in possession are required to vacate. The notice shall set forth generally the rights of tenants and subtenants under this section and shall be hand-delivered to the unit or mailed by prepaid United States mail to the tenant and subtenant at the address of the unit or any other mailing address provided by a tenant. If mailed, the notice will be deemed received on the earlier of actual receipt or thirty days after mailing. No tenant or subtenant shall be required to vacate upon shorter notice than that required by the Uniform Owner-Resident Relations Act, Section 47-8-1 NMSA 1978 et seq. Failure to give notice as required by this section is a defense to an action for possession.

B. For sixty days after receipt of the notice described in Subsection A of this section, the person required to give the notice shall offer to convey each unit or proposed unit occupied for residential use to the tenant who leases that unit. If a tenant fails to purchase the unit during the sixty-day period, the offeror may not offer to dispose of an interest in that unit during the following sixty days at a price more favorable to the offeree than the price offered to the tenant. This subsection does not apply to any unit in a conversion building if that unit will be restricted exclusively to nonresidential use or the boundaries of the converted unit do not substantially conform to the dimensions of the residential unit before conversion.

C. If a seller, in violation of Subsection B of this section, conveys a unit to a purchaser for value who has no knowledge of the violation, recordation of the deed conveying the unit extinguishes any right a tenant may have under Subsection B of this section to purchase that unit but does not affect the right of a tenant to recover damages from the seller for a violation of Subsection B of this section.

D. From the date on which the tenant or subtenant accepts the offer pursuant to Subsection B of this section, there shall be no increase in the rental rate applicable to the portion of the conversion building of which the tenant or subtenant is in possession. If the tenant fails or refuses to consummate the purchase, the rent may thereafter be increased.

E. Nothing in this section permits termination of a lease by a declarant in violation of its terms. Any provision in a lease which would permit termination or cancellation of the lease by a declarant prior to its stated term solely because the declarant seeks to convert the real estate to a condominium is unenforceable.

History: Laws 1982, ch. 27, § 64.

ANNOTATIONS

Compiler's notes. — This section is similar to § 4-112 of the Uniform Condominium Act, with the following main exceptions: in Subsection A of this section of the state Condominium Act, "disclosure" is substituted for "public offering" and "sixty" is substituted for "120" in the first sentence, "If mailed, the notice will be deemed received on the earlier of actual receipt or thirty days after mailing" is inserted and "shorter notice than that required by the Uniform Owner-Resident Relations Act, Section 47-8-1 NMSA 1978 et seq." is substituted in the next-to-last sentence for language in subsection (a) of § 4-112 of the Uniform Condominium Act prohibiting enforced vacation upon less than 120 days' notice, except for reasons such as nonpayment of rent, waste or conduct interfering with other tenants' peaceful enjoyment of the premises; in Subsection B of this section of the state Condominium Act, "receipt" is substituted for "delivery or mailing" near the beginning of the first sentence, "sixty" is substituted for "[180]," following "during the following" in the second sentence and "or on terms" is deleted following "price" in two places in the second sentence; "if the deed states that the seller has complied with subsection (b)" is deleted following "to purchase that unit" in Subsection C of this section of the state Condominium Act; subsection (d) of § 4-112 of the Uniform Condominium Act, relating to notice of date of conversion constituting notice to vacate, is deleted and Subsection D of this section of the state Condominium Act is substituted therefor; and Subsection E of this section of the state Condominium Act adds the second sentence.

COMMISSIONERS' COMMENT

1. One of the most controversial issues in the field of condominium development relates to conversion of rental buildings to condominiums. Opponents of conversions point out that the frequent result of conversions, which occur principally in large urban areas, is to displace low- and moderate-income tenants and provide homes for more affluent persons able to afford the higher prices which the converted apartments command. Indeed, studies indicate that the burden of conversion displacement falls most frequently on low- and moderate-income and elderly persons. At the same time, the conversion of a building to condominium ownership can lead to a substantial increase in property value, a result which proponents believe can be an important factor in curtailing the problem of declining urban tax bases. Proponents also point out that the conversion of rental units in inner-city areas to individual ownership frequently results in the stabilization of the buildings concerned, thus providing an important technique for use in neighborhood preservation and revitalization. This section, which seeks to balance these competing interests, is based principally on similar provisions set forth in the condominium statutes of Virginia and the District of Columbia.

2. In an attempt to strike a fair balance between the competing interests of rental tenants and prospective owners, subsection (b) [Subsection B] provides the tenant a right for 60 days to purchase the unit which he leases at a price and on terms offered by the declarant. The subsection discourages unreasonable offers by declarants by providing that, if the tenant fails to accept the terms offered, the declarant may not thereafter sell the unit at a lower price or upon more favorable terms to a third person for at least 180 days. However, the declarant is not required to offer residential tenants

the right to purchase commercial units or to offer to sell to tenants if the dimensions of their previous apartments have been substantially altered. The reason for this exception is that, if an apartment is subdivided or if two apartments are merged into a single condominium unit, compliance with the requirements of subsection (b) [Subsection B] would be impossible.

3. Jurisdictions with rent control statutes should consider whether amendments to this section are necessary to conform to the procedures or substantive requirements set out in the rent control laws or whether modifications to the rent control laws may be required as a result of the enactment of this section.

4. Except for the restrictions on permissible evictions stated in subsection (a) [Subsection A], this act does not change the law of summary process in a state. As a result, if a tenant refuses to vacate the premises following the 120-day notice, the usual provisions of the state's summary process statutes would apply, while any defenses available to a tenant would also be available.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 21 to 23.

Validity and construction of law regulating conversion of rental housing to condominiums, 21 A.L.R.4th 1083.

31 C.J.S. Estates § 153 et seq.

47-7D-13 to 47-7D-16. Reserved.

ANNOTATIONS

Compiler's notes. — Sections 4-113 to 4-116 of the Uniform Condominium Act, which would have been compiled as 47-7D-13 to 47-7D-16 NMSA 1978, were not adopted by New Mexico. *See* 47-7A-1 NMSA 1978 and notes thereto.

47-7D-17. Effect of violations on rights of action; attorney's fees.

If a declarant or any other person subject to the Condominium Act fails to comply with any provision of that act or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. The court, in an appropriate case, may award reasonable attorney's fees.

History: Laws 1982, ch. 27, § 65.

ANNOTATIONS

Compiler's notes. — This section is similar to § 4-117 of the Uniform Condominium Act, with the following main exception: this section of the state Condominium Act deletes "Punitive damages may be awarded for a willful failure to comply with this Act," as it appears following the first sentence of § 4-117 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

This section provides a general cause of action or claim for relief for failure to comply with the act by either a declarant or any other person subject to the act's provisions. Such persons might include unit owners, persons exercising a declarant's rights of appointment pursuant to § 3-103(d) [47-7C-3D NMSA 1978] or the association itself. A claim for appropriate relief might include damages, injunctive relief, specific performance, rescission or reconveyance if appropriate under the law of the state or any other remedy normally available under state law. The section specifically refers to "any person or class of persons" to indicate that any relief available under the state class action statute would be available in circumstances where a failure to comply with this act has occurred. This section specifically permits punitive damages to be awarded in the case of willful failure to comply with the act and also permits attorney's fees to be awarded in the discretion of the court to any party that prevails in an action.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments § 26.

31 C.J.S. Estates § 153 et seq.

47-7D-18. Labeling of promotional material.

If any improvement contemplated in a condominium is labeled "NEED NOT BE BUILT" on a plat or plan or is to be located within a portion of the condominium with respect to which the declarant has reserved a development right, no promotional material shall be displayed or delivered to prospective purchasers which describes or portrays that improvement unless the description or portrayal of the improvement in the promotional material is conspicuously labeled or identified as "NEED NOT BE BUILT."

History: Laws 1982, ch. 27, § 66.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 4-118 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

1. Section 2-109(c) [47-7B-9C NMSA 1978] requires that the plats and plans for every condominium indicate whether or not any improvement that might be built in the condominium must be built. However, § 4-103 [47-7D-3 NMSA 1978] does not require

that copies of the plats and plans be provided to purchasers as part of the public offering statement. Consequently, this section requiring the labeling of improvements depicted on promotional material is necessary to assure that purchasers are not deceived with respect to which improvements the declarant is obligated to make in a particular condominium project.

2. Since no contemplated improvements on real estate subject to development rights need be shown on plats and plans, additional labeling is required by this section to insure that, if the declarant shows any contemplated improvements in his promotional material which are not shown on the plats and plans, those improvements must also be appropriately labeled.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 22, 28.

31 C.J.S. Estates § 153 et seq.

47-7D-19. Declarant's obligation to complete and restore.

A. The declarant shall complete all improvements labeled "MUST BE BUILT" on plats or plans prepared pursuant to Section 21 [47-7B-9 NMSA 1978] of the Condominium Act.

B. The declarant is subject to liability for the prompt repair and restoration, to a condition compatible with the remainder of the condominium, of any portion of the condominium affected by the exercise of rights reserved pursuant to or created by Sections 22, 23, 24, 25, 27 and 28 [47-7B-10 to 47-7B-13, 47-7B-15, 47-7B-16 NMSA 1978] of the Condominium Act.

History: Laws 1982, ch. 27, § 67.

ANNOTATIONS

Compiler's notes. — This section is substantially similar to § 4-119 of the Uniform Condominium Act.

COMMISSIONERS' COMMENT

1. Subsection (a) [Subsection A] requires the declarant to complete any improvement which the plats or plans indicate, pursuant to the requirements of § 2-109(c) [47-7B-9C NMSA 1978], "MUST BE BUILT." This is a fundamental obligation of the declarant and is one with which a successor declarant is obligated to comply under § 3-104 [47-7C-4 NMSA 1978].

2. Under subsection (b) [Subsection B], in the event that a declarant exercises the right to use an easement which is created by § 2-116 [47-7B-16 NMSA 1978], or in the event

the declarant maintains model units or signs on the condominium, the declarant is obligated to restore the portions of the condominiums used to a condition compatible with the remainder of the condominium.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 14, 15, 26, 29, 34.

31 C.J.S. Estates § 153 et seq.

47-7D-20. Substantial completion of units.

In case of a sale of a unit where delivery of a disclosure statement is required, a contract of sale may be executed, but no interest in that unit may be conveyed until the declaration is recorded and the unit is substantially completed, as evidenced by a recorded certificate of substantial completion pursuant to Section 13 [47-7B-1 NMSA 1978] of the Condominium Act.

History: Laws 1982, ch. 27, § 68.

ANNOTATIONS

Compiler's notes. — This section is similar to § 4-120 of the Uniform Condominium Act, with the following main exceptions: "disclosure" is substituted for "public offering"; the bracketed language "[except pursuant to Section 5-103(b)]" is deleted following "may be conveyed"; and "pursuant to Section 13 of the Condominium Act" is substituted for "executed by an independent [registered] architect, surveyor or engineer, or by issuance of a certificate of occupancy authorized by law."

COMMISSIONERS' COMMENT

The purpose of this section, complemented by § 4-110 [47-7D-10 NMSA 1978], is to assure that the declarant is not able to obtain use of the purchaser's money until the purchaser is able to get a completed unit.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Condominiums and Cooperative Apartments §§ 14, 15, 22.

31 C.J.S. Estates § 153 et seq.

ARTICLE 7E
Homeowner Association (Recompiled.)

47-7E-1. Recompiled.

History: Laws 2013, ch. 122, § 1; recompiled as § 47-16-1 NMSA 1978.

ANNOTATIONS

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14, the Homeowner Association Act, effective July 1, 2013, were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

47-7E-2. Recompiled.

History: Laws 2013, ch. 122, § 2; recompiled as § 47-16-2 NMSA 1978.

ANNOTATIONS

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14, the Homeowner Association Act, effective July 1, 2013, were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

47-7E-3. Recompiled.

History: Laws 2013, ch. 122, § 3; recompiled as § 47-16-3 NMSA 1978.

ANNOTATIONS

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14, the Homeowner Association Act, effective July 1, 2013, were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

47-7E-4. Recompiled.

History: Laws 2013, ch. 122, § 4; recompiled as § 47-16-4 NMSA 1978.

ANNOTATIONS

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14, the Homeowner Association Act, effective July 1, 2013, were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

47-7E-5. Recompiled.

History: Laws 2013, ch. 122, § 5; recompiled as § 47-16-5 NMSA 1978.

ANNOTATIONS

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14, the Homeowner Association Act, effective July 1, 2013, were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

47-7E-6. Recompiled.

History: Laws 2013, ch. 122, § 6; recompiled as § 47-16-6 NMSA 1978.

ANNOTATIONS

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14, the Homeowner Association Act, effective July 1, 2013, were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

47-7E-7. Recompiled.

History: Laws 2013, ch. 122, § 7; recompiled as § 47-16-7 NMSA 1978.

ANNOTATIONS

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14, the Homeowner Association Act, effective July 1, 2013, were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

47-7E-8. Recompiled.

History: Laws 2013, ch. 122, § 8; recompiled as § 47-16-8 NMSA 1978.

ANNOTATIONS

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14, the Homeowner Association Act, effective July 1, 2013, were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

47-7E-9. Recompiled.

History: Laws 2013, ch. 122, § 9; recompiled as § 47-16-9 NMSA 1978.

ANNOTATIONS

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14, the Homeowner Association Act, effective July 1, 2013, were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

47-7E-10. Recompiled.

History: Laws 2013, ch. 122, § 10; recompiled as § 47-16-10 NMSA 1978.

ANNOTATIONS

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14, the Homeowner Association Act, effective July 1, 2013, were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

47-7E-11. Recompiled.

History: Laws 2013, ch. 122, § 11; recompiled as § 47-16-11 NMSA 1978.

ANNOTATIONS

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14, the Homeowner Association Act, effective July 1, 2013, were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

47-7E-12. Recompiled.

History: Laws 2013, ch. 122, § 12; recompiled as § 47-16-12 NMSA 1978.

ANNOTATIONS

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14, the Homeowner Association Act, effective July 1, 2013, were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

47-7E-13. Recompiled.

History: Laws 2013, ch. 122, § 13; recompiled as § 47-16-13 NMSA 1978.

ANNOTATIONS

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14, the Homeowner Association Act, effective July 1, 2013, were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

47-7E-14. Recompiled.

History: Laws 2013, ch. 122, § 14; recompiled as § 47-16-14 NMSA 1978.

ANNOTATIONS

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14, the Homeowner Association Act, effective July 1, 2013, were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

ARTICLE 8
Owner-Resident Relations

47-8-1. Short title.

Sections 47-8-1 through 47-8-51 [47-8-52] NMSA 1978 may be cited as the "Uniform Owner-Resident Relations Act".

History: 1953 Comp., § 70-7-1, enacted by Laws 1975, ch. 38, § 1; 1995, ch. 195, § 1.

ANNOTATIONS

Cross references. — For provisions on human rights, *see* 28-1-1 NMSA 1978 et seq.

The 1995 amendment, effective July 1, 1995, substituted "Sections 47-8-1 to 47-8-51 NMSA 1978" for "Sections 1 through 52 of this act [47-8-1 to 47-8-51 NMSA 1978]".

Uniform Owner-Resident Relations Act. — Laws 1975, ch. 38, §§ 1 to 51 appear as 47-8-1 to 47-8-51 NMSA 1978. Section 52 of that act is an uncodified severability provision. Additionally, Laws 1989, ch. 253, § 3 enacted 47-8-52 NMSA 1978 as part of the Uniform Owner-Resident Relations Act. The bracketed material was inserted by the compiler; it was not enacted by the legislature, and it is not part of the law.

Article is remedial and in derogation of common law. Its application must be liberally construed. *T.W.I.W., Inc. v. Rhudy*, 1981-NMSC-062, 96 N.M. 354, 630 P.2d 753.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

For annual survey of New Mexico law relating to property, see 13 N.M.L. Rev. 435 (1983).

For article, "Survey of New Mexico Law, 1982-83: Property Law," see 14 N.M.L. Rev. 189 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Inability to obtain license, permit, or charter required for tenant's business as defense to enforcement of lease, 89 A.L.R.3d 329.

Children's day-care use as violation of restrictive covenant, 29 A.L.R.4th 730.

Sufficiency as to method of giving oral or written notice exercising option to renew or extend lease, 29 A.L.R.4th 903.

What constitutes timely notice of exercise of option to renew or extend lease, 29 A.L.R.4th 956.

Sufficiency as to parties giving or receiving notice of exercise of option to renew or extend lease, 34 A.L.R.4th 857.

Death of lessee as terminating lease, 42 A.L.R.4th 963.

Express or implied restriction on lessee's use of residential property for business purposes, 46 A.L.R.4th 496.

Strict liability of landlord for injury or death of tenant or third person caused by defect in premises leased for residential use, 48 A.L.R.4th 638.

Air-conditioning appliance, equipment, or apparatus as fixture, 69 A.L.R.4th 359.

Implied warranty of fitness or suitability in commercial leases - modern status, 76 A.L.R.4th 928.

Provision in lease as to purpose for which premises are to be used as excluding other uses, 86 A.L.R.4th 259.

Landlord's liability to third person for injury resulting from attack off leased premises by dangerous or vicious animal kept by tenant, 89 A.L.R.4th 374.

Coverage of leases under state consumer protection statutes, 89 A.L.R.4th 854.

Landlord's liability for failure to protect tenant from criminal acts of third person, 43 A.L.R.5th 207.

Landlord's liability to third party for repairs authorized by tenant, 46 A.L.R.5th 1.

Apportionment of liability between landowners and assailants for injuries to crime victims, 54 A.L.R.5th 379.

Liability of landlord for injury or death occasioned by swimming pool maintained for tenants, 62 A.L.R.5th 475.

47-8-2. Purpose.

The purpose of the Uniform Owner-Resident Relations Act is to simplify, clarify, modernize and revise the law governing the rental of dwelling units and the rights and obligations of owner and resident, and to encourage the owners and the residents to maintain and improve the quality of housing in New Mexico.

History: 1953 Comp., § 70-7-2, enacted by Laws 1975, ch. 38, § 2.

ANNOTATIONS

Cross reference. — For the Mobile Home Park Act, *see* 47-10-1 NMSA 1978.

Acts linked. — Although the Uniform Owner-Resident Relations Act governs the rights and obligations of owners and residents of "dwelling units", and the Mobile Home Park Act [Section 47-10-1 NMSA 1978 et seq.], governs tenancy in a "mobile home park", the legislature has linked the two acts in that the latter provides that an action for termination shall be commenced and prosecuted in the manner described in the former. *Martinez v. Sedillo*, 2005-NMCA-029, 137 N.M. 103, 107 P.3d 543.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

47-8-3. Definitions.

As used in the Uniform Owner-Resident Relations Act:

A. "abandonment" means absence of the resident from the dwelling, without notice to the owner, in excess of seven continuous days; providing such absence occurs only after rent for the dwelling unit is delinquent;

B. "action" includes recoupment, counterclaim, set-off, suit in equity and any other proceeding in which rights are determined, including an action for possession;

C. "amenity" means a facility appurtenance or area supplied by the owner and the absence of which would not materially affect the health and safety of the resident or the habitability of the dwelling unit;

D. "codes" includes building codes, housing codes, health and safety codes, sanitation codes and any law, ordinance or governmental regulation concerning fitness

for habitation or the construction, maintenance, operation, occupancy or use of a dwelling unit;

E. "deposit" means an amount of currency or instrument delivered to the owner by the resident as a pledge to abide by terms and conditions of the rental agreement;

F. "dwelling unit" means a structure, mobile home or the part of a structure, including a hotel or motel, that is used as a home, residence or sleeping place by one person who maintains a household or by two or more persons who maintain a common household and includes a parcel of land leased by its owner for use as a site for the parking of a mobile home;

G. "eviction" means any action initiated by the owner to regain possession of a dwelling unit and use of the premises under terms of the Uniform Owner-Resident Relations Act;

H. "fair rental value" is that value that is comparable to the value established in the market place;

I. "good faith" means honesty in fact in the conduct of the transaction concerned as evidenced by all surrounding circumstances;

J. "normal wear and tear" means deterioration that occurs based upon the use for which the rental unit is intended, without negligence, carelessness, accident, abuse or intentional damage of the premises, equipment or chattels of the owner by the residents or by any other person in the dwelling unit or on the premises with the resident's consent; however, uncleanliness does not constitute normal wear and tear;

K. "organization" includes a corporation, government, governmental subdivision or agency thereof, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest or any other legal or commercial entity;

L. "owner" means one or more persons, jointly or severally, in whom is vested:

(1) all or part of the legal title to property, but shall not include the limited partner in an association regulated under the Uniform Limited Partnership Act [repealed]; or

(2) all or part of the beneficial ownership and a right to present use and enjoyment of the premises and agents thereof and includes a mortgagee in possession and the lessors, but shall not include a person or persons, jointly or severally, who as owner leases the entire premises to a lessee of vacant land for apartment use;

M. "person" includes an individual, corporation, entity or organization;

N. "premises" means facilities, facilities and appurtenances, areas and other facilities held out for use of the resident or whose use is promised to the resident coincidental with occupancy of a dwelling unit;

O. "rent" means payments in currency or in-kind under terms and conditions of the rental agreement for use of a dwelling unit or premises, to be made to the owner by the resident, but does not include deposits;

P. "rental agreement" means all agreements between an owner and resident and valid rules and regulations adopted under Section 47-8-23 NMSA 1978 embodying the terms and conditions concerning the use and occupancy of a dwelling unit or premises;

Q. "resident" means a person entitled under a rental agreement to occupy a dwelling unit in peaceful possession to the exclusion of others and includes the owner of a mobile home renting premises, other than a lot or parcel in a mobile home park, for use as a site for the location of the mobile home;

R. "roomer" means a person occupying a dwelling unit that lacks a major bathroom or kitchen facility in a structure where one or more major facilities are used in common by occupants of the dwelling units. As referred to in this subsection, "major facility", in the case of a bathroom, means toilet and either a bath or shower and, in the case of a kitchen, means refrigerator, stove or sink;

S. "single family residence" means a structure maintained and used as a single dwelling unit. Notwithstanding that a dwelling unit shares one or more walls with another dwelling unit, it is a single family residence if it has direct access to a street or thoroughfare and shares neither heating facilities, hot water equipment nor any other essential facility or service with any other dwelling unit;

T. "substantial violation" means a violation of the rental agreement or rules and regulations by the resident or occurring with the resident's consent that occurs in the dwelling unit, on the premises or within three hundred feet of the premises and that includes the following conduct, which shall be the sole grounds for a substantial violation:

(1) possession, use, sale, distribution or manufacture of a controlled substance, excluding misdemeanor possession and use;

(2) unlawful use of a deadly weapon;

(3) unlawful action causing serious physical harm to another person;

(4) sexual assault or sexual molestation of another person;

(5) entry into the dwelling unit or vehicle of another person without that person's permission and with intent to commit theft or assault;

(6) theft or attempted theft of the property of another person by use or threatened use of force; or

(7) intentional or reckless damage to property in excess of one thousand dollars ($1,000);

U. "term" is the period of occupancy specified in the rental agreement; and

V. "transient occupancy" means occupancy of a dwelling unit for which rent is paid on less than a weekly basis or where the resident has not manifested an intent to make the dwelling unit a residence or household.

History: 1953 Comp., § 70-7-3, enacted by Laws 1975, ch. 38, § 3; 1977, ch. 55, § 1; 1983, ch. 122, § 18; 1985, ch. 146, § 1; 1989, ch. 340, § 1; 1995, ch. 195, § 2; 1997, ch. 39, § 1; 1999, ch. 91, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2007, ch. 129, § 1206 repealed the Uniform Limited Partnership Act, effective January 1, 2009. For comparable provisions, *see* the Uniform Revised Limited Partnership Act, Chapter 54, Article 2A NMSA 1978.

Cross references. — For the Mobile Home Park Act, *see* 47-10-1 NMSA 1978.

The 1999 amendment, effective June 18, 1999, added present Subsection C, and redesignated the subsequent subsections accordingly; deleted "written" following "means all" in Subsection P; and rewrote Subsection T.

The 1997 amendment, effective June 20, 1997, substituted "in excess of seven continuous days" for "for one full rental period or in excess of seven days, whichever is less" in Subsection A, deleted "other than a mobile home lot" following "land" in Subsection E, and made stylistic changes in Subsection S.

The 1995 amendment, effective July 1, 1995, deleted "as referred to in the Uniform Owner-Resident Relations Act" preceding "includes" in Subsection C; inserted "including a hotel or motel" following "part of a structure" in Subsection E; in Subsection I, substituted "that" for "which" and substituted "residents or any other person in the dwelling unit or on the premises with the resident's consent" for "tenant, members of the tenant's household or by his invitees or guests"; substituted "the Uniform Limited Partnership Act" for "Sections 54-2-1 through 54-2-30 NMSA 1978" in Paragraph (1) of Subsection K; inserted "corporation, entity" in Subsection L; added Subsection S, redesignated former Subsection S as Subsection T; added Subsection U; and made minor stylistic changes throughout the section.

The 1989 amendment, effective June 16, 1989, in Subsection O, substituted "all written agreements" for "all agreements written or oral".

The 1985 amendment added Subsection I and redesignated former Subsections I through R as Subsections J through S, respectively.

The 1983 amendment inserted "other than a mobile home lot" in Subsection E, deleted "or of vacant land for a mobile home park or court" at the end of Paragraph (2) of Subsection J and inserted "other than a lot or parcel in a mobile home park" in Subsection O.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Recovery of expected profits lost by lessor's breach of lease, 92 A.L.R.3d 1286.

What constitutes abandonment of residential or commercial lease - modern cases, 84 A.L.R.4th 183.

47-8-4. Principles of law and equity.

Unless displaced by the provisions of the Uniform Owner-Resident Relations Act, the principles of law and equity, including the law relating to capacity to contract, mutuality of obligations, equitable abatement, principal and agent, real property, public health, safety and fire prevention, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy or other validating or invalidating cause supplement its provisions.

History: 1953 Comp., § 70-7-4, enacted by Laws 1975, ch. 38, § 4; 1995, ch. 195, § 3.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, inserted "equitable abatement" near the middle of the section.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Housing Laws and Urban Redevelopment § 17.

Farmland cultivation arrangement as creating status of landlord-tenant or landowner-cropper, 95 A.L.R.3d 1013.

47-8-5. General act.

The Uniform Owner-Resident Relations Act being a general act is intended as a unified coverage of its subject matter, and no part of it is to be construed as impliedly repealed by subsequent legislation if that construction can reasonably be avoided.

History: 1953 Comp., § 70-7-5, enacted by Laws 1975, ch. 38, § 5.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Housing Laws and Urban Redevelopment § 2.

47-8-6. Recovery of damages.

A. The remedies provided by the Uniform Owner-Resident Relations Act shall be so administered that the aggrieved party may recover damages as provided in the Uniform Owner-Resident Relations Act. The aggrieved party has a duty to mitigate damages.

B. Any right or obligation declared by the Uniform Owner-Resident Relations Act is enforceable by action unless the provision declaring it specifies a different and limited effect.

History: 1953 Comp., § 70-7-6, enacted by Laws 1975, ch. 38, § 6.

ANNOTATIONS

Cross references. — For inapplicability of general forcible entry or detainer provisions to actions by landlord, *see* 35-10-2 NMSA 1978.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Housing Laws and Urban Development § 17.

Right and duty of lessor of advertising space to relet in order to minimize damages from lessee's breach, 35 A.L.R. 1536.

Recovery of expected profits lost by lessor's breach of lease, 92 A.L.R.3d 1286.

Tenant's recovery of damages for emotional distress under Uniform Residential Landlord and Tenant Act, 6 A.L.R.4th 528.

What constitutes willfulness or malice justifying landlord's collection of statutory multiple damages for tenant's wrongful retention of possession, 7 A.L.R.4th 589.

Respective rights in excess rent when landlord relets at higher rent during lessee's term, 50 A.L.R.4th 403.

Landlord's duty, on tenant's failure to occupy, or abandonment of, premises, to mitigate damages by accepting or procuring another tenant, 75 A.L.R.5th 1.

51C C.J.S. Landlord and Tenant §§ 247(2), 250(2).

47-8-7. Provision for agreement.

A claim or right arising under the Uniform Owner-Resident Relations Act or on a rental agreement may be settled by agreement.

History: 1953 Comp., § 70-7-7, enacted by Laws 1975, ch. 38, § 7.

ANNOTATIONS

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 49 Am. Jur. 2d Landlord and Tenant §§ 77, 690.

47-8-8. Rights, obligations and remedies.

The Uniform Owner-Resident Relations Act applies to, regulates and determines rights, obligations and remedies under a rental agreement, wherever made, for a dwelling unit located within this state.

History: 1953 Comp., § 70-7-8, enacted by Laws 1975, ch. 38, § 8.

ANNOTATIONS

Cross references. — For inapplicability of forcible entry or detainer provisions, *see* 35-10-2 NMSA 1978.

For landlord's lien on tenant's personalty, *see* 48-3-5 and 48-3-6 NMSA 1978.

Magistrate court had subject matter jurisdiction when it decided claim for possession. — Where the parties entered into a lease option contract pursuant to which plaintiff agreed to lease and defendant agreed to rent a residential property in Vanderwagen, New Mexico for sixty months, and where the lease option contract included an option to purchase the residence at any time during the contract’s terms, and where defendant paid plaintiff $10,000 that defendant claimed to be a down payment toward the purchase price of the property but which was not mentioned in the lease option contract, and where defendant stopped making monthly payments on the

property after two years, and where plaintiff filed a petition for restitution seeking possession of the property in magistrate court, and where the magistrate court granted the writ of restitution and awarded damages, past-due rent, and attorney fees, and where, on appeal, defendant claimed that the magistrate court did not have subject matter jurisdiction because defendant was not occupying the property pursuant to a rental agreement but pursuant to a contract for the sale of the real property, the magistrate court did not err in exercising jurisdiction because the plain language of the parties' lease option contract demonstrates that the parties entered into a rental agreement as defined in NMSA 1978 § 47-8-3 and subject to the Uniform Owner-Resident Relations Act (UORRA), and the plain language of NMSA 1978 § 47-8-10(A) demonstrates that the legislature has endowed magistrate courts with subject matter jurisdiction over claims arising from any conduct in this state governed by the UORRA or with respect to any claim arising from a transaction subject to UORRA for a dwelling located within its jurisdictional boundaries. *White v. Farris*, 2021-NMCA-014.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Housing Laws and Urban Development § 17.

What constitutes willfulness or malice justifying landlord's collection of statutory multiple damages for tenant's wrongful retention of possession, 7 A.L.R.4th 589.

Specificity of description of premises as affecting enforceability of lease, 73 A.L.R.4th 236.

47-8-9. Exemptions.

Unless created to avoid the application of the Uniform Owner-Resident Relations Act, the following arrangements are exempted by that act:

A. residence at an institution, public or private, if incidental to detention or the provision of medical, geriatric, counseling, religious, educational when room and board are an entity or similar service;

B. occupancy under a contract of sale of a dwelling unit or the property of which it is part, if the occupant is the purchaser or a person who succeeds to his interest;

C. occupancy by a member of a fraternal or social organization in the portion of a structure operated for the benefit of the organization;

D. transient occupancy in a hotel or motel;

E. occupancy by an employee of an owner pursuant to a written rental or employment agreement that specifies the employee's right to occupancy is conditional upon employment in and about the premises; and

F. occupancy under a rental agreement covering premises used by the occupant primarily for agricultural purposes.

History: 1953 Comp., § 70-7-9, enacted by Laws 1975, ch. 38, § 9; 1995, ch. 195, § 4.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, substituted "that" for "which" in the introductory sentence, and substituted "pursuant to a written rental or employment agreement that specifies the employee's" for "whose" in Subsection E.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

47-8-10. Judicial jurisdiction.

A. The district or magistrate court of this state may exercise jurisdiction over any person with respect to any conduct in this state governed by the Uniform Owner-Resident Relations Act or with respect to any claim arising from a transaction subject to this act for a dwelling unit located within its jurisdictional boundaries. In addition to any other method provided by rule or by statute, personal jurisdiction over a person may be acquired in a civil action or proceeding instituted in the district or magistrate court by the service of process in the manner provided by this section.

B. If a person is not a resident of this state or is a corporation not authorized to do business in this state and engages in any conduct in this state governed by the Uniform Owner-Resident Relations Act, or engages in a transaction subject to this act, he may designate an agent upon whom service of process may be made in this state. The agent shall be a resident of this state or a corporation authorized to do business in this state. The designation shall be in writing and shall be filed with the secretary of state. If no designation is made and filed or if process cannot be served in this state upon the designated agent, process may be served upon the secretary of state, but service upon him is not effective unless the plaintiff or petitioner immediately mails a copy of the process and pleading by registered or certified mail to the defendant or respondent at his last reasonably ascertainable address. An affidavit of compliance with this section shall be filed with the clerk of the court on or before the return day of the process, if any, or within any further time the court allows.

History: 1953 Comp., § 70-7-10, enacted by Laws 1975, ch. 38, § 10.

ANNOTATIONS

Magistrate court had subject matter jurisdiction when it decided claim for possession. — Where the parties entered into a lease option contract pursuant to which plaintiff agreed to lease and defendant agreed to rent a residential property in Vanderwagen, New Mexico for sixty months, and where the lease option contract included an option to purchase the residence at any time during the contract's terms, and where defendant paid plaintiff $10,000 that defendant claimed to be a down payment toward the purchase price of the property but which was not mentioned in the lease option contract, and where defendant stopped making monthly payments on the property after two years, and where plaintiff filed a petition for restitution seeking possession of the property in magistrate court, and where the magistrate court granted the writ of restitution and awarded damages, past-due rent, and attorney fees, and where, on appeal, defendant claimed that the magistrate court did not have subject matter jurisdiction because defendant was not occupying the property pursuant to a rental agreement but pursuant to a contract for the sale of the real property, the magistrate court did not err in exercising jurisdiction because the plain language of the parties' lease option contract demonstrates that the parties entered into a rental agreement as defined in NMSA 1978 § 47-8-3 and subject to the Uniform Owner-Resident Relations Act (UORRA), and the plain language of NMSA 1978 § 47-8-10(A) demonstrates that the legislature has endowed magistrate courts with subject matter jurisdiction over claims arising from any conduct in this state governed by the UORRA or with respect to any claim arising from a transaction subject to UORRA for a dwelling located within its jurisdictional boundaries. *White v. Farris*, 2021-NMCA-014.

District court had subject matter jurisdiction over Plaintiff's claim for damages pursuant to its original jurisdiction. — Where the parties entered into a lease option contract pursuant to which plaintiff agreed to lease and defendant agreed to rent a residential property in Vanderwagen, New Mexico for sixty months, and where the lease option contract included an option to purchase the residence at any time during the contract's terms, and where defendant paid plaintiff $10,000, which was not mentioned in the lease option contract but which defendant claimed to be a down payment toward the purchase price of the property, and where defendant stopped making monthly payments on the property after two years, and where plaintiff filed a petition for restitution seeking possession of the property in magistrate court, and where the magistrate court granted the writ of restitution and awarded damages, past-due rent, and attorney fees, and where, on de novo appeal, the district court ruled in plaintiff's favor on all issues and awarded plaintiff back-rent, damages over $10,000, and attorney fees, and where defendant argued that the district court did not have subject matter jurisdiction, arguing that the grant of authority to magistrate courts would have prevented the district court, on de novo appeal, from awarding more than $10,000 in damages, the district court did not err in exercising jurisdiction because the district court decided plaintiff's claim for damages pursuant to its original jurisdiction and therefore any limits on the district court's de novo appellate jurisdiction did not apply here. *White v. Farris,* 2021-NMCA-014.

47-8-11. Obligation of good faith.

Every duty under the Uniform Owner-Resident Relations Act and every act which must be performed as a condition precedent to the exercise of a right or remedy under the Uniform Owner-Resident Relations Act imposes an obligation of good faith in its performance or enforcement.

History: 1953 Comp., § 70-7-11, enacted by Laws 1975, ch. 38, § 11.

ANNOTATIONS

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 49 Am. Jur. 2d Landlord and Tenant § 109 et seq.

When lessor may withhold consent under unqualified provision in lease prohibiting assignment or subletting of leased premises without lessor's consent, 21 A.L.R.4th 188.

51C C.J.S. Landlord and Tenant § 2(1).

47-8-12. Inequitable agreement provision.

A. If the court, as a matter of law, finds that any provision of a rental agreement was inequitable when made, the court may limit the application of such inequitable provisions to avoid an inequitable result.

B. If inequitability is put into issue by a party to the rental agreement, the parties to the rental agreement shall be afforded a reasonable opportunity to present evidence as to the setting, purpose and effect of the rental agreement, or settlement, to aid the court in making determination.

History: 1953 Comp., § 70-7-12, enacted by Laws 1975, ch. 38, § 12.

ANNOTATIONS

Purpose of section. — This section modifies common-law principles by allowing the court to make a determination of the underlying fairness of the rental agreement when made and allowing selective enforcement of the contract to bring about an equitable result. *Ramirez-Eames v. Hover*, 1989-NMSC-038, 108 N.M. 520, 775 P.2d 722.

Review on appeal. — The determination of whether a rental agreement is inequitable should not be made de novo on review. Appellate courts should not be de novo courts of equity in landlord-tenant disputes. *Ramirez-Eames v. Hover*, 1989-NMSC-038, 108 N.M. 520, 775 P.2d 722.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Application of usury laws to transactions characterized as "leases," 94 A.L.R.3d 640.

47-8-13. Service of notice.

A. A person has notice of a fact if:

(1) he has actual knowledge of it;

(2) he has received a notice or notification of it; or

(3) from all facts and circumstances known to him at the time in question he has reason to know that it exists.

B. A person notifies or gives a notice or notification to another by taking steps reasonably calculated to inform the other in ordinary course, whether or not the other actually comes to know of it.

C. A person receives a notice or notification:

(1) when it comes to his attention;

(2) where written notice to the owner is required, when it is mailed or otherwise delivered at the place of business of the owner through which the rental agreement was made or at any place held out by him as the place for receipt of the communication; or

(3) if written notice to the resident is required, when it is delivered in hand to the resident or mailed to him at the place held out by him as the place for receipt of the communication, or in the absence of such designation, to his last known place of residence.

D. Notwithstanding any other provisions of this section, notice to a resident for nonpayment of rent shall be effective only when hand delivered or mailed to the resident or posted on an exterior door of the dwelling unit. In all other cases where written notice to the resident is required, even if there is a notice by posting, there must also be a mailing of the notice by first class mail or hand delivery of the notice to the resident. The date of a posting shall be included in any notice posted, mailed or hand delivered, and shall constitute the effective date of the notice. A posted notice shall be affixed to a door by taping all sides or placed in a fixture or receptacle designed for notices or mail.

E. Notice, knowledge or a notice or notification received by the resident or person is effective for a particular transaction from the time it is brought to the attention of the

resident or person conducting that transaction, and in any event from the time it would have been brought to the resident's or person's attention if the resident or person had exercised reasonable diligence.

F. Where service of notice is required under the Uniform Owner-Resident Relations Act, and the item is mailed but returned as undeliverable, or where the last known address is the vacated dwelling unit, the owner shall serve at least one additional notice if an alternative address has been provided to the owner by the resident.

History: 1953 Comp., § 70-7-13, enacted by Laws 1975, ch. 38, § 13; 1995, ch. 195, § 5.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, divided Subsection B to form Subsection C; in Subsection C, substituted "where written notice to the owner is required, when" for "in the case of the owner", and inserted "mailed or otherwise" preceding "delivered" in Paragraph (2), substituted "if written notice to the resident is required, when" for "in the case of the resident" in Paragraph (3); added Subsections D and F; and redesignated former Subsection C as Subsection E.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of tenant holding over after termination of definite term to notice to quit, 19 A.L.R. 1405, 156 A.L.R. 1310.

Notice by landlord of change in rent or other modification of tenancy as affecting rights and liabilities incident to tenant's holding over after expiration of term or rent period or time fixed by notice, 109 A.L.R. 197.

Sufficiency as to parties giving or receiving notice of exercise of option to renew or extend lease, 34 A.L.R.4th 857.

47-8-14. Terms and conditions of agreement.

The owner and resident may include in a rental agreement terms and conditions not prohibited by the Uniform Owner-Resident Relations Act or other rule of law including rent, term of the agreement or other provisions governing the rights and obligations of the parties.

History: 1953 Comp., § 70-7-14, enacted by Laws 1975, ch. 38, § 14.

ANNOTATIONS

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 49 Am. Jur. 2d Landlord and Tenant § 45 et seq.

Application of usury laws to transactions characterized as "leases," 94 A.L.R.3d 640.

Sufficiency of provision of lease to effect second or perpetual right of renewal, 29 A.L.R.4th 172.

51C C.J.S. Landlord and Tenant §§ 235 to 243.

47-8-15. Payment of rent.

A. The resident shall pay rent in accordance with the rental agreement. In the absence of an agreement, the resident shall pay as rent the fair rental value for the use of the premises and occupancy of the dwelling unit.

B. Rent is payable without demand or notice at the time and place agreed upon by the parties. Unless otherwise agreed, rent is payable at the dwelling unit. Unless otherwise agreed, periodic rent is payable at the beginning of any term of one month or less and otherwise in equal monthly installments at the beginning of each monthly period. The date of one month to the same date of the following month shall constitute a term of one month.

C. Unless the rental agreement fixes a definite term, the residency is week-to-week in the case of a person who pays weekly rent and in all other cases month-to-month.

D. If the rental agreement provides for the charging of a late fee, and if the resident does not pay rent in accordance with the rental agreement, the owner may charge the resident a late fee in an amount not to exceed ten percent of the total rent payment for each rental period that the resident is in default. To assess a late fee, the owner shall provide notice of the late fee charged no later than the last day of the next rental period immediately following the period in which the default occurred.

E. An owner may not assess a fee from the resident for occupancy of the dwelling unit by a reasonable number of guests for a reasonable length of time. This shall not preclude charges for use of premises or facilities other than the dwelling unit by guests.

F. An owner may increase the rent payable by the resident in a month-to-month residency by providing written notice to the resident of the proposed increase at least thirty days prior to the periodic rental date specified in the rental agreement or, in the case of a fixed term residency, at least thirty days prior to the end of the term. In the case of a periodic residency of less than one month, written notice shall be provided at least one rental period in advance of the first rental payment to be increased.

G. Unless agreed upon in writing by the owner and the resident, a resident's payment of rent may not be allocated to any deposits or damages.

History: 1953 Comp., § 70-7-15, enacted by Laws 1975, ch. 38, § 15; 1995, ch. 195, § 6.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, inserted "the" preceding "case" in Subsection C, and added Subsections D to G.

Notice of late fees required. — Landlords failed to give notice of late fees in any month in which they claimed they intended to collect late fees; as such, the trial court did not err in ruling that the landlords were not entitled to collect late fees because they did not comply with the New Mexico Uniform Owner-Resident Relations Act. *Hedicke v. Gunville*, 2003-NMCA-032, 133 N.M. 335, 62 P.3d 1217, cert. denied, 133 N.M. 413, 63 P.3d 516.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 49 Am. Jur. 2d Landlord and Tenant § 711 et seq.

Inability to obtain license, permit, or charter required for tenant's business as defense to enforcement of lease, 89 A.L.R.3d 329.

52 C.J.S Landlord and Tenant §§ 534 to 546.

47-8-16. Waiver of rights prohibited.

No rental agreement may provide that the resident or owner agrees to waive or to forego rights or remedies under the law.

History: 1953 Comp., § 70-7-16, enacted by Laws 1975, ch. 38, § 16.

ANNOTATIONS

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

47-8-17. Unlawful agreement provision.

If an owner deliberately uses a rental agreement containing provisions known by him to be prohibited by law, the resident may recover damages sustained by him resulting from application of the illegal provision and reasonable attorney's fees.

History: 1953 Comp., § 70-7-17, enacted by Laws 1975, ch. 38, § 17.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Application of usury laws to transactions characterized as "leases," 94 A.L.R.3d 640.

51C C.J.S. Landlord and Tenant § 304.

47-8-18. Deposits.

A. An owner is permitted to demand from the resident a reasonable deposit to be applied by the owner to recover damages, if any, caused to the premises by the resident during his term of residency.

(1) Under the terms of an annual rental agreement, if the owner demands or receives of the resident such a deposit in an amount greater than one month's rent, the owner shall be required to pay to the resident annually an interest equal to the passbook interest permitted to savings and loan associations in this state by the federal home loan bank board on such deposit.

(2) Under the terms of a rental agreement of a duration less than one year, an owner shall not demand or receive from the resident such a deposit in an amount in excess of one month's rent.

B. It is not the intention of this section to include the last month's prepaid rent, which may be required by the rental agreement as a deposit as defined in Subsection D [E] of Section 47-8-3 NMSA 1978. Any deposit as defined in Paragraph (1) of Subsection A of this section shall not be construed as prepaid rent.

C. Upon termination of the residency, property or money held by the owner as deposits may be applied by the owner to the payment of rent and the amount of damages which the owner has suffered by reason of the resident's noncompliance with the rental agreement or Section 47-8-22 NMSA 1978. No deposit shall be retained to cover normal wear and tear. In the event actual cause exists for retaining any portion of the deposit, the owner shall provide the resident with an itemized written list of the deductions from the deposit and the balance of the deposit, if any, within thirty days of the date of termination of the rental agreement or resident departure, whichever is later. The owner is deemed to have complied with this section by mailing the statement and any payment required to the last known address of the resident. Nothing in this section shall preclude the owner from retaining portions of the deposit for nonpayment of rent or utilities, repair work or other legitimate damages.

D. If the owner fails to provide the resident with a written statement of deductions from the deposit and the balance shown by the statement to be due, within thirty days of the termination of the tenancy, the owner:

(1) shall forfeit the right to withhold any portion of the deposit;

(2) shall forfeit the right to assert any counterclaim in any action brought to recover that deposit;

(3) shall be liable to the resident for court costs and reasonable attorneys' fees; and

(4) shall forfeit the right to assert an independent action against the resident for damages to the rental property.

E. An owner who in bad faith retains a deposit in violation of this section is liable for a civil penalty in the amount of two hundred fifty dollars ($250) payable to the resident.

History: 1953 Comp., § 70-7-18, enacted by Laws 1975, ch. 38, § 18; 1985, ch. 146, § 2; 1989, ch. 340, § 2.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Subsection D of 47-8-3 NMSA 1978 was redesignated Subsection E by Laws 1999, ch. 99, § 1.

The 1989 amendment, effective June 16, 1989, in Subsection D, added Paragraph (4); and added Subsection E.

The 1985 amendment substituted "Section 47-8-3 NMSA 1978" for "Section 3 of the Uniform Owner-Resident Regulations Act" at the end of the first sentence and inserted "of Subsection A" following "Paragraph (1)" in the second sentence of Subsection B, substituted "Section 47-8-22 NMSA 1978" for "Section 22 of the Uniform Owner-Resident Relations Act" at the end of the first sentence, deleted the former second sentence, relating to delivering the balance of the deposit and prepaid rent to the resident, and added the second, third, and fourth sentences of Subsection C and deleted the former provisions of Subsection D which read as set out in the 1982 Replacement Pamphlet.

Duty to provide list of damages. — When the landlord failed to provide her tenant with an itemized list of damage deductions as required by Subsection C, she forfeited her right to withhold any portion of the deposit or to file suit for damages as provided by Subsection D, and the tenant was entitled to an award of attorney's fees. *Garcia v. Thong*, 1995-NMSC-030, 119 N.M. 704, 895 P.2d 226.

Itemization not required when deposit used to cover deficient rent. — A landlord was entitled to apply the security deposit to the tenant's deficient rent payment without sending a written itemization. *Bruce v. Attaway*, 1996-NMSC-030, 121 N.M. 755, 918 P.2d 341.

Unreasonable deposit. — The tenants' $50,000 was not a security deposit, and therefore there could be no interest due on it and no conversion as a matter of law; a deposit under the statute was required to be reasonable and most deposits were limited to one month's rent, or, if not, be somewhat greater, but not by a multiple of 32. *Hedicke v. Gunville*, 2003-NMCA-032, 133 N.M. 335, 62 P.3d 1217, cert. denied, 133 N.M. 413, 63 P.3d 516.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 49 Am. Jur. 2d Landlord and Tenant § 119 et seq.

Landlord and tenant: violation of statute or ordinance requiring landlord to furnish specified facilities or services as ground of liability for injury resulting from tenant's attempt to deal with deficiency, 63 A.L.R.4th 883.

Landlord-tenant security deposit legislation, 63 A.L.R.4th 901.

52 C.J.S. Landlord and Tenant §§ 472(1) to 476.

47-8-19. Owner disclosure.

A. The owner or any person authorized to enter into a rental agreement on his behalf shall disclose to the resident in writing at or before the commencement of the residency the name, address and telephone number of:

(1) the person authorized to manage the premises; and

(2) an owner of the premises or a person authorized to act for and on behalf of the owner for the purpose of service of process and for the purpose of receiving and receipting for notices and demands.

B. The information required to be furnished by this section shall be kept current, and this section extends to and is enforceable against any successor, owner or manager.

C. A person designated under Paragraph (2) of Subsection A of this section becomes an agent of each person who is an owner for the purpose of service of process and receiving and receipting for notices and demands. A person designated under Paragraph (1) of Subsection A of this section becomes an agent of each person who is an owner for the purpose of performing the obligations of the owner under the Uniform Owner-Resident Relations Act and under the rental agreement.

D. Failure of the owner to comply with this section shall relieve the resident from the obligation to provide notice to the owner as required by the Uniform Owner-Resident Relations Act.

History: 1953 Comp., § 70-7-19, enacted by Laws 1975, ch. 38, § 19; 1995, ch. 195, § 7.

ANNOTATIONS

Cross references. — For the Real Estate Disclosure Act, *see* 47-13-1 NMSA 1978.

The 1995 amendment, effective July 1, 1995, substituted "name, address and telephone number" for "name and address" in Subsection A, and added Subsection D.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 51C C.J.S. Landlord and Tenant § 307.

47-8-20. Obligations of owner.

A. The owner shall:

(1) substantially comply with requirements of the applicable minimum housing codes materially affecting health and safety;

(2) make repairs and do whatever is necessary to put and keep the premises in a safe condition as provided by applicable law and rules and regulations as provided in Section 47-8-23 NMSA 1978;

(3) keep common areas of the premises in a safe condition;

(4) maintain in good and safe working order and condition electrical, plumbing, sanitary, heating, ventilating, air conditioning and other facilities and appliances, including elevators, if any, supplied or required to be supplied by him;

(5) provide and maintain appropriate receptacles and conveniences for the removal of ashes, garbage, rubbish and other waste incidental to the occupancy of the dwelling unit and arrange for their removal from the appropriate receptacle; and

(6) supply running water and a reasonable amount of hot water at all times and reasonable heat, except where the building that includes the dwelling unit is not required by law to be equipped for that purpose or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the resident and supplied by a direct public utility connection.

B. If there exists a minimum housing code applicable to the premises, the owner's maximum duty under this section shall be determined by Paragraph (1) of Subsection A of this section. The obligations imposed by this section are not intended to change existing tort law in the state.

C. The owner and resident of a single family residence may agree that the resident perform the owner's duties specified in Paragraphs (5) and (6) of Subsection A of this section and also specified repairs, maintenance tasks, alterations and remodeling, but only if the transaction is in writing, for consideration, entered into in good faith and not for the purpose of evading the obligations of the owner.

D. The owner and resident of a dwelling unit other than a single family residence may agree that the resident is to perform specified repairs, maintenance tasks, alterations or remodeling only if:

(1) the agreement of the parties is entered into in good faith and not for the purpose of evading the obligations of the owner and is set forth in a separate writing signed by the parties and supported by consideration; and

(2) the agreement does not diminish or affect the obligation of the owner to other residents in the premises.

E. Notwithstanding any provision of this section, an owner may arrange with a resident to perform the obligations of the owner. Any such arrangement between the owner and the resident will not serve to diminish the owner's obligations as set forth in this section, nor shall the failure of the resident to perform the obligations of the owner serve as a basis for eviction or in any way be considered a material breach by the resident of his obligations under the Uniform Owner-Resident Relations Act or the rental agreement.

F. In multi-unit housing, if there is separate utility metering for each unit, the resident shall receive a copy of the utility bill for his unit upon request made to the owner or his agent. If the unit is submetered, the resident shall then be entitled to receive a copy of the apartment's utility bill. When utility bills for common areas are separately apportioned between units and the costs are passed on to the residents of each unit, each resident may, upon request, receive a copy of all utility bills being apportioned. The calculations used as the basis for apportioning the cost of utilities for common areas and submetered apartments shall be made available to any resident upon request. The portion of the common area cost that would be allocated to an empty unit if it were occupied shall not be allocated to the remaining residents. It is solely the owner's responsibility to supply the items and information in this subsection to the resident upon request. The owner may charge an administrative fee not to exceed five dollars ($5.00) for each monthly request of the items in this subsection.

G. The owner shall provide a written rental agreement to each resident prior to the beginning of occupancy.

History: 1953 Comp., § 70-7-20, enacted by Laws 1975, ch. 38, § 20; 1987, ch. 297, § 1; 1989, ch. 340, § 3; 1999, ch. 91, § 2.

ANNOTATIONS

The 1999 amendment, effective June 18, 1999, in Subsection F substituted "resident" for "tenant" in the next-to-last sentence and "five dollars ($5.00)" for "two dollars ($2.00)" in the last sentence; and substituted "resident" for "tenant" in Subsection G.

The 1989 amendment, effective June 16, 1989, added Subsection G.

The 1987 amendment, effective June 19, 1987, substituted "Section 47-8-23 NMSA 1978" for "Section 23 of the Uniform Owner-Resident Relations Act" in Subsection A(2) and added Subsection F.

Loss of use damages are available for reparable property, but not for completely destroyed property. *Behrens v. Gateway Court, L.L.C.*, 2013-NMCA-097, cert. granted, 2013-NMCERT-009.

Loss of use damages are not available for completely destroyed property. — Where plaintiff rented a mobile home unit from defendant; a fire destroyed the mobile home and its contents; and the fire was caused by an electrical short in the wiring of an old air conditioner that had been left under the porch of the mobile home when defendant installed a new air conditioner in the mobile home, plaintiff was not entitled to loss of use damages for plaintiff's completely destroyed property. *Behrens v. Gateway Court, L.L.C.*, 2013-NMCA-097, cert. granted, 2013-NMCERT-009.

Owners required to supply heat, unless specific legal objection. — The legislature intended to require owners to provide reasonable heat, unless they could show some specific law exempting them from the requirement. *T.W.I.W., Inc. v. Rhudy*, 1981-NMSC-062, 96 N.M. 354, 630 P.2d 753.

Subsection (A)(6) places burden upon owner to show that a law exists which exempts him from providing reasonable heat for the resident. *T.W.I.W., Inc. v. Rhudy*, 1981-NMSC-062, 96 N.M. 354, 630 P.2d 753.

Loose dogs as unsafe condition. — Under the right circumstances, dogs roaming loose upon the common grounds of a government-operated residential complex could represent an unsafe condition. *Castillo v. County of Santa Fe*, 1988-NMSC-037, 107 N.M. 204, 755 P.2d 48.

Unsafe condition of common area. — Where a child went through a hole in the fence around his apartment complex playground and was struck by a car and killed, the landlord, who undertook to provide a playground for children in a potentially hazardous area, was under a legal obligation to maintain the playground in a reasonably safe condition, so that children playing on the playground would be unable to escape from the playground and potentially be injured beyond its confines. *Calkins v. Cox Estates*, 1990-NMSC-044, 110 N.M. 59, 792 P.2d 36.

No right to complain about neighbors. — Section 47-8-39A(3) NMSA 1978 does not bar an owner's otherwise proper action for possession of the premises after termination

of a month-to-month residency, where the owner is retaliating against the resident for complaining about noisy neighbors. *Casa Blanca Mobile Home Park v. Hill*, 1998-NMCA-094, 125 N.M. 465, 963 P.2d 542.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

For annual survey of New Mexico law relating to property, see 13 N.M.L. Rev. 435 (1983).

For survey of 1990-91 tort law, see 22 N.M.L. Rev. 799 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Failure of landlord to make, or permit tenant to make, repairs or alterations required by public authority as constructive eviction, 86 A.L.R.3d 352.

Measure of damages for landlord's breach of implied warranty of habitability, 1 A.L.R.4th 1182.

Liability of owner or occupant of premises to fireman coming thereon in discharge of his duty, 11 A.L.R.4th 597.

Applicability of exculpatory clause in lease to lessee's damages resulting from defective original design or construction, 30 A.L.R.4th 971.

Strict liability of landlord for injury or death of tenant or third person caused by defect in premises leased for residential use, 48 A.L.R.4th 638.

Legal aspects of speed bumps, 60 A.L.R.4th 1249.

Liability of landlord for injury or death occasioned by swimming pool maintained for tenants, 62 A.L.R.5th 475.

47-8-21. Relief of owner liability.

A. Unless otherwise agreed, upon termination of the owner's interest in the dwelling unit, including but not limited to terminations of interest by sale, assignment, death, bankruptcy, appointment of receiver or otherwise, the owner is relieved of all liability under the rental agreement and of all obligations under the Uniform Owner-Resident Relations Act as to events occurring subsequent to written notice to the resident of the termination of the owner's interest. The successor in interest to the owner shall be liable for all obligations under the rental agreement or under the Uniform Owner-Resident Relations Act. Upon receipt by the resident of written notice of the termination of the owner's interest in the dwelling unit, the resident shall pay all future rental payments, when due, to the successor in interest to the owner.

B. Unless otherwise agreed, a manager of premises that include a dwelling unit is relieved of liability under the rental agreement and the Uniform Owner-Resident Relations Act as to events occurring after written notice to the resident of the termination of his management.

History: 1953 Comp., § 70-7-21, enacted by Laws 1975, ch. 38, § 21.

ANNOTATIONS

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

47-8-22. Obligations of resident.

The resident shall:

A. comply with obligations imposed upon residents by applicable minimum standards of housing codes materially affecting health or safety;

B. keep that part of the premises that he occupies and uses as clean and safe as the condition of the premises permit, and, upon termination of the residency, place the dwelling unit in as clean condition, excepting ordinary wear and tear, as when residency commenced;

C. dispose from his dwelling unit all ashes, rubbish, garbage and other waste in a clean and safe manner;

D. keep all plumbing fixtures in the dwelling unit or used by the resident as clean as their condition permits;

E. use in a reasonable manner all electrical, plumbing, sanitary, heating, ventilation, air conditioning and other facilities and appliances including elevators, if any, in the premises;

F. not deliberately or negligently destroy, deface, damage, impair or remove any part of the premises or knowingly permit any person to do so;

G. conduct himself and require other persons on the premises with his consent to conduct themselves in a manner that will not disturb his neighbors' peaceful enjoyment of the premises;

H. abide by all bylaws, covenants, rules or regulations of any applicable condominium regime, cooperative housing agreement or neighborhood association not inconsistent with owner's rights or duties; and

I. not knowingly commit or consent to any other person knowingly committing a substantial violation.

History: 1953 Comp., § 70-7-22, enacted by Laws 1975, ch. 38, § 22; 1995, ch. 195, § 8.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, added Subsection I and made minor stylistic changes throughout the section.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 49 Am. Jur. 2d Landlord and Tenant §§ 507, 538 et seq.

Liability of lessee to persons injured by defects in premises or property after surrender of possession by lessee, 11 A.L.R.4th 579.

Liability of owner or occupant of premises to fireman coming thereon in discharge of his duty, 11 A.L.R.4th 597.

Measure and elements of Damages for Lessee's breach of covenant as to repairs, 45 A.L.R.5th 251.

51C C.J.S. Landlord and Tenant §§ 235 to 243.

47-8-23. Application of rules or regulations.

An owner, from time to time, may adopt rules or regulations, however described, concerning the resident's use and occupancy of the premises. They are enforceable as provided in Section 47-8-33 NMSA 1978 against the resident only if:

A. their purpose is to promote the appearance, convenience, safety or welfare of the residents in the premises, preserve the owner's property from abusive use or make a fair distribution of services and facilities held out for the residents generally;

B. they are reasonably related to the purpose for which they are adopted;

C. they apply to all residents in the premises in a fair manner;

D. they are sufficiently explicit in their prohibition, direction or limitation of the resident's conduct to fairly inform him of what he must or must not do to comply;

E. they are not for the purpose of evading the obligations of the owner; and

F. the resident is presented with copies of existing rules and regulations at the time he enters into the rental agreement and is presented notice of amendments to the rules and regulations and rules and regulations adopted subsequent to the time he enters into the rental agreement. A rule or regulation adopted after the resident enters into the rental agreement is enforceable against the resident if reasonable notice of its adoption is given to the resident and it does not work a substantial modification of his bargain.

History: 1953 Comp., § 70-7-23, enacted by Laws 1975, ch. 38, § 23; 1995, ch. 195, § 9.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, made minor stylistic changes throughout the section.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 49 Am. Jur. 2d Landlord and Tenant §§ 507, 538 et seq.

51C C.J.S. Landlord and Tenant §§ 235 to 243.

47-8-24. Right of entry.

A. The resident shall, in accordance with provisions of the rental agreement and notice provisions as provided in this section, consent to the owner to enter into the dwelling unit in order to inspect the premises, make necessary or agreed repairs, decorations, alterations or improvements, supply necessary or agreed services or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, prospective residents, workmen or contractors; provided that:

(1) unless otherwise agreed upon by the owner and resident, the owner may enter the resident's dwelling unit pursuant to this subsection only after giving the resident twenty-four hours written notification of his intent to enter, the purpose for entry and the date and reasonable estimate of the time frame of the entry;

(2) this subsection is not applicable to entry by the owner to perform repairs or services within seven days of a request by the resident or when the owner is accompanied by a public official conducting an inspection or a cable television, electric, gas or telephone company representative; and

(3) where the resident gives reasonable prior notice and alternate times or dates for entry and it is practicable or will not result in economic detriment to the owner, then the owner shall attempt to reasonably accommodate the alternate time of entry.

B. The owner may enter the dwelling unit without consent of the resident in case of an emergency.

C. The owner shall not abuse the right of access.

D. The owner has no other right of access except by court order, as permitted by this section if the resident has abandoned or surrendered the premises or if the resident has been absent from the premises more than seven days, as permitted in Section 47-8-34 NMSA 1978.

E. If the resident refuses to allow lawful access, the owner may obtain injunctive relief to compel access or terminate the rental agreement. In either case, the owner may recover damages.

F. If the owner makes an unlawful entry, or a lawful entry in an unreasonable manner, or makes repeated demands for entry that are otherwise lawful but that have the effect of unreasonably interfering with the resident's quiet enjoyment of the dwelling unit, the resident may obtain injunctive relief to prevent the recurrence of the conduct or terminate the rental agreement. In either case, the resident may recover damages.

History: 1953 Comp., § 70-7-24, enacted by Laws 1975, ch. 38, § 24; 1995, ch. 195, § 10.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, in Subsection A, inserted "and notice provisions as provided in this section" near the beginning, substituted "; provided that:" for a period at the end of the introductory paragraph, added Paragraphs (1) to (3); in Subsection D, added "or if the resident has been absent from the premises more than seven days, as permitted in Section 47-8-34 NMSA 1978" at the end and made minor stylistic changes; and added Subsections E and F.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 51C C.J.S. Landlord and Tenant § 318.

47-8-25. Use of dwelling unit limited.

Unless otherwise agreed, the resident shall occupy his dwelling unit only as a dwelling unit and in compliance with terms and conditions of the rental agreement. The rental agreement may require that the resident notify the owner of any anticipated extended absence from the premises in excess of seven days no later than the first day of the extended absence.

History: 1953 Comp., § 70-7-25, enacted by Laws 1975, ch. 38, § 25.

ANNOTATIONS

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Provision in lease as to purpose for which premises are to be used, as excluding use for other purpose, 148 A.L.R. 583.

51C C.J.S. Landlord and Tenant § 327.

47-8-26. Delivery of possession.

A. At the time specified in the rental agreement for the commencement of occupancy, the owner shall deliver possession of the premises to the resident in compliance with the rental agreement and Section 47-8-20 NMSA 1978. The owner may bring an action for possession against the resident or any person wrongfully in possession and may recover the damages provided in Subsection F of Section 47-8-33 NMSA 1978.

B. If the owner fails to deliver possession of the premises to the prospective resident as provided in Subsection A of this section, one hundred percent of the rent abates until possession is delivered and the prospective resident may:

(1) upon written notice to the owner, terminate the rental agreement effective immediately. Upon termination the owner shall return all prepaid rent and deposits; or

(2) demand performance of the rental agreement by the owner and, if the prospective resident elects, maintain an action for possession of the premises against any person wrongfully withholding possession and recover the damages sustained by him and seek the remedies provided in Section 47-8-48 NMSA 1978.

C. If the owner makes reasonable efforts to obtain possession of the premises and returns prepaid rents, deposits and fees within seven days of receiving a prospective resident's notice of termination, the owner shall not be liable for damages under this section.

History: 1953 Comp., § 70-7-26, enacted by Laws 1975, ch. 38, § 26; 1999, ch. 91, § 3.

ANNOTATIONS

The 1999 amendment, effective June 18, 1999, added the Subsection A designation and substituted "At the time specified in the rental agreement for the commencement of occupancy" for "At the commencement of the rental period as specified in the rental agreement", deleted the former last sentence, which read "If the owner makes reasonable efforts to obtain possession of the premises, he shall not be liable for an

action under this section"; added Subsections B and C; and updated statutory references.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Implied covenant or obligation to provide lessee with actual possession, 96 A.L.R.3d 1155.

What constitutes willfulness or malice justifying landlord's collection of statutory multiple damages for tenant's wrongful retention of possession, 7 A.L.R.4th 589.

What constitutes tenant's holding over of leased premises, 13 A.L.R.5th 169.

51C C.J.S. Landlord and Tenant §§ 308 to 310.

47-8-27. Repealed.

ANNOTATIONS

Repeals. — Laws 1995, ch. 195, § 27, repealed 47-8-27 NMSA 1978, as enacted by Laws 1975, ch. 38, § 27, relating to noncompliance by the owner to rental agreement or matters affecting health and safety, effective July 1, 1995. For provisions of former section, *see* the 1994 NMSA 1978 on *NMOneSource.com.*

47-8-27.1. Breach of agreement by owner and relief by resident.

A. Upon the failure of the owner to perform his obligations as required by Section 47-8-20 NMSA 1978, the resident shall give written notice to the owner specifying the breach and:

(1) if there is a material noncompliance by the owner with the rental agreement or a noncompliance with the Uniform Owner-Resident Relations Act materially affecting health and safety, the resident shall deliver a written notice to the owner specifying the acts and omissions constituting the breach. The notice shall state that the rental agreement will terminate upon a date not less than seven days after receipt of the notice if a reasonable attempt to remedy the breach is not made in seven days, and the rental agreement shall terminate as provided in the notice. If the owner makes a reasonable attempt to adequately remedy the breach prior to the date specified in the notice, the rental agreement shall not terminate. If the rental agreement is terminated by the resident and possession restored to the owner, the owner shall return the balance, if any, of prepaid rent and deposit to which the resident is entitled pursuant to the rental agreement or Section 47-8-18 NMSA 1978; or

(2) the resident may be entitled to abatement of the rent as provided in Section 47-8-27.2 NMSA 1978.

B. The rights provided under this section do not arise if the condition was caused by the deliberate or negligent act or omission of the resident, a member of his family or other person on the premises with his consent. If the noncompliance with the rental agreement or with Section 47-8-20 NMSA 1978 results solely from circumstances beyond the owner's control, the resident is entitled only to those remedies set forth in Paragraph (1) or (2) of this subsection and is not entitled to an action for damages or injunctive relief against the owner.

C. The resident may also recover damages and obtain injunctive relief for any material noncompliance by the owner with the rental agreement or the provisions of Section 47-8-20 NMSA 1978. The remedy provided in this subsection is in addition to any right of the resident arising under Subsection A of this section.

D. If the resident proceeds under Paragraph (1) of Subsection A of this section, he shall not proceed under Paragraph (2) of Subsection A of this section in the same rental period for the same violation. If the resident proceeds under Paragraph (2) of Subsection A of this section, he shall not proceed under Paragraph (1) of Subsection A of this section in the same rental period for the same violation. A resident may, however, proceed under another paragraph of Subsection A of this section for a subsequent violation or the same violation that occurs in subsequent rental periods.

E. When the last day for remedying any breach pursuant to the written notice required under the Uniform Owner-Resident Relations Act occurs on a weekend or federal holiday, the period to remedy shall be extended until the next day that is not a weekend or federal holiday.

History: 1978 Comp., § 47-8-27.1, enacted by Laws 1995, ch. 195, § 11.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 195, § 28 made Laws 1995, ch. 195, § 11 effective July 1, 1995.

47-8-27.2. Abatement.

A. If there is a violation of Subsection A of Section 47-8-20 NMSA 1978, other than a failure or defect in an amenity, the resident shall give written notice to the owner of the conditions needing repair. If the owner does not remedy the conditions set out in the notice within seven days of the notice, the resident is entitled to abate rent as set forth below:

(1) one-third of the pro-rata daily rent for each day from the date the resident notified the owner of the conditions needing repair, through the day the conditions in the notice are remedied. If the conditions complained of continue to exist without remedy through any portion of a subsequent rental period, the resident may abate at the same rate for each day that the conditions are not remedied; and

(2) one hundred percent of the rent for each day from the date the resident notified the owner of the conditions needing repair until the date the breach is cured if the dwelling is uninhabitable and the resident does not inhabit the dwelling unit as a result of the condition.

B. For each rental period in which there is a violation under Subsection A of this section, the resident may abate the rent or may choose an alternate remedy in accordance with the Uniform Owner-Resident Relations Act. The choice of one remedy shall not preclude the use of an alternate remedy for the same violation in a subsequent rental period.

C. If the resident's rent is subsidized in whole or in part by a government agency, the abatement limitation of one month's rent shall mean the total monthly rent paid for the dwelling and not the portion of the rent that the resident alone pays. Where there is a third party payor, either the payor or the resident may authorize the remedy and may abate rent payments as provided in this section.

D. Nothing in this section shall limit a court in its discretion to apply equitable abatement.

E. Nothing in this section shall entitle the resident to abate rent for the unavailability of an amenity.

History: 1978 Comp., § 47-8-27.2, enacted by Laws 1995, ch. 195, § 12; 1999, ch. 91, § 4.

ANNOTATIONS

The 1999 amendment, effective June 18, 1999, in Subsection A in the first sentence inserted "other than a failure or defect in an amenity" and updated a statutory reference and in the second sentence inserted "set out in the notice within seven days of the notice"; and added Subsection E.

Tenant was not entitled to abatement for repairs. — Where, in 2017, tenant and landlord entered into a lease agreement that specified that rent was $450 and was due the first day of each month and that landlord would assess a $50 fee to rent paid more than three days late, that tenant would pay a $400 security deposit, and that landlord would make all necessary repairs to the common areas of the building, and where, in 2018, landlord asked tenant to begin paying $10 a month for water, to which tenant agreed, and where, months later, tenant withheld $40 from his rent after reviewing his lease and discovering that there was no written obligation for him to pay for water, and where, the following day, landlord delivered a notice of nonpayment requiring tenant to pay $450 in rent plus a late fee of $50 for a total of $500, and where landlord filed a petition for restitution three days after the notice of nonpayment was delivered, and where tenant counterclaimed that he was entitled to abatement of his rent for repairs not made, the district court did not err in determining that tenant was not entitled to

abatement for repairs, because tenant did not give landlord any written notice of the needed repairs until the notice of nonpayment was delivered and did not ask for any abatement or reimbursement in writing. The Uniform Owner Resident Relations Act, 47-8-1 to 47-8-51 NMSA 1978, requires written notice of conditions needing repair and the passage of seven days before a resident can withhold rent. *Cheng v. Rabey*, 2023-NMCA-013.

Abatement not allowed. — Tenants were not entitled to abate rent where the tenants were living on the premises continuously until the fire and the premises were not uninhabitable for any of the 17 months the tenants had not paid rent; moreover, the trial court did not err in granting a directed verdict on the claim of retaliation because there was no issue of retaliation in response to rent abatement if there was no right to abate. *Hedicke v. Gunville*, 2003-NMCA-032, 133 N.M. 335, 62 P.3d 1217, cert. denied, 133 N.M. 413, 63 P.3d 516.

47-8-28. Repealed.

ANNOTATIONS

Repeals. — Laws 1999, ch. 91, § 8 repealed 47-8-28 NMSA 1978, as enacted by Laws 1975, ch. 38, § 28, relating to failure to deliver possession of premises, effective June 18, 1999. For provisions of former section, *see* the 1998 NMSA 1978 on *NMOneSource.com.* For present comparable provisions, *see* 47-8-26 NMSA 1978.

47-8-29. Repealed.

ANNOTATIONS

Repeals. — Laws 1995, ch. 195, § 27, repealed 47-8-29 NMSA 1978, as enacted by Laws 1975, ch. 38, § 29, relating to resident rights in event of breach by owner, effective July 1, 1995. For provisions of former section, *see* the 1994 NMSA 1978 on *NMOneSource.com.*

47-8-30. Action for counterclaim for resident.

A. In an action for possession based upon nonpayment of rent or in an action for rent where the resident is in possession, the resident may counterclaim for any amount which he may recover under the rental agreement or the Uniform Owner-Resident Relations Act, providing that the resident shall be responsible for payment to the owner of the rent specified in the rental agreement during his period of possession. Judgment shall be entered in accordance with the facts of the case.

B. If the defense or counterclaim by the resident is without merit and is not raised in good faith, the owner may recover reasonable attorney's fees and his court costs.

C. If the action or reply to the counterclaim is without merit and is not in good faith, the resident may recover reasonable attorney's fees and his court costs.

History: 1953 Comp., § 70-7-30, enacted by Laws 1975, ch. 38, § 30.

ANNOTATIONS

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Setoff or counterclaim in action by tenant against landlord for restitution under Federal Housing and Rent Act of 1947 and amendments, 10 A.L.R.2d 249.

Rights and remedies of tenant upon landlord's breach of covenant to repair, 28 A.L.R.2d 446.

Respective rights in excess rent when landlord relets at higher rent during lessee's term, 50 A.L.R.4th 403.

47-8-31. Resident rights following fire or casualty.

A. If the dwelling unit or premises are damaged or destroyed by fire or casualty to an extent that enjoyment of the dwelling unit is substantially impaired, the resident may:

(1) vacate the premises and notify the owner in writing within seven days thereafter of his intention to terminate the rental agreement, in which case the rental agreement terminates as of the date of vacating; or

(2) if continued occupancy is lawful, vacate any part of the dwelling unit rendered unusable by the fire or casualty, in which case the resident's liability for rent is reduced in proportion to the diminution in the fair rental value of the dwelling unit.

B. If the rental agreement is terminated, the owner shall return the balance, if any, [of] prepaid rent and deposits recoverable under Section 18 [47-8-18 NMSA 1978] of the Uniform Owner-Resident Relations Act. Accounting for rent, in the event of termination or apportionment, is to occur as of the date of the vacation. Notwithstanding the provisions of this section, the resident is responsible for damage caused by his negligence.

History: 1953 Comp., § 70-7-31, enacted by Laws 1975, ch. 38, § 31.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 49 Am. Jur. 2d Landlord and Tenant § 759 et seq.

Condition of premises within the contemplation of provision of lease or statute for cessation of rent or termination of lease in event of destruction of or damage to property as result of fire, 118 A.L.R. 106, 61 A.L.R.2d 1445.

Modern status of rule as to tenant's rent liability after injury to or destruction of demised premises, 99 A.L.R.3d 738.

Liability of owner or occupant of premises to fireman coming thereon in discharge of his duty, 11 A.L.R.4th 597.

52A C.J.S. Landlord and Tenant § 991.

47-8-32. Repealed.

ANNOTATIONS

Repeals. — Laws 1995, ch. 195, § 27, repealed 47-8-32 NMSA 1978, as enacted by Laws 1975, ch. 38, § 32, relating to unlawful removal and penalty to owner, effective July 1, 1995. For provisions of former section, *see* the 1994 NMSA 1978 on *NMOneSource.com.*

47-8-33. Breach of agreement by resident and relief by owner.

A. Except as provided in the Uniform Owner-Resident Relations Act, if there is noncompliance with Section 47-8-22 NMSA 1978 materially affecting health and safety or upon the initial material noncompliance by the resident with the rental agreement or any separate agreement, the owner shall deliver a written notice to the resident specifying the acts and omissions constituting the breach, including the dates and specific facts describing the nature of the alleged breach, and stating that the rental agreement will terminate upon a date not less than seven days after receipt of the notice if the breach is not remedied in seven days.

B. Upon the second material noncompliance with the rental agreement or any separate agreement by the resident, within six months of the initial breach, the owner shall deliver a written notice to the resident specifying the acts and omissions constituting the breach, including the dates and specific facts describing the nature of the alleged breach, and stating that the rental agreement shall terminate upon a date not less than seven days after receipt of the notice. If the subsequent breach occurs more than six months after the initial breach, it shall constitute an initial breach for purposes of applying the provisions of this section.

C. The initial notice provided in this section shall state that the rental agreement will terminate upon the second material noncompliance with the rental agreement or any separate agreement by the resident, within six months of the initial breach. To be effective, any notice pursuant to this subsection shall be given within thirty days of the breach or knowledge thereof.

D. If rent is unpaid when due and the resident fails to pay rent within three days after written notice from the owner of nonpayment and his intention to terminate the rental agreement, the owner may terminate the rental agreement and the resident shall immediately deliver possession of the dwelling unit; provided that tender of the full amount due, in the manner stated in the notice, prior to the expiration of the three-day notice shall bar any action for nonpayment of rent.

E. In any court action for possession for nonpayment of rent or other charges where the resident disputes the amount owed because:

(1) the resident has abated rent pursuant to Section 47-8-27.2 or 47-8-4 NMSA 1978; or

(2) the owner has allocated rent paid by the resident as payment for damages to the premises, then, if the owner is the prevailing party, the court shall enter a writ of restitution conditioned upon the right of the resident to remedy within three days of entry of judgment. If the resident has satisfied the judgment within three days, the writ shall be dismissed. If the resident has not satisfied the judgment within three days, the owner may execute upon the writ without further order of the court.

F. Except as provided in the Uniform Owner-Resident Relations Act, the owner may recover damages and obtain injunctive or other relief for any noncompliance by the resident with the rental agreement or this section or Section 47-8-22 NMSA 1978.

G. In a judicial action to enforce a remedy for which prior written notice is required, relief may be granted based only upon the grounds set forth in the written notice served; provided, however, that this shall not bar a defendant from raising any and all defenses or counterclaims for which written notice is not otherwise required by the Uniform Owner-Resident Relations Act.

H. When the last day for remedying any breach pursuant to written notice required under the Uniform Owner-Resident Relations Act occurs on a weekend or federal holiday, the period to remedy shall be extended until the next day that is not a weekend or federal holiday.

I. If the resident knowingly commits or consents to another person in the dwelling unit or on the premises knowingly committing a substantial violation, the owner shall deliver a written notice to the resident specifying the time, place and nature of the act constituting the substantial violation and that the rental agreement will terminate upon a date not less than three days after receipt of the notice.

J. In any action for possession under Subsection I of this section, it shall be a defense that the resident is a victim of domestic violence. If the resident has filed for or secured a temporary domestic violence restraining order as a result of the incident that is the basis for the termination notice or as a result of a prior incident, the writ of restitution shall not issue. In all other cases where domestic violence is raised as a defense, the court shall have the discretion to evict the resident accused of the violation, while allowing the tenancy of the remainder of the residents to continue undisturbed.

K. In any action for possession under Subsection I of this section, it shall be a defense that the resident did not know of, and could not have reasonably known of or prevented, the commission of a substantial violation by any other person in the dwelling unit or on the premises.

L. In an action for possession under Subsection I of this section, it shall be a defense that the resident took reasonable and lawful actions in defense of himself, others or his property.

M. In any action for possession under Subsection I of this section, if the court finds that the action was frivolous or brought in bad faith, the petitioner shall be subject to a civil penalty equal to two times the amount of the monthly rent, plus damages and costs.

History: 1953 Comp., § 70-7-33, enacted by Laws 1975, ch. 38, § 33; 1977, ch. 130, § 1; 1995, ch. 195, § 14; 1999, ch. 91, § 5.

ANNOTATIONS

The 1999 amendment, effective June 18, 1999, substituted "the Uniform Owner-Resident Relations Act" for "this Act" in Subsection H; added present Subsection L, redesignating the subsequent subsection accordingly; and made minor stylistic changes.

The 1995 amendment, effective July 1, 1995, redesignated a former part of Subsection A as Subsection B, inserted "including the dates and specific facts describing the nature of the alleged breach" and "stating" in Subsections A and B, substituted "more than six months" for "six months" in Subsection B, added Subsection C, redesignated former Subsection B as Subsection D, added the last part in Subsection D beginning "provided that tender", added Subsection E, redesignated former Subsection C as Subsection F, deleted "If the resident's noncompliance is willful, the owner may recover reasonable attorney's fees and his court costs." from the end in Subsection F, added Subsections G to L, and made minor stylistic changes throughout the section.

Section 8 housing agreement. — Where the tenant rented a residential property from the landlord pursuant to the federal Section 8 housing program which paid the majority of the tenant’s rent; in addition to rent, the lease required the tenant to pay a security deposit; the lease permitted the landlord to terminate the lease during the first year’s term if the tenant committed a serious violation of the lease; the tenant failed to pay the

full amount of the security deposit on the first day of the term; the tenant failed to pay rent for July and August on the first day of the month as required by the lease because the tenant did not receive public assistance checks for July and August until after the first day of the month; the tenant mailed rent payments for July and August when the tenant received the public assistance checks; the lease did not specify any date when the security deposit was due or whether partial payments could be made; the amount of the security deposit exceeded the amount of monthly rent contrary to the express terms of the lease; the failure to pay the security deposit on the first day of the term did not have a materially adverse effect on the landlord; and by October 2009, the tenant had fully paid the security deposit and was current on all monthly rent payments, tenant's late payments of rent and the security deposit did not constitute a serious violation of the lease. *Serna v. Gutierrez*, 2013-NMCA-026, 297 P.3d 1238.

Petition for restitution filed prematurely. — Where, in 2017, tenant and landlord entered into a lease agreement that specified that rent was $450 and was due the first day of each month and that landlord would assess a $50 fee to rent paid more than three days late, that tenant would pay a $400 security deposit, and that landlord would make all necessary repairs to the common areas of the building, and where, in 2018, landlord asked tenant to begin paying $10 a month for water, to which tenant agreed, and where, months later, tenant withheld $40 from his rent after reviewing his lease and discovering that there was no written obligation for him to pay for water, and where, the following day, landlord delivered a notice of nonpayment requiring tenant to pay $450 in rent plus a late fee of $50 for a total of $500, and where landlord filed a petition for restitution three days after the notice of nonpayment was delivered, and where tenant argued that landlord filed his petition for restitution prematurely because the three-day notice period had not elapsed at the time of filing, the landlord's petition should have been dismissed as untimely filed, because an owner cannot file a petition for restitution or otherwise terminate the rental agreement and seek possession of the premises until the day following the third day. Allowing an owner to file before the third day has elapsed would defeat the remedial purpose of Subsection D of this section. *Cheng v. Rabey*, 2023-NMCA-013.

Landlord and tenant orally modified the lease to include water payments. — Where, in 2017, tenant and landlord entered into a lease agreement that specified that rent was $450 and was due the first day of each month and that landlord would assess a $50 fee to rent paid more than three days late, that tenant would pay a $400 security deposit, and that landlord would make all necessary repairs to the common areas of the building, and where, in 2018, landlord asked tenant to begin paying $10 a month for water, to which tenant agreed, and where, months later, tenant withheld $40 from his rent after reviewing his lease and discovering that there was no written obligation for him to pay for water, and where, the following day, landlord delivered a notice of nonpayment requiring tenant to pay $450 in rent plus a late fee of $50 for a total of $500, and where landlord filed a petition for restitution three days after the notice of nonpayment was delivered, and where tenant argued that because the lease was silent as to who pays for water, landlord retained the obligation to pay for water, the district court did not err in denying tenant's requested offset for water, because the parties

conduct clearly demonstrated an oral modification of the lease agreement requiring tenant to pay for water. In the absence of a prohibiting statute, a written agreement which specifies it may only be amended in writing may nevertheless be changed by the parties' words or conduct that signify an intention to change the prior agreement. *Cheng v. Rabey*, 2023-NMCA-013.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 49 Am. Jur. 2d Landlord and Tenant § 228 et seq.

What constitutes willfulness or malice justifying landlord's collection of statutory multiple damages for tenant's wrongful retention of possession, 7 A.L.R.4th 589.

Right to exercise option to renew or extend lease as affected by tenant's breach of other covenants or conditions, 23 A.L.R.4th 908.

Children's day-care use as violation of restrictive covenant, 29 A.L.R.4th 730.

Express or implied restriction on lessee's use of residential property for business purposes, 46 A.L.R.4th 496.

Commercial leases: application of rule that lease may be canceled only for "material" breach, 54 A.L.R.4th 595.

Provision in lease as to purpose for which premises are to be used as excluding other uses, 86 A.L.R.4th 259.

51C C.J.S. Landlord and Tenant §§ 250(1) to 250(3).

47-8-34. Notice of extended absence.

A. If the rental agreement requires the resident to give notice to the owner of an anticipated extended absence in excess of seven days as required in Subsection A of Section 3 [47-8-3 NMSA 1978] of the Uniform Owner-Resident Relations Act and the resident willfully fails to do so, the owner may recover damages from the resident.

B. During any absence of the resident in excess of seven days, the owner may enter the dwelling unit at times reasonably necessary.

C. If the resident abandons the dwelling unit as defined in Subsection A of Section 3 of the Uniform Owner-Resident Relations Act, the owner shall be entitled to take immediate possession of the dwelling unit. The owner shall, in such cases, be responsible for the removing and storing of the personal property for such periods as are provided by law. Upon abandonment, the owner may make reasonable efforts to

rent the dwelling unit and premises at a fair rental. If the owner rents the dwelling unit for a term beginning prior to the expiration of the rental agreement, it is deemed to be terminated as of the date the new tenancy begins.

History: 1953 Comp., § 70-7-34, enacted by Laws 1975, ch. 38, § 34.

ANNOTATIONS

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — What constitutes abandonment of residential or commercial lease - modern cases, 84 A.L.R.4th 183.

47-8-34.1. Disposition of property left on the premises.

A. Where the rental agreement terminates by abandonment pursuant to Section 47-8-34 NMSA 1978:

(1) the owner shall store all personal property of the resident left on the premises for not less than thirty days;

(2) the owner shall serve the resident with written notice stating the owner's intent to dispose of the personal property on a date not less than thirty days from the date of the notice. The notice shall also contain a telephone number and address where the resident can reasonably contact the owner to retrieve the property prior to the disposition date in the notice;

(3) the notice of intent to dispose of personal property shall be personally delivered to the resident or be sent by first class mail, postage prepaid, to the resident at his last known address. If the notice is returned as undeliverable, or where the resident's last known address is the vacated dwelling unit, the owner shall also serve at least one notice to such other address as has been provided to the owner by the resident, including the address of the resident's place of employment, or of a family member or emergency contact for which the owner has a record;

(4) the resident may contact the owner to retrieve the property at any time prior to the date specified in the notice for disposition of the property;

(5) the owner shall provide reasonable access and adequate opportunities for the resident to retrieve all of the property stored prior to any disposition; and

(6) if the resident does not claim or make attempt to retrieve the stored personal property prior to the date specified in the notice of disposition of the property, the owner may dispose of the stored personal property.

B. Where the rental agreement terminates by the resident's voluntary surrender of the premises, the owner shall store any personal property on the premises for a minimum of fourteen days from the date of surrender of the premises. The owner shall provide reasonable access to the resident for the purpose of the resident obtaining possession of the personal property stored. If after fourteen days from surrender of the premises, the resident has not retrieved all the stored personal property, the owner may dispose of the stored personal property.

C. Where the rental agreement terminates by a writ of restitution, the owner shall have no obligation to store any personal property left on the premises after three days following execution of writ of restitution, unless otherwise agreed by the owner and resident. The owner may thereafter dispose of the personal property in any manner without further notice or liability.

D. Where the property has a market value of less than one hundred dollars ($100), the owner has the right to dispose of the property in any manner.

E. Where the property has a market value of more than one hundred dollars ($100), the owner may:

(1) sell the personal property under any provisions herein, and the proceeds of the sale, if in excess of money due and owing to the owner, shall be mailed to the resident at his last known address along with an itemized statement of the amounts received and amounts allocated to other costs, within fifteen days of the sale; or

(2) retain the property for his own use or the use of others, in which case the owner shall credit the account of the resident for the fair market value of the property against any money due and owing to the owner, and any value in excess of money due and owing shall be mailed to the resident at his last known address along with an itemized statement of the value allocated to the property and the amount allocated to costs within fifteen days of the retention of the property.

F. If the last known address is the dwelling unit, the owner shall also mail at least one copy of the accounting and notice of the sums for distribution, to the other address, if provided to the owner by the resident, such as, place of employment, family members, or emergency contact on record with the owner.

G. An owner may charge the resident reasonable storage fees for any time that the owner provided storage for the resident's personal property and the prevailing rate of moving fees. The owner may require payment of storage and moving costs prior to the release of the property.

H. The owner may not hold the property for any other debts claimed due or owning or for judgments for which an application for writ of execution has not previously been filed. The owner may not retain exempt property where an application for a writ of execution has been granted.

History: 1978 Comp., § 47-8-34.1, enacted by Laws 1995, ch. 195, § 15.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 195, § 28 made Laws 1995, ch. 195, § 15 effective July 1, 1995.

Owners must provide residents with a reasonable opportunity to recover left-behind personal property. — The Uniform Owner-Resident Relations Act requires owners to provide residents with a reasonable opportunity to recover left-behind personal property as a matter of right, upon payment of reasonable moving and storage fees if sought by the owner, within three days of the execution of a writ of restitution or at a later agreed-to date. *White v. Farris*, 2021-NMCA-014.

47-8-34.2. Personal property and security deposit of deceased resident; contact person.

A. As used in this section, "contact person" means the person designated by a resident in writing as the person to contact and release property to in the event of the resident's death.

B. The owner may request in writing, including by a requirement in the rental agreement, that the resident:

(1) provide the owner with the name, address and telephone number of a contact person; and

(2) sign a statement authorizing the owner in the event of the resident's death to:

(a) grant the contact person access to the dwelling unit at a reasonable time and in the presence of the owner or the owner's agent;

(b) allow the contact person to remove the resident's property from the dwelling unit; and

(c) refund the resident's security deposit, less lawful deductions, to the contact person.

C. A resident may, without request from the owner, provide the owner with the name, address and telephone number of a contact person.

D. Except as provided in Subsection E of this section, in the event of the death of a resident who is the sole occupant of a rental dwelling, the owner:

(1) shall turn over possession of property in the dwelling unit to the contact person or to any other person lawfully entitled to the property if the request is made prior to the property being discarded pursuant to Paragraph (5) of this subsection;

(2) shall refund the resident's security deposit, less lawful deductions, including the cost of removing and storing the property, to the contact person or to any other person lawfully entitled to the refund;

(3) may remove and store all property found in the dwelling unit;

(4) may require any person who removes property from the resident's dwelling unit to sign an inventory of the property being removed; and

(5) may discard property removed by the owner from the resident's dwelling unit if:

(a) the owner has mailed a written request by certified mail, return receipt requested, to the contact person, requesting that the property be removed;

(b) the contact person failed to remove the property within thirty days after the request is mailed; and

(c) the owner, prior to the date of discarding the property, has not been contacted by anyone claiming the property.

E. An owner and a resident may agree to a procedure different than the procedure in this section for removing, storing or disposing of property in the dwelling unit of a deceased resident in a written rental agreement or other agreement.

F. If, after a written request by an owner, a resident does not provide the owner with the name, address and telephone number of a contact person, the owner shall have no responsibility after the resident's death for removal, storage, disappearance, damage or disposition of property in the resident's dwelling.

G. An owner who violates Subsection D of this section shall be liable to the estate of the deceased resident for actual damages.

History: Laws 2007, ch. 169, § 1.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 169, contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

47-8-35. Claim for rent and damages.

If the rental agreement is terminated, the owner is entitled to possession and may have a claim for rent and a separate claim for damages for breach of the rental agreement and reasonable attorney's fees as provided in Subsection C of Section 33 [47-8-33 NMSA 1978] of the Uniform Owner-Resident Relations Act.

History: 1953 Comp., § 70-7-35, enacted by Laws 1975, ch. 38, § 35.

ANNOTATIONS

Compiler's notes. — The reference to Subsection C of 47-8-33 NMSA 1978 was a reference to former Subsection C and should now be a reference to Subsection F following the 1995 amendment to that section. Effective July 1, 1995, attorney's fees are no longer authorized by that section. See 47-8-48 NMSA 1978 for payment of attorney's fees to the prevailing party in a suit brought to enforce the terms and conditions of a rental agreement or the provisions of the Uniform Owner-Resident Relations Act.

District court did not err in awarding plaintiff damages for property damage and unpaid rent, but erred in failing to credit defendant for the cost of repairs to the property. — Where the parties entered into a lease option contract pursuant to which plaintiff agreed to lease and defendant agreed to rent a residential property in Vanderwagen, New Mexico for sixty months, and where the lease option contract included an option to purchase the residence at any time during the contract's terms, and where defendant paid plaintiff $10,000, which was not mentioned in the lease option contract but which defendant claimed to be a down payment toward the purchase price of the property, and where defendant stopped making monthly payments on the property after two years, and where plaintiff filed a petition for restitution seeking possession of the property in magistrate court, and where the magistrate court granted the writ of restitution and awarded damages, past-due rent, and attorney fees, and where, on de novo appeal, the district court ruled in plaintiff's favor on all issues and awarded plaintiff back-rent and damages over $10,000, and where defendant argued that plaintiff should have been barred from recovering damages and rent at all because plaintiff retained defendant's initial $10,000 payment and that the district court failed to credit defendant for the full value of the repairs he made to the property during his occupancy, despite evidence that defendant spent $900 repairing faucets and replacing a fuse box on the property, the district court did not err in determining that plaintiff was entitled to damages for past-due rent and property damage because the district court credited defendant with the $10,000 in calculating plaintiff's damages, in effect ruling that plaintiff was not entitled to retain the payment, but the district court erred to the extent that it determined that defendant's evidence was insufficient evidence of other repairs as a matter of law. *White v. Farris*, 2021-NMCA-014.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 49 Am. Jur. 2d Landlord and Tenant § 786 et seq.

What constitutes willfulness or malice justifying landlord's collection of statutory multiple damages for tenant's wrongful retention of possession, 7 A.L.R.4th 589.

What constitutes tenant's holding over of leased premises, 13 A.L.R.5th 169.

52 C.J.S. Landlord and Tenant § 568.

47-8-36. Unlawful removal and diminution of services prohibited.

A. Except in case of abandonment, surrender or as otherwise permitted in the Uniform Owner-Resident Relations Act, an owner or any person acting on behalf of the owner shall not knowingly exclude the resident, remove, threaten or attempt to remove or dispossess a resident from the dwelling unit without a court order by:

(1) fraud;

(2) plugging, changing, adding or removing any lock or latching device;

(3) blocking any entrance into the dwelling unit;

(4) interfering with services or normal and necessary utilities to the unit pursuant to Section 47-8-32 NMSA 1978, including but not limited to electricity, gas, hot or cold water, plumbing, heat or telephone service, provided that this section shall not impose a duty upon the owner to make utility payments or otherwise prevent utility interruptions resulting from nonpayment of utility charges by the resident;

(5) removing the resident's personal property from the dwelling unit or its premises;

(6) removing or incapacitating appliances or fixtures, except for making necessary and legitimate repairs; or

(7) any willful act rendering a dwelling unit or any personal property located in the dwelling unit or on the premises inaccessible or uninhabitable.

B. The provisions of Subsection A of this section shall not apply if an owner temporarily interferes with possession while making legitimate repairs or inspections as provided for in the Uniform Owner-Resident Relations Act.

C. If an owner commits any of the acts stated in Subsection A of this section, the resident may:

(1) abate one hundred percent of the rent for each day in which the resident is denied possession of the premises for any portion of the day or each day where the owner caused termination or diminishment of any service for any portion of the day;

(2) be entitled to civil penalties as provided in Subsection B of Section 47-8-48 NMSA 1978;

(3) seek restitution of the premises pursuant to Sections 47-8-41 and Section 47-8-42 NMSA 1978 or terminate the rental agreement; and

(4) be entitled to damages.

History: 1953 Comp., § 70-7-36, enacted by Laws 1975, ch. 38, § 36; 1995, ch. 195, § 16.

ANNOTATIONS

Compiler's notes. — Section 47-8-32 NMSA 1978, referred to in Paragraph A(4), was repealed in 1995.

The 1995 amendment, effective July 1, 1995, rewrote this section to such an extent that a detailed comparison would be impracticable.

Judgment of restitution of possession of premises does not constitute a court order to end water services. — Where plaintiffs brought a petition for restitution of possession of premises against resident based on unpaid rent and property damage, and where the magistrate court entered a judgment for restitution in favor of plaintiffs and issued a corresponding writ of restitution, ordering the sheriff to remove resident within seven days of entry of the judgment, and where, prior to the execution of the writ of restitution, plaintiffs had resident's water shut off for unpaid water charges, and where, on appeal to the district court, resident filed a counterclaim for unlawful diminution of services and seeking abatement of rent for the days resident was without water service, the district court erred in denying resident's claim for unlawful diminution of services, because 47-8-36(A) NMSA 1978, prohibits an owner from acting to recover possession of a dwelling unit that a resident has not surrendered or abandoned, such as directing a utility to shut off water to the premises, unless a "court order" authorizes the owner to take such action, and the plain language of Subsection A of this section indicates that the legislature did not intend that a judgment for restitution, for which a writ of restitution has been issued, constitutes a "court order". *Roser v. Hufstedler*, 2023-NMCA-040.

Duty exemption clause did not permit owners to direct utility to shut off water services. — Where Plaintiffs brought a petition for restitution of possession of premises against Resident based on unpaid rent and property damage, and where the magistrate court entered a judgment for restitution in favor of plaintiffs and issued a corresponding writ of restitution, ordering the sheriff to remove resident within seven days of entry of the judgment, and where, prior to the execution of the writ of restitution, plaintiffs had resident's water shut off for unpaid water charges, and where, on appeal to the district court, resident filed a counterclaim for unlawful diminution of services and seeking abatement of rent for the days resident was without water service, the district court erred in concluding that, because the utility was holding plaintiffs responsible for resident's unpaid water bill, the duty exemption clause, set forth in 47-8-36(A)(4) NMSA 1978, permitted plaintiffs to direct the utility to shut off the dwelling unit's water services,

because, in this case, the utility had not acted to interrupt utility services before plaintiffs directed the utility to do so. The duty exemption clause does not apply. *Roser v. Hufstedler*, 2023-NMCA-040.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 49 Am. Jur. 2d Landlord and Tenant § 637 et seq.

Landlord and tenant: violation of statute or ordinance requiring landlord to furnish specified facilities or services as ground of liability for injury resulting from tenant's attempt to deal with deficiency, 63 A.L.R.4th 883.

51C C.J.S. Landlord and Tenant §§ 297, 298.

47-8-36.1. Landlord lien.

A. There shall be no landlord's lien arising out of the rental of a dwelling unit to which the Uniform Owner-Resident [Relations] Act applies.

B. Nothing in this section shall prohibit the owner from levy and execution on a judgment arising out of a claim for rent or damages.

History: 1978 Comp., § 47-8-36.1, enacted by Laws 1995, ch. 195, § 17.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For landlords' liens on personal property, *see* 48-3-5 NMSA 1978.

For liens of owners and operators of public accommodations on personal property, *see* 48-3-16 NMSA 1978.

Effective dates. — Laws 1995, ch. 195, § 28 made Laws 1995, ch. 195, § 17 effective July 1, 1995.

47-8-37. Notice of termination and damages.

A. The owner or the resident may terminate a week-to-week residency by a written notice given to the other at least seven days prior to the termination date specified in the notice.

B. The owner or the resident may terminate a month-to-month residency by a written notice given to the other at least thirty days prior to the periodic rental date specified in the notice.

C. If the resident remains in possession without the owner's consent after expiration of the term of the rental agreement or its termination, the owner may bring an action for possession and if the resident's holdover is willful and not in good faith the owner, in addition, may recover the damages sustained by him and reasonable attorney's fees. If the owner consents to the resident's continued occupancy, Subsection C of Section 15 [47-8-15 NMSA 1978] of the Uniform Owner-Resident Relations Act applies.

History: 1953 Comp., § 70-7-37, enacted by Laws 1975, ch. 38, § 37.

ANNOTATIONS

Tenant holding over formerly entitled to six-months' notice to vacate. — Since the tenant did not endorse the extensions of the lease, they were not binding upon him, and, therefore, he then became a tenant holding over after a term with the consent of the landlord. This would make him a tenant from year-to-year and entitle him to six-months' notice to vacate. *Baker v. Storie*, 1960-NMSC-037, 67 N.M. 27, 350 P.2d 1039 (1960) (decided under former law).

To be effective, notice must be sufficiently definite to inform the tenant of the landlord's desire that the tenant vacate the premises. *T.W.I.W., Inc. v. Rhudy*, 1981-NMSC-062, 96 N.M. 354, 630 P.2d 753.

Notice coupled with option to remain insufficient. — Where a notice to quit is coupled with an option to the tenant to remain at an increased rental, it is insufficient to terminate the tenancy. *T.W.I.W., Inc. v. Rhudy*, 1981-NMSC-062, 96 N.M. 354, 630 P.2d 753.

Notice not given within requisite time period effective for next rental date. — A notice to quit which is ineffective because it does not give the month-to-month tenant the requisite 30 days prior to the periodic rental date is nonetheless effective for the next ensuing rental date. *T.W.I.W., Inc. v. Rhudy*, 1981-NMSC-062, 96 N.M. 354, 630 P.2d 753.

Failure to comply with Subsection B forfeits security deposit. — A landlord was entitled to apply the security deposit to the tenant's deficient rent payment without sending a written itemization since it was undisputed that the tenant failed to comply with the thirty-day notice requirement of Subsection B upon vacating the unit. *Bruce v. Attaway*, 1996-NMSC-030, 121 N.M. 755, 918 P.2d 341.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

For annual survey of New Mexico law relating to property, see 13 N.M.L. Rev. 435 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Tenant's liability in damages for holding over after expiration of terms as effected by reason or excuse for so doing, 122 A.L.R. 280.

Measure of damages for tenant's failure to surrender possession of rented premises, 32 A.L.R.2d 582.

What constitutes willfulness or malice justifying landlord's collection of statutory multiple damages for tenant's wrongful retention of possession, 7 A.L.R.4th 589.

Waiver of statutory demand-for-rent due or of notice-to-quit prerequisite of summary eviction of lessee for nonpayment of rent - modern cases, 31 A.L.R.4th 1254.

Waiver or estoppel as to notice requirement for exercising option to renew or extend lease, 32 A.L.R.4th 452.

Lessor's retention of past-due rental payments as precluding termination of lease and dispossession of lessee for nonpayment of rent, 39 A.L.R.4th 1204.

52A C.J.S. Landlord and Tenant § 758.

47-8-38. Injunctive relief.

A. If the resident refuses to allow lawful access, the owner may obtain injunctive relief to compel access or terminate the rental agreement. In either case, the owner may recover damages, reasonable attorney's fees and court costs.

B. If the owner makes an unlawful entry or a lawful entry in an unreasonable manner or makes repeated demands for entry otherwise lawful but which have the effect of unreasonably harassing the resident, the resident may obtain injunctive relief to prevent the recurrence of the conduct or terminate the rental agreement. In either case, the resident may recover damages and reasonable attorney's fees.

History: 1953 Comp., § 70-7-38, enacted by Laws 1975, ch. 38, § 38.

ANNOTATIONS

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Injunction to prevent tenant in arrears for rent from removing chattels or improvements not constituting fixtures, 53 A.L.R. 294.

Right to specific performance, or injunction against breach, of lease or sublease or of contract to make lease as affected by right of complainant to cancel lease before expiration of term for which other party is bound, 117 A.L.R. 256.

Injunction in respect of property as covering action for rent or for use or occupation, 155 A.L.R. 844.

52A C.J.S. Landlord and Tenant § 774.

47-8-39. Owner retaliation prohibited.

A. An owner may not retaliate against a resident who is in compliance with the rental agreement and not otherwise in violation of any provision of the Uniform Owner-Resident Relations Act by increasing rent, decreasing services or by bringing or threatening to bring an action for possession because the resident has within the previous six months:

(1) complained to a government agency charged with responsibility for enforcement of a minimum building or housing code of a violation applicable to the premises materially affecting health and safety;

(2) organized or become a member of a residents' union, association or similar organization;

(3) acted in good faith to exercise his rights provided under the Uniform Owner-Resident Relations Act, including when the resident makes a written request or complaint to the owner to make repairs to comply with the owner's obligations under Section 47-8-20 NMSA 1978;

(4) made a fair housing complaint to a government agency charged with authority for enforcement of laws or regulations prohibiting discrimination in rental housing;

(5) prevailed in a lawsuit as either plaintiff or defendant or has a lawsuit pending against the owner relating to the residency;

(6) testified on behalf of another resident; or

(7) abated rent in accordance with the provisions of Section 47-8-27.1 or 47-8-27.2 NMSA 1978.

B. If the owner acts in violation of Subsection A of this section, the resident is entitled to the remedies provided in Section 47-8-48 NMSA 1978 and the violation shall be a defense in any action against him for possession.

C. Notwithstanding the provisions of Subsection A of this section, the owner may increase the rent or change services upon appropriate notice at the end of the term of the rental agreement or as provided under the terms of the rental agreement if the owner can establish that the increased rent or changes in services are consistent with

those imposed on other residents of similar rental units and are not directed at the particular resident, but are uniform.

History: 1953 Comp., § 70-7-39, enacted by Laws 1975, ch. 38, § 39; 1989, ch. 253, § 1; 1995, ch. 195, § 18; 1999, ch. 91, § 6.

ANNOTATIONS

The 1999 amendment, effective June 18, 1999, substituted "six months" for "three months" near the end of the introductory language of Subsection A and made a minor stylistic change.

The 1995 amendment, effective July 1, 1995, in subsection A, deleted "Except as provided in this section" from the beginning, added "the resident has within the previous three months:" to the end, deleted "the resident, who is in compliance with the rental agreement and not otherwise in violation of any provision of that act, has" from the beginning of Paragraph (1), inserted "association" following "union" in Paragraph (2), substituted all the language at the end of Paragraph (3) beginning "the Uniform Owner-Resident Relations Act" for "that act", and added Paragraphs (4) to (7); in Subsection B, substituted "remedies provided in 47-8-48" for "remedies provided in 47-8-29", substituted "the violation shall be a defense in any action" for "has a defense in action", and deleted "Nothing in this section shall be construed as prohibiting reasonable rent increases or changes in services notwithstanding the occurence of acts specified in Subsection A of this section" from the end of Subsection B; added Subsection C; and made minor stylistic changes throughout the section.

The 1989 amendment, effective June 16, 1989, added Subsection A(3), and made minor stylistic changes throughout the section.

Action uniform to all tenants. — Where the owner's decision to discontinue participation in the housing program was to be uniformly applied to all of the low-income tenants as their leases expired, the tenant could not base her retaliation defense on the owner's decision to discontinue the program. *Carol Rickert & Assocs. v. Law*, 2002-NMCA-096, 132 N.M. 687, 54 P.3d 91.

No right to complain about neighbors. — Subsection A(3) does not bar an owner's otherwise proper action for possession of the premises after termination of a month-to-month residency, where the owner is retaliating against the resident for complaining about noisy neighbors. *Casa Blanca Mobile Home Park v. Hill*, 1998-NMCA-094, 125 N.M. 465, 963 P.2d 542.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Retaliatory eviction of tenant for reporting landlord's violation of law, 23 A.L.R.5th 140.

47-8-40. Action for possession by owner.

A. Notwithstanding Subsections A and B of Section 47-8-39 NMSA 1978, an owner may bring an action for possession if:

(1) the violation of the applicable minimum building or housing code was caused primarily by lack of reasonable care by the resident or other person in his household or upon the premises with the resident's consent;

(2) the resident is in default in rent;

(3) there is a material noncompliance with the rental agreement that would otherwise give rise to the owner's right to terminate the rental agreement;

(4) a resident knowingly commits or consents to any other person in the dwelling unit or on the premises knowingly committing a substantial violation; or

(5) compliance with the applicable building or housing code requires alteration, remodeling or demolition that would effectively deprive the resident of use of the dwelling unit.

B. The maintenance of an action under Subsection A of this section does not release the owner from liability under Section 47-8-20 NMSA 1978.

History: 1953 Comp., § 70-7-40, enacted by Laws 1975, ch. 38, § 40; 1995, ch. 195, § 19.

ANNOTATIONS

Compiler's notes. — The reference to Subsections A and B of Section 38 of the Uniform Owner-Resident Relations Act in Subsection A of this section probably should be to Subsections A and B of Section 39 of the Uniform Owner-Resident Relations Act.

Cross references. — For unlawful and forcible entry provision, *see* 47-8-49 NMSA 1978.

For inapplicability of general forcible entry or detainer provisions to actions by landlord, *see* 35-10-2 NMSA 1978.

The 1995 amendment, effective July 1, 1995, in Subsection A, inserted Paragraphs (3) and (4), and redesignated former Paragraph (3) as Paragraph (5), and made minor stylistic changes throughout the section.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Tenant's recovery of damages for emotional distress under Uniform Residential Landlord and Tenant Act, 6 A.L.R.4th 528.

What constitutes willfulness or malice justifying landlord's collection of statutory multiple damages for tenant's wrongful retention of possession, 7 A.L.R.4th 589.

Landlord's permitting third party to occupy premises rent-free as acceptance of tenant's surrender of premises, 18 A.L.R.5th 437.

52A C.J.S. Landlord and Tenant §§ 729 to 751.

47-8-41. Action for possession by owner or resident.

An action for possession of any premises subject to the provisions of the Uniform Owner-Resident Relations Act shall be commenced in the manner prescribed by the Uniform Owner-Resident Relations Act.

History: 1953 Comp., § 70-7-41, enacted by Laws 1975, ch. 38, § 41.

ANNOTATIONS

Eviction subject to equitable defenses. — A court may find that a qualified indigent tenant of public housing need not be evicted solely because adjudged liable for back rent. Equitable principles may be applied to prevent eviction. *City of Albuquerque v. Brooks*, 1992-NMSC-069, 114 N.M. 572, 844 P.2d 822.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 51C C.J.S. Landlord and Tenant § 320.

47-8-42. Petition for restitution.

The person seeking possession shall file a petition for restitution with the clerk of the district or magistrate court. The petition shall contain:

A. the facts, with particularity, on which he seeks to recover;

B. a reasonably accurate description of the premises; and

C. the requisite compliance with the notice provisions of the Uniform Owner-Resident Relations Act.

The petition may also contain other causes of action relating to the residency, but such causes of action shall be answered and tried separately, if requested by either party in writing.

History: 1953 Comp., § 70-7-42, enacted by Laws 1975, ch. 38, § 42.

ANNOTATIONS

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Setoff or counterclaim in action by tenant against landlord for restitution under Federal Housing and Rent Act of 1947 and amendments, 10 A.L.R.2d 249.

52A C.J.S. Landlord and Tenant § 762.

47-8-43. Issuance of summons.

A. The summons shall be issued and directed, with a copy of the petition attached to the summons, and shall state the cause of the complaint, the answer day for other causes of action and notice that if the defendant fails to appear, judgment shall be entered against him. The summons may be served pursuant to the New Mexico rules of civil procedure and returned as in other cases. Trial of the action for possession shall be set as follows:

(1) for any matter brought by the owner for possession, not less than seven or more than ten days after the service of summons; or

(2) for any matter brought by the resident for possession, not less than three or more than five days after the service of summons.

B. Upon finding of good cause, the court may continue the date of hearing on the action for possession for up to seven days from the date of the initial hearing.

History: 1953 Comp., § 70-7-43, enacted by Laws 1975, ch. 38, § 43; 1995, ch. 195, § 20.

ANNOTATIONS

Cross references. — For the Rules of Procedure for the District Courts, *see* Rule 1-001 NMRA et seq.

The 1995 amendment, effective July 1, 1995, designated the existing language as Subsection A; in Subsection A, in the second sentence inserted "pursuant to the New Mexico rules of civil procedure" following "served" and deleted "or by any authorized person" from the end, deleted the former third sentence which read "The person making the service shall file with the court an affidavit stating with particularity the manner in which he made the service", substituted "shall be set as follows" for "shall be not less than seven nor more than ten days after the service of summons" at the end of the

fourth sentence, added Paragraphs (1) and (2), and made minor stylistic changes throughout the subsection; and added Subsection B.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 52A C.J.S. Landlord and Tenant § 741.

47-8-44. Absence from court of defendant.

If the defendant shall not appear in response to the summons, and it shall have been properly served, the court shall try the cause as though he were present.

History: 1953 Comp., § 70-7-44, enacted by Laws 1975, ch. 38, § 44.

ANNOTATIONS

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

47-8-45. Legal or equitable defense.

On or before the day fixed for his appearance, the defendant may appear and answer and assert any legal or equitable defense, setoff or counterclaim.

History: 1953 Comp., § 70-7-45, enacted by Laws 1975, ch. 38, § 45.

ANNOTATIONS

Eviction subject to equitable defenses. — A court may find that a qualified indigent tenant of public housing need not be evicted solely because adjudged liable for back rent. Equitable principles may be applied to prevent eviction. *City of Albuquerque v. Brooks*, 1992-NMSC-069, 114 N.M. 572, 844 P.2d 822.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Rights and remedies of tenant upon landlord's breach of covenant to repair, 28 A.L.R.2d 446.

47-8-46. Writ of restitution.

A. Upon petition for restitution filed by the owner if judgment is rendered against the defendant for restitution of the premises, the court shall declare the forfeiture of the rental agreement and shall, at the request of the plaintiff or his attorney, issue a writ of

restitution directing the sheriff to restore possession of the premises to the plaintiff on a specified date not less than three nor more than seven days after entry of judgment.

B. Upon a petition for restitution filed by the resident, if judgment is rendered against the defendant for restitution of the premises, the court shall, at the request of the plaintiff or his attorney, issue a writ of restitution directing the sheriff to restore possession of the premises to the plaintiff within twenty-four hours after entry of judgment.

History: 1953 Comp., § 70-7-46, enacted by Laws 1975, ch. 38, § 46; 1995, ch. 195, § 21.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, added Subsection A; designated the existing language as Subsection B, and in that subsection, substituted "Upon a petition for restitution filed by the resident" for "Trial shall be had on the date or dates set as in all other cases, and" at the beginning, deleted "declare the forfeiture of the rental agreement and shall" following "the court shall", substituted "within twenty-four hours" for "specified date not more than seven days" near the end, and made minor stylistic changes throughout the subsection.

Restitution not mandatory in back rent actions. — This section does not require that a court issue a writ of restitution if it renders a money judgment against a tenant based on causes of action such as back rent. *City of Albuquerque v. Brooks*, 1992-NMSC-069, 114 N.M. 572, 844 P.2d 822.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Setoff or counterclaim in action by tenant against landlord for restitution under Federal Housing and Rent Act of 1947 and amendments, 10 A.L.R.2d 249.

52A C.J.S. Landlord and Tenant § 762.

47-8-47. Appeal stays execution.

A. If either party feels aggrieved by the judgment, that party may appeal as in other civil actions. An appeal by the defendant shall stay the execution of any writ of restitution; provided that in cases in which the resident is the appellant, the execution of the writ of restitution shall not be stayed unless the resident, within five days of the filing of the notice of appeal, pays to the owner or into an escrow account with a professional escrow agent an amount equal to the rental amount that shall come due from the day following the judgment through the end of that rental period. The resident shall continue to pay the monthly rent established by the rental agreement at the time the complaint was filed, on a monthly basis on the date rent would otherwise become due. Payments

pursuant to this subsection by a subsidized resident shall not exceed the actual amount of monthly rent paid by that resident. When the resident pays the owner directly, the owner shall immediately provide a written receipt to the resident upon demand. When the resident pays into an escrow account the resident shall cause such amounts to be paid over to the owner immediately upon receipt unless otherwise ordered by the court. Upon the failure of the resident or the escrow agent to make a monthly rent payment on the first day rent would otherwise be due, the owner may serve a three-day written notice on the resident pursuant to Subsection D of Section 47-8-33 NMSA 1978. If the resident or the resident's escrow agent fails to pay the rent within the three days, a hearing on the issue shall be scheduled within ten days from the date the court is notified of the failure to pay rent. In the case of an appeal de novo, the hearing shall be in the court in which the appeal will be heard. If, at the hearing, the court finds that rent has not been paid, the court shall immediately lift the stay and issue the writ of restitution unless the resident demonstrates a legal justification for failing to comply with the rent payment requirement.

B. In order to stay the execution of a money judgment, the trial court, within its discretion, may require an appellant to deposit with the clerk of the trial court the amount of judgment and costs or to give a supersedeas bond in the amount of judgment and costs with or without surety. Any bond or deposit shall not be refundable during the pendency of any appeal.

History: 1953 Comp., § 70-7-47, enacted by Laws 1975, ch. 38, § 47; 1989, ch. 253, § 2; 1995, ch. 195, § 22; 1999, ch. 91, § 7.

ANNOTATIONS

The 1999 amendment, effective June 18, 1999, rewrote Subsection A.

The 1995 amendment, effective July 1, 1995, added the subsection designations and rewrote this section to such an extent that a detailed comparison would be impracticable.

The 1989 amendment, effective June 16, 1989, made minor stylistic changes in the second sentence, and inserted the fourth and fifth sentences.

Effect of violation of stay of execution. — This section does not explicitly or implicitly require that a property owner either do or not do a specific act after the court has issued a writ of restitution, nor does the statute provide a standard of conduct for a reasonable person under circumstances where an appeal has been taken. Accordingly, violation of the statute does not establish negligence per se. *Runge v. Fox*, 1990-NMCA-086, 110 N.M. 447, 796 P.2d 1143.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 52A C.J.S. Landlord and Tenant § 784.

47-8-48. Prevailing party rights in law suit; civil penalties.

A. If suit is brought by any party to the rental agreement to enforce the terms and conditions of the rental agreement or to enforce any provisions of the Uniform Owner-Resident Relations Act, the prevailing party shall be entitled to reasonable attorneys' fees and court costs to be assessed by the court.

B. Any owner who violates a provision of Section 47-8-36 or 47-8-39 NMSA 1978 shall be subject to a civil penalty equal to two times the amount of the monthly rent.

C. Any resident who intentionally violates a provision of Subsection F of Section 47-8-22 NMSA 1978 shall be subject to a civil penalty equal to two times the amount of the monthly rent.

History: 1953 Comp., § 70-7-48, enacted by Laws 1975, ch. 38, § 48; 1995, ch. 195, § 23.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, designated the existing language as Subsection A, and in that subsection, substituted "or to enforce any provisions" for "entered into pursuant to the terms", and substituted "attorneys' " for "attorney's"; and added Subsections B and C.

Determination of reasonable attorney fees. — Where a fire, that was negligently caused by defendant, destroyed plaintiff's personal property in a mobile home that plaintiff rented from defendant; the jury awarded plaintiff $25,000 in compensatory damages; plaintiff sought $70,318 in attorney fees based on the lodestar calculation of time spent on the case and the hourly rate charged by plaintiff's counsel; and on the grounds that plaintiff's attorney fees were almost three times the jury award and that the case involved only property damage and no broader public policy, the district court applied a proportional test and awarded plaintiff $10,000 in attorney fees with an offset of $5,000 for defendant's successful defense of plaintiff's claims for punitive damages, emotional stress damages, and civil penalty damages, the district court abused its discretion because the district court failed to consider the public policy goals of the Uniform Owner-Resident Relations Act to encourage compliance with the act and because the district court failed to consider a lodestar analysis or any objective analysis of the facts in determining attorney fees. *Behrens v. Gateway Court, L.L.C.*, 2013-NMCA-097, cert. granted, 2013-NMCERT-009.

Prevailing party. — The "prevailing party" is the party who wins on the merits or on the main issue of the case. *Hedicke v. Gunville*, 2003-NMCA-032, 133 N.M. 335, 62 P.3d 1217, cert. denied, 133 N.M. 413, 63 P.3d 516.

Assessing attorneys' fees. — Assessing attorneys' fees need not be mechanistic or formalistic, but as governed by, and should be apportioned according to, the facts and circumstances of the case and the extent to which the parties, in fact, prevailed. *Hedicke v. Gunville*, 2003-NMCA-032, 133 N.M. 335, 62 P.3d 1217, cert. denied, 133 N.M. 413, 63 P.3d 516.

Prevailing parties are entitled to award of reasonable attorney fees. — Where tenants brought action against apartment owner and manager for violations of the New Mexico Unfair Practices Act (UPA), §§ 57-12-1 through § 57-12-26 NMSA 1978, and the New Mexico Uniform Owner-Resident Relations Act (UORRA), §§ 47-8-1 through § 47-8-52 NMSA 1978, and where the parties reached a settlement agreement on all issues except attorney fees, plaintiffs were entitled to reasonable attorney fees, notwithstanding the fact that the damage award was small, because plaintiffs successfully prosecuted their UPA and UORRA claims; the amount involved and the results obtained are only one factor among several the court may consider to determine a reasonable attorney fee. *Fallen v. GREP Southwest, LLC*, 247 F.Supp.3d 1165 (2017).

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 51C C.J.S. Landlord and Tenant §§ 247(2), 250(2).

47-8-49. Unlawful and forcible entry.

The laws and procedures of New Mexico pertaining to complaints of unlawful and forcible entry shall apply to actions for possession of any premises not subject to the provisions of the Uniform Owner-Resident Relations Act or the Mobile Home Park Act [Chapter 47, Article 10 NMSA 1978].

History: 1953 Comp., § 70-7-49, enacted by Laws 1975, ch. 38, § 49; 1995, ch. 195, § 24.

ANNOTATIONS

Cross references. — For action for possession by owner, *see* 47-8-40 NMSA 1978.

For inapplicability of general forcible entry or detainer provisions to actions by landlord, *see* 35-10-2 NMSA 1978.

The 1995 amendment, effective July 1, 1995, rewrote the section to such an extent that a detailed comparison would be impracticable.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 52A C.J.S. Landlord and Tenant §§ 720, 752 to 792.

47-8-50. Prior transactions valid.

Transactions entered into before the effective date of the Uniform Owner-Resident Relations Act, and not extended or renewed after that date, and the rights, duties and interests flowing from them remain valid and may be terminated, completed, consummated or enforced as required or permitted prior to the effective date of the Uniform Owner-Resident Relations Act.

History: 1953 Comp., § 70-7-50, enacted by Laws 1975, ch. 38, § 50.

ANNOTATIONS

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

47-8-51. Applicability.

The provisions of the Uniform Owner-Resident Relations Act are applicable to rental agreements entered into or extended or renewed after the effective date and shall not be applicable to any agreements or conditions entered into between the owner and resident which provisions may alter agreements or conditions existing prior to the effective date of the provisions of the Uniform Owner-Resident Relations Act.

History: 1953 Comp., § 70-7-51, enacted by Laws 1975, ch. 38, § 51.

ANNOTATIONS

Severability. — Laws 1975, ch. 38, § 52 provided for the severability of the act if any part or application thereof is held invalid.

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

47-8-52. Conflicts; applicability of law.

Unless a provision of the Mobile Home Park Act [Chapter 47, Article 10 NMSA 1978] directly conflicts with the provisions of the Uniform Owner-Resident Relations Act, the provisions of the Uniform Owner-Resident Relations Act shall apply to mobile home park owners and residents.

History: Laws 1989, ch. 253, § 3.

ARTICLE 8A
Rent Control Prohibition

47-8A-1. Rent control prohibition.

A. No political subdivision or any home rule municipality shall enact an ordinance or resolution that controls or would have the effect of controlling rental rates for privately owned real property.

B. This section does not impair the right of a state agency, county or municipality to otherwise manage or control its property.

C. The provisions of Subsection A of this section do not apply to privately owned real property for which benefits or funding have been provided under contract by federal, state or local governments or a governmental instrumentality for the express purpose of providing reduced rents to low- or moderate-income tenants.

History: Laws 1991, ch. 23, § 1.

ARTICLE 9
Right to Farm

47-9-1. Short title.

Sections 47-9-1 through 47-9-7 NMSA 1978 may be cited as the "Right to Farm Act".

History: Laws 1981, ch. 287, § 1; 1991, ch. 129, § 1.

ANNOTATIONS

The 1991 amendment, effective June 14, 1991, substituted "Sections 47-9-1 through 47-9-7 NMSA 1978" for "This act".

47-9-2. Purpose of act.

The purpose of the Right to Farm Act is to conserve, protect, encourage, develop and improve agricultural land for the production of agricultural products and to reduce the loss to the state of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed a nuisance.

History: Laws 1981, ch. 287, § 2.

47-9-3. Agricultural operations deemed not a nuisance.

A. Any agricultural operation or agricultural facility is not, nor shall it become, a private or public nuisance by any changed condition in or about the locality of the agricultural operation or agricultural facility if the operation was not a nuisance at the time the operation began and has been in existence for more than one year; except that the provisions of this section shall not apply whenever an agricultural operation or agricultural facility is operated negligently or illegally such that the operation or facility is a nuisance.

B. Any ordinance or resolution of any unit of local government that makes the operation of any agricultural operation or agricultural facility a nuisance or provides for abatement of it as a nuisance under the circumstances set forth in this section shall not apply when an agricultural operation is located within the corporate limits of any municipality as of April 8, 1981.

C. The established date of operation is the date on which an agricultural operation commenced or an agricultural facility was originally constructed. If an agricultural operation or agricultural facility is subsequently expanded or a new technology is adopted, the established date of operation does not change.

D. No cause of action based upon nuisance may be brought by a person whose claim arose following the purchase, lease, rental, or occupancy of property proximate to a previously established agricultural operation or agricultural facility, except when such previously established agricultural operation or agricultural facility has substantially changed in the nature and scope of its operations.

History: Laws 1981, ch. 287, § 3; 1991, ch. 129, § 2; 2014, ch. 22, § 1; 2016, ch. 44, § 1.

ANNOTATIONS

The 2016 amendment, effective May 18, 2016, amended the Right to Farm Act to protect agricultural operations or facilities from nuisance claims; and added new Subsection D.

The 2014 amendment, effective May 21, 2014, eliminated improperly operated agricultural operations or facilities as a nuisance; prescribed the date when agricultural operations that are located within a municipality are exempt from local governmental rules and regulations that make agricultural operations a nuisance; in Subsection A, after "is operated negligently", deleted "improperly"; and in Subsection B, after "corporate limits of any municipality as of", deleted "the effective date of the Right to Farm Act" and added "April 8, 1981".

The 1991 amendment, effective June 14, 1991, deleted former Subsection A which read "For the purposes of this Act, 'agricultural operations' means the use of land for the

production of plants, crops, trees, forest products, orchard crops, livestock, poultry or fish"; redesignated former Subsections B and C as Subsections A and B; inserted "or agricultural facility" in two places in Subsection A and near the beginning of Subsection B; substituted the language beginning "whenever an agricultural operation" for "in the case of a negligent operation or when a change in an operation would result in a common law nuisance" at the end in Subsection A; added Subsection C; and made minor stylistic changes throughout the section.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Hog breeding, confining, or processing facility as constituting nuisance, 93 A.L.R.5th 621.

47-9-4. Contracts; agreements.

The Right to Farm Act shall not invalidate any contracts made prior to the enactment of that act but shall be applicable only to contracts and agreements after the effective date of that act. This section shall not be construed to invalidate or supercede land uses and related powers of counties and municipalities.

History: Laws 1981, ch. 287, § 4.

ANNOTATIONS

Severability. — Laws 1981, ch. 287, § 5, provided for the severability of the act if any part or application thereof is held invalid.

47-9-5. Definitions.

As used in the Right To Farm Act:

A. "agricultural facility" includes but is not limited to any land, building, structure, pond, impoundment, appurtenance, machinery or equipment that is used for the commercial production or processing of crops, livestock, animals, poultry, honey bees, honey bee products, livestock products, poultry products or products that are used in commercial agriculture;

B. "agricultural operation" means:

(1) the plowing, tilling or preparation of soil at an agricultural facility;

(2) the planting, growing, fertilizing or harvesting of crops;

(3) the application of pesticides, herbicides, or other chemicals, compounds or substances to crops, weeds or soil in the connection with production of crops, livestock, animals or poultry;

(4) the breeding, hatching, raising, producing, feeding, keeping, slaughtering or processing of livestock, hogs, aquatic animals, equines, chickens, turkeys, poultry or other fowl normally raised for food, mules, cattle, sheep, goats, rabbits or similar farm animals for commercial purposes;

(5) the production and keeping of honey bees, production of honey bee products and honey bee processing facilities;

(6) the production, processing or packaging of eggs or egg products;

(7) the manufacturing of feed for poultry or livestock;

(8) the rotation of crops;

(9) commercial agriculture;

(10) the application of existing, changed or new technology, practices, processes or products to an agricultural operation; or

(11) the operation of a roadside market.

History: 1978 Comp., § 47-9-5, enacted by Laws 1991, ch. 129, § 3.

47-9-6. Damages.

The provisions of the Right to Farm Act do not affect or defeat the right of a person to recover damages from injuries or damages sustained by him because of the pollution of, or change in the condition of, waters of a stream or because of an overflow on his lands.

History: 1978 Comp., § 47-9-6, enacted by Laws 1991, ch. 129, § 4.

47-9-7. Frivolous lawsuits.

If a court determines that any action alleging that an agricultural operation is a nuisance is frivolous, the court may award reasonable costs and attorneys' fees to the defendant.

History: 1978 Comp., § 47-9-7, enacted by Laws 1991, ch. 129, § 5.

ANNOTATIONS

Severability. — Laws 1991, ch. 129, § 6 provided for the severability of the act if any part or application thereof is held invalid.

ARTICLE 10
Mobile Home Parks

47-10-1. Short title.

Chapter 47, Article 10 NMSA 1978 may be cited as the "Mobile Home Park Act".

History: Laws 1983, ch. 122, § 1; 1993, ch. 147, § 1.

ANNOTATIONS

Cross reference. — For the Uniform Home Resident Relations Act, *see* 47-8-1 NMSA 1978.

The 1993 amendment, effective July 1, 1993, substituted "Chapter 47, Article 10 NMSA 1978" for "Section 1 through 18 of this act".

Acts linked. — Although the Uniform Owner-Resident Relations Act, Section 47-8-1 NMSA 1978 et seq., governs the rights and obligations of owners and residents of "dwelling units," and the Mobile Home Park Act governs tenancy in a "mobile home park," the legislature has linked the two acts in that the latter provides that an action for termination shall be commenced and prosecuted in the manner described in the former. *Martinez v. Sedillo*, 2005-NMCA-029, 137 N.M. 103, 107 P.3d 543.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Landlord's fraud, deceptive trade practices, and the like, in connection with mobile home owner's lease or rental of landsite, 39 A.L.R.4th 859.

Validity, construction, and application of mobile home eviction statutes, 43 A.L.R.5th 705.

47-10-2. Definitions.

As used in the Mobile Home Park Act:

A. "landlord" or "management" means the owner or any person responsible for operating and managing a mobile home park or an agent, employee or representative authorized to act on the management's behalf in connection with matters relating to tenancy in the park;

B. "mobile home" means a single-family dwelling built on a permanent chassis designed for long-term residential occupancy and containing complete electrical, plumbing and sanitary facilities designed to be installed in a permanent or semipermanent manner with or without a permanent foundation, which dwelling is capable of being drawn over public highways as a unit or in sections by special permit.

"Mobile home" does not include a recreational travel trailer or a recreational vehicle, as those terms are defined in Section 66-1-4.15 NMSA 1978;

C. "mobile home park", "trailer park" or "park" means a parcel of land used for the continuous accommodation of twelve or more occupied mobile homes and operated for the pecuniary benefit of the owner of the parcel of land, his agents, lessees or assignees. "Mobile home park" does not include mobile home subdivisions or property zoned for manufactured home subdivisions;

D. "mobile home space", "space", "mobile home lot" or "lot" means a parcel of land within a mobile home park designated by the management to accommodate one mobile home and its accessory buildings and to which the required sewer and utility connections are provided by the mobile home park;

E. "premises" means a mobile home park and existing facilities and appurtenances therein, including furniture and utilities where applicable, and grounds, areas and existing facilities held out for the use of the residents generally or the use of which is promised to the resident;

F. "rent" means any money or other consideration to be paid to the management for the right of use, possession and occupation of the premises;

G. "rental agreement" means a written agreement, including those conditions implied by law, between the management and the resident establishing the terms and conditions of a tenancy, including reasonable rules and regulations promulgated by the park management. A lease is a rental agreement;

H. "resident" means any person or family of such person owning a mobile home that is subject to a tenancy in a mobile home park under a rental agreement;

I. "tenancy" means the right of a resident to use a space or lot within a park on which to locate, maintain and occupy a mobile home, lot improvements and accessory structures for human habitation, including the use of services and facilities of the park;

J. "utility services" means electric, gas, water or sewer services, but does not include refuse services;

K. "first lienholder" means a person or his successor in interest who has a security interest in a mobile home, whose interest has been perfected pursuant to the provisions of Section 66-3-201 NMSA 1978 and whose interest is prior to any other security interest in the mobile home; and

L. "abandoned" means absence of the resident from the mobile home, without notice to the landlord, in excess of seven continuous days, providing such absence occurs after the mobile home lot rent is delinquent.

History: Laws 1983, ch. 122, § 2; 1993, ch. 147, § 2; 1997, ch. 39, § 2.

ANNOTATIONS

The 1997 amendment, effective June 20, 1997, added Subsections K and L and made related stylistic changes.

The 1993 amendment, effective July 1, 1993, added the second sentence in Subsection B, made minor stylistic changes in Subsections H and I, and added Subsection J.

47-10-3. Tenancy; requirements; notice to quit.

A. No tenancy or other lease or rental occupancy of space in a mobile home park shall commence without a written lease or rental agreement, and no tenancy in a mobile home park shall be terminated until a notice to quit has been served upon the mobile home resident. The notice to quit shall be in writing directed to the resident and in the form specified in this section. The form of notice shall be deemed legally sufficient if it states:

(1) the name of the landlord or of the mobile home park;

(2) the mailing address of the property;

(3) the location or space number upon which the mobile home is situated;

(4) the county in which the mobile home is situate; and

(5) the reason for the termination of the tenancy and the date, place and circumstances of any acts allegedly justifying the termination.

B. The notice to quit shall be served by delivering the notice to the mobile home tenant personally or by posting the notice at the main entrance of the mobile home. If service is made by posting the notice, a copy of the notice shall also be sent by certified mail to the mobile home tenant, return receipt requested. The date of a posting shall be included on the posted notice and on the copy mailed to the mobile home tenant and shall constitute the effective date of the notice.

C. The tenant shall be given a period of not less than thirty days from the end of the rental period during which the termination notice was served to remove any mobile home from the premises, but which is automatically extended to sixty days where the tenant must remove a multisection mobile home. In those situations where a multisection mobile home is being leased to or occupied by a person other than its owner and in a manner contrary to the rules and regulations of the landlord, then, in that event, the tenancy may be terminated by the landlord upon giving a thirty-day notice instead of a sixty-day notice.

D. No lease shall contain any provision by which the tenant waives his rights under the Mobile Home Park Act, and any such waiver shall be deemed to be contrary to public policy and shall be unenforceable and void. Any lease, however, may provide for the termination of the tenancy in accordance with the provisions of Subsection C of this section.

E. No tenancy shall be terminated by a mobile home park owner solely because of the size or age of the mobile home.

History: Laws 1983, ch. 122, § 3; 1997, ch. 186, § 1.

ANNOTATIONS

The 1997 amendment, effective June 20, 1997, in Subsection A, added "upon the mobile home resident" in the first sentence and inserted "directed to the resident" in the second sentence; rewrote Subsection B; and added Subsection E.

Strict compliance required. — The notice provisions of this act require strict compliance. *Green Valley Mobile Home Park v. Mulvaney*, 1996-NMSC-037, 121 N.M. 817, 918 P.2d 1317.

Notice to month-to-month tenants required. — The Mobile Home Park Act requires a landlord to include a statement of good cause on a notice to quit that is given to month-to-month tenants. *Green Valley Mobile Home Park v. Mulvaney*, 1996-NMSC-037, 121 N.M. 817, 918 P.2d 1317.

47-10-4. Action for termination.

A. The action for termination shall be commenced and prosecuted in the manner described in the Uniform Owner-Resident Relations Act [47-8-1 to 47-8-52 NMSA 1978]. The property description shall be deemed legally sufficient if it states:

(1) the name of the landlord or of the mobile home park;

(2) the mailing address of the property;

(3) the location or space number upon which the mobile home is situated; and

(4) the county in which the mobile home is situate.

B. Service of the summons shall be as specified in Section 47-8-43 NMSA 1978. Service by posting shall be deemed legally sufficient within the meaning of Section 47-8-43 NMSA 1978 if the summons is conspicuously affixed to the main entrance of the mobile home.

C. Jurisdiction of courts in cases of forcible entry, forcible detainer or unlawful detainer shall be as specified in Section 47-8-49 NMSA 1978.

D. After commencement of the action and before judgment, any person not already a party to the action who is discovered to have a property interest in the mobile home shall be allowed to enter into a stipulation with the landlord and be bound thereby.

History: Laws 1983, ch. 122, § 4.

ANNOTATIONS

Acts linked. — Although the Uniform Owner-Resident Relations Act, Section 47-8-1 NMSA 1978 et seq., governs the rights and obligations of owners and residents of "dwelling units," and the Mobile Home Park Act governs tenancy in a "mobile home park," the legislature has linked the two acts in that the latter provides that an action for termination shall be commenced and prosecuted in the manner described in the former. *Martinez v. Sedillo*, 2005-NMCA-029, 137 N.M. 103, 107 P.3d 543.

47-10-5. Reasons for termination.

A tenancy shall be terminated pursuant to the Mobile Home Park Act only for one or more of the following reasons:

A. failure of the tenant to comply with local ordinances and state laws and regulations concerning mobile homes;

B. conduct of the tenant on the premises which constitutes an annoyance to other tenants or interference with park management;

C. failure of the tenant to comply with written rules and regulations of the mobile home park either established by the management in the rental agreement at the inception of the tenancy, amended subsequently thereto with the consent of the tenant, or amended subsequently thereto without the consent of the tenant on thirty days' written notice if the amended rules and regulations are reasonable, except when local ordinances and state laws and regulations or emergency situations require immediate compliance. However, regulations applicable to recreational facilities may be amended at the discretion of the management;

D. condemnation or change of use of the mobile home park. When the owner of a mobile home park is formally notified by an appropriate governmental agency that his mobile home park is the subject of a condemnation proceeding, the landlord shall, within seventeen days, notify his tenants in writing of the terms of the condemnation notice which he receives; or

E. in those cases where the zoning law allows the landlord to change the use of his land without obtaining the consent of the zoning authority and where such change of

use would result in eviction of inhabited mobile homes, the landlord shall first give the owner of each mobile home subject to such eviction a written notice of his intent to evict not less than six months prior to such change of use of the land, notice to be mailed to each tenant.

History: Laws 1983, ch. 122, § 5.

47-10-6. Nonpayment of rent.

Any tenancy or other estate at will or lease in a mobile home park may be terminated upon the landlord's written notice to the tenant requiring, in the alternative, payment of rent and utility charges or the removal of the tenant's unit from the premises, within a period of not less than three days after the date notice is served or posted, for failure to pay rent when due. Rent shall not be increased without sixty days' written notice to the tenant.

History: Laws 1983, ch. 122, § 6; 1993, ch. 147, § 3.

ANNOTATIONS

The 1993 amendment, effective July 1, 1993, substituted "sixty" for "thirty" in the second sentence.

47-10-7. Common areas; tenant meetings.

Common areas of a mobile home park shall be open to all residents of the mobile home park at all reasonable times subject to such conditions and limitations as are imposed by written regulations of the mobile home park owner or management. Meetings of tenants relating to mobile home living and affairs held in their park community hall or recreation hall, if such facility or similar facility exists, shall not be subject to prohibition by the park management if the hall is reserved according to park rules and such meetings are held at reasonable hours and when the facility is not otherwise in use.

History: Laws 1983, ch. 122, § 7.

47-10-8. Security deposits.

The owner of a mobile home park or his agents may charge a security deposit not greater than the amount of one month's rent or two months' rent for multiwide units.

History: Laws 1983, ch. 122, § 8.

47-10-9. Remedies.

A. Upon granting judgment for possession by the landlord in a forcible entry and detainer action, the court shall issue the writ of restitution as provided in Section 47-8-46 NMSA 1978.

B. The notice of judgment shall state that at a specified time, not less than forty-eight hours from the entry of judgment, the sheriff will return to serve a writ of restitution and superintend the peaceful and orderly removal of the mobile home under that order of court. The notice of judgment shall also advise the mobile home owner to prepare the mobile home for removal from the premises by removing the skirting, disconnecting utilities, attaching tires and otherwise making the mobile home safe and ready for highway travel.

C. Should the mobile home owner fail to have the mobile home safe and ready for physical removal from the premises or should inclement weather or other unforeseen problems occur at the time specified in the notice of judgment, the landlord and the sheriff may by written agreement extend the time for the execution of the writ of restitution to allow time for the landlord to arrange to have the necessary work done or to permit the sheriff's execution of the writ of restitution at a time when weather or other conditions will make removal less hazardous to the mobile home.

D. If the mobile home is not removed from the landlord's land on behalf of the mobile home owner within the time permitted by the writ of restitution, the landlord and the sheriff shall have the right to take possession of the mobile home for the purposes of removal and storage. The liability of the landlord and the sheriff in that event shall be limited to gross negligence or willful and wanton disregard of the property rights of the mobile home owner. The responsibility to prevent freezing and to prevent wind and weather damage to the mobile home lies exclusively with those persons who have a property interest in the mobile home.

E. Utility charges, other charges incurred by the landlord for which the resident is liable to the landlord pursuant to the provisions of a rental agreement, including amounts awarded to the landlord in an action brought pursuant to this section, rents and reasonable removal and storage charges may be paid by any party in interest. Those charges constitute a lien that will run with the mobile home. The lien may be foreclosed in the same manner as a landlord's lien created pursuant to Section 48-3-5 NSMA [sic] 1978.

F. Prior to the issuance of the writ of restitution, the court shall make a finding of fact that the mobile home is or is not subject to the security interest of a first lienholder. A written statement on the mobile home resident's owner's application for tenancy identifying a lienholder by name and address shall be prima facie evidence of the existence of the interest of the lienholder. If the application for tenancy contains no information or states that no liens exist, the landlord shall obtain a written title search statement from the motor vehicle division of the taxation and revenue department and the matter contained in that document shall be conclusive evidence of the existence or nonexistence of security interests in the mobile home.

G. If the court finds there is a security interest in favor of a first lienholder on the mobile home subject to the writ of restitution or if the mobile home has been abandoned by the resident or possession of the mobile home has been surrendered to the landlord by the resident, then, upon receipt of the writ of restitution, the landlord shall notify the first lienholder in writing that the landlord has obtained a writ of restitution for the mobile home park space where the mobile home is located or that the mobile home has been abandoned or surrendered by the resident. The notice shall be provided in accordance with the provisions of Subsection J of this section and shall:

(1) state that an action for restitution has been filed against the resident and the effective date of a writ of restitution, if issued, or the date the mobile home was abandoned or voluntarily surrendered by the resident;

(2) disclose the amount of the utility charges, other charges incurred by the landlord as provided in the rental agreement, rents and reasonable removal and storage charges, accruing daily rent calculated pursuant to this section, and the date upon which the resident is required to make regular payments to the landlord; and

(3) attach a copy of the lease and the landlord's rules and regulations that apply to the resident.

H. Notwithstanding the provisions of the [sic] Subsection E of this section, the landlord shall be entitled to collect from the first lienholder only the utility charges, other charges incurred by the landlord as provided in the rental agreement and rents and reasonable removal and storage charges accruing from and after the date the landlord provides the first lienholder the written notice prescribed under Subsection G of this section. The first lienholder shall notify the landlord within thirty days of receipt of the notice whether it intends to pay the rents and charges collectible under this subsection or remove the mobile home. The rents and charges due under this subsection shall be prorated to the date the mobile home is removed or the date a new lease with a new resident becomes effective, and the first lienholder shall not be liable for any rents and charges thereafter. The maximum rent payable to the landlord under this subsection is a daily rate equal to one-thirtieth of the then-current lot rental amount that would have been payable by the resident under the lease. The maximum daily rent may be increased over time in accordance with the notice requirements under the applicable provisions of the Mobile Home Park Act. The first lienholder shall have thirty days from the date notice is provided by the landlord to pay the rent and charges accruing to the notice date. Thereafter, the first lienholder shall pay the rent and charges in accordance with the resident's lease. If the first lienholder desires to remove the mobile home prior to a payment due date, the first lienholder shall pay the rent and charges accrued to the date of removal prior to removing the mobile home.

I. If the first lienholder fails to pay the rent and charges due as provided in Subsection H of this section, the landlord may give the first lienholder notice of the nonpayment in accordance with Section 47-10-6 NMSA 1978. If the first lienholder fails to make payment within the time period specified in the notice, the landlord may

proceed against the first lienholder by exercising the remedies granted it under the Mobile Home Park Act. The landlord may also seek any other remedies to which it is entitled by law. The prevailing party in any action brought in an event to seek relief under this section, including an action for damages, is entitled to an award for reasonable attorney fees and costs incurred in the suit. Notwithstanding anything in this section to the contrary, the judgment obtained in such an action, if in favor of the landlord, constitutes a lien against the mobile home having priority over the lien of the first lienholder. The lien may be foreclosed pursuant to the procedures pertaining to a landlord's lien created in Section 48-3-5 NMSA 1978.

J. Any notice required by this section between the first lienholder and landlord shall be in writing and either hand delivered or mailed by certified mail, return receipt requested. The notice shall be effective the date of delivery or mailing. If hand delivered, the notice shall be delivered at the principal office or place of business of the addressee during regular business hours to the person in charge of the office or place of business.

K. If the mobile home is sold to third parties who intend to remain in the park, they will not be allowed to reside in the mobile home unless the parties have been qualified by the landlord as residents. Until the purchasers and the landlord enter into a written lease agreement, the landlord may refuse to recognize the sale and treat any persons living in the mobile home as trespassers.

L. If the first lienholder has paid in full all money due under Subsection H of this section, it shall be unlawful for the landlord to refuse to allow the first lienholder to remove the mobile home. If the landlord refuses to allow the first lienholder to remove the mobile home, the landlord is liable to the first lienholder for each day the landlord unlawfully maintains possession of the mobile home, at a daily rate equal to one-thirtieth of the monthly payment required by a contract between the first lienholder and resident. In all disputes between the landlord and the first lienholder, the court shall award reasonable attorney fees and costs to the prevailing party. In the event the mobile home has not been resold within six months of the landlord providing notice pursuant to Subsection G of this section, the landlord may request the first lienholder to remove the mobile home within thirty days of the request. Notice of the request shall be given to the first lienholder in accordance with Subsection J of this section.

History: Laws 1983, ch. 122, § 9; 1997, ch. 39, § 3.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

The 1997 amendment, effective June 20, 1997, in Subsection E, inserted the language beginning "other charges" and ending "this section" in the first sentence, deleted "shall" following "charges" and deleted "and whoever ultimately claims the mobile home will owe that sum to the person who paid it" following "home" in the second sentence and

added the third sentence; rewrote Subsection F; rewrote Subsection G; and added Subsections H through L.

47-10-10. Entry fees prohibited; entry fee defined; security deposit; court costs.

A. The owner of a mobile home park or the agent of such owner shall neither pay to nor receive from an owner or a seller of a mobile home an entry fee of any type as a condition of tenancy in a mobile home park.

B. As used in this section, "entry fee" means any fee paid to or received by an owner of a mobile home park or his agent, except for:

(1) rent;

(2) a security deposit against actual damages to the premises or to secure rental payments, which deposit shall not be greater than the amount allowed under Section 9 [8] [47-10-8 NMSA 1978] of the Mobile Home Park Act. Security deposits shall remain the property of the tenant, and they shall be deposited into a separate trust account by the landlord to be administered by the landlord as a private trustee. For the purpose of preserving the corpus, the landlord shall not commingle the trust funds with other money, but he is permitted to keep the interest and profits thereon as his compensation for administering the trust;

(3) a fee charged by any state, municipal or county governmental agency;

(4) utilities; or

(5) incidental charges for services actually performed by the mobile home park owner or his agent or agreed to in writing by the tenant.

C. The trial judge may award court costs and reasonable attorney fees in any court action brought pursuant to the Mobile Home Park Act to the prevailing party upon a finding that the prevailing party undertook the court action and legal representation for a legally sufficient reason and not for a dilatory or unfounded cause.

D. The management or the resident may bring a civil action for violation of the rental agreement or any violation of the Mobile Home Park Act in the appropriate court of the county in which the mobile home park is located. Either party may recover actual damages, or, the court may in its discretion award such equitable relief as it deems necessary, including the enjoining of either party from further violations.

History: Laws 1983, ch. 122, § 10.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. The reference to § 9 of the Mobile Home Park Act in the first sentence of Subsection B(2) seems incorrect, as that section, compiled as 47-10-9 NMSA 1978, deals with remedies. Section 8 of the act, compiled as 47-10-8 NMSA 1978, deals with security deposits.

Metropolitan court injunctive power. — Metropolitan court has jurisdiction to issue injunction to enjoin a party to a mobile lot rental agreement from violating the rental agreement or the Mobile Home Park Act. *Martinez v. Sedillo*, 2005-NMCA-029, 137 N.M. 103, 107 P.3d 543.

Jurisdiction. — The "the appropriate court" in Subsection D of this section includes the magistrate court, metropolitan court and district court within the jurisdictional monetary limitations of the courts. *Martinez v. Sedillo*, 2005-NMCA-029, 137 N.M. 103, 107 P.3d 543.

Notice of non-compliance. — Where landlord filed notice of non-compliance with rental agreement, this filing provided notice that the landlord contended that the tenant violated the rental agreement. *Martinez v. Sedillo*, 2005-NMCA-029, 137 N.M. 103, 107 P.3d 543.

47-10-11. Closed parks prohibited.

A. The management shall not require, as a condition of tenancy in a mobile home park, that the prospective tenant purchase a mobile home from a particular seller or from any one of a particular group of sellers and shall not require that the management act as agent in the future sale of the mobile home.

B. The management shall not give any special preference in renting to a prospective tenant who has purchased a mobile home from a particular seller.

C. A seller of mobile homes shall not require as a condition of sale that a purchaser locate in a particular mobile home park or in any one of a particular group of mobile home parks.

D. The management shall not prohibit the listing or sale of a mobile home within the park by the owner of the mobile home or the owner's agent. The management shall not require as a condition of sale that the management serve as the selling agent.

E. The management shall treat all persons equally in evaluating credit or renting or leasing available space, except that a park may be designated for housing for older persons after a six months' notice to the residents, provided that the management complies with all applicable procedures of state and federal antidiscrimination laws, including the federal Fair Housing Act, 42 U.S.C. Sections 3601-3619.

History: Laws 1983, ch. 122, § 11; 1997, ch. 186, § 2; 2007, ch. 194, § 1.

ANNOTATIONS

The 2007 amendment, effective June 15, 2007, amended Subsection E to permit a mobile home park to be designated for older persons if management complies with all applicable procedures of state and federal antidiscrimination laws.

The 1997 amendment, effective June 20, 1997, in Subsection A, substituted "purchase" for "has purchased" and added the language beginning "and shall not"; added Subsection D and redesignated former Subsection D as Subsection E; and inserted "evaluating credit or" in Subsection E.

47-10-12. Selling fees prohibited.

The owner of a mobile home park or his agent shall not require payment of any type of selling fee or transfer fee by either a tenant in the park wishing to sell his mobile home to another party or by any party wishing to buy a mobile home from a tenant in the park as a condition of tenancy in a mobile home park for the prospective buyer. This section shall in no way prevent the owner of a mobile home park or his agent from applying the normal park standards to prospective buyers before granting or denying tenancy or from charging a reasonable selling fee or transfer fee for services actually performed and agreed to in writing by the tenant. Nothing in this section shall be construed to affect the rent charged.

History: Laws 1983, ch. 122, § 12.

47-10-13. Certain types of landlord-seller agreements prohibited.

A seller of mobile homes shall not pay or offer cash or other consideration other than rent to the owner of a mobile home park or his agent for the purpose of reserving spaces or otherwise inducing acceptance of one or more mobile homes in a mobile home park.

History: Laws 1983, ch. 122, § 13.

ANNOTATIONS

Cross references. — For Real Estate Disclosure Act, *see* 47-13-1 NMSA 1978.

47-10-14. Rental agreement; disclosure of terms in writing.

A. The terms and conditions of a tenancy shall be adequately disclosed in writing in a rental agreement by the management to any prospective resident prior to the rental or occupancy of a mobile home space or lot. The disclosures shall include:

(1) the term of the tenancy, the amount of the rent and the dollar amount of any rent increases for each of the preceding two years;

(2) the day the rental payment is due;

(3) the day when unpaid rent shall be considered in default;

(4) the rules and regulations of the park then in effect;

(5) the zoning applicable to the property upon which the park is located;

(6) the name and mailing address where a manager's decision may be appealed;

(7) the name and mailing address of the owner of the park;

(8) all charges to the tenant other than rent; and

(9) A statement explaining the resident's right to request alternative dispute resolution of any disputes with the mobile home park owner or management, except for disputes over nonpayment of rent or utility charges or in the case of public safety emergencies.

B. The rental agreement shall be signed by both the management and the resident, and each party shall receive a copy of it.

C. The management and the resident may include in a rental agreement terms and conditions not prohibited under the provisions of the Mobile Home Park Act.

D. If an owner deliberately uses a rental agreement containing provisions known by him to be prohibited by law or by the provisions of Section 47-10-11, 47-10-12 or 47-10-13 NMSA 1978, the resident may recover damages sustained by him resulting from application of the illegal provision and reasonable attorney fees.

History: Laws 1983, ch. 122, § 14; 1993, ch. 147, § 4; 1997, ch. 186, § 3.

ANNOTATIONS

Cross references. — For Real Estate Disclosure Act, *see* 47-13-1 NMSA 1978.

The 1997 amendment, effective June 20, 1997, in Subsection A, added the language beginning "and the dollar" in Paragraph (1), added Paragraph (5) and redesignated the remaining paragraphs accordingly, added Paragraph (9), and made stylistic changes throughout the subsection.

The 1993 amendment, effective July 1, 1993, in Subsection A, added Paragraph (6), redesignated former Paragraph (6) as Paragraph (7), and made several stylistic changes; made a minor stylistic change in Subsection B; and substituted "Section 47-

10-11, 47-10-12 or 47-10-13 NMSA 1978" for "Sections 11, 12, or 13 of the Mobile Home Park Act" in Subsection D.

47-10-15. Rules and regulations.

The management shall adopt rules and regulations concerning all residents' use and occupancy of the premises. The rules and regulations are enforceable against a resident only if:

A. they are submitted to tenants for their comment sixty days prior to the rules being implemented;

B. their purpose is to promote the convenience, safety or welfare of the residents, protect and preserve the premises from abusive use or make a fair distribution of services and facilities held out for the residents generally;

C. they are reasonably related to the purpose for which they are adopted;

D. they are not retaliatory or discriminatory in nature, except that all or any portion of the park may be designated for adult-only occupancy after a six-months' notice to the residents; and

E. they are sufficiently explicit in prohibition, direction or limitation of the resident's conduct to fairly inform him of what he shall or shall not do to comply.

History: Laws 1983, ch. 122, § 15; 1997, ch. 186, § 4.

ANNOTATIONS

The 1997 amendment, effective June 20, 1997, added Subsection A and redesignated the remaining subsections accordingly, and substituted "shall" for "must" in two places in Subsection E.

47-10-15.1. New or amended rules; notification; open meeting; pets; physical improvements.

A. The management shall notify mobile home park residents of proposed new rules or amendments to existing rules at least sixty days prior to the effective date of the new or amended rules. The management shall allow residents a thirty-day comment period on proposed rule changes. Comments from residents to management on proposed rule changes shall be in writing and signed by the author. Once all comments have been received, the management shall post all comments and the responses to the comments in a conspicuous place. The new rules or amended rules shall not take effect before sixty days after the notification date.

B. Existing pets that are in compliance with the mobile home park rules or regulations shall be exempt from any provision of new rules or regulations that would prohibit those pets provided those are not a nuisance violating the public peace, health or safety.

C. The mobile home park management shall not require existing residents to comply with changes in rules or regulations that require physical improvements to the existing resident's mobile home or lot unless the mobile home is in violation of a local municipal or county ordinance or the physical condition of the resident's mobile home or lot constitutes a public nuisance or threat to the public peace, health or safety.

History: Laws 1997, ch. 186, § 5.

ANNOTATIONS

Effective dates. — Laws 1997, ch. 186 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 20, 1997, 90 days after adjournment of the legislature.

47-10-16. New developments and parks; rental of sites to dealers authorized.

A. The management of a new mobile park or manufactured housing community development may require as a condition of leasing a mobile home site or manufactured home site for the first time such site is offered for lease that the prospective lessee has purchased a mobile home or manufactured home from a particular seller or from any one of a particular group of sellers.

B. A licensed mobile home dealer or a manufactured home dealer may, by contract with the management of a new mobile home park or manufactured housing community development, be granted the exclusive right to first-time rental of one or more mobile home sites or manufactured home sites.

History: Laws 1983, ch. 122, § 16.

47-10-17. Alternative dispute resolution; when permitted; court actions.

A. In any civil dispute between the management and a resident of a mobile home park arising out of the provisions of the Mobile Home Park Act, except for nonpayment of rent or utility charges or in cases in which the health or safety of other residents is in imminent danger, the controversy may be submitted to alternative dispute resolution by request of either party prior to the filing of a court action or a forcible entry and detainer action. The cost of the alternative dispute resolution services shall be divided equally among the disputing parties.

B. The agreement, if one is reached, shall be presented to the court as a stipulation. Either party to the dispute resolution process may terminate the process at any time without prejudice.

C. If either party subsequently violates the stipulation, the other party may apply immediately to the court for relief.

D. Any alternative dispute resolution pursuant to this section shall be performed by a professionally certified mediator approved by all disputing parties.

History: Laws 1983, ch. 122, § 17; 1997, ch. 186, § 6.

ANNOTATIONS

The 1997 amendment, effective June 20, 1997, substituted "Alternative Dispute Resolution" for "Mediation" in the section heading; in Subsection A, substituted "civil dispute" for "controversy", inserted "or utility charges", substituted "alternative dispute resolution by request of" for "mediation by", inserted "a court action or", deleted "upon agreement of the parties" following "action", and added the second sentence; in Subsection B, substituted "dispute resolution process" for "mediation" and deleted "mediation" preceding "process"; and added Subsection D.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Alternative dispute resolution: sanctions for failure to participate in good faith in, or comply with agreement made in, mediation, 43 A.L.R.5th 545.

47-10-18. Conflicts; applicability of law.

Unless a provision of the Mobile Home Park Act directly conflicts with the provisions of the Uniform Owner-Resident Relations Act [47-8-1 to 47-8-52 NMSA 1978], the provisions of the Uniform Owner-Resident Relations Act shall apply to mobile home park owners and residents.

History: Laws 1989, ch. 253, § 4.

47-10-19. Rent increase; disclosure requirement.

A. A landlord shall fully and accurately disclose in writing to a resident an increase in rent. The disclosure shall be provided to a resident at least sixty days prior to implementation of an increase in rent.

B. Upon receiving a written request from a resident or prospective resident, a landlord shall fully and accurately disclose in writing a current schedule of the range of rental rates in the mobile home park. The landlord shall include the date of preparation on the face of the schedule of rental rates.

History: 1978 Comp., § 47-10-19, enacted by Laws 1993, ch. 147, § 5.

47-10-20. Cost of utility services; access to records.

A. Mobile home park owners shall be responsible for maintaining all park-owned exterior utility lines from the mobile home hookups to the main lines in the park, except lines that are damaged by a resident.

B. When a landlord purchases utility services for residents, the charge for utility services billed to residents shall not exceed the cost per unit amount paid by the landlord to the suppliers of the utility services.

C. A landlord shall provide a resident with reasonable access to records of meter readings, if any, taken at the resident's mobile home space.

History: 1978 Comp., § 47-10-20, enacted by Laws 1993, ch. 147, § 6; 1997, ch. 186, § 7.

ANNOTATIONS

The 1997 amendment, effective June 20, 1997, added Subsection A and redesignated the remaining subsections accordingly.

47-10-21. Provision of utility services; administrative fee; disclosure requirement.

A. A landlord may charge residents a reasonable fee to offset the cost of administration incurred by a landlord when he provides utility services to residents.

B. The amount of the administrative fee for utility services shall be fully and accurately disclosed in writing in a rental agreement, pursuant to the provisions of Paragraph (6) [the introductory language] of Subsection A of Section 47-10-14 NMSA 1978.

C. A landlord shall fully and accurately disclose in writing to a resident any increase in the administrative fee. The disclosure shall be provided to a resident at least sixty days prior to implementation of an increase in the administrative fee.

History: 1978 Comp., § 47-10-21, enacted by Laws 1993, ch. 147, § 7.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. The reference to Paragraph (6) of Subsection A of 47-10-14 NMSA 1978 seems incorrect, as that paragraph deals with disclosures concerning the owner. The

correct reference is probably to the introductory language of Subsection A of 47-10-14 NMSA 1978.

47-10-22. Itemized bill; utility services; administrative fees.

When a landlord purchases utility services for residents, he shall provide residents with a monthly itemized bill that includes:

A. a separate listing of charges for each utility service;

B. the amount consumed and the cost per unit for each utility service; provided, that when individual cost per unit figures for utility services are not available, the landlord shall provide residents with the total cost of utility services and the formula used to determine the individual charges for utility services; and

C. if applicable, the amount of the administrative fee for providing utility services to residents.

History: 1978 Comp., § 47-10-22, enacted by Laws 1993, ch. 147, § 8.

47-10-23. Civil penalties.

A. For each violation by a landlord of the provisions of Sections 47-10-19 through 47-10-22 NMSA 1978 a landlord may be charged a civil penalty not to exceed five hundred dollars ($500).

B. The remedies provided in this section are not exclusive and do not limit the rights or remedies that are otherwise available to a resident under any other law.

History: 1978 Comp., § 47-10-23, enacted by Laws 1993, ch. 147, § 9.

ARTICLE 11
Time Shares

47-11-1. Short title.

This act [47-11-1 to 47-11-13 NMSA 1978] may be cited as the "New Mexico Time Share Act".

History: Laws 1986, ch. 97, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Property taxation of residential time-share or interval-ownership units, 80 A.L.R.4th 950.

47-11-2. Definitions.

As used in the New Mexico Time Share Act:

A. "commission" means the New Mexico real estate commission;

B. "developer" means any person creating or engaged in the business of selling ten or more of its own time shares and includes any person who controls, is controlled by or is in common control with the developer and who is engaged in creating or selling time shares for the developer;

C. "enrolled" means having a paid membership in an exchange program or a membership in an exchange program evidenced by written acceptance or confirmation of membership;

D. "exchange company" means any person operating an exchange program;

E. "exchange program" means any opportunity or procedure for the assignment or exchange of time shares among purchasers in the same or another time share project;

F. "managing agent" means a person who undertakes the duties, responsibilities and obligations of the management of a time share program;

G. "person" means one or more natural persons, corporations, partnerships, associations, trusts, other entities or any combination thereof;

H. "purchaser" means any person, other than a developer or lender, who owns or acquires an interest or proposes to acquire an interest in a time share;

I. "time share" means a right to occupy a unit or any of several units during five or more separated time periods over a period of at least five years, including renewal options, whether or not coupled with a freehold estate or an estate for years in a time share project or a specified portion thereof, including, but not limited to, a vacation license, prepaid hotel reservation, club membership, limited partnership interest or vacation bond;

J. "time share program" means any arrangement for time shares whereby real property has been made subject to a time share;

K. "time share project" means any real property that is subject to a time share program;

L. "time share salesperson" means a person, other than a person who has at least a fifteen percent interest in the developer, who sells or offers to sell on behalf of a developer a time share to a purchaser; and

M. "time share unit" or "unit" means a living space in a time share project that is divided into time shares and designated for separate occupancy or use.

History: Laws 1986, ch. 97, § 3.

ANNOTATIONS

Cross references. — For the New Mexico real estate commission, *see* 61-29-4 NMSA 1978.

47-11-2.1. Registration required of time share projects; real estate salesperson license required.

A. It shall be unlawful for any person in this state to engage or attempt to engage in the business of a time share salesperson without first obtaining a real estate broker or salesperson license issued by the New Mexico real estate commission under the provisions of Section 61-29-1 NMSA 1978.

B. It shall be unlawful for a time share developer to sell or offer to sell time shares located in this state without first obtaining a certificate of registration for the time share project to be offered for sale issued by the New Mexico real estate commission under the provisions of the New Mexico Time Share Act.

History: Laws 1986, ch. 97, § 2; 1978 Comp., § 61-29-1.1, recompiled as 1978 Comp., § 47-11-2.1.

47-11-3. Time shares deemed real estate; partition.

A. A time share is deemed to be an interest in real estate and shall be governed by the law of this state relating to real estate.

B. A purchaser of a time share may, in accordance with Section 14-9-1 NMSA 1978, record the instrument by which he acquired his interest and upon such recordation shall be entitled to the protection provided by Section 14-9-2 NMSA 1978 for the recordation of other real property instruments.

C. A document transferring or encumbering a time share shall not be rejected for recordation because of the nature or duration of that estate, provided all other requirements necessary to make an instrument recordable are complied with.

D. When a time share is owned by two or more persons as tenants in common or as joint tenants, either may seek a partition by sale of that interest but no purchaser of a time share may maintain an action for partition from the time share project of the unit in which such time share is held.

History: Laws 1986, ch. 97, § 4.

47-11-4. Disclosure statement.

Each developer shall fully and conspicuously disclose to each purchaser in a disclosure statement at least the following information:

A. the total financial obligation of the purchaser, including the initial purchase price and any additional charges to which the purchaser may be subject;

B. any person who has or may have the right to alter, amend or add to charges to which the purchaser may be subject and the terms and conditions under which such charges may be imposed;

C. the nature and duration of each agreement between the developer and the person managing the time share program or its facilities;

D. the date of availability of each amenity and facility of the time share program which is not completed at the time of sale of a time share;

E. the specific term of the time share;

F. the purchaser's right to cancel within seven days of execution of the contract and how that right may be exercised under the New Mexico Time Share Act; and

G. a statement that under New Mexico law an instrument conveying a time share must be recorded in the office of the clerk of the county where the real property is located to protect that interest.

History: Laws 1986, ch. 97, § 5.

47-11-5. Purchaser's right to cancel; escrow; violation.

A. A developer shall, before conveyance of a time share and not later than the execution of any contract of sale, provide a purchaser with a copy of a disclosure statement containing the information required by the New Mexico Time Share Act. The contract of sale is voidable by the purchaser within seven days after execution of the contract of sale. The contract shall conspicuously disclose the purchaser's right to cancel under this subsection and how that right may be exercised. An instrument transferring a time share shall not be recorded until seven days after the execution of the contract of sale.

B. A purchaser may elect to cancel within the time period set out in Subsection A of this section by hand-delivering or by mailing notice to the developer or to his agent for service of process. Cancellation under this section is without penalty and upon receipt of the notice all payments made prior to cancellation shall be refunded within thirty days.

C. Any payments received by a time share developer or real estate licensee in connection with the sale of a time share shall be handled in accordance with Subsections E, H and I of Section 61-29-12 NMSA 1978 and applicable rules and regulations of the commission. These payments shall be held in such manner until:

(1) delivered to the developer at closing;

(2) delivered to the developer because of the purchaser's default under a contract of sale; or

(3) refunded to purchaser.

D. The commission may waive the requirements of Subsection C of this section for a time share project if:

(1) the time share developer submits to the commission information sufficient to allow the commission to determine the total cost of completing the time share project; and

(2) the time share developer delivers to the commission a performance bond, with a surety acceptable to the commission, in an amount sufficient to complete the time share project. If the developer does not complete the project, the commission may use funds received from the bond to complete the project.

History: Laws 1986, ch. 97, § 6.

47-11-6. Prizes.

An advertisement or promotion of a time share which includes the offer of a prize or other inducement shall fully comply with the provisions of the Unfair Practices Act.

History: Laws 1986, ch. 97, § 7.

47-11-7. Time share proxy.

No proxy, power of attorney or similar device given by the purchaser of a time share regarding the management of the time share program or its facilities shall exceed one year in duration, but the same may be renewed from year to year.

History: Laws 1986, ch. 97, § 8.

47-11-8. Exchange programs.

A. If a purchaser is offered the opportunity to subscribe to an exchange program, the developer shall, except as provided in Subsection C of this section, deliver to the purchaser, prior to the execution of the sales contract or any contract between the

purchaser and the exchange company, at least the following information regarding such exchange program:

(1) the name and address of the exchange company;

(2) the names of all officers, directors and share holders owning five percent or more of the outstanding stock of the exchange company;

(3) whether the exchange company or any of its officers or directors has any legal or beneficial interest in any developer or managing agent for any time share project participating in the exchange program and, if so, the name and location of the time share project and the nature of the interest;

(4) unless the exchange company is also the developer, a statement that the purchaser's contract with the exchange company is a contract separate and distinct from the sales contract;

(5) whether the purchaser's participation in the exchange program is dependent upon the continued affiliation of the time share project with the exchange program;

(6) whether the purchaser's membership or participation, or both, in the exchange program is voluntary or mandatory;

(7) a complete and accurate description of the terms and conditions of the purchaser's contractual relationship with the exchange company and the procedure by which changes thereto may be made;

(8) a complete and accurate description of the procedure to qualify for and effectuate exchanges;

(9) a complete and accurate description, expressed in boldfaced type, of all limitations, restrictions or priorities employed in the operation of the exchange program, including but not limited to limitations on exchanges based on seasonality, unit size or levels of occupancy and, in the event that such limitations, restrictions or priorities are not uniformly applied by the exchange program, a clear description of the manner in which they are applied;

(10) whether exchanges are arranged on a space available basis and whether any guarantees of fulfillment of specific requests for exchanges are made by the exchange program;

(11) whether and under what circumstances an owner, in dealing with the exchange company, may lose the use and occupancy of his time share in any properly applied-for exchange without substitute accommodations being provided or arranged for by the exchange company;

(12) the expenses, fees or range of fees for participation by owners in the exchange program, whether any such fees may be altered by the exchange company and the circumstances under which alterations may be made;

(13) the name and address of the site of each time share project or other property which is participating in the exchange program;

(14) the number of units in each project or other property participating in the exchange program which are available for occupancy and qualify for participation in the exchange program, expressed within the following numerical groupings, 1-5, 6-10, 11-20, 21-50 and 51 and over;

(15) the number of owners with respect to each time share project or other property which are eligible to participate in the exchange program expressed within the following numerical groupings, 1-100, 101-249, 250-499, 500-999 and 1,000 and over, and the criteria used to determine those owners who are currently eligible to participate in the exchange program;

(16) the disposition made by the exchange company of time shares deposited with the exchange program by owners eligible to participate in the exchange program and not used by the exchange company in effecting exchanges;

(17) the following information which, except as provided in Subparagraph (b) of this paragraph, shall be independently audited by a certified public accountant in accordance with the standards of the accounting standards board of the American institute of certified public accountants and reported for each year no later than July 1 of the succeeding year:

(a) the number of owners enrolled in the exchange program and the relationship between the exchange company and owners as being either fee paying or gratuitous in nature;

(b) the number of time share projects or other properties eligible to participate in the exchange program indicating those having a contractual relationship between the developer or the association and the exchange company and those having solely a contractual relationship between the exchange company and owners directly;

(c) the percentage of confirmed exchanges, which shall be the number of exchanges confirmed by the exchange company divided by the number of exchanges properly applied for, together with a complete and accurate statement of the criteria used to determine whether an exchange request was properly applied for;

(d) the number of time shares or other intervals for which the exchange company has an outstanding obligation to provide an exchange to an owner who relinquished a time share or interval during the year in exchange for a time share or interval in any future year; and

(e) the number of exchanges confirmed by the exchange company during the year; and

(18) a statement in boldfaced type to the effect that the percentage described in Subparagraph (c) of Paragraph (17) of this subsection is a summary of the exchanges properly applied for in the period reported and that the percentage does not indicate the likelihood of confirmation of a purchaser's specific choice or range of choices, since availability at individual locations may vary.

The developer shall obtain the purchaser's written certification of receipt of the information required by this subsection.

B. The information required by Paragraphs (2), (3), (13), (14), (15) and (17) of Subsection A of this section shall be accurate as of December 31 of the year preceding the year in which the information is delivered, except for information delivered within the first one hundred eighty days of any calendar year which shall be accurate as of December 31 of the year two years preceding the year in which the information is delivered to the purchaser. The remaining information required by Subsection A of this section shall be accurate as of a date which is no more than thirty days prior to the date on which the information is delivered to the purchaser.

C. In the event an exchange company offers an exchange program directly to the purchaser, the exchange company shall deliver to each purchaser, concurrently with the offering and prior to the execution of any contract between the purchaser and the exchange company, the information set forth in Subsection A of this section. The requirements of this subsection shall not apply to any renewal of a contract between a purchaser and an exchange company.

D. All promotional brochures, pamphlets, advertisements or other materials disseminated by the exchange company to purchasers in this state which contain the percentage of confirmed exchanges described in Subparagraph (c) of Paragraph (17) of Subsection A of this section must include the statement set forth in Paragraph (18) of Subsection A of this section.

History: Laws 1986, ch. 97, § 9.

47-11-9. Service of process on exchange company.

Any exchange company offering an exchange program to a purchaser shall be deemed to have made an irrevocable appointment of the commission to receive service of lawful process in any proceeding against the exchange company arising under the New Mexico Time Share Act.

History: Laws 1986, ch. 97, § 10.

47-11-10. Securities laws apply.

The Securities Act of New Mexico shall apply to time shares deemed to be investment contracts or to other securities offered with or incident to a time share.

History: Laws 1986, ch. 97, § 11.

ANNOTATIONS

Compiler's notes. — The Securities Act of New Mexico, formerly 58-13-1 to 58-13-46 NMSA 1978, was repealed by Laws 1986, Chapter 7. Present comparable provisions are found in the New Mexico Securities Act of 1986, 58-13B-1 NMSA 1978 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. — What is "investment contract" within meaning of § 2(1) of Securities Act of 1933 (15 USCS § 77b(1)) and § 3(a)(10) of Securities Exchange Act of 1934 (15 USCS § 78c(a)(10)), both defining term "security" as including investment contract, 134 A.L.R. Fed. 289.

47-11-11. Application for registration of time share project; denial of registration; renewal; reinstatement; termination of developer's interest.

A. Prior to the offering in this state of any time share located in this state, the developer of the time share project shall make written application to the commission for the registration of the project. The application shall be accompanied by a fee in an amount fixed by the commission, based upon the number of time shares to be offered for sale, but not to exceed one thousand five hundred dollars ($1,500). The application shall include a description of the project, copies of proposed time share instruments including disclosure statements, sale contracts and deeds, information pertaining to any marketing or managing entity to be employed by the developer for the sale of time shares in the time share project or for the management of the project, information regarding any exchange program available to the purchaser, an irrevocable appointment of the commission to receive service of any lawful process in any proceeding against the developer or the developer's salespersons arising under the New Mexico Time Share Act and any other information or documentation required by the commission.

Upon receipt of a properly completed application and fee and upon a determination by the commission that the sale and management of the time shares in the time share project will be directed and conducted by persons of good moral character, the commission shall issue to the developer a certificate of registration authorizing the developer to offer time shares in the project for sale. The commission shall, within fifteen days after receipt of an incomplete application, notify the developer by mail that the commission has found deficiencies, which shall be specified in the notice, and shall, within forty-five days after the receipt of a properly completed application, either issue the certificate of registration or notify the developer by mail of any specific objections to the registration of the project. The certificate shall be prominently displayed in the office of the developer on the site of the project.

The developer shall promptly report to the commission any and all changes in the information required to be submitted for the purpose of the registration. The developer shall also immediately furnish the commission complete information regarding any change in its interest in a registered time share project. In the event a developer disposes of or otherwise terminates its interest in a time share project, the developer shall certify to the commission in writing that its interest in the time share project is terminated and shall return the certificate of registration to the commission for cancellation.

B. In the event the commission finds that there is substantial reason to deny the application for registration as a time share project, the commission shall notify the applicant that such application has been denied and shall afford the applicant an opportunity for a hearing before the commission to show cause why the application should not be denied. The provisions of the Uniform Licensing Act [61-1-1 to 61-1-31 NMSA 1978] shall apply in all proceedings to deny a certificate of registration.

C. The acceptance by the commission of an application for registration shall not constitute the approval of its contents or waive the authority of the commission to take disciplinary action as provided by the New Mexico Time Share Act.

History: Laws 1986, ch. 97, § 12.

47-11-11.1. Register of applicants; roster of registrants; registered projects; financial report to secretary of state.

A. The executive secretary of the commission shall keep a register of all applicants for certificates of registration, showing for each the date of application, name, business address and whether the certificate was granted or refused.

B. The executive secretary of the commission shall also keep a current roster showing the name and address of all time share projects registered with the commission. The roster shall be kept on file in the office of the commission and be open to public inspection.

C. On or before the first day of September of each year, the commission shall file with the secretary of state a copy of the roster of time share projects registered with the commission and a report containing a complete statement of income received by the commission in connection with the registration of time share projects for the preceding fiscal year ending June 30 attested by the affidavit of the executive secretary of the commission.

History: Laws 1986, ch. 97, § 13; 1978 Comp., § 61-29-5.1, recompiled as 1978 Comp., § 47-11-11.1.

ANNOTATIONS

Cross references. — For duties of secretary of New Mexico real estate commission, *see* 61-29-5 NMSA 1978.

47-11-11.2. Disciplinary action by commission.

A. The commission shall have power to take disciplinary action. Upon its own motion, or on the verified complaint of any person, the commission may investigate the actions of any time share broker or salesperson or any developer of a time share project registered under the New Mexico Time Share Act or any other person or entity who shall assume to act in such capacity. If the commission finds probable cause that a time share broker, salesperson or developer has violated any of the provisions of this act, the commission may hold a hearing on the allegations of misconduct. All such hearings shall be conducted in accordance with the provisions of the Uniform Licensing Act [61-1-1 to 61-1-31 NMSA 1978].

The commission shall have power to suspend or revoke a real estate license issued to a time share broker or salesperson, suspend or revoke a certificate of registration of a time share project issued, reprimand or censure such broker, salesperson or developer, or fine such developer in the amount of five hundred dollars ($500) for each violation of the New Mexico Time Share Act, if, after a hearing, the commission adjudges that broker, salesperson or developer to be guilty of:

(1) making any willful or negligent misrepresentation or any willful or negligent omission of material fact about any time share or time share project;

(2) making any false promise of a character likely to influence, persuade or induce;

(3) pursuing a course of misrepresentation or making of false promises through agents, salespersons, advertising or otherwise;

(4) failing, within a reasonable time, to account for all money received from others in a time share transaction and failing to remit such money as may be required in Section 6 [47-11-5 NMSA 1978] of the New Mexico Time Share Act;

(5) paying a commission, salary or other valuable consideration to any person for acts or services performed in violation of the New Mexico Time Share Act;

(6) any other conduct which constitutes improper, fraudulent or dishonest dealing;

(7) performing or undertaking to perform the practice of law as set forth in Section 36-2-27 NMSA 1978;

(8) failing to deposit and maintain in a trust or escrow account in an insured bank or savings and loan association in New Mexico all money received from others in

a time share transaction as may be required in Section 6 [47-11-5 NMSA 1978] of the New Mexico Time Share Act;

(9) failing to deliver to a purchaser a disclosure statement containing the information required by Section 5 [47-11-4 NMSA 1978] of the New Mexico Time Share Act and any other disclosures that the commission may by regulation require;

(10) failing to comply with the provisions of Section 7 [47-11-6 NMSA 1978] of this act in the advertising or promotion of time shares for sale or failing to assure such compliance by persons engaged on behalf of a developer;

(11) failing to comply with the provisions of Section 9 [47-11-8 NMSA 1978] of this act in furnishing complete and accurate information to a purchaser concerning any exchange program which may be offered to such purchaser; or

(12) making any false or fraudulent representation on an application for registration.

B. Following a hearing, the commission shall also have power to suspend or revoke any certificate of registration issued under the provisions of the New Mexico Time Share Act or to reprimand or censure any developer when the registrant has been convicted or has entered a plea of guilty or no contest upon which final judgment is entered by a court of competent jurisdiction in this state, or any other state, of any felony or any one or more of the criminal offenses of embezzlement, obtaining money under false pretense, fraud, forgery, conspiracy to defraud or other offense involving moral turpitude which would reasonably affect the developer's performance in the time share business.

C. The commission may appear in its own name in district court in actions for injunctive relief to prevent any person or entity from violating the provisions of the New Mexico Time Share Act or rules promulgated by the commission. The district court shall have the power to grant an injunction even if criminal prosecution has been or may be instituted as a result of the violations and regardless of whether the person or entity has been registered by the commission.

D. Each developer shall maintain or cause to be maintained complete records of every time share transaction including records pertaining to the deposit, maintenance and withdrawal of money required to be held in a trust or escrow account pursuant to Section 6 [47-11-5 NMSA 1978] of the New Mexico Time Share Act, or as otherwise required by the commission. The commission may inspect these records periodically without prior notice and may also inspect these records whenever the commission determines that they are pertinent to an investigation of any specific complaint against a time share project.

E. Nothing in the New Mexico Time Share Act precludes any enforcement authority provided pursuant to the Unfair Practices Act [Chapter 57, Article 12 NMSA 1978] or other enforcement authority provided by law.

History: Laws 1986, ch. 97, § 14; 1978 Comp., § 61-29-17.1, recompiled as 1978 Comp., § 47-11-11.2.

47-11-12. Private enforcement.

The provisions of the New Mexico Time Share Act shall not be construed to limit in any manner the right of a purchaser or other person injured by a violation of the New Mexico Time Share Act to bring a private action.

History: Laws 1986, ch. 97, § 15.

47-11-13. Release of liens.

A. Prior to the recordation of any instrument transferring a time share, the developer shall record or furnish to the purchaser a release of all liens affecting that time share or shall provide a surety bond or insurance against the lien from a company acceptable to the commission as provided for liens on real estate in this state, and such underlying lien document shall contain a provision wherein the lienholder subordinates its rights to that of a time share purchaser who fully complies with all of the provisions and terms of the contract of sale.

B. Unless a time share purchaser or a time share purchaser's predecessor in title has agreed otherwise with the lienholder, if a lien other than a mortgage or deed of trust becomes effective against more than one time share in a time share project, any time share purchaser is entitled to a release of his time share from a lien upon payment of the amount of the lien attributable to his time share. The amount of the payment shall be proportionate to the ratio that the time share purchaser's liability bears to the liabilities of all time share purchasers whose interests are subject to the lien. Upon receipt of payment, the lienholder shall promptly deliver to the time share purchaser a release of the lien covering that time share. After payment, the managing agent may not assess or have a lien against that time share for any portion of the expenses incurred in connection with that lien.

History: Laws 1986, ch. 97, § 16.

ARTICLE 12
Land Use Easements

47-12-1. Short title.

This act [47-12-1 to 47-12-6 NMSA 1978] may be cited as the "Land Use Easement Act".

History: Laws 1991, ch. 15, § 1.

ANNOTATIONS

Compiler's notes. — This act is substantially similar to the Uniform Conservation Easement Act.

Cross references. — For the Cultural Properties Preservation Easement Act, *see* 47-12A-1 NMSA 1978 et seq.

For land development fees and rights, *see* 5-8-1 NMSA 1978 et seq.

Counties may acquire and hold conservation easements assuming they do so consistent with other laws applicable to public purchases of real property and do not do so by eminent domain. 2001 Op. Att'y Gen. No. 01-02.

Law reviews. — For article, "Rural Development Considerations for Growth Management," see 43 Nat. Res. J. 781 (2003).

47-12-2. Definitions.

As used in the Land Use Easement Act:

A. "holder" means any nonprofit corporation, nonprofit association or nonprofit trust, the purposes or powers of which include retaining or protecting the natural or open space values of real property, assuring the availability of real property for agricultural, forest, recreational or open space use, protecting natural resources or maintaining production uses of real property;

B. "land use easement" means a holder's nonpossessory interest in real property imposing any limitation or affirmative obligation the purpose of which includes retaining or protecting natural or open space values of real property, assuring the availability of real property for agricultural, forest, recreational or open space use or protecting natural resources; and

C. "third-party enforcement right" means a right expressly provided by the parties to a land use easement empowering a specifically identified nonprofit corporation, nonprofit association or nonprofit trust that, although eligible to be a holder, is not a holder, to enforce any term of the easement. No party shall have any third-party enforcement right unless that right is expressly provided for in a land use easement.

History: Laws 1991, ch. 15, § 2.

ANNOTATIONS

Law reviews. — For article, "Rural Development Considerations for Growth management," see 43 Nat. Res. J. 781 (2003).

47-12-3. Creation, conveyance, recording, acceptance and duration.

A. Except as otherwise provided in the Land Use Easement Act, a land use easement may be created, conveyed, recorded, assigned, released, modified, terminated or otherwise altered or affected in the same manner as any other easement.

B. A land use easement is not effective and creates no rights or obligations until it is recorded in the office of the county clerk of the county or counties in which any part of the real property subject to the land use easement is located.

C. No right or duty in favor of or against a holder and no right in favor of a person having a third-party enforcement right arises under a land use easement prior to its acceptance by that holder and recordation of that acceptance in the office of the county clerk of the county where the real property subject to a land use easement is located, in whole or in part.

D. Except as provided in Subsection B of Section 4 [47-12-4 NMSA 1978] of the Land Use Easement Act, the term of a land use easement shall be the term stated in the easement.

E. No land use easement may impair an interest in real property existing at the time the land use easement is created, unless the owner of that interest is a party to the land use easement and consents to it.

F. The rights, obligations and duties created by a land use easement shall only be enforceable upon and impact the land located within that easement.

History: Laws 1991, ch. 15, § 3.

ANNOTATIONS

Prescriptive extinguishment of easements. — An easement will be prescriptively extinguished if the servient owner's use of the area is adverse to the easement owner's rights in the easement, open or notorious, and continuous without effective interruption for the prescriptive period of ten years. The level of adversity must amount to an unreasonable interference such that the easement owner is on notice that the easement is under threat, and the extinguishment resulting from the servient owner's adverse use may be complete, or partial, based on the extent it interferes with the easement holder's rights. *Mimbres Hot Springs Ranch v. Vargas*, 2023-NMCA-046, cert. denied.

Defendants' conduct failed to satisfy the adversity element for extinguishment by prescription. — Where, in 1981, a third party who owned property abutting plaintiff's property, granted plaintiff an express easement, consisting of an old road that allowed plaintiff to access its property without needing to cross a creek that tends to flood during monsoon season, and where, in 1993, defendants purchased the property from the third party, subject to plaintiff's easement, and where defendants replaced an existing wire

gate with a metal tube gate across the easement, which has remained locked since it was first installed in 1993, and where, despite the locked gate, plaintiff's individual members have used the easement for walking, hiking, and occasionally surveying the property by going around the gate, and where, in 2015, plaintiff asked defendants to remove the gate so that plaintiff could improve the easement into a road that could be driven on more easily, and where defendants denied plaintiff's request, claiming that the easement was not valid due to non-use, and where plaintiff filed a complaint, seeking to quiet title to the easement along with an order enjoining defendants from blocking it, and where defendants counterclaimed seeking to quiet title in their favor, alleging the easement had either been abandoned or prescriptively extinguished, the district court did not err in granting plaintiff's motion for summary judgment, because defendants' act of placing a locked gate over the easement was not sufficiently adverse so as to unreasonably interfere with plaintiff's enjoyment of the easement and did not put plaintiff on notice that its rights in the easement were under threat. *Mimbres Hot Springs Ranch v. Vargas*, 2023-NMCA-046, cert. denied.

47-12-4. Actions.

A. An action affecting a land use easement may be brought by any of the following:

(1) an owner of an interest in the real property burdened by the land use easement;

(2) a holder of a land use easement; or

(3) a person having a third-party enforcement right.

B. This section does not affect the power of a court to modify or terminate a land use easement in accordance with any principle of law or equity.

History: Laws 1991, ch. 15, § 4.

47-12-5. Validity of land use easement.

A land use easement is valid even though the land use easement:

A. is not appurtenant to an interest in real property;

B. imposes a negative covenant that is a restriction on the use of the land that is subject to the terms of the easement;

C. imposes affirmative obligations upon the owner of any interest in the burdened property or upon the holder;

D. does not touch or concern real property; or

E. does not establish any privity of estate or of contract.

History: Laws 1991, ch. 15, § 5.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Waiver of right to enforce restrictive covenant by failure to object to other violations, 25 A.L.R.5th 123.

Laches or delay in bringing suit as affecting right to enforce restrictive building covenant, 25 A.L.R.5th 233.

47-12-6. Effect on enforceable interests.

A. Nothing in the Land Use Easement Act invalidates any interest, whether designated as a land use easement, covenant, equitable servitude, restriction or easement that is enforceable under the laws of this state.

B. No interest benefiting or encumbering real property cognizable under the statutes or common law in effect in this state prior to the enactment of the Land Use Easement Act, nor any application or permit for a change of a point of diversion place or purpose of use of a water right at any time shall be impaired, invalidated or in any way adversely affected by reason of any provision of that act.

C. Nothing in the Land Use Easement Act shall be construed to diminish or impair the rights of any person authorized by the laws of this state to acquire rights-of-way, easements or other property rights through the exercise of eminent domain. Nothing in that act shall be construed to authorize a governmental body or any charitable corporation or trust to acquire a conservation or preservation restriction through the exercise of eminent domain.

D. Nothing in the Land Use Easement Act shall be deemed to constitute a denial of surface owner consent for the surface mining of coal under the Surface Mining Act [Chapter 69, Article 25A NMSA 1978] or the federal Surface Mining Control and Reclamation Act of 1977 or to restrict, condition or affect the alienability, commercial development or extraction of leasable or locatable minerals under federal laws.

History: Laws 1991, ch. 15, § 6.

ANNOTATIONS

Cross references. — For the federal Surface Mining Control and Reclamation Act of 1977, *see* 30 U.S.C. § 1201 et seq.

ARTICLE 12A
Cultural Properties Preservation Easements

47-12A-1. Short title.

This act [47-12A-1 to 47-12A-6 NMSA 1978] may be cited as the "Cultural Properties Preservation Easement Act".

History: Laws 1995, ch. 137, § 1.

ANNOTATIONS

Cross references. — For the Land Use Easement Act, *see* 47-12-1 NMSA 1978 et seq.

For Historic Landscape Act, *see* 18-13-1 NMSA 1978 et seq.

Effective dates. — Laws 1995, ch. 137 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 1995, 90 days after adjournment of the legislature.

47-12A-2. Definitions.

As used in the Cultural Properties Preservation Easement Act:

A. "cultural property" means a structure, place, site or object having historical, archaeological, scientific, architectural or other cultural significance deemed potentially eligible for inclusion in the national register of historic places;

B. "holder" means any nonprofit corporation, nonprofit association or nonprofit trust, the purposes or powers of which include retaining or protecting structures or sites significant for their history, architecture, archaeology, paleontology or other prehistorical or other values;

C. "cultural properties preservation easement" means a holder's nonpossessory interest in real property imposing any limitation or affirmative obligation, the purpose of which includes preserving the historical, architectural, archaeological or cultural significance of real property; and

D. "third-party enforcement right" means a right empowering a nonprofit corporation, nonprofit association or nonprofit trust to enforce any term of the easement.

History: Laws 1995, ch. 137, § 2.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 137 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 1995, 90 days after adjournment of the legislature.

47-12A-3. Cultural properties preservation easement created; dispositions.

A. Except as otherwise provided in the Cultural Properties Preservation Easement Act, a cultural properties preservation easement may be created, conveyed, recorded, assigned, released, modified, terminated or otherwise altered or affected in the same manner as any other easement.

B. A cultural properties preservation easement is not effective and creates no rights or obligations until it is recorded in the office of the county clerk of the county or counties in which any part of the real property subject to the cultural properties preservation easement is located.

C. No right or duty in favor of or against a holder and no right in favor of a person having a third-party enforcement right arises under a cultural properties preservation easement prior to its acceptance by that holder and recordation of that acceptance in the office of the county clerk of the county where the real property subject to a cultural properties preservation easement is located, in whole or in part.

D. Except as provided in Subsection B of Section 4 [47-12A-4 NMSA 1978] of the Cultural Properties Preservation Easement Act, the term of a cultural properties preservation easement shall be the term stated in the easement.

History: Laws 1995, ch. 137, § 3.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 137 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 1995, 90 days after adjournment of the legislature.

47-12A-4. Actions.

An action affecting a cultural properties preservation easement may be brought by any of the following:

A. an owner of an interest in the real property subject to the cultural properties preservation easement;

B. a holder of a cultural properties preservation easement; or

C. a person having a third-party enforcement right.

History: Laws 1995, ch. 137, § 4.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 137 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 1995, 90 days after adjournment of the legislature.

47-12A-5. Validity of easement.

A cultural properties preservation easement is valid even though the cultural properties preservation easement:

A. is not appurtenant to an interest in real properties;

B. imposes a negative covenant that is a restriction on the use of the land that is subject to the terms of the easement;

C. imposes affirmative obligations upon the owner of any interest in the property subject to the easement or upon the holder;

D. does not touch or concern real property; or

E. does not establish any privity of estate or of contract.

History: Laws 1995, ch. 137, § 5.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 137 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 1995, 90 days after adjournment of the legislature.

47-12A-6. Enforceable interests.

A. Nothing in the Cultural Properties Preservation Easement Act invalidates any interest, whether designated as a cultural properties preservation easement, covenant, equitable servitude, restriction or easement that is enforceable under the laws of this state.

B. No interest benefiting or encumbering real property cognizable under the statutes or common law in effect in this state prior to the enactment of the Cultural Properties Preservation Easement Act, nor any application or permit for a change of a point of diversion place or purpose of use of a water right at any time shall be impaired, invalidated or in any way adversely affected by reason of any provision of that act.

C. Nothing in the Cultural Properties Preservation Easement Act shall be construed to diminish or impair the rights of any person authorized by the laws of this state to acquire rights of way, easements of other property rights through the exercise of eminent domain. Nothing in that act shall be construed to authorize any charitable corporation, association or trust to acquire a preservation restriction through the exercise of eminent domain.

History: Laws 1995, ch. 137, § 6.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 137 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 1995, 90 days after adjournment of the legislature.

ARTICLE 13
Real Estate Disclosure

47-13-1. Short title.

Chapter 47, Article 13 NMSA 1978 may be cited as the "Real Estate Disclosure Act".

History: Laws 1991, ch. 74, § 1; 2009, ch. 165, § 1.

ANNOTATIONS

Cross references. — For advertising standards relating to subdivided land, *see* 47-5-5 NMSA 1978.

For liability for disclosure statement requirements, *see* 47-7D-2 NMSA 1978.

For requirement of disclosure by owner to resident, *see* 47-8-19 NMSA 1978.

For prohibition against certain types of landlord-seller agreements, *see* 47-10-13 NMSA 1978.

For requirement of written disclosure of rental agreement terms, *see* 47-10-14 NMSA 1978.

The 2009 amendment, effective July 1, 2009, changed the reference of the act to the chapter and article of NMSA 1978.

47-13-1.1. Definitions.

As used in the Real Estate Disclosure Act:

A. "estimated amount of property tax levy" means the product of one-third of the listed price of the residential real property being sold or otherwise transferred in the transaction multiplied by the current property tax rates applicable to the property if those tax rates have been imposed in accordance with Section 7-38-34 NMSA 1978 for the current year for the county in which the property is located or, in all other cases, by the tax rates for the prior year;

B. "listed price" means the current price at which the residential property is being marketed;

C. "seller's broker" means a real estate broker acting on behalf of a residential property seller; and

D. "buyer's broker" means a real estate broker acting on behalf of a prospective residential property purchaser.

History: 1978 Comp., § 47-13-1.1, enacted by Laws 2009, ch. 165, § 2.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 165, § 4 made Laws 2009, ch. 165, § 2 effective July 1, 2009.

47-13-2. Disclosure of information not required in real estate transactions.

A seller, lessor or landlord of real property, including a participant in an exchange of real property and any agent involved in such a transaction, shall not be liable for failure to disclose and shall not have a duty to disclose to any person who acquires, by voluntary or involuntary transfer, a legal or equitable interest in the real property, including any leasehold interest or security interest for an obligation, the fact or suspicion that the real property is or has been:

A. the site of a natural death;

B. the site of a homicide, suicide, assault, sexual assault or any other crime punishable as a felony; or

C. owned or occupied by a person who was exposed to, infected with or suspected to be infected with the human immunodeficiency virus or diagnosed to be suffering from acquired immune deficiency syndrome or any other disease that has been determined by medical evidence as highly unlikely to be transmittable to others through the occupancy of improvements to real property or that is not known to be transmitted through the occupancy of improvements located on that real property.

History: Laws 1991, ch. 74, § 2.

47-13-3. Cause of action, termination or rescission.

A. No cause of action shall arise against a seller, lessor or landlord of real property, including a participant in an exchange of real property and any agents involved in such a transaction for failure to disclose to any person who, by voluntary or involuntary transfer, acquires a legal or equitable interest in the real property, including any leasehold interest or security interest for an obligation, in any action at law or in equity because of the failure to disclose that the real property was or is suspected to have been the site of the incidents described in Section 2 [47-13-2 NMSA 1978] of the Real Estate Disclosure Act or was owned, occupied or suspected of being occupied by persons exposed to, infected with or diagnosed to be suffering from the diseases described in Section 2 of that act.

B. The failure to make a disclosure of any of the facts or suspicions as set forth in Section 2 of the Real Estate Disclosure Act shall not be deemed to be grounds for termination or rescission of any sale, lease, exchange or any transaction in which an interest in the real property has been or will be conveyed to another.

History: Laws 1991, ch. 74, § 3.

47-13-4. Finding; disclosure of information required in certain real estate transactions.

A. The legislature finds that property tax levied on a residential property for the current year can be a misleading guide to property tax levies in the years following the sale of that property and that a prospective buyer needs information regarding the property tax obligation in the year following the property's sale to properly judge the affordability of a contemplated purchase.

B. Prior to accepting an offer to purchase, the property seller or the seller's broker shall:

(1) request from the county assessor the estimated amount of property tax levy with respect to the property and shall specify the listed price as the value of the property to be used in the estimate; and

(2) provide a copy of the assessor's response pursuant to Subsection D of this section in writing to the prospective buyer or the buyer's broker.

C. A buyer's broker shall provide to the prospective buyer the county assessor's estimated amount of property tax levy immediately upon receiving it from the property seller or the seller's broker. The prospective buyer shall acknowledge in writing the receipt of the estimated amount of property tax levy.

D. Upon request, a county assessor shall furnish in writing, pursuant to the provisions of Subsection E of this section, an estimated amount of property tax levy with

respect to a residential property in the county, calculated at a property value specified by the requestor. The request shall be complied with by the close of business of the business day following the day the request is received. A county may satisfy this obligation through an internet site or other automated format that allows a user to print the requested estimated amount of property tax levy. A document associated with the request or the response is not a public record or a valuation record. County assessors shall not use information provided with a request, including the specified value, to assess the valuation of the property. Neither the county nor any jurisdiction levying a tax against residential property in the county is bound in any way by the estimate given.

E. A county assessor's estimated amount of property tax levy with respect to a residential property in the county shall contain the following:

(1) the actual amount of property tax levied for the property for the current calendar year if the tax rates for the current year have been imposed in accordance with Section 7-38-34 NMSA 1978 for the county in which the property is located or, in all other cases, the amount of property tax levied with respect to the property for the prior calendar year;

(2) the estimated amount of property tax levy, as calculated by the county assessor, for the property for the calendar year following the year in which the transaction takes place; and

(3) a disclaimer substantially similar to the following:

"The estimated amount of property tax levy is calculated using the stated price and estimates of the applicable tax rates. The county assessor is required by law to value the property at its "current and correct" value, which may differ from the listed price. Further, the estimated tax rates may be higher or lower than those that will actually be imposed. Accordingly, the actual tax levy may be higher or lower than the estimated amount. New Mexico law requires your real estate broker or agent to provide you an estimate of the property tax levy on the property on which you have submitted or intend to submit an offer to purchase. All real estate brokers and agents who have complied with these disclosure requirements shall be immune from suit and liability arising from suit relating to the estimated amount of property tax levy."

F. A prospective buyer may waive the disclosure requirements of this section by signing a written document prior to the time the offer to purchase is to be made in which the buyer acknowledges that the required estimated amount of property tax levy is not readily available and waives disclosure of the estimated amount of property tax levy.

G. All property sellers and real estate brokers and agents who have complied with the provisions of this section shall be immune from suit and liability arising from or relating to the estimated amount of property tax levy.

H. The New Mexico real estate commission shall biannually inform all New Mexico real estate licensees of the statutory requirement for disclosure of the estimated amount of property tax levy to prospective residential property purchasers.

History: 1978 Comp., § 47-13-4, enacted by Laws 2009, ch. 165, § 3.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 165, § 4 made Laws 2009, ch. 165, § 3 effective July 1, 2009.

47-13-5. Disclosure of certain distributed energy generation systems.

The requirements of the Distributed Generation Disclosure Act [57-31-1 to 57-31-5 NMSA 1978] shall not apply to a transaction involving the sale or transfer of the real property on which the distributed energy generation system is located.

History: Laws 2017, ch. 102, § 6.

ANNOTATIONS

Effective dates. — Laws 2017, ch. 102 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2017, 90 days after the adjournment of the legislature.

ARTICLE 14
Appraisal Management Company Registration

47-14-1. Short title.

Chapter 47, Article 14 NMSA 1978 may be cited as the "Appraisal Management Company Registration Act".

History: Laws 2009, ch. 214, § 1; 2010, ch. 13, § 1.

ANNOTATIONS

The 2010 amendment, effective July 1, 2010, at the beginning of the sentence, changed "Sections 1 through 23 of this act" to "Chapter 47, Article 14 NMSA 1978".

47-14-2. Definitions.

As used in the Appraisal Management Company Registration Act:

A. "appraisal" means the act or process of developing an opinion of the value of real property in conformance with the uniform standards for professional appraisal practice published by the appraisal foundation;

B. "appraisal foundation" means the appraisal foundation incorporated as an Illinois not-for-profit corporation on November 30, 1987 and to which reference is made in the Federal Financial Institutions Examination Council Act of 1978, as amended by Title 11, Real Estate Appraisal Reform Amendments;

C. "appraisal management company" means:

(1) any external third party that oversees a network or panel of certified or licensed appraisers to:

(a) recruit, select and retain appraisers;

(b) contract with appraisers to perform appraisal assignments;

(c) manage the process of having an appraisal performed; or

(d) review and verify the work of appraisers; or

(2) any external third party that contracts with a qualifying licensed real estate broker or associate broker as defined in Chapter 61, Article 29 NMSA 1978 to provide broker price opinions;

D. "appraisal management services" means the process of receiving a request for the performance of real estate appraisal services from a client, and for a fee paid by the client, entering into an agreement with one or more independent appraisers to perform the real estate appraisal services contained in the request;

E. "appraiser" means a person who provides an opinion of the market value of real property and holds a state license, registration or certified license in good standing;

F. "appraiser panel" means a group of independent appraisers that have been selected and retained by an appraisal management company to perform real estate appraisal services for the appraisal management company;

G. "automated valuation model" means any computerized model used by mortgage originators and secondary market issuers to determine the collateral worth of a mortgage secured by a consumer's principal dwelling;

H. "board" means the real estate appraisers board created pursuant to the Real Estate Appraisers Act [Chapter 61, Article 30 NMSA 1978];

I. "broker price opinion" means an opinion by a qualifying or associate broker of the price of real estate for the purpose of marketing, selling, purchasing, leasing or exchanging the real estate or any interest therein or for the purposes of providing a financial institution with a collateral assessment of any real estate in which the financial institution has an existing or potential security interest; provided that the opinion of the price shall not be referred to or construed as an appraisal or appraisal report and shall not be used as the primary basis to determine the value of real estate for the purpose of loan origination;

J. "client" means a person or entity that contracts with, or otherwise enters into an agreement with, an appraisal management company for the performance of real estate appraisal services;

K. "controlling person" means:

(1) an owner, officer or director of a corporation, partnership, limited liability company or other business entity seeking to offer appraisal management services in this state;

(2) an individual employed, appointed or authorized by an appraisal management company that has the authority to enter into a contractual relationship with clients for the performance of appraisal management services and that has the authority to enter into agreements with independent appraisers for the performance of real estate appraisal services; or

(3) an individual who possesses, directly or indirectly, the power to direct or cause the direction of the management or policies of an appraisal management company;

L. "real estate appraisal services" means the practice of developing an opinion of the value of real property in conformance with the uniform standards of professional appraisal practice published by the appraisal foundation; and

M. "uniform standards of professional appraisal practice" means the uniform standards of professional appraisal practice promulgated by the appraisal foundation and adopted by rule pursuant to the Real Estate Appraisers Act.

History: Laws 2009, ch. 214, § 2; 2013, ch. 143, § 1.

ANNOTATIONS

The 2013 amendment, effective June 14, 2013, added definitions and changed the definition of "appraisal management company"; in Subsection C, after "means" deleted the former language which defined "appraisal management company" as a business entity that contracts with independent appraisers; and added Paragraphs (1) through (2); in Subsection E, after "real property", added "and holds a state license, registration

or certified license in food standing"; in Subsection F, after "have been selected", added "and retained"; and added Subsections G and I.

47-14-3. Registration required.

A. It is unlawful for a person, corporation, partnership, sole proprietorship, subsidiary, limited liability company or any other business entity to, directly or indirectly, engage or attempt to engage in business as an appraisal management company, to, directly or indirectly, engage or attempt to perform appraisal management services or to advertise or hold itself out as engaging in or conducting business as an appraisal management company without first obtaining a certificate of registration issued by the board under the provisions of the Appraisal Management Company Registration Act, regardless of the entity's use of the term "appraisal management company", "mortgage technology company" or any other name.

B. A person, corporation, partnership, sole proprietorship, subsidiary, limited liability company or any other business entity seeking the registration required by Subsection A of this section shall:

(1) register with the appraisal subcommittee or the board and be subject to supervision by the board;

(2) verify that only licensed or certified appraisers are used for federally related transactions;

(3) require that appraisals comply with the uniform standards of professional appraisal practice; and

(4) require that appraisals are conducted independently and free from inappropriate influence and coercion pursuant to the appraisal independence standards established pursuant to the federal Truth in Lending Act.

C. The registration required by Subsection A of this section shall include:

(1) the name of the entity seeking registration;

(2) the business address of the entity seeking registration;

(3) telephone contact information of the entity seeking registration;

(4) if the entity seeking registration is not a corporation that is domiciled in this state, the name and contact information for the company's agent for service of process in this state;

(5) the name, address and contact information for any individual or any corporation, partnership or other business entity that owns ten percent or more of the appraisal management company;

(6) the name, address and contact information for a controlling person;

(7) a certification that the entity seeking registration has a system and process in place to verify that an appraiser is selected and retained for the network or the appraiser panel of the appraisal management company holds a license or certification in good standing in this state pursuant to the Real Estate Appraisers Act [Chapter 61, Article 30 NMSA 1978];

(8) a certification that the entity seeking registration has a system in place to review, on a periodic basis, the work of all independent appraisers that are performing real estate appraisal services for the appraisal management company to ensure that the real estate appraisal services are being conducted in accordance with uniform standards of professional appraisal practice;

(9) a certification that the entity maintains a detailed record of each service request that it receives and of the independent appraiser that performs the real estate appraisal services for the appraisal management company;

(10) an irrevocable consent to service of process;

(11) a bond or other equivalent means of security as required by the Appraisal Management Company Registration Act; and

(12) any other information required by the board.

D. The requirements of Subsection B of this section shall apply to an appraisal management company that is a subsidiary owned and controlled by a financial institution regulated by a federal financial institution regulatory agency.

History: Laws 2009, ch. 214, § 3; 2010, ch. 13, § 2; 2013, ch. 143, § 2.

ANNOTATIONS

Cross references. — For the federal Truth in Lending Act, *see* 15 U.S.C. § 1601 et seq.

The 2013 amendment, effective June 14, 2013, provided registration standards; added Subsection B, in Paragraph (7) of Subsection C, after "to verify that", deleted "a person being added to the" and added "an appraiser is selected and retained for the network or the"; in Paragraph (8) of Subsection C, after "in place to review", added "on a periodic basis" and after "management company", deleted "on a periodic basis"; and added Subsection D.

The 2010 amendment, effective July 1, 2010, added Subsection B(11); and renumbered the succeeding paragraph accordingly.

47-14-3.1. Bonding requirements.

A. In order to qualify for registration or renewal of registration, an appraisal management company shall maintain a bond underwritten by a corporate surety authorized to transact business in New Mexico, or other equivalent means of security. The board shall set by rule the amount and conditions of the surety bond or other equivalent means of security required by this section, provided that the amount of the bond or security required shall not exceed twenty-five thousand dollars ($25,000).

B. The bond or other equivalent means of surety shall secure payment for any administrative or judicial penalties that may be imposed by the board or the state and for any penalties or costs required by a board disciplinary action, and also as indemnity for any loss sustained by any person damaged as a result of a violation by the appraisal management company, of any provision of the Appraisal Management Company Registration Act or of any rule of the board adopted pursuant to that act. Consumer claims shall be given priority in recovering from the bond or equivalent surety.

C. An appraisal management company shall notify the board in writing of any claim made on the appraisal management company's bond or equivalent surety.

D. A deposit of cash or security may be accepted in lieu of the surety bond.

History: Laws 2010, ch. 13, § 7.

ANNOTATIONS

Effective dates. — Laws 2010, ch. 13, § 8 made the provisions of Laws 2010, ch. 13, § 7 effective July 1, 2010.

47-14-3.2. Criminal background checks.

A. The board may adopt rules that provide for criminal background checks for all licensees to include:

(1) requiring criminal history background checks of applicants for licensure pursuant to the Appraisal Management Company Registration Act;

(2) requiring applicants for licensure to be fingerprinted;

(3) providing for an applicant who has been denied licensure to inspect or challenge the validity of the background check record;

(4) establishing a fingerprint and background check fee not to exceed the current rate as determined by the department of public safety to be paid by the applicant; and

(5) providing for submission of an applicant's fingerprint cards to the federal bureau of investigation to conduct a national criminal history background check and to the department of public safety to conduct a state criminal history check.

B. Arrest record information received from the department of public safety and the federal bureau of investigation shall be privileged and shall not be disclosed to persons not directly involved in the decision affecting the applicant.

C. Electronic live fingerprint scans may be used when conducting criminal history background checks.

History: Laws 2013, ch. 143, § 9.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 143 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

47-14-4. Exemptions.

The Appraisal Management Company Registration Act is not applicable to:

A. a corporation, partnership, sole proprietorship, subsidiary, limited liability company or other business entity that employs persons on an employer and employee basis exclusively for the performance of real estate appraisal services in the normal course of its business and the entity is responsible for ensuring that the real estate appraisal services being performed by its employees are being performed in accordance with uniform standards of professional appraisal practice;

B. an individual who in the normal course of the individual's business enters into an agreement, whether written or otherwise, with another independent contractor appraiser for the performance of real estate appraisal services that the hiring or contracting appraiser cannot complete for any reason, including competency, work load, schedule or geographic location; or

C. an individual, corporation, partnership, sole proprietorship, subsidiary, limited liability company or other business entity that in the normal course of business enters into an agreement, whether written or otherwise, with an independent contractor appraiser for the performance of real estate appraisal services and upon the completion of the appraisal, the report of the appraiser performing the real estate appraisal services

is co-signed by the appraiser who subcontracted with the independent appraiser for the performance of the real estate appraisal services.

History: Laws 2009, ch. 214, § 4.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 214 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

47-14-5. Forms.

An applicant for registration as an appraisal management company shall submit to the board an application on a form prescribed by the board.

History: Laws 2009, ch. 214, § 5.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 214 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

47-14-6. Expiration of license.

A registration granted by the board pursuant to the Appraisal Management Company Registration Act shall expire on September 30 of each year.

History: Laws 2009, ch. 214, § 6; 2013, ch. 143, § 3.

ANNOTATIONS

The 2013 amendment, effective June 14, 2013, provided for the expiration of licenses; and after "Registration Act shall", deleted "be valid for one year from the date on which it is issued" and added "expire on September 30 of each year".

47-14-7. Consent to service of process.

Each entity applying for registration as an appraisal management company shall complete and execute an irrevocable consent to service of process form as prescribed by the board.

History: Laws 2009, ch. 214, § 7.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 214 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

47-14-8. Fee.

A. The board shall establish the fee for appraisal management company registration by rule to cover the cost of the administration of the Appraisal Management Company Registration Act, but in no case shall the fee be more than two thousand dollars ($2,000).

B. Registration fees shall be credited to the appraiser fund pursuant to Section 61-30-18 NMSA 1978.

C. An appraisal management company that either has registered with the board or operates as a subsidiary of a federally regulated financial institution shall pay to the board an annual registry as determined by the appraisal subcommittee.

History: Laws 2009, ch. 214, § 8; 2013, ch. 143, § 4.

ANNOTATIONS

The 2013 amendment, effective June 14, 2013, provided for a fee for a company that is associated with a subsidiary of a federally regulated financial institution; and added Subsection C.

47-14-9. Owner requirements.

A. An appraisal management company applying for registration may not be owned by a person or have any principal of the company who has had a license or certificate to act as an appraiser refused, denied, canceled or revoked in this state or in any other state.

B. Each person that owns, is an officer of or has a financial interest in an appraisal management company in this state shall:

(1) be of good moral character, as determined by the board; and

(2) submit to a background investigation, as determined by the board.

C. An appraisal management company shall not be registered by the board or included on the national registry if the company, in whole or in part, directly or indirectly, is owned by any person who has had an appraiser license or certificate refused, denied, canceled, surrendered in lieu of revocation or revoked in any state and not subsequently granted or reinstated. A person that owns more than ten percent of an

appraisal management company shall be of good moral character, as determined by the board, and shall submit to a background investigation carried out by the board.

History: Laws 2009, ch. 214, § 9; 2013, ch. 143, § 5.

ANNOTATIONS

The 2013 amendment, effective June 14, 2013, prohibited the registration of a company that has had a license refused, denied, canceled, surrendered, or revoked; deleted former Paragraph (3) of Subsection B, which required officers of a company to certify that the person has never had a license refused, denied, canceled or revoked; and added Subsection C.

47-14-10. Controlling person.

Each appraisal management company applying to the board for registration in this state shall designate one controlling person that will be the main contact for all communication between the board and the appraisal management company.

History: Laws 2009, ch. 214, § 10.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 214 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

47-14-11. Controlling person requirements.

In order to serve as a controlling person of an appraisal management company, a person shall:

A. certify to the board that the person has never had a certificate or a license issued by the board of this state, or the board of any other state, to act as an appraiser refused, denied, canceled or revoked;

B. be of good moral character, as determined by the board; and

C. submit to a background investigation, as determined by the board.

History: Laws 2009, ch. 214, § 11.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 214 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

47-14-12. Employee requirements.

A. Any employee of the appraisal management company, or any person working on behalf of the appraisal management company, that has the responsibility of selecting independent appraisers for the performance of real estate appraisal services for the appraisal management company or the responsibility of reviewing completed appraisals shall have geographic and product competence and be appropriately trained and qualified in the performance of real estate appraisals as determined by the board by rule.

B. Any employee of the appraisal management company that has the responsibility to review the work of independent appraisers shall have demonstrated knowledge of the uniform standards of professional appraisal practice, as determined by the board by rule.

History: Laws 2009, ch. 214, § 12; 2010, ch. 13, § 3.

ANNOTATIONS

The 2010 amendment, effective July 1, 2010, in Subsection A, after "reviewing completed appraisals shall", added "have geographic and product competence and".

47-14-13. Requirements; liability.

A. An appraisal management company registered in this state pursuant to the Appraisal Management Company Registration Act shall not enter into contracts or agreements with an independent appraiser for the performance of real estate appraisal services unless that person is licensed or certified in good standing pursuant to the Real Estate Appraisers Act [Chapter 61, Article 30 NMSA 1978].

B. An appraisal management company shall not require an appraiser to indemnify the appraisal management company against liability except liability for errors and omissions by the appraiser.

History: Laws 2009, ch. 214, § 13; 2010, ch. 13, § 4.

ANNOTATIONS

The 2010 amendment, effective July 1, 2010, in the catchline, changed "Limitations" to "Requirements; liability"; in Subsection A, after "Appraisal Management Company Registration Act", changed "may" to "shall"; and added Subsection B.

47-14-14. Pre-engagement certification.

Each appraisal management company seeking to be registered in this state shall certify to the board on an annual basis on a form prescribed by the board that the appraisal management company has a system and process in place to verify that a person being added to the appraiser panel of the appraisal management company holds a license in good standing in this state pursuant to the Real Estate Appraisers Act [Chapter 61, Article 30 NMSA 1978].

History: Laws 2009, ch. 214, § 14.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 214 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

47-14-15. Adherence to standards.

Each appraisal management company seeking to be registered in this state shall certify to the board on an annual basis that it has a system in place to review the work of all independent appraisers that are performing real estate appraisal services for the appraisal management company on a periodic basis to ensure that the real estate appraisal services are being conducted in accordance with uniform standards of professional appraisal practice.

History: Laws 2009, ch. 214, § 15.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 214 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

47-14-15.1. Automated valuation models used to estimate collateral value for mortgage lending purposes.

A. Automated valuation models shall adhere to quality control standards designed to:

(1) ensure a high level of confidence in the estimates produced by automated valuation models;

(2) protect against the manipulation of data;

(3) seek to avoid conflicts of interest;

(4) require random sample testing and reviews; and

(5) account for any other such factor that the board determines to be appropriate.

B. The board, in consultation with the staff of the appraisal subcommittee and the appraisal standards board of the appraisal foundation, shall promulgate rules to implement the quality control standards required under this section.

History: Laws 2013, ch. 143, § 8.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 143 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

47-14-16. Recordkeeping.

Each appraisal management company seeking to be registered shall certify to the board on an annual basis that it maintains a detailed record of each service request that it receives and the independent appraiser that performs the real estate appraisal services for the appraisal management company.

History: Laws 2009, ch. 214, § 16.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 214 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

47-14-17. Appraiser independence; prohibitions.

A. Appraisals shall be conducted independently and free from inappropriate influence and coercion pursuant to the appraisal independence standards established pursuant to the federal Truth in Lending Act.

B. It is unlawful for any employee, director, officer or agent of an appraisal management company registered pursuant to the Appraisal Management Company Registration Act to influence or attempt to influence the development, reporting or review of an appraisal through coercion, extortion, collusion, compensation, instruction, inducement, intimidation, bribery or in any other manner, including:

(1) withholding or threatening to withhold timely payment for an appraisal;

(2) withholding or threatening to withhold future business for an independent appraiser or demoting or terminating, or threatening to demote or terminate, an independent appraiser;

(3) expressly or impliedly promising future business, promotions or increased compensation for an independent appraiser;

(4) conditioning the request for an appraisal service or the payment of an appraisal fee or salary or bonus on the opinion, conclusion or valuation to be reached or on a preliminary estimate or opinion requested from an independent appraiser;

(5) requesting that an independent appraiser provide an estimated, predetermined or desired valuation in an appraisal report or provide estimated values of comparable sales at any time prior to the independent appraiser's completion of an appraisal service;

(6) providing to an independent appraiser an anticipated, estimated, encouraged or desired value for a subject property or a proposed or target amount to be loaned to the borrower, except that a copy of the sales contract for purchase transactions may be provided;

(7) providing to an independent appraiser, or any entity or person related to the appraiser, stock or other financial or non-financial benefits;

(8) allowing the removal of an independent appraiser from an appraiser panel, without prior written notice to such appraiser;

(9) obtaining, using or paying for a second or subsequent appraisal or ordering an automated valuation model in connection with a mortgage financing transaction unless there is a reasonable basis to believe that the initial appraisal was flawed or tainted and such basis is clearly and appropriately noted in the loan file, or unless such appraisal or automated valuation model is done pursuant to a bona fide pre- or post-funding appraisal review or quality control process; or

(10) engaging in any other act or practice that impairs or attempts to impair an appraiser's independence, objectivity or impartiality.

C. Nothing in Subsection B of this section shall be construed as prohibiting the appraisal management company from requesting that an independent appraiser:

(1) provide additional information about the basis for a valuation; or

(2) correct objective factual errors in an appraisal report.

D. In an effort to preclude discrimination, criteria shall be established by the appraisal management company and may include education achieved, experience, sample appraisals and references from prior clients. Membership in a nationally recognized professional appraisal organization may be a criterion considered, though lack of membership shall not be the sole bar against consideration for an assignment under these criteria.

History: Laws 2009, ch. 214, § 17; 2013, ch. 143, § 6.

ANNOTATIONS

The 2013 amendment, effective June 14, 2013, required that appraisals be conducted independently and free from influence and coercion; required companies to prepare criteria that will preclude discrimination in appraisal assignments; and added Subsections A and D.

47-14-18. Payment; limits; disclosure; nontaxable transaction certificate.

A. The fees paid to an appraiser for completion of the appraisal shall not include a fee for management of the appraisal process or any activity other than the performance of the appraisal.

B. An appraisal management company shall separately state the fees paid to an appraiser for appraisal services and the fees charged by the appraisal management company for services associated with the management of the appraisal process, including procurement of the appraiser's services to the client, borrower and any other payor.

C. Appraisers shall not be prohibited by the appraisal management company, client or other third party from disclosing the fee paid to the appraiser for the performance of the appraisal in the appraisal report.

D. As used in this section, "payor" means any person or entity who is responsible for making payment for the appraisal.

E. An appraisal management company shall, except in cases of breach of contract or substandard performance of services, make payment to an independent appraiser for the completion of an appraisal or valuation assignment within sixty days of the date on which the independent appraiser transmits or otherwise provides the completed appraisal or valuation study to the appraisal management company or its assignee.

F. An appraisal management company shall provide an appraiser with the appropriate nontaxable transaction certificate pursuant to Section 7-9-48 NMSA 1978.

History: Laws 2009, ch. 214, § 18; 2010, ch. 13, § 5.

ANNOTATIONS

The 2010 amendment, effective July 1, 2010, in the catchline, added "limits; disclosure;"; added new Subsections A, B, C and D, and relettered former Subsections A and B as Subsections E and F.

47-14-19. Appraisal reports; alteration; use.

An appraisal management company shall not:

A. alter, modify or otherwise change a completed appraisal report submitted by an independent appraiser without the appraiser's written knowledge and consent; or

B. use an appraisal report submitted by an independent appraiser for any other transaction.

History: Laws 2009, ch. 214, § 19.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 214 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

47-14-20. Adjudication of disputes between an appraisal management company and an independent appraiser.

A. An appraisal management company shall not remove an appraiser from its appraiser panel, or otherwise refuse to assign requests for real estate appraisal services to an independent appraiser without notifying the appraiser in writing of the reasons for the appraiser being removed from the appraiser panel of the appraisal management company. If the appraiser is being removed from the panel for illegal conduct, violation of the uniform standards of professional appraisal practice or a violation of state licensing standards, the appraisal management company shall provide the independent appraiser the nature of the alleged conduct or violation and provide an opportunity for the appraiser to respond.

B. An independent appraiser that is removed from the appraiser panel of an appraisal management company for alleged illegal conduct, violation of the uniform standards of professional appraisal practice or violation of state licensing standards may file a complaint with the board for a review of the decision of the appraisal management company, except that in no case shall the board make any determination regarding the nature of the business relationship between the appraiser and the appraisal management company that is unrelated to the actions specified in Subsection A of this section.

C. If an independent appraiser files a complaint against an appraisal management company pursuant to Subsection B of this section, the board shall adjudicate the complaint within one hundred eighty days.

D. If after opportunity for hearing and review, the board determines that an independent appraiser did not commit a violation of law, a violation of the uniform standards of professional appraisal practice or a violation of state licensing standards, the board shall order that the appraiser be added to the appraiser panel of the appraisal management company that was the subject of the complaint without prejudice.

History: Laws 2009, ch. 214, § 20; 2019, ch. 51, § 1.

ANNOTATIONS

The 2019 amendment, effective June 14, 2019, eliminated the authority of an appraisal management company to remove an independent appraiser from its appraiser panel without notice during the first month of the independent appraiser being added to the panel; and in Subsection A, deleted "Except within the first thirty days after an independent appraiser is first added to the appraiser panel of an appraisal management company".

47-14-21. Enforcement.

A. The board may censure an appraisal management company, conditionally or unconditionally suspend or revoke any registration issued under the Appraisal Management Company Registration Act, levy fines or impose civil penalties not to exceed twenty-five thousand dollars ($25,000) per violation if, in the opinion of the board, an appraisal management company is attempting to perform, has performed or has attempted to perform any of the following acts:

(1) committing any act in violation of the Appraisal Management Company Registration Act;

(2) violating any rule or regulation adopted by the board in the interest of the public and consistent with the provisions of the Appraisal Management Company Registration Act;

(3) procuring a registration, license or certification by fraud, misrepresentation or deceit; or

(4) violating the Real Estate Appraisers Act [Chapter 61, Article 30 NMSA 1978] or the federal Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

B. The board may deny an application for registration for failure to comply with the minimum requirements and criteria as set forth by the Appraisal Management Company Registration Act.

C. Board action relating to the issuance, suspension or revocation of any registration, license or certificate shall be governed by the provisions of the Uniform Licensing Act [61-1-1 to 61-1-31 NMSA 1978]; provided that the time limitations set forth in the Uniform Licensing Act shall not apply to the processing of administrative complaints filed with the board, which shall be governed by federal statute, regulation or policy.

History: Laws 2009, ch. 214, § 21; 2013, ch. 143, § 7.

ANNOTATIONS

The 2013 amendment, effective June 14, 2013, provided standards for enforcement; and added Subsections B and C.

47-14-22. Disciplinary hearings.

The board shall conduct adjudicatory proceedings in accordance with the Uniform Licensing Act [61-1-1 to 61-1-31 NMSA 1978]; provided that:

A. a written notice shall be satisfied by personal service on the controlling person of the registrant or the registrant's agent for service of process in this state or by sending the notice by certified mail, return receipt requested, to the controlling person of the registrant to the registrant's address on file with the board; and

B. a hearing on the charges shall be at a time and place prescribed by the board.

History: Laws 2009, ch. 214, § 22; 2010, ch. 13, § 6.

ANNOTATIONS

The 2010 amendment, effective July 1, 2010, in the introductory sentence, after "The board", changed "may" to "shall", and after "in accordance with the", deleted "Administrative Procedures" and added "Uniform Licensing"; deleted former Subsection A, which provided that before taking disciplinary action, the board shall notify the registrant of any changes at least twenty days before the date set for a hearing and shall afford the registrant an opportunity to be heard; deleted former Subsection D, which provided that the board may make findings of fact and shall deliver findings to the registrant charged with the offense; and relettered former Subsections B and C as Subsections A and B.

47-14-23. Rulemaking authority.

The board may adopt rules that are reasonably necessary to implement, administer and enforce the provisions of the Appraisal Management Company Registration Act, including rules for obtaining copies of appraisals and other documents necessary to audit compliance with the Appraisal Management Company Registration Act.

History: Laws 2009, ch. 214, § 23.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 214 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

ARTICLE 15
Mortgage Foreclosure Consultant Fraud Prevention

47-15-1. Short title.

This act [47-15-1 to 47-15-8 NMSA 1978] may be cited as the "Mortgage Foreclosure Consultant Fraud Prevention Act".

History: Laws 2010, ch. 58, § 1.

ANNOTATIONS

Effective dates. — Laws 2010, ch. 58 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2010, 90 days after the adjournment of the legislature.

Severability. — Laws 2010, ch. 58 § 9 provided if any provision of the Mortgage Foreclosure Consultant Fraud Prevention Act or the application of any of its provisions to any person or circumstance is held to be unconstitutional and void, the remainder of the Mortgage Foreclosure Consultant Fraud Prevention Act remains valid.

47-15-2. Definitions.

As used in the Mortgage Foreclosure Consultant Fraud Prevention Act:

A. "compensation" means monetary payment, remuneration or other benefits received, including monetary donations made in conjunction with the performance of services;

B. "foreclosure consultant":

(1) means a person who, directly or indirectly, makes a solicitation or offer to an owner to perform services for compensation or who, for compensation, performs a service that the person represents will:

(a) stop or postpone a foreclosure sale;

(b) obtain any forbearance from a beneficiary or mortgagee;

(c) assist the owner to exercise the right to reinstatement;

(d) obtain an extension of the period within which the owner may reinstate the owner's obligation;

(e) obtain a waiver of an acceleration clause contained in a promissory note, deed of trust or contract secured by a mortgage on a residence in foreclosure or contained in the mortgage;

(f) assist an owner in foreclosure or loan default to obtain a loan or advance of funds;

(g) avoid or ameliorate the impairment of an owner's credit resulting from the recording of a notice of default or from a foreclosure sale; or

(h) otherwise save an owner's residence from foreclosure; and

(2) does not include:

(a) a person licensed to practice law in this state when the person renders service in the course of the person's practice as an attorney;

(b) a person licensed as a real estate broker or salesperson in this state when the person engages in acts requiring real estate licensure, unless the person is offering services designed to, or purportedly designed to, enable the owner to retain possession of the residence in foreclosure;

(c) a person licensed as an accountant in this state when the person is acting in any capacity for which the person is licensed as an accountant;

(d) a person acting under the express authority or written approval of the United States department of housing and urban development or other department or agency of the United States or this state to provide services;

(e) a person who holds or is owed an obligation secured by a lien on any residence in foreclosure when the person performs services in connection with the obligation or lien if the obligation or lien did not arise as the result of or as part of a proposed foreclosure reconveyance;

(f) a person doing business under any law of this state or of the United States relating to banks, trust companies, savings and loan associations, industrial loan and thrift companies, regulated lenders, credit unions or insurance companies, or a mortgagee that is a United States department of housing and urban development-approved mortgagee or any subsidiary or affiliate of these persons, or any agent or employee of these persons while engaged in the business of these persons;

(g) a person licensed as a residential mortgage originator or servicer pursuant to the New Mexico Mortgage Loan Originator Licensing Act [58-21B-1 to 58-21B-24 NMSA 1978] when acting under the authority of that license;

(h) a nonprofit agency or organization registered pursuant to New Mexico law that offers counseling or advice to an owner of a home in foreclosure or loan default if the nonprofit agency or organization does not contract for services with for-profit lenders or foreclosure purchasers; or

(i) a foreclosure purchaser, including a person who purchases a home in foreclosure at, or subsequent to, a judicial sale of foreclosure property;

C. "foreclosure reconveyance" means a transaction involving:

(1) the transfer of title to real property by a foreclosed homeowner during a foreclosure proceeding on that homeowner's home, either by transfer of interest from the foreclosed homeowner or by creation of a mortgage or other lien or encumbrance during the foreclosure process that allows the acquirer to obtain title to the property by redeeming the property as a junior lienholder;

(2) the subsequent conveyance, or offer or promise of a subsequent conveyance, of an interest back to the foreclosed homeowner by the acquirer or a person acting in participation with the acquirer that allows the foreclosed homeowner to possess either the residence in foreclosure or any other real property, which interest includes, but is not limited to, an interest in a contract for deed, purchase agreement, option to purchase or lease; or

(3) the authorization, solicitation or offer of a proposal to refinance the real estate during the foreclosure process contingent on participation in any life, term life or periodic insurance arrangement with any third party not providing private mortgage insurance;

D. "owner" means the record owner of a residence in foreclosure at the time a foreclosure notice of pendency was recorded or a summons and complaint for foreclosure was served;

E. "person" means an individual, a partnership, a corporation, a limited liability company, an association or other group, however organized;

F. "residence in foreclosure" means residential real property consisting of one to four family dwelling units, one of which the owner occupies as the owner's principal place of residence, where there is a delinquency or default on any loan payment or debt secured by or attached to the residential real property, including contract for deed payments; and

G. "service" means and includes, but is not limited to, any of the following:

(1) debt, budget or financial counseling of any type;

(2) receiving money for the purpose of distributing it to creditors in payment or partial payment of an obligation secured by a lien on a residence in foreclosure;

(3) contacting creditors on behalf of an owner;

(4) arranging or attempting to arrange for an extension of the period within which the owner of a residence in foreclosure may cure the owner's default and reinstate the owner's obligation;

(5) arranging or attempting to arrange for a delay or postponement of the time of sale of the residence in foreclosure;

(6) advising the filing of any document or assisting in any manner in the preparation of any document for filing with a bankruptcy court; or

(7) giving advice, explanation or instruction to an owner, which in any manner relates to the cure of a default in or the reinstatement of an obligation secured by a lien on the residence in foreclosure, the full satisfaction of that obligation, or the postponement or avoidance of a sale of a residence in foreclosure, pursuant to a power of sale contained in a mortgage.

History: Laws 2010, ch. 58, § 2.

ANNOTATIONS

Effective dates. — Laws 2010, ch. 58 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2010, 90 days after the adjournment of the legislature.

Severability. — Laws 2010, ch. 58 § 9 provided if any provision of the Mortgage Foreclosure Consultant Fraud Prevention Act or the application of any of its provisions to any person or circumstance is held to be unconstitutional and void, the remainder of the Mortgage Foreclosure Consultant Fraud Prevention Act remains valid.

Law firm and individual attorneys were liable for violations of the Mortgage Foreclosure Consultant Fraud Prevention Act. — Where the state of New Mexico

brought an action against certain California law firms and individual lawyers, alleging defendants violated the Mortgage Foreclosure Consultant Fraud Prevention Act (MFCFPA), §§ 47-15-1 through 47-15-8 NMSA 1978, and where it was established at trial that defendants performed or offered to perform services, such as obtaining a loan modification or reducing loan payments, that they claimed they would save a home from foreclosure for individuals who entered foreclosure services, and that through their fee agreements, defendants accepted advance payment for mortgage foreclosure relief and consultant services, defendants' activities satisfied the MFCFPA's requirements that, to be a foreclosure consultant, a person or an entity provide services to a homeowner to delay or postpone foreclosure sales through litigation, defendants' conduct violated the MFCFPA because it is a violation for a foreclosure consultant to claim, demand, charge collect or receive any compensation until after the foreclosure consultant has fully performed every service the foreclosure consultant contracted to perform or represented the consultant would perform, and defendants' fee agreements did not comply with several of the warnings, notices, and disclosures required by the MFCFPA regarding foreclosure consultant contracts. Moreover, the MFCFPA's attorney exemption did not apply because defendants were not licensed in New Mexico as required by § 47-15-2(B)(2)(a) NMSA 1978. *New Mexico ex rel. Balderas v. Real Estate Law Center, PC*, 430 F. Supp. 3d 761 (D. N.M. 2019).

Accepting advance payment for mortgage foreclosure relief is a violation of the Mortgage Foreclosure Consultant Fraud Prevention Act. — Where the state of New Mexico (plaintiff) brought an action against two attorneys and the mortgage assistance company they owned, alleging defendants violated the Mortgage Foreclosure Consultant Fraud Prevention Act (MFCFPA), §§ 47-15-1 through 47-15-8 NMSA 1978, by accepting advance payment for mortgage foreclosure relief and consultant services, and where defendants moved for summary judgment, arguing that plaintiff cannot show that defendants were foreclosure consultants or that defendants provided mortgage relief services, and, as attorneys, they were exempt from the reach of the MFCFPA, summary judgment was not appropriate, because the MFCFPA's attorney exemption did not apply because defendants were not licensed in New Mexico as required by § 47-15-2(B)(2)(a), and there were genuine issue of material fact where plaintiff presented evidence that defendants offered clients help with preventing foreclosure and modifying their mortgages, that defendants received compensation before they fully performed every service they contracted to perform or represented that they would perform, and that defendants' fee agreement did not comply with several of the warnings, notices, and disclosures required by § 47-15-3 NMSA 1978. *New Mexico ex rel. Balderas v. Real Estate Law Center, PC*, 401 F. Supp.3d 1229 (D. N.M. 2019).

47-15-3. Foreclosure consultant contract; requirements.

A. A foreclosure consulting contract shall:

(1) be provided to the owner for review at least twenty-four hours before being signed by the owner;

(2) be printed in at least fourteen-point type and written in the same language that was used by the owner in discussions with the foreclosure consultant to describe the consultant's services or to negotiate the contract;

(3) fully disclose the nature and extent of the foreclosure consulting services to be provided, including any foreclosure reconveyance that may be involved, and the total amount and terms of any compensation to be received by the foreclosure consultant or anyone working in association with the foreclosure consultant;

(4) disclose the names of any other corporations, businesses or entities on behalf of which the consultant does business or with which the consultant is affiliated or employed;

(5) separately itemize all costs, fees or expenses and the purpose of the costs, fees or expenses that are charged to the homeowner during the term of the contract;

(6) be dated and personally signed by the owner and the foreclosure consultant; and

(7) contain the following notice, which shall be printed in at least fourteen-point boldface type, completed with the name of the foreclosure consultant, and located in immediate proximity to the space reserved for the owner's signature:

"NOTICE REQUIRED BY NEW MEXICO LAW

..... (Name) or anyone working for him or her CANNOT ask you to sign or have you sign any lien, mortgage or deed as part of signing this agreement unless the terms of the transfer are specified in this document and you are given a separate explanation of the nature and extent of the transaction.

..... (Name) or anyone working for him or her CANNOT guarantee you that they will be able to refinance your home or arrange for you to keep your home. Continue making mortgage payments until a refinancing, if applicable, is approved. If a transfer of the deed or title to your property is involved in any way, you may rescind the transfer any time within 3 days after the date you sign the deed or other document of sale or transfer. See the attached Notice of Rescission form for an explanation of this right. As part of any rescission, you must repay any money spent on your behalf as a result of this agreement within 60 days of receiving commercially reasonable documentation of the payments.

THIS IS AN IMPORTANT LEGAL CONTRACT AND COULD RESULT IN THE LOSS OF YOUR HOME. CONTACT AN ATTORNEY OR COUNSELOR BEFORE SIGNING."

B. A foreclosure consulting contract shall contain on the first page, in at least fourteen-point type:

(1) the name and address of the foreclosure consultant to which the notice of cancellation is to be mailed; and

(2) the date the owner signed the contract.

C. A foreclosure consulting contract shall be accompanied by a completed form in duplicate, captioned "NOTICE OF RESCISSION RIGHTS", which shall:

(1) be on a separate sheet of paper attached to the contract;

(2) be easily detachable; and

(3) contain the following statement printed in at least fifteen-point type:

"NOTICE OF RESCISSION RIGHTS
(Date of Contract)

You may cancel or rescind this contract, without any penalty, at any time until midnight of the third business day after the day on which you sign this contract. If you want to end this contract, mail or deliver a signed and dated copy of this Notice of Rescission, or any other written notice indicating your intent to rescind to (name of foreclosure consultant) at (address of foreclosure consultant, including facsimile and electronic mail).

As part of any rescission, you (the homeowner) must repay any money spent on your behalf as a result of this agreement within 60 days of receiving commercially reasonable documentation of the payments.

THIS IS AN IMPORTANT LEGAL CONTRACT AND COULD RESULT IN THE LOSS OF YOUR HOME. CONTACT AN ATTORNEY OR COUNSELOR BEFORE SIGNING.

RESCISSION OF CONTRACT FORM

TO: (name of foreclosure consultant)

(address of foreclosure consultant, including facsimile and electronic mail)

I hereby rescind this contract.

..... (Date)

..... (Homeowner's signature)".

D. The foreclosure consultant shall provide the owner with a signed and dated copy of the foreclosure consulting contract and the attached notice of rescission rights and rescission of contract form immediately upon execution of the contract.

E. The time during which the owner may rescind the foreclosure consulting contract does not begin to run until the foreclosure consultant has complied with this section and the owner has signed the contract.

History: Laws 2010, ch. 58, § 3.

ANNOTATIONS

Effective dates. — Laws 2010, ch. 58 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2010, 90 days after the adjournment of the legislature.

Severability. — Laws 2010, ch. 58 § 9 provided if any provision of the Mortgage Foreclosure Consultant Fraud Prevention Act or the application of any of its provisions to any person or circumstance is held to be unconstitutional and void, the remainder of the Mortgage Foreclosure Consultant Fraud Prevention Act remains valid.

Law firm and individual attorneys were liable for violations of the Mortgage Foreclosure Consultant Fraud Prevention Act. — Where the state of New Mexico brought an action against certain California law firms and individual lawyers, alleging defendants violated the Mortgage Foreclosure Consultant Fraud Prevention Act (MFCFPA), §§ 47-15-1 through 47-15-8 NMSA 1978, and where it was established at trial that defendants performed or offered to perform services, such as obtaining a loan modification or reducing loan payments, that they claimed they would save a home from foreclosure for individuals who entered foreclosure services, and that through their fee agreements, defendants accepted advance payment for mortgage foreclosure relief and consultant services, defendants' activities satisfied the MFCFPA's requirements that, to be a foreclosure consultant, a person or an entity provide services to a homeowner to delay or postpone foreclosure sales through litigation, defendants' conduct violated the MFCFPA because it is a violation for a foreclosure consultant to claim, demand, charge collect or receive any compensation until after the foreclosure consultant has fully performed every service the foreclosure consultant contracted to perform or represented the consultant would perform, and defendants' fee agreements did not comply with several of the warnings, notices, and disclosures required by the MFCFPA regarding foreclosure consultant contracts. Moreover, the MFCFPA's attorney exemption did not apply because defendants were not licensed in New Mexico as required by § 47-15-2(B)(2)(a) NMSA 1978. *New Mexico ex rel. Balderas v. Real Estate Law Center, PC*, 430 F. Supp. 3d 761 (D. N.M. 2019).

Accepting advance payment for mortgage foreclosure relief is a violation of the Mortgage Foreclosure Consultant Fraud Prevention Act. — Where the state of New Mexico (plaintiff) brought an action against two attorneys and the mortgage assistance company they owned, alleging defendants violated the Mortgage Foreclosure Consultant Fraud Prevention Act (MFCFPA), §§ 47-15-1 through 47-15-8 NMSA 1978, by accepting advance payment for mortgage foreclosure relief and consultant services, and where defendants moved for summary judgment, arguing that plaintiff cannot show

that defendants were foreclosure consultants or that defendants provided mortgage relief services, and, as attorneys, they were exempt from the reach of the MFCFPA, summary judgment was not appropriate, because the MFCFPA's attorney exemption did not apply because defendants were not licensed in New Mexico as required by § 47-15-2(B)(2)(a), and there were genuine issue of material fact where plaintiff presented evidence that defendants offered clients help with preventing foreclosure and modifying their mortgages, that defendants received compensation before they fully performed every service they contracted to perform or represented that they would perform, and that defendants' fee agreement did not comply with several of the warnings, notices, and disclosures required by § 47-15-3 NMSA 1978. *New Mexico ex rel. Balderas v. Real Estate Law Center, PC*, 401 F. Supp.3d 1229 (D. N.M. 2019).

47-15-4. Rescission of foreclosure consultant contract.

A. In addition to any other right under law to rescind a contract, an owner may rescind a foreclosure consulting contract until midnight of the third business day after the day on which the owner signs a foreclosure consulting contract that complies with the Mortgage Foreclosure Consultant Fraud Prevention Act.

B. Cancellation of a foreclosure consulting contract occurs when an owner gives written notice of cancellation to the foreclosure consultant at the address specified in the contract.

C. Notice of cancellation, if given by mail, is effective when deposited in the mail properly addressed with postage prepaid.

D. Notice of cancellation given by an owner need not take the particular form as provided with the contract and, however expressed, is effective if it indicates the intention of the owner not to be bound by the contract.

History: Laws 2010, ch. 58, § 4.

ANNOTATIONS

Effective dates. — Laws 2010, ch. 58 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2010, 90 days after the adjournment of the legislature.

Severability. — Laws 2010, ch. 58 § 9 provided if any provision of the Mortgage Foreclosure Consultant Fraud Prevention Act or the application of any of its provisions to any person or circumstance is held to be unconstitutional and void, the remainder of the Mortgage Foreclosure Consultant Fraud Prevention Act remains valid.

47-15-5. Violations.

It is a violation of the Mortgage Foreclosure Consultant Fraud Prevention Act for a foreclosure consultant to:

A. claim, demand, charge, collect or receive any compensation until after the foreclosure consultant has fully performed every service the foreclosure consultant contracted to perform or represented the consultant would perform;

B. claim, demand, charge, collect or receive any fee, interest or any other compensation for any reason that exceeds five percent per annum of the amount of any loan that the foreclosure consultant may make to the owner. Such a loan may not be secured by the residence in foreclosure or any other real or personal property;

C. take a wage assignment, lien of any type on real or personal property or other security to secure the payment of compensation. Any such security is void and unenforceable;

D. receive any consideration from a third party in connection with services rendered to an owner;

E. acquire any interest, directly or indirectly, or by means of a subsidiary or affiliate in a residence in foreclosure from an owner with whom the foreclosure consultant has contracted;

F. take a power of attorney from an owner for any purpose, except to inspect documents as provided by law;

G. include a provision in a foreclosure consulting contract that:

(1) attempts or purports to waive an owner's rights under the Mortgage Foreclosure Consultant Fraud Prevention Act;

(2) requires an owner to consent to jurisdiction for litigation or choice of law in a state other than New Mexico;

(3) provides for venue in a county other than the county in which the residence in foreclosure is located; or

(4) imposes any costs or filing fees greater than the fees required to file an action in a district court; or

H. induce or attempt to induce an owner to enter a contract that does not comply in all respects with the Mortgage Foreclosure Consultant Fraud Prevention Act.

History: Laws 2010, ch. 58, § 5.

ANNOTATIONS

Effective dates. — Laws 2010, ch. 58 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2010, 90 days after the adjournment of the legislature.

Severability. — Laws 2010, ch. 58 § 9 provided if any provision of the Mortgage Foreclosure Consultant Fraud Prevention Act or the application of any of its provisions to any person or circumstance is held to be unconstitutional and void, the remainder of the Mortgage Foreclosure Consultant Fraud Prevention Act remains valid.

Law firm and individual attorneys were liable for violations of the Mortgage Foreclosure Consultant Fraud Prevention Act. — Where the state of New Mexico brought an action against certain California law firms and individual lawyers, alleging defendants violated the Mortgage Foreclosure Consultant Fraud Prevention Act (MFCFPA), §§ 47-15-1 through 47-15-8 NMSA 1978, and where it was established at trial that defendants performed or offered to perform services, such as obtaining a loan modification or reducing loan payments, that they claimed they would save a home from foreclosure for individuals who entered foreclosure services, and that through their fee agreements, defendants accepted advance payment for mortgage foreclosure relief and consultant services, defendants' activities satisfied the MFCFPA's requirements that, to be a foreclosure consultant, a person or an entity provide services to a homeowner to delay or postpone foreclosure sales through litigation, defendants' conduct violated the MFCFPA because it is a violation for a foreclosure consultant to claim, demand, charge collect or receive any compensation until after the foreclosure consultant has fully performed every service the foreclosure consultant contracted to perform or represented the consultant would perform, and defendants' fee agreements did not comply with several of the warnings, notices, and disclosures required by the MFCFPA regarding foreclosure consultant contracts. Moreover, the MFCFPA's attorney exemption did not apply because defendants were not licensed in New Mexico as required by § 47-15-2(B)(2)(a) NMSA 1978. *New Mexico ex rel. Balderas v. Real Estate Law Center, PC*, 430 F. Supp. 3d 761 (D. N.M. 2019).

Accepting advance payment for mortgage foreclosure relief is a violation of the Mortgage Foreclosure Consultant Fraud Prevention Act. — Where the state of New Mexico (plaintiff) brought an action against two attorneys and the mortgage assistance company they owned, alleging defendants violated the Mortgage Foreclosure Consultant Fraud Prevention Act (MFCFPA), §§ 47-15-1 through 47-15-8 NMSA 1978, by accepting advance payment for mortgage foreclosure relief and consultant services, and where defendants moved for summary judgment, arguing that plaintiff cannot show that defendants were foreclosure consultants or that defendants provided mortgage relief services, and, as attorneys, they were exempt from the reach of the MFCFPA, summary judgment was not appropriate, because the MFCFPA's attorney exemption did not apply because defendants were not licensed in New Mexico as required by § 47-15-2(B)(2)(a), and there were genuine issue of material fact where plaintiff presented evidence that defendants offered clients help with preventing foreclosure and modifying their mortgages, that defendants received compensation before they fully performed every service they contracted to perform or represented that they would perform, and

that defendants' fee agreement did not comply with several of the warnings, notices, and disclosures required by § 47-15-3 NMSA 1978. *New Mexico ex rel. Balderas v. Real Estate Law Center, PC*, 401 F. Supp.3d 1229 (D. N.M. 2019).

47-15-6. Waiver not allowed.

Any waiver by an owner of the provisions of the Mortgage Foreclosure Consultant Fraud Prevention Act is void and unenforceable as contrary to public policy. Any attempt by a foreclosure consultant to induce an owner to waive the owner's rights under the Mortgage Foreclosure Consultant Fraud Prevention Act is a violation of that act.

History: Laws 2010, ch. 58, § 6.

ANNOTATIONS

Effective dates. — Laws 2010, ch. 58 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2010, 90 days after the adjournment of the legislature.

Severability. — Laws 2010, ch. 58 § 9 provided if any provision of the Mortgage Foreclosure Consultant Fraud Prevention Act or the application of any of its provisions to any person or circumstance is held to be unconstitutional and void, the remainder of the Mortgage Foreclosure Consultant Fraud Prevention Act remains valid.

47-15-7. Remedies.

A. A violation of the Mortgage Foreclosure Consultant Fraud Prevention Act constitutes an unfair trade practice pursuant to the Unfair Practices Act [Chapter 57, Article 12 NMSA 1978].

B. A prevailing plaintiff in a suit for violation of the Mortgage Foreclosure Consultant Fraud Prevention Act may recover actual damages, reasonable attorney fees and costs and appropriate equitable relief.

C. The rights and remedies provided in Subsection A of this section are cumulative to, and not a limitation of, any other rights and remedies provided by law. Any action brought pursuant to this section must be commenced within four years from the date of the alleged violation.

D. In addition to any other damages, a court may award exemplary damages up to three times the compensation charged by the foreclosure consultant if the court finds that the foreclosure consultant violated a provision of Section 5 [47-15-5 NMSA 1978] of the Mortgage Foreclosure Consultant Fraud Prevention Act and that the foreclosure consultant's conduct was willful or in bad faith.

E. Notwithstanding any other provision of this section, no action may be brought on the basis of a violation of the Mortgage Foreclosure Consultant Fraud Prevention Act, except by an owner against whom the violation was committed or by the attorney general.

History: Laws 2010, ch. 58, § 7.

ANNOTATIONS

Effective dates. — Laws 2010, ch. 58 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2010, 90 days after the adjournment of the legislature.

Severability. — Laws 2010, ch. 58 § 9 provided if any provision of the Mortgage Foreclosure Consultant Fraud Prevention Act or the application of any of its provisions to any person or circumstance is held to be unconstitutional and void, the remainder of the Mortgage Foreclosure Consultant Fraud Prevention Act remains valid.

47-15-8. Penalty.

A person who commits a violation of the provisions of Section 5 [47-15-5 NMSA 1978] of the Mortgage Foreclosure Consultant Fraud Prevention Act is guilty of a fourth degree felony and, upon conviction, shall be sentenced pursuant to Section 31-18-15 NMSA 1978. Each violation of the provisions of Section 5 of the Mortgage Foreclosure Consultant Fraud Prevention Act constitutes a distinct offense. The attorney general or the district attorney for the district in which the violation arose may prosecute any violation of Section 5 of the Mortgage Foreclosure Consultant Fraud Prevention Act. Prosecution or conviction for any violation described in Section 5 of the Mortgage Foreclosure Consultant Fraud Prevention Act does not bar prosecution or conviction for any other offenses. These penalties are cumulative to any other remedies or penalties provided by law.

History: Laws 2010, ch. 58, § 8.

ANNOTATIONS

Effective dates. — Laws 2010, ch. 58 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2010, 90 days after the adjournment of the legislature.

Severability. — Laws 2010, ch. 58 § 9 provided if any provision of the Mortgage Foreclosure Consultant Fraud Prevention Act or the application of any of its provisions to any person or circumstance is held to be unconstitutional and void, the remainder of the Mortgage Foreclosure Consultant Fraud Prevention Act remains valid.

ARTICLE 16
Homeowner Association

47-16-1. Short title.

Chapter 47, Article 16 NMSA 1978 may be cited as the "Homeowner Association Act".

History: Laws 2013, ch. 122, § 1; 2015, ch. 104, § 1.

ANNOTATIONS

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14 were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler. Laws 2013, ch. 122, § 15 formerly appeared as a compiler's note in Chapter 47, Article 7E §§ 1 through 14.

The 2015 amendment, effective July 1, 2015, changed the statutory reference of the Homeowner Association Act; and deleted "This act" and added "Chapter 47, Article 16 NMSA 1978".

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;

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

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

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

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

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

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

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

J. "declaration" means an instrument, however denominated, including amendments or supplements to the instrument, that:

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

(2) creates the authority in the association to impose on lots or on the owners or occupants of such lots, or on any other entity, any mandatory payment of money in connection with the provision of maintenance or services for the benefit of some or all of the lots, the owners or occupants of the lots or the common areas.

"Declaration" does not include a like instrument for a condominium or time-share project;

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

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

M. "disclosure certificate" or "disclosure statement" means:

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

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

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

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

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

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

(7) the current operating budget of the association;

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

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

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

(11) a statement of the remaining term of any leasehold estate affecting the association and the provisions governing any extension or renewal thereof; and

(12) the contact person and contact information for the association;

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

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

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

Q. "master planned community" means a large-scale residential development that allows for a phasing of development that will take place over a long period of time, following comprehensive and coordinated planning review by a local government and approval of design and development standards beyond conventionally platted subdivisions; provided that additional design and development standards approved by

the local government shall be included in a site plan, area plan or master plan as required by the local government approving the development; and

R. "proxy" means a person authorized to act for another.

History: Laws 2013, ch. 122, § 2; 2019, ch. 30, § 1.

ANNOTATIONS

The 2019 amendment, effective July 1, 2019, defined "conflict of interest" and revised the definition of "disclosure certificate" or "disclosure statement" as used in the Homeowner Association Act; added a new Subsection H and redesignated former Subsections H through Q as Subsections I through R, respectively; and in Subsection M, added a new Paragraph M(10) and redesignated former Paragraphs M(10) and M(11) as Paragraphs M(11) and M(12), respectively.

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14 were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

47-16-3. Creation of a homeowner association.

An association pursuant to the Homeowner Association Act shall be organized in accordance with the laws of the state and be identified in a recorded declaration. The membership of the association shall consist exclusively of all lot owners in the development.

History: Laws 2013, ch. 122, § 3.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 122, § 16 provided that the Homeowner Association Act was effective July 1, 2013.

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14 were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

47-16-4. Recording or filing of homeowner association notice and declaration.

A. An association organized after July 1, 2013 shall record a notice of homeowner association in the office of the county clerk of the county or counties in which the real property affected thereby is situated no later than thirty days after the date on which the association's declaration is recorded as provided in Section 3 [47-16-3 NMSA 1978] of the Homeowner Association Act.

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

C. A notice of homeowner association pursuant to Subsection A or B of this section shall fully and accurately disclose the name and address of the association and any management company charged with preparation of a disclosure certificate and shall contain the recording data for the subdivision plat and the declaration governing the lots within the development. A notice of homeowner association pursuant to Subsection A of this section shall also include the public regulation commission number, if any, of the association.

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

History: Laws 2013, ch. 122, § 4.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 122, § 16 provided that the Homeowner Association Act was effective July 1, 2013.

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14 were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

47-16-5. Record disclosure to members; updated information.

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

B. The association shall not charge a fee for making financial and other records available for review. The association may charge a fee of not more than ten cents ($.10) per page for copies.

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

(1) the declaration of the association;

(2) the name, address and telephone number of the association's designated agent;

(3) the bylaws of the association;

(4) the names and addresses of all association members;

(5) minutes of all meetings of the association's lot owners and board for the previous five years, other than executive sessions, and records of all actions taken by a committee in place of the board or on behalf of the association for the previous five years;

(6) the operating budget for the current fiscal year;

(7) current assessments, including both regular and special assessments;

(8) financial statements and accounts, including bank account statements, transaction registers, association-provided service or utility records and amounts held in reserve;

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

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

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

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

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

History: Laws 2013, ch. 122, § 5; 2019, ch. 30, § 2.

ANNOTATIONS

The 2019 amendment, effective July 1, 2019, revised the records disclosure requirements, and added a penalty for failure of a homeowner association to timely make record disclosures to members; in Subsection A, after "made available", added "during regular business hours", and after "ten business days of", deleted "the" and added "a written"; in Subsection B, after "may charge a", deleted "reasonable", and after "fee", added "of not more than ten cents ($.10) per page"; in Subsection C, in Paragraph C(4), after "the names", added "and addresses", in Paragraph C(8), after "including",

added "bank account statements, transaction registers, association-provided service or utility records and", and added Paragraph C(12); and added Subsection D.

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14 were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

47-16-6. Duties of a homeowner association.

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

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

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

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

History: Laws 2013, ch. 122, § 6.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 122, § 16 provided that the Homeowner Association Act was effective July 1, 2013.

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14 were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

47-16-7. Board members and officers; duties; budget.

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

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

(1) has read the community documents;

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

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

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

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

(1) Homeowner Association Act; or

(2) Nonprofit Corporation Act [Chapter 53, Article 8 NMSA 1978], if the association is organized under the Nonprofit Corporation Act.

E. The board or the lot owners, as provided for in the community documents, shall adopt a budget annually. Within thirty calendar days after adoption of any proposed budget for the association, the board shall provide a copy of the budget to all the lot owners.

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

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

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

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

History: Laws 2013, ch. 122, § 7; 2019, ch. 30, § 3.

ANNOTATIONS

The 2019 amendment, effective July 1, 2019, required elected or appointed board members to provide a written certification, and required management companies retained by a homeowner association to provide a conflict of interest disclosure; in Subsection A, after "ordinary and reasonable care", added "free from any undisclosed conflict of interest"; added new Subsections B through D and redesignated former Subsection B as Subsection E; and added Subsections F and G.

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14 were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

Planned community has not yet reached the threshold required for lot owners to elect a board member to the homeowner's association. — The Homeowner Association Act (HOAA), 47-16-1 to 47-16-18 NMSA 1978, dictates that the period of declarant control shall terminate, if not voluntarily terminated by the declarant sooner, no later than the earlier of certain specific conditions, and as the percentage of lots conveyed to lot owners increases, so too does the percentage of board members elected by the lot owners; this allows for the orderly transition of authority to control the board from the declarant to parcel owners. Determining whether a sufficient percentage of lots have been sold to someone other than the declarant must take into account the total number of parcels in the development, present and anticipated, including those owned by the declarant, and therefore, where the Picacho mountain community master plan allowed for a total of 1560 total lots, with 1493 of those lots designated for residential purposes, and, at most, only 252 lots have been transferred, the lots sold to date versus the total number of lots in the master plan does not require members of the board be elected by lot owners other than the declarant because the total number of lots sold has not reached the twenty-five percent threshold set forth in 47-16-8(E) NMSA 1978 of the HOAA. *End of Exclusive Declarant Control under Home Owner Association Act* (8/17/22), Att'y Gen. Adv. Ltr. 2021-05.

47-16-8. Declarant control of board.

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

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

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

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

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

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

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

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

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

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

G. Not later than the termination of a period of declarant control, the lot owners shall elect a board of at least three members, at least a majority of whom shall be lot owners. The board shall elect the officers. The board members and officers shall take office upon election.

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

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

History: Laws 2013, ch. 122, § 8.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 122, § 16 provided that the Homeowner Association Act was effective July 1, 2013.

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14 were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

Planned community has not yet reached the threshold required for lot owners to elect a board member to the homeowner's association. — The Homeowner Association Act (HOAA), 47-16-1 to 47-16-18 NMSA 1978, dictates that the period of declarant control shall terminate, if not voluntarily terminated by the declarant sooner, no later than the earlier of certain specific conditions, and as the percentage of lots conveyed to lot owners increases, so too does the percentage of board members elected by the lot owners; this allows for the orderly transition of authority to control the board from the declarant to parcel owners. Determining whether a sufficient percentage of lots have been sold to someone other than the declarant must take into account the total number of parcels in the development, present and anticipated, including those owned by the declarant, and therefore, where the Picacho mountain community master plan allowed for a total of 1560 total lots, with 1493 of those lots designated for residential purposes, and, at most, only 252 lots have been transferred, the lots sold to date versus the total number of lots in the master plan does not require members of the board be elected by lot owners other than the declarant because the total number of lots sold has not reached the twenty-five percent threshold set forth in 47-16-8(E) NMSA 1978 of the HOAA. *End of Exclusive Declarant Control under Home Owner Association Act* (8/17/22), Att'y Gen. Adv. Ltr. 2021-05.

47-16-8.1. Removal of board members.

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

History: Laws 2019, ch. 30, § 8.

ANNOTATIONS

Effective dates. — Laws 2019, ch. 30, § 11 made Laws 2019, ch. 30 effective July 1, 2019.

47-16-9. Proxy and absentee voting; ballot counting.

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

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

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

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

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

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

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

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

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

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

History: Laws 2013, ch. 122, § 9; 2019, ch. 30, § 4.

ANNOTATIONS

The 2019 amendment, effective July 1, 2019, clarified that this section shall not be considered in conflict with or a replacement of voting member councils or representative voting systems created by the community documents; and added Subsection G.

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14 were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

47-16-10. Financial audit.

At least every three years, the board shall provide for a financial audit, review or compilation of the association's records in accordance with generally accepted accounting principles by an independent certified public accountant and shall provide that the cost thereof be assessed as a common expense. The audit, review or compilation shall be made available to lot owners within thirty calendar days of its completion.

History: Laws 2013, ch. 122, § 10; 2019, ch. 30, § 5.

ANNOTATIONS

The 2019 amendment, effective July 1, 2019, changed the annual audit requirement to every three years; deleted Subsection A, which required an annual financial audit; deleted subsection designation "B"; in the first sentence of the subsection, deleted "Unless otherwise provided in the community documents, in an association managing a development consisting of fewer than one hundred lots, upon a majority vote of all of the lot owners" and added "At least every three years", and after "association's records", added "in accordance with generally accepted accounting principles by an independent certified public accountant".

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14 were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

47-16-11. Contract disclosure statement or disclosure certificate; right of cancellation of purchase contract.

Except as provided in Section 12 [47-16-12 NMSA 1978] of the Homeowner Association Act, a person selling a lot that is subject to an association shall provide in writing a disclosure certificate that states that the lot is located within a development that is subject to an association. If the lot is located within a development that is subject to an association and the association is subject to the Homeowner Association Act:

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

B. A purchaser or the purchaser's agent has the right to cancel the purchase contract within seven days after receiving the disclosure certificate.

History: Laws 2013, ch. 122, § 11.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 122, § 16 provided that the Homeowner Association Act was effective July 1, 2013.

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14 were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

47-16-12. Sale of lots; disclosure certificate.

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

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

(2) the bylaws of the association;

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

(4) the rules of the association; and

(5) a disclosure certificate from the association.

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

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

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

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

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

(1) pursuant to court order;

(2) by a government or governmental agency;

(3) by foreclosure or deed in lieu of foreclosure; or

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

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

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

History: Laws 2013, ch. 122, § 12; 2019, ch. 30, § 6.

ANNOTATIONS

The 2019 amendment, effective July 1, 2019, provided that lot owners may request updates to disclosure certificates beginning 61 days after the creation of the disclosure certificate, provided a three day time limit within which the association must respond with updated information, and placed a three hundred dollar ($300) cap that a homeowner association may charge for preparation of a disclosure certificate; in Subsection B, after the first occurrence of "lot owner", added "or the lot owner's representative"; added a new Subsection G and redesignated former Subsection G as Subsection H; and in Subsection H, added "Notwithstanding any local ordinance or ordinance enacted by a home rule municipality", after "reasonable charges", added "not to exceed three hundred dollars ($300)", and after "Homeowner Association Act", added "to be collected at the time of closing; provided that the transaction closes".

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14 were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

47-16-13. Purchaser’s cancellation of a purchase contract.

If a purchaser elects to cancel a purchase pursuant to Section 11 [47-16-11 NMSA 1978] of the Homeowner Association Act, the purchaser may do so by hand delivering notice of the cancellation to the lot owner or by mailing notice of cancellation, by prepaid United States mail, to the lot owner, or to the lot owner's agent for service of process. Cancellation shall be without penalty, and all payments made by the purchaser before cancellation shall be refunded within fifteen days.

History: Laws 2013, ch. 122, § 13.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 122, § 16 provided that the Homeowner Association Act was effective July 1, 2013.

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14 were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

47-16-14. Attorney fees and costs.

A court may award attorney fees and costs to any party that prevails in a civil action between a lot owner and the association or declarant based upon any provision of the declaration or bylaws; provided that the declaration or bylaws allow at least one party to recover attorney fees or costs.

History: Laws 2013, ch. 122, § 14.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 122, § 16 provided that the Homeowner Association Act was effective July 1, 2013.

Compiler's notes. — Laws 2013, ch. 122, §§ 1 through 14 were erroneously compiled as 47-7E-1 through 47-7E-14 NMSA 1978, and have been recompiled as 47-16-1 through 47-16-14 NMSA 1978 by the compiler.

47-16-15. Applicability.

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

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

C. The Homeowner Association Act does not apply to a condominium governed by the Condominium Act [47-7A-1 to 47-7D-20 NMSA 1978].

History: Laws 2013, ch. 122, § 15; 2015, ch. 104, § 3; 2019, ch. 30, § 7.

ANNOTATIONS

Compiler's notes. — Laws 2013, ch. 122, § 15 formerly appeared as a compiler's note in Chapter 47, Article 7E §§ 1 through 14.

The 2019 amendment, effective July 1, 2019, provided that homeowner associations created before July 1, 2013 and have fewer than 30 lots, are exempt from certain provisions of the Homeowner Association Act; in Subsection B, after "July 1, 2013", added "and that have fewer than thirty lots"; and deleted former Subsection C, which provided that certain provisions of the Homeowner Association Act do not invalidate existing provisions of the articles of incorporation, declaration, bylaws or rules of a homeowner association created before July 1, 2013, and redesignated former Subsection D as Subsection C.

The 2015 amendment, effective July 1, 2015, provided that the flag flying provision in Section 47-16-16 NMSA 1978 invalidates any related provision existing in the articles of incorporation, declaration, bylaws or rules of a homeowner association created before July 1, 2013; in Subsection B, after "Sections", deleted "9, 10, and 14 of the Homeowner Association Act" and added "47-16-9, 47-16-10 and 47-16-14 NMSA 1978"; in Subsection C, after "Sections", deleted "4 and 8 of the Homeowner Association Act, that" and added "47-16-4 and 47-16-8 NMSA 1978 and Section 2 of this 2015 act, the Homeowner Association".

47-16-16. Flags.

An association shall not adopt or enforce a restriction related to the flying or displaying of flags that is more restrictive than the applicable federal or state law or county or municipal ordinance.

History: Laws 2015, ch. 104, § 2.

ANNOTATIONS

Effective dates. — Laws 2015, ch. 104, § 4 made Laws 2015, ch. 104, § 2 effective July 1, 2015.

47-16-17. Meetings of association.

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

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

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

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

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

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

(2) pending or contemplated litigation; or

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

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

History: Laws 2019, ch. 30, § 9.

ANNOTATIONS

Effective dates. — Laws 2019, ch. 30, § 11 made Laws 2019, ch. 30 effective July 1, 2019.

47-16-18. Enforcement of covenants; dispute resolution.

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

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

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

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

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

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

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

History: Laws 2019, ch. 30, § 10.

ANNOTATIONS

Effective dates. — Laws 2019, ch. 30, § 11 made Laws 2019, ch. 30 effective July 1, 2019.