

January 22, 2019

Excerpts from a letter sent to NM Representative Chandler and Senator Shendo Jr.

The following concerns have been introduced to Senator Mimi Stewart, sponsor of the Bill, past Governor Susanna Martinez and commented on in committee hearings.

Senator Stewart has accomplished a much needed law to protect HOA homeowners in NM; however the new Senate Bill 150 still fails on two substantive issues.

1. The 1/20/2019 fiscal impact report misconstrues the language in its synopsis of the new bill:

"...changing the annual audit requirement to every three years" (47-16-10).

The language of the bill provides for an audit, review OR compilation that gives an HOA Board *the discretion to choose*. The wording in the law is:

"At least every three years, the board shall provide for a financial audit, review or compilation of the association's records...."

This is NOT beneficial to any member of an association as there are substantial differences in the level of assurance that these financial reports deliver. If the state expects financial accountability by HOA Boards then it needs to demand a level of financial oversight that will protect members. Giving a Board the discretion to provide a cheap ineffective compilation instead of a higher level audit/review can harm member's ability to ascertain their association's financial situation and hide fraud/embezzlement from the membership.

If an association's Bylaws state otherwise, ie: an audit every three years and a yearly review, this new provision change in SB 150 can, at the discretion of a Board, nullify a contract provision that already provides a better level of financial oversight assurance and substitute for a worthless compilation.

A correction to this provision should include "unless otherwise provided for in the governing documents."

2. §47-16-15- "Applicability" provision "C" of the law has been deleted:

All associations have contracts in place, agreed to by the property owners of an HOA, and if provided for in their governing docs, have the ability to be changed by a majority vote of the members. Deleting this provision from the current law (47-16-1) will invalidate some provisions of those contracts that should rightly belong to the decision of the members, not a state dictate.

The original provision in 47-16-15, C states:

"Except as provided in Sections 4, & 8, of the [HOA Act], that act does not invalidate existing provisions of the articles of incorporation, declaration, bylaws or rules of a homeowner association created before July 1, 2013,"

This provision should be upheld to protect contract rights of HOA members.

Does the NM state legislative body have the constitutional right to invalidate a contract?

Ref: Article I of the United States Constitution. Prohibiting states from interfering with private contracts....

The answer we hope will be forthcoming soon.