CAI Legislative Action Committee

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July 16, 2019

Via Email and Regular Mail
Geraldine Callahan
Department of Community Affairs
PO Box 800
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Re: Planned Real Estate Development Full Disclosure Act Regulations
Proposed Amendments: N.J.A.C. 5:26-1.3, 8.1, 8.2, and 8.4
Proposed New Rules: N.J.A.C. 5:26-8.8 through 8.14

Dear Ms. Callahan:

This letter is submitted by the New Jersey CAI Legislative Action Committee ("CAI") with respect to the proposed rule amendments and new rules referenced above as published in the New Jersey Register on June 3, 2019.

With more than 2,000 members dedicated to building better communities, CAI's New Jersey Chapter develops and provides information, education and resources to volunteer association board members, community managers and other professionals who support the community association housing model. CAI's mission is to inspire professionalism, effective leadership and responsible citizenship—ideals reflected in homeowners associations and condominium communities that are preferred places to call home.

New Jersey has approximately 7,000 community associations housing 1,392,000 New Jersey residents. CAI and its members possess a wealth of knowledge and expertise about the manner in which community associations best operate. It is with this knowledge and expertise that CAI respectfully offers the following comments concerning the proposed amendments and new rules to the Planned Real Estate Full Development Disclosure Act. Please note that for ease of referenced P.L. 2017, c.106 is referred to as the "Radburn Election Law."

Commentary

1. 5:52-1.3 Definitions. Relevant text of proposed rule:

"Association" means an association for the management of common elements and facilities, organized pursuant to Section 1 of P.L. 1993, c. 30 (N.J.S.A. 45:22A-43).

"Association member" means the owner of a unit within a planned real estate development, or a unit's tenant to the extent that the bylaws of the planned real estate development permit tenant membership in the association, and the developer to the extent that the development contains unsold lots, parcels, units, or interests pursuant to Section 1 of P.L. 1993, c. 30 (N.J.S.A. 45:22A-43).

"Master association" means a type of association in a development that is made up of representatives from other associations developed and established to cover specific areas within that development.

"Umbrella association" means a type of association that is made up of representatives across multiple associations established for the governance, management, and oversight of the common elements and facilities of multiple developments.

Comment:

A. Definition of "Association". This definition does not account for associations created prior to the adoption of PREDFDA even though relevant judicial decisions[1] have held that the amendments to PREDFDA that concerned the operations of community associations were applicable to associations created prior to the initial enactment of PREDFDA. CAI urges a revision to clarify that the regulations will be applicable to all New Jersey community associations.

B. Definition of "Association Member". This definition would not be consistent with S3661/A5043 which clarifies amendments to PREDFDA made in 2017 that gave association members certain voting rights in board elections. The referenced statute has passed both houses of the legislature and is currently awaiting action by the governor. If signed, it exempts certain owners of lots or units within voluntary associations from being considered an association member, which would require an amendment to this definition.

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[1] *Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 383 N.J.Super. 22, 53 (App. Div. 2008) *rev'd on other grounds*; *Moore v. Radburn Association,* 2010 WL 910189 at 5-7.

C. Definition of "Master Association" and "Umbrella Association". These terms are used interchangeably by draftspersons of the governing documents creating common interest communities. They are literally synonymous. While the Radburn Election Law contains two references to "umbrella or master association," CAI suggests that the inclusion of both terms was for the avoidance of doubt and not to designate two different types of associations. As a result, it is recommended that the above definition of "umbrella association" be applicable to both.

2. 5:26-8.2 (a). Relevant text of proposed rule:

5:26-8.2 [Powers] Association powers and [duties] responsibilities (a) Subject to the master deed, declaration of covenants, bylaws, and restrictions or other instruments of creation, the association may do all that it is legally entitled to do under the laws applicable to its form of organization. **The executive board of the association may act in all instances on behalf of the association.** (Emphasis added.)

Comment:

As it is currently set forth in the proposed regulation, the language in the last sentence leads to the conclusion that notwithstanding the terms of the governing documents, the board has the sole authority to act on behalf of the association. In a number of instances, the executive board may not act for the association without the consent of the members. This is often true in connection with special assessments, capital improvements or borrowing, depending on the terms of the governing documents. As set forth in the Condominium Act: "The administration and management of the condominium and condominium property and **the actions of the association shall be governed by bylaws** which shall initially be recorded with the master deed. . ." Hence, the authority of executive boards may be constrained by the terms of the bylaws. The statement in the last sentence would be accurate only in connection with condominium associations concerning the duties of the board as set forth in N.J.S.A. 46:8B-14 ("Duties of the Association").

3. 5:26-8.4(b). Relevant text of proposed rule:

(b) A developer who has stopped selling units in the regular course of business shall not be entitled to an automatic seat on the executive board.

Comment:

This paragraph uses the phrase "selling units in the regular course of business." Currently, the Condominium Act uses the phrase "ordinary course of business" in connection with the developer retaining one seat on the executive board (N.J.S.A. 46:8B-12.1(c)) and in the definition of "developer" (N.J.S.A 46:8B-3). Experience has shown that absent a commonly understood definition of that phrase, it is nearly impossible to enforce. On occasion developers rent units and then list the units at prices above fair market value, yet claim they are selling them in the ordinary course of business while maintaining control of the executive board for a protracted period of time. The term "regular course of business" is subject to the same vagueness. As a result, CAI urges that the phrase "regular course of business" be defined in a manner that gives it effective meaning. An objective standard for that phrase would relate to the time between the sale of the last unit in the project and the current time. CAI suggests that if that time exceeds one year, then the developer has ceased to sell units in the regular course of business.

4. 5:26-8.8(a). Relevant text of proposed rule:

(a) Upon acceptance of a deed to the unit, each owner shall be an association member for so long as he or she holds title to the unit.

Comment:

This paragraph does not take into account S3661/A5043, mentioned under comment 1B above. If the bill pending in the governor's office is signed, this should be amended to reflect to the impact of that legislation.

5. 5:26-8.8(c)(1). Relevant text of proposed rule:

(c) An association member shall be considered to be in good standing with respect to eligibility to vote in executive board elections, vote to amend bylaws, and nominate or be a candidate for a position on the executive board when the association member:

1. Is current in the payment of common expenses, late fees, interest on unpaid assessments, legal fees, or other charges lawfully assessed; 2. Is in compliance with a judgment for common expenses, late fees, interest on unpaid assessments, legal fees, or other charges lawfully assessed;

Comment:

While it is acknowledged that this provision is consistent with the 2017 amendments to PREDFA, the regulation, as stated, does not allow an executive board to grant owners with *de minimis* outstanding fees the ability to participate in an election. This can lead to the inability to meet the quorum requirements set forth in the bylaws of an association. With some association bylaws setting forth a quorum requirement of 50 percent of all members, this rule makes it difficult to meet those requirements and conduct an annual meeting. CAI recommends that this regulation permit the board to permit those owners with small outstanding balances ($25 or less) to be able to participate in the annual meeting and count towards the quorum.

6. 5:26-8.9(e). Relevant text of proposed rule:

(e) Each unit shall be allocated either one vote or an equal number of votes per unit, unless the bylaws of the association allow for voting proportional to a unit's value or size.

Comment:

CAI recommends revising this text to substitute "governing documents" for "bylaws," since it would more commonly be a declaration or master deed that would provide for such alternative manner of voting based on value or size. In some instances, the relevant language concerning value or size may be found in the certificate of incorporation or, as the text suggests, in the bylaws. Since the current PREDFDA regulations do not contain a definition for the phrase "governing documents" we suggest that it include the master deed, declaration, bylaws, and certificate of incorporation, notwithstanding how such documents may be denominated.

7. 5:26-8.9(f). Relevant text of proposed rule:

(f) The association shall not prohibit, limit, impede, or restrict participation by residents of low- or moderate-income housing units. No association election procedure shall impose any requirement for voting on low- or moderate-income housing owners that would interfere with their right to vote.

Comment:

This should be modified to insert, after the words "or moderate-income housing owners," the phrase: "who are in good standing." The 2017 amendments to PREDFDA ensured the right to vote only to all owners in good standing, as defined by that law.

Without clarification, an association that revokes the voting rights of an affordable housing unit owner for lack of good standing may be found to have restricted an affordable owner's right to vote or be a candidate for the executive board. The Radburn Election Law contains the following provision: "Election procedures shall not be established or administered in any way to prohibit participation by the residents of low or moderate income housing units." Although we assume that is the source of this rule, the language of the rule goes beyond the terms of the law by broadening, in its first sentence, the intent of the statute. The simple revision suggested above would prevent a misinterpretation of this rule.

8. 5:26-8.9(h)(2) & (3). Relevant text of proposed rule:

(2) All ballot tallying shall occur publicly, and the ballots shall be open to inspection by any member of the association for a period of 90 days from the date of the election.

(3) All ballots shall be cast in an anonymous manner.

Comment:

Nothing in the existing PREDFDA law nor the Condominium Act makes reference to the tallying of ballots in public or requires that ballots be cast in an anonymous manner. In particular, the Radburn Election Law was the first law adopted in New Jersey to provide a detailed roadmap to ensure fair and open elections; yet despite delving into details such as the number of days before an annual meeting that notice of a call for candidates must be served upon the association membership or providing for an alphabetical listing of the candidates on the ballot, it does not require public tallying or anonymous voting.

In addition, there are serious practical reasons that CAI strenuously objects to these provisions. With respect to the tallying of ballots in public, there are the following issues:

A. The tallying of ballots is, in many instances, an event that is undertaken while the annual meeting is being conducted. The typical agenda for an annual meeting (often mandatory under the bylaws) calls for the collection of ballots and closing of the polls during the early part of the meeting so that while the balance of the annual meeting is in progress the process of counting the ballots – time consuming in larger communities – can proceed during the annual meeting. The types of activities that occur during the balance of the annual meeting include, among other matters, reports of officers, reports of committees and a question-and-answer period. This rule would, on the one hand, divert the focus of the inspectors of the election who

would be forced to count in a noisy venue and, on the other hand, would draw attention of the membership away from the important annual meeting proceedings. One can easily envision that during a contested election, when passions may run high, the inspectors being subject to interference by the candidates or supporters of the candidates.

B. The Radburn Election Law authorizes the use of electronic balloting. The nature of electronic balloting, in which a third-party service provider receives the votes through an online system and then reports the results in writing at such time as they are requested, cannot accommodate being tallied in public. The tallying is merely the product of a computer program.

C. Some community associations have a system by which the voting commences through the use of proxies or absentee ballots before the annual meeting, continues by in-person balloting at the meeting and permits ballots to continue to be cast for one or more days after the meeting with the annual meeting being adjourned by a vote of the membership to the following day or evening. Only then are the ballots tallied, when, typically, none of the membership would be present.

D. A related and similar concern regards very large associations (with more than 1,000 units), where the tallying literally takes place over several days because of the burden of tallying such a large number of votes. In those associations public tallying would be impractical.

E. It is not unusual for an association to be unable to obtain a quorum of the membership by the first scheduled date of the election meeting. In such an event, the election meeting is adjourned to a future date, but the proxies, absentee ballots, and in-person ballots received at the annual meeting continue to be valid while the association solicits additional proxies or absentee ballots to meet the quorum requirements. Even though quorum may not be obtained on the first scheduled date, the informational items on the annual meeting agenda that do not require a vote will go forward so as to not frustrate those who turned out in person to see, hear and participate in the annual meeting program. When quorum is reached the ballots are tallied at the adjourned date of the annual meeting, but those that originally attended will not typically appear again and all that occurs on the adjourned date is the tallying of the ballots with no public present.

F. As can be seen from the foregoing, association elections and public governmental elections are different in significant respects. The corporate nature of associations does not lend itself to public tallying and we point out that even most municipal,

state and federal elections where the results are recorded by voting machines are simply reported without a "public tallying."

With regard to anonymous balloting, CAI has the following issues:

A. The Radburn Election Law calls for the use of "proxy ballots." *See* C.45:22A-45.2(6)(c)(5) and C.45:22A-46(4)(d). Proxy ballots and proxies accompanied by ballots are two different types of documents. A proxy ballot contains the ballot in the body of the proxy document. This ensures the person granting the proxy that his or her election choices will be honored, which a ballot separated from a proxy does not. It is not unusual for candidates to solicit owners to provide signed proxies. If the ballot is on a separate page than the proxy itself, the candidate would be able to substitute a ballot of his or her own choice. Of course, the proxy ballot must be signed and usually contains the printed name and unit designation of the owner. Without this the proxy ballot could not be qualified. When a person submits a proxy or absentee ballot the association must confirm it is from a person who is in good standing and is an owner. With regard to the issue of ownership it is sometimes found that while two spouses reside in the unit, only one is the owner and is therefore authorized to vote. Yet, the non-owner spouse will sometimes return the absentee ballot or proxy when that person is not authorized to cast the ballot. This requirement attempts to treat association elections as the equivalent of public elections. They are not. In a public election there are no issues of ownership or "good standing," which are inherent to the corporate form.

B. If a person contests the determination that they are not in good standing on the day of the annual meeting – a not infrequent occurrence - their ballot will often be set aside and considered provisional and marked as such. If the results of the voting indicate that the casting of all provisional ballots might affect the outcome of the election, the issue over whether those ballots were properly excluded is determined when the records of the association can be accessed. If it is found that the association improperly determined the person to not be an owner in good standing, the ballot will then be counted. This cannot occur where ballots are anonymous.

C. Where voting is weighted (by percentage interest, shares or otherwise) the inspectors must have a way to determine which unit the vote is associated with, otherwise the correct weighting cannot be determined.

D. The Radburn Election Law demonstrates a preference for absentee ballots over proxy ballots inasmuch as an association that provides only a proxy must offer the member the availability of an absentee ballot in its place. *See* C.45:22A-45.2(a). An

absentee ballot must contain the name of the name of the person submitting it, otherwise its validity cannot be determined.

Given the foregoing, CAI strongly urges the Department to reconsider these two rules. The salutary purpose of the rules can be accomplished in other ways. For instance, in place of anonymous ballots the inspectors of the election may be required to execute or publicly swear an oath of confidentiality before being qualified as inspectors.

Additionally, it would be helpful to those managing associations if they were able to point to a rule of the Department specifically prohibiting board members from having access to the voted ballots, proxies and absentee ballots. In lieu of tallying of ballots in public, the association could be required to retain ballots, proxies or absentee ballots, including those excluded as unqualified, for 30 days. If the difference between the initial tally's vote count demonstrates that the successful candidate with the lowest vote total is less than five percent ahead of the unsuccessful candidate with the highest vote total, that unsuccessful candidate can request a recount. In such an event, a recount could be required by alternative inspectors or by the accounting firm for the association.

See also the commentary under #14 below suggesting that the Department is without the legal authority to adopt such a rule.

9. 5:26-8.9(j). Relevant text of proposed rule:

When independent associations with residential units share facilities or obligations that require them to be members of a master or umbrella association board to oversee those facilities or obligations, the members of the independent association shall, unless the independent associations' governing documents provide for such association to appoint a member to the master or umbrella association, elect representatives to the master or umbrella association in accordance with this section.

Comment:

It is often the master association's governing documents that require that the president of a sub-association serve on the master board or that the sub-association board elect a representative to the master board. As written, this limits the authority for the appointment of a master association board member to the sub-associations governing documents when those are typically not the documents that set this methodology forth. As a result, CAI suggests that the rule be modified to permit the requirement for election to the master board be pursuant to the independent associations' governing document or the governing documents of the master association.

10. 5:26-8.9(l)(iv). Relevant text of proposed rule:

The election meeting notice shall contain a copy of the ballot.

Comment:

An association election meeting notice typically contains the proxy or absentee ballot that encompasses the form of the ballot. The stand-alone ballot is used at the election meeting for in-person voting. To include both the proxy or absentee ballot and a copy of the in-person ballot, which this appears to require, would cause confusion concerning the correct document to return. Further, the language of the Radburn Election Law is consistent with this comment wherein it states:

> An association shall provide association members written notice of an election by personal delivery, mail, or electronic means, no less than 14 nor more than 60 days prior to the meeting at which an election of executive board members is scheduled. **This notice shall include a proxy ballot and an absentee ballot**, unless prohibited by the bylaws, which ballots shall list in alphabetical order by last name the names of all candidates nominated pursuant to paragraph (4) of this subsection. (Emphasis added.)
> C.45:22A-45.2(6)(c)(5).

Lastly, with respect to this proposed rule, we direct the Department's attention to an inconsistency in the Radburn Election Law. While the above cited section of the law requires the inclusion of both a proxy ballot and an absentee ballot, the same section of the law states, in (6)(a), provides that:

> Any proxies used by an association must contain a prominent notice that use of the proxy is voluntary on the part of the granting owner, that it can be revoked at any time before the proxy holder casts a vote, **and that absentee ballots are available. An association may not use proxies for an executive board member election without also making absentee ballots available.** (Emphasis added.)

As a matter of good voting procedures including both types of ballots with the annual meeting notice will lead to confusion among some association members. If it is possible for the Department to rectify this inconsistency, we urge it to adopt the policy in (6)(a) so that only one form of ballot need be included with the election meeting notice.

11. 5:26-8.9(l)(iv)(1). Relevant text of proposed rule:

(1) If the bylaws permit, the notice shall include an absentee ballot with instructions for returning the ballot. If the bylaws provide for a proxy ballot, an absentee ballot shall also be included.

Comment:

The Radburn Election Law mandates that an association make absentee ballots available to owners whether or not the association's bylaws permit their use. *See* C.45:22A-45.2(6)(a) and (6)(c)(5). While we acknowledge that C.45:22A-46(4)(d)(2)(d) contains a provision allowing proxy or absentee ballots if the bylaws so permit, that section deals solely with bylaw amendments, not elections.

We also parenthetically note that there is very little difference between a proxy ballot and an absentee ballot other than the fact that the proxy ballot gives another person the ability to cast an owner's completed ballot. The proxy ballot can lead to difficulties if the proxy holder is not in attendance at the meeting. Hence, in many instances the absentee ballot is preferable since it does not require the presence at the meeting of any other person.

12. 5:26-8.9(l)(iv)(2). Relevant text of proposed rule:

When an election is for a specific board position, the ballot shall indicate what office and term each candidate is seeking.

Comment:

Nothing in the Radburn Election Bill or other provisions of PREDFDA requires a candidate to declare which term of office a candidate is seeking. This typically arises where an existing seat was vacated before the end of the then board member's term. Hence, if there were three trustee positions open, two might be for two-year terms and one might be for a one-year term. While it is possible that a candidate would choose to specifically run for the one-year term, it is unlikely. Hence, there might be four candidates vying for the two two-year terms and no candidate seeking the one-year term. In such an instance, the one-year term would remain unfilled and would be subject to board appointment even though there was an adequate number of candidates running. CAI suggests that this rule be revised to employ the most common procedure utilized by most associations in such an instance: The elected candidates receiving the greatest number of votes fill the longer term and the elected candidate receiving a lesser number of votes fills the shorter term.

13. 5:26-8.9(l)(1)(v). Relevant text of proposed rule:

A minimum of 30 days prior to the election, the association shall notify residents who are not in good standing. Such notice shall state the reason why the resident is not in good standing. The notice shall state that residents have the right to contest the board's determination by requesting Alternative Dispute Resolution. Residents shall be allowed to rectify their standing up until five business days prior to the election date.

Comment:

First, by allowing an owner not in good standing to cure the delinquency until five days before the election meeting the rule contradicts the terms of the Nonprofit Corporations Act (C.15A-1 et seq.), since that law specifically permits the bylaws to set a record date or, where they do not, it empowers the board to fix a record date subject to certain timing limitations, one of which prohibits a board from fixing a record date less than 10 days before the date of a meeting. *See* C.15A:5-7. Many associations have a record date set forth in the bylaws that is more than five days before the election meeting, with some being as long as 30 days prior to the date of the election and others requiring that good standing be as of the last day of the preceding month. Inasmuch as there is no provision in PREDFDA that calls for an association's record date to be five days before the meeting, an administrative rule cannot require that the terms of an association's bylaws be disregarded, particularly when other applicable law contradicts the rule.

Second, this rule's requirements are, in some instances, a violation of the Fair Debt Collection Practices Act. For instance, that law prohibits a debt collector from contacting a debtor when the debtor has refused, in writing, to pay the debt or wishes the debt collector to cease further communication. A rule that mandates such a communication flies in the face of federal law.

Further, the requirement that the debtor is entitled to ADR would, in some instances, be inappropriate, such as where judgment has previously been entered against the delinquent owner. At that point, the owner is no longer entitled to ADR.

Last, the issue of good standing also applies to qualifying a candidate for the governing board. Since the notice of the opening of nominations must be mailed or otherwise delivered a minimum of 44 days before the election meeting and the owners may be required to return their nomination forms within 14 days of the mailing, common sense suggests that the qualification of the candidates must be determined at the time the nomination is received. It would be unreasonable for an association send an annual meeting notice with a proxy or absentee ballot that contains the name of a candidate

not in good standing on the basis that the candidate would have the ability to cure his or her delinquency until five days before the election. If a delinquent candidate did not cure the delinquency, other owners would have been induced to cast their vote for a candidate that cannot serve.

14. 5:26-8.10(a)(2). Relevant text of proposed rule:

When affordable units represent a minority of units in the development, the bylaws shall reserve a seat or seats on the executive board for election by owners of affordable units.

Comment:

Nothing in PREDFDA or other law suggests that association bylaws must reserve a position for affordable housing owners. The provision of PREDFDA granting the Department rule-making authority reads as follows:

> The agency shall adopt, amend, or repeal such rules and regulations **as are reasonably necessary for the enforcement of the provisions of this act** . . .The rules may provide for, but are not limited to: provisions for advertising standards to insure full and fair disclosure; disclosure provisions relating to conversions; provisions relating to nonbinding reservation agreements; provisions for adequate bonding or access to some escrow or trust fund not otherwise required by the municipal governing body to be located within this State, so as to insure compliance with the provisions of this act, and to compensate purchasers for failure of the registrant to perform in accordance with the terms of any contract or public statement; provisions that require a registrant to deposit purchaser down payments, security deposits or other funds in an escrow account, or with an attorney licensed to practice law in this State, until such time as the agency by its rules and regulations deems it appropriate to permit such funds to be released; provisions to insure that all contracts between developer and purchaser are fair and reasonable; provisions that the developer must give a fair and reasonable warranty on construction of any improvements; provisions that the budget for the operation and maintenance of the common or shared elements or interests shall provide for adequate reserves for depreciation and replacement of the improvements; provisions for operating procedures; and such other rules and regulations as are necessary and proper to effectuate the purposes of this act, and taking into account and providing for, the broad range

> of development plans and devises, management mechanisms, and methods of ownership, permitted under the provisions of this act.
> C.45:22A-11

The grant of this authority is notable in several regards. First the rules are limited to those reasonably necessary for the enforcement of the act. In other words, the rule must further a PREDFDA provision. Second, it is evident that this section of the law authorized the Department to adopt rules only with regard to the activities of developers in relation to the registration of planned real estate developments. Although the grant of rule-making authority contains the phrase "such other rules as are necessary and proper to effectuate the purposes of this act," the rules of construction of legislation requires that such general words of authority are to be interpreted in conjunction with the preceding list of enumerated powers ("Under [the rule of *ejusdem generis]* the general words are construed to embrace only the objects similar in nature to those objects enumerated by the preceding specific words." Hovbilt, Inc. v. Township of Howell 264 N.J.Super. 567, 572). While this rule of construction is not absolute and is applied only when there is doubt as to legislative intent, a review of the cited language granting the Department rule-making authority is objectively clear when following the broad phrase of authority are limiting words stating that the "other rules" are to "take into account and provide for, the broad range of development plans and devises, management mechanisms, and methods of ownership, permitted under the provisions of this act." It is necessary to remain mindful that the "provisions of this act" were those extant in 1977.

Despite various subsequent statutory amendments to PREDFDA that added provisions concerning the operations of community associations, the legislature did not revise this section of the law to adopt additional authority to allow the Department rule-making authority related to association operations. The legislature is entitled to limit an agency's rule-making authority and where it sets forth limitations on an administrative agency's rule-making authority those limitations are required to be observed ("But it is the Legislature which determines whether to delegate rule-making authority to an administrative agency and, if so, the nature and scope of that authority." In the MATTER OF the ADOPTION OF REGULATIONS GOVERNING the STATE HEALTH PLAN, N.J.A.C. 8:100, ET SEQ., 262 N.J.Super. 469, 489 (App. Div. 1993).

Further, aside from the lack of legislative authority for the adoption of such a rule, where bylaws do not reserve a seat for affordable owners, it is questionable that mandating such a provision does anything but create hostility between the market owners who are not permitted to run for the affordable board seat and the affordable owners, who, under this rule, are entitled to vote, and run, for both an affordable-

designated board member and all other board positions. While CAI supports bylaws that preserve a seat for affordable owners, it does not support administrative rules that isolates the right of owners to select board members based on their economic status.

Given the absence of any stated intent by the legislature to require association bylaws to be amended to preserve a seat for affordable housing owners, CAI objects to this rule as outside those that are reasonably necessary for the enforcement of the Act, assuming any rules impacting association operations whatsoever are permitted by the grant of rule-making authority in PREDFDA.

15. 5:26-8.11(d). Relevant text of proposed rule:

(d) Association members may initiate removal of a board member by submitting to the board a petition signed by 51 percent of association members for removal of that board member.

1. A special election of the association membership shall be held within 60 days of receipt of the petition.

2. When the annual meeting of the association membership is scheduled to occur within 60 days of the submission of the petition, then the election shall be held at the annual meeting.

Comment:

CAI questions the intent of this rule and finds the language lacking in clarity. It is noted that this rule only provides for the initiation ("to cause or facilitate the beginning of" *Webster's Dictionary*) of the removal process, not the actual removal. With very minor exception association bylaws contain provisions relating to the method by which the members may initiate the removal of one or more board members. The overwhelming majority of those bylaws require far less than 51% of the members to call for a meeting for a vote of the membership to initiate the process to remove one or more board members.

However, the further provision of the rules requiring a vote by the membership for a replacement within 60 days *of receipt* of the petition suggests that the Department's intention may have been to permit a board member to be removed simply through the petition process. This would violate the terms of most bylaws, which give the board member whose removal is sought an opportunity to speak to the membership at a meeting of the members prior to a final vote on the issue of his or her removal. Additionally, existing case law provides that where removal of a sitting board member is

"with cause" the board member is entitled, as a matter of due process, to rebut the claim of cause.

This rule would further violate bylaw terms that authorize the board to choose a replacement for a removed board member. When bylaws guarantee a measure of due process for a board member designated for removal, and grant the authority to replace the removed member by the remaining board members, the Department is not empowered to lawfully modify bylaw provisions by rule, particularly when PREDFDA expresses no legislative intent to create a state policy concerning the method by which board members of a private entity may be removed.

See the commentary under comment 14 for further support for this position.

16. 5:26-8.12(b) & (h). Relevant text of proposed rule:

(b) The association shall hold an annual meeting. Within seven days following the annual association meeting, the association shall post, and maintain posted throughout the year, an open meeting schedule of the executive board.

* * *

3. Any changes to the posted open meeting schedule shall be made at least seven days prior to the scheduled date and posted and maintained in the same manner as the original schedule.

(h) When the board has determined to cancel a scheduled open meeting, it shall post notice of the cancellation at the meeting site by the time the meeting is scheduled to begin. The Board shall promptly post the notice of cancellation at the location on the property where notices are posted and, if applicable, its website.
1. The notice shall state when the meeting will be held and the reason for the cancellation.
2. If the start time is delayed, notice of the new time shall be posted at the meeting site to provide notice of the delay to those attending.

Comment:

Many boards do not hold a board meeting within seven days of the annual meeting, thereby making it impractical to establish a meeting schedule for the following 12 months. CAI suggests that the requirement for posting an annual meeting schedule be changed to within seven days of the first open board meeting following the annual meeting.

With respect to changes made to the open meeting schedule under (b)(3), the requirement that the notice be posted seven days prior to a scheduled date leads to instances where this rule will not, as a practical matter, be able to be observed. If, for instance, it is learned two days before a meeting that a quorum of the board would not be available due to illness, vacation or a required business trip the board will not be able to conduct a meeting and the seven-day requirement will not be met.

CAI suggests that the language be modified to: (a) follow the rule set forth in paragraph (h) of this same section, which does not contain the seven-day advance notice requirement; or (b) continue to provide for seven days' notice, but allow a lesser time period "for good cause shown." If the Department were inclined to accept (a) in the preceding sentence, we point out that under (h)(1), if the board is unable to meet due to a lack of quorum, it will not be possible to state in the posted notice when the meeting will be held; and, if there is no pressing business before the board, the meeting may simply be cancelled with no alternative date. CAI urges that the rule be revised to reflect these practical concerns.

17. 5:26-8.12(c)(3). Relevant text of the proposed rule:

3. The notice shall include the following details:
i. The time, date, and location of the meeting;
ii. Agenda items, which shall include items for discussion, items for action, and reoccurring items, such as passage of a budget.

Comment:

The existing regulation governing this matter (5:20-1.2(b)) provides "The 'adequate notice' required by this section shall mean written notice, at least 48 hours in advance, giving the time, date, location and, **to the extent known**, the agenda of any regular, special, or rescheduled meeting . . ." (Emphasis added.). The "extent known" language allows boards to discuss and vote on matters that may not have been known at the time the original agenda was created. CAI urges the Department to maintain this language since if it is not, it creates ambiguity regarding whether an unnoticed agenda item can be acted on by the board. Particularly in larger associations where matters that require board action arise on a regular basis, this rule should be clarified to indicate that it does not prevent the board from considering matters not previously listed on the agenda. This flexibility is necessary for the reasonably efficient operation of the association.

18. 5:26-8.12(d). Relevant text of the proposed rule:

(d) Every elected board member shall be provided equal opportunity to participate in any meeting of board members.

Comment:

This rule provides a one-size-fits-all approach that is impractical. CAI has several objections to it.

First, it undermines the role of the meeting chair, who is charged with moving an agenda forward and focusing the board on important business before it.

Second, it is unlikely to serve the purpose for which it is proposed. By way of example, if a motion is proposed and approved by four out of five board members, the four affirmative votes will simply say "aye." It is typically the "nay" vote that wishes to express reasons for his or her vote. This rule would permit the chair to deny the "nay" voter that opportunity on the basis that "equal opportunity" means an opportunity to state only aye or nay.

Third, understood literally, this rule would require the chair to keep track of the time of participation by each board member to determine how much time each board member should be given since the opportunity must be "equal." Chairs running efficient meetings must have the authority to end repetitive comments or comments that are not germane to the issue being discussed.

Last, many boards have adopted board rules governing board conduct. Boards have few sanctions available to enforce these rules. If, for instance, the board rules prohibit board members from disclosing attorney-client privileged communications to third parties (which, or course, negates the privilege), its only alternative in the event of a violation of this rule may be to deny a board member attorney-client privileged communications for a period of time to protect the legal interests of the association. The "equal opportunity" language would provide a recalcitrant board member with the ability to avoid a sanction for misconduct.

CAI suggests that an alternative to this would be to state that every board member will, at any meeting attended, be given the opportunity to reasonably participate in the meeting, subject to: (a) the chair's reasonable limits on time, relevance and repetitiveness, and (b) where a board has adopted rules related to the conduct of board members it may deny a board member the opportunity to participate in executive

sessions of the board where the subject matter of the four exceptions to the open meeting requirements may be discussed and the board member has previously breached reasonable confidentiality requirements of board rules, provided that no board member may be prohibited from participating in a meeting of the board open to the members.

19. 5:26-8.12(e)(2). Relevant text of the proposed rule:

2. A vote taken at a closed meeting shall not be binding. If the matter requires a binding vote, it shall be taken at a subsequent open meeting in a manner that does not disclose any confidences.

Comment:

CAI believes this rule is contrary to the statutory provisions contained in the New Jersey Condominium Act and PREDFDA. Those statutes provide as follows:

> [A]ll meetings of the governing board, except conference or working sessions at which no binding votes are to be taken, shall be open to attendance by all unit owners, and adequate notice of any such meeting shall be given to all unit owners in such manner as the bylaws shall prescribe; except that the governing board may exclude or restrict attendance at those meetings, or portions of meetings, dealing with (1) any matter the disclosure of which would constitute an unwarranted invasion of individual privacy; (2) any pending or anticipated litigation or contract negotiations; (3) any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer; or (4) any matter involving the employment, promotion, discipline or dismissal of a specific officer or employee of the association. At each meeting required under this subsection to be open to all unit owners, minutes of the proceedings shall be taken, and copies of those minutes shall be made available to all unit owners before the next open meeting. C.46:8B-13

The foregoing provides that where the board will be taking binding votes there must be both notice of the meeting and it must be open to attendance by all unit owners. However, the language expressly excepts from both of those requirements board meetings that "deal with" four enumerated topics.

The cited rule appears to be an attempt to graft the terms of the "Sunshine Law" (C.10:4-6 et seq.) applicable to public bodies onto the language in the Condominium Act

and PREDFDA. The Sunshine Law contains language significantly different than the open meetings act provisions applicable to community associations. It provides, in C.10:4-12, that "A public body may exclude the public only from that portion of a meeting at which the public body **discusses** any: . . ." Hence, it can be seen that a public body may retire to a non-public session only for purposes of discussion. Although that public meetings provision existed since 1975, when the legislature adopted open meetings requirements in the Condominium Act (1991) and PREDFDA (1993), it did not mimic the language in C.10:4-12.

The reasonable conclusion to be drawn is that the legislature did not intend to impose the same open meetings provisions on community associations as it had for public bodies. The "deal with" language is materially broader than the "discussion" language of the Sunshine Law. As such, it must be assumed it permitted the board to do more than discuss a matter; it was intended to permit it to take binding votes.

Again, where the underlying statutes do not express an intent that binding votes on enumerated exclusions be taken in a meeting open to the members, the Department may not adopt rules that do not reasonably advance the purposes of the relevant community association statutes, but, instead, bespeak an amendment to the statute's intent without an amendment of the underlying legislation.

As a result, CAI strongly urges the Department to remove this rule.

20. 5:26-8-12(f)(6). The relevant text of the proposed rule:

If a meeting is recorded electronically, a written record shall be taken of the matters addressed and the matters voted on. Association members shall have access to the electronic recording, as well as the written record, including the right to make a copy of electronic or written records.

Comment:

PREDFDA contains no reference to electronic recordings or access to them. While comment 34 of the Department in the New Jersey Digest related to this rule, states that "These requirements were also at N.J.A.C. 5:20. . .," that is incorrect. 5:20 makes no reference to electronic recordings. While some associations use a recording to facilitate the preparation of meeting minutes, associations typically erase the recording after the approval of the minutes. The electronic recording is not minutes and there is no valid basis upon which the Department may require that they be retained.

As an alternative, CAI would not object if, in the second sentence of the rule, it was modified to state that "Association members shall have access to the electronic recording if retained by the association, as well as. . ."

21. 5:26-8.13(b). The relevant text of the proposed rule:

(b) No amendments to the bylaws shall be effective until they are recorded in the same county Clerk's Office as the existing bylaws

Comment:

Comment: Cooperatives which are not subject to the "Co-op Recording Act" (N.J.S.A. 46:8d-1, et seq.) ("Pre-Act Co-ops") should be exempt from the requirement to record the bylaws. In Pre-Act Co-ops, none of the Governing Documents nor any unit transfer deeds are recorded. No "title search" is done in connection with a Pre-Act Co-op, as there are no pertinent recorded documents. Therefore, recording the bylaws and any amendments will not further the intent of the statute, which is to provide constructive notice to potential purchasers of the provisions of the documents. Instead, the requirement that such co-ops record their bylaws will merely impose an administrative burden and expense. Instead, it would make more sense to require a Pre-Act Co-op to provide the buyer with a full set of all validly adopted bylaws and any amendments at the time of closing.

In addition to the foregoing, the proposed regulation is contrary to statute. The governing document recording requirements in the Condominium Act, PREDFDA, and the Co-op Recording Act do not apply to Pre-Act Co-ops. Instead, the validity of Pre-Act Co-ops Bylaws are governed by C.14A:2-9 of the Corporations Act.

22. 5:26-8.13(d). The relevant text of the proposed rule:

The majority shall be determined based on association membership in good standing at the time of the vote.

Comment:

This concerns bylaws amendments. While CAI endorses the concept that the majority vote should be based on membership in good standing, the relevant date is the record date, not the date of the meeting. Otherwise, those not qualified as of the record date, but who became qualified thereafter, would enlarge the number against which the

majority vote would be calculated, but would not be able to vote. This would make it more difficult to obtain the required majority vote.

23. 5:26-8.13(f)(4). The relevant text of the proposed rule:

If the bylaws permit, the notice of the meeting shall include an absentee ballot with instructions for returning the ballot. If the bylaws provide for a proxy ballot, an absentee ballot shall also be included. The instructions shall allow return of the proxy or absentee ballot by facsimile or electronic means **provided that such return protects the anonymity of the voter**. The association shall not require receipt of the ballot more than one business day prior to the meeting. (Emphasis added.)

Comment:

See comments under item #8 above.

24. 5:26-8.13(g)(1) & (2). The relevant text of the proposed rule:

If an insufficient number of ballots or proxies are received at the special meeting to determine whether the proposed amendment has been approved or rejected, then the meeting shall be adjourned for 30 days or longer as approved by the association membership.
1. The bylaws of the association shall provide for the percentage of association members required to determine the period of adjournment.
2. The period between the original special meeting and the next special meeting for the amendments to the bylaws shall not be longer than 11 months from the date the notice of the meeting was sent.

Comment:

This requires a minimum 30-day adjournment when a sufficient number of votes are not present in connection with an amendment to the bylaws. It is unclear why the Department considered this a palliative to some ill not apparent. In most instances the 30-day delay is what an association would seek in any event; however, in some instances there would be no reason to adjourn for a full 30 days particularly when the vote was already close to accomplishing the goal of a bylaw amendment. Occasionally, there may be urgency to make an amendment to the bylaws; for instance, in connection with a loan transaction. There is no advantage to the 30-day requirement. This rule micromanages the procedures of the association without a corresponding public benefit. As such CAI urges its deletion.

Section (f)(1) mandates a bylaws provision providing for the percentage required to determine the period of adjournment. Virtually all bylaws contain a boilerplate provision stating that an action of the membership is deemed approved upon the affirmative vote of a majority of those persons present in person or by proxy at a meeting. There is no need to amend the bylaws to deal separately with the issue of adjourning a meeting for the purpose of amending the bylaws.

It would assist associations if the rule instead stated that those present by absentee ballot also count towards the required quorum.

25. 5:26-8.14(e). The relevant text of the proposed rule:

The Department may levy and collect fines and may issue penalties as set forth in N.J.A.C. 5:26-11.

Comment:

When the original PREDFDA law was adopted in 1977 (P.L. 1999, c. 419) it was limited to the issue of developer registration of planned real estate developments and authorized the Department to impose fines in connection with violations of that act (C45:22A-38). In 1993 the legislature adopted the Proprietary Campground Facilities Regulation (P.L. 1989, c. 299), which amended PREDFDA and provided for fines for that act under C.45:22A-53. When, however, the legislature adopted P.L. 1993, c. 30 in 1993, which included the requirements for open meetings of the board, among other matters, no provisions authorizing the fining of associations or board members were included. Although adopted in the same legislative session, these subsequent bills took starkly opposite positions on the imposition of fines and penalties. Similarly, no fining authority was added to the Radburn Election Law.

As a result, CAI believes there is no statutory authority for the Department to impose fines or other penalties on associations or members of the board. Such a regulation conflates the provisions applicable to developers and those involved in the operation of Campground facilities with those persons involved in the operation of associations. As the Department is aware, the board members of associations serve in a voluntary, uncompensated role. Associations are not commercial entities formed for the purpose of pecuniary gain. Board members and associations should not be subject to fines, which under applicable law may range from $50.00 to $50,000.00.

Given the lack of statutory authority for these fines and penalties, CAI urges, in the strongest terms possible, the removal of this rule.

In the end, the proposed regulations add complexity, burden and expense for the overwhelming majority of associations and their owners for the sake of the few. Not only do the regulations appear to exceed the lawful authority of the Department to adopt the regulations noted above, but from a practical point of view they are likely to exponentially increase litigation over association elections and board meetings. In the end, litigation surrounding technical regulations that, in some instances, place the sanctity of association elections above even those of public elections, and administrative detailing of the process of board meetings will lead to many unintentional violations of the rules. The Radburn Election bill, enthusiastically supported by CAI, was a necessary correction to ensure fair and open elections. The regulations unfortunately over-manage association operations at a significant cost for very little benefit.

CAI's Legislative Action Committee is available to discuss any of these comments with the appropriate Department representatives at their convenience. As stated at the outset, the members of CAI have many years of expertise in association operations and are open to discussion with DCA representatives concerning rules that will provide appropriate protection of the association membership while not hamstringing associations in the performance of their obligations and duties. An efficient operated association benefits the association, its board and its membership.

Respectfully submitted,

CAI Legislative Action Committee - NJ