COMMUNITY AFFAIRS

DIVISION OF CODES AND STANDARDS

Planned Real Estate Development Full Disclosure Act Regulations

Adopted Amendments: N.J.A.C. 5:26-8.9, 8.11, 8.12, and 8.13

Proposed: June 20, 2022, at 54 N.J.R. 1115(a).

Adopted: March 16, 2023, by Lt. Governor Sheila Y. Oliver, Commissioner, Department of Community Affairs.

Filed: June 20, 2023, as R.2023 d.087, **without change**.

Authority: N.J.S.A. 45:22A-21.

Effective Date: July 17, 2023.

Expiration Date: February 9, 2029.

Summary of Public Comments and Agency Responses:

Comments were received from the Community Association Institute, New Jersey Chapter (CAI-NJ) Legislation Action Committee (LAC), and retired, former employees of the Department of Community Affairs (Department), Edward Hannaman, and Mitchell Malec.

Comments Received from the Community Association Institute, New Jersey Chapter, Legislation Action Committee

1. COMMENT: The LAC states that they do not believe the Department of Community Affairs has the authority to adopt regulations relating to the "Radburn" legislation (P.L. 2017, c. 106) and that the regulations presently at issue are outside the scope of authority of the Department. They further state that their comments do not constitute a waiver of their positions and

arguments regarding pending, unresolved, and resolved litigation, petitions, or appeals against the State or Department.

RESPONSE: The Department respectfully disagrees that it does not have authority. N.J.S.A. 45:22A-35 states that the Department can "adopt … regulations as are reasonably necessary for the enforcement and provisions of this Act." P.L. 2017, c. 106, is a part of the Planned Real Estate Development Full Disclosure Act (the Act); thus, the Department has rulemaking authority to ensure the intent of P.L. 2017, c. 106, is met. The Department notes that LAC's comments do not constitute a waiver of their positions and arguments regarding pending, unresolved, and resolved litigation, petitions, or appeals against the State or Department. No responses set forth in this notice of adoption constitute a waiver of the Department's positions and arguments regarding pending, unresolved, and resolved litigation, petitions, or appeals.

2. COMMENT: Regarding N.J.A.C. 5:26-8.9(l)1iv(1), the LAC states that proxies are not ballots and should not be referred to as such within the regulations. Their contention is that a proxy is someone who votes on behalf of the owner, and that a general proxy grants the proxy holder to vote how they choose and a directed proxy votes in a manner as directed by the owner. The latter being the preferred form in the industry.

RESPONSE: The Department notes this distinction; however, a proxy ballot is merely a ballot for the proxy to vote with and the language was written this way for clarification.

3. COMMENT: The LAC does not believe that sample in-person ballots should be supplied prior to in-person voting sessions as this can cause confusion and anger. Because owners must deal with a proxy, absentee ballot, and possible electronic voting options, a sample in-person

ballot may cause unnecessary complications. Additionally, these sample in-person ballots are sometimes submitted during the voting sessions causing unnecessary ballot disqualifications. The LAC suggests that if sample in-person ballots are supplied, they should include information regarding returning proxy votes and absentee ballots and that the in-person ballot should not be used for voting.

RESPONSE: The Department respectfully disagrees that a sample in-person ballot would cause confusion and anger. Sample ballots are required, pursuant to N.J.A.C. 5:26-8.13(f). This subsection of the rule is not included in the rulemaking; thus, this comment is outside the scope of this rulemaking. The Department agrees that these sample in-person ballots should be clearly identified as such; this is the responsibility of the association.

4. COMMENT: The LAC believes the Department does not have the regulatory authority for any part of N.J.A.C. 5:26-8.9(l)1(v) as there is no rulemaking authority set forth at P.L. 2017, c. 106. The commenter further explains that the proposed amendment does not make it clear upon what authority an association or board of directors must rely on when "allowing for more time." The LAC suggests that the language should be revised to include references to the association's governing documents, or validly adopted rules of the executive board.

RESPONSE: The Department respectfully disagrees that it does not have authority pursuant to the Planned Real Estate Development Full Disclosure Act (the Act), N.J.S.A. 45:22A-35. The Act states that the Department can "adopt … regulations as are reasonably necessary for the enforcement and provisions of this Act." P.L. 2017, c. 106, is a part of the Act; thus, the Department has rulemaking authority to ensure the intent of P.L. 2017, c. 106, is met, and the rules further the intent of the Act. The Department notes the suggestion to include references to

the association's governing documents, or validly adopted rules of the executive board, and may undertake further rulemaking to address this language should that be necessary.

5. COMMENT: The LAC states that N.J.A.C. 5:26-8.9(l)1v is unclear and is open to multiple interpretations regarding the owners standing and voting. The LAC lists examples of potential confusion, such as only those receiving a 30-day notice who fail to cure can be disqualified; or that all owners must be in good standing to vote, but those receiving 30-day notices must cure the arrears in the notice by five business days prior to the election and any other amounts due from any owner must be paid by day of the election. The LAC requests that the Department rewrite the entire rule to specifically set forth what is intended.

RESPONSE: The Department respectfully disagrees that N.J.A.C. 5:26-8.9(l)1v is unclear. The requirement to be in good standing in order to vote is established at N.J.A.C. 5:26-8.8(c), membership in the association. This rulemaking amended this subsection to allow associations to establish a timeframe for members to come into good standing. Further comments to this subsection are outside the scope of this rulemaking.

6. COMMENT: The LAC believes the association should only have to offer Alternative Dispute Resolution (ADR) in connection with a good standing determination if the Association has not previously offered ADR in connection with the alleged debt in issue, and if the Association has not already obtained a judgement for the debt in question. The LAC also notes that the ADR provision as currently drafted may lead to inconsistent and unfair results. LAC cites, for example, an owner who acts responsibly and requests an ADR immediately after receipt of the 30-day notice who may receive the ADR prior to the election and be deemed to be not in good

standing. On the other hand, if an owner waits until five business days before the election to request ADR, the ADR will assuredly not occur prior to the election enabling the owner to vote. The commenter believes this distinction to be arbitrary and capricious.

RESPONSE: The Department thanks the commenter for the suggestion that ADR does not need to be offered if it was previously offered or provided to the member or if the association has obtained a judgement for the debt in question against the member. The Department will review and amend the language, if necessary, in a future rulemaking of the rules to clarify this point, although no change is needed at this point in time.

7. COMMENT: The LAC argues that the Department has no authority to adopt N.J.A.C. 5:26-8.11(d), which addresses removal of directors, as it is contrary to various provisions of the law. The LAC refers the Department to Title 14A (N.J.S.A. 14A:6-6) and Title 15A (N.J.S.A. 15A:6-6) that permits the removal of directors only through a vote of the owners at a regular or special meeting. The commenters also reference case law from New Jersey, New York, Delaware, and other jurisdictions that require a directors proposed "for cause" removal must be provided with an opportunity to "be heard" regarding their removal.

Additionally, the LAC objects to provisions allowing a petition to be the basis for removal. They believe that a petition should trigger a special meeting in order to vote on the matter, arguing that it could create chaos as the whole board can be removed immediately due to petitions thus disrupting the continued operation of the association. The commenter also states that it impedes the director's right to be heard on the merits of their proposed removal prior to being removed. LAC further states that in their experience, petitions are troublesome and

frequently produce problems, such as questions on validity of signatures and if the information provided by solicitors was accurate.

The commenter states that the Department should repeal the regulation in its entirety, or, if that cannot occur, the language should be revised to state that a special meeting to vote on removal shall be held following a petition with additional requirements relating to the rules regarding voting and contingencies.

RESPONSE: The Department disagrees that it does not have the authority to adopt these rules; see the Responses to Comments 1 and 4. In addition, the language aligns with that requested in the Community Association Institute's (CAI) petition regarding a petition being the impetus for removal, as was always the intent for the rulemaking. Concerning the opportunity to be heard, an individual removed by a petition is not prohibited from running in the subsequent election, thus allowing for a chance to make their case. This process ensures that residents of the association have a say in the removal of a board member, while also ensuring that member is still given the opportunity to keep their seat should they be reelected.

8. COMMENT: The commenter states that they understand the intention of N.J.A.C. 5:26-8.13(b)2 regarding the filing of bylaws with the county, however, they believe the language is unclear due to previous sections of the regulation. They propose changes in the subsection to reduce ambiguity and clarify language.

RESPONSE: The Department disagrees that the language is unclear. Because paragraph (b)2 is a subset of the text at subsection (b), these regulations must be read together, which clarifies that paragraph (b)2 is an exception from the requirements set forth at subsection (b).

Comments Received from Edward Hannaman, Retired, Former Employee of the Department of Community Affairs

9. COMMENT: The commenter agrees with the intent of the language regarding N.J.A.C. 5:26-8.9(h)2I; however, he believes clarification is required as associations will abuse the ambiguity regarding how owners can know results of the election. Technical clarification must be in the regulations concerning what additional information is available when gaining access to inspect electronic voting as the requesting owner must be entitled to receive more than a simple recitation of results. The commenter believes this will require input from technical advisors so a requesting owner can examine data of the electronic voting in a way that maintains voters' anonymity. They state it is imperative to add appropriate guidance to ensure this right is rendered meaningful.

RESPONSE: The Department respectfully disagrees. After electronic voting, results are immediately available to anyone who received the link to vote. The Department notes that to date, they have not received complaints regarding electronic voting results. However, the Department thanks the commenter for the suggestion regarding the simple recitation of results and due to the diverse and numerous systems available, generalized language may be needed for post-election audits to indicate more than a recitation of results. The Department will review the rule and may make amendments, if necessary, in a future rulemaking.

10. COMMENT: The commenter states that the provision at N.J.A.C. 5:26-8.9(j) should not be amended, as it defers to member-controlled association bylaws as to representation on an umbrella board. Because the rulemaking would limit umbrella board candidates to those already on a sub-association board, the commenter details how the rulemaking would deprive sub-

association owners who are not already on their board from having an opportunity to have an independent voice on the umbrella board.

They further question why the Department is undermining owner rights to appease the CAI and details the history of the CAI's actions and drafted positions relating to the issue. The commenter states that Department's current deference to existing association bylaws as to how each association shall be represented on the umbrella board is an eminently reasonable application of the statute. The commenter believes the proposed change unfairly and unjustifiably removes association owners' ability to have independent representation and should not be enacted.

RESPONSE: The Department respectfully disagrees, as this change is required to align with the statute, as indicated in the CAI petition. In considering CAI's petition for rulemaking, the Department found that the Planned Real Estate Development Full Disclosure Act (PREDFDA) requires a person serving as a member of a master association to have initially been an elected member of an independent association's board under the master association and, therefore, concluded that an amendment is appropriate.

11. COMMENT: The commenter objects to the rulemaking as the wording at N.J.A.C. 5:26-8.9(l)1iv(1) will allow association bylaws to force proxies on owners without providing an absentee ballot. They state that the existing language of the regulation is already in line with statutory requirements and that by allowing the rulemaking to go through, associations can easily justify not providing absentee ballots. They believe the existing provisions protect owner voting rights and suggest that if any improvement to the provisions should be made, they should include language stating, "if an association provides a proxy, it shall also provide owners with an

absentee ballot." The commenter recognizes that the associations are only required to send notice that absentee ballots are available, but believes the Department is well within its authority to recognize that this burdens owners. Additionally, the commenter states that any bylaw prohibition on the use of proxies should not automatically be construed to mean a prohibition to the use of absentee ballots and clarification should be included to reference this. The commenter believes it is a disservice to owners who may not be able to vote in person due to health, or other various issues outside of the owners' control.

RESPONSE: The Department respectfully disagrees, as this language aligns with that of within the law. The Department notes that the language does not allow a bylaw prohibiting the use of proxy ballots to automatically mean that there is a prohibition on absentee ballots.

12. COMMENT: The commenter notes the language at N.J.A.C. 5:26-8.11(d) stating that a removal petition is limited to board members who were elected by the unit owners. The commenter states that this deprives owners of the right to remove an appointee by petition simply because they were not elected and forces them to wait a year as noted in a preceding subsection. The commenter questions the reasoning and logic of this provision as owners should have a greater ability to remove appointed board members without having to wait a year to do so.

RESPONSE: The requirement allowing for board members to make appointments is a longstanding provision. The purpose for the amendment to this section is to align the language at N.J.A.C. 5:26-8.11(d) with the requirements set forth at paragraph (c)3, which allows the board to make appointments. The comment regarding the ability to make appointments is outside the scope of this rulemaking and may be considered in a future rulemaking.

13. COMMENT: The commenter notes that the provisions at N.J.A.C. 5:26-8.12(f)6 propose a 30-day limit for an owner's access to an electronic recording from the time the written minutes are approved. The commenter agrees that imposition of a time limit is reasonable, but they submit that even 90-days is too limited. They state that electronic records are not burdensome to maintain, and owners should have access to these records for the duration of the specific board's tenure.

Additionally, the commenter states that there are problems calculating the time limit, as it is not accurate to state that the time period runs from when the minutes were approved. Instead, the commenter states that it should be from when the approved minutes were made available to owners, which is some time in the future as permitted by the law. The commenter provides examples on how this could cause issues as approvals and meetings may cause owners to run out of time to access electronic records prior to the publication of approved minutes. The commenter would like the Department to clarify the timing to prevent meeting schedules from being manipulated to eliminate owners right to access electronic records of meetings. The commenters suggest language stating, "… owners have the right to access electronic recordings for X days from the date owners are able to access the approved written minutes to which the recording pertains."

RESPONSE: The Department respectfully disagrees. The extended electronic record provision recommended by the commenter is not necessary. Additionally, owners can request access to the electronic records of meetings within the timeframe without the need to wait for the published minutes.

14. COMMENT: The commenter states that the provision at N.J.A.C. 5:26-8.13(b)2 is being unjustifiably modified to eliminate the requirement for all associations to record their bylaws with the county clerk. They acknowledge that the petitioners base their argument that some co-ops are not required to file pursuant to the Cooperative Recording Act, but that reasoning cannot be used to justify provisions to eliminate requirements to file bylaws. The commenter explains th11easononing and history behind the exceptions provided to co-ops and notes that because of the broad language in the rulemaking the Department is going above what the petitioner is requesting and allowing all associations exceptions to the requirement.

The commenter explains the importance of filing and recording bylaws as they serve as protections for owners from "secret" changes that boards have been known to do. The commenter further states that the filing of these bylaws constitutes no real burden as the industry claims. The fees associated with filing are minimal and can be prepared with standard transmittal documents. Additionally, to assuage the industry of the excuse of the burden imposed by the filing of bylaws, the commenter suggests the Department could exempt small co-op associations from the recording requirement, and for a small fee, accept filing of those association bylaws within the Bureau of Homeowner Protection where they could be made electronically available to requesting leaseholders.

The commenter notes that if this rulemaking is adopted, exempted co-op boards can decide that bylaws are whatever they wish, and owners will have no way to verify their authenticity. They request, in order to continue the protection provided to owners, that the provision should remain as currently written.

RESPONSE: The Department respectfully disagrees that this exception allows all associations to circumvent the requirements, because those that are required to file with the county clerk's

office are still required to do so, and failure to comply would render the bylaw amendments null and void. Additionally, the Department is not contemplating maintaining the storage of any association documents exempt from the requirement to be filed with the county clerk's office or charging any fee for holding such records, because this would impose a cost burden for associations that are exempt from filing requirements.

Comments Received from Mitchell Malec, Retired, Former Employee of the Department of Community Affairs

15. COMMENT: The commenter states the amendments do not address comment numbers 95, 96, 97, and 98 from the May 18, 2020, adoption notice. He explains that the Department's response disagreed with comment number 96, which concerns a board member being removed through the petition process and prevented from having the opportunity to be heard by association members prior to the final vote of the special election. The commenter notes that the adopted rulemaking would contradict the Department's response to the contrary and the board member would lose access to due process. The commenter also questions as to why 51 percent was chosen in regard to a petition to remove a board member rather than 25 percent, similar to N.J.A.C. 5:26-8.9(b)3 or 15 percent, similar to N.J.A.C. 5:26-8.13(c) and (e)1, which can trigger a special meeting. Additionally, he is curious to what percentage voting against removal would stop the process and states that the proposed amendments should not be adopted as written.

RESPONSE: The purpose of this rulemaking was to address necessary changes resulting from CAI's petition to the Department; it was not intended to address comments received in the May 18, 2020, adoption notice. Thus, this comment is outside the scope of this rulemaking. Both the former text and the amendment included in this rulemaking mean that, immediately upon receipt

of a petition signed by 51 percent of members, the board member in question would be removed, and the executive board would have to hold an election to fill their seat on the board. There is nothing preventing the removed member from running and, thus, being able to state their case throughout their campaign. 51 percent was chosen because it is a uniform, consistent majority of the membership; in other words, associations do not have the ability to interpret language such as "a majority of the membership," to mean any other value they would want to determine.

16. COMMENT: Regarding the proposed changes at N.J.A.C. 5:26-8.11, the commenter questions the meaning of 51 percent. He provides an example of a 205-unit complex, with one vote per unit, and questions if they would need 105 signatures or more on the petition or just a simple majority of 103 signatures. The commenter is unsure if the intent was that a petition signed by a simple majority could initiate removal of a board member but was not expressed. As written, approval by the members means approved or ratified by the affirmative vote of the majority of the votes represented and voting at a duly held meeting of which a quorum is present or by written ballot. The commenter also notes that the word "majority" means more than half, not 51 percent.

RESPONSE: See the Response to Comment 15 regarding why 51 percent was chosen; this will mean that at least 51 percent of members must provide their signature. Please note that each unit maintains one membership to the association, regardless of the number of people living in the unit; thus, only one signature may be allowed per unit unless the governing documents provide otherwise. Additionally, the Response to Comment 15 clarifies the course of action after the petition is submitted; the subsequent election would follow the ordinary procedure for an executive board election.

17. COMMENT: The commenter states that the current and proposed provisions appear to express that each association member has a vote. They would like clarification on the applicability of this provision and if it is one vote per dwelling unit or one vote per association member.

RESPONSE: This rulemaking does not change the sections regarding association membership. As such, this comment is outside the scope of this rulemaking. For the sake of clarity, as stated at N.J.A.C. 5:26-8.8, membership in the association is granted to each owner upon acceptance of a deed to a unit, and each dwelling unit gets one vote, unless the association uses a different, weighted voting mechanism.

18. COMMENT: The commenter considers a situation where an association contains "affordable units" and a reserved seat on the executive board is provided for those members and asks if it is required to have a simple majority of the affordable unit association members in addition to a simple majority of all association members sign the petition to remove an affordable unit executive board member.

RESPONSE: It is 51 percent of all members, regardless of whether they live in affordable units. All members have the same voting power, regardless of whether they are members who live in affordable units; this is true for elections and for removals.

19. COMMENT: The commenter notes that these provisions are only applicable to a board member who was elected by the unit owners and not to an appointed board member. They question if the removal of an appointed member should be allowed to follow the same procedure

as the removal of an elected member. They recognize that it may have been the Department's intent that these provisions are only applicable to elected board members since an appointed board member is subject to an election within a year following such appointment, but that would also hold true for existing elected board members where the terms of appointment are only for one year but not where elected board member's appointment terms are greater than one year.
RESPONSE: This comment regarding who may be removed is outside the scope of this rulemaking, and changes to the section for further clarity may be considered in future amendments should changes be warranted.

20. COMMENT: The commenter questions if there is a unit requirement to the provisions. They note that it appears the provisions are applicable to all associations but wonder if they only apply to associations of 50 or more units. They ask if it would be reasonable to allow associations with fewer than 50 units to remove board members through a simple majority petition or upon obtaining an affirmative vote of a majority of all members entitled to vote by means of a secret ballot and allow the proposed provisions to apply to larger associations.
RESPONSE: This requirement applies regardless of the number of units in the development. The rules for removal of a board member are contained at N.J.A.C. 5:26-8.11(d), which applies to all developments, rather than at subsection (c), which applies only to those with 50 or more units.

21. COMMENT: The commenter explains that the provisions concerning homeowner association voting in California and states that, in his opinion, the recall of association directors should be done by secret ballot, similarly to the State of California's provisions.

RESPONSE: The Department respectfully disagrees; this system still requires an executive board election to be held, which entails the casting of anonymous votes.

22. COMMENT: The commenter is curious of a situation where bylaws allow tenants to vote and asks if the tenant is allowed to sign the petition or can only association members sign, that is, would the tenant need to obtain specific consent of "good standing." The commenter also believes the provisions should be revised to reflect that association members need to be in "good standing" to be eligible to petition removal of an executive board member, similar to N.J.A.C. 5:26-8.8(c) requirements, even though the meaning of "good standing" at N.J.S.A. 45:22A-23.r appears to refer only to voting.

RESPONSE: Anyone who signs the petition must be in good standing for their signature to count towards the removal of the member. During the Board's review of the petition, it must ensure that all who signed the petition are in good standing. Any signatures from members not in good standing would not be counted towards the 51 percent majority.

23. COMMENT: The commenter notes that if these amendments are adopted as written, the specific phrase "or following a vote in favor of removal open to all association members in accordance with the terms of the bylaws" at N.J.A.C. 5:26-8.11(c)3 may be literally interpreted as prohibiting the board from filling a vacancy as a result of removal by petition or even removal by votes. In other words, once members remove a director, their replacement must be elected by the membership. The commenter would like clarification on this matter.

RESPONSE: The Department respectfully disagrees. N.J.A.C. 5:26-8.11(c)3 provides the situations in which executive boards can appoint a member in order to fill a vacancy, wherein a

vacancy due to a removal of a board member is included; the Department may make amendments in the future to clarify language utilized throughout this subsection, if deemed necessary.

24. COMMENT: The commenter notes that the regulations state that no amendments to the bylaws shall be effective until they are recorded, but proposed N.J.A.C. 5:26-8.13(b)2 has an exemption for some associations from filing amendments. The commenter questions when these association's amendments would then become effective, and how would association members be notified of these amendments in these situations. The commenter additionally questions if associations who are now exempt from filing due to the rulemaking and who previously complied with the regulations by filing, need to maintain a record of the filing independent of the non-filed bylaws or do they only need to provide a copy of the bylaws upon request.
RESPONSE: For associations that are not required to record bylaws, such associations' amended bylaws are effective pursuant to the associations governing documents, including its master deed and governing bylaws related to amending bylaws, as well as any governing law and rules applicable to such associations. These associations must maintain the bylaws in their records, and copies must be available for any resident or designee upon request. They also need to provide a copy of the bylaws at the time of closing. Associations that previously filed but are no longer required to record their bylaws do not need to continue filing subsequent updates.

25. COMMENT: The commenter would like clarification regarding N.J.A.C. 5:26-8.9(l)1v to confirm that the Department's intent of the proposed amendment is to continue to allow an association member to rectify their standing less than five days prior to an election if the bylaws

or association allow it. The commenter then informs the Department of the regulations concerning associations voting rights in California. They explain that in New Jersey your fundamental association voting rights could be taken away by the association and they request to know if the Department is aware of any legislation in New Jersey that changes this provision.

RESPONSE: The commenter is correct that, at a minimum, residents must be given the opportunity to rectify their standing up to five business days prior to the election. Associations may also allow the opportunity to rectify standing up to the day of the election. The Department is not aware of any pending legislation that negates this.

Federal Standards Statement

No Federal standards analysis is required for the adopted amendments because the amendments are not being adopted under the authority of, or in order to implement, comply with, or participate in, any program established pursuant to Federal law or any State statute that incorporates or refers to Federal law, standards, or requirements.

Full text of the adoption follows:

TEXT