

PUBLIC NOTICES

COMMUNITY AFFAIRS

(a)

DIVISION OF CODES AND STANDARDS

Notice of Action on Petition for Rulemaking for Planned Real Estate Development Full Disclosure Act Regulations

N.J.A.C. 5:26-8

Petitioner: Community Associations Institute—New Jersey Chapter, Inc.

Take notice that on October 1, 2021, the Department of Community Affairs (Department) received a petition for rulemaking from the Community Associations Institute—New Jersey Chapter, Inc. (CAI), seeking amendments to, and repeal of, rules at N.J.A.C. 5:26-8, Community Associations. The petitioner seeks 18 amendments or repeals to the rules adopted on May 18, 2020, at 52 N.J.R. 1057(a), because the petitioner alleges that the rules cited in the petition are arbitrary, capricious, and unreasonable, inconsistent with the statutory intent, and exceed the rulemaking authority at P.L. 2017, c. 106, which amended the Planned Real Estate Full Disclosure Act (PREDFDA), N.J.S.A. 45:22A-21 through 56 to enhance resident voter participant rights in common interest communities.

Take further notice that the petition was duly considered pursuant to law. The Department has determined to approve the petition in part, as described below. The portions that are being denied are also described below. The 18 requested amendments or repeals are addressed in 14 paragraphs below. For those portions that have been approved, the Department will initiate its rulemaking process to make the revisions.

A copy of this notice has been mailed to the petitioner.

Response to the petition follows:

1. Delete N.J.A.C. 5:26-8.9(h)2 and 3. The petitioner requests that N.J.A.C. 5:26-8.9(h)2 and 3 be deleted. The petitioner states that these sections bear no correlation to the legislative intent of P.L. 2017, c. 106. The petitioner raised this issue in its comments to the notice of proposal, and the Department responded to those comments in the adoption of this rulemaking (See Comment 66).

These subsections require that ballots be cast in an anonymous manner, tallied publicly, and be open for inspection by association members for 90 days following the election. The petitioner disagrees with the statement that, for electronic elections, the display of an electronic tally mitigates the need for public tallying and availability for inspection. The petitioner also argues that allowing ballots to be available for inspection would risk members' private information being disclosed. The petitioner further argues that anonymous voting is impractical for associations with weighted voting and that the Legislature did not intend for voting to be anonymous.

The petitioner states that many associations utilize procedures to ensure that members contesting a determination that they are not in good standing at the time of the election are afforded an opportunity to have their vote counted upon successful contest and opine that anonymous voting does not allow for this process to occur.

This petition for deletion is denied. However, as noted below, the Department will amend the rules for clarity. The Department disagrees that a deletion of these paragraphs is necessary or appropriate. The intent of these provisions, as stated within the text of P.L. 2017, c. 106, are to encourage fair and open elections. These paragraphs appropriately reflect that intent. In addition, anonymous voting is not so impractical or burdensome on an association that it should be deleted, nor is anonymous or secret balloting an usual condition. Anonymous voting is used in common interest communities throughout the country, including California (California Civil Code 5110, Inspector of Elections), Delaware (29 Del c. 2544, Common Interest Community Ombudsperson; powers and duties), Florida (Bill 394), Maryland (Condominium Act, Real

Property Article, Title 11), Virginia (VA Code Ann. 55-509, Property Owner's Association Act), and Washington D.C. (District of Columbia Condominium Act, Title 42-1901 et seq.). There are methods and services that associations can employ to adhere to these requirements. Since the adoption of these challenged regulations, for example, the Department has seen associations require a signature on absentee and proxy ballots include a perforation line to remove identifying information once good standing is verified. Double envelope systems can address proxy ballots and good standing; associations can verify standing or proxy status on the outer envelope, which is discarded once the relevant information is verified. In addition, the weight of a ballot can be printed on the ballot itself without any further identifying information. Any potential negative impact in applying this requirement is far outweighed by the goal to conduct fair and open elections. The Department will amend the regulations to reflect that, when electronic voting is employed, thus public tallying is not possible, the results of the report shall nevertheless remain subject to inspection for 90 days, and the results of the electronic voting tally shall be made available for public review on the date of the election.

2. Amend N.J.A.C. 5:26-8.9(j). The petitioner notes that this regulation, which addresses master associations, fails to reconcile with the statutory requirement that for a person to serve as a member of the executive board of a master association, that person must initially be an elected member of an independent association's board under the master association. The petitioner requests that the regulations be amended to reflect such.

The Department agrees that the regulations could better reflect the statutory language, therefore, the rules will be amended for this purpose.

3. Amend N.J.A.C. 5:26-8.9(l)iv. The petitioner suggests that the Department amend this subparagraph, which currently requires that, for associations with 50 or more units, the election meeting notice contain a copy of the ballot and, if the bylaws permit, an absentee ballot with instructions for returning the ballot. Finally, if the bylaws provide for a proxy ballot, an absentee ballot shall also be included. The petitioner notes that P.L. 2017, c. 106 mandates that, unless prohibited by the bylaws, an association shall include a proxy and an absentee ballot with the meeting notice.

The Department agrees with this request for amendment and will revise its regulations, accordingly.

4. Delete N.J.A.C. 5:26-8.9(l)lv. The petitioner requests that the Department delete this section, which requires that, a minimum of 30 days prior to the election, the association shall notify residents not in good standing of their standing and requires that the notice state that residents have the right to contest the board's determination by requesting alternative dispute resolution (ADR). Residents are allowed to rectify their standing up until five days prior to the election date.

The petitioner argues that many association bylaws establish a record date for residents to rectify their standing and noted that allowing a resident to rectify their standing until five business days prior to the election would not give associations enough time to provide ballots to residents. The petitioner also argues that residents could abuse this requirement by requesting ADR at the last minute to allow them to vote while avoiding the obligation to make their standing status current. The petitioner states that requiring an offer for ADR may not always be appropriate, because a resident could have already been offered ADR, or an owner could have a judgement entered against them related to the failure to pay, and there is no law requiring a second offer to be made.

The petitioner argues that this requirement exceeds the reasonable bounds of the enabling statute.

The Department has no reported incidents of owners abusing this provision to request a second ADR, which is not what was intended by the regulation, but agrees that this warrants clarification. Thus, the Department will amend its regulations to clarify that residents who are not in good standing and who have already been offered ADR or who have a judgement entered against them related to their standing shall not be offered ADR prior to the election. In addition, the Department notes that the decision to pursue ADR does not necessarily grant a resident the right

to vote. One goal specified at P.L. 2017, c. 106, was to encourage and increase participation in elections. Allowing members to rectify their standing meets that intent. The Department disagrees that allowing up until five days before the election poses an undue hardship. Because members are notified of their standing 14 days for associations with fewer than 50 units or 30 days for associations with 50 or more units prior to the election, associations should be able to appropriately identify and prepare to rectify standing issues for those members who are not in good standing. In addition, the petitioner states in Item 1 that many associations allow for residents to rectify their standing up to the election day. As such, it is unclear why five business days would cause undue hardship in providing the appropriate number of ballots. The Department will amend its regulations to state that associations that allow for more time for residents to rectify their standing, may continue to do so.

5. Delete N.J.A.C. 5:26-8.10(a)2. The petitioner argues that this paragraph, which requires that the board reserve at least one seat on the board for a representative of affordable units when affordable units represent a minority of the units in the development, must be deleted. The petitioner states that this provision “eviscerates the discretion granted to an association to determine how it can best effectuate fair representation.” The petitioner also notes that there is no explicit directive regarding the composition of the board and claims that the regulation is in direct conflict with the plain meaning of P.L. 2017, c. 106 and is invalid. The petitioner raised this issue in its comments to the notice of proposal, and the Department responded to those comments in the adoption of this rulemaking (see Comment 81).

This request is denied. There is no basis for the deletion of this provision. One seat ensures representation but does not provide control of the association. For example, even on a three-person board, one seat would only be a 33 percent controlling interest. Boards can be made up of any workable number to ensure adequate representation of all market-rate owners and the required reserved seat for affordable unit owners simply by increasing the number of board members based on the size of the association; this rule, thus, does not “eviscerate” associations’ broad discretion as argued by petitioner. In addition, the Department disagrees this provision conflicts with the meaning of PREDFDA or P.L. 2017, c. 106. The Department has authority pursuant to N.J.S.A. 45:22A-35 to “adopt ... regulations as are reasonably necessary for the enforcement and provisions of this Act.” P.L. 2017, c. 106 is a part of PREDFDA; thus, the Department has rulemaking authority to ensure the intent of P.L. 2017, c. 106 is met. Further, the rule does not conflict with the statute because P.L. 2017, c. 106, at N.J.S.A. 45:22A-45.2.f(1), gave associations the option of reserving seats for owners of affordable units. The regulations further those provisions in the interest of democratic elections and fair representation on the executive board and are necessary to ensure owners of affordable units have a voice on the executive board.

6. Delete N.J.A.C. 5:26-8.11(c)3. The petitioner requests that this paragraph be deleted. This paragraph deals with appointments, removals, and executive board vacancies. The petitioner states that the language allowing for association members to appoint an executive board member to fill a vacancy created by the removal of a board member is not aligned with P.L. 2017, c. 106. In addition, the petitioner feels that the process in this provision conflicts with the requirements at subsection (d) for the recall of a board member. The petitioner asked whether the special election is akin to a recall election or if the petition signed by 51 percent of the board members effectuates the removal of a member.

The Department agrees that the language at (c)3 should be changed; the association board should have the right to fill a vacancy in the executive board created by resignation, death, or failure to maintain reasonable qualification to be an executive board member. The Department will amend the regulations to reflect this. Regarding subsection (d), the 51 percent petition removes the board member. A special election is then held to fill the position of the removed board member. The Department agrees to amend the language of subsection (d) to clarify the effect of the 51 percent petition.

7. Amend N.J.A.C. 5:26-8.12(b) and (h). These subsections require associations to hold an annual meeting and provide notice of such meeting. In addition, the regulations delineate the requirements for when the board has determined to cancel a meeting.

The petitioner states that subsection (b) appears to attempt to incorporate provisions of the Senator Byron M. Baer Open Public Meetings Act into the meetings of a board of a private corporation. The petitioner requests that this be deleted and argued that the Legislature never endeavored to impose requirements for notice within seven days of an annual meeting.

The Department disagrees with the petitioner and rejects the request to delete subsection (b). This requirement comes directly from existing law (former N.J.A.C. 5:20), which regulated open meetings in planned real estate developments, and was relocated into the PREDFDA regulations for ease of use. The language was incorporated without any change and has never been seen as burdensome.

In addition, the petitioner argues that subsection (h), which addresses how associations may cancel meetings, does not quite align with the requirements at paragraph (b)3 to provide seven days’ notice of any change to the meeting schedule, and requests that paragraph (b)3 be amended to correct this.

The Department agrees that a revision is appropriate at paragraph (b)3 to clarify that notwithstanding a cancellation pursuant to subsection (h), 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.

8. Delete N.J.A.C. 5:26-8.12(e)2. The petitioner argues that this paragraph, which relates to open meetings of the association, misrepresents the language at P.L. 2017, c. 106 and the Senator Byron M. Baer Open Public Meetings Act. This provision states that no binding votes can be taken during a closed session.

This request for deletion is denied. This language already existed at N.J.A.C. 5:20, which regulated open meetings in planned real estate developments, and was relocated into the PRED regulations for ease of use; it was not changed in any substantive way. Some terms are different than those which were previously at N.J.A.C. 5:20; this was done for consistency with terminology used throughout N.J.A.C. 5:26 and does not constitute a change in the substantive applicability of these requirements. This provision has been consistently interpreted by the Department as requiring binding votes to be taken only during open portions of a meeting since the initial adoption of N.J.A.C. 5:20. This is supported by PREDFDA at N.J.S.A. 45:22A-46, which states that the bylaws of the association “shall include ... a requirement that all meetings of the executive board, except for conference or working sessions at which no binding votes are to be taken, shall be open to attendance by all association members.”

9. Delete N.J.A.C. 5:26-8.12(f)6. The petitioner finds this paragraph, which requires that if a meeting is recorded electronically, a written record shall be taken of the matters addressed and voted on, and that association members shall have access to the electronic recording, as well as the written record, to be unduly burdensome for associations. The petitioner states that the obligation to retain and store electronic recordings taken for accuracy to draft minutes does not serve a legitimate purpose outlined at P.L. 2017, c. 106. The petitioner states that minutes should be made available to “qualified persons,” and this requirement should be deleted. As an alternative, the petitioner suggests that the association can be required to retain the recording for a limited time period (30 days) from the date the minutes are approved.

The Department disagrees that maintaining an electronic file is unduly burdensome and declines to delete this paragraph. However, the Department agrees that the alternative amendment offered by the petitioner is appropriate and still provides residents with fair access to the meeting records. The rules will be amended to require the electronic recording to be available for 30 days from the date the written minutes are approved.

10. Amend N.J.A.C. 5:26-8.13(b). The petitioner raises concern with this subsection, which requires associations to record amended bylaws with the county clerk’s office. The petitioner notes that there are co-ops that are not required to file a Master Declaration and Registration, and co-ops created before the Co-op Recording Act do not have their bylaws filed with the county clerk’s office. The petitioner requests this section be amended to exempt these co-ops from the recording requirement.

The Department agrees and will amend the regulations, as necessary. The Department also notes that in its comments to the rules, CAI

recommended that the Department require those cooperatives that are not required to file with the county clerk's office to provide the buyer with a full set of all validly adopted bylaws and any amendments at the time of closing (see Comment 129). The Department intends to incorporate this requirement for exempt co-ops.

11. Amend N.J.A.C. 5:26-8.13(d). The petitioner notes that this subsection requires the association to determine the majority of the total authorized votes based on association membership in good standing at the time of the vote for amendments to the bylaws. The petitioner requests that the majority be determined as of the record date as defined by the association's bylaws.

The Department denies this request for a change. Utilizing the time of the vote mirrors the timelines for establishing good standing in elections. This allows the same time periods for members to remedy any standing issues in the same manner as elections. A record date could be established at any time before the vote/return of ballots. Maintaining the current language avoids any confusion or ability to manipulate the majority and ensures consistency in the association's obligations regardless of the type of vote. As noted, this timeline is the same for executive board elections. In the time since these regulations have been adopted, there have been no complaints brought to the Department's attention that show there have been hardships in applying these timelines to either executive board elections or votes for bylaw amendments.

12. Delete N.J.A.C. 5:26-8.13(f)4. The petitioner requests the deletion of this section, which requires that absentee and proxy ballots be provided with the notice for meetings for amendments to bylaws. The petitioner argues that P.L. 2017, c. 106 requires that "proxy or absentee" ballots be provided, and the intent was to allow associations to provide a proxy ballot without including an absentee ballot.

The petitioner then reiterates their objections stated in Item 1 above, relative to anonymous voting and the rectification of good standing time limits.

The Department rejects this request for deletion. The first request, relative to the ballots to be provided, is in direct conflict with the request made by the petitioner in Item 3 above, which ensures that both proxy and absentee ballots are provided to residents. If bylaws allow for absentee ballots, an absentee ballot must be provided. If bylaws allow for a vote by proxy, a proxy and an absentee ballot must be provided. This is consistent with the requirements at N.J.A.C. 5:26-8.9(l)iv. Allowing for increased resident participation in bylaw amendments through the use of absentee or proxy ballots should be encouraged, since one of the intents delineated at P.L. 2017, c. 106, was to increase voter participation. In addition, as noted above, anonymity ensures fair and open elections pursuant to the intent and purpose of P.L. 2017, c. 106. Anonymous voting is not so impractical or burdensome on an association that it should be deleted, as discussed above.

13. Amend N.J.A.C. 5:26-8.13(g) and (g)2 and 3. The petitioner requests that the Department amend this section to properly reflect P.L. 2017, c. 106 by including "or annual meeting" each time "special meetings" are referenced. This section relates to receiving an insufficient number of votes for bylaw amendments.

This request is granted, and the Department will amend the rules appropriately.

14. Delete N.J.A.C. 5:26-8.14(e). This subsection states that the Department may levy and collect fines and may issue penalties as set forth at N.J.A.C. 5:26-11 and states that for associations that are controlled by unit owners, the Department may issue cease and desist orders, may issue a monetary penalty, may transmit the case to the Office of Administrative Law, or may file an action in the Superior Court. The petitioner argues that the Department does not have the right to issue penalties to associations and opined that the Legislature maintains the practice of explicitly codifying fines and penalties in all instances where they are allowed. The petitioner further argues that the Department does not have explicit enforcement authority for P.L. 2017, c. 106.

This request is denied. As explained to the commenter upon the adoption of this rule (see Comment 156), the Department does have the authority to issue penalties pursuant to N.J.S.A. 45:22A-38. The Department also has rulemaking authority and explicit authority to administer PREDFDA pursuant to N.J.S.A. 45:22A-24. P.L. 2017, c. 106 amends PREDFDA, meaning that all scoping sections of PREDFDA are

applicable to the provisions established by that law. There is no basis to delete this provision.

EDUCATION

(a)

STATE BOARD OF EDUCATION

Notice of Action on Petitions for Rulemaking Educational Facility Planning Standards Educational Facilities

N.J.A.C. 6A:26-6.3

Petitioner: Robert J. Chester, Esq.

Take notice that on October 7 and 8, 2021, and December 3, 2021, the New Jersey State Board of Education (State Board) received three petitions for rulemaking from the above petitioner, requesting the State Board of Education amend N.J.A.C. 6A:26-6.3.

The petitioner sought three amendments at N.J.A.C. 6A:26-6.3(b), which sets forth 13 general design and construction requirements that, along with the educational facility planning standards delineated at N.J.A.C. 6A:26-6.3(c) through (h) and the Uniform Construction Code (UCC), form the requirements for the design and construction of public schools. N.J.A.C. 6A:26-6.4 sets forth specific standards for school facilities housing preschool students.

The first petition sought to amend the general design and construction requirements for public schools to include, in each classroom, a video camera(s) with sound that faces the teacher, for the purposes of student safety, student access to lectures and lessons while students are home sick, and parental access to what their children are learning in the classroom.

The second petition sought to amend the general design and construction requirements to require each classroom to be heated and air conditioned, the air quality to be monitored, and the heating, ventilation, and air conditioning (HVAC) to be at least the minimum efficiency reporting value (MERV) 16 and to conform to American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) standards.

The third petition sought to require video cameras with sound in each special education classroom aimed at all visible areas, with recordings kept according to the Record Retention Guidelines of the New Jersey Archives, accessible on demand by the parents and guardians of the special education students in that classroom at the time.

A notice acknowledging receipt of the first two petitions was published in the November 15, 2021, New Jersey Register at 53 N.J.R. 1931(b). A notice of action indicating that additional time was needed for the Department of Education to deliberate about the first two petitions was published in the January 18, 2022, New Jersey Register at 54 N.J.R. 183(b). A notice acknowledging receipt of the third petition was published in the January 18, 2022, New Jersey Register at 54 N.J.R. 184(a).

The petitioner's two requests to require video cameras in each classroom, including each special education classroom, do not require or constitute a facility or furnishing or equipment and, as such, should not be included at N.J.A.C. 6A:26 as a general design and construction requirement. Furthermore, the expenditures associated with the proposed requirements most likely would not qualify for school facilities funding under the Educational Facilities and Construction Financing Act and would constitute an unfunded mandate.

The petitioner's proposed requirements related to video cameras in classrooms also implicate Federal, State, and local laws that govern the privacy of students and teachers, including but not limited to, the Federal Family Educational Rights and Privacy Act (FERPA) student records requirements, the Individuals with Disabilities Education Act (IDEA) privacy requirements, the student records regulations at N.J.A.C. 6A:32-7, and the individual collective bargaining agreements governing school districts' and teachers' employer/employee relationships. Because the proposed video recording poses privacy and legal questions that may be