New Jersey
Appleseed

June 22, 2020

Via regular and electronic mail

Assemblyman Herb Conaway, Jr.
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Re: A.4265/S.2261 NJ Common Interest Ownership Act

Dear Assemblyman Conaway:

We are writing to you as primary sponsor of A.4265, entitled the "New Jersey Common Interest Ownership Act," which was introduced and referred to committee on June 15, 2020. This bill is the same bill as S.2261, which was released from the Senate Urban and Community Affairs Committee on May 28. New Jersey Appleseed Public Interest Law Center ("NJ Appleseed") surmises that had members of that Committee been provided adequate context of the bill's relationship to current New Jersey law in this area, it would not have been released in its current form. As we detail in this letter, written in consultation with Ms. Joyce Murray, we believe that this bill, if enacted into law, will result in significant and unnecessary confusion in the areas of municipal land use and the turnover of association board control to owners in the case of master associations. Most importantly, from our perspective, it will further lessen protections for homeowners living in these communities because it seeks to supplement current law regarding common interest communities ("CIC"), rather than amend it, leading to ambiguity regarding whether it implicitly repeals certain provisions of the law in the case of inconsistency or silence.

NJ Appleseed submits these comments on behalf of common interest resident owners throughout the State based on our representation of various self-organized groups of owners over the years, and Ms. Murray's many years of experience working on housing issues for the Office of Legislative Services.[1] NJ Appleseed is a nonprofit 501(c)(3) organization, which has a

[1] Ms. Murray served as bill drafter, lead counsel and committee aide to the Assembly Housing and Local Government Committee of the New Jersey Legislature at OLS for more than 26 years, until her retirement in 2011. She also served as Secretary to the Task Force of the Assembly to Study Homeowners' Associations, which issued its report in 1998. The report listed 31 recommendations for

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Common Interest Association Democracy Project, under which it represents owners of common interest associations, including, in the past, the residents of Radburn, Our Concordia, Alexandria, Fox Chase II, Seville Condominiums, Carlton Towers, Lake Parsippany and others. This project was operated jointly with Professor Frank Askin of the Rutgers Constitutional Rights Clinic prior to his retirement and thus, has focused, and continues to focus, on assisting common interest association owners in their efforts to ensure open and fair board elections pursuant to the New Jersey Constitution and the Property Real Estate Development and Full Disclosure Act ("PREDFDA"). Ms. Murray's professional experience is broader than that of NJ Appleseed, and includes representation of owners in housing controlled by other statutes, including cooperatives and condominiums. These comments are based on our respective professional experiences with the difficulties faced by owners, primarily with respect to having their voices heard and considered by entrenched boards that often serve personal interests rather than the welfare of the community at large.

The New Jersey Law Revision Commission, in its final report on the Uniform Common Interest Ownership Act released in 2016, recognized the governmental nature of the powers wielded by a homeowner's association board, and the need for the laws governing such associations to balance private contractual rights with protections afforded the public when dealing with government. The Commission's report did not recognize, however, that New Jersey, in contrast to many other states in the country, had already adopted many "democracy" related provisions that regulate all types of CICs under the 1993 amendments to PREDFDA, N.J.S.A. 45:22A-43 et seq., further amended in 2017. In addition, there have been several important court cases, including some issued by the New Jersey Supreme Court, which have interpreted New Jersey's CIC laws to consider homeowners' associations to be "quasi-governmental," even subjecting them to the free speech and association provisions of the New Jersey Constitution. Further, DCA just issued comprehensive regulations governing board elections. The result has been that association boards are required currently to hold open board meetings, provide financial disclosure, hold fair and inclusive elections, and more generally, serve the common social welfare of the community in a manner similar to that of municipal governments.

Although A.4265 claims to be based on the NJ Law Revision Commission's report, it only adopts a few portions of that report. Indeed, the portions that are incorporated are those that increase developer and board control and omit the accountability requirements that have already been put in place by the Legislature for CICs and their developers. Moreover, it must be noted that in 1996, the New Jersey Legislature convened a Legislative Task Force that conducted hearings around the state on problems in homeowner associations. The overwhelming majority of those testifying described problems centered on association abuses of owner rights. The Task Force issued an extensive report, which included many recommendations to address owners' complaints; none of those recommendations, however, are included in A.4625.

We hope that you find the following review of current law in this area helpful in understanding our alarm about the bill in its current form. It is our position that if specific changes need to be made to PREDFDA, that law should be amended, not supplemented with a whole new statute that in some areas is inconsistent with current law and remains silent with

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change, very few of which have been enacted by the Legislature, but they still remain relevant.

respect to other provisions (leaving open questions concerning whether such provisions are still valid).

The purpose of PREDFDA, N.J.S.A. 45:22A-43 et seq. (1977), as stated by the Legislature, is to protect consumers who are purchasing a home by way of a "compound" type of real estate transaction, wherein they buy both an individual home and a pro-rata interest in the common or shared facilities of the residential development in which the home is located. That pro-rata interest in the communal property, which is noted in a declaration or master deed, comes with membership in, and an obligation to fund, an association that is responsible for the costs of maintaining the common property. While the laws governing the establishment of a condominium were clear under N.J.S.A. 46:8B-1 et seq., developers proceeded to form similar types of CICs, which were not condominiums, but which nevertheless bound individual property owners to pay for maintenance of commonly owned property. In some cases, the developers never turned over title to the common property; the owners were thus doubly bound to pay for its maintenance, which the developer performed, and also to pay rent to the developer for use of his property. PREDFDA was enacted to stop this type of fraud and abuse and initially addressed only the formation, sale, and advertisement of these types of communities by developers. The law requires developers to make certain disclosures to purchasers before a purchase; and, it has been amended and supplemented to include a multitude of various owners' rights.

In 1993, the Legislature enacted chapter 30 as a supplement to PREDFDA, which according to the Sponsor, addressed the need for further regulation of these CICs, and was meant to spell out when control of the community would be turned over to an owner-controlled governing board. Senator Bennett's statement to S.217 of P.L.1993, c.30 reads as follows:

> This bill provides certain standard administrative forms and procedures for all planned real estate developments (PREDs), which include condominiums, cooperatives, and various other "common-interest communities" that combine individual occupancy of lots or units with communal ownership and management of common elements serving those lots or units. These standards are intended to prescribe a consistency of management methods in all types of PREDs **and to safeguard the interests of the individual owners or occupants.**
>
> This bill incorporates into statute law certain provisions already existing in the PRED regulations of the Department of Community Affairs (DCA). It also incorporates into general PRED law certain provisions -- relating to the bylaws of Unit owners' associations--the establishment of members' voting rights, the allocation and collection of common expenses, the amendment of association bylaws and the adoption, amendment and enforcement of rules concerning the common elements that are now found only in the statute on condominiums. The bill also introduces a requirement that meetings of an association's executive board be open to all members of the association, with certain specified exceptions.
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> The bill also requires DCA to prepare informative materials, including suggested "model" bylaw provisions, to assist existing associations in bringing their practices into conformity with the provisions of this bill.
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> (Emphasis added).

Although DCA has never prepared those "model bylaws" as mandated under this statute, it has gradually exercised its authority over association boards more and more, including implementing its right to object to unfair declarations drafted by developers, review master deed amendments, oversee access to records, supervise alternative dispute resolution, and, most recently, pursuant to amendments made by P.L.2017, c.106, create and enforce procedures for fair elections.

Your proposed bill, however, being based on a national model act, the Uniform Common Interest Owners Association Act ("UCIOA") does not take into account any of these laws that are specifically designed to protect consumers purchasing and living in all CICs. The proponents of this version of UCIOA point to the fact that there is no "enabling act" for cooperatives or homeowner associations, as there is for condominiums under the New Jersey Condominium Act, N.J.S.A. 46:8B-1 et. seq. Although PREDFDA was technically a less specific statute than the Condominium Act when it was initially enacted, it is our opinion that the proponents of UCIOA and its New Jersey version, A.4265/S.2261 are ignoring the import of the PREDFDA. P.L.1977, c. 419, which **serves as a valid enabling act for all types of common interest community associations.** Moreover, any developer forming any type of CIC, including condominiums, cooperatives and CICs formed prior to PREDFDA's enactment in 1977, must comply with PREDFDA's democracy provisions enacted in 1993, with respect to transfer of ownership to owners and governance of the community going forward.

Because A.4265/S. 2261 are written as supplementary laws, with no reference to current statutory provisions, both fail to inform anyone as to which current laws are intended to be amended and which are intended to be implicitly repealed. Moreover, many of the bill's provisions, such as taxation, termination, etc. already exist in the Condominium Act. Rather than incorporate such provisions into PREDFDA, where they currently do not exist, the bill deletes them from the Condominium Act and adds them to this newly created chapter under the Revised Statutes. This makes the law more fragmented than it currently is, and does not make things uniform as the proponents of the bill assert. In addition, the bill draws what we believe is a false distinction between planned communities, and other types of CICs such as condominiums and cooperatives, which are all currently regulated under PREDFDA and its regulations. Because the bill has an "override clause" in case of conflict with current laws, it is unclear whether the PREDFDA will continue to apply to condominiums or cooperatives, and in particular, whether P.L.1993, c. 30 (the owners' rights provisions) will apply.

A.4265 also explicitly repeals the Cooperative Recording Act of 1987, which requires unit ownership in cooperatives formed after 1987 to be recorded in a master register as a means to provide protection for creditors and cooperative owners. Under a 1995 amendment to the Statute of Frauds (N.J.S.A. 25:5-1 et seq.), cooperative shares are treated as real property, and the transfer of ownership interest in them requires a real estate contract in writing. A.4265 would confuse the status of cooperative shares, with "conversion developers" claiming that unrecorded cooperative shares are not real property but are stock, and thus PREDFDA disclosures to tenants and prospective purchasers would not be applicable. If uniformity is the goal of A.4625, then it is suggested that, instead of repealing N.J.S.A. 46:8D-1 et seq., all cooperative housing associations should be required to register under that Act, regardless of the date of creation, which would then afford protection to all creditors and owners. In addition, all

"termination of association" and taxation provisions in A.4625 that are not clearly spelled out in PREDFDA could simply be incorporated into that law by amendment (rather than enacting an entirely new statute).

It should be noted that the portions of the bill creating a master planned association (defined as over 300 units) also appear to be suspending parts of the Municipal Land Use Law (MLUL) concerning planned unit developments, PUDs or phased development, as well as PREDFDA requirements for turnover of board control to the homeowners. Under A.4265, a developer need not list (as is currently required under the PREDFDA) exactly how many homes over 300 will be built. This could result in the community having just one phase, which could be stretched out indefinitely. In this manner, municipal zoning ordinances, which are enacted after the initial development application is approved, could be ignored. Turnover of control of the association from the developer to the homeowners (determined under the statute as a ratio of how many homes are to be built versus how many have been sold) could also be delayed indefinitely. The proponents of the bill do not explain why amendments to the MLUL and PREDFDA could not be easily made to meet their goals, nor do they state exactly what those goals are. Furthermore, the Public Offering Statement (POS), which is now required to be given to prospective purchasers in a CIC under PREDFDA will no doubt be irrelevant, if it is unknown how many units will be built and exactly what will comprise the final common elements or costs to maintain them.

Most importantly from our perspective representing the interests of consumers (i.e., potential owners and owners), the bill misstates ownership rights in non-condominium CICs. Section 46:8E-2 (definition of common elements) provides "[c]ommon interest community includes condominiums, cooperatives, and any other real estate development composed of individually owned property units and common property jointly owned and managed by the unit owners as an association." Under the definition of "allocated interests," the bill states that owners in “Home Owners Associations” (in contrast to condominiums) do not have allocated interests in the common property; but that they have common expense liability, and they can "vote." **This could not be more wrong**. It is the very DNA of a planned real estate development that the purchaser of a home or unit in such a community is buying a pro-rata interest in the common elements. The association formed by the developer initially represents the developer’s ownership interest in units and the common elements, until the developer gradually sells all units and proportional common elements to each purchaser. The "association" is not a party to those real estate contracts, and thus does NOT, and CANNOT be, a purchaser of or an owner of the common elements. Section 46:8E-4 of the bill recognizes that the value of the common elements is to be folded into each individual owner's home (as is the case with condominiums), and thus there is no separate tax bill in the association's name for the common elements. The association is merely an owner-controlled management vehicle for the common elements. Management does not equal ownership. The Legislature clearly spelled this out under P.L. 1993, c. 30 and P.L. 2017, c.106, s.4, which supplemented and amended the PREDFDA. See also N.J.A.C. 5:26-8.8 Membership in the Association. If there is a method of allocating the common expenses to each owner, as there must be in the governing documents, then there are commensurate, corresponding allocated interests of each owner in the common property. Enacting A.4265, as proposed, would once again erroneously resurrect this debunked understanding of who owns the common property. The homeowners own such property

collectively so long as they each hold a deed to a home in that community.[2] This is why it is necessary for the governing or executive board of an association to take a vote of the owners prior to taking certain actions, such as amending the bylaws or declaration, or selling the common property.

In short, many of the goals that A.4265 seeks to accomplish, if properly justified, could be done via amendment to the existing PREDFDA law, without risking loss of owners' rights or confusion over the effect of the bill on current law. As the bill is now written, it fails to recognize or reconcile many of its provisions with certain existing laws, and, in fact, conflicts with some of them. Indeed, it is not clear whether any of DCA's enforcement powers currently authorized under PREDFDA would be overridden or otherwise nullified by A.4265. This is a serious risk that must be explicitly addressed prior to moving this bill forward.

We thus urge you to significantly change A.4265, and reject the bill's apparent rejection of current New Jersey law. If uniformity is the goal sought by the bill's proponents, we suggest incorporating desired changes into the existing PREDFDA law as amendments, including the addition of an enforceable mandate for DCA to provide model bylaws, rather than creating a whole new statute. We offer our expertise in this area to assist you or the Legislature in any way that is helpful, but in a way that will improve matters for homeowners and the CICs in which they reside.

Respectfully,

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[2] Ownership of common property in the context of a cooperative is different. The cooperative housing corporation owns all of the property in a coop; the shareholders are deemed to have "proprietary leases" for their housing units.

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