New Jersey
Appleseed

July 31, 2019

NEW JERSY APPLESEED COMMENTS RREGARDING
PLANNED REAL ESTATE DEVELOPMENT FULL DISCLOSURE 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
Proposed Repeals: N.J.A.C. 5:20 and 5:26-9.3

Geraldine Callahan
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Dear Ms. Callahan:

Please accept the following comments on behalf of common interest resident owners, which we submit based on our representation of various self-organized groups of owners over the years. New Jersey Appleseed Public Interest Law Center is a nonprofit 501(c)(3) organization, which has a Common Interest Association Democracy Project, under which we represent owners of common interest associations, including, in the past, the residents of Radburn, Our Concordia, Alexandria, Fox Chase II, Seville Condominiums, Carlton Towers 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"). These comments are based on professional experience with certain difficulties faced by owners primarily with respect to having their voices heard and considered by

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entrenched boards that often serve personal interests rather than the social welfare of the community at large.

First and foremost, we ask that these regulations be written as clearly and simply as possible, with the least possible ambiguity, so the regulations can provide direction to both board members and owners with minimal room for interpretation. Owners must know how their board is required to act, and boards must know that if they do not follow the regulations, they are violating the democracy mandates of PREDFDA. In this way, the regulations must set a minimum standard to which all associations must adhere. From this perspective, we make the following recommendations for change or clarification.

5:26-1.3 Definitions

The definition of "Association" should specify the inclusion of any common interest association that is not only governed by PREDFDA, but may be organized or incorporated under specific acts such as the N.J. Condominium Act, N.J.S.A. 46:8B-1 et seq., the N.J. Nonprofit Corporation Act, N.J.S.A. 15A:1-1 et seq., or any other specific statute. For many years, some older common interest associations in New Jersey took the position that the 1993 representative democracy amendments to PREDFDA were not retroactive to associations organized prior to the original enactment of PREDFDA in 1977. The New Jersey Supreme Court has held otherwise. We believe that these regulations should explicitly state that the 2017 amendments to PREDFDA, enacted to enhance resident voting participation rights, also apply to common interest associations that predate PREDFDA.

The regulations contain distinct definitions for an "Umbrella association" and a "Master association." However, in common parlance, a master association is often considered a second-level umbrella association that handles matters affecting an entire development, in contrast to a first-level home owners association that handles matters only affecting its particular portion or neighborhood within the larger planned development. The regulations define umbrella association as established for the governance, management and oversight of the common elements and facilities of multiple associations that are represented in that second-level association. In reality, it is very hard to

understand the difference between the two types of second-level associations.. The New Jersey Supreme Court has addressed master or umbrella associations in the following manner:

> . . . Although the Court recognized that an umbrella organization could serve a useful purpose in controlling common elements shared by several associations, it found no intent by the Legislature to diminish the statutory power of condominium unit owners to control their common elements. [citation omitted]. The Court concluded that the Kings Grant governance scheme that granted irrevocable control over all common elements to the umbrella organization "plainly violate[d] both the letter and spirit of the [Act]."
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> Brandon Farms Prop. Owners' Ass'n, v. Brandon Farms Condominium Ass'n, Inc., 180 N.J. 361, 368 (2004), quoting Fox v. Kings Grant Maintenance Ass'n, 167 N.J. 208, 224 (2001).

We are unaware of any statute defining these terms differently. If the Department believes that the distinction between master associations and umbrella associations is necessary, it would be very helpful to FLESH out the definitions with specific examples. Is there a difference in who pays the fees of the different associations? Meaning, do indii9 vidual residents typically pay a fee to their association and a separate fee to their master association, whereas does an association, not the individual owners, pay a fee to an umbrella association to ensure the maintenance of common facilities that are shared by all the members of the multiple, cooperating home owner associations? Again, please augment the definitions so the difference between the two is apparent to homeowners, not just association attorneys. Above all, the definitions should comport with the New Jersey Supreme Court rulings in this area forbidding the dilution of unit owners' power to control their property, including property owned in common by all owners

5:26-8.4 Administration and Control by Developer

New Jersey Appleseed reads the amendments to N.J.A.C. 5:26-84 as essential to clarifying that once a developer sells 75% of the units to be built in the planned community, that developer retains one seat on the board only so long as it is selling the remaining 25% of the units in the regular course of business. Retention of "one or more" units as rental units does not entitle the developer to retain that automatic seat, though it permits the developer to be a candidate for the board as an owner. We therefore suggest that 8.4 (a) be changed from "retains at least one unit as a rental unit" to "retains one or more units as rental units" to make the prohibition clearer.

Furthermore, the DCA should make clear whether it approves of a developer who retains a significant number of units for rent (or the developer's successor owner), retaining multiple board seats by submitting its employees or representatives as candidates for the board. New Jersey Appleseed is aware of at least one homeowners association, Sunrise Bay Association at Galloway, where the owner of over 200 rental units controls all but one board seat through election of its employees to several board seats, thus precluding the resident owners from any meaningful representation on the board. It is our position that the developer should be entitled to run for only one seat on the board, not multiple seats; and thus not continue to dominate the board through retention of any number of rental units, especially if the developer never sells 75% of the units built.

This issue appears to be addressed in N.J.A.C. 5:26-8.10(c), which states that a person or owning entity shall not hold more than one seat on the executive board. That same provision should be included in 5:26-8.4 to avoid any ambiguity.

5:26-8.8 Membership in the Association

The proposed regulation N.J.A.C. 5.6-8.8(b) provides that a developer "shall have one membership in the association for each unit registered pursuant to this chapter that has not been conveyed to an individual purchaser." The proposed regulation goes on to state that "This subsection shall not be construed to

provide the developer a different transition obligation than that required pursuant to [N.J.S.A. 45:22A-47]." Given the recent controversy that arose within the Radburn Association, New Jersey Appleseed recommends that application of this particular provision be limited to the developer of an independent common interest association, and not include the developer of units added to an existing common interest association that has already transitioned to residential control. That is, a developer of units whose owners will be entitled to membership in an established homeowners association should not be entitled to membership in that association prior to conveying such units to individual owners who will be members in that association. Securing one seat on the board, otherwise controlled by residents, may be more appropriate than controlling a significant block of votes that could give that developer total control of the association that has already transitioned to unit-owner control.

5:26-8.9 Executive Board Elections

N.J.A.C. 5:26-8.9 (b)(3) sets out a procedure that homeowners should follow in the event that their association has not held an election in compliance with bylaws (and, implicitly, if its bylaws are not in accord with PREDFDA and these regulations). It specifically uses the term "may" when directing that a petition signed by a minimum of 25% of association members be submitted to any board member to compel an election. The looming question is whether the Department intends this to be a prerequisite before any group of homeowners may proceed to the Chancery Division of the Superior Court to compel an election.

This issue is similarly raised by the confusing language found in N.J.A.C. 5:26-8.9(c). That provision states "If an association has no executive board members and association members fail to act on petition or by a majority, any association member or group, at common expense and upon written notice to all owners, may petition a court with jurisdiction for authority to act temporarily in the interests of the association and to organize and hold an election within 90 days of the court order." First, if an association has no board members, then

unit owners are unable to organize and submit a petition to any board member as set forth in (b)(3). Second, what does the Department mean when it states "act . . . by majority"? Act how and to whom? Third, requiring unit owners to give notice to all owners prior to submitting a petition to court is an onerous burden, when management typically does not share e-mail addresses and sending notice, by regular or certified mail, to all unit owners may be logistically and financially burdensome for an individual unit owner or group thereof. Finally, as noted with respect to 8.9(b)(3), does the Department understand these regulations to set up a requirement that would take away the jurisdiction of the Chancery Division, if a group of homeowners went directly to court to compel compliance with its bylaws without first notifying all unit owners. Or is the procedure set forth in the regulations required to be followed only if the group of unit owners that goes to court to compel an election desires that its expenses be considered a "common expense," ultimately to be reimbursed by the association?

These ambiguities must be clarified. Otherwise, these regulations will create more problems for unit owners faced with noncompliant boards than is currently the situation, where an owner may proceed to court to compel compliance with the law and/or an association's bylaws without satisfying any petition or notice requirements.

Furthermore, we understand that N.J.A.C. 5:26-8.9(d)(3), linking the provision of absentee ballots to the provision of proxy ballots, flows directly from the requirements set forth in the 2017 amendments to PREDFDA. Read in isolation, this provision makes it sound as if the provision of proxy ballots, and therefore absentee ballots, is discretionary. However, we note that the language of 8.9(g)(i.e., "The association shall not prohibit . . . proxy holders . . . from voting for any candidate") is written to suggest that the provision of proxy ballots, and therefore absentee ballots, is mandatory. New Jersey Appleseed believes that the provision of proxy ballots and absentee ballots should be required in the regulations as it is in the statutory law to ensure maximum participation of unit owners in elections. Therefore, we contend that 8.9(d)(3) and

9(g) should be rewritten to make it clear that both proxy and absentee ballots are required to be in compliance with PREDFDA.

N.J.A.C. 5:26-8.9(j) sets forth that representatives to a master or umbrella association should be elected in accordance with this section, unless the first level homeowners "association's governing documents provide for such association to appoint a member to the master or umbrella association." New Jersey Appleseed asserts that this regulation must be further qualified in order to guarantee that the master or umbrella association does not become an oligarchy controlling the first-level, constituent homeowners associations. We recommend the following language:

> Where the executive board of a planned homeowners association is authorized pursuant to its governing documents to appoint a representative of that association or board to the executive board of a master or umbrella association, the name of that representative should be submitted to membership for majority approval, even if that representative is already an elected member of the association's executive board. If the nominated representative is a board member, such representative shall serve on the executive board of the umbrella or master association no longer than the term to which that representative was most recently elected to the association's board. If not a board member, the representative should serve on the board of the master or umbrella association for a term no longer than four years.
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> Each constituent homeowners association should be represented on the executive board of the umbrella or master association by a number of representatives that is reasonably proportionate to the number of units in each constituent planned development compared to the total number of units in all constituent planned developments whose common elements and facilities are being managed by the executive board of the umbrella or master association.

5:26-8.10 Representation

N.J.A.C. 5:26-8.10(a) states that an association's bylaws MAY provide for representation on the executive board for owners with different types of units. Notwithstanding the use of the word "may," implying discretion, N.J.A.C. 5:26-8.10(a)(2) appears to require that the bylaws SHALL (i.e., must) reserve a seat or seats on the executive board for election by owners of affordable units, if affordable units represent a minority of units. There is no definition of "affordable unit" in either the current or proposed PREDFDA regulations. We assume that the Department meant the proposed rule to apply to inclusionary developments with COAH units, not to low cost housing that is generally considered to be affordable. Therefore, the term should be defined; and to avoid confusion, the regulations should state that representation of different types of units is discretionary except when COAH units constitute a minority in that particular association. And, in such case, reservation of a reasonably proportionate number of seats is required. We also reference our previous remarks concerning umbrella associations for illustration. The New Jersey Supreme Court's holding in Brandon Farms, supra, would require a seat to be reserved on the master or umbrella association for a COAH unit owner, if all of the COAH units had been placed in their own condominium association separate from the market rate units existing in the greater common interest community, which are also governed by the umbrella association.

As noted above, retention by the developer or a successor owner/company of a significant portion of rental units often creates significant problems for residential owners with respect to their participation on the executive board. N.J.A.C. 5:26-8.10(c) should make explicit that the prohibition against one owner holding more than one seat on the executive board applies to the developer, along with the developer's employees and other agents, who never sells more than 75% of the units and retains a significant number of rental units.

5:26:8.11 Appointments, Removals and Executive Board Vacancies.

With respect to associations with 50 or more units, N.J.A.C. 5:26-8.11(d) permits the initiation of a board removal petition signed by 51% of association members. That 51% threshold imposes an unnecessarily high burden simply to petition for a special election that is essentially equivalent to a recall election of municipally elected officers. A 15% requirement to initiate a removal election is more appropriate, and adequately protects board members from frivolous petitions, because they ultimately cannot be removed unless 51% of unit owners vote them out. Requiring owners to organize 51% owners merely to put removal on a special ballot, the same percentage needed to win the election, is a sure way to maintain the status quo even if the actions of a board member warrant removal.

5:26-8.12 Open Meetings

N.J.A.C. 5:26-8.12 requires that all binding votes of an association must be taken at a meeting open to attendance by all association members. Subsection (1) notes that a binding vote is a vote made with a quorum of the executive board members present. The regulations, however, do not go as far as the requirements under the Open Public Meetings Law("OPM"), N.J.S.A. 10:4-1 et seq., where any meeting where there is a quorum of municipal council members must be open to the public, because when a quorum is present, a binding vote may occur (even if it is not called binding at the time the closed door voting occurs). When enacted, the Condominium Act exactly mirrored the OPM. Subsequent amendments to that law, however, were not incorporated into the Condominium Act nor explicitly incorporated into the 1993 or 2017 "democracy" amendments to PREDFDA.

Nonetheless, association board members have often abused PREDFDA's working sessions exception to open board meetings. They meet behind closed doors (calling their meetings "working sessions") where real discussions occur and decisions are made. They then hold a public meeting at which time the vote is again taken, with little discussion or opportunity for unit owners to

understand what was decided or to comment. Unlike the public introduction of an ordinance by a city council, which is subject to a second reading with the opportunity for public comment prior to voting, association owners are given minimal or no ability to influence the decisions of their executive board. Although N.J.A.C. 5:26-8.12 (a)(2) now requires association boards to provide a brief explanation of the basis for and cost entailed in a matter that is the subject of any binding vote, it is not clear that such requirement will create the transparency needed to promote genuine participation by owners in the affairs of their community. New Jersey Appleseed therefore urges the Department to adopt a regulation stating that any meeting at which there is a quorum of executive board members present must be open to attendance by unit owners. This way, working sessions will be limited to a subset of board members, and the board will always vote on all matters for the first time at an open meeting.

Respectfully submitted,

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