

Department of Community Affairs Issues Substantial Regulations Affecting Common Interest Communities

Client Alert

5.21.20

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On May 18, 2020, the New Jersey Department of Community Affairs, Division of Codes and Standards (DCA) published new regulations under the Planned Real Estate Development Full Disclosure Act (PREDFDA). The purpose of these regulations, which became effective upon publication, is to assist in the administration of the Radburn Law (P.L. 2017, Ch. 106), which most notably amended the election provisions in PREDFDA.

The new regulations have been a hot topic in the common interest community industry since they were proposed on June 3, 2019. This level of interest prompted a strong response, both for and against the proposed changes, during the public comment period that expired on August 2, 2019. In fact, 158 comments and responses were included with the publication of the regulations.

On January 6, 2020, DCA adopted the regulations, which were filed on April 9, 2020 without any substantial changes from the original proposal. These regulations amend N.J.A.C. 5:26-1.3, 8.1, 8.2, and 8.4; adopt new regulations at N.J.A.C. 5:26-8.8 through 8.14; and repeal N.J.A.C. 5:20 and 5:26. There are significant penalties for common interest communities found to be in violation.

Common interest communities and property managers should seek legal counsel to determine the impact of the new regulations on their properties. The following is a summary of what we perceive to be among the more significant new and revised regulations that are now in effect.

Executive Board Elections

This entirely new section provides the framework for how executive board elections are to be conducted. Specifically, it provides as follows:

- **General Election Procedures.** These regulations apply to the facilitation of executive board elections.

- The depository (ballot box) for physical ballots must be secured at all times.
- The tallying/counting of ballots must occur publicly and shall be open for inspection by any member for at least ninety (90) days from the election.
- The ballots must be cast in an anonymous manner. The most common method of accomplishing this is the “double envelope” system.
- **Election Procedures for Associations with Less than Fifty (50) Units.**
 - Between fourteen (14) and thirty (30) calendar days from the election, the association shall send a notice of the election and the method of voting.
 - Any member in good standing can be nominated or self-nominate themselves as a candidate. At least fourteen (14) days before the election, the association shall notify any resident who is not in good standing and the reason why. The notice must state that the resident can contest that the resident is not in good standing by requesting alternative dispute resolution.
 - The association shall provide members the opportunity to review the qualifications of the candidates.
- **Election Procedures for Associations with More than Fifty (50) Units.**
 - Between thirty (30) and sixty (60) calendar days prior to the election meeting notice, a notice calling for candidates shall be mailed which specifies the process for submitting nominations. The period of nominations shall be at least fourteen (14) days. If no deadline is set, nominations shall be deemed valid up to one (1) business day prior to the meeting notice.
 - Between fourteen (14) and sixty (60) days prior to the election, the association shall send a notice of the meeting to all members with a copy of the ballot. If permitted by the bylaws, proxy forms and absentee ballots shall be sent.
 - The ballots shall list the candidates in alphabetical order with no indication of which candidates are incumbents, if any. The font, size, and color of the listing of candidates must be consistent.
 - At least thirty (30) days before the election, the association shall notify any resident who is not in good standing and the reason why. The notice must state that the resident can contest that the resident is not in good standing by requesting alternative dispute resolution. Members can rectify their standing up until five (5) business days prior to the election.
- **Write-In Votes.** Write-in votes must now be an option in all elections. If a write-in vote candidate is successful but is not a member in good standing, the candidate with the next highest vote count shall be the winner. If there are no other candidates, the seat shall be vacant. Ballots shall contain space for write-in votes for as many seats as are up for election.
- **Electronic Voting.** Electronic voting is permissible provided that (i) all election regulations are still followed, (ii) the bylaws permit electronic voting, and (iii) the electronic voting is administered by a neutral third-party.
- **Developer Voting.** The developer shall not be entitled to cast votes in any executive board elections while the developer maintains a seat on the board.
- **Election Frequency.** The frequency of the elections shall be set in the bylaws of the association however they must be held at least every four (4) years. If the bylaws do not set the frequency, the elections shall be held every two (2) years.

- **Board Member Term.** The maximum term for a board member shall be four (4) years.
- **Failure to Conduct an Election.** If an association has not held an election that complies with its bylaws, owners may submit a petition of at least 25% of the membership in good standing (unless the bylaws designate a larger percentage as the quorum for elections) to any board member to compel an election. In such case, an election must be held within ninety (90) days of receipt of the petition.
- **No Board Members Exist.** If there are no board members and association members fail to act on petition or by majority, any member or group can seek a court order appointing that person or group to act temporarily in the interests of the association and to organize an election within ninety (90) days. The costs incurred shall be a common expense.
- **Proxies & Absentee Ballots.** The regulations memorialize the requirements of the Radburn Law that clearly states that the use of the proxy is voluntary on the part of the granting owner and may be revoked at any time before a vote, and that absentee ballots be made available if proxies are available
- **Low- and Moderate-Income Housing.** There may be no prohibition, limitation, impediment, or restriction on the participation of residents of low- or moderate-income housing units in elections.
- **Voting Eligible Tenants.** If allowed by the bylaws, voting eligible tenants shall not be prohibited from voting.

Representation

- **Classes of Units.** Bylaws may provide for representation on the board with different unit types elected by members of that unit type.
- **Affordable Units.** All associations that have affordable units that represent a minority of the units in the development shall reserve at least one (1) seat on the board for election by owners of affordable units.
- **Commercial Units.** Regardless of their number or value, owners of commercial units in a development may not constitute a majority of the board.
- **Multiple Residents from Same Unit.** Except for representatives of the developer, not more than one (1) resident from a single unit may serve on the board simultaneously.
- **Multiple Seats.** No individual or owning entity may hold more than one (1) seat on the board.

Open Meetings

Notice for and conduct of board meetings will be different. The rule that has been in effect for years, N.J.A.C. 5:20-1.1, is repealed and has been replaced by N.J.A.C. 5:26-8.12. The highlights are as follows:

- **Notice Requirements.**
 - No prior newspaper notice is required.
 - A posted annual meeting schedule is required with time, date, and location.
 - All meetings, regardless of the annual schedule, are to be noticed at least seven (7) days prior to the meeting. Notice must be:

- Prominently posted in at least one (1) location at the property that all owners can access at all times;
 - Posted on the association's website and included in any newsletter; or
 - Personally provided to each member (or their designee) by mail, hand-delivery, or electronic means.
 - Members may waive notice in writing.
- Content of the notice must include:
 - Time, date, and location; and
 - Agenda to the extent known.
- **Conduct at Meetings.**
 - Minutes are to be taken of meetings.
 - A uniform policy for member comments may be adopted by the board.
 - All matters subject to a binding vote shall be accompanied by "a brief explanation of the basis for and cost entailed in the matter," which explanation shall be incorporated in the minutes.
- **Emergency Meetings.** Emergency meetings may be held with less than seven (7) days notice. However, such meetings are limited to matters that if not addressed may result in substantial harm to the interests of the association. The contents and posting of the notice are the same as for all meetings.
- **Binding Votes.** Binding votes may not be taken at a closed meeting. Votes are to be taken at an open meeting in "a manner that does not disclose any confidences."
- **Closed Meetings.** Closed meetings separate from an open meeting will require separate meeting notice. If a closed meeting is incorporated as part of an open meeting, the closed meeting must first be opened and the closed portion convened either before or after the open portion of the meeting agenda.

Association Powers and Responsibilities

The amendments to this section adopt new regulations that reinforce provisions of PREDFDA that pre-date the Radburn Law.

- **Executive Board May Act on Behalf of The Association.** This amendment adds as regulation that the executive board may act on behalf of the association in all instances.
- **Developer Appointed Board Members Responsibilities.** Developer appointed board members are liable as fiduciaries to the unit owners for their acts or omissions.
- **Developer Responsibilities.** The annual audit of the association's funds must be available onsite for inspection by and reproduction to the unit owners or their representatives while the developer controls the executive board of the association.

Administration and Control

- **Limitations on Developer's Seats on the Board.** The amendments to this section adopt two new regulations related to developers holding an automatic seat on the executive board, which were not a

part of the Radburn Law. Specifically, the amendment provides:

- That a developer who retains at least one (1) unit as a rental unit is not entitled to an automatic seat on the executive board.
- That a developer who ceases selling units in the regular course of business is also not entitled to an automatic seat on the executive board.
- The above notwithstanding, the regulations recognize that there is no prohibition on a developer who is not entitled to an automatic seat from seeking to be elected to the board.

Membership in the Association

This is an entirely new section that adopts as regulations, and provides certain clarity of, several components of the Radburn Law.

- **Unit Owner Membership.** An owner of a unit becomes a member in an association upon acceptance of a deed and holds that membership so long as they hold title to the unit.
- **Developer's Membership Interest.** The developer holds one (1) membership interest for each registered unit that has not yet been sold.
- **Definition of "Good Standing."** This amendment adopts the Radburn Law's definition of a member being in "good standing," i.e., with respect to voting in executive board elections, voting to amend the bylaws, and nominating or running as a candidate for the executive board, an association member is in "good standing" so long as they:
 - Are "current in the payment of common expenses, late fees, interest on unpaid assessments, legal fees, or other charges lawfully assessed;"
 - Are "in compliance with a judgment for common expenses, late fees, interest on unpaid assessments, legal fees, or other charges lawfully assessed;"
 - Are "in full compliance with a settlement agreement with respect to the payments of assessments, legal fees, or other charges lawfully assessed;" or
 - Have "requested or [are] participating in Alternative Dispute Resolution (ADR) or in a court proceeding for a dispute over a matter that affects the owner's good standing."
- **Tenant's Voting Rights and Membership.**
 - The bylaws must only allow tenants to vote in executive board elections or be members in the association with the consent of the owner of the unit leased by the tenant.
 - If the association previously allowed tenant voting, that may continue with the consent of the unit owner.
 - If the association's bylaws allow for a unit owner to designate a tenant as a "voting eligible tenant," the owner may do so in writing and allow the tenant to vote as the owner's agent through a proxy or power of attorney.
 - A voting eligible tenant's rights are in place of the unit owner's rights. Thus, they have the same rights that the unit owner would have.
 - An owner not in good standing cannot empower a tenant, or any other person, to vote in their place.

Appointments, Removals, and Executive Board Vacancies

- **Removal of Executive Board Members.**

- A member of the board can only be removed in accordance with the bylaws, or by the remainder of the board “for good cause directly impacting the member’s ability to serve.”
- The board cannot remove an elected member for simply disagreeing with the majority or for violating a confidentiality agreement without first providing alternative dispute resolution (ADR). Further, the ADR provider must conclude “from substantial credible evidence” that the member’s actions constituted a breach that adversely impacted the association members’ interests, and not just the executive board’s interests.

- **Removal of Executive Board Members by Special Election.** A unit-owner elected board member may be removed via special election following the submission to the board of a petition signed by 51% of the association members in support of removal.

- The special election shall be held within sixty (60) days of receipt of the petition unless the annual meeting is scheduled to occur within that time frame. In that case, the special election will take place at the annual meeting.
- Notice must be provided to all members and voting eligible tenants at least fourteen (14) days prior to the meeting.
- The meeting must be scheduled on a reasonable date and time of day to allow the majority of the members to participate.
- The ballot must conform to the newly created N.J.A.C. 5:26-8.9(l)1iv, and must be mailed, hand delivered, or electronically delivered (if permitted in the bylaws and the owner consents) with the notice of the meeting.
- If the bylaws permit absentee voting, then the notice must include an absentee ballot with instructions for returning the ballot. If the bylaws allow for proxy voting, then an absentee ballot must also be included.
- The instructions can allow for facsimile or electronic transmittal of the ballot but cannot require that the ballot be submitted more than one (1) business day prior to the meeting.

- **Appointment of Executive Board Members.** This provision adopts as a regulation the provision from the Radburn Law that in associations with fifty (50) or more units the board cannot appoint, and an individual cannot accept, an executive position unless the vacancy was created by resignation, death, failure to maintain reasonable qualifications, which includes remaining in good standing, or if the board member was removed following a vote open to all association members pursuant to the bylaws.

- Any position that is filled by appointment is subject to election within one (1) year following the appointment.
- An extension of a board member’s existing term shall be considered a prohibited appointment.
- These prohibitions do not apply to proper developer appointments.

Amendments to the Bylaws

- This regulation fundamentally adopts the Radburn Law provisions regarding amending bylaws, including the approval of amendments that are not rejected by at least 10% of the members by ballot.

Complaints and Penalties

- **Complaints.** This is a new provision concerning complaints arising out of the matters subject to the new regulations.
 - Complaints are to be filed with the DCA on a form provided on its website.
 - Complaints concerning the conduct of an election must be submitted at least ten (10) business days prior to the scheduled election date in order for the DCA to intervene in the election.
 - The filing of a Complaint with the DCA is not necessary prior to commencement of a legal action.
- **Penalties.** The DCA may issue fines and penalties against associations that are found to be out of compliance with the new regulations.

Given the potential imposition of steep penalties for violations of these new regulations, common interest communities should work closely with legal counsel to ensure compliance.

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