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RULE ADOPTIONS

Reporter

52 N.J.R. 1057(a)

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Agency

COMMUNITY AFFAIRS > DIVISION OF CODES AND STANDARDS

Administrative Code Citation

Adopted Amendments: N.J.A.C. 5:26-1.3, 8.1, 8.2, and 8.4

Adopted New Rule: N.J.A.C. 5:26-8.8 through 8.14

Adopted Repeals: N.J.A.C. 5:20 and 5:26-8.3

Text

Planned Real Estate Development Full Disclosure Act Regulations

Proposed: June 3, 2019, at 51 N.J.R. 795(a).

Adopted: January 6, 2020, by Lt. Governor Sheila Y. Oliver, Commissioner, Department of Community Affairs.

Filed: April 9, 2020, as R.2020 d.056, **with non-substantial changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

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

Effective Date: May 18, 2020.

Expiration Date: April 4, 2025.

Summary of Public Comments and Agency Responses:

Comments were received from: Shekeira Alexander, Portfolio Manager, RCP Management; Carri L. Alper, President, Target Property Management; Ed Anderson, Property Manager, Prime Management, Inc.; Anonymous Resident; Bald Eagle Village Condominium Association, Inc., Board of Trustees; Joe Balzamo, Chief Operating Officer, AR Management Company; Leonard Barber, President, Executive Property Management; Regina Belowski, President, Society Hill East II Condominium Association, Inc.; Joseph Bernstein, Board Member, Green Bay Harbor Condominium Association; Bonnie Bertan, President, Association Advisors NJ; Jean Bestafka; Patricia Bielski, Treasurer, Board of Trustees, Pheasant Run of Barnegat; Diane Blanchard, Community Manager, RCP Management; Cindy Blank, Office Manager and Secretary to the Board, Leisure Village East Association; Board of Trustees, Leisure Village East Association, Inc.; Jackie Boker, Community Manager, RCP Management, Knob Hill Country Club Community Association; Chuck Boyle, Property Manager, RCP Management; Joanne Bradley, Executive Director, Kings Grant Open Space Association; Roslyn Brodsky, President, Concordia Homeowners Association, Inc.; Ralph Brownlee, Treasurer, Woods Landing Homeowner's Association; Sherryl Burman, President, Riviera at East Windsor Homeowners Association; Roy Campos; Barbara Cauceglia; Yvonne Cautillo; Janet Chavez; Jane Chepitch; Joseph Chorba, WilkinGuttenplan; Stacey Cole, Community Association Manager, Towne and Country Management; Jill Colella; Community Associations Institute Legislative Action Committee; Edward J. Connor, Treasurer, Marlton Lakes Civic Association; Senator Christopher J. Connors, Assemblyman Brian E. Rumpf, and Assemblywoman DiAnne C. Gove, of the 9th District Legislative Delegation; Crestwood Village Six Community Association, Inc., Board of Trustees; Marie Cutrona; Roni Dalesandro; Debra Daraklis; Stephen DeBaun; Joann DeMarco, Accounts Receivable Associate, Prime Management, Inc.; Evelyn Doherty; Coleen Doran, Community Manager, Towne & Country Management, Inc.; William Dougherty, Heritage Woods Homeowners Association; Erika Drennan, Community Association Manager, Towne and Country Management; Barbara Drummond, Community Manager, Prime Management, Inc.; Beth Duffy, Community Manager, FirstService Residential; John Dunkirk, Vice President, Parke Place Condominium Association; Audrey Eils, The Glens; Shelby A. Evans, GEM Property Management; John D. Fahey, President, Greenbriar II Homeowner's Association; Naomi Fisch, President, Somerset Park Condominium Association; Crystal L. Fitzpatrick, Director of Financial Services, Prime Management, Inc.; William Foelsch, President, Wildflower Village Condominium Association; Four Seasons at Metedeconk Lakes, Board of Trustees; John Gagliard, Trustee, Four Seasons at Metedeconk Lakes; John Gallagher, Board Member, Village Grande at English Mill Egg Harbor Township; Jacqueline Geis; Bill Geronimo; Nina Globus; Richard Goldstein, President, Dayton Square Condominium IV Association; Ira Goodman, Executive House Condominium; Carolyn Green, Vice President, Board of Trustees, Society Hill East II; Ellen Griffiths; Ted Groesbeck; Dorthea Gwinn, Community Manager, Access Property Management; Debbie Haraburda for Debra L. Dodson, President, Canal Pointe Homeowners Association; Noel Hatzinikitas, Office Assistant, Lions Head Woods Condominium Association, Inc.; Gary Himber, President, Carriage Homes at Quailbrook Homeowners Association, Inc; Teresa Hogya, Community Manager, RCP Management; Eleanor Hunt, Board President, Fox Hills at Rockway Village Condominium Association; Louisa Huntington, President, Board of Trustees, Four Seasons of Upper Freehold; Michael Jenzano, President, Saint Regis Walk; Kevin Jorgensen, President, Middlesex Village Homeowners Association, Inc.; John Juliano, President, Park Place Garden Condominium Association; Dr. Robert Kahrmann; Tejas Kadia, Reliance Property Management Group; Jennifer Karge; Gerald Krams, Resident, Four Seasons at Upper Freehold; Beth G. Kelly, Senior Property Manager, Preferred Community Management Services; Carl Kentzel; Albert Kobylarz, Trustee, Bald Eagle Village Condominium Association, Inc; Terry Kolb; Myron S. Kozak, President, MSK Professional Management, LLC; Michelina LaForgia; John Lawler, Board Member, Harmon Cove Towers I Condominium Association, Inc.; Allan Levy, Vice President, Board of Trustees, Pheasant Run of Barnegat; Rosie Long, Property Manager, RCP Management; John Lovelock, HOA President, Horizons at Woods Landing; Eileen Lukens, Community Manager, Realty Solutions LLC; Ronald MacKenzie; Mitchell Malec, a retired former employee of the Department; Mark Maloney, Special Projects and Board Director, The Ponds at Clearbrook Association; Steve Mamakas, President, Highview Estate Home Owners Association; Janine Manganella, Community Association Manager, RCP Management; Glen A. Masullo, Owner, Preferred Community Management Services, Inc.; Cliff Maurer; Eileen McCarthy Born, New Jersey Coalition of Lake Associations (NJCOLA); Francis J. McGovern, Jr., Esquire; Lynn Meekins, Taylor Management Company; Lynn Meekins for Eleanor Hunt, Board President, Fox Hills at Rockaway Condominium Association, Inc.; Thomas Meister, Pheasant Run Condominium; Karen J. Mesler; Norma Meyer for Robert Mueller, President, Board of Directors, Blue Heron Pines Homeowner's Association; Richard Michelson, Board of Trustees, Pheasant Run of Barnegat; Mike Milano, Board Member, Wyckham Manor Homeowners Association; Todd Mitchell; Kathy Moore; Robert P. Morgan; Fikry Moustafa; Susan Mueller, Madison Place Condominium Association; Kristina Munson, Chief Operating Officer, RCP Management; Sandy Myers, Community manager, Cooks Bridge COA; New Jersey Builders Association; Michele Newman, Board Member, Ocean Club Condominium; Debbie Nicholson, Property manager, Society Hill at Bernards II Condo Association, Inc.; Christopher Nicosia, Vice President and Chief Operating Officer, Prime Management, Inc.; Jay Norman, President, Village Green Condominium Association; Patrick Notaroberto; Kenneth O'Connor; Cheryl Palent, Vice President, Renaissance at Raritan Valley Master Association; James Panzitta; Dan Paradis; Tony Paz; Ronald L. Perl, Esq., Hill Wallack, LLP; Michele Peters; Dennis Pietrattini; Andy Pignatelli, President, Board of Trustees, Pheasant Run of Barnegat; Pinnacle Real Estate Property Management; Richard Pucciarelli, Rambling Knolls Association; Mary Pyrros, Director of Property Management, Kent Builders Management, LLC; Marianne Raniolo-Flagg, Vice President, Montgomery Hills Homeowners Association, Inc.; Regency Club Condominium Association; Michelle Ricardy, Assistant Vice President, Towne & Country Management; Karen Riggins; River Ridge Terrace Condominium Association; Adam Roberts; Rachel Rutman, Community Manager, FirstService Residential; Lawrence Sanders, President, Greenbriar Oceanaire Community Association; Maria Sappo, Community Association Manager, Towne & [page=1058] Country Management; Margaret Scott, Board Member, Cedar Village East Brunswick; Denise Schisano, Property Manager, Greenbriar II Homeowner's Association; Kim Schleider, President, Ridgeview Estates Homeowners Association; Linda Schoeppler, Secretary, Board of Trustees, Bald Eagle Village Condominium Association, Inc.; Fred Schulz; Wolfgang Schulz, Four Seasons at Upper Freehold; Stephen A. Shemonis; Mary Shute, Heritage Woods Homeowners Association; Lisa Smythe, President, The Case DiLusso Condominium Association, Inc.; Stuart M. Snyder, President, Warwick Board of Trustees; Janet Speziale; Roberta Stein, President, Trendmaker Homes at Quailbrook Condominium Association, Inc.; Renee Steinhagen, New Jersey Appleseed Public Interest Law Center of New Jersey; Greg Steinman, President, Mount Kemble Mews Condominium Association, Inc.; Mary Jo Stover for Steve Hazzard, President, Timber Glen Condominium Association; Mary Jo Stover for Paul Bodkin, President, Board of Trustees, The Fairways at Laguna Oaks Condominium Association; Cecilia Telling for Walter Wilkins, President, Board of Trustees, Village Grande at Little Mill Homeowner's Association; Larry Thomas, Chapter Executive Director, Community Association Institute (CAI); Alan R. Trachtenberg, Esq., In-House Counsel and Director of Risk Management, FirstService Residential; Walter Tucker; Ellen Vastola, Common Interest Community Resident; Ellen Vastola, President, Common Interest Homeowner's Coalition (CIHC); Mariaellen Valeris, Community Manager, RCP Management; Robert Weber, Board Member, St. Regis Walk Townhouse Community; Brian Weaver, Vice President, Wilkin Management Group; Christopher J. West, General Manger, Northbridge Park Co-Op, Inc., RCP Management; Ann Marie Wiedemann; Anne Marie Wilcox; Cynthia Williams, Community Manager, Dilucia Management Corporation; Michelle Williams, General Manager, Clearbrook Community; Marjorie M. Wilson, President, Atlantic Realty Management, Inc.; Mark Winter, Former Trustee, Lexington Village Association; and Jean C. Wyer.

General Comments

1. COMMENT: Several commenters expressed support for this rulemaking. One commenter stated that this holds managers and board members to a higher standard and ensures transparency for association members. Another commenter stated that because owners are at the mercy of their association, fair elections are vital. One commenter pointed out that many associations already address most of these provisions in their bylaws and stated that these rules would mean that all boards are held to the same standards. One commenter pointed out that the provisions at N.J.A.C. 5:26-8.4 and 8.9 would guarantee that developers do not maintain unwarranted influence over executive boards, an issue the commenter stated has been prevalent in some associations for years.

RESPONSE: The Department of Community Affairs (Department) thanks the commenters for the support.

2. COMMENT: Several commenters expressed opposition to this rulemaking. The basis for opposition was the belief that these rules will discourage association members from volunteering for the executive boards and that the requirements are burdensome. The commenters believe that the State is interfering with executive boards' rights to govern associations based on their specific needs.

RESPONSE: This rulemaking was necessitated by the passage of P.L. 2017, c. 106, (hereinafter the "Election Law"). The Election Law amended the Planned Real Estate Development Full Disclosure Act, N.J.S.A. 45:22A-21 to codify resident voting participation rights in common interest communities. In enacting the Election Law, the Legislature noted that in common interest associations, the governing entity has significant influence over residents' lives, and that it was "contrary to American democratic values for these communities to be governed by trustees who are not elected in a fair and open manner." The Legislature placed the election law in the Planned Real Estate Development Full Disclosure Act (PREDFDA) (N.J.S.A. 45:22A-21 et seq.), which the courts have recognized to be a consumer-oriented statute that is remedial in nature. *Tung v. Briant Park Homes, Inc.*, 287 *N.J. Super*. 232, 238 (App. Div. 1996). As such, the court declared that the Act must be interpreted expansively, and liberally construed to protect consumers residing in common interest communities. Those guiding principles were the framework for this rulemaking to implement the legislative mandate for fair and open elections.

The Department addresses these issues with significant relevant experience. It has been applying laws protecting homeowners in post-turnover situations for almost 25 years through the Association Regulation Unit (ARU). Thus, the Department enters this area of jurisdiction with a considerable background in understanding both the nature of the problems and adequate remedies.

3. COMMENT: CAI commented that the proposed regulations add complexity, burden, and expense for associations and their owners for the sake of a few poorly run associations. CAI further argued that the regulations are likely to increase litigation over association elections and board meetings and place the sanctity of association elections above public elections. CAI stated that the administrative detailing of the process of board meetings will lead to unintentional violations of the rules. CAI expressed that although it supported the Election Law, the regulations over-manage association operations for little benefit.

RESPONSE: Formalizing the procedures necessary to ensure fair elections does not impose an undue burden when the legitimacy of the governing board's membership is involved; it is anticipated that many associations already hold fair elections. However, the Department has received a multitude of complaints showing that there are associations where fair elections are not held, thus necessitating uniform standards. Because the Department takes its obligation to ensure and enforce the rights of owners to fair elections seriously, it is obligated to issue orders and penalties, should that become necessary, to protect those rights. To allay any fears regarding enforcement, the Department intends to resort to penalties only as a result of direct refusal or failure to comply after notice of a violation and an opportunity to cure the violation or assure future compliance. All formal Department actions are subject to administrative appeal; no one is ever subject to paying a penalty without due process. Therefore, concern over the Department's potential response to unintentional rule violations is unwarranted, as the Department will offer ample opportunities to redress violations as they occur before resorting to punitive measures.

4. COMMENT: Many commenters, including the 9th District Legislative Delegation, simply seconded the comments submitted by CAI; CAI's comments are identified and summarized throughout this rulemaking under the appropriate subheadings. Many of these commenters, not including any member of the Legislature, asked to be notified if the Department was to hold a public hearing.

RESPONSE: Each of CAI's comments are identified, summarized, and responded to throughout this notice of adoption in the order in which they correspond with the sections of the Planned Real Estate Full Disclosure Act Regulations, N.J.A.C. 5:26. As the Department received written comments from CAI, and a large number of comments received simply seconded CAI's comments, it was found that there was no need for a public hearing to receive testimony.

5. COMMENT: One commenter, who is a member of an executive board, expressed opposition to CAI's comments. The commenter found that the comments were problematic and intended to weaken the applicable laws. The commenter was also opposed to the form letters submitted to second CAI's comments and expressed support for CIHC's comments.

RESPONSE: The comments received from CAI and CIHC are identified, summarized, and responded to throughout this notice of adoption in the order in which they correspond with the sections of the rules.

6. COMMENT: New Jersey Appleseed (NJA) Public Interest Law Center, Common Interest Association Democracy Project, requested that the regulations be written as clearly and simply as possible with the least possible ambiguity. NJA stated that 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 democratic mandates of PREDFDA.

RESPONSE: The Department kept these issues in mind when drafting the amendments and the rulemaking is clear. Once adopted, if there is confusion regarding certain provisions, the Department may issue guidance. In all cases, failure to comply with the rules is a violation.

7. COMMENT: One commenter submitted a series of complaints about the community in which the commenter lives. These complaints included [page=1059] the functioning of the executive board, renters in the community, and parking.

RESPONSE: These complaints are outside the scope of this rulemaking. Any unit owner who believes a board is in violation of any applicable laws and rules should direct complaints to the Association Regulation Unit of the Bureau of Homeowner Protection pursuant to the instructions provided online at http://www.nj.gov/dca/divisions/codes/offices/ari.html .

8. COMMENT: One commenter asked whether P.L. 2017, c. 106, and the PRED Regulations supersede the bylaws of the association regarding members in good standing and election procedures.

RESPONSE: Yes, statutes and adopted rules supersede the bylaws of the association.

9. COMMENT: One commenter requested that these regulations be voted on by the membership of every association in compliance with the association's governing documents. If the association approves the rules, then the executive board will amend the bylaws accordingly.

RESPONSE: Because the rules adopted by the Department supersede the bylaws of the association, these rules will be in effect for all associations upon publication of this notice of adoption by the State. Associations will need to amend their association governing documents to comply with the law and the amendments.

10. COMMENT: One commenter questioned if these requirements were reconciled with P.L. 2017, c. 106. The commenter also asked how an association should deal with these new requirements.

RESPONSE: Yes, this rulemaking is a direct result of that act. The Department intends to issue guidance on its website at http://www.nj.gov/dca/divisions/codes/offices/ari.html to provide information about implementing the requirements established by this rulemaking.

11. COMMENT: One commenter recommended the Department review the provisions contained in the California "Davis-Stirling Act," which is a body of law governing common interest developments.

RESPONSE: The Department reviewed regulations of other states as this rulemaking was drafted, but stayed consistent with the requirements established in the Election Law, which are appropriate for planned real estate developments in New Jersey.

12. COMMENT: One commenter noted that the adoption of these regulations could impact existing applications, public offering statements, contracts, and agreements, and asked if amendments to these documents would be required to be submitted to the Department with a fee for review and approval. The commenter asked what the economic impact of such amendments would be.

RESPONSE: For developments where the developer is in control of the executive board, any necessary amendments will need to be submitted to the Department; the amendment fee is currently $ 250.00 and is paid by the developer. When the owners are in control of the executive board, amendments do not need to be filed with the Department unless the developer is still offering units in the ordinary course of business, in which case the developer must submit any amendments and pay the fee.

13. COMMENT: One commenter stated the understanding that these amendments implement P.L. 2017, c. 106. The commenter expressed his understanding that a State statute could not impede a pre-existing declaration. The commenter asked if this rulemaking is intended to impair contracts that were effective before the effective date of the Election Law. The commenter asked for the regulations to clarify that the amendments are applicable only to bylaws created after the effective date of the Act. The commenter summarized the PRED requirements that in the case of a conflict between the declaration and bylaws, the declaration controls; in the case of a conflict between the articles and the bylaws, the articles shall control; and in the case of a conflict between the statute and the bylaws, the statute shall control. The commenter again stated the understanding that because PRED-governing documents are a legal binding contract, legislative acts implemented after the acceptance of the provisions and before the effective date of the legislation are not enforceable. The commenter stated that the State Constitution prohibits states from passing laws that impair existing contract rights and asked for confirmation of such.

RESPONSE: The commenter has taken the applicable laws out of context. The commenter is correct in the summary of PRED's requirements, but comes to the wrong conclusion; the Act and the rules adopted pursuant thereto supersede the bylaws of the association. Associations may need to amend their bylaws to be in compliance with the Election Law and this rulemaking. There is nothing in the State Constitution preventing new laws or rules that impact association governing documents.

14. COMMENT: One commenter asked whether the Department is contemplating having the Office of Administrative Law (OAL) and administrative law judges presiding over and reviewing association elections. The commenter asked if the OAL is recruiting an association lawyer to serve as the judge on these issues. The commenter stated the belief that these regulations lay the groundwork for a comprehensive State takeover of association governance. Further, the commenter took issue with the Social Impact and Economic Impact statements in the notice of proposal. The commenter stated that the Social Impact did not state that the regulation will diminish the right to self-governance, empower contrarians, and discourage volunteers. The commenter stated that the Economic Impact statement was not correct because the complaints and penalties provision will necessitate significant State spending. The commenter asked "who will carry out the complaint process, the review, the relief determination, who will provide the report, who will undertake an investigation, who will levy and collect these new fines? Who will pay those at the OAL? What new taxes, fines, fees, or penalties will fund the new personnel and procedures?"

RESPONSE: The Department respectfully disagrees with the commenter's characterization of the social impact. This rulemaking requires boards to operate in a transparent manner and ensures that all association members have a voice in their community. Fair election procedures have a positive impact on self-governance by assuring democratic decision making. The Social Impact statement does not say that the amendments diminish the right to self-governance, empower contrarians, and discourage volunteers because such a statement would be inaccurate. The program will be administered by the Association Regulation Unit, which already exists in the Bureau of Homeowner Protection. The Bureau is charged with administration and enforcement of the Act; thus, OAL will not be responsible for oversight of elections. If the Bureau issues an Order, the appeal process may go through the Office of Administrative Law, which is an entity in, but not of, the Department of the Treasury, and operates under separate funds designated for that purpose within the overall State budget.

15. COMMENT: One commenter felt that all common interest community board members should be required to undertake basic training. The commenter stated the belief that executive board members do their best to govern common interest communities, but often defer to the perspective of property managers and attorneys. The commenter stated that the State should have oversight as to the content of and compliance with any training and added that the Common Interest Homeowner's Coalition would welcome the opportunity to train board members.

RESPONSE: The suggestion is beyond the scope of this rulemaking. The Department is not considering changes to require basic training at this time.

16. COMMENT: The New Jersey Coalition of Lake Associations (NJCOLA) submitted comments related to lake associations. NJCOLA stated that because lake associations were generally formed in the early 1900s and have a long history of operating under bylaws that have been tailored to meet the needs of the individual communities, more consideration should be given to the historic nature of these association's bylaws and discretion as to enforcement or applicability should be allowed.

NJCOLA stated that N.J.A.C. 5:26-8.2(a) may be inconsistent with the bylaws of a lake association that reserves to the membership certain authority to act, including authority to amend bylaws or sell association property.

NJCOLA stated that N.J.A.C. 5:26-8.8(e) may be inconsistent with bylaws of lake associations because many lake associations allow owners only one membership and vote, even if they own multiple properties. NJCOLA requested this section be amended to allow this practice to continue if authorized to do so in an association's bylaws.

NJCOLA stated that the provisions at N.J.A.C. 5:26-8.9(l) would put an unreasonable burden on lake associations because most lake associations only invoice once a year, at which time association members [page=1060] receive notice that their account is in arrears and they have lost good standing. NJCOLA further stated that giving residents the right to contest the boards' determination would not apply to the members not in good standing for failure to pay dues and assessments, requiring an association to handle multiple demands of alternative dispute resolution (ADR) when ADR is not appropriate under the circumstances. NJCOLA recommended that as an alternative, the notice only be required when the "good standing" status has been suspended for reasons other than failure to pay dues.

RESPONSE: Nothing in this rulemaking or PREDFDA prevents bylaw amendments; in fact, this rulemaking develops a system through which bylaws are to be amended. PREDFDA and this rulemaking are intended for planned real estate developments. Voluntary associations, including lake associations, do not fall under the scope of this rulemaking; such organizations can continue to operate to meet the needs of the individual association. Any determination by an appropriate forum that a specific lake association qualifies as a PRED would mean that the association falls under the scope of this rulemaking. In such instances, the association would have to modify its practices accordingly.

Definitions (N.J.A.C. 5:26-1.3)

17. COMMENT: One commenter requested that the Department add definitions of "amendments to the master deed/bylaws" and "bylaw resolutions."

RESPONSE: The Department respectfully disagrees this change is necessary. These terms are common terms of art and do not need to be defined specifically within the rules.

18. COMMENT: Two commenters requested a definition of "common expense" be included in the regulations.

RESPONSE: This addition is outside the scope of this rulemaking and cannot be accommodated at this time; however, the Department agrees a definition of "common expense" would be helpful and will include this in a future amendment to N.J.A.C. 5:26.

19. COMMENT: NJA stated that the definition of "association" at N.J.A.C. 5:26-1.3 should specify the inclusion of any common interest association that is not only governed by PREDFDA, but may be organized or incorporated under other acts, such as the Condominium Act, N.J.S.A. 15A:1-1 et seq., or any other specific statute. NJA stated that 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.

RESPONSE: The Department believes this is appropriately addressed within the rules because the definition of association references the 1993 amendments, which state that an association is an association for the management of common elements and facilities, organized pursuant to Section 1 of P.L. 1993, c. 30 (N.J.S.A. 45:22A-43). This section of PREDFDA states that the application of P.L.1993, c. 30 to the association of an existing planned real estate development is not limited by whether the developer has been subject to, or exempted from, the registration requirements of PREDFA or the development's date of establishment.

20. COMMENT: CAI commented that the definition of "association" does not account for associations created prior to the Planned Real Estate Development Full Disclosure Act (PREDFDA) even though judicial decisions have held that amendments to the PREDFDA that concern operations of community associations were applicable to associations created prior to the enactment of PREDFDA. CAI requested the Department revise the definition of association accordingly.

RESPONSE: The Department respectfully disagrees that the definition of "association" must be amended. It is clear as written and was taken verbatim from PREDFDA at N.J.S.A. 45:22A-23

21. COMMENT: CAI commented that the definition of "association member" would not be consistent with pending bill S3661/A5043, which clarifies the sections of the Election Law. If the bill is signed, it would exempt certain owners of lots or units within voluntary associations from being considered an association member.

RESPONSE: The Department respectfully disagrees this change is necessary at this time. In the event the bill is signed into law, the Department will review the current definition to determine whether further amendments regarding association membership are necessary.

22. COMMENT: Two commenters requested the Department amend the definitions of "association member" and "voting eligible tenant" to remove references to the tenant's right to vote. The commenters expressed the opinion that because tenants do not own their unit, they should not be allowed to vote.

RESPONSE: The Department cannot make this change; as stated in the Response to Comment 43, P.L. 2017, c. 106 established rights for voting eligible tenants, and the provisions regarding tenant eligibility further the intent of ensuring fair elections in associations.

23. COMMENT: One commenter had a number of questions pertaining to the definition of "bylaws" as the governing documents adopted for the administration and management of the property. The commenter stated that using the term "governing documents" may lead some to believe that declarations, covenants, and master deed documents would be considered bylaws. The commenter stated the belief that P.L. 2017, c. 106 applies only to bylaw amendments and not to the amendment of a master deed, declaration, or covenant. The commenter further expressed the understanding that the bylaws establish policies and procedures for the governing of an association including, but not limited to, election of directors, terms of office, powers and duties, and quorums. The commenter recommended the definition of "bylaws" be revised to reflect this.

RESPONSE: The Department respectfully disagrees that a change is needed. The examples provided by the commenter all fall within the current definition. Declarations, covenants, and master deeds are separate governing documents with multiple purposes, including the administration and management of the development; bylaws are a subset of governing documents. Further, "governing documents" is a term of art that is universally understood, and no amendment to include its definition is being considered at this time.

24. COMMENT: The New Jersey Builders Association (NJBA) stated that the term "governing documents" is broader and more inclusive than the term "bylaws," which are the regulations of an association that deal with procedures and processes or operations of the association. NJBA requested the term bylaws be amended and the term governing documents be included as follows:

> "Bylaws" means the governing regulations adopted under this chapter for the administration and management of the property.
>
> "Governing documents" means the master deed, the declaration of covenants and restrictions, or other instrument of creation of a planned real estate development that is recorded in the recording office of the county where the planned real estate development is located, and shall include any bylaws authorized or adopted in accordance with the master deed, declaration of covenants and restrictions.

RESPONSE: The Department respectfully disagrees with the changes proposed by the commenter. The definition of bylaws is appropriate as proposed, because they are a governing document. Further, the term "governing document" is a term of art that is understood by those involved in this area.

25. COMMENT: NJBA stated that "condominium" is defined in the Condominium Act and proposed that the definition in these regulations be consistent with that definition:

> "Condominium" means the form of ownership of real property under a master deed providing for ownership by one or more owners of units of improvements together with an undivided interest in common elements appurtenant to each such unit.

RESPONSE: The Department notes that the only difference between this definition and the one proposed for adoption is that the rules say "units *or* improvements"; this difference was intentional. "Units of improvements" is a typo that has been in PREDFDA since its enactment, and this rulemaking change is intended to fix that typo in the Administrative Code.

26. COMMENT: CAI commented that the terms "master association" and "umbrella association" are used interchangeably by draftspersons of the governing documents creating common interest communities. CAI [page=1061] stated the belief that these terms are synonymous and suggested that two separate definitions were added for the avoidance of doubt and not to designate two different types of associations. CAI recommends that the Department make the definition of "umbrella association" applicable to master or umbrella associations.

RESPONSE: The Department agrees with the commenter. Upon adoption, the term "master association" is deleted, and "umbrella association" is changed to read "umbrella or master association."

27. COMMENT: NJA noted that N.J.A.C. 5:26-1.3 contained distinct definitions for "master association" and "umbrella association." NJA stated that in common parlance, a master association is often considered a second-level umbrella association that handles matters affecting an entire development, in contract to a first-level association that handles matters only affecting its particular portion of a neighborhood within the larger development. NJA further expressed that it was unaware of any statute defining these terms differently, and stated that if a distinction between master and umbrella associations is necessary, the definitions should include specific examples.

RESPONSE: As stated in the Response to Comment 26, the Department has deleted the definition of master association; the Department agrees that in practice, these terms are used interchangeably, and for clarity, the rules should reflect such.

28. COMMENT: NJBA suggested that separate definitions of master and umbrella associations are not warranted because the statute and regulations use these terms interchangeably, and recommended that the definition encompass master and umbrella associations, which have unit owners as members and those that have other associations as members. NJBA suggested the following definition:

> "Master or umbrella association" means a type of association in a planned real estate development, whose members may either be other associations within that planned real estate development or unit owners within that planned real estate development and which is established for the governance, management, and oversight of specific areas or common facilities within that planned real estate development or to provide certain services within that planned real estate development for the benefit of the members of the master or umbrella association.

RESPONSE: As stated in the Response to Comments 26 and 27, the Department agrees that these terms are interchangeable; upon adoption, the terms have been consolidated in the definition of umbrella association.

29. COMMENT: NJBA stated the opinion that the definition of "voting eligible tenant" in the notice of proposal is not consistent with the definition of this term in PREDFDA. NJBA stated that if the prior standard practice of allowing tenants to vote is to be memorialized in writing, then such requirement should be included at proposed N.J.A.C. 5:26-8.8(d) and not in the definition. NJBA recommended the following language:

> "Voting eligible tenants" means a tenant of a unit within a planned real estate development in which the governing documents of the development permit the tenant's participation in the executive board election and either the development has allowed tenant participation in executive board elections as a standard practice prior to the effective date of P.L. 2017, c. 106 (N.J.S.A. 45:22A-1, et seq.), or the owner has affirmatively acknowledged the right of the tenant to vote through a provision of the written lease agreement or separate document. "Voting eligible tenants" shall not be construed to affect voting as an agent of the owner through a proxy or power of attorney.

RESPONSE: The Department respectfully disagrees with the commenter regarding the necessity of this amendment. The language recommended by NJBA still contains all of the information currently proposed. The Department recognizes there are multiple ways of writing one definition, but finds that the definition as currently written is clear.

Formation of the Association (N.J.A.C. 5:26-8.1)

30. COMMENT: One commenter pointed out that the notice of proposal states that an association may be formed as a for-profit or nonprofit corporation, unincorporated association, or any other form allowed by the law, and questioned whether these regulations conflict with the New Jersey Corporation Law, and which law controls.

RESPONSE: This language has been a part of the rule text since the inception of the PRED rules in 1978. The rulemaking merely shifts where the requirement was codified with no change in text. No conflicts have been brought to the Department's attention in the decades this rule has been in effect. In addition, common interest coalitions formed as a non-profit corporation are a very small subset of nonprofit corporations.

Association Powers and Responsibilities (N.J.A.C. 5:26-8.2)

31. COMMENT: CAI commented that the rule text, at N.J.A.C. 5:26-8.2, allows the executive board to act in all instances on behalf of the association. CAI stated the opinion that this leads to the conclusion that the board has the sole authority to act on behalf of the association and stated that in a number of instances, the board cannot act for the association without the consent of the members. CAI cited the provision in the Condominium Act that states "the actions of the association shall be governed by the bylaws" and stated its understanding that the requirements of this section are accurate only in connection with the constraints set forth in the Condominium Act.

RESPONSE: The Department notes that this section is not a change in rule text or requirement; it is merely a recodification from former N.J.A.C. 5:26-8.3 to 8.2. This language has existed since the inception of the PRED rules. This rule text, in conjunction with the specific requirements set forth in the Condominium Act, is sufficiently clear as written.

32. COMMENT: NJBA stated that an association can be created through the recording of a master deed for a condominium or a declaration of covenants and restrictions for a non-condominium development, and all associations must have bylaws to provide for the operation of the association. As a result, NJBA recommended that N.J.A.C. 5:26-8.2(a) be amended to read as follows:

> Subject to the governing documents of the association, the association may do all that it is legally entitled to do under the laws applicable to its form of organization. The executive board of the association may act in all instances as provided in the governing documents on behalf of the association.

RESPONSE: The Department respectfully disagrees that this suggested rewording is necessary or beneficial. As proposed, the language cites all "instruments of creation" that may be used to form an association. This is another section where the proposed revision is a distinction in language without a difference in requirement, and the Department feels that the requirements are clear as written.

33. COMMENT: NJBA stated that every executive board member, whether appointed by the developer or elected by the owners, should have a fiduciary duty to the owners of units. As a result, NJBA requests the following language change to N.J.A.C. 5:26-8.2(e) :

> Members of the executive board shall be liable as fiduciaries to the unit owners for their acts or omissions.

RESPONSE: This language is recodified from former N.J.A.C. 5:26-8.3 without change. Moreover, this language was taken verbatim from PREDFDA at N.J.S.A. 45:22A-45c Because this requirement reflects the Act, the Department declines to change the rule at this time. The Department notes that multiple court decisions, including *Thanasoulis v. Winston Tower 200 Association, Inc.* 214 *NJSuper* 408 (Appellate Division 1986) and *Siller v. Hartz Mountain Association*, 93 *NJ* 370, 382 *cert. den.* 464 *U.S.* 961 (New Jersey Superior Court 1983), found that an association's board had a fiduciary relationship to the unit owners comparable to the obligation that a board of directors of a corporation owes to its stockholders.

Administration and Control (N.J.A.C. 5:26-8.4)

34. COMMENT: NJA had a few comments concerning N.J.A.C. 5:26-8.4, Administration and control. NJA stated that this section is essential to clarifying that once a developer sells 75 percent of the units to be built in the planned real estate development, that developer retains one seat on the board only so long as it is selling the remaining 25 percent of the units in the regular course of business and suggested that N.J.A.C. 5:26-8.4(a) be amended from "retains at least one unit as a rental unit" to "retains one or more units as rental units" to make the prohibition clearer.

[page=1062] Further, NJA states that the Department 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. NJA stated its position that the developer should be entitled to run for only one seat on the board, not multiple seats, which would allow the developer to continue to dominate the board through retention of any number of rental units, especially if the developer never sells 75 percent of the units built. NJA points out that this issue is addressed at 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, and stated that the requirement should be included at N.J.A.C. 5:26-8.4 to avoid ambiguity.

RESPONSE: The Department respectfully disagrees with the suggested amendment to N.J.A.C. 5:26-8.4(a); the recommended language is no different in meaning from the current provision. The Department recognizes there are multiple ways to format a given requirement, but the section is clear as proposed.

The Department also disagrees that there is ambiguity regarding representation on the board. Pursuant to N.J.A.C. 5:26-8.10(c), an owning entity shall not hold more than one seat on the executive board. Thus, the developer could not have multiple employees serve on the board. N.J.A.C. 5:26-8.10 is the appropriate place for this requirement, because that section deals with representation on the board. This language is not needed at N.J.A.C. 5:26-8.4, which deals with administration and control of the executive board.

35. COMMENT: Regarding N.J.A.C. 5:26-8.4(a), CIHC asked what makes a developer the same as a member in good standing if the developer does not pay dues on the developer's unit at the same rate as other members pay dues on their units, but may be entitled to vote and run in an election if the developer does not hold a seat on the executive board. CIHC also questioned provisions at N.J.A.C. 5:26-8.8 and 8.9 regarding developer membership in the association and participation in elections. CIHC stated that the concern is that a developer who purchases undeveloped land or redevelops units within an existing association that had previously ceded control by its original developer but has not yet conveyed any of those new units to members should not be entitled to a number of new votes for those unsold or prospective units if they do not pay assessments to the new association. CIHC further stated that the developer does not have an equal stake in the ongoing finances of the association because the developer wants to sell units and move on and does not contribute to the finances of the association as do other members. Lastly, CIHC notes that only owners current on their assessments are entitled to vote and run for an executive board position.

RESPONSE: The Department notes that the developer does pay its proportionate cost of association operations before the owners control the executive board. Additionally, in accordance with PREDFDA, the developer is guaranteed a seat on the executive board and retains the seat only while selling in the ordinary course of business. With regards to the scenario depicted by the commenter, a developer who fails to pay assessments to the association would not retain their right to vote; a failure to pay means they would no longer be in good standing, and good standing is a precondition for voting for both owners and developers.

36. COMMENT: CAI notes that the proposed regulations state, "a developer who has stopped selling units in the regular course of business shall not be entitled to an automatic seat on the board." CAI pointed out that the Condominium Act uses the term "ordinary course of business," and stated the opinion that because there is no commonly understood definition of either phrase, it is impossible to enforce. CAI recommends the phrase "regular course of business" be defined in a concrete manner that would use an objective standard for the time between sale of the last unit in the project at the current time and suggested if the time exceeds one year, then the developer has ceased to sell units in the regular course of business.

RESPONSE: This is outside the scope of this rulemaking; however, the Department agrees there would be value in defining "regular course of business," and will include this in a future amendment to N.J.A.C. 5:26.

37. COMMENT: NJBA stated that the proposed regulation at N.J.A.C. 5:26-8.4(b) contradicts the existing PREDFDA regulation which states, "the developer may retain one member of the executive board so long as there are any units remaining unsold in the regular course of business." NJBA stated that "the proposed revisions would serve to undermine an important right currently provided by the law of the developer to maintain representation on the executive board during the development of a project when that project has either taken longer than anticipated to develop or has stalled for various market-related reasons and adversely impact the entire development. The developer's limited representation on the executive board following its turnover of control to the owners, as required by both PREDFDA and the Condominium Act, does not pose an opportunity for the developer to exert undue influence over the decisions of the executive board nor limit the right of the owner elected executive board members from controlling the decisions made by the association. In addition, the proposed revisions do not take into account that the leasing of one or more units by a developer can stabilize a stalled project and generate potential buyers." NJBA recommended the following language:

"Notwithstanding (a)1, 2, and 3 above, and so long as control of the executive board has been turned over to the owners, other than the developer, the developer may retain one member of the executive board so long as there are any units remaining unsold in the regular course of business, subject to the following:

i. For those developments intended to be comprised of 100 or fewer units at full buildout, the developer-appointed member shall resign from the executive board no later than two years following the date of turnover of control of the executive board to the unit owners; and

ii. For those developments intended to be comprised of 101 or 250 units at full buildout, the developer-appointed member shall resign from the executive board no later than five years following the date of turnover of control of the executive board to the unit owners; and

iii. For those developments intended to be comprised of more than 250 units, the developer-appointed member shall resign from the executive board no later than eight years following the date of turnover of control to the executive board to the unit owners."

RESPONSE: The recommended language would be a substantive change to the rules, is outside the scope of this rulemaking, and cannot be done upon adoption. The Department agrees that clearly defining ordinary course of business would be a valuable amendment to the rules and will propose the change in a future rulemaking. The Department also notes that this section applies to associations of all sizes.

38. COMMENT: NJBA expressed that N.J.A.C. 5:26-8.4(f), regarding copies of the annual audit, should not be limited to only during the period of the developer control, and suggested the following revision:

Copies of the annual audit of association funds, whether prepared during the period of developer control or after control of the association is transferred to the owners of units, shall be available onsite for inspection and reproduction by owners and/or their authorized representatives.

RESPONSE: The recommended language would be a substantive change to the rules and cannot be done upon adoption. The Department agrees that this would be a valuable amendment to the rules and will propose the change in a future rulemaking. Currently, there is no requirement that unit owner-controlled boards prepare audits.

Membership in the Association (N.J.A.C. 5:26-8.8)

39. COMMENT: CAI stated that N.J.A.C. 5:26-8.8(a), which provides that each owner is an association member upon acceptance of the deed, does not take into account pending bill S3661/A5043 and recommended the section be amended accordingly.

RESPONSE: As stated in the Response to Comment 21, the Department declines to make any amendments based on a pending bill. Pending bill S3661/A5043 addresses lake associations; this requirement only applies to associations that have been determined to be planned real estate developments within the scope of N.J.A.C. 5:26.

40. COMMENT: NJA stated that N.J.A.C. 5:26-8.8(b), which provides that a developer shall have one membership in the association for each unit registered pursuant to this chapter, should 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 [page=1063] has already transitioned to residential control. NJA stated that 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. NJA suggested that securing one seat on the board, otherwise controlled by residents, may be more appropriate than controlling a significant block of votes that would give that developer total control of the association that has already transitioned to unit-owner control.

RESPONSE: The scenario presented by the commenter is not possible; if the association has already transitioned, the developer is only entitled to one seat on the board even if the developer chooses to add more units after transition in accordance with N.J.S.A. 45:22A-47(a) 3.

41. COMMENT: CAI expressed concern regarding N.J.A.C. 5:26-8.8(c) 1. This section states that an association member is in good standing when the member is current in the payment of any charges lawfully assessed or in compliance with a judgement for such expenses. CAI acknowledged that these provisions come directly from P.L. 2017, c. 106, but stated that the regulations do not allow an executive board to grant owners with *de minimis* outstanding fees the ability to participate in an election. CAI stated that this could lead to the inability to meet the quorum requirements in an association's bylaws. Because some associations set the quorum at 50 percent of all members, CAI expressed that this rule makes it difficult to meet those requirements and conduct an annual meeting. CAI recommends an amendment to permit the board to permit those owners with small outstanding balances of $ 25.00 or less to be able to participate in the annual meeting.

RESPONSE: As noted by CAI, the provisions for good standing come directly from P.L. 2017, c. 106. Therefore, the Department is unable to make a change.

42. COMMENT: At N.J.A.C. 5:26-8.8(c), CIHC questioned whether it was necessary to make the condition of voting dependent upon good standing. The commenter mentioned the right to vote in State and Federal elections is not dependent upon paying taxes and other fees and questioned whether common interest community owners pay for their right to vote or if it is their democratic right to vote regardless of money owed to an association.

RESPONSE: The right for members in good standing to vote is established in the Election Law at N.J.S.A. 45:22A-23r. For common interest communities, election practices need not always parallel voting in a large-scale election.

43. COMMENT: Three commenters objected to tenants voting in association elections. One commenter stated that owners make the financial commitments to purchase homes in these communities and, thus, have a long-term interest in the condition and character of the community. The commenter expressed the opinion that renters' voices are heard through their landlords and have no place in voting for community association boards.

RESPONSE: The provision for tenant-eligibility comes directly from the Election Law and fits the intent of the Act by ensuring fair election practices for those living in common interest communities. In addition, because tenants can only vote with the consent of the owner and in place of the owner, the rules still give the owner the ultimate say. If the owner does not consent to a tenant voting in his or her place, then the owner's vote will be eligible, so long as they are in good standing. Furthermore, bylaws of the association must permit tenant voting for such practice to be allowed.

Executive Board Elections (N.J.A.C. 5:26-8.9)

44. COMMENT: CIHC stated that the regulations need to set standards regarding how elections are to be conducted in a "fair and open manner."

RESPONSE: N.J.A.C. 5:26-8.9, Elections, fully covers this matter. Associations in compliance with this section would be conducting fair and open elections.

45. COMMENT: Two commenters requested that the Department specify that once a vote is cast, it cannot be changed.

RESPONSE: This matter is more appropriately handled by the governing documents of the association. However, the Department will be monitoring the effects of this rulemaking over time, and if there are issues pertaining to this matter that were not foreseen at the time of adoption, further rulemaking will be undertaken to address these problems.

46. COMMENT: Three commenters recommended adding language to state, "any candidate running for board elections shall not be prohibited, limited, impeded, or restricted in their efforts to solicit votes in person, by mail, by email, or by phone, by anyone-the Board, Management, Association Lawyers, or other Unit Owners."

RESPONSE: This recommendation is outside the scope of this rulemaking; the Department does not regulate campaigning. The Department will be monitoring the effects of this rulemaking over time, and if there are issues that were not foreseen at the time of adoption, further rulemaking will be undertaken to address these problems.

47. COMMENT: One commenter requested an amendment to state that no board member can support any candidate, including themselves, on any association document, newsletter, or association letterhead, and cannot use their title as a trustee on any election literature.

48. COMMENT: One commenter recommended that at least 33 percent of the membership must vote in any election. The commenter stated that it is impossible to get 51 percent of the membership to vote, especially in larger associations.

RESPONSE: This matter is more appropriately established by the governing documents of each individual association.

49. COMMENT: Three commenters recommended adding language to state, "Should a quorum as defined in the bylaws not be met, all votes shall be frozen as cast and a notice sent to the community that additional time has been granted for casting their votes. Candidates will be given the number of votes they received at the election meeting and the number needed for quorum to be reached. If quorum is not reached within the additional time given, the candidates with the most votes will fill the Board vacancies."

RESPONSE: This matter is more appropriately handled by the governing documents of the association. The Department does not regulate how associations address lack of quorum at a meeting or election. However, the Department will be monitoring the effects of this rulemaking over time, and if there are issues that were not foreseen at the time of adoption, further rulemaking will be undertaken to address these problems.

50. COMMENT: One commenter requested that the rules specify that no board member can serve more than three terms in office, no board member can serve as president for more than two consecutive years, and boards without election terms specified in the bylaws should be limited to three years.

RESPONSE: In accordance with N.J.A.C. 5:26-8.9(b) 2, associations shall set the term of an executive board member for a maximum of four years. The other limits recommended by the commenter cannot be added upon adoption, and the Department believes these limits are more appropriately determined by the governing documents of the association.

51. COMMENT: NJA had a few questions regarding N.J.A.C. 5:26-8.9, Executive board elections. NJA noted that N.J.A.C. 5:26-8.9(b) 3 establishes a procedure that homeowners should follow in the event that their association has not held an election in compliance with its bylaws and noted the use of the word "may" when directing that a petition signed by a minimum of 25 percent of the association members be submitted to any board member to compel an election. NJA questioned 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.

NJA also raised this issue regarding N.J.A.C. 5:26-8.9(c), which provides the options when an association has no board members and the association members fail to act on petition or by majority. NJA stated that if an association has no board members, then unit owners are unable to organize and submit a petition as set forth at N.J.A.C. 5:26-8.9(b)3. In addition, NJA questioned what is meant by "act by majority." Lastly, NJA stated the opinion that requiring unit owners to give notice to all owners prior to submitting a petition to court is an onerous burden. NJA asked whether the Department understands these regulations to set up a [page=1064] 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; NJA also asked whether this procedure is only required to be followed if the group of unit owners that goes to court desires that its expenses be a common expense to be reimbursed by the association.

NJA stated that these ambiguities must be clarified, otherwise, these regulations will create more problems for unit owners faced with noncompliant boards than the current procedure of going to court to compel an election.

Lastly, NJA expressed understanding that N.J.A.C. 5:26-8.9(d) comes directly from the Election Law, but noted that read in isolation, the provision makes it sound as if the use of proxies and absentee ballots is discretionary. NJA believed this to be in conflict with N.J.A.C. 5:26-8.9(g), which forbids associations from prohibiting proxy holders from voting for any candidate; NJA stated that this requirement suggests that proxies, and, therefore, absentee ballots, are mandatory. NJA further posited that 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. NJA recommended that N.J.A.C. 5:26-8.9(g) be rewritten to make it clear that both proxies and absentee ballots are required to be in compliance with PREDFDA.

RESPONSE: The term "may" was used because the Department does not intend to require association members to petition board members to compel an election; it is an option for members who wish to do so. Because this is an optional remedy, the Department does not see this as a prerequisite to proceeding to the Chancery Division of the Superior Court.

The rule text at N.J.A.C. 5:26-8.9(c) was taken from the requirements established in the Election Law at N.J.S.A. 45:22A-45 and is intended to establish an optional procedure to address situations in which there is no executive board. Notifying all owners is a necessity in these instances because, as stated in the text, "any association member or group, at common expense ... may petition a court with jurisdiction ..." Because this matter involves the use of common expense, it is imperative that all owners know how their money is being used. Acting by a majority means 51 percent of the membership must vote to act on a matter.

These requirements reflect those established by the Election Law and provide options to association members in certain situations; members still maintain the right to petition a court of competent jurisdiction without giving other members notice, at the acting member's expense, not at the common expense of the association.

Lastly, the Election Law does not mandate the use of proxies or absentee ballots. Throughout PREDFDA and this rulemaking, the use of proxies is always established in an association's bylaws; the statute and this rulemaking do mandate that if proxies are allowed, absentee ballots must also be allowed. As such, the Department respectfully disagrees that there is a conflict between N.J.A.C. 5:26-8.9(d) 3 and (g); N.J.A.C. 5:26-8.9(d) establishes the rules for how proxies and absentee ballots are to be used. Proxies and absentee ballots not used in accordance with this subsection would be a violation of the rules, and by extension, of PREDFDA. Further explanation is not needed within the rules. All rules must be followed; failure to comply is a violation. The language at N.J.A.C. 5:26-8.9(g) is to ensure that no one voting in the board election (which *may* include association "members ..., proxy holders, individuals acting pursuant to a valid power of attorney, or voting eligible tenants") is prohibited from voting for any candidate. The purpose of this requirement is not to require proxies; it is to ensure that proxy holders are not restricted in voting for any candidate.

52. COMMENT: One commenter asked if cumulative voting is allowed during elections in which two or more positions on the executive board are to be filled.

RESPONSE: This matter may be established and addressed in the governing documents of the association.

53. COMMENT: CAI recommended that at N.J.A.C. 5:26-8.9(e), regarding allocation of votes, the term "governing documents" should be used, as opposed to "bylaws." This is because allocation of votes based on value or size would more likely be found in the declaration or master deed than the bylaws. CAI also recommended a definition for "governing documents" be included in the regulations and include the master deed, declaration, bylaws, and certificate of incorporation.

RESPONSE: Upon adoption, the Department has replaced the term "bylaws" with the term "governing documents" at N.J.A.C. 5:26-8.9(e). However, the Department respectfully disagrees that a definition of "governing documents" is necessary. "Governing documents" is a term of art that is universally understood, and no amendment to include its definition is being considered at this time. This term has been understood since the inception of PREDFDA.

54. COMMENT: CIHC had a few questions regarding the provision at N.J.A.C. 5:26-8.9(e). CIHC questioned whether the equal basis clause applies to the one or equal number of votes or to the proportional votes? CIHC stated that the current equal number of votes provision permits an association to allocate a fixed number of votes to each unit regardless of size or value and noted that this regulation appears to force a form or proportionate voting where none is intended. CIHC stated that the "one or more" provision was intended to allow one association to continue its prior policy of granting two votes per unit to permit a split vote regardless of the unit size or value. CIHC stated that a lot of time was spent to ensure that associations "are not influenced by commercial interests, and it would be a huge slap in the face if DCA were to negate any part of our efforts."

RESPONSE: This section comes from the Election Law at N.J.S.A. 45:22A-45.2c(9), which states, "An association shall not provide for an allocation of votes other than one vote for each unit or such larger number of equal votes per unit ... except ... where the bylaws or other governing document provide for the voting interest to be proportional to a unit's value or size." As reflected in the rules, the requirement is that all units be assigned one vote or an equal number of votes per unit. This would allow a single vote per unit or two votes per unit throughout an entire development. The rule further states that the bylaws of the association may allow for voting proportional to a unit's size or value, so long as the allocation is consistent such that all owners of units of the same size or value shall have the same number of votes and ensures that representatives of commercial units do not constitute a majority of the executive board.

55. COMMENT: One commenter expressed concern about the Summary statement for N.J.A.C. 5:26-8.9(e), regarding allocation of votes. The statement included an example of allocating votes proportional to a unit's size or value. The commenter expressed the opinion that the example provided "established and implied that is justifiable that members living in a unit of 925 square feet may be entitled to one vote and members living in a 1010 square foot unit may be entitled to two votes within the bylaws. This does not appear to be 'proportional' and the Department needs to clarify or rescind this example even though it is not included as part of the proposed regulations." The commenter stated the opinion that the owners of larger units would have an unfair advantage. The commenter further pointed out that the act and proposed rulemaking state that a unit's value can be used to establish proportional voting and asked a series of questions regarding how a unit's value is determined, including whether the value remains indefinitely once determined; whether it needs to be updated through amendment; whether it means just the price or if other factors can impact value. The commenter stated that allowing the number of votes to be manipulated by bylaws based on size or value gives larger units disproportionate power to determine the outcome of elections. The commenter recommended the Department discuss this with State legislators.

RESPONSE: The Election Law specifically allows for allocation of votes by size or value. Furthermore, the Department notes that value is determined by the fair market value at the time of sale of a unit; in over 40 years of administering PREDFDA, the agency has not heard of any voting situations similar to the one presented by the commenter. Generally, when voting is based on size, the typical allocation is based on either wide square footage groupings, exact percentage voting proportional to the square footage, or by the number of bedrooms. The Department respectfully notes that changes cannot be made to the example provided within the Summary statement of the notice of proposal, per the commenter's recommendations, as the notice of proposal Summary statements is final upon publication of the notice of proposal.

56. COMMENT: CAI expressed concern with the requirements at N.J.A.C. 5:26-8.9(f), which states that associations shall not prohibit, limit, impede, or restrict participation by residents of low- or moderate-income housing units in executive board elections. CAI stated that this section should be amended to include that these residents must be in good [page=1065] standing. CAI expressed the opinion that, as currently written, if an association revokes the voting rights of an affordable housing unit owner for lack of good standing, it may be found to have restricted the owner's right to vote.

RESPONSE: The Department respectfully disagrees that this change is necessary and with the commenter's interpretation of the section. In accordance with N.J.A.C. 5:26-8.8(c), good standing is a prerequisite for voting. The intent of N.J.A.C. 5:26-8.9(f) is to ensure that no members who own low- or moderate-income housing units are prevented from participating because of the size or cost of the unit they own. N.J.A.C. 5:26-8.9(f) has nothing to do with whether members who own low- or moderate-income units are in good standing, because any

Tenant sorting duty and who is a tenant; duty to provide a copy of a lease, sub-lease, etc. and mediation thereof; tenants.

SECTION 1. (1) Subject to section 2, every person who is a tenant of a dwelling unit in a residential complex shall be subject to the provisions of this Act.

(2) Subject to section 2, every person who is a tenant of a dwelling unit in a residential complex shall be subject to the provisions of this Act.

MARGINAL NOTE: Sub-tenants, etc. Department has discretion Tenants, creditors, etc. of the Crown. R.S., c. C-16 (4th Sup.) 72; consequential amendments.

SECTION 2. (1) Subject to section 3, the provisions of this Act do not apply to a person who is a tenant of a dwelling unit in a residential complex where that person occupies the dwelling unit because he has the same relation to the owner of the residential complex or a predecessor in interest of the owner of the residential complex as a person who is a member of the family of the owner.

SECTION 3. (1) Subject to section 4, the Department is empowered, from time to time and on such terms as it deems fit, to exempt any person or class of persons from the operation of the Act.

(2) Exemptions may be made under subsection (1) by the Department on its own initiative or on the application of any person.

(3) Exemptions may be made under subsection (1) by the Department without notice to any person.

(4) Exemptions made under subsection (1) shall be published in the Canada Gazette.

SECTION 4. (1) Subject to section 5, the Department has the following powers to make regulations:

(a) exempt any residential complex or any class of residential complex from the operation of the Act;

(b) exempt any tenant or class of tenants from the operation of the Act;

(c) exempt any dwelling unit or class of dwelling units from the operation of the Act;

(d) exempt any lease or class of leases from the operation of the Act;

(e) exempt any sub-lease or class of sub-leases from the operation of the Act;

(f) exempt any other person, dwelling unit, residential complex, lease or sub-lease from the operation of the Act;

(g) prescribe the form of a lease, sub-lease, etc. and the contents thereof;

(h) prescribe the form of a notice of a dispute and the contents thereof;

(i) prescribe the form of a notice of a dispute and the contents thereof;

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3. This subsection shall not prevent the association from filling a vacancy in the executive board created by resignation, death, or failure to [page=1081] maintain reasonable qualification to be an executive board member, including maintaining good standing, or following a vote in favor of removal open to all association members in accordance with the terms of the bylaws. Any executive board position that has been filled by an appointee in such instances shall be subject to election within a year following such appointment.

(d) Association members may initiate removal of a board member ***who was elected by the unit owners*** by submitting to the board a petition signed by 51 percent of association members for removal of that board member.

1. A special election of the association membership shall be held within 60 days of receipt of the petition.

2. When the annual meeting of the association membership is scheduled to occur within 60 days of the submission of the petition, then the election shall be held at the annual meeting.

(e) Notice of the special election meeting shall be provided to all association members and voting eligible tenants at least 14 days prior to the date of the meeting.

1. The meeting shall be scheduled at a reasonable date and time of day to allow most association members to attend.

2. The ballot shall be drafted in accordance with N.J.A.C. 5:26-8.9(l)1iv.

3. At least 14 days prior to the meeting, the ballot shall be mailed, hand delivered, or if bylaws permit, and the owner consents, electronically delivered to all association members together with the notice of the meeting.

4. If the bylaws permit, the notice of the meeting shall include an absentee ballot with instructions for returning the ballot. If the bylaws provide for a proxy ballot, an absentee ballot shall also be included.

i. The instructions shall allow return of the proxy or absentee ballot by facsimile or electronic means and shall not require receipt of the ballot more than one business day prior to the meeting.

5:26-8.12 Open meetings

(a) The bylaws of the association shall include a requirement that meetings of the executive board where a binding vote of the executive board is to be taken shall be open to attendance by all association members and voting-eligible tenants, as applicable.

1. A binding vote is a vote made with a quorum of the executive board members present.

2. The board shall provide a brief explanation of the basis for and cost entailed in the matter that is the subject of any binding vote and include the explanation in the minutes for the meeting.

3. Associations may adopt a policy for comments by association members and voting eligible tenants during meetings. Such policy shall be applied uniformly.

(b) The association shall hold an annual meeting. Within seven days following the annual association meeting, the association shall post, and maintain posted throughout the year, an open meeting schedule of the executive board.

1. Such open meeting schedule shall be posted at the place or places at which notices are posted pursuant to (c) below and filed with the board member designated for administering association business.

2. The open meeting schedule shall contain the time, date, and locations of such meetings.

3. 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.

(c) In addition to the posted open meeting schedule, adequate notice of at least seven days prior to any such meeting shall be given to all association members and voting eligible tenants, as applicable.

1. Such notice shall be provided as follows:

i. The notice shall be prominently posted in at least one place on the property that is accessible to all owners at all times;

ii. The notice shall be posted on the association's website and included in any association newsletter; or

iii. The notice shall be personally provided to each member or designee by mail, hand-delivery, or electronic means.

2. The notice shall be filed with the board member designated as responsible for administering association business. It shall be maintained by the executive board for a period of two years.

3. The notice shall include the following details:

i. The time, date, and location of the meeting;

ii. Agenda items ***to the extent known***, which shall include items for discussion, items for action, and reoccurring items, such as passage of a budget.

4. An individual association member or designee may provide written notice to the board waiving any personal delivery of meeting notices. Such member or designee may rescind such waiver at any time by written notification to the board. Notwithstanding the meeting notice waiver, the member or designee shall be entitled to open meeting minutes as provided in (f) below.

(d) Every elected board member shall be provided equal opportunity to participate in any meeting of board members.

(e) The executive board may exclude attendance of all association members and voting eligible tenants at meetings, or portions of a meeting.

1. The exclusion under (e) above shall only be for discussion of any matters listed in this paragraph:

i. Those in which disclosure would constitute an unwarranted invasion of individual privacy;

ii. Pending or anticipated litigation or contract negotiations;

iii. Those involving employment, promotion, discipline, or dismissal of a specific employee or officer of the association; and/or

iv. Those falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his or her ethical duties as a lawyer.

2. A vote taken at a closed meeting shall not be binding. If the matter requires a binding vote, it shall be taken at a subsequent open meeting in a manner that does not disclose any confidences.

3. If the closed meeting is to be part of an open meeting, the closed portion shall be convened either before the open portion or at the end of the open meeting portion of the agenda.

(f) Minutes for the open sessions of meetings shall be taken for each meeting.

1. The minutes shall be legible.

2. The minutes shall include the board members present and their titles.

3. The minutes shall include clear identification of any matters addressed.

4. The minutes shall include clear identification of any matters voted on at the meeting, a record of the votes, and a brief explanation of the basis for and cost entailed in the matter which is the subject of the vote.

5. The minutes shall be made available to association members in a timely manner before the next meeting and may be identified as "draft" or "unapproved."

6. If a meeting is recorded electronically, a written record shall be taken of the matters addressed and the matters voted on. Association members shall have access to the electronic recording, as well as the written record, including the right to make a copy of electronic or written records.

(g) When a meeting of the executive board is required to deal with matters of such urgency and importance that delay for the purpose of providing seven days advance notice would be likely to result in substantial harm to the interests of the association and provided that the meeting is limited to discussion of, and acting with respect to, such matters of urgency and importance, notice of the emergency meeting shall be deemed to be adequate if it is provided as soon as possible following the calling of the meeting by posting in accordance with (c) above.

1. The executive board shall maintain, on the record, the facts establishing the emergency and any prior knowledge of the condition.

2. Minutes for emergency meetings shall be taken and made available to members of the association in accordance with (f) above.

(h) When the board has determined to cancel a scheduled open meeting, it shall post notice of the cancellation at the meeting site by the time the meeting is scheduled to begin. The Board shall promptly post the notice of cancellation at the location on the property where notices are posted and, if applicable, its website.

1. The notice shall state when the meeting will be held and the reason for the cancellation.

[page=1082] 2. If the start time is delayed, notice of the new time shall be posted at the meeting site to provide notice of the delay to those attending.

5:26-8.13 Amendments to the bylaws

(a) The bylaws shall detail the method in which the bylaws may be amended.

(b) No amendments to the bylaws shall be effective until they are recorded in the same county Clerk's Office as the existing bylaws.

1. The amendments to the bylaws shall be recorded in the same county Clerk's Office as the existing bylaws in a timely manner.

2. In order to enforce the bylaws and any amendments thereto, any association that has not previously recorded its bylaws, shall record the bylaws and any amendments in the Clerk's Office of the county in which the property is located.

3. The association shall maintain a record of the filing, which shall be available to any owner, or designee, upon request.

(c) If the bylaws do not provide an amendment method by a vote of association members that is open to all association members, or if they provide for an amendment by more than a two-thirds majority, the association members may amend the bylaws by a vote of the majority of the total authorized votes in the association.

(d) The majority shall be determined based on association membership in good standing at the time of the vote.

(e) If the bylaws do not provide a method through which association members may call a meeting of association members to conduct a bylaws amendment vote or a vote concerning the provisions of N.J.A.C. 5:26-8.10, 8.11, and 8.12, the method shall be as follows:

1. A petition shall be signed and submitted to the executive board by not less than 15 percent of the association members to request a special meeting;

2. A special meeting of the association membership shall be held within 60 days of receipt of the request; and

3. If the annual meeting of association membership is scheduled to occur within 60 days of the request, the amendment vote shall be held at that meeting.

(f) Notice of the meeting to amend the bylaws, as set forth in this subsection, shall be provided to all association members and voting eligible tenants at least 14 days prior to the date of the meeting.

1. Such notice shall prominently state that it is for a proposed amendment to the bylaws and include a copy of the proposed language.

2. The amendment shall be drafted in clear language and in a manner that is consistent with the association's bylaws and applicable laws.

3. The amendment shall be mailed, hand delivered, or if bylaws permit, electronically delivered together with the notice of the meeting at least 14 days prior to the meeting.

4. If the bylaws permit, the notice of the meeting shall include an absentee ballot with instructions for returning the ballot. If the bylaws provide for a proxy ballot, an absentee ballot shall also be included. The instructions shall allow return of the proxy or absentee ballot by facsimile or electronic means provided that such return protects the anonymity of the voter. The association shall not require receipt of the ballot more than one business day prior to the meeting.

(g) If an insufficient number of ballots or proxies are received at the special meeting to determine whether the proposed amendment has been approved or rejected, then the meeting shall be adjourned for 30 days or longer as approved by the association membership.

1. The bylaws of the association shall provide for the percentage of association members required to determine the period of adjournment.

2. The period between the original special meeting and the next special meeting for the amendments to the bylaws shall not be longer than 11 months from the date the notice of the meeting was sent.

3. If the proxies or ballots received prior to the extension date are valid under the bylaws, then they remain valid for the upcoming special meeting.

(h) An amendment proposed by the association board shall be considered defeated if, when the association board provided notice to all association members of the proposed amendment, a ballot to reject the amendment was included and at least 10 percent of the association members in good standing voted to reject the amendment within 30 days of the mailing.

1. The board's proposed amendment shall include a notice that the amendment will fail only if at least 10 percent of the association members in good standing vote to reject the amendment.

(i) When an amendment is approved, a copy shall be provided to all association members and the association shall record it in the county recording office where the bylaws were originally recorded, or in the county recording office where the property is situated where the bylaws have not been previously recorded.

(j) An executive board shall not amend the bylaws without a vote open to all association members or as detailed above except to the extent necessary to render the bylaws consistent with State, Federal, or local law.

5:26-8.14 Complaints and penalties

(a) Any unit owner may file a complaint with the Department concerning any matter subject to the rules at N.J.A.C. 5:26-8.8 through 8.13.

1. Such complaint shall be in writing and shall be on a form approved by the Department for this purpose. It may be submitted electronically through the Bureau's website, mailed to the address below, or submitted by fax. Physical copies of the required complaint form may be downloaded at (website to be added upon adoption) or requested through the Department at:

Association Regulation Unit
101 South Broad Street
Post Office Box 805
Trenton, New Jersey 08625
Telephone: 609-984-7574
Fax: 609-292-2839

2. The complaint shall include a clear, factual statement of the issue and shall include any applicable documentation to support such statement. The Department shall not conduct a review until the complaint is complete.

3. The complaint must be submitted at least ten business days prior to any scheduled upcoming election in order for the Department to issue any relief as to that election. Upon receipt of the complaint, the Department shall complete a review of the complaint and make a determination of the appropriate action as set forth in (e) below.

(b) The Department shall review and evaluate the complaint to ensure compliance with this subchapter. The Department may be in contact with the association and unit owners for clarification of any matter disclosed in the complaint.

1. Upon receipt of the complaint, the Department shall make a determination as to whether relief may be enacted for the immediate upcoming election or will apply to prospective elections. The Department shall so inform the complainant.

2. Upon completion of the review, the Department shall provide a report to the complainant as to the actions taken in regard to the complaint.

(c) Nothing in this section shall prevent the Department from instituting an investigation on its own initiative.

(d) Unit owners who believe that the association is acting contrary to this chapter or any applicable law, may petition a court of competent jurisdiction for relief at any time without filing a complaint with the Department.

1. When a complaint is filed in a court of competent jurisdiction, the Department shall be provided with a filed copy and then the Department shall hold its action in abeyance pending the court decision.

(e) The Department may levy and collect fines and may issue penalties as set forth in N.J.A.C. 5:26-11.

1. 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.

2. In addition to the penalties listed above, for associations that are controlled by the developer, the Department may issue a revocation of registration.

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