March 7, 2024

New Jersey Appellate Division Reviews Regulations Regarding Election Procedures and Practices in Community Associations

In 2017, the New Jersey Legislature amended the Planned Real Estate Development Full Disclosure Act (PREDFDA). In response, the Department of Community Affairs (DCA) set forth regulations regarding election procedures and other practices in community associations. The regulations were adopted on January 6, 2020. On September 30, 2021, the Community Associations Institute (CAI-NJ) petitioned the DCA to amend or repeal the regulations. The DCA responded on February 9, 2022, and agreed to amend some regulations in response to CAI-NJ's concerns; however, they denied the remainder of CAI-NJ's petition. CAI-NJ appealed the denial of certain regulations to the Appellate Division, arguing some of the regulations exceed the grant of authority under PREDFDA.

On February 23, 2024, the Appellate Division of New Jersey reviewed CAI-NJ's appeal and challenges to specific regulations in the case titled *In the Matter of the Challenge of the Cmty. Ass'ns Inst. New Jersey Chapter, Inc.* The Appellate Division affirmed in part and reversed in part regarding several regulations, outlined below.

Regulations the Appellate Division Upheld

Public Tallying of Votes and Maintaining Anonymity in Elections. N.J.A.C. 5:26-8.9(h) provides, in relevant part, "The association shall verify the eligibility of the voters and count the ballots in a non-fraudulent and verifiable way.... 2. All ballot tallying shall occur publicly, and the ballots shall be open to inspection by any member of the association for a period of ninety days from the date of the election....3. all ballots shall be cast in an anonymous manner." CAI-NJ argues that subsection (h)(2) should be repealed because it exceeds the grant of authority in PREDFDA, and the public tallying of ballots would result in a violation of members' privacy and places undue burdens on the associations. In addition, CAI-NJ challenges the degree to which faxing or emailing ballots achieves anonymity. The Appellate Division found no error with the regulations for public tallying of votes, noting that concerns of privacy could be addressed with a double envelope system to preserve voter anonymity. Furthermore, the Appellate Division held that it is possible to maintain anonymity electronically by using electronic forms and ID numbers that can be used separately from identifying information to determine whether a member is in good standing. The Appellate Division upheld this regulation.

Thirty-Day Notice to Members Not in Good Standing. N.J.A.C. 5:26-8.9(l)(1)(v), which applies to associations with 50 or more units, requires 30-day notification to residents who are not in good standing and allows residents the opportunity to rectify their standing up until five business days prior to the election date. CAI-NJ argues this section conflicts with the Nonprofit Corporation Act. The Appellate Division found that the regulation and the Nonprofit Corporation Act are not entirely in line. However, the regulation does not conflict with the enabling statute, PREDFDA. Thus, the Appellate Division found no reason to strike down this regulation and upheld it.

Electronic Record of Meeting Minutes. N.J.A.C. 5:26-8.12(f)(6) provides that minutes must be taken for each meeting. If a meeting is recorded electronically, the recording must be preserved for 30 days after the approval of the written minutes in connection with the meeting. CAI-NJ argued this is unduly burdensome. The Appellate Division held that CAI-NJ did not explain why it is burdensome for an association to retain an electronic recording for 30 days and affirmed this regulation.

Regulations the Appellate Division Invalidated

Requirement to Reserve an Executive Board Seat for Affordable Housing Members. The Appellate Division reviewed the regulation in N.J.A.C. 5:26-8.10(a)(2) requiring an executive board seat for affordable housing members when they constitute a minority of the community. The Appellate Division determined that the regulation alters the terms of the statute by "turning an opinion into a requirement" and goes beyond PREDFDA. Thus, the Appellate Division reversed.

Requirement for Open-Session Board Votes. The Appellate Division reviewed the regulation allowing association boards to hold closed sessions to discuss matters based on the four exemptions in N.J.A.C. 5:26-8.12(e)(1)-(2). The four exceptions are "those in which disclosure would constitute an unwarranted invasion of individual privacy; pending or anticipated litigation or contract negotiations; those involving employment, promotion, discipline, or dismissal of a specific employee or officer of the association; and/or 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." Votes taken at those sessions may be binding as long as they fall into one of the four exemptions. The Appellate Division reviewed the regulation to determine whether the legislature intended to permit or prohibit voting at meetings or portions of meetings that are closed due to the four exemptions listed in PREDFDA under N.J.S.A. 45:22A-46(a). The Appellate Division found that PREDFDA does not allow voting at closed meetings, even those falling under one of the four exceptions, and the Appellate Division reversed.

Requirement Mandating Both a Proxy Ballot and an Absentee Ballot for Bylaw Amendment Votes. N.J.A.C. 5:26-8.13(f)(4) requires that notice of a meeting to amend the bylaws shall be provided to the association membership at least 14 days prior to the date of the meeting. Additionally, the notice shall include an absentee ballot and a proxy ballot when there is a proposed bylaw amendment. CAI-NJ argues that this conflicts with the statute, which states that "the notice of the meeting [to amend bylaws] shall include a proxy ballot ***or*** absentee ballot [if the bylaws permit it]." The Appellate Division agreed the DCA altered the statute's terms. Thus, the Appellate Division invalidated the regulation requiring both a proxy ballot and an absentee ballot to be included when seeking a vote to amend the bylaws.

This alert is only meant to summarize the decision and is not intended as legal advice. Any inquiries concerning the Appellate Division's decision affirming in part and reversing in part several regulations that impose specific requirements on community associations throughout New Jersey should be directed to any of Day Pitney's community association attorneys listed in the sidebar.

Authors

Carly M. Clinton
Associate

Parsippany, NJ | (973) 966-8123

cclinton@daypitney.com

Peter J. Wolfson
Partner

Parsippany, NJ | (973) 966-8298

pwolfson@daypitney.com

Katharine A. Coffey
Partner

Parsippany, NJ | (973) 966-8323

kcoffey@daypitney.com

C. John DeSimone III
Partner

Parsippany, NJ | (973) 966-8299

cjdesimone@daypitney.com

Luke S. Pontier
Partner

Parsippany, NJ | (973) 966-8714

lpontier@daypitney.com

Amanda M. Curley
Counsel

Parsippany, NJ | (973) 966-8063

acurley@daypitney.com

Larry Zhao

Associate

Parsippany, NJ | (973) 966-8103

lzhao@daypitney.com