



**STATEMENT CONCERNING A.2480 (CLARIFYING PREFEDA'S
ASSESSMENT PAYMENT AND ELECTION PARTICIPATION
REQUIREMENT) BEFORE THE ASSEMBLY HOUSING COMMITTEE**

MARCH 5, 2020

Good afternoon Chairman Wimberly, Vice-Chair Spearman and other Committee members:

My name is Renée Steinhagen and I am the Executive Director of New Jersey Appleseed Public Interest Law Center ("NJA"), a nonprofit 501(c)(3) organization, which has a Common Interest Association Democracy Project under which we have decided to represent the members of Homeowners at Cranberry State Lake United, and on whose behalf I speak to you today. This project was operated jointly with Professor Frank Askin of the Rutgers Constitutional Litigation Clinic prior to his retirement, and thus has focused and continues to focus on assisting common interest association owners in their various efforts to ensure open and fair board elections pursuant to the New Jersey Constitution and the PREFEDA.

Pursuant to this project, I personally litigated Moore et al. v. Radburn Association, both in the trial and appellate courts; and in the late 1990s, NJA represented homeowners who held an easement right to access Upper Greenwood Lake and thus were responsible for a fair-share assessment, but had no representation on the board of the association that exacted that assessment. Thus, I am particularly dismayed by Cranberry Lake Community Club's, and what I understand several other lake community clubs', distortion of the Radburn Law; that is, to take a statutory mandate to ensure representation on association boards for all property owners residing in common interest communities, who are required by deed or common law to pay an assessment to maintain commonly owned or shared property, and convert it into an obligation to pay membership fees to an entity, which in effect is nothing more than a social club.

Many of New Jersey's lake communities, and not all, are not planned real estate developments ("or PREDs"), within the meaning of the statute, N.J.S.A. 45:22A-23(h). Just because one landowner subdivided his/her property over a period of several years in the 1920s and 1930s, and sold such lots adjacent to or within the close proximity of a lake (perhaps under one promotional plan), does not make such area a PRED, with commonly held or shared property and/or facilities for the exclusive use by the owners residing within that subdivided area. Other elements have to exist in order for such lake communities to constitute a PRED.

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As members of this committee know, Radburn was also developed in the 1920s; but the Radburn Association was specifically charged with maintaining, improving and developing over 149 acres of interior parkland, a host of recreational facilities, and other properties within its control for the mutual benefit of its residents. Conversely, purchasers of any parcel within the Radburn community were covered by a declaration of covenants and restrictions, whether that property was purchased from the original developer or subsequent entities were granted access to such common properties and were deemed to agree to pay the Radburn Association an annual assessment to be fixed by the Association. These hallmarks of a common interest community: declaration of covenants and restrictions on use of individually owned units or lots (i.e., master deed), commonly held or shared property, and easements granting owners access to such commonly held property, must be present in order to compel membership in what, otherwise, in many cases, is nothing more than a social or beach club. Accordingly, any attempt to employ either the 1993 or 2017 democracy amendments to PREDFDA, which together were intended to enhance owner participation rights in the governance of common interest communities, in order to force membership on homeowners, who by deed, have no easement or right to use property held by a given lake community association, is completely unjustified, and a perverse application of the law. Thus, the need for this Committee to approve A.2480 and send it to the Assembly floor for ultimate enactment into law.

If we have the time, let me explain NJA's legal position in more detail:

PREDFDA Amendments, P.L. 2017, Chapter.106 (S. 2492)

In direct response to the unpublished decisions in Moore et al. v. Radburn Association, the Legislature amended PREDFDA, N.J.S.A. 45:22A-21 et seq., in 2017 to enhance the voting rights of residents owning or leasing property in common interest communities. The amendments were intended to make clear that all unit owners residing in such communities, who (1) either owned a proportionate share of common property or were given access to such property and (2) were required to pay an assessment to an association that was responsible for the maintenance of such common property, were able to nominate themselves to the board and/or elect each board member of the association's governing board. The law was also intended to clarify that the Department of Community Affairs had jurisdiction over common interest association elections, not just financial disclosure, open board meetings and alternative dispute resolution. The amendments did not change the definition of a "planned real estate development" or "association," just "association member," among other substantive changes concerning association elections.

Prior to the 2017 amendments, N.J.S.A. 45:22A-45(a), which the court in Comm. For a Better Twin Rivers, v. Twin Rivers Homeowners' Ass'n, 383 N.J. Super. 22, 50-51 (App. Div. 2006), *rev'd on other grounds*, 192 N.J. 344 (2007), had found to apply retroactively to common interest communities organized prior to 1977 when PREDFDA was first enacted, stated as follows:

The form of administration of an association . . . shall provide for the election of an executive board, elected by and responsible to the members of an association. (Emphasis added).

This provision was the only provision in the relevant part of PREDFDA that employed the term “members.” On the other hand, several other provisions of the 1993 democracy amendments employed the term “unit owners” or “owners” rather than “members.” *E.g.*, N.J.S.A. 45:22A-46(a)(permits unit owners to attend board meetings of association); N.J.S.A. 45:22A-46(b)(required bylaws to include method of calling meetings of unit owners); N.J.S.A. 45:22A-46(c)(required bylaws to set forth manner of collecting assessments from unit owners); and N.J.S.A. 45:22A-47(a) (sets forth manner in which control of association was to be surrendered by developer to the owners and called for the executive board of association ultimately to be elected by owners). Despite legislative history making it clear that the purpose of the 1993 amendments to PREDFDA was “to safeguard the interests of the individual owners with respect to various governance issues,”¹ both Moore v. Radburn courts refused to provide Radburn owners with the right to elect the governing board of their association. For historical reasons, unit owners in the Radburn community were not members of the Association; only trustees and former trustees of such Association were members. As a result, a group of approximately 36 people, including the nine trustees in power at any given time, controlled the budget, assessments and common property of a community of over 1,200 families, without the accountability and responsiveness that representative democracy is supposed to ensure.

To solve this injustice, the Legislature responded by amending certain provisions of the 1993 amendments to PREDFDA regarding elections, bylaws and amendments to bylaws. N.J.S.A. 45:22A-45(a) was changed to read:

The form of administration of an association organized pursuant to section 1 of P.L.1993, c.30 (C.45:22A-43) shall provide for the election of an executive board, elected by the association members, and voting-eligible tenants where applicable, and responsible to the members of the association pursuant to section 4 of P.L.1993, c.30 (C.45:22A-46), through which the powers of the association shall be exercised and its functions performed. N.J.S.A. 45:22A-45(a).

And the definition of “association member” was changed to provide:

“Association member” means the owner of a unit within a planned real estate development, or a unit's tenant to the extent that the governing documents of the planned real estate development permit tenant membership in the association, and the developer to the extent that the development contains unsold lots, parcels, units, or interests pursuant to subsection c. of section 1 of P.L.1993, c.30 (C.45:22A-43). . . N.J.S.A. 45:22A-23(q).

Notwithstanding these changes, what did not change was either the definition of “planned real estate development” or the “association” governing that PRED. The former remained defined, in part, as:

¹ Committee Statement to Senate, No. 217, L.1993, c.30.

"Planned real estate development" or "development" means any real property situated within the State, whether contiguous or not, which consists of or will consist of, separately owned areas, irrespective of form, be it lots, parcels, units, or interest, and which are offered or disposed of pursuant to a common promotional plan, and providing for common or shared elements or interests in real property. . . This definition shall be construed liberally to effectuate the purposes of this act. N.J.S.A. 45:22A-23(h).

The latter remained defined as:

"Association" means an association for the management of common elements and facilities, organized pursuant to section 1 of P.L.1993, c.30 (C.45:22A-43). N.J.S.A. 45:22A-23(n).

A review of the 2017 amendments and the legislative statements accompanying such amendments indicates that the purpose of the amendments was not to redefine a planned real estate development or the organization governing such PRED. Rather, the purpose was just to make sure that property owners residing in such common interest communities had the right to elect the board that was exacting an assessment from them and that governed the commonly owned or shared property. It is our position that A.2480, (and its counterpart that has already been passed by the Senate, S.908) supports this interpretation of the Radburn Law. That is, this bill merely clarifies the 2017 amendments and does not change them; it emphasizes that the Legislature had no intention to compel property owners who have no servitude in their “deed titles” to use property held and maintained by an association to become members of such organizations. Simply put, if an association does not have the legal authority to exact a fair share assessment, it has no authority to exact additional membership fees.

In short, what the Radburn Law does make clear is that it is the obligation to pay an assessment by deed (i.e., individual property lots or units are governed by a declaration of restrictions and covenants, including agreement to pay assessment to maintain commonly held or shared property) or common law (i.e., deed easement to use certain shared facilities supports obligation to pay for maintenance of such shared property or facilities) gives rise to membership for purposes of voting for the executive board of the association, which holds the common property in trust for or on behalf of the individual property owners. The explicit intent of the 2017 amendments was to enable such owners, who pay an assessment, to hold accountable the association to which they pay such assessment. There is simply nothing in the law requiring a property owner to pay to maintain property, facilities or services to which they have no access or easement rights pursuant to their deed.

Accordingly, we support this clarifying amendment to PREDFDA in order to put an end to interpretations of the 2017 Radburn Law that fundamentally turn that law on its head (i.e., forcing unit owners to become a member of an association in order to justify exacting an assessment against them in the form of membership fees). Such interpretations are blatantly wrong as a matter of law. I am thus glad that the Legislature has decided to make its position clear in order to protect the many homeowners who are now being forced to become members in

beach clubs that do not hold property in common for their benefit, and whose **deeds do not include easements to such property.**