

ASK THE FORMER REGULATOR

Expert Analysis

Forming a HOA in New York: 3 Pathways to Meet Regulatory Requirements

By Erica F. Buckley

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Question: I am a developer in upstate New York, and I am looking to form a homeowners association as part of a residential development. Can you lay out the regulatory pathways I must follow to comply with New York law?

Answer: Forming a homeowners association (HOA) in New York involves navigating a complex statutory and regulatory landscape overseen by the New York State Department of Law, commonly referred to as the Attorney General's Office. In New York, the sale of property with a required membership interest in an HOA are real estate securities and are therefore regulated by New York's blue-sky law known as the Martin Act. To comply with New York law, there are three primary pathways to establish an HOA: obtaining a no-action letter under 13 NYCRR Section 22.8, utilizing the Cooperative Policy Statement No. 7 (CPS-7), or filing an offering plan pursuant to 13 NYCRR Part 22 (Part 22). Each filing has its own set of requirements, procedures, and implications. This article explores these three pathways in detail.

1. No-Action Letter Under 13 NYCRR Section 22.8

A no-action letter is a discretionary tool used by the Department of Law to indicate that it will not take enforcement action because the transaction described does not require the filing of an offering plan under Article 23-A of the New York General Business Law

(the Martin Act). This pathway is suitable for HOAs with minimal annual charges or those involving a small number of homes or lots.

Application Procedure:

- **Affidavit:** The offeror must submit an affidavit detailing the name, address, and legal status of each offeror and its principals, a description of the property, and the proposed transaction.
- **Compliance:** The offeror must agree to comply with escrow and trust fund provisions and provide detailed information to each offeree, including financial statements, zoning compliance, and any potential extraordinary expenses.
- **Documentation:** The application must include a site plan, declaration of covenants, estimated assessments, and a certification of budget adequacy.
- **Transmittal Letter:** An attorney must submit a transmittal letter affirming compliance with the Martin Act and Part 22.

Criteria for Granting:

- The Department of Law will issue a no-action letter if it determines that filing an offering plan is unnecessary to protect the public interest (or that a CPS-7 wouldn't be more appropriate).
- The HOA must demonstrate minimal annual charges unless it involves private roads used by four or fewer homes or lots.



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2. Cooperative Policy Statement No. 7 (CPS-7)

CPS-7 provides a simplified procedure for HOAs with a de minimis cooperative interest, meaning the HOA will own or maintain limited property or recreational facilities requiring minimal maintenance. This pathway offers partial exemption from the full requirements of Part 22.

Applicability:

- **De Minimis Cooperative Interest:** The HOA must own or maintain limited property or amenities such as open spaces, private roads, sewers, water lines, and minimal recreational facilities.
- **Exclusions:** HOAs with shared exterior maintenance obligations, major mechanical systems, or substantial recreational facilities are excluded from CPS-7 treatment.

Procedure:

- **Application Submission:** Sponsors must submit an application to the Real Estate Finance Bureau, including certifications by the sponsor and its principals, an affidavit detailing the property and transaction, and compliance with escrow provisions.
- **Disclosure Requirements:** The application must provide full disclosure of amenities, property conditions, legal proceedings, and financial obligations.
- **Attorney's Transmittal Letter:** An attorney must affirm familiarity with the Martin Act and Part 22 and disclaim responsibility for independent property inspections.

Granting Criteria:

- The Department of Law will review the application within 30 days and either grant CPS-7 treatment or list deficiencies.
- The granting is based solely on the information provided in the application and does not waive the Attorney General's enforcement authority.

3. Filing an Offering Plan Pursuant to the Martin Act and Part 22

If the proposed HOA doesn't meet the criteria for a no-action letter or CPS-7 due to conditions such as the anticipated ownership of substantial recreational facilities, then an offering plan must be filed with the Department of Law. Filing an offering plan ensures full compliance with disclosure requirements of the Martin Act and Part 22.

Applicability:

- The offering plan is required where homes, lots, or a cooperative interest in realty are sold in conjunction with a membership interest in an HOA.
- If an HOA also involves the offering of cooperative shares or condominium units, sponsor will be required to comply in entirety with the governing regulations for such cooperative interests in realty as well as Part 22.

Procedure:

- **Submission:** Sponsors must submit a proposed offering plan and exhibits to the Real Estate Finance Bureau.
- **Exhibits:** Required exhibits include a Schedule A, a Schedule B, description of property of HOA-owned property, certifications by the sponsor and experts, title reports, management agreements, financial projections, and compliance with local zoning laws.
- **Transmittal Letter:** An attorney must submit a transmittal letter affirming compliance with the Martin Act and Part 22.

Compliance Standards:

- The offering plan must be complete, current, accurate, and provide an adequate basis for potential investors' judgment.
- It must not omit any material facts or contain any untrue statements.

Review Process:

- The Department of Law will review the offering plan within 30 days and either file it or indicate deficiencies. This 30-day cycle continues until the Department of Law accepts the offering plan for filing.
- Amendments to the offering plan are required for material changes and must be filed promptly.

Conclusion

Many residential projects benefit from an overarching homeowners association, especially for projects that offer substantial recreational facilities to its members. While there are three methods available to meet the statutory and regulatory requirements in New York to form an HOA, each has specific requirements and procedures designed to ensure transparency and to protect the public interest. Developers should work with competent counsel in exploring these pathways to plan accordingly to comply with the Martin Act and governing regulations that are applicable to sponsor's project.