

Does the State Constitution Apply To the Governance of Homeowners Associations?

*Committee for a Better Twin Rivers
v.
Twin Rivers Homeowners Association*

By Barry S. Goodman, Esq.

Do homeowner associations have to comply with state constitutional standards, including freedom of speech and assembly, when they make rules governing the association? This issue was squarely before the court in a "test case" brought by the American Civil Liberties Union ("ACLU") against a homeowners association known as Twin Rivers.

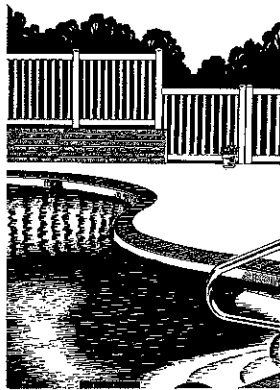
In a decision rendered in February 2004, a Chancery Judge in Mercer County, New Jersey, rejected an argument that Twin Rivers had to comply with the state Constitution. However, the court's analysis not only sets forth important insights regarding the possible application of constitutional standards to all homeowners associations, but also provides a framework for analyzing an association's rules, including the placement of political and other signs in the community, the use of an association's community room, the placement of articles in an association-sponsored newsletter, access to the association's financial documents, board members obligation to maintain confidentiality, Alternative Dispute Resolution ("ADR"), access to the association's

voting lists and the use of weighted voting for board elections.

BACKGROUND

Twin Rivers is a private community that covers about one square mile and has a population of approximately 10,000 people. It is a planned unit development located in East Windsor, New Jersey, consisting of privately-owned condominium duplexes, townhouses, single-family homes, apartments and commercial buildings.

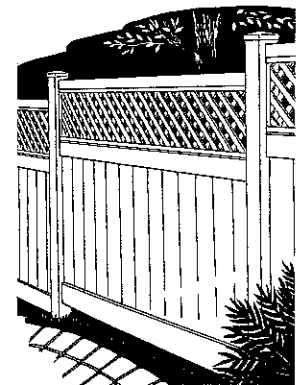
The ACLU commenced the lawsuit in the matter known as *Committee for a Better Twin Rivers v. Twin Rivers Homeowners Association*, ultimately representing three members of the association who alleged that the New Jersey Constitution should



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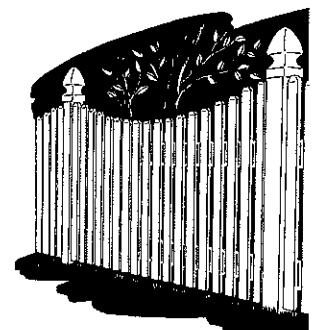
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be applied to the association's governance of Twin Rivers and that many of the association's rules were unreasonable and therefore should be voided.

APPLICATION OF THE CONSTITUTION

Plaintiffs argued in the *Twin Rivers* case that the Constitution should be applied because Twin Rivers in many ways functions like a municipality, which is subject to constitutional restrictions. For example, plaintiffs contended that the Twin Rivers board is no different than a town council, its maintenance fees are akin to taxes, its architectural standards are the same as zoning ordinances, its ability to assess fines is like a town's police powers, and it maintained certain roads and collected garbage within the community as the municipality does in other areas of the town.

In a far-reaching 80-page decision, the court initially rejected plaintiffs' argument that Twin Rivers should be treated as a "quasi-municipal entity" and therefore governed by the Constitution. The court rejected the analogies plaintiffs raised and reasoned that, even if a private organization performs some municipal functions, it does not become an agent of the municipality or subject itself to constitutional scrutiny. However, the concept of a quasi-municipality subject to constitutional protections may be applicable where an entity is created by a municipality to perform [Continues on page 12]

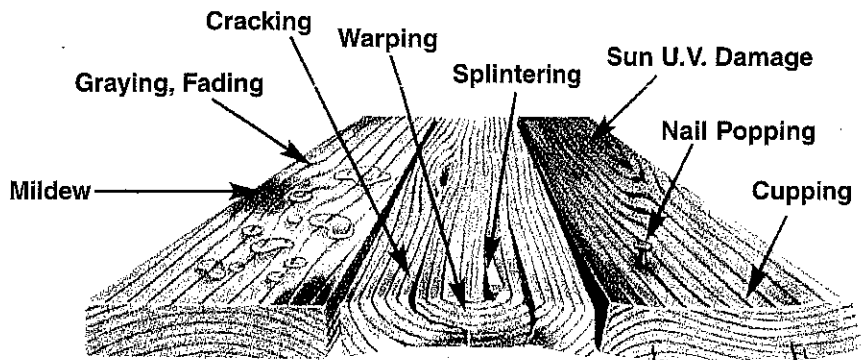
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functions for the municipality, e.g., a board of education.

Similarly, the court held that an association's imposition of fines cannot be equated with the police power of a municipality to impose fines since the relationship between an association and its members is a contractual relationship that residents choose when they select to purchase property to live in Twin Rivers.

In addition, the court ruled that homeowners associations are private entities whose actions are governed by the Planned Real Estate Development Full Disclosure Act ("PREDFDA") and by the business judgment rule, under which the court will not disturb a board's decision unless there is fraud, self-dealing or unconscionable conduct involved in the decision. The court also held that amendments to PREDFDA passed in 1993 apply to Twin Rivers, which was built before PREDFDA was enacted in 1977.

GOVERNANCE ISSUES

The court dealt with the following numerous specific governance issues that were raised by the plaintiffs in the *Twin Rivers* lawsuit:

Sign Policy

Twin Rivers has a sign policy under which signs are permitted to be placed in windows of units and in flower beds throughout the community all year long. Signs cannot be placed anywhere else. Twin Rivers' purpose in limiting the placement of signs around the community is to avoid clutter, preserve the aesthetics of the community and allow for lawn maintenance and leaf collection in the fall. The ACLU contended that plaintiffs should be allowed to place signs anywhere around the community they desired, including anywhere on the lawns. They highlighted their argument by claiming that they had a free speech right to put up "political" signs to campaign for board elections. The court rejected plaintiffs' free speech argument and applied contract law in finding that the association's restrictions are reasonable and upholding Twin Rivers' sign policy.

In so doing, the court noted that the lawns where plaintiffs wanted to place signs were for the private use of [*Continues on page 14*]

Copies of Judge Schuster's decision in the *Committee for A Better Twin Rivers versus Twin Rivers Homeowners' Association (TRHA)* case, as well as "The Community Association Manager: Compensation and Salary Survey" are available from the CAI-NJ Office at a cost of \$9.95 plus \$2.00 shipping and handling.

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Twin Rivers' residents and the public was not invited to come on to Twin Rivers' lawns. As a result, there is no public right to place signs on such private property.

Community Room

The association has a policy of charging a \$165 fee to use the community room and not to allow any political events in the community room, except a meeting once a year at which members of the association are invited to meet candidates for the upcoming board election. Plaintiffs alleged that the fee was unreasonable and they could not be denied the use of the community room for any reason. The court held that the \$165 fee was reasonable but instructed Twin Rivers to specify the standards under which the association would allow or deny the use of the community room since an association cannot have "unfettered discretion" with no objective standards when deciding who can and cannot use the room.

Community Newsletter

Twin Rivers sponsors a monthly newsletter containing articles, a *President's Message* and *Letters to the Editor* to keep residents of the community informed about the community's affairs. Plaintiffs complained that they should have equal access to the newsletter so that their articles and letters would be published next to the *President's Message*

and any articles or letters that mention them or the lawsuit. The court rejected this argument, finding that all of the plaintiffs' letters had been published, except one that had contained libelous allegations. Since plaintiffs had reasonable access to include their articles and letters to the editor in the newsletter, they had no right to otherwise place rebuttals in the newsletter.

Access to Association Documents

Plaintiffs claimed that they were entitled to view any document from the association that they desired. However, the association's document policy was upheld by the court because it pro-

Under the business judgment rule, there was no basis to overturn this policy.

vides reasonable guidelines concerning what constitutes "good cause" for denying access to any documents. Under the business judgment rule, there was no basis to overturn this policy.

Board Confidentiality

Plaintiffs challenged the censure of one of the plaintiffs, a former board member, who had been found to violate the board's requirement that certain information be kept confidential. The court decided that PREDFDA governs what information board members should maintain as confi-

dential and that homeowners associations cannot classify any other information as confidential. Since the association had included three additional categories of confidential information, this additional portion of the association's policy was too broad and unenforceable.

ADR

Twin Rivers' ADR policy provides that a member can select ADR to resolve all disputes, except for the non-payment of fees and assessments, election issues and the alleged noncompliance by the board or association with the governing documents and applicable law. The member would have to split the cost of ADR with the association by paying a \$150 deposit. Plaintiffs claimed that the ADR policy should be available for all issues and without any charge. They specifically sought ADR for one of the plaintiffs who objected to the payment of a \$3.00 per month assessment that was made on all members so that all members would have cable television available to them. The court applied PREDFDA, finding that ADR is not required for every dispute and upheld Twin Rivers' ADR policy as reasonable.

Access to Association Voting Lists

Twin Rivers requires members who want the voting list for a board election to sign a confidentiality agreement ensuring that the voting list will not be misused for, by way of example, commercial solicitations. The court held that Twin Rivers has the right to require members who want the

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voting list to sign such a confidentiality agreement. However, it was inappropriate to provide in the agreement for liquidated damages of \$1,000 for violating the agreement since that amount might not bear any relationship to the damages suffered by the association. Instead, Twin Rivers can sue for damages if the member violates the confidentiality agreement.

Weighted Voting for Board Elections

The voting system for board elections in Twin Rivers is based upon the value of each owner's property. Plaintiffs argued that the court should consider if tenants should have the right to vote in board elections and there should be a one-person/one-vote or a one-unit/one-vote system. The court held that the governing documents, which provide for such a weighted voting system, bind the owners under general contract law and that applicable statutes also permit such a voting system. The court also noted that tenants have no right to vote to control a private community since they could "vote with their feet" by choosing to leave the community.

In conclusion, the court's decision makes it clear that a private homeowners association engaged in private activities should not be subjected to constitutional standards. Contract law and the business judgment rule should be applied, as well as applicable statutes.* ■

*The ACLU has appealed the trial court's decision in *Committee for a Better Twin Rivers v. Twin Rivers Homeowners Association*.

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