

Twin Rivers  
was a “fundamental  
test case” for  
applying  
constitutional limits  
to a homeowner  
association.

By Karyn A. Kennedy Branco, ESQ.,  
and Barry S. Goodman, ESQ.

*illustration by Robert Neubecker*

community

And the  
association  
won.

# Un- limited



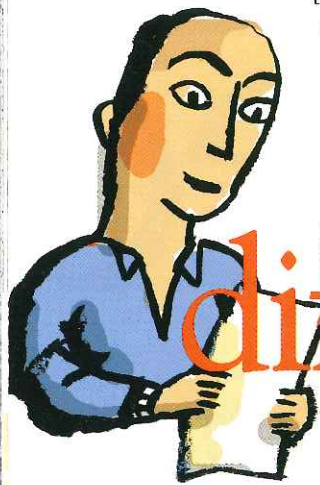
TWO YEARS AGO, the *New York Times* published an article titled “Lawsuit Tests Power of Homeowner Associations.” The article suggested, not inappropriately, that the lawsuit in question “could change New Jersey law and prove influential in other states as well.” Indeed, the American Civil Liberties Union of New Jersey (ACLU), which filed the lawsuit against the Twin Rivers Homeowners’ Association in central New Jersey on behalf of a handful of disgruntled residents, argued that the association’s actions should be governed by the state Constitution, and proclaimed that this was a “fundamental test case, not

apply to public governing bodies. But many of us who practice association law, along with other industry professionals and a significant number of people who live in associations, have always considered condominium and other homeowner associations to be private communities that are not akin to public entities.

Why does this matter? When a community of homes is somehow set off from the rest of a municipality—whether by legal documentation or a brick wall—should we be concerned if that community is described as being “public”? The answer, without question, is yes. Inviting the public onto property that is otherwise private in nature may

residents who called themselves the Committee for a Better Twin Rivers (CBTR). The group had a total of three members, two of whom were former Twin Rivers board members, who disagreed with many of the association’s rules, such as its policies for posting signs around the community, using the community room, having access to the association’s newsletter, and using weighted voting for board elections.

Twin Rivers is a planned unit development that covers about one square mile and has a population of approximately 10,000 people. Located in East Windsor, New Jersey, it consists of privately owned condominium duplexes, townhouses, single-family



1. Some people argue that associations are **different** from municipal governments and should be subject to the same constitutional standards that apply to public governing bodies. **no**

only for New Jersey but for the country.”

That may well be true. If so, then Twin Rivers passed the test, because the Superior Court of New Jersey recently found in favor of the association. Why did the court decide the Constitution should not be applied to Twin Rivers? Should it be applied to other community associations in New Jersey and elsewhere? This is the story of the *Twin Rivers* decision and what it means for other associations.

#### **PUBLIC V. PRIVATE ENTITIES**

A hot issue in the area of association law has been whether constitutional limitations should be imposed on associations, which are private communities. Some people argue that associations are no different from municipal governments and should be subject to the same constitutional standards that

someday open up the potential for an association and its board members to be held to constitutional standards.

More than one lawsuit against an association has taken aim at a particular deed restriction, rule, or regulation. And, in such cases, more than one attorney has alleged that the association’s actions violated his client’s inalienable constitutional rights to freedom of speech and freedom of assembly. Sometimes, these cases proceed quietly, out of the media spotlight. However, in other instances, attorneys use the press to publicize their “test case.” One such lawsuit is the *Twin Rivers* case—known in full as *Committee for a Better Twin Rivers, et al. v. Twin Rivers Homeowners’ Association, et al.*

#### **MUNICIPALITY ANALOGY?**

As the case name suggests, the lawsuit was filed on behalf of a few dissident

homes, apartments, and commercial buildings. In its lawsuit, the CBTR essentially argued that, if Twin Rivers walks like a municipality and talks like a municipality, then it’s a municipality. The group contended that Twin Rivers’ board functioned like a municipal council, that its fees were the same as taxes, that it levied fines like a municipality, and that its architectural standards were no different from zoning laws. They also said that the association in effect had replaced many functions of the local government because certain “public” buildings, such as schools and libraries, are located within the boundaries of Twin Rivers. (Of course, these services are administered by the municipality of East Windsor, not the association.) Because of all this, the ACLU, on behalf of the CBTR, argued that the association

was akin to a municipal government and that the New Jersey Constitution should be applied to its decisions, rules, and regulations.

Of course, the association disagreed, arguing that it is a private community not subject to the onerous constitutional standards applied to government entities. Instead, the association contended that its policies should be judged by what is known as the business judgment rule, under which a board's actions will not be disturbed by a court unless they are unconscionable, fraudulent, or self-dealing.

As it turned out, the court also disagreed with the ACLU's position, holding that, under the circumstances presented, the association was not subject to the constitutional limitations imposed on state actors. The full opinion, which is more than 80 pages long, spells out in some detail how courts should review the everyday decisions of association volunteers and how to evaluate the public and private nature of the community itself, thereby providing guidance for other associations to use in making decisions.

Initially, the court analyzed the ACLU's constitutional arguments and wasn't persuaded by the analogies it tried to draw between the association and municipalities. Instead, the court found that the relationship between Twin Rivers and its members is contractual, and that residents choose to enter into this relationship when they decide to buy a home in the community. The court also held that the applicable standard for reviewing the decisions of an association is, as the association contended, the business judgment rule.

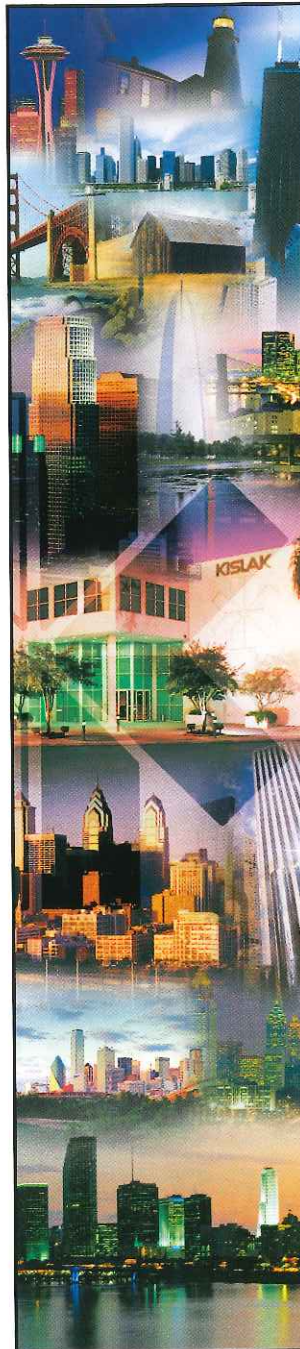
### ASSOCIATION GUIDELINES

The court then addressed the specific rules, regulations, and policies with which the CBTR took issue. An important issue in the case stemmed from an association rule specifying that signs could be placed only in flower beds and windows around the community year round. Although this rule is authorized by the association's governing documents, members of the CBTR wanted

to place what they called "political signs" for upcoming board elections on lawns and elsewhere throughout Twin Rivers each fall; they contended that the association's limit on signs violated their right to free speech. However, the trial court found that—even though the Constitution does not apply to this rule—the CBTR had failed to show that the association's policy did not meet the constitutional test requiring

that a sign policy be reasonable as to time, place, and duration.

The court next considered whether there was a public interest in placing the signs on the lawns that outweighed the interest of the private property owner—in this case, Twin Rivers—that would make the Constitution applicable. An important factor in this balancing test is that the lawns in Twin Rivers are for the use of its residents,



## Understanding the needs of our Community Association Clients

### PROJECT FINANCING

*Concrete Restoration • Roofing / Siding  
Plumbing • Painting / Waterproofing  
Irrigation Systems  
Clubhouse and Recreational Facilities  
Fire Safety Systems  
Elevators • Windows • Security*

### STATE OF THE ART LOCK BOX SERVICES

*Internet Web Based Technology  
Image Capture of Checks and Coupons  
Online "Stop" Orders  
Online "Exception" Processing • Online Research  
Automated Payment Posting  
Direct Payments via ACH  
Instant Bank Statements (e-statements)*

## WE EVEN FINANCE INSURANCE PREMIUMS

**Toll Free: 800-233-7164 ext. 143**



[www.kislak.com](http://www.kislak.com)



not the public at large. Because the use of the association's lawns is completely private, the court concluded that the limited restrictions on placing signs did not interfere with any public interest and that a constitutional analysis would be inappropriate.

The ACLU (and the CBTR) also challenged the association's regulations regarding the use of the community room, including the \$165 fee residents

have to pay to use it. The association did not allow any political events in the community room, except for a meeting once a year for residents to meet candidates running in the board election. Also, the community room could be rented only by association residents, and was not available for rental by people from outside Twin Rivers. The court held that the fee for this private community room did not violate the busi-

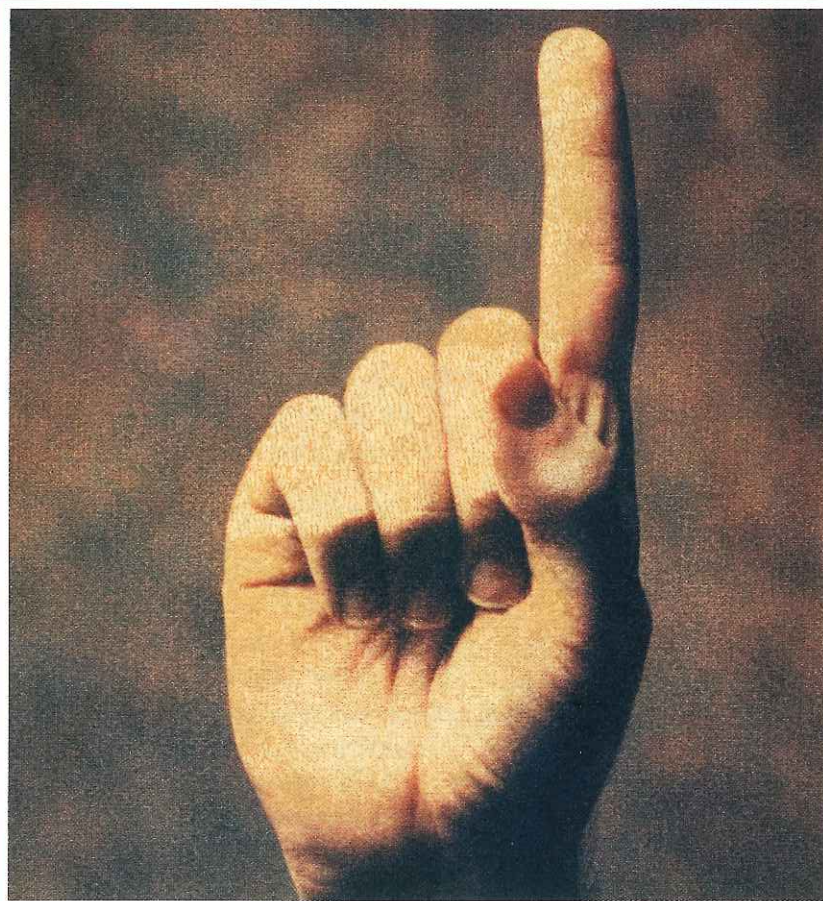
ness judgment rule, but did find that the association should draft specific guidelines for the approval or denial of a request to use the room.

The CBTR also argued that the association had unfairly censored them by not providing them with equal access to Twin Rivers' monthly newsletter whenever their names or the lawsuit were mentioned in the newsletter, including in the "President's Message." In response to this, the association pointed out that it had published every letter and article submitted by CBTR members, except one that contained potentially libelous statements. In addition, the newsletter was intended for and distributed to Twin Rivers' owners and residents only, not people outside the community. The court found that, although the board had a duty not to exclude opposing viewpoints from this private newsletter, it didn't have to seek out and publish the plaintiffs' views or provide them with such "equal access."

Finally, the plaintiffs argued that Twin Rivers' weighted voting system for board elections disenfranchised many members of the community, including tenants. Under this voting system, votes are weighted based on the value of each owner's home. However, the ACLU contended that a one-person/one-vote, one-unit/one-vote, or other similar system was required by the Constitution. Once again, the court disagreed, finding no constitutional limitation applicable and holding that two New Jersey statutes, the Nonprofit Corporation Act and the Planned Real Estate Development Full Disclosure Act, as well as the association's own governing documents supported Twin Rivers' voting system.

#### MEMBERS ONLY

The *Twin Rivers* case might not be over yet, because the ACLU has appealed the trial court's decision. Meanwhile, although the court ruled in the association's favor, that doesn't mean there are no lessons for Twin Rivers—and other communities—to take from the case. Foremost among them is that you



**“Reserve Advisors is always my first choice for Reserve Studies.”**



**JOHN LAWTON, CMCA, PCAM**  
President, HRW, Inc.

For your Free Proposal visit  
**reserveadvisors.com**  
or call **1-800-221-9882**

should carefully consider the extent to which you open association activities and facilities to the "public," instead of maintaining them solely for the use of residents and guests. As this case showed, a public invitation might open the door to an argument in favor of constitutional limits on the association's decisions. Even if the argument is unsuccessful, defending the lawsuit can be costly and time-consuming.

The flip side of this lesson is that, when your association does keep its activities and facilities private, your decisions should be governed by contract law, the business judgment rule, and applicable statutes. **CG**

KARYN A. KENNEDY BRANCO is a partner in the law firm of Kennedy, Wronko & Kennedy, in Sea Girt, New Jersey. BARRY S. GOODMAN is a partner in the law firm of Greenbaum, Rowe, Smith, Ravin, Davis & Himmel LLP, in Woodbridge, New Jersey. They successfully represented the Twin Rivers Homeowners' Association in this case.

## AT-A-GLANCE

In a lawsuit brought by the ACLU, a group of dissident residents claimed that the New Jersey Constitution should apply to the Twin Rivers Homeowners' Association.

### PUBLIC V. PRIVATE ENTITIES.

The lawsuit hinged on whether private communities are different from public governing bodies.

### MUNICIPALITY ANALOGY?

The dissidents claimed that Twin Rivers' board functioned just like a municipal council. The trial court disagreed.

### ASSOCIATION GUIDELINES.

Specifically, the court found that Twin Rivers' policies on posting signs, using its community room, accessing its newsletter, and voting were reasonable and appropriate.

**MEMBERS ONLY.** The lesson for all associations is to be careful about representing community events and facilities as open to the public.

# AssociationVoice

## Smart Web Sites for Associations and Management!

*Simple. Affordable. Efficient.*  
*Are you ready to:*

- Save your time
- Save your associations' money
- Improve communication

*...Find out why we're used  
by our Industry's top leaders.*

Are You  
Ready?



Learn About It:

Call us at 800.959.3442 or visit us at [www.AssociationVoice.com](http://www.AssociationVoice.com)

## GARAGE AND GATE REMOTES AT WHOLESALE PRICES



We carry all brands and models of  
Gate and Garage Remotes



Same Day Shipping on Most Orders



Repair Parts for Garage Door  
Operators and Gate Operators



All CAI Members Orders Shipped  
on Open Account



Mention you are a CAI member and  
receive FREE SHIPPING  
on your first order!



NO SALES TAX OUTSIDE OF COLORADO

**GLOBAL GATE CONTROLS, Inc.**

**800-873-0442**

CAI MEMBER

