

Twin Rivers Why the Appellate Division Got it Wrong

by Barry S. Goodman

The New Jersey Supreme Court is faced with deciding this term whether or not New Jersey should become the only state in the country to impose the Constitution on a private, voluntary homeowners association's rules dealing with its own members.

Although at least 25 states and the United States Supreme Court now have made it clear that they would not apply the Constitution to private homeowners associations with respect to their internal membership rules, the Appellate Division in *Committee for A Better Twin Rivers v. Twin Rivers Homeowners' Association*¹ became the first court in the country to apply the Constitution to such a situation.

The New Jersey Supreme Court has granted certification, and now will decide if this unprecedented decision is warranted, especially in light of the extensive statutory and regulatory scheme that already governs homeowners associations in New Jersey. The Supreme Court's decision will affect the governance of homeowners associations throughout New Jersey, as well as countless other private associations whose right to create rules for their members may be impacted by this decision.

Background

Twin Rivers is a planned unit development consisting of privately owned condominium duplexes, townhouses, single-family homes, apartments and commercial premises located in East Windsor. It is a private community that has a population of approximately 10,000 people, and has certain community facilities that are for the exclusive use of Twin Rivers' residents and guests, not the general public. Although the Twin Rivers Homeowners' Association provides certain services for its members, such as maintaining its private residential roads and street lighting, recycling and landscaping, the township of East Windsor provides social services, police

protection, animal control, education, first aid/rescue squad, fire department, hazardous waste and sewerage treatment, water supply system, maintenance of public roads and traffic lights, etc.

The plaintiffs in this lawsuit are three members of the association who call themselves the Committee for a Better Twin Rivers. They are seeking, among other relief, changes to the association's rules concerning the following:

Signs—Voiding the Association's content neutral sign policy, which allows political and all other signs to be placed in flowerbeds and unit windows throughout Twin Rivers all year long, but not on Association-owned lawns for maintenance and aesthetic reasons;

Community Rooms—Use of the Twin Rivers community room without paying the cleaning and maintenance fee of \$165 that all other members pay when they use the room for a private function;

Newsletter—"Equal access" with the Association's President in the Association newsletter, even though all of plaintiffs' letters and articles have been published, with the exception of one that was defamatory, and plaintiffs have been provided with the same access to the newsletter as all other residents;

Standing to Vote—Invalidating a rule that a member must be in good standing to vote in Board elections, including the payment of fees that have been duly assessed by the Association;

Weighted Voting—Invalidating the weighted voting provisions of the Association's Charter and bylaws, under which votes are weighted according to the size of the member's unit, which is akin to weighted votes of shareholders in a corporation.

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The plaintiffs argue that the New Jersey Constitution should apply to these issues because Twin Rivers is so large and can be analogized to a municipality, which would be subject to the Constitution. They also contend that Twin Rivers has the appearance of a municipality because certain "public" buildings, such as schools and a library, are located within the boundaries of Twin Rivers. (Of course, these services are administered by the township of East Windsor and Mercer County, respectively, not the association.)

The association, on the other hand, argued that Twin Rivers is a private non-profit association that should not be subject to constitutional standards applied to governmental entities, and that the rules that are being contested should be judged based upon the historically applicable business judgment rule standard and the contractual relationship between the association and its members, not a radical extension of the Constitution to such a private entity.

The trial court, following well-established precedents in New Jersey, rejected the plaintiffs' arguments and upheld the association's rules on all of these issues. However, the Appellate Division, while upholding the trial court with regard to a member having to be in good standing to vote and the association's weighted voting system, reversed and remanded to the trial court with regard to the association's rules concerning signs, the community room and the newsletter, holding for the first time in the country that these three claims involved undefined "fundamental rights" that should be analyzed under the New Jersey Constitution.

More specifically, the Appellate Division, although noting that it was not ruling on the merits of any of the plaintiffs' claims and was remanding to the trial court to apply the Constitution to those claims, held that there should be no dif-

ference between people invited onto private property to exercise expressive rights (who might be protected by the New Jersey Constitution under applicable case law) and those people who are members of the association. The court explained that "any regulation of a fundamental right engages the public interest by definition, especially where the regulator is functionally equivalent to a governmental body in its impact upon the affected public."² The Appellate Division concluded that homeowners associations should be considered "constitutional actors" subject to constitutional standards even though they are not "state actors," which traditionally would be required to apply the Constitution.

The court, therefore, held that the Constitution should apply to

plaintiffs' right to engage in expressive activities—including those related to public issues in their own community, such as with regard to the election of candidates for the TRHA [Twin Rivers Homeowners Association] Board, or broader issues of governmental and public policy consequence, or matters of general interest" and that these rights must take precedence over the Association's private property interests.³

The New Jersey Supreme Court now has granted the association's petition for certification to review this unprecedented decision to apply the Constitution to a homeowners association's rules for its members. However, the Court has denied the plaintiffs' cross-petition for certification in which they argued that, under the Appellate Division's holding, the Constitution also should apply to a member's standing to vote and the weighted voting issue since the right to vote is a "fundamental right."

New Jersey Case Law

Prior to the Appellate Division's decision, New Jersey courts uniformly

applied the business judgment rule to homeowners associations' decisions concerning their own members, often expressly rejecting a constitutional analysis in so doing.⁴ Under the business judgment rule, absent a showing of fraud, self-dealing or unconscionable conduct, the court will not interfere with the decision of a private homeowners association's board of directors as long as the decision is authorized by a statute, the association's bylaws or the master deed.⁵

In addition, beginning with the New Jersey Supreme Court's 1980 decision in *State v. Schmidt*,⁶ New Jersey became one of the only states in the country to apply the Constitution to private property owners where the public is involved and invited to use that property for such expressional activities. In *Schmid*, the Court held that Princeton University was subject to constitutional standards with regard to the public because it opened its property to the public for such expressional activities.

In 1994, the Supreme Court then extended this rationale in *New Jersey Coalition Against War in the Middle East v. JMB*⁷ to shopping malls, holding that members of the public had a constitutional right to distribute political leaflets at these malls since they held themselves out to the public for a wide range of expressive activities. Similarly, the Appellate Division affirmed a lower court decision that a condominium association had to allow nonresidents onto its property to campaign for a public municipal election in which the association actively had campaigned for candidates.⁸

Significantly, the New Jersey Supreme Court expressly rejected applying the Constitution to a housing association that not only owned all of the land in a municipality but also "provide[d] many services usually reserved to governments" in its 1989 decision known as *Bluvas v. Winfield Mutual Housing Corp.*⁹ The Court held the housing corporation

was not a state actor, and the Constitution, therefore, was inapplicable, explaining as follows:

We find that the claimed state actor, Winfield Mutual Housing Corporation, although owning all of other property within the geographic boundaries of Winfield Township (only the streets are excluded), does not exercise the governmental powers of the community. A duly-elected governing body and a board of education established under law administer any necessary governmental services. The Housing Corporation's board is a separate entity with separate members. This is not a "company town."¹⁰

In making the quantum leap of applying the rationale in the *Schmid* case and its progeny (and rejecting the applicability of the *Bluvias* decision), the Appellate Division in the present case not only ignored that the association has a board that is unrelated to East Windsor's duly elected governing body, but also failed to consider critical factual differences between shopping malls and universities, on the one hand, and homeowners associations, on the other. For example, homeowners association members participate in association decision-making, whereas the public has no say in the policies governing shopping malls or universities. Additionally, there are extensive statutory and regulatory protections for association members, including the Planned Real Estate Development Full Disclosure Act,¹¹ the Condominium Act,¹² the Nonprofit Corporations Act,¹³ and the oversight of the Department of Community Affairs, whereas there are no similar protections for invitees to malls or universities.

Finally, the business judgment rule does not protect invitees to malls or universities like it does association members. Thus, the reason for extending

constitutional protections to members of the public invited to shopping malls and universities for expressive purposes does not hold true in the present case, which clearly is why no other court in New Jersey ever has applied the Constitution to a homeowners association's rules for its own members.

The Unanimous Decisions Around the Rest of the Country

In rendering its decision, the Appellate Division did not consider the fact that at least 25 other states¹⁴ and the United States Supreme Court¹⁵ have rendered decisions that have made it clear that they would not apply the Constitution to private homeowners associations with respect to their internal membership rules. Indeed, when the New Jersey Supreme Court decided, in the *Coalition* case in 1994, to apply constitutional standards to invitees to shopping malls, it noted that four states had applied state constitutions to private property in limited situations. However, all four of those states, as well as all the other states that have decided this issue, now have rejected application of the Constitution to private property owners.

Many of the states that have rejected applying the Constitution to private property have held that state action is a prerequisite to a constitutional claim for speech rights on private property. Of course, the association in Twin Rivers is a private nonprofit association whose rules for its members do not constitute state action, as the Appellate Division acknowledged.

Conclusion

The Appellate Division's decision in this matter to apply the New Jersey Constitution to private homeowners associations' internal rules for their members is grossly out-of-step with the unanimous trend in all the other states that have decided this issue, as well as with the United States Supreme Court. Unless

overturned by the New Jersey Supreme Court, the decision will open a Pandora's box of issues. For example, would an association's community room that historically only has been open to members now be required to be open to the public? Could the public have a right to equal access with association members to the association's newsletter? Would members of a voluntary homeowners association now have constitutional due process rights with regard to their board's actions? Would non-members have such rights? Since municipalities have a constitutionally mandated obligation to provide affordable housing, would homeowners associations also have this obligation? Would (and should) homeowners associations have the benefits of the Constitution if the burdens of constitutional restraints are placed on them, *e.g.* would associations have the constitutional right to take the property of members through condemnation or pass criminal ordinances that courts would enforce?

Members of homeowners associations in New Jersey already have significant protections as a result of various statutes, the oversight of the Department of Community Affairs and our courts applying the business judgment rule to decisions of homeowners associations' boards. Adding another layer of constitutional standards on the private activities of homeowners associations concerning their own members simply is unnecessary and unwarranted. It would appear that the New Jersey Supreme Court recognized this when it denied the plaintiffs' petition for certification in which the plaintiffs argued the Constitution should be applied to the voting issues the plaintiffs raised, even though there is no question that the Constitution would govern such voting issues if a governmental entity were involved. It remains to be seen whether New Jersey will become the only state in the coun-

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try to hold a private homeowners association's rules for its own members to such constitutional standards. ☪

Endnotes

1. 383 N.J. Super. 22 (App. Div. 2006).
2. 383 N.J. Super. at 49.
3. 383 N.J. Super. at 43.
4. See, e.g., *Verna v. Links at Valleybrook Neighborhood Ass'n*, 371 N.J. Super. 77 (App. Div. 2004); *Walker v. Briarwood Condo Ass'n*, 274 N.J. Super. 422 (App. Div. 1994); *Chin v. Coventry Square Condo.*, 270 N.J. Super. 323 (App. Div. 1994).
5. *Owners of the Manor Home of Whittingham v. Whittingham Homeowners Ass'n, Inc.*, 367 N.J. Super. 314 (App. Div. 2004).
6. 84 N.J. 535 (1980).
7. 138 N.J. 326 (1994), *cert. denied*, 516 U.S. 812 (1995).
8. *Guttenberg Taxpayers & Rentpayers Ass'n v. The Galaxy Towers Condominium Ass'n*, 297 N.J. Super 404 (Ch. Div. 1996), *aff'd*, 297 N.J. Super. 309 (App. Div.), *certif. denied*, 149 N.J. 141 (1997).
9. 114 N.J. 589 (1989), *aff'g*, 224 N.J. Super. 515 (App. Div. 1988).
10. 114 N.J. at 590.
11. N.J.S.A. 45:22A-1, *et seq.*
12. N.J.S.A. 46:80-1, *et seq.*
13. N.J.S.A. 15A:5-1, *et seq.*
14. These states include Arizona, California, Colorado, Connecticut,

- Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Washington and Wisconsin.
15. See *Hudgens v. NLRB*, 424 U.S. 507 (1974).

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