

Twin Rivers: Bringing the NJ Constitution to Private Communities
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By Frank Askin

In the landmark opinion protecting freedom of speech and petition at New Jersey's shopping malls, Chief Justice Wilentz wrote:

We look back and we look ahead in an effort to determine what a constitutional provision means. If free speech is to mean anything in the future, it must be exercised at these [shopping] centers. . . . {i}f the people have left for the shopping centers, our constitutional right includes the right to go there too We do not believe that those who adopted a constitutional provision granting a right to free speech wanted it to diminish in importance as society changed, to be dependent on the unrelated accidents of economic transformation, or to be silenced because of a new way of doing business. (1)

The Court thus held that the people could enforce rights of speech and petition guaranteed by Article 1, ¶¶ 6 and 18 of the State Constitution directly against privately owned and operated malls which had effectively replaced the old town squares as centers of public congregation and discourse. (2) That decision expanded a line of cases dating to the Seventies in which the Court had ruled that fundamental rights enshrined in the New Jersey Constitution applied not just to governmental actors but also to certain private entities which exercised dominion over persons who had been invited on to the property. (3)

The case of *The Committee for a Better Twin Rivers v. The Twin Rivers Homeowners Assn.* (4), which is scheduled for review by the New Jersey Supreme Court this fall, involves the application of fundamental-rights provisions of the State Constitution to *private* community associations, which now number in the thousands in the state and are home to more than a million Jerseyans.

Twin Rivers is a sprawling community of some 10,000 residents in East Windsor, Mercer County, living in 3,000 dwelling units which include condos, apartments, town houses and free-

standing homes. It is governed by a 9-member elected Board of Directors which operates a \$3.5 million annual budget and oversees many traditional municipal functions.

The complaint, filed in December 2000 in Mercer County Chancery Division, challenged four major aspects of Twin Rivers' governance under the State Constitution: (1) a prohibition against posting of political signs on residents' lawns and in common areas; (2) an excessive fee for rental of the community room for public meetings; (3) the partisan use of the monthly community newspaper by the Board; and (4) a system of weighted voting for the Board of Directors..

Plaintiffs' constitutional arguments rested on the shopping mall decision and the intervening Appellate Division decision in *Guttenberg Taxpayers and Rentpayers Assn. v. The Galaxy Towers Condominium Assn.* (5), which held that the Galaxy Towers had to allow access to opposition candidates to enter the three high-rise residential buildings to distribute literature in the building so long as the board actively campaigned for candidates for election to town offices. In *Galaxy Towers*, the Appellate Division had warned that the buildings could not be a "political isolation booth" in which only one side of an electoral debate could be heard. (6) Presumably, the opinion left it open for the Galaxy to bar access to outsiders so long as it discontinued its own political campaigning in the buildings.

The Twin Rivers defendants attempted to distinguish *Coalition* and *Galaxy Towers* on essentially two grounds: (1) Twin Rivers, unlike shopping malls, had extended no public invitation to strangers to come onto the property; and (2) Twin Rivers residents had waived any constitutional rights which they might otherwise have had by purchasing property with either actual or constructive knowledge of pre-existing easements.

The trial court accepted both of those arguments and awarded summary judgment to the

defendants on all of the constitutional issues. The court ruled that the actions of the homeowners' board were to be governed by the business judgment rule, not the New Jersey Constitution.

Federal Constitution Unavailable

It is important at this point to note that because of decisions of the United States Supreme Court that post-date the (Earl) Warren Era, Plaintiffs in these cases can claim no rights under the First Amendment of the Federal Constitution. With the change in the make-up of the Court following the election of Richard Nixon as President in 1968, earlier decisions generally labeled as public-function cases were overruled either overtly or *sub silentio*, and private property recovered its legal sanctity when it came into conflict with fundamental individual rights.

Thus, in 1976, the new Nixon Court majority directly overruled a 1968 opinion written by Justice Thurgood Marshall which had held -- as Chief Justice Wilentz was to write nearly 30 years later -- that suburban shopping malls had become the new town squares and would be considered public forums under the First Amendment. (7) The result of that decision was to also effectively overrule the landmark 1946 decision in *Marsh v. Alabama* (8), the company-town case, which was the foundation of the public-function doctrine on which the shopping mall case rested.

The new conservative principles reinstated older notions of the state-action doctrine that restricted the reach of federal constitutional standards to actions of entities clearly operating under color of law.

No State-Action Doctrine in New Jersey

New Jersey has long rejected an arbitrary division between public and private action. As far back as 1971, without even invoking the State Constitution, our Supreme Court held that

when human rights came into conflict with property rights, the former was preeminent. In a case involving the right of social service workers to enter a private farm to provide public information to migrant laborers who were being housed there, the Court intoned:

Property rights serve human values. . . . Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law. (9)

That decision was followed in 1980 by *State v. Schmid*, which involved the prosecution for trespass of a leafleter on the Princeton University campus.(10) That was the case in which the Court formally announced that the New Jersey constitution, unaffected as it was by concerns of federalism, had no state-action doctrine, and reached the actions of some private entities as well as governmental actors. (11)

Schmid formally established a tri-partite test to determine when property owners/managers had to accommodate the rights of others lawfully on the property without providing much guidance as to how the three parts interacted with each other: (1) the nature of the invitation to use the property; (2) the principle or normal use of the property; and (3) the compatibility of the normal use and the proposed use.

Applying that test in *Coalition*, the Court noted that the public invitation to come to the malls was unlimited (except possibly for expressive purposes) and the normal use of the property included much more than commercial activity – listing as an appendix to the opinion the wide variety of exhibitions, shows, meetings and other public events that transpired each year on the property of the ten defendants – plus an implied invitation to meet friends and hang out. It was emblematic of the case – as pointed out by Justice O’Hern at oral argument – that one of the defendants denominated itself as Rockaway Townsquare Mall. They couldn’t have it both ways!

Chief Justice Wilentz, in his opinion, said that the tri-partite test of *Schmid*, was only one

application of a general balancing test of free speech vis-a-vis property rights under the New Jersey Constitution, which he held incorporated the federally-abandoned doctrine of *Marsh v. Alabama* that “the more an owner, for his advantage, opens up his property for use by [others], the more do his rights become circumscribed by the rights of those who use it.” (12)

The Appellate Division recognized the applicability of the *Marsh/Coalition* principles to residential communities in the *Galaxy Towers* case.

Strangely, the 80-page trial court opinion in *Twin Rivers* never once mentioned *Galaxy Towers*, although Plaintiffs had heavily relied on it! The Appellate Division dismissed the trial court ruling as follows:

The motion judge in this matter did not consider the impact of the holdings in *Schmid* and *Coalition*, except to observe that Twin Rivers was ‘no more a municipality’ than was a university or a mall. He did not adequately address plaintiffs’ argument that, even if Twin Rivers is viewed solely as private property, the TRHA can be required to allow free speech and other expressive exercises, as broadly guaranteed in the New Jersey Constitution even as to non-governmental actors, when the public interest weighs more heavily in the balance than the private property rights involved. (13)

The opinion analogized the relationship of community associations to traditional municipal governance in a manner similar to that which the Supreme Court had analogized shopping centers to the old town squares in *Coalition*:

The manner and extent to which functions undertaken by community associations have supplanted the role that only towns or villages once played in our polity mirrors the manner and extent to which regional shopping centers have become the functional equivalents of downtown business districts. “Common interest developments are the fastest growing form of housing in the United States.” (14)

As to the argument that Twin Rivers had issued no public invitation to strangers to come on its property, the opinion noted that this case involved not strangers to the property but residents thereon: “Any person is free to accept Twin River’s invitation to purchase or rent property in that community . . .”

And the Court then added: “[T]hat choice cannot be at the expense of relinquishing what the New Jersey Constitution confers.” (15)

On that latter point, the Appellate Division appeared to concur with the dissenters in a recent 4-3 decision of the California Supreme Court in a case involving the right of tenants to distribute leaflets under their neighbors’ doors in a high-rise apartment building. (16) In that case, the majority appeared to cut back on California’s equivalent to *Coalition, Robins v. Pruneyard Shopping Center* (17) by holding that the apartment owners had not extended a public invitation to enter the building. The three dissenters discredited that notion by pointing out that the plaintiffs had been *invited* to live on the property.

No Waiver of Rights

The Appellate Division also soundly rejected the defendants’ waiver argument:

We reject the notion that a community association’s suppression of its own members campaigns for election to the board of that association or any other expressive exercise relating to life in the community or elsewhere should be regarded as matters of contractual right or business judgment. In the exercise of fundamental rights, we discern no principled basis for distinguishing between the general public at large and the members of a community association. Because of the broadly applicable rights guarantees contained in the New Jersey Constitution, 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. (18)

Defendants had also strenuously argued that Twin Rivers residents voluntarily buy homes in such a community precisely because they want to live under such regimes with their rigid rules and regulations. However, that contention was seriously undercut by evidence introduced at trial concerning the housing market in the Twin Rivers area. The data involved the homes listed for sale by the Delaware Valley Multiple Listing Service in the East Windsor Area for a typical day in 2003. Of the 92 listings on that day, 68 required membership in a condominium association, a homeowners association or both. Of the 24 listings with no

membership requirement, the lowest asking price was \$239,000. By contrast, the overwhelming majority of listings that required association membership was below \$200,000. The conclusion of plaintiffs from that data was that Twin Rivers purchasers buy homes there *despite* the restrictions, not because of them – because they are seeking affordable housing.

The Court's Decision

The Appellate Division declined to rule finally on plaintiffs' constitutional claims, but remanded to the trial court "for reconsideration under the proper (constitutional) standard of the claims based upon the expressive rights guarantees of Article I, ¶¶ 6 and 18." (19) Thus, barring reversal by the Supreme Court, it will be for the trial court to determine what kind of reasonable "time, place and manner" regulations the TRHA may apply to sign-posting, rental of the community room, and access of opposing viewpoints to the community newspaper. (20)

The Court ruled against plaintiffs on one of their constitutional claims – Twin Rivers' weighted voting system under which the election of Directors is based upon property values, with owners voting the assessed value of their properties. The opinion provides little explanation as to why constitutional standards were not equally applicable to the electoral system. The Court quoted the trial court opinion on the issue at great length, including its conclusion that the "business judgment rule" was the appropriate standard to govern such provisions. (21) The Appellate Division then cryptically added:

The arguments advanced by plaintiffs import to elections in community associations the standards heretofore applied only in public sector elections. Without a basis in legislation, it is beyond our authority to effect such a change in the relationships between community associations and their members. (22)

There is no hint why the same balancing test of public versus private interests should not be applied to the fundamental issue of electoral democracy as to other fundamental constitutional

rights.

Interested parties all over the country are awaiting the final word from the New Jersey Supreme Court. More than 50 million Americans live in common interest communities, and many of them are hoping their state courts will adopt the reasoning of the New Jersey Appellate Division -- assuming that reasoning is endorsed by the Supreme Court. The Community Associations Institute, the trade association that represents common interest communities and their managers, has already filed an Amicus brief on behalf of the defendants. A brief supporting the decision of the Appellate Division is being prepared by the AARP, an association representing 34 million senior citizens, many of whom reside in adult communities governed by elected boards. The stakes are high for both sides.

End Notes

(1) *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 138 N.J. 326, 370 (1994).

(2) *Id.* at 357-61.

(3) *State v. Shack*, 58 N.J. 297 (1971); *State v. Schmid*, 84 N.J. 535 (1980), *cert. den.*, 451 U.S. 982 (1981).

(4) *Committee for a Better Twin Rivers v. Twin Rivers Homeowners Ass'n.*, 383 N.J. Super. 22 (2006), *certif. granted*, 186 N.J. 608 (2006).

(5) 297 N.J. Super. 309 (App. Div. 1996), *aff'g* 297 N.J. Super. 404 (Ch. Div. 1996), *on remand from* 296 N.J. Super. 101 (App. Div. 1995), *certif. den.* 149 N.J. 141 (1997).

(6) 296 N.J. Super, at 106.

(7) *Hudgens v. NLRB*, 424 U.S. 507 (1976).

(8) 326 U.S. 501 (1946).

(9) *State v. Shack*, 58 N.J. 297, 303 (1971).

(10) 84 N.J. 535 (1980).

(11) *Id.* at 559.

(12) 138 N.J. 1t 362-63, quoting 326 U.S. at 506.

(13) 383 N.J. Super. at 44.

(14) *Id.* at 43, citing *Mulligan v. Ppanther Valley Property Owners Ass'n*, 337 N.J. Super. 293, 301 (App. Div. 2001).

(15) 383 N.J. Super. at 47.

(16) *Golden Gateway Center v. Golden Gateway Tenants Asas'n*, 29 P. 3d 797 (2001).

(17) 592 P. 2d 341 (1979).

(18) 383 N.J. Super. At 49.

(19) *Id.* At 60.

(20) *Id.*

(21) *Id.* at 67.

(22) *Id.* At 68.