

N.J. Supreme Court: Condos cannot restrict free speech

Chief Justice Stuart Rabner and a unanimous New Jersey Supreme Court have issued a virtual emancipation proclamation for the million and a half residents of New Jersey's 6,400 common-interest communities — condominiums, homeowners' associations and co-op residences required by state law to elect their own governing boards.

In most of the United States, governance of such communities is mostly unregulated because they are considered private property, beyond the reach of the Constitution. New Jersey is unique because the state Supreme Court ruled 30 years ago that our state constitution has no state action requirement, meaning that its protection of private rights can reach certain private entities that encroach on individual rights, such as freedom of speech.

The major application of this principle resulted in a 1994 Supreme Court decision that the state's shopping malls were quasi-public forums that had to let nonprofit advocacy groups petition and leaflet on the privately owned grounds under reasonable regulations. In so doing, the court established a formula to determine when private property had been opened to the public exercise of free speech. That formula involved a test that focused on a public invitation to use the property.

Since malls in New Jersey had essentially replaced public squares, the court ruled the malls had deliberately opened themselves to public activity beyond shopping, and that petitioning was not incompatible with normal use.

When the Supreme Court partially extended this principle to common-interest communities in 2010, it attempted to follow the test set out in the shopping mall case. That was not an easy fit. The associations objected, insisting they hadn't invited the general public onto their property. The court ruled the test would still apply, even though the case involved not outsiders, but residents of the community who were invited to dwell there.

It was like trying to fit a square peg into a round hole. The court recognized the problem, and in a somewhat irreconcilable conclusion, announced that the ruling did not mean that residents of such communities did not have rights under the state constitution.

The contradictory aspects of the decision in the Twin Rivers case left associations and their lawyers uncertain of the kinds of rules they could enforce against their members. In a case arising in Mazdabrook Commons in Parsippany, the court ruled that a homeowner who was running for county freeholder could post a political sign on his house despite a community rule forbidding such signs without consent of the governing board. The court there emphasized that the homeowner's interest in free speech and control over his property outweighed the interest of the association in enforcing its rules. In so doing, the court seemed to ignore the public invitation prong of the governing formula, causing more confusion in the legal community.

Along came the *Dublirer* case. Robert *Dublirer*, a retired New York attorney, was a resident of a 483-unit high rise co-op building in Fort Lee. *Dublirer* was a critic of the governing board, published his own in-house newsletter critical of board decisions, and decided to run for a seat on the governing board. Pursuant to a house rule, he was forbidden to put his newsletter (or any other printed material) under his neighbors' doors.

Earlier this month, Rabner and the court took the occasion to clarify the law and end the confusion caused by the *Twin Rivers* opinion. Distinguishing the shopping mall case, the court declared: "When the governing board of a common-interest community attempts to restrict speech by its fellow members ... the speakers are not outsiders; they live in the community and have both property and free speech rights there."

The opinion continued: "For these reasons, we now clarify the standard to evaluate restrictions on the right to free speech and assembly for residents of a private common-interest community. In those instances, the courts should focus on 'the purpose of the expressional activity undertaken' in relation to the property's use."

Thus, the court squared the circle and got rid of round pegs.

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