IN THE

Supreme Court of New Jersey

No. 59,230

COMMITTEE FOR A BETTER TWIN RIVERS (CBTR), DIANNE McCARTHY, HAIM BAR-AKIVA, and BRUCE FRITGES,

Plaintiffs-Respondents,

v.

TWIN RIVERS HOMEOWNERS' ASSOCIATION (TRHA), TWIN RIVERS COMMUNITY TRUST (TRCT), and SCOTT POHL (TRHA PRESIDENT),

Defendants-Petitioners.

ON CERTIFICATION FROM A FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION (NO. A-4047-3T2)
(KESTIN, P.J.A.D., LEFELT, J.A.D., AND FUENTES, J.A.D.)

BRIEF OF AMICUS CURIAE PUBLIC ADVOCATE OF NEW JERSEY

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INTEREST OF THE AMICUS CURIAE

The Department of the Public Advocate was reconstituted as a principal executive department of the State on January 17, 2006, pursuant to the Public Advocate Restoration Act of 2005, P.L. 2005, c. 155. The Department is authorized by statute to "represent the public interest in such administrative and court proceedings . . . as the Public Advocate deems shall best serve the public interest." N.J.S.A. 52:27EE-57. The statute defines "the public interest" broadly, as an "interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A. 52:27EE-12.

The issue presented by this case is of great public importance. That issue is whether, and to what extent, the state Constitution's guarantees of free expression and association limit the authority of a private community association to make and administer rules for that community.

The case raises significant questions about how to reconcile the expressive rights of residents of a private community with the private property interests of all the community's residents. Furthermore, it requires the Court to consider the extent to which a homeowners' association for a large private community might be considered the analogue of a municipal government; and

whether, in that circumstance, evaluation of its actions under the traditional "business judgment" rule must give way to state constitutional standards.

This case squarely presents these issues. The Appellate Division held that the Twin Rivers Community Association was a "constitutional actor" whose regulations, at least insofar as they impinged on its members' exercise of fundamental expressional rights, were subject to the state Constitution. It expressly rejected

> 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.

Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 383 N.J. Super. 22, 49 (App. Div. 2006).

This Court's resolution of that issue will have a significant statewide impact. According to data cited by the Appellate Division, more than one million New Jerseyans and 40 percent of the state's private residences are now governed by some form of private homeowners' association. See 383 N.J. Super. at 36-37.

It is therefore the judgment of the Public Advocate that this case implicates the "public interest." As the Appellate Division said below, "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." 383 N.J. Super. at 29.

STATEMENT OF THE CASE

This action challenges the validity, under the state Constitution, of certain rules and regulations enacted by the Twin Rivers Homeowners' Association, the entity that governs the private community of Twin Rivers. In particular, it seeks to establish that the association's rules governing signs, use of the community room, and access to the community newsletter violate the state constitutional guarantees of free expression and association. The expressive rights at issue here are fundamental. They involve an individual's right to express his opinion on matters of political, social, or community interest.

Were Twin Rivers a conventional municipality, subject to the first amendment, these rights would lie at that amendment's core: the protection of "uninhibited, robust, and wide-open" debate on public issues. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). That is particularly true of an individual's right to

post political signs, see City of Ladue v. Gilleo, 512 U.S. 43, 54-55 (1994), and his right of access to community facilities that have been dedicated to expressive and associational purposes, see Hague v. CIO, 307 U.S. 496, 515-16 (1939).

The Appellate Division held that the state constitution applies to TRHA's speech regulations. The court explicitly analogized the TRHA to a municipal government and, despite TRHA's status as a private corporation, rejected its argument that the "business judgment rule," rather than Article I, paragraph 6, of the state constitution, should be the standard against which its regulation of residents' speech should be judged. See 383 N.J. Super. at 43-49.

On April 28, 2006, this Court granted the TRHA's petition for certification, and, on the same day, denied plaintiffs' petition for cross-certification. On November 9, 2006, it granted the Public Advocate's petition to participate as amicus curiae, limited to the filing of a brief.

In this brief, the Public Advocate argues that the Appellate Division's decision should be sustained insofar as it applies the state constitution to the TRHA regulations governing expression. This Court should recognize, and afford state constitutional protection to, the expressive interests at stake in this case. Vindication of these expressive interests is crucial to the political and social health of private communities in this state;

defendants' arguments, if accepted, would eviscerate those interests in ways inimical to the public good.

This brief addresses four discrete aspects of defendants' argument that the state constitutional guarantee of free expression does not apply to Twin Rivers.

First, defendants contend that the state constitution has no application to regulations imposed by a private homeowners' association. On the contrary, homeowners' associations have steadily expanded their role as "private governments" – and especially their regulatory control over residents' ability to speak, to meet, to interact, and to make their views and opinions known to their neighbors and to the community at large. This development raises issues of constitutional dimension and demands constitutional restraints on the conduct of the associations and concomitant protections for the residents. Defendants argue that a 17-year-old per curiam decision of this Court, Bluvias v. Winfield Housing Corp., 114 N.J. 589 (1989), controls this case and compels rejection of plaintiffs' position. That contention is incorrect. Bluvias is not binding precedent on the facts of this case.

Second, defendants seek to limit the scope of this Court's holdings in State v. Schmid, 84 N.J. 535 (1984), and New Jersey Coalition Against the War in the Middle East v. J.M.B. Realty Corp., 138 N.J. 326 (1994), so they do not apply to this case.

Defendants suggest these cases apply only to private property owners who have "opened" their property for expressive purposes to members of the general public. But this factual distinction, which amicus concedes, should not prevent the Court from applying Schmid and its progeny to this case. As residents of Twin Rivers – as opposed to non-residents seeking access – plaintiffs are more rather than less entitled to the constitutional protections against private action first enunciated in Schmid.

Third, defendants posit a series of adverse consequences that will ensue if the Court subjects TRHA to the state constitution. That prediction is ill-founded and rests on a gross overstatement of plaintiffs' claim. Moveover, it ignores this Court's capacity – already demonstrated in the J.M.B. decision – to craft an appropriate remedy, one that renders defendants' fears illusory.

Fourth, defendants trumpet the "content neutrality" of TRHA's sign regulations as a basis for sustaining them, and as proof of the effectiveness of TRHA's private regulatory regime. But their ostensible neutrality does not save these regulations, for they amount to a ban on effective political speech. The critical importance of residential signs as an expressive medium underscores the necessity for their constitutional protection.

STATEMENT OF THE FACTS

Amicus adopts the statement of the facts submitted by plaintiffs in this matter.

ARGUMENT

I. Because The Twin Rivers Homeowners' Association Functions As A Private Government, The State Constitution Should Constrain It In Regulating The Free Speech Of Residents.

As the record in this case reveals, both nationally and in New Jersey, the past 40 years have seen enormous growth and development of private communities in New Jersey, and of the myriad ways in which these community associations have come to affect the lives of their members. As more people come under the regulatory authority of homeowners' associations, and as those associations assert increasing control over the basic expressive and associational rights of their residents, the imperative to extend constitutional protections to these communities grows as well.

Nationally, more than 42 million people live in community associations. 383 N.J. Super at 36. The estimated number of such associations grew from 10,000 in 1970, to 130,000 in 1990, to 150,000 in 1992. In 2000, the number was estimated at 225,000 and in 2006, 286,000. Community Association Institute, Data on U.S. Associations, http://caionline.org/about/facts,cfm; see Ewan McKenzie, Privatopia: Homeowner Associations and the Rise of Residential Private Government at 11 (Yale 1994).

In New Jersey, more than one million persons, representing 40% of private residences, are governed by community or homeowners' associations, according to Edward Hannaman of the state Department of Community Affairs' Planned Real Estate Development Unit. In 2002, in a paper presented at the Rutgers Center for Government Services,[1] Hannaman noted the following:

- Since 1978, New Jersey has registered 3,550 "developments," see N.J.S.A. 45:22A-23(h), containing 375,000 units and has exempted 9,200 developments containing approximately 119,000 units.

- The 494,000-unit figure undercounts the number of common-interest units in the state, since it excludes developments constructed before the advent of the Planned Real Estate Development Full Disclosure Act (PREFDA), N.J.S.A. 45:22A-21 et seq. Hannaman estimates that an additional "tens if not hundreds of thousands of units" should be added to the 494,000 total.

- Between 1978 and 2001, the number of units governed by homeowners' associations increased by an average of 33,000 each year.

Hannaman also noted the ever-increasing regulatory role of associations, reflected in the burgeoning number of complaints his unit receives. As he put it:

> It is obvious from the complaints that owners did not realize the extent association rules

[1] This paper is in the record at Pa231-241.

> could govern their lives. This is especially true in individual lot associations in which the board is formally granted only common area jurisdiction but can enforce bylaws providing a myriad of restrictions on private property use and even individual conduct.

Pa237. These "regulatory" complaints concern issues that do not fall within the DCA's statutory bailiwick. See N.J.S.A. 45:22A-32. Rather, they involve matters, such as the restrictions on speech and association at issue in this case, that compel the analogy between homeowners' associations and municipal government and that implicate the state constitution's commitment to free expression.

The legislature has recognized "the increasingly governmental nature of the duties and powers ascribed to the homeowners' association board." Pa439, Report of the Assembly Task Force to Study Homeowners' Associations at 2 (1997). Moreover, the expanded regulatory regime reflects a trend that encompasses not just the state, but the nation. See Paula Franzese, Privatization and Its Discontent: Common Interest Communities and the Rise of Government for "the Nice", 37 Urban Lawyer 335 (2005); see also McKenzie, supra at 15-18, 122-40.

When homeowners' associations function as private municipal governments, and seek to restrict their residents' fundamental rights to free expression and association, they should be subject to the constraints of the state Constitution.

Defendants suggest this Court's per curiam decision in Bluvias v. Winfield Mutual Housing Co., 114 N.J. 589 (1989), forecloses this result. The suggestion is incorrect. Bluvias is fully distinguishable on its facts. It involved a housing cooperative that exercised no regulatory control over the free expression of its members. The rights at issue there – limitations on residents' ability to sell cooperative property – were economic, not fundamental. See Brown v. City of Newark, 113 N.J. 565, 572, 574 (1989). The Bluvias Court's two-paragraph opinion, dismissing the appeal for want of a constitutional question, held only that the corporation did "not exercise the governmental powers of the community" and that Winfield was not "a company town." 114 N.J. at 590 (citing Marsh v. Alabama, 326 U.S. 501 (1946)).

In contrast, the Appellate Division found here that the Twin Rivers Homeowners' Association, and homeowners' associations in general, have increasingly come to "supplant[] the role that only towns or villages once played in our polity." Committee for a Better Twin Rivers, 383 N.J. Super. at 43. It therefore concluded that "fundamental rights exercises, including free speech, must be protected as fully as they always have been, even where modern societal developments have created new relationships or have changed old ones." Ibid. Thus, this case differs from Bluvias in two dispositive respects: here, the homeowners'

association functions as a municipality, whereas there the cooperative did not; and here, the association seeks to silence its residents, whereas there, the cooperative had imposed restraints on the alienation of members' property.

"Cases state principles but decide facts, and it is only the decision on the facts that is binding precedent." Feldman v. Lederle Laboratories, 97 N.J. 429, 455 (1984), (citing Konrad v. Anheuser-Busch, Inc., 48 N.J. Super. 386, 388 (Law. Div. 1958)); see also Dixon v. Jacobsen Mfg. Co., 270 N.J. Super. 569, 584 (App. Div. 1994). The issue presented by this case was not squarely – or even indirectly – presented in Bluvias. Accordingly, the Court should reject defendants' invitation to rely on Bluvias to decide this case.

II. That Plaintiffs Are Twin Rivers Residents, Rather Than "Invitees" From The General Public, Makes Application of The State Constitution More Rather Than Less Appropriate.

In State v. Schmid, supra, this Court held that in certain circumstances, the free speech guarantee of Article I, Paragraph 6, of the state constitution[2] prohibits private restraints on free expression. The Court reaffirmed and extended that holding in New Jersey Coalition Against the War in the Middle East v. J.M.B. Realty Corp., supra.

[2] "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the

In Schmid, the Court set forth the "relevant considerations" that governed whether, and to what extent, the state constitution's right of free speech existed on privately owned property:

> This standard must take into account (1) the nature, purposes, and primary use of such private property, generally, its "normal" use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property. This is a multi-faceted test which must be applied to ascertain whether in a given case owners of private property may be required to permit, subject to suitable restrictions, the reasonable exercise by individuals of the constitutional freedoms of speech and assembly.

84 N.J. at 563.

In this case, defendants' principal contention is that plaintiffs do not share the constitutional right of expression on private property this Court established in State v. Schmid. The crux of the argument is defendants' claim that Twin Rivers has not "opened" its property to "general public use" and therefore plaintiffs cannot satisfy the second "prong" of the "test" by which Schmid determined the right's existence.

That argument misapprehends the fundamental significance of Schmid, and of the constitutional principle it establishes. Moreover, it contorts the basic factual difference between the

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liberty of speech or of the press." N.J. Const. (1947) art. I, ¶

Schmid line of cases and this case. Schmid and J.M.B. involved members of the public seeking access to someone else's private property for expressive purposes. This case involves Twin Rivers residents – individuals who already have access to the property – seeking to use that property for expressive purposes.

Defendants claim Twin Rivers has not opened its property for general public use.[3] They then reason that because the community has not invited the general public to express themselves on their property, residents can have no such expressive rights.

That argument reverses the hierarchy of constitutional entitlement. If, as plaintiffs contend and amicus agrees, Twin Rivers functions like a municipality when it regulates speech, then plaintiffs' status as residents should moot any necessity of determining whether non-residents have a right to speak on the property. Accordingly, the relevant question here is not whether Twin Rivers has "invited" the general public onto its property. It is whether, as a valid condition of choosing to live in Twin Rivers, residents must surrender rights of free expression they would otherwise possess.

In that context, it makes little sense to ask whether Twin Rivers has opened its property to public use, much less to make the existence of plaintiffs' constitutional rights contingent on

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[3] The record is not entirely clear on that point but amicus will accept it for purposes of this argument.

that general invitation. Plaintiffs' rights to express themselves on what is essentially their property cannot be made to turn on whether non-residents have a right to express themselves there.

A more appropriate factual paradigm for this issue can be found in State v. Shack, 58 N.J. 297 (1971). Although it was decided on common law, rather than constitutional, grounds, Shack presents a close analogue to this case. There, as here, a property owner (a farmer named Tedesco) asserted his property right to prohibit residents (his migrant farmworkers) from exercising fundamental rights (privacy and freedom to associate) on his farm.

In determining whether the assertion of private property rights could trump the assertion of individual rights, this Court eschewed a resort to labels and formal "tests":

> We see no profit in trying to decide upon a conventional category and then forcing the present subject into it. That approach would be artificial and distorting. The quest is for a fair adjustment of the competing needs of the parties, in the light of the realities of the relationship between the migrant worker and the operator of the housing.

58 N.J. at 307. Under that approach, the balance of interests tipped decisively in favor of the individual's rights. "[T]he employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens. These rights are too fundamental

to be denied on the basis of an interest in real property and to fragile to be left to the unequal bargaining strength of the parties." Id. at 308.

This approach is truer to the principle that animates Schmid and J.M.B. than is defendant's attempt to force this case into an inappropriate analytical framework. As those cases made clear, in these situations the "ultimate" determinant of state constitutional protection is "the general balancing between private property rights and expressional rights." J.M.B., 138 N.J. at 362; see Schmid, 84 N.J. at 560-62; see also Green Party of New Jersey v. Hartz Mountain Industries, Inc., 164 N.J. 127, 148 (2000). The Court in J.M.B. put it this way:

> In New Jersey we have an affirmative right of free speech, and neither government nor private entities can unreasonably restrict it. It is the extent of the restriction, and the circumstances of the restriction that are critical, not the identity of the party restricting free speech.

138 N.J. at 369.

Here the extent and circumstances of the restrictions are dispositive. Plaintiffs' status as residents strengthens their claim for constitutional protection of their expression. Twin Rivers can no more require its residents to surrender their speech rights as a condition of living in the community than Tedesco could require his migrant workers to surrender their

rights of privacy and association as a condition of working on his farm.

The opinion below recognizes this fact. The court predicated its decision upon a balance of interests that recognizes the strength of plaintiffs' constitutional claim:

> Any person is free to accept Twin Rivers' invitation to purchase or rent property in that community; that choice cannot be at the expense of relinquishing what the New Jersey Constitution confers.

383 N.J. Super. at 47. This Court should affirm both the reasoning and the result of the appellate division on this point.

III. The Court's Power To Craft An Appropriate Remedy Renders Illusory Defendants' "Parade of Horribles."

Defendants suggest that applying Article I, Paragraph 6, to TRHA's restraints on speech will trigger a wholesale application of the state constitution to private communities, and predict "chaos" as the result.

The prediction rests on a false premise: application of Article I, Paragraph 6, to TRHA's speech regulations does not automatically subject every private community in the state to the entire state constitution. The only constitutional issue before the Court concerns the applicability of the free speech clause to TRHA's regulations, and turns on the specific balance between property and speech interests implicated on these facts. See Green Party, 164 N.J. at 148-49.

Even with respect to that issue, there is no danger that "chaos" would follow an affirmation of the Appellate Division's holding. On numerous occasions this Court has demonstrated both the authority and the capacity to craft a state constitutional remedy appropriate to the particular case, and the particular interests involved. See, e.g., Lewis v. Harris, 188 N.J. 415 (2006)(same-sex unions); Abbott by Abbott v. Burke, 119 N.J. 287, 385-88 (1990)(school funding disparities); Oakwood at Madison, Inc. v. Madison Twp., 72 N.J. 481, 549-51 (1977)(builder's remedy for exclusionary zoning).

In fact, the Court has already demonstrated its ability, in cases dealing with free speech rights on private property, to fashion an appropriate remedy. For example, in J.M.B., supra, which involved leafleting at large shopping centers, the Court limited its holding both with respect to the type of property involved – large "regional shopping centers" - and the type of expressive activity protected – "leafleting and associated speech in support of, or in opposition to, causes, candidates and parties – political and societal free speech." See 138 N.J. at 373-74.

Moreover, the Court recognized the need for flexibility in this area, acknowledging the existence of "differences of degree" but indicating as well that such differences "can be of constitutional dimension":

> The list of "horribles" suggested by defendants as the inevitable consequence of our holding for other forms of private property should be dealt with now, rather than in some future litigation. No highway strip mall, no football stadium, no theater, no single huge suburban store, no stand-alone use, and no small to medium shopping center sufficiently satisfies the standard of Schmid to warrant the constitutional extension of free speech to those premises, and we so hold.

138 N.J. at 373.

The Court in J.M.B. also recognized that not every adjustment between expressive rights and property rights can be made with precision, or by decree. "Problems of this kind concerning regulation of free speech have traditionally been resolved either through discussions and negotiations between the citizens involved and the government, usually the police, and if unsuccessful, then resolved by courts and counsel." Id. at 378.

Similarly, in Green Party, supra, which dealt with the constitutionality of insurance requirements for shopping mall leafleters, the Court made clear that the viability of any particular insurance requirement depended on a careful accommodation of the costs and benefits of the expressive activity to both the speakers and the property owners. See 164 N.J. at 152-57.

That surgical approach is precisely what the Appellate Division called for in remanding this case.

> [W]e remand for reconsideration by the proper standard of the claims based upon the expressive rights guarantees of article I, ¶¶ 6 and 18. We recognize that such rights, while fundamental, are not absolute. They are subject to reasonable and proper limitations having to do with the time, place and manner of their exercise.

Committee for a Better Twin Rivers, supra, 383 N.J. Super. at 60 (citing J.M.B., 138 N.J. at 377-78; Schmid,.84 N.J. at 563-64). This Court should affirm, and reject defendants' exaggerated claim that application of the constitution spells the end of their community.

IV. Twin Rivers' Sign Regulations, Even If Content-Neutral, Amount To A Ban On Effective Political Speech.

As evidence of the efficacy of its regulatory regime, defendants point to TRHA's sign policy, which they claim is a reasonable, "content-neutral" restriction on residents' ability to post signs. Even if one accepts that claim, however, it does not validate the sign restrictions. To the contrary, it illustrates why these regulations, and TRHA's other restrictions on expression, must be made subject to the state constitution.

Signs, particularly yard signs posted by an individual community resident, are "a venerable means of communication that is both unique and important":

> Signs that react to a local happening or express a view on a controversial issue both reflect and animate change in the life of a community. Often placed on lawns or in windows, residential signs play an important

> part in political campaigns, during which they are displayed to signal the resident's support for particular candidates, parties, or causes. They may not afford the same opportunities for conveying complex ideas as do other media, but residential signs have long been an important and distinct medium of expression.

City of Ladue v. Gilleo, supra, 512 U.S at 54-55. See also State v. Miller, 83 N.J. 402, 413 (1980)("Adequate alternative means of political communication are not available to owners who are precluded from putting signs and posters in their yard.")

In Ladue, the Supreme Court considered the constitutionality of a municipal ordinance regulating signs. Even though the ordinance permitted some signs and prohibited others, the Court treated it as content-neutral. Nevertheless, it struck the ordinance down because it banned "too much protected speech." 512 U.S. at 51.

Ladue illustrates an important constitutional principle: some types of speech are so important that content-neutrality, or "reasonableness" of purpose, will not save a restriction that impinges too greatly on such speech. As Ladue points out, a governing standard of content-neutrality would permit a total ban on a particular form of speech. "Under the . . . content discrimination rationale, the City might theoretically remove the defects in its ordinance simply by repealing all of the exemptions." 512 U.S. at 53. Yet, even if they are content neutral or serve legitimate competing interests, restrictions

that "foreclose an entire medium of expression" engender "particular" constitutional concern. Ladue, 512 U.S. at 55; see also Schad v. Mt. Ephraim, 452 U.S. 61, 75-76 (1981)(concern with nudity does not justify total ban on live entertainment); Schneider v. State (Town of Irvington), 308 U.S. 147, 164-65 (1939) (concern with littering cannot justify total ban on handbilling).

Such regulations must be carefully and fully scrutinized because of the importance of the matter regulated and the sweep of the regulation. To allow them to stand is to risk silencing "too much" speech.[4]

TRHA's regulations amount to a ban on political signs. Although defendants claim political signs are allowed, in reality they are limited to small signs in flower beds, a restriction that renders them virtually invisible and that therefore effectively prohibits them. As this Court has noted:

> [S]ize limits, if any, must be large enough to permit viewing from the road, both by persons in vehicles and on foot. Inadequate sign dimensions may strongly impair the free flow of protected speech.

Miller, 83 N.J. at 416.

TRHA's regulations thus pose the same risk of banning "too much speech" as did Ladue's sign ordinance. The effect on

[4] This is not to say that every medium ban is unconstitutional. See Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (upholding for aesthetic purposes ban on signs

residents' expressive rights does not change, or diminish, simply because the regulator is a "private" rather than a "public" entity.

Moreover, content-neutral regulations must leave open "adequate alternative channels for communication." U.S. Postal Service v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 132 (1981). Here, TRHA has foreclosed a "unique and important" medium, residential signs at plaintiffs' homes, for which there is simply no adequate alternative. See Ladue, 512 at 54-55. Again, the private nature of the regulation does not lessen its impact.

When residents of a community are deprived of the ability to use their homes to make an effective political statement – on national, state, local or even community matters – the impact on the residents' speech rights is too significant to leave assessment of the restriction's viability to a rule that turns merely on "reasonableness," or "content-neutrality," or the absence of fraud or unconscionable conduct.

Accordingly, as this Court has noted in a related context, the "business judgment rule" is simply not "the proper standard" for making that assessment. Green Party, 164 N.J. at 147. The magnitude of the restrictions, and the importance of the rights

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attached to utility poles).

involved, require that the state constitution provide the measure of the regulations' validity.

This is true not only for TRHA's sign regulations, but also for the community room rules and the rules governing access to the community newspaper. Like the sign regulation, those rules involve significant rights, centering on equal access to community property that has been "dedicated" to expressive activity. See Galaxy Taxpayers and Rentpayers Ass'n v. Galaxy Towers Condominium Ass'n, 297 N.J. Super. 404 (Ch. Div.), aff'd 297 N.J. Super. 309 (App. Div. 1996); see also Rutgers 1000 Alumni Council v. Rutgers, 353 N.J. Super. 554, 573 (App. Div. 2002)(advertising section of university magazine is "limited public forum"). Plaintiffs' ability to exercise those rights must be judged by constitutional standards.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in plaintiffs' brief, the Court should affirm the decision of the Appellate Division insofar as it subjects the TRHA's regulations regarding signs, access to the community room, and access to the community newspaper to Article I, Paragraph 6, of the New Jersey Constitution.

Respectfully submitted,

DATED:

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