Procedural History

A Complaint was filed on December 8, 2000 by five individual members of the Twin Rivers Homeowners Association (TRHA)and the unincorporated Committee for a Better Twin Rivers(CBTR)in Mercer County Chancery Division against the TRHA, the elected governing body of the 10,000-member Twin River community in East Windsor, New Jersey; Scott Pohl, the president of the Association; and Jennifer Ward, the trust administrator. (Pa1) The court denied a restraining order sought by one of the Plaintiffs for a right to vote in the 2000 TRHA Board elections on December 11. The Complaint included nine counts, challenging various rules and regulations of the association under the New Jersey Constitution and the Planned Real Estate Development and Full Disclosure Act. (PREDFA), N.J.S.A. 45:22A, et. seq. An Amended Complaint was filed on February 13, 2001. (Pa19) Count 4 of the complaint (concerning the right of members to tape record meetings of the TRHA Board of Directors) was settled after the Board revised its rules to permit such taping. (Order of May 9, 2002, Pa855, ¶10) Plaintiffs voluntarily dismissed the Complaint against Ms. Ward. (Pa856, ¶11) Two of the Plaintiffs, Emily and Edward McDonald, were dismissed from the Complaint after they sold their home and moved from Twin Rivers (Pa856, ¶13)

Extensive pre-trial proceedings included the filing of expert reports and expert depositions (Prof. Evan McKenzie for Plaintiffs and Prof. Katherine Rosenberry for Defendants) and the depositions of all Plaintiffs and Defendants plus several non-party witnesses. (Plaintiffs took the depositions of Evan Greenberg, a member of the TRHA Board, and Raymond Dickey, the publisher of *Twin Rivers Today (TRT)*, the monthly newspaper of the TRHA. Defendants took the deposition of Al Wally, a non-party resident of Twin Rivers.) Discovery also included the exchange of Interrogatories and Production of Documents and lengthy sets of Admissions by both sides. (Pa142-170;

Pa171-212) The record was further supplemented by submissions of statistics from the Delaware Valley Multiple Listing Service on the housing market in the East Windsor area and Mercer County. (Plaintiffs' submission begins at Pa540 - attached to Lister certification.)

Cross-motions for Summary Judgment were filed in January and February, 2003. A hearing on those motions was heard by the Hon. Neil Shuster on September 30, 2003. Judge Shuster issued his Order (pa55) and an 80-page opinion on February 17, 2004 (Pa56-135), granting judgment to Defendants on Counts 1 (restrictions on signs), 3 (access to the community newspaper), 5 (inspection of Association records), 8 (denial of voting rights to members who fail to pay fines) and 9 (weighted voting for election to TRHA Board) of the Complaint; judgment to the Plaintiffs on Counts 6 (restricting speech of members of TRHA Board) and 7 (restriction on access to TRHA voting list), and partial judgment to the Plaintiffs on Count 2 (restrictions on access and use of Community Room.) Judge Shuster also denied standing to CBTR.

Statement of Facts About Twin Rivers and Its Governance[1]

Twin Rivers, founded in 1970, is the oldest planned unit development in New Jersey. Its co-founder, Jerry Finn, set out to create a town-like entity. Finn "envisioned it as a nineteenth century village with a mixture of homes, schools, churches, temples, stores, and light industry." (Pa243[2]) It has approximately 10,000 residents and more than 2,700 dwelling units of every size and style, "larger than many towns and

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[1] In an effort to conserve space and avoid redundancy, facts mainly relevant to specific rules and regulations of the association being challenged will be discussed in the Points related to those issues.

[2] Pa242-254 is a self-portrait of Twin Rivers taken from its internet site, twinrivers-nj.com.

municipalities located within [Mercer] County." (Pa360)[3]

Twin Rivers includes detached houses, townhouses, condominiums and apartment buildings and some 200 acres of parks and lawns. (Pa144, No. 1) It includes 31 miles of streets, 10 acres of sidewalks, 25 acres set aside for parking lots (Pa216) and 34 privately owned and maintained streets. (Pa405) Recreational facilities include green space, four pool complexes, tennis, handball and basketball courts, ball fields and playgrounds. (Pa242) Public services located within the community include a county library, two K-5 schools operated by the Township of East Windsor, a firehouse, a rescue squad and a house of worship. (Pa40, at ¶27) A state highway runs through the center of Twin Rivers into a downtown shopping district, which includes a bank, a veterinary hospital, a dry cleaner, a dance studio, doctor and dental offices, three gas stations, a bar and five restaurants. (Pa146-148, Nos. 14-22)

[3] Trial exhibit P6 (Pa270 to 395) is a compilation prepared by the TRHA entitled "Twin Rivers Community Trust Documents, Rules - Regulations - and Guidelines." See Pa360 at §6 - Resolution 95-12. According to the 2000 United States Census, Twin Rivers has a population greater than 327 of the 566 municipalities in New Jersey. (Pa396-404)

Twin Rivers, as described by its former administrator, operates as a "quasi-governmental entity" and is governed by an elected Board of Trustees which "operate[s] much like a Township Council" whose "[g]overnmental duties include the fiduciary responsibility to enforce the Trust documents as authored, to establish policy and to establish procedures to accomplish both." (Pa222[4]) As such, the Board makes and enforces community rules, provides services, assesses taxes on residents and exercises certain judicial authority over the violation of its rules. The Board's rule-making powers include regulation of conduct on common grounds, use of vehicles on trust property, procedures to be followed in snow emergencies and husbanding of pets. (See Pa317-385) The Board also exercises a quasi-zoning power controlling what residents may do with the physical structure of their homes. (Pa148-49, No. 25) The Board can assess penalties for infractions of its rules, including fines (Pa149, No. 27, and Pa152, No. 40); denial of the use of common facilities (Pa318-23) and even denial of the right to vote in Board elections (Pa167, No. 122)[5]

The Association also provides the following services to residents: trash removal, recycling, road repair and repaving of its privately owned roads and access roads, maintenance of 85 trust-owned parking lots, maintenance of the storm sewer system, street lighting, sidewalk and curb repair and replacement, snow removal, and tree and shrub replacement. (Pa387-88) The TRHA also sponsors community events, conducts

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[4] P1 is a document entitled "Twin Rivers A Planned Unit Development," dated January 1, 1989 and prepared by the then Administrator Joseph R. Vuzzo.

[5] The description of communities such as Twin Rivers concurs with the findings of The New Jersey Assembly Task Force to Study Homeowners Associations, which, noting the broad range of municipal-like powers they exercise and services they provide, described such associations as "quasi-governmental" entities. (Pa439-40) Even the Community Associations Institute, CAI, the trade association of which TRHA is a member, has conceded that "[i]n some respects, condominium associations have quasi-governmental attributes." (Pa465)

elections, and conducts architectural inspections. (Pa248-253)

The governmental functions are financed through mandatory assessments levied upon the members of the community pursuant to an annual budget adopted by the Board. (Pa152, Item 42) In 2001, the TRHA/Trust budget was $3.4 million. (Pa156, Item 63) A homeowner's failure to pay an assessment – like a taxpayer's failure to pay a property tax – results in the foreclosure of a lien against the property. (Pa152-53, Items 45, 46)

The governmental powers exercised by the Association are a direct result of authority bestowed by the State of New Jersey. The fines and penalties imposed by the TRHA for violations of rules are authorized by N.J.S.A. 46:8B-15.[6] Indeed, the TRHA itself is a creature of state law, since its establishment is required by N.J.S.A. 45:22A-43 The Planned Real Estate Development Full Disclosure Act (PREDFA)(requiring the developer of a planned real estate development to "organize or cause to be organized an association whose obligation it shall be to manage the common elements and facilities"). East Windsor's Planned Unit Development Ordinance also required the establishment of an association. (Pa507-17)

In other instances, the governing bodies of East Windsor and Twin Rivers act jointly in the exercise of governmental powers. For example, the East Windsor police enforce parking regulations enacted by the TRHA (Pa335; Pa153, No. 50); and certain

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[6] That statute was enacted by the Legislature in response to the decision in Walker v. Briarwood Condominium Assn., 274 N.J. Super. 422, 428 (App. Div. 1994), suggesting that the exaction of fines and penalties is a uniquely governmental function.

architectural changes require approval by both East Windsor and the TRHA. (Pa224; Pa506[7])

The symbiotic relationship between East Windsor and Twin Rivers is demonstrated in other ways. For example, Twin Rivers has ceded to East Windsor police patrolling, waste collection and animal control on TRHA property. (Pa153-54, Nos. 51-53.) In a tripartite exercise of governmental power, TRHA arranges for snow removal and street lighting on Twin Rivers private roads, but is reimbursed the cost by East Windsor pursuant to the State Condominium Services Act, N.J.S.A. 40:67-23.2 to 23.8. (Pa151, Nos. 35-36)

Even the New Jersey State Highway Department treats Twin Rivers a municipality. Highway signs at Exit 8 of the New Jersey Turnpike point the way to Twin Rivers and other municipalities. (Pa800; Pa764- Evan McKenzie dep. T141-3 to 17)

Twin Rivers is one in a proliferating network of private governments that blanket the State. As recently reported by Edward R. Hanneman, of the Bureau of Homeowner Protection of the New Jersey Department of Community Affairs:

> During the period from 1978 to 2001 the number of association residential units increased by an average of 33,000 each year ... A review of warranty data reveals that fully 40 per cent of all private residential construction necessitates the formation of associations. With a post 1978 base of about 494,000 units, obviously more than one million people reside in some type of New Jersey homeowner association.

(Pa235)

This case challenges, under the New Jersey Constitution and laws, the validity of certain rules and regulations adopted by the TRHA or included in its governing

[7] TRHA Architectural Control Standard, requiring that rear deck installations "be approved by the Trust prior to construction and East Windsor Twp. Building permit application."

documents as follows:

(1) The regulation forbidding the posting of political signs in Twin Rivers except for one small sign in the flower bed by a resident's home and signs in windows.

(2) An excessive fee for the rental by association members of the Community Room for meetings.

(3) The use of the community newspaper as a political weapon by the president of the Association and the refusal to provide some type of equivalent access to those whom the president denounces in print.

(4) The weighted voting scheme for Board elections which counts member's votes according to the value of their property. (5) The disfranchisement of members for failure to pay petty, disputed fines for rules violations.

(6) The denial of access by members to association financial documents.

ARGUMENT

Introduction

Homeowners in Twin Rivers may not display political signs on their lawns; must pay $165 (plus a refundable $250 deposit) in order to hold a public meeting at the community room maintained by the governing association; have a very restricted right of access for their views about community governance in the monthly governing-body newsletter, which the local elected leader uses as his personal soap box to denounce his political opponents; are disenfranchised if they contest the legality of a community regulation by refusing to pay a fine assessed for violation; and are subject to a weighted voting system in which the weight of one's vote is based on the value of one's property.

No such provisions could be constitutionally applied to Twin Rivers' neighbors in

other parts of East Windsor. The overriding issue that this case poses is whether residents abandon their constitutional rights when they cross the road to live in the Twin Rivers community.

Essentially, this case responds to the issue noted but not decided by the Appellate Division in Mulligan v. Panther Valley Property Owners Assoc., 337 N.J. Super. 293, 305 (2001), as to whether the defendant association "performed quasi-municipal functions, such that its actions perhaps should be viewed as analogous to governmental actions in some regards." The record in this case fills the gap that existed in the Panther Valley record, and requires that the Appellate Division's question be answered in the affirmative. See generally, Steven Siegel, The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After March v. Alabama, 6 Wm. & Mary Bill of Rts. J. 461 (1998).

I. WHEN EXERCISING DOMINION OVER PERSONS RESIDING WITHIN ITS BORDERS, THE TWIN RIVERS HOMEOWNERS ASSOCIATION/COMMUNITY TRUST MUST RESPECT FUNDAMENTAL RIGHTS GUARANTEED BY THE NEW JERSEY CONSTITUTION

Probably the most remarkable aspect of the trial court opinion is that not once in its 80 pages does the court ever mention the one case on which Plaintiffs squarely rely for the proposition that a residential community association may be subjected to constraints of the State Constitution, Guttenberg Taxpayers and Rentpayers Assn. V. The Galaxy Towers Condominium Assn., 297 N.J. Super. 404 (Ch. Div. 1296), on remand from 296 N.J. Super. 101 (App. Div. 1965), aff'd 297 N.J. Super. 309 (App. Div. 1006), certif. Den. 149 N.J. 141 (1997).

Following New Jersey Coalition Against War in the Middle East v. JMB Realty, 138 N.J. 326 (1994), holding that private shopping malls were subject to the free speech

provisions of the New Jersey Constitution, the Galaxy case applied the same principles to hold that the Galaxy Towers had to allow political candidates opposed to a slate supported by the condominium association to distribute their literature in the buildings "in essentially the same manner" as the association did. 297 N.J. Super. at 411. The court held that the State Constitution would not permit the Galaxy Towers to be a "political isolation booth." Id.

Indeed, the trial court hardly even acknowledged the Supreme Court's Coalition decision. In the 7-page exegesis as to why Twin Rivers was not a constitutional actor subject to the state constitution (Pa59-66), there is but one cryptic reference to Coalition, which defies analysis: "The community of Twin Rivers ... is no more a municipality than are malls [citing Coalition] or private universities [citing State v. Schmid, ...]" Of course, the court somehow loses sight of the fact that despite not being "municipalities" both the shopping malls and the Princeton University campus involved in Schmid, were found to be entities subject to the constraints of the New Jersey Constitution.

The trial court seems to have been lead astray by its confusion with the notion of Twin Rivers as a "quasi-municipality" with a "municipality," and its mistaken belief that Plaintiffs were arguing that Twin Rivers should be "required to respect *the same constitutional boundaries* that would be required of a municipality" (Pa59, emph. Supplied), and that the Constitution applies to Twin Rivers "in the *same way* it applies to state actors." (Pa60, emph. supplied) In fact, Plaintiffs specifically recognized in their trial brief that a "different standard had to be applied in cases involving 'government regulation of private property' [this case] ... than in cases where a court was prohibiting government infringement of constitutional rights." (Pa859, citing Green Party v. Hartz

Mountain Industries, 164 N.J. 127, 146-147 (2000).[8]

Although at times the Plaintiffs have used a short-hand reference to Twin Rivers as a "quasi-municipality," Plaintiffs spelled out in the very opening of their trial brief that "the term 'constitutional actor' will be used herein to indicate an entity, whether or not a state actor, which is subject to the constraints of the New Jersey Constitution." (Pa858, n.2) The record in this case overwhelmingly supports the proposition that the Twin Rivers Homeowners Association is a constitutional actor under the New Jersey Constitution.

[8] The Supreme Court held that when a court was restricting an owner's dominion over *private* property, as opposed to governmental property, the court must take into account the competing private interest "giving proper weight to the constitutional values." 164 N.J. at 148-49.

The trial court's misreading of prior New Jersey law is strikingly illustrated by its statement that "[t]here is no precedent for the concept that a homeowners' association could be a quasi-municipality" other than Plaintiffs' attorney own argument addressed by the Appellate Division in a prior case." (Pa60, citing Mulligan v. Panther Valley Property Owners Assoc, 337 N.J. Super. 293 (App. Div., 2001)[9] The only way the court could have come to that conclusion was by ignoring the opinion in Galaxy Towers, cited above, where a residential condominium was found to be a constitutional actor subject to the free speech provisions of the New Jersey Constitution. In Mulligan, the Appellate Division actually found the record to be insufficient to decide whether Panther Valley was a "quasi municipality." 337 N.J. Super at 305.

A. When Private Space Functions as Public Domain, the State Constitution Applies

Twin Rivers is a privately governed community that has substantially replaced the role of the municipality in the lives of its 10,000 residents. As such, Twin Rivers falls within the purview of New Jersey constitutional doctrine protecting the exercise of fundamental rights on property that functions as public space. Accordingly, the Twin Rivers Homeowners Association/Community Trust is a *constitutional actor* required to respect fundamental rights protected by the New Jersey Constitution when exercising dominion over persons residing within its borders.

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[9] The court was incorrect in stating that Plaintiffs attorney had been involved in the cited case, apparently confusing a different Panther Valley case in which he was. See Mulligan v. Brooks, 312 N.J. Super. 353 (App. Div. 1998).

As the New Jersey Supreme Court held in the Coalition case, the fact that more and more people are leading more and more of their lives on what is technically private property may not serve as an excuse for the diminution of their rights. 138 N.J. at 368. If fundamental rights are to endure, their substance must remain fixed as society changes. Today, people are spending more and more time in the private spaces known as community associations, which have become our new towns.[10]

Coalition involved a challenge by members of an advocacy group to the decisions of ten regional shopping mall owners to bar them from leafleting and petitioning on mall premises. In finding that the plaintiffs had a right to engage in such activities at the malls, the Court re-affirmed its commitment to the principle that in this State, a fundamental right endures even when the environment in which the right has typically been exercised changes.

The right implicated in Coalition was that of free speech. The issue was not, of

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[10] An estimate by an official of the New Jersey Department of Community Affairs places the number of New Jerseyans residing in some form of community association at over a million. (Pa235 – Report submitted by Edward R. Hannaman, Association Regulator in the Planned Real Estate Development Unit in the Bureau of Homeowner Protection of the State Department of Community Affairs, to March 19, 20002 conference sponsored by the Rutgers Center for Government Services on "State and Municipal Perspectives - Homeowners Associations.") See also, Paula Franzese, Does It Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community, 47 Villanova L. Rev. 553, 554-55 (2002) ("Once considered a remote alternative or the domain of the affluent, today condominiums, cooperatives, planned, walled and gated communities represent the main staple of suburban and metropolitan residential development across diverse economic strata." (footnotes omitted)

course, whether the plaintiffs had a right to distribute their materials to the public. The question was whether the right followed the plaintiffs onto the private property belonging to the mall owners. The Supreme Court ruled that it did:

> If constitutional provisions of this magnitude should be interpreted in light of a changed society, and we believe they should, the most important change is the emergence of these centers as the competitors of the downtown business district and to a great extent as the successors to the downtown business district. The significance of the historical path of free speech is unmistakable and compelling: the parks, the squares, and the streets, traditionally the home of free speech, were succeeded by the downtown business districts ... where that speech followed. Those districts have now been substantially displaced by these centers. If our State constitutional right of free speech has any substance, it must continue to follow that historic path. It cannot stop at the downtown business district that has become less and less effective as a public forum.

138 N.J. at 368. Downtown shopping districts, the Court reasoned, had been the primary locus of public activity and the primary forum for public speech at the time the New Jersey Constitution was conceived. However, the face of society had changed, in part due to the advent of regional shopping centers.

> Like many constitutional determinations, our decision today applies a constitutional provision written many years ago to a society changed in ways that could not have been foreseen.

Id. at 366-67. Similarly, the Founders could not have foreseen that the former public streets would become part of "private" community associations.

The doctrine invoked by our Supreme Court to shield our rights against encroaching privatization begins with the company town case, Marsh v. Alabama, 326 U.S. 501 (1946), in which the United States Supreme Court held that the town of Chickasaw, Alabama, which was owned entirely by a private corporation, could not bar Grace Marsh, a Jehovah's Witness, from distributing religious materials within community borders. Because Chickasaw had "all the characteristics of any other American town," the Court held that it was a state actor subject to the same

constitutional restrictions as a municipality, 326 U.S. at 502[11], and declared:

> In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties . . . .

326 U.S. at 509.[12]

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[11] See also Frank Askin, Free Speech, Private Space and the Constitution, 29 Rutgers L. J. 947, 948 (1998)("In essence, the Court held: if downtown Chickasaw looked like Main Street, walked like Main Street and quacked like Main Street, it was Main Street. The fact that the deed to the streets resided with the steel mill was just irrelevant.").

[12] The potential consequences of such unregulated private governance were prophetically warned about in Note, The Rule of Law in Residential Associations, 99 Harv. L. Rev. 472, 474-75 (1985):

> It takes little imagination to see expanded uses of the residential association. People may wish to build forms of community otherwise impossible in a society dominated by liberal social norms, by multifarious bureaucracies, by large and heterogeneous political subdivisions, and by a distant representative democracy in which professional politicians wield power. If unrestrained by external regulation, increasing numbers of illiberal political enclaves may arise as people establish concurrent , private governments renouncing the constitutional principles that structure public life and protect private activity in the surrounding community.

Beginning with the landmark case of State v. Schmid, 84 N.J. 535 (1980), cert. den. 451 U.S. 982 (1981), the New Jersey Supreme Court has incorporated the Marsh principle into the fabric of our constitutional jurisprudence.[13] Schmid involved the challenge by a leafleter to a Princeton University decision to exclude his activities from its campus. Our Supreme Court held that the New Jersey Constitution protected the rights of the plaintiff to leaflet on Princeton's campus, in spite of its finding that the campus was private property.

Having decided the case on State constitutional grounds, the Schmid Court did not reach the federal First Amendment question also raised by the plaintiff in that case. Nonetheless, the Court took a page from Marsh in arriving at its conclusion that "the

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[13] The Marsh doctrine underwent a lot of change in the years between 1968 and 1976. First, the United States Supreme Court expanded the reach of the doctrine to protect free speech in shopping centers. See Amalgumated Food Employees Union 590 v. Logan Valley Plaza, 391 U.S. 308 (1968). However, in Lloyd Corp v. Tanner, 407 U.S. 551 (1972), a changed Court balked at what it felt to be too expansive a read of Marsh. And in Hudgens v. NLRB, 424 U.S. 507 (1976), the Court flatly rejected its earlier, expansive interpretation, adopting instead a standard sheltering rights only where the private entity functionally equated to a municipality. Presently, the more cautious Marsh/Hudgens doctrine is law at the Federal level.

New Jersey, however, being free to adopt a more expansive interpretation of Marsh, did so. (See Schmid, 84 N.J. at 553 (citing PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980)); see also William J. Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 491 (1977) ("State constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the [United States] Supreme Court's interpretation of federal law.")).

more private property is devoted to public use, the more it must accommodate the rights which inhere in individual members of the general public who use that property." 84 N.J. at 562.

Importantly, the Court did not predicate its decision on state action. In fact, it found state action to be an artifact of federalism, irrelevant to rights questions under the State Constitution. 84 N.J. at 559-60. Rather than looking for state action, the Court looked to the principle at the core of Marsh, that private property may not be opened to the public in a manner that diminishes fundamental individual rights--a principle that actually dated back to the Court's opinion in State v. Shack, 58 N.J. 297, 303-05 (1971), ten years earlier:

> Property rights serve human values. They are recognized to that end, and are limited by it. 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.
> ***
> [A]n owner must expect to find the absoluteness of his property rights curtailed by the organs of society, for the promotion of the best interests of others for whom these organs also operate as protective agencies.

Pursuant to these bedrock principles, Justice Handler described a three-prong test that took into consideration (1) the normal use of the private property, (2) the extent and nature of the public's invitation to use the property, and (3) the compatibility of the activity proposed in relation to both the private and public use of the property. 84 N.J. at 563.

Twin Rivers, and other private communities that, like it, have come to take the place of the municipality in the lives of their residents, quite clearly meet the Schmid/Coalition test. This test first seeks to determine whether the use of the property is sufficiently public to tip the balance in favor of rights protection. The first two prongs of the Schmid test inquire into the normal use of the property and the nature and extent of the public's invitation to use it. In Coalition, the "all-inclusiveness" of both the uses of

the property and the invitation to use it were held to militate strongly in favor of protection of the right:

> The almost limitless public use of defendants' property, its inclusion of numerous expressive uses, its total transformation of private property to the mirror image of a downtown business district and beyond that, a replica of the community itself, gives rise to an implied invitation of constitutional dimensions that cannot be obliterated by defendants' attempted denial of that invitation ...

138 N.J. at 360-61. To apply this description to Twin Rivers one need only add one detail: unlike visitors to a mall, our plaintiffs do not leave the property at the end of the day; they and their families live and sleep there.

The third prong inquires into the compatibility between the activity and the public and private uses of the property. Coalition, 138 N.J. at 363. The Coalition Court found leafleting compatible with the public and private uses of the mall:

> [W]e find that the more than two hundred years of compatibility between free speech and the downtown business district is proof enough of its compatibility with these shopping centers.

Id. at 361.

The public and private uses of Twin Rivers mirror those of a municipality. Hence, nearly any activity compatible with life in any "normal" New Jersey town or village is compatible with the public and private uses of Twin Rivers.

Moreover, The Schmid tripartite test was actually just one application of New Jersey's balancing test under the Marsh principle 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 statutory and constitutional rights of those who use it,'" 138 N.J. at 362-63 (citing Marsh, 326 U.S. at 506). The absorption of the principle underlying Marsh into New Jersey constitutional law was reaffirmed in Coalition:

> [The] enduring principle recognized in Marsh, a principle that remains pertinent for our purposes even though it has not been accepted in this context as a matter of federal constitutional doctrine . . . . is that the constitutional right of free speech cannot be determined by title to property alone. Thus, where private ownership

> of property that is the functional counterpart of a downtown business district has effectively monopolized significant opportunities for free speech, the owners cannot eradicate those opportunities by prohibiting it.

138 N.J. at 366. The pervasive concern expressed by the Coalition Court centers on what happens to rights when our public places move into private spaces. The answer is simple: our rights adapt to meet our new way of living.

> We do not believe that those who adopted a constitutional provision granting a right . . . 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.

138 N.J. at 370. The Appellate Division recognized the applicability of the Marsh/Coalition principle to residential communities in Galaxy Towers, supra. In Galaxy Towers, the plaintiffs were strangers to the community who wanted access in order to respond to political messages being distributed to residents by the condominium association in regard to local elections. The trial court initially dismissed the Complaint on the ground that the residential high-rise was private property. The Appellate Division reversed on the basis of the Supreme Court's intervening decision in Coalition, noting that, although private property, the condominium threatened to become a "political isolation booth" if it allowed some political speech and denied other. 296 N.J. Super. at 106 (citing State v. Kolcz, 114 N.J. Super. 408, 416 (Cty. Ct. 1971)). On remand, the trial court found that the condominium had become "in essence a political 'company town.'" 297 N.J. Super. at 411. It entered an injunction requiring the association to allow the plaintiffs to distribute materials in the building in "essentially the same manner" that the condo association did. Id. The Appellate Division affirmed, finding that the trial court "faithfully carried out the tasks assign" in its earlier opinion. 297 N.J. Super. 309. The Supreme Court denied certification. 149 N.J. 141.

This case presents the other side of the Galaxy Towers coin. Plaintiffs are not strangers to the community; they are part of it. Their rights are even stronger than

those of the Plaintiffs in Galaxy Towers. Just as the Galaxy Towers Condominium Association could not use its dominion over the property to the detriment of strangers, the Twin Rivers Association cannot use its dominion to the detriment of residents, who are entitled to an equal participation in the governance of their community.

Coalition recognized that once the shopping mall managers had invited others to the full enjoyment of the property, they could not arbitrarily deny them the exercise of constitutional rights. Similarly, having invited the Plaintiffs to live in Twin Rivers, the TRHA cannot unilaterally determine which rights those residents may enjoy.

In Marsh, supra, 326 U.S. at 508-09, speaking of Chickasaw, Alabama, the United States Supreme Court said:

> Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their state and country. ... There is no more reason for to depriving these people of the liberties guaranteed by the First and 14th Amendments than there is for curtailing these freedoms with respect to any other citizen [in a public municipality].

These words are surely as applicable to residents of Twin Rivers as they are to those of Chickasaw.

Although the United States Supreme Court's decision in Marsh serves only as persuasive authority with respect to the state constitutional claims here at issue, the opinion nevertheless is instructive for several reasons. Marsh expressly identified an entire *category* of private municipalities (company towns), and said essentially that this *category* must be treated as if it were a public municipality for purposes of core free-speech principles, because to do otherwise would improperly abridge the constitutional rights of the substantial number of residents who lived in that category of municipality. Id.

Stated differently, the Court in Marsh found that the constitutional rights of residents of company towns could not be curtailed precisely because "many people" in

1946 resided in such towns. Id. Residents of company towns, the Court held, are "free citizens of the state and country," and, consequently, "there is no more reason for depriving these people of the liberties guaranteed by the [Constitution] than there is in curtailing these freedoms with respect to an other citizen [in a public municipality]. Id.

Applying a similar analysis, the New Jersey Supreme Court in Coalition held that free-speech rights under the State Constitution applied at regional shopping centers because these centers essentially had, for many people in New Jersey, assumed the myriad functions that had previously been the exclusive province of public town squares. 138 N.J. at 344-48.

Similarly, "many people" – indeed approximately one in 8 – in New Jersey in 2004 live in community associations. (Pa235) Moreover, the record conclusively establishes that such community associations have assumed the functions and delivered the services previously the exclusive province of public municipalities. See, e.g., Pa439 - New Jersey Assembly Task Force Report, noting "the increasingly governmental nature of the duties and powers ascribed to the homeowners' association board."

Thus, the fundamental concerns that animated the United States Supreme Court in Marsh (as to company towns usurping the functions of traditional municipalities) and the New Jersey Supreme Court in Coalition (as to regional shopping malls privatizing the functions of traditional town squares) inform this case as well. The essential lesson of both Marsh anf Coalition is this: Constitutional principle, to retain their vitality, must adapt to changing circumstances.

The relevance of the shopping mall cases to residential communities was recently recognized by three members of the California Supreme Court in Golden Gateway Center v. Golden Gateway Tenants Ass'n. 26 Cal. 4th 1013, 11 Cal. Rptr. 3d

336, 29 P. 3d 797 (2001). Analogizing the rights of residents of a residential community to the rights of invitees at a shopping mall, the judges observed: "The private property owner seeking to restrict speech already has for its own purposes surrendered to those whose speech it would restrict much of its interest in retaining exclusive control over the premises."[14]

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[14] Id. at 827 (dissenting opinion). The 3-member plurality opinion based its ruling on the presence of a state-action requirement in the California Constitution. This distinguished the case from its prior shopping mall decision, one similar to New Jersey's Coalition case. However, the New Jersey Supreme Court has made it abundantly clear that, unlike California, the New Jersey Constitution has no state-action requirement, and would clearly follow the California dissenters. See Schmid, supra, 84 N.J. at 559-60.

Indeed, in this case, the scope of governmental functions exercised by the TRHA might actually bring Twin Rivers directly within the state action principle of the federal constitution, *a la* Marsh itself. However, since "state action" is irrelevant under the New Jersey Constitution, it is an issue this Court need not reach.[15]

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[15] Alternatively, the New Jersey cases might be read as creating a state constitutional state-action doctrine *a la* Marsh's public function doctrine. See Coalition discussion of Marsh, 138 N.J. at 366. In other words, whether or not Twin Rivers would be considered a state actor for purposes of the Federal Constitution, its performance (or replacement) of traditional public functions makes it a state actor for purposes of the New Jersey Constitution.

This possibility is suggested by Defendants' own expert, Professor Katharine Rosenberry. Professor Rosenberry writes that individual states are beginning to find state action under their own constitutions. Katharine Rosenberry, An Introduction to Constitutional Challenges to Covenant Enforcement, CAI's Journal of Community Association Law, Vo. 1, No. 1, pg. 23 (1998). She cites Laguna Publishing Co. v. Golden Rain Foundation of Laguna Hills, 182 Cal. Rptr.813 (1982), a case in which a publishing company attempted to distribute a free newspaper in a private, residential community. The California Court of Appeals ruled that there was no state action under the federal constitution because the community called Leisure World did not meet the criteria of Marsh. Id. at 824. However, she reports that state action was found under the California Constitution because of Leisure World's municipal attributes. Id. at 828. Professor Rosenberry also cites Park Redlands Covenant Control Committee v. Simon, 226 Cal. Rptr. 199 (1086), where the Court of Appeals found state action under the California Constitution when a homeowners association imposed restrictions that

violated individuals' right to privacy under the State Constitution.

For all of the foregoing reasons, Twin Rivers must be recognized as a constitutional actor under the State Constitution required to accommodate the rights of its residents/members to exercise the fundamental prerogatives of citizenship in the operation and governance of the community.

B. Twin Rivers Homeowners Do Not Waive Their Constitutional Rights by Signing Contracts Containing Non-Negotiable Deed Restrictions

While the trial court denied that the defendant association is a constitutional actor subject to any of the constraints of the New Jersey Constitution, it also found that any rights the Plaintiffs might have under either the Constitution or common law had been waived by contract. "The relationship between homeowners and the Association is a contractual one, formalized in the restrictive covenants appearing in the deeds of the properties . . . ." (Pa77)

In apparent contradiction to its holding that Twin Rivers was private property unencumbered by the State Constitution, the opinion seems, cryptically, to acknowledge that strangers might have rights on Twin Rivers property under the Coalition decision, but that plaintiffs' rights were trumped by contract:

> Where the private property rights of landowners impermissibly infringe on the rights of the public to free expression, the court can step in to correct the infringement. But where the restriction of expression is imposed by contract between the parties, or by a valid and enforceable restrictive covenant running with the land, the ability of the court to interfere is limited by the law of contracts and restrictive covenants.

(Pa78) The court thus misunderstood and misapplied both the constitutional law of New Jersey and the state's waiver-of-rights jurisprudence.

1. The restrictive covenants, to the extent unconstitutional under the New Jersey Constitution, are unenforceable by operation of law *and without regard to the doctrine of waiver*, which does not apply *at all* to this record

Homeowners in public sectors of East Windsor cannot be prohibited from posting political signs on their front lawns, cannot be charged excessive fees for holding a political forum at Town Hall and cannot have their votes weighted according to the value of their property. The New Jersey Constitution (as well as the federal Constitution) would prohibit such regulations. But Defendants claimed, and the trial court agreed, that Twin Rivers residents waived such constitutional rights of free speech and equal protection by purchasing property in a community whose foundation documents abrogated these rights.[16]

However, it is a long established principle in this State that contracts that violate public policy are unenforceable and *absolutely void* (as distinct from merely voidable). See, e.g. Vasquez v. Glassboro Service Corp., 83 N.J. 86, 98-99 (1980) (holding that "courts in New Jersey have refused to enforce contracts that violate the public policy of the State"); Houston Petroleum Co. v. Automotive Products Credit Ass'n, 9 N.J. 122, 130 (1952) (holding that "a contract in contravention of the public policy of this State will not be enforced"); Lobeck v. Gross, 2 N.J. 100, 102 (1949) (holding that "a contract … will not be enforced … if it violates the public policy [of this State])"; Cameron v. International Alliance of Theatrical Stage Employees No. 384, 118 N.J. Eq. 11, 23 (E & A 1934) (holding that "no contract, whatever its subject matter,

[16] Among other things, this argument ignores the doctrine of "unconstitutional conditions," which forbids a constitutional actor such as Twin Rivers from conditioning a right to own property on a waiver of constitutional rights. See generally, Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413 (1989); Cf. Matter of Plan for Orderly Withdrawal from New Jersey of Twin City Fire Ins. Co., 129 N.J. 389, 420-21 (1992).

can be sustained, which the law, upon reasonable grounds, forbids as inconsistent with the public interest, or as hurtful to the public order, or as detrimental to the common good").

Our Supreme Court has made clear that that the sources of "public policy" include, but are not limited to, "federal and state legislation and judicial decisions." Vasquez, supra, 83 N.J. at 98. Thus, for example, New Jersey courts have invalidated contracts that are antithetical to public policy when such contracts "violate statutes, promote crime, interfere with the administration of justice, encourage divorce, violate public morality, or restrain trade." Id. at 99 (citing cases). Whatever the precise meaning or source of "public policy" may be in other contexts involving the enforceability of contracts, *there can be no ambiguity as to meaning or source of "public policy" in this context.* That is to say: the source of the "public policy" that renders unenforceable the restrictive covenants here at issue is *the State Constitution itself*, the supreme embodiment of public policy of this State. Thus, the bedrock principle limiting the enforceability of contracts in this State means, quite simply, that when, as here, a restrictive covenant violates *the State Constitution itself*, the covenant is unenforceable and absolutely void. Stated differently, a restrictive covenant that, if enforced, would violate the State Constitution, is unenforceable for that reason alone. See Restatement (Third) of Property (Servitudes) § 3.1 (stating that "[a] servitude ... is valid *unless it is* illegal or *unconstitutional* or violates public policy.") (emphasis added). This conclusion arises inexorably from the first principles of constitutional law.

It is fundamental to our constitutional order that a statute enacted by the New Jersey Legislature, if inconsistent with the State Constitution, cannot stand. General Assembly v. Byrne, 90 N.J. 376, 391 (1982). The same can be no less true of a contract between private parties that is inconsistent with, or violative of, a mandate of the New Jersey Constitution. To the extent that a contact is otherwise enforceable as an agreement between parties under the common law of this State, the "[New Jersey] Constitution supersedes the common law." Ackerman Dairy Inc. v. Kandle, 54 N.J. 71, 75 (1969).

The foregoing principle is illustrated by the Supreme Court's decision in Houston Petroleum, supra, which addressed the enforceability of a restrictive covenant that was determined to be "in contravention of ... constitutional ... provisions pertaining to zoning." 9 N.J. at 130. The Court did not hesitate to conclude that the covenants at issue were "illegal and void," and that "the plaintiff is not entitled to their enforcement." Id. Put another way, the Court determined that the covenant was absolutely void, not merely voidable.

Here, the motion court below simply concluded that "it is not clear that [Plaintiffs] waived a Constitutional right that they held prior to the purchase of the Property in question." (Pa83) But the question of whether Plaintiffs did or did not waive their constitutional rights (an argument put forth by Plaintiffs in the alternative and discussed herein at Point IB(2) in the alternative) *need not even be reached.* The restrictive covenants, to the extent unconstitutional under the New Jersey Constitution, are unenforceable by operation of law and without regard to the doctrine of waiver, which does not apply *at all* to this record.

2. Residents of Twin Rivers did not knowingly and voluntarily waive their constitutional rights.

Even assuming (for purposes of this point only), that the doctrine of waiver of rights was applicable here, Twin Rivers residents did not waive their constitutional rights, because the constitutional standard of a "knowing and voluntary waiver" cannot be satisfied on this record.

Constitutional rights, if waivable at all, can only be waived by "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." State v. Morgenstein, 147 N.J. Super. 234, 237-38 (App. Div. 1977), (quoting Brady v. U.S., 397 U.S. 742, 748 (1970)). These rights extend to civil cases, as well. See West Jersey Title, Co. v. Industrial Trust Co., 27 N.J. 144, 149 (1958) (holding that a waiver involves the intentional relinquishment of a known right); Allstate v. Howard Savings Inst., 127 N.J. Super. 479, 487-88 (App. Div. 1974)(holding that it must affirmatively appear that persons charged with waiver knew their rights and deliberately intended to relinquish them). A waiver of rights "must be clearly and unmistakably established and contractual language alleged to constitute a waiver will not be read expansively."

Garfinkel v. Morristown Obstetrics and Gynecology Assocs., 168 N.J. 124, 132 (2001) (arbitration agreement in employment contract did not waive employee's right to sue under the Law Against Discrimination).[17] Since the contract of sale contains no notice that buyers are waiving rights under the State Constitution, the mere act of purchasing a home in Twin Rivers does not allow the conclusion that the purchaser voluntarily elected to surrender constitutional rights. (Pa412, McCarthy certif., at ¶17; Pa659-60, Bar Akiva certif.) The trial court's assertion that Plaintiffs' constructive and actual notice of the restrictive covenants is sufficient is erroneous.

Moreover, empirical research challenges the theory that home buyers knowingly "consent" to waiver of constitutional rights by purchasing property within a community such as Twin Rivers. Professor Paula Franzese of Seton Hall Law School, commenting on such studies, stated: "[T]o conjecture that CIC [Common Interest Community] buyers experience 'a significant component of innocent ignorance' is not a stretch." Franzese, Does It Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community, 47 Vill. L. Rev. 553, 559-61 (2002) (quotations omitted). As explained by Plaintiffs' expert, Professor Evan McKenzie, such arguments about "consent" to waiver of constitutional rights are further vitiated by the lack of alternatives to RCAs in regional housing markets like Twin Rivers:

> Even the choice of selling and moving is often illusory. Deed restrictions accompanying homeowner association-run developments are largely standardized, so that owners are often unable to find developments that are free of restrictions that they find onerous. Because the deed restrictions are recorded against all lots at the time the land is subdivided, there is no actual negotiation between the developer and the eventual purchaser as to the content of the restrictions. From the buyer's

[17] The decision in Martindale v. Sandvik, 173 N.J. 76 (2002) does not change this requirement. The waiver of jury trial upheld in Martindale was explicit in the agreement. Id. at 96.

> perspective, the entire package of restrictions is a "take it or leave it" proposition.

(Pa493 at ¶9).

Further, the trial court's reliance on cases such as Acme Markets is misapplied because the court ignored the public policy concerns surrounding such restrictive covenants. In applying the Schmid test to determine whether there are public interest concerns relevant to the association's regulations, the trial court incorrectly analyzed the three-prong Schmid test by overemphasizing the alleged reasonableness of the association's interest while ignoring the public interest supporting Plaintiffs' rights to free speech and democratic governance.

The trial court's discussion of the Billig factors in determining the reasonableness of a community association's regulations is also misplaced. Billig concerned condominium owners' attempt to install their own heating, ventilation and air conditioning system and discussed the limitations of community association's power under the Condominium Act. N.J. Stat. Ann. § 46:8B-1. Billig v. Buckingham Towers Condo. Assoc., 287 N.J. Super. 551, 563 (App. Div. 1996) (holding that defendant acted unreasonably in denying plaintiffs' request to modify the air system). Even if considered relevant factors in this case, surely TRHA would be more limited in it regulation of Plaintiffs' free speech and voting rights than the Buckingham Towers Association's regulation of the condominium owners' desire to install different heating systems. As Professor Evan McKenzie has commented, when such covenants provide for the waiver of fundamental rights, courts should require "something more substantial than the showing of assent one might offer to enforce the purchase of a truckload of chickens." Evan McKenzie, Symposium: Reinventing Common Interest Developments: Reflections on a Policy Role for the Judiciary, 31 J. Marshall L. Rev. 397, 422 (1998).

3. In the context of the limited market for new homes in the Mercer County suburbs, anti-democratic conditions imposed on the purchasers of Twin Rivers property constituted contracts of adhesion under New Jersey law.

More than fifty percent of all purchasers of new homes in Mercer County are required to participate in a homeowners association, according to the New Jersey Department of Community Affairs. (Pa230) For the years 1996-2000, the figure was 50.3 percent. Id. The current figures are probably closer to 75 percent since the statewide figures on community association participation increased by 50 percent between 1996 and 2000 (from 19.7 percent to 30.74 percent). Id.

These numbers indicate that people purchase homes in Twin Rivers not because they wish to live in a community with such restrictive regulations, but because that is what is available in the housing market. The house-for-sale listings on the Delaware Valley Multiple Listing Services for the East Windsor Area on January 24, 2003 is illustrative. (Pa542-633) Of these 92 listings on that date 68 required membership in a condominium association, a homeowner association, or both. Only 24 listings required neither. The price differential is also instructive. Of the 27 listings with no association requirement, the lowest asking price was $239,000. By contrast, the overwhelming majority of listings that required association membership was below $200,000. Despite Defendants assertion otherwise, Twin Rivers purchasers buy homes there *despite* the restrictions because it provides affordable housing.

The evidentiary relevance of the restricted market for new private homes in Mercer County is demonstrated by the opinion in Kuzmiak v. Brookchester Inc., 33 N.J. Super. 575, 587 (App. Div. 1955). Relying on the existence of a tight housing market, the Kuzmiak court invalidated an exculpatory clause in a landlord's lease agreement, taking "judicial notice that under present housing conditions the

bargaining positions of landlord and tenant in an apartment building are decidedly unequal." Id. at 587. As a consequence, the court held that the exculpatory clause violated the State's public policy. Id. at 588.

Similarly, the dearth of affordable alternative housing in the East Windsor area places additional pressure on home buyers to accept the non-negotiable deed restrictions in Twin Rivers purchase agreements. (See Pa412 at ¶18, McCarthy certif.) Such unequal contracts violate our public policy, and "no contract can be sustained if it is inconsistent with the public interest or detrimental to the common good." Vasquez v. Glassboro Serv. Ass'n, 83 N.J. 86, 98-99 (1980) (citations omitted).

The trial court acknowledged that "[p]urchasers are required, as a condition of purchase, to accept the regulations of the TRHA Articles of Incorporation and its By-Laws." (Pa57) However, the court rejected Plaintiffs' argument that TRHA's restrictive covenants should be deemed unenforceable under New Jersey law because unequal bargaining power alone does not equate to unenforceability. The trial court ignored the empirical data, discussed above, which demonstrates that not only are these restrictive covenants take-it-or-leave it restrictions, but that home buyers have few alternatives as a result of the lack of housing options.

The trial court also improperly applied the factors determining whether a contract is unconscionable set forth in Rudbart v. North Jersey Dist. Water Supply Co., 127 N.J. 344, 356 (1992). The Rudbart Court stated:

> [I]n determining whether to enforce the terms of a contract of adhesion, courts have looked not only to the take-it-or-leave-it nature or the standardized form of the document but also to the subject matter of the contract, the parties' relative bargaining positions, the degree of economic compulsion motivating the "adhering" party, and the public interests affected

by the contract.

The trial court here determined that there is no public interest affected by restricting homeowners' constitutional rights, and, therefore the unequal bargaining power of the parties was insufficient to make the sales contracts unenforceable. (Pa85) In so doing, the trial court ignored the importance of free speech, free association and voting rights to the residents of Twin Rivers, as discussed supra.

Finally, the trial court said that because of the privity of contracts, there should be less judicial interference. However, it ignored the New Jersey Supreme Court's instruction that courts should "not hesitate to declare void as against public policy contractual provisions which clearly tend to the injury of the public in some way." Henningsen v Bloomfield, Inc., 32 N.J. 358, 403-04 (1960) (holding that defendant's pre-printed, standardized purchase agreement, as a matter of public policy, could not release defendant from the duty of an implied warranty). See also State v. Shack, supra, finding that "the needs of the occupants may be so imperative and their strengths so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare or dignity." 58 N.J. at 303.

II. THE RESTRICTIONS ON DISPLAYING POLITICAL SIGNS VIOLATE THE NEW JERSEY CONSTITUTION

The TRHA governing documents prohibit the display of signs anywhere in the Twin Rivers community.

> No sign or device of any kind shall be placed upon any of the Trust land except those specifically approved by the Trustee in writing and the Trustee shall have the power to remove any such sign...

(Pa333, Twin Rivers Trust Agreement, Indenture, P6, Sec. 1, ¶25.)

Further restrictions read, "...no sign of any kind or for any use or purpose whatsoever shall be erected, posted, pasted, painted or displayed upon any of said lots..." (Pa356, Twin Rivers Trust

Agreement, Declaration of Restrictions and Reservation of Easements, P6, Sec. 4, ¶9.) The board again restricted sign-posting in Twin Rivers with the enactment of Rev. 99-11 (Pa634), prohibiting the display of signs from "trees, rocks, other natural features or public utility poles." While the governing documents prohibit all signs on Twin Rivers' property, the "Real Estate for Sale Sign Policy" (Pa636) authorizes the placement of small "House for Sale" signs in the flower beds within three feet of a dwelling. The latter regulation has been interpreted to apply also to political signs.(Pa780)

However, such signs are essentially invisible. Neither pedestrians nor passing motorists are likely to spot such notices hidden alongside the house in a flower bed or in a window. (See photos annexed to McCarthy certif, Pa420-26, DM 10, 12, 14, 16, 18-21) Plaintiffs are completely prohibited from posting signs where they can be most effective, on their own front lawns and on the community treelawn, which is the grassy strip between roadways and the sidewalks.

This prohibition violates Article I, §¶6 and 18 of the New Jersey Constitution, whose protections extend to some private property. See discussion of the three-pronged test of State v. Schmid, supra, which the Supreme Court refined in New Jersey Coalition to provide that the first two elements of the Schmid standard are best considered together, 138 N.J. at 357.

The members of TRHA who seek to display political signs in the common areas and on their lawns are not simply members of the public at large, but, as owners, are individuals who are specifically invited to use that property. While the public may not be invited to use the common areas of Twin Rivers, clearly the members of the community are. This case is therefore different from one in which a private property owner seeks to exclude free speech activities of outsiders, as in Schmid and Coalition, but rather presents an effort to restrict the free speech activities of individuals who have an actual ownership interest in the property. In fact, while Twin Rivers' rules treat

residents' front lawns as "common property," residents actually own their lawns in fee simple. The prohibition of political signs by the TRHA is thus more akin to the situation where a municipality attempts to restrict the free speech activities of property owners rather than where a private property owner attempts to exclude free speech activities of the general public.

In Farrell v. Teaneck Tp., 126 N.J. Super. 460, 465 (Law Div. 1974), the court ruled invalid an ordinance that prohibited the posting of signs expressing political preferences on private residential property. As the State Supreme Court later noted in State v. Miller, 83 N.J. 402, 413 (1980), "ordinances which exclude political signs from residential districts have uniformly been held unconstitutional." (Citations omitted) As the Supreme Court emphasized in Miller, political speech "occupies a preferred position in our system of constitutionally-protected interests." 83 N.J. at 411. Such protection of political speech has been held to go beyond that enjoyed by other personal rights.

> Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.

Id. at 412, citing, Schneider v. New Jersey, 308 U.S. 147, 161 (1939).

The regulations at issue here, on their face, restrict all political signs, including those supporting candidates for public office or for election to the TRHA Board, as well as signs discussing issues of concern to the Twin Rivers community. Such signs are clearly

political speech and thus deserving of the highest protection. Additionally, the signs relate directly to the property itself. Unlike in Schmid, where the speech concerned a mayoral election in far off Newark, the speech here concerns the governance of the TRHA, which controls the common areas of Twin Rivers. That (1) the property is intended for the enjoyment of TRHA members, that (2) TRHA members are invited to use the property, indeed own in fee some of the property in question, and that (3) the proposed speech relates directly to the property itself, satisfy each of the factors utilized in Schmid to determine when private property may be reasonably restricted to accommodate free speech.

In Schmid, the Court also noted that the existence or absence of alternative channels of communication is relevant in considering the extent to which the private property may be required to accommodate speech: "While the presence of such alternatives will not eliminate the constitutional duty, it may lighten the obligations upon the private property owner . . ." Id. at 563.

There exist no other comparable alternative channels of communication for members who wish to express their personal support for candidates in Board elections and issues of community governance. The prohibition of political signs discourages community participation. As the United States Supreme Court has noted:

> Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. . . . Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a hand-held sign may make the difference between participating and not participating in some public debate.

> Furthermore, a person who puts up a sign at her residence often intends to reach *neighbors*, an audience that could not be reached nearly as well by other means.

City of Ladue v. Gilleo, 512 U.S. 43, 56-57 (1994)(emph. In original). Furthermore, Board members receive no compensation for their services and candidates have little incentive to spend or raise money to finance their campaigns. The need for affordable means of communication was recognized in Miller:

> [M]eans of political communication are not entirely fungible; political posters have unique advantages. Their use may be localized to a degree that radio and newspaper advertising may not. With exception of handbills, they are the least expensive means by which a candidate may achieve name recognition among voters in a local election.

State v. Miller, 83 N.J. at 413(citation omitted). The posting of signs is one of the most effective mechanisms by which residents of Twin Rivers can communicate with the other members of their community. Regulations that sweep so broadly as to exclude such speech activity on common areas severely limit the ability of the members of the community to participate in the governance of their community.

Despite Schmid and Coalition, the trial court held that contract law (Pa78), aesthetics (Pa80), lawn maintenance (Pa80) and the business judgment rule (Pa82) trumped plaintiffs' rights under the State Constitution when it upheld the restrictions on the posting of political signs. (Plaintiffs have already dealt with the contract (waiver) issue in the preceding section.)

In suggesting that TRHA had an aesthetic interest in barring political signs, the court, bizarrely, cites State v. Miller, supra, 83 N.J. 415 (pa80), which in fact held that aesthetic interests might justify the prohibition of *commercial* lawn signs, but not *political* ones. Of course, the court below could cite no authority whatsoever for the proposition that rights of free speech could be subordinated to the association's interest in lawn maintenance or the business judgment rule.

In its most remarkable sleight-of-hand, the court invoked State v. Schmid to say that even if the State Constitution does apply in any way to Twin Rivers, strangers have no right to come on the lawns of Twin River homeowners and put up signs (Pa82-3) -- as if anyone had ever suggested such an absurd proposition.

In Township of Saddle Brook v. A.B. Family Ctr., 156 N.J. 587 (1999), the town attempted to close an adult bookstore because it was in violation of a town ordinance. The Court held that the body responsible for restricting protected speech has "the obligation of demonstrating that its restrictions are reasonably tailored to achieve its objectives, are not more intrusive than necessary, and provide adequate available alternative avenues of communication." Id. at 598. The defendants cannot satisfy these requirements. As noted above, there are no reasonable alternatives to signs in a community like Twin Rivers, and small notices in flower beds are totally inadequate for communication. The comment of Plaintiff's expert Evan McKenzie while discussing, at his deposition, his Twin Rivers site visit is instructive:

> If you don't have a political process for people to organize and campaign and be a loyal opposition and run for office ... and put up their signs and have their meeting in the committee [sic] room without some exorbitant fee paid to do it and if they can't campaign in these public venues, ... then how do you then conclude that everything is okay because they had elections.

(Pa765-66, T711-20 to 712-3)

Moreover, the restrictions are far more intrusive than necessary. Less intrusive provisions would provide limitations on the size of signs and allow posting for a restricted period of time during election campaigns -- as does East Windsor's ordinance 20-5.1600 governing "Signs and Billboards," (Pa640) allowing the posting of electoral signs during the 45-day period prior to an election. (Pa646)

The court in Coalition rested the decision not only on the Schmid factors, but also on a general balancing test: "We decide this case not only on the basis of the three-pronged test in

Schmid, but also by the general balancing of expressional rights and private property rights." 138 N.J. at 362. In so doing, the court adopted the standard set forth in Marsh v. Alabama, 326 U.S. 501 (1946). In Marsh, the people lived in a company-owned town, yet the court found that:

> free citizens of their State and country ... must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. ... [T]o be properly informed their information must be uncensored.

326 U.S. at 508. That observation is equally applicable to the citizens of Twin Rivers as to the citizens of Chickasaw, Alabama. If Grace Marsh had a free-speech right to bring her message to the residents of Chickasaw through handbills, surely the residents of Twin Rivers have a right to bring their message to their neighbors through the medium of lawn signs.

III. THE FEES CHARGED TO TWIN RIVERS RESIDENTS FOR USE OF THEIR COMMUNITY ROOM ARE EXCESSIVE AND UNREASONABLE BECAUSE THEY ARE NOT REASONABLY RELATED TO THE ACTUAL COSTS INCURRED BY THE ASSOCIATION FOR RENTAL OF THE COMMUNITY ROOM, AND THUS, VIOLATE NEW JERSEY LAW

TRHA maintains the community room as a common area for the use and benefit of Twin Rivers residents and other authorized groups. (Pa767) All unit owners of Twin Rivers are assessed monthly fees by the TRHA for maintenance of the common areas in the Twin Rivers community, including the community room. However, in order to rent the community room, a resident must pay an additional $165 rental fee, post a refundable $250 security deposit, and produce a certificate of insurance. Id. The additional charge for rental of the community room is excessive and unreasonable because it is not reasonably related to the actual costs incurred by the TRHA for rental of the community room, and thus, violates New Jersey law.

As the trial court correctly points out, New Jersey law requires that the fees charged to residents for use of common areas must be reasonably related to the actual costs incurred by the association for such use. (Pa90) In Chin v. Coventry Square Condo. Assoc., 270 N.J. Super. 323, 330 (App. Div. 1994), the Appellate Division held that fees charged by the condominium association to owners each time they rented their unit had to be reasonably related to the services rendered by the association in preparation for the rental. Thus, the court concluded that

the association was permitted by the Condominium Act only to charge unit owners a fee that offset the costs of inspection and the review of the new leases.[18] Id. at 328; see also Wendell A. Smith, New Jersey Condominium Law, §§ 6:7.13; 6:7.14 (1990) (asserting that it is reasonable for associations to charge a fee to recoup losses incurred by the association when reviewing documents and inspecting units because this fee is directly related to the actual cost of the services rendered); Green Party of New Jersey v. Hartz Mountain Indus., 164 N.J. 127, 157-58 (2000)(where a shopping mall imposes an insurance requirement as a condition of petitioning on its property, the fee has to be reasonably related to the actual cost incurred by the mall for the additional coverage).

Additionally, as the trial court similarly points out, New Jersey law prohibits an association from imposing fees and assessments that are "revenue raising devices" which would result in an individual owner paying more than his or her proportionate share of the common expenses. (Pa89)(citing Chin, 270 N.J. Super. at 330); see also N.J. STAT. ANN. § 46:8B-3(e)(stating that each condominium unit owner is proportionately liable for common expenses); Thanasoulis v. Windsor Towers 200 Assoc., 110 N.J. 650, 660-61 (1998) (concluding that an association is not entitled to profit on use of a common element). This principle is consistent with community association law which mandates that rules may not be arbitrary and capricious, but must be reasonable and must serve the health and happiness of the members. Papalexiou v. Tower West Condo., 167 N.J. Super. 516, 527 (Ch. Div. 1979). See generally Paula A. Franzese,

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[18] Although Plaintiffs recognize that Twin Rivers is not a condominium community as defined by the Act, the Act may provide guidance because of the similarities between a planned unit development and a condominium development. See State v. Panther Valley Prop. Owners Assoc., 307 N.J. Super. 319, 332 (App. Div. Super. 293, 311 (App. Div. 2001). See also Kerekes Assoc. v. Twin Rivers Cmty. Trust, No. C-26-95, (Ch. Div. 1996) (Pa258) (noting that for the purposes of the decision, a planned unit development such as Twin Rivers is analogous to a condominium association.)

Common Interest Communities: Standards of Review and Review of Standards, 3 Wash. U. J.L. & Pol'y 663, 684-85 (2000).

In the case at bar, the fees charged to residents for rental of the community room are excessive and unreasonable because they are not reasonably related to the actual costs incurred by the TRHA for rental of the community room, and thus, violate New Jersey law. Nevertheless, without acknowledging the full record before it, the trial court concluded that the Defendants made a "satisfactory showing" that the rental fee was reasonable. (Pa90) The trial court rested its determination upon the Defendants' breakdown of the total annual costs for the operation of the community room. (Pa776-78) However, the trial court failed to recognize the important difference between the total annual costs incurred by the TRHA for the general operating costs of the community room and the additional *marginal costs* incurred by the TRHA for the rental of the community room to residents. Indeed, the trial court failed to recognize that aside from opening and closing the room, and the possible incidental costs of heating or cooling the room, all the other operating costs listed by the Defendants would remain the same whether or not any resident ever rented the community room. For instance, the room is regularly cleaned by salaried maintenance workers who are paid out of TRHA's regular budget, which is funded by the residents of Twin Rivers. (Pa747, Ward Dep. at T57:7 to 9; Pa775, Defendants' Response to Plaintiffs Supplemental Request for Production of Documents No 10, acknowledging that TRHA has no records of overtime payments for cleanup and maintenance of community room.) Nor could the TRHA incur any additional overtime payments or additional maintenance costs, since residents who rent the community room post a security deposit to guarantee the cleanup of the room. (Pa769; Pa748, Ward Dep. at T58-21 to 24).

The trial court also failed to recognize that TRHA lists the profits from the rental of the community room as part of the income budget that is included under general operations. (Pa749, Ward Dep. at T60-12 to 20). Thus, residents who rent the community room are paying a disproportionate share of its maintenance costs, in violation of New Jersey law.[19] Chin, 270 N.J.

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[19] Residents who rent the community room are paying the assessment fee for the

Super. at 330; Thanasoulis, 110 N.J. at 661. Furthermore, TRHA is not entitled to profit on use of a common element. Thanasoulis, 110 N.J. at 661.

Consequently, an appropriate fee for rental of the community room must be based on the marginal costs incurred by the TRHA for the additional use of the community room by residents over and beyond its normal use for association business. According to the figures provided by the Defendants, the actual costs incurred by the TRHA for rental of the community room consists of $9.75 for opening the room and $19.50 for closing the room, plus the incidental costs of heating or cooling the room depending on the time of year. (Pa778). Under any comparison, the $165 fee charged to residents for rental of the community room is excessive and not reasonably related to the actual costs incurred by the TRHA for rental of the room.

The trial court also ignored the larger implications of charging excessive and unreasonable fees for use of the community room. The community room is the only available meeting room in Twin Rivers for public discussion of community affairs. (Pa407-08 at __ 5-7) It is also the place where TRHA holds meetings for such purposes. Yet, if a group in opposition to TRHA policies wishes to meet there, it must pay an excessive and unreasonable fee which is unrelated to the actual costs incurred by TRHA for use of the room. In effect, by charging such an excessive and unreasonable fee, TRHA is impairing their residents' access to an open exchange of ideas, and thus, violating the New Jersey Constitution. See Green Party, 164 N.J. at 151; New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 138 N.J. at 362. In Galaxy Towers, the court held that an association's refusal to allow the plaintiffs to distribute political literature to the residents of Galaxy Towers impaired the guarantee of free speech under the New Jersey Constitution. The court recognized that "[a] level playing field

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community room, which is levied upon all members of the community, plus the additional rental fee.

requires equal access," and that the association's refusal to permit dissemination of other political ideas would impair the residents' access to information. 297 N.J. Super. at 411.

In Green Party, the New Jersey Supreme Court held that a shopping mall could not condition leafletting on the purchase of a million-dollar insurance policy. 164 N.J. at 151-52. The Court noted that leafletting in private shopping malls was an effective and inexpensive way to disseminate information and seek public support. Id. The Court cautioned that "putting too high a price on the exercise of that freedom may destroy it." Id. at 152.

Similar to the plaintiffs in Galaxy and Green Party, Plaintiffs here are seeking access to their community room in order to disseminate information. Indeed, unlike the plaintiffs in Green Party and Galaxy, Plaintiffs are members of the very community with which they wish to communicate. Further, as stated earlier, the community room is the only available meeting room in Twin Rivers for discussion of community affairs. Thus, by charging an excessive and unreasonable fee for use of the community room, TRHA is effectively impairing their residents' access to information and creating a political isolation booth in violation of the New Jersey Constitution. Galaxy Towers, 297 N.J. Super. at 411.

IV. DENIAL OF EQUITABLE ACCESS TO THE COMMUNITY NEWSPAPER VIOLATES PLAINTIFFS' RIGHTS TO FREE EXPRESSION UNDER THE NEW JERSEY CONSTITUTION

The trial court acknowledged that *Twin Rivers Today* (TRT), as the "official voice of the Association," has a fiduciary obligation to also represent plaintiffs' views." (Pa103) However, the court went on to hold that the newspaper fulfilled that obligation by publishing opposition articles in the "letters to the editor" column.

In so ruling, the trial court completely misrepresented the extent to which TRHA president and newspaper editor Scott Pohl used its pages as his own political campaign tool. The court further ignored the holding in the Galaxy Towers case that under such circumstances opposition voices have a right to be heard "in essentially the same manner" as the association management. 297 N.J. Super. at 410. To the

contrary, the court passed over this holding and ruled that the Association newsletter does not have a duty to represent Plaintiffs' views "to the same extent, as those of the Association." (Pa105)

Examples of how the Association has abused its power in denying Plaintiffs equal access begin with the Association's egregious use of the TRT cover page, which has been used on numerous occasions to insult and malign Plaintiffs and their views. From the September 2000 through November 2000 editions, Defendants placed the "CBTR thermometer" on the cover pages of TRT and proclaimed it as "a new feature in our paper that will show how much the 'committee for a better Twin Rivers' has cost our community since their inception..." (Pa667-69)

Other examples include the August 2000 edition's cover page, which contained a column by Defendant Scott Pohl under the screaming headline "THEY'RE BAAACK," a reference to Plaintiffs. (Pa670) The article concludes with an ad hominem attack on the CBTR which compares them to the iniquitous Jim Jones and Charles Manson. (Pa671) A front-page story in the October 2000 edition refers to the CBTR as "a handful of malcontent residents" and concludes with the comment: "hoping these people come to their senses." (Pa668). On the other hand, the publishers of TRT restricted the views of opposing members to the "letters" section, which regularly appears in the interior pages of the newspaper.

The inequality of the publishers' treatment of submissions opposing Association policies is further accentuated by the rebuttal that the publishers append to critical letters from opposing members. The November 2000 issue of TRT contains a point-by-point rebuttal to a Letter to the Editor from the CBTR. (Pa666) The rebuttal was signed by Evan Greenberg, Scott Pohl's running mate in the upcoming TRHA election. The rebuttal is more than twice as long as the CBTR letter itself, and after responding to the four points raised in the CBTR

letter, adds: "The CBTR is a small group whose goal is to foment disruption and divisiveness." Id. Apparently, even the so-called right to an even-handed response in the "letters" column is a fiction.

Ignoring the uncontested facts, the trial court ruled that "[i]t is not inappropriate ... to append factual corrections or clarification to the reader where those corrections are necessary for accuracy or to provide needed context." (Pa106) The court gave as an example an instance when a submission refers to an individual without clarifying his position within the association. Id. In such instance, the court said that it is appropriate for the editors to supplement the letter with an explanation of that person's position and his role in the association. (Pa106) But the actual scenario of which Plaintiffs complained had nothing in common with the hypothetical problem identified by the trial court. More particularly, the rebuttals have denied Plaintiffs the ability to express their views "essentially in the same manner" as those of the Association.

Equal access has also been denied Plaintiffs by Defendant Pohl's authority over TRT to place free advertisements supporting his candidacy for association office.[20] A half page advertisement supporting Pohl and his running mate Evan Greenberg appeared prominently on page 3 of the November 1999 issue of TRT. (Pa672) Although the TRT rate card indicates that the ad should have cost $219 (Pa673; Pa678 Dickey dep. at T13-21), the printer, Raymond Dickey, proprietor of Micray Press, which prints and distributes TRT, conceded that there was no evidence indicating that the ad was ever paid for. (Pa698 - sworn statement by Raymond Dickey dated Sept. 27, 2001) Although Pohl claims that he paid Dickey for the ad, he could not

[20] The trial court declined to consider the evidentiary weight of this point. It said only that "the question does not need to be addressed in analyzing the issue as a whole." (Pa104n.19)

produce any documentary evidence of payment. (Pa717-18, T29-4 to 30-18) Nor could he recall the price of the ad or how much he allegedly paid. Id. Further, Pohl claimed to have spent less than $100 on his campaign and mentioned only the printing of flyers when asked about the nature of his campaign expenditures. (Pa717, at T29-9 to 20) He volunteered no information about expenditures for newspaper advertising until prompted. (Pa716-17, at T28-13 to 29-20)

This lack of payment is likely best explained by the nature of the relationship that existed between TRHA and the distributor of TRT, Micray Press. Although Micray was contractually obligated to TRHA to distribute TRT, the distribution was actually performed by TRHA for most of 2000 and part of 2001 due to Micray's inability to fulfill its obligation. (Pa752-53, Ward dep. at T91-4 to 92-10) Still, TRHA billed Micray $95 a month for distribution, but Micray never paid the invoices. (Pa685-89, Dickey dep. at T25-25 to 29-4) As such, Micray received a windfall of well over $1,000, compliments of TRHA. It is no wonder that Micray never pressed TRHA officials for payment of their ads.

The consequence of the abusive use of the TRT cover page, the unequal placement of Plaintiffs' submissions, the Association's rebuttal tactic, and Pohl's ability to use his position to place a free advertisement for his candidacy in TRT is that TRHA and Scott Pohl, who is both the Association president and the TRT editor, is able to drown out opposition voices.[21] The Appellate Division in

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[21] Plaintiffs suggested to the trial court guidelines for TRT along the following lines:

Twin Rivers Today (TRT) is a community resource which belongs to all of the residents of Twin Rivers and members of the Twin Rivers Homeowners Association (TRHA). These guidelines are intended to provide guidance for the editors of TRT in carrying out their fiduciary responsibilities. They shall be published at least twice a year in TRT.

1) The news pages of TRT should not be used for the purpose of promoting or opposing candidates for the TRHA Board or for disparaging individuals or groups because of their positions with regard to issues of governance of Twin Rivers.

2) In the event of a violation of Para. 1., the persons or groups harmed or disparaged shall provide space of equal size and prominence for purposes of reply in the succeeding issue. If the forbidden commentary should appear in the issue of TRT immediately preceding the election for TRHA Board, the target of such comments shall be entitled to prepare a written response of equal length which shall be promptly distributed by the TRHA at its expense to all TRHA members who receive copies of TRT.

3) TRT, if it so decides, may include one or more Opinion pages within each issue which shall be open to all members of the TRHA to publish comments of up to 500 words in issues f Twin Rivers' governance. Space permitting, all such comments shall be published. Libelous and other salacious and obscene material shall be omitted. If an excess number of comments are submitted for any issue, the editors shall endeavor to provide relatively equal space for all points of view. Comments omitted from the issue for which submitted shall receive preference for inclusion in the next succeeding issue of TRT.

4) The Letters to the Editor column shall be managed in a fair and non-partisan manner. All members of the Association are entitled to express their views in the Letters column. The editors shall not append responses to a letter in the same issue in which it is initially printed. No individuals have a right to monopolize the Letters column. When an excess of letters is submitted, the editors shall create a priority list which gives preference to the following: (1) letters from persons who are responding to prior letters which identified them by name in an unfavorable manner; (2) according to the date of their last published latter, with priority to the least recent writers.

5) Complaints for violation of these Guidelines shall be submitted to the New Jersey Department of Community Affairs (DCA) for resolution. If DCA is unable to resolve a dispute, the grievant may invoke the TRHA's arbitration policy.

Galaxy Towers found this drowning out to be unlawful as it creates a "political isolation booth." Galaxy Towers, 296 N.J. Super. at 106 (citing State v. Kolcz, 114 N.J. Super. 408, 416 (Cty. Ct. 1971)). Following the remand from the Appellate Division, the trial court found that the plaintiffs had "no adequate meaningful substitute for... communication" with residents of Galaxy Towers, and ordered the association to permit the candidates to communicate with residents "in essentially the same manner" and to the same extent that the Association did. 297 N.J. Super. at 411.

Similarly, in the instant case, TRT is the only viable means of communication with Twin Rivers residents, and it is the only common meeting ground where Twin Rivers residents can exchange views on community governance. Defendants concede that TRT is "the official newspaper of Twin Rivers." As such, aside from TRT, Plaintiffs have no "meaningful substitute for communication" with Twin Rivers residents. For the TRHA and Scott Pohl to exclude or diminish the opposing side of a public debate from TRT while using TRT as a sounding board for their own side is to transform the community into a "political isolation booth."

Indeed, Plaintiffs' claim is stronger than that of the Galaxy Towers plaintiffs. Here, Plaintiffs want to communicate with the members of their own community. In Galaxy Towers, the challengers did not even live in the complex. Certainly, if outsiders in Galaxy Towers had a right to communicate with Galaxy residents in the same manner as the association, then Plaintiffs here have the right to voice their dissenting views in an equal manner as the THRA and its president voice their views.

V. THE TWIN RIVERS WEIGHTED VOTING SYSTEM VIOLATES THE NEW JERSEY CONSTITUTION AND MUST BE REFORMED-

Although the actions of the Board regarding governance of the Twin Rivers community affect all residents equally, only owners are allowed to vote, and votes are weighted based on the value of an owner's property. Therefore, absentee landlords are entitled to vote while resident tenants are not; and owners of the most expensive homes cast about four times the votes of owners of the least expensive homes. This scheme allocates roughly 4.5 Million votes to the owners of three apartment complexes and nearly 64,000 votes to higher priced property owners as compared to roughly 16,000 for lower priced property owners.(Pa779) However, the Board's actions with respect to amenities of life such as recreation, street maintenance, sanitation, parking, pets, and architecture affect all residents equally, and tenants more so than absentee landlords. Nevertheless, under the current regime tenants are totally disfranchised while owners of expensive property are given more leverage based on their properties' value.

The trial court first misrepresents Plaintiffs' position as to an appropriate remedy for the undemocratic electoral system employed in Twin Rivers and then falls back on the waiver doctrine (Pa133) and the business judgment rule (Pa134) to uphold the current voting scheme based on property values.

As set forth in Point IB, supra, Plaintiffs may not be held to a waiver of their right to a regime of constitutional governance pursuant to an unbargained for take-it-or-leave-it deed restriction. And, of course, the business judgment rule is inapplicable to a denial of a constitutional right.

A. Twin Rivers' Weighted Voting Scheme Violates Fundamental Constitutional Principles

> Every citizen of the United States, of the age of 18 years, shall be entitled to vote for all officers that now are or hereafter may be elective by the people ...

New Jersey Constitution, Article 2, ¶3.

In New Jersey, the right to vote is absolute. Asbury Park Press. Inc. v. Woolley, 33 N.J. 1, 11 (1960). "[T]he basic right of suffrage,

a civil and political franchise, [is] the very essence of our democratic process [and] is to be liberally and not strictly construed. ...” Gangemi v. Berry, 25 N.J. 1, 12 (1957). A voting scheme that results in unequal effects denies the equality among voters guaranteed by the New Jersey Constitution. Asbury Park Press at 11. “Ours is a representative form of government [and] can remain such ... only if the vote of each citizen has equality with that of his neighbor...” Id.

Voting rights in this country “did not share in the glorious history of our other democratic values,” but, rather, have developed over time. Gangemi v. Rosengard, 44 N.J. 166, 169 (1965). Indeed, as the United States Supreme Court observed in its landmark decision of Reynolds v. Sims:

> [H]istory has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.

377 U.S. 533, 555 (1964)(footnotes omitted).

The line of authority leading directly from the United States Supreme Court’s decision in Reynolds powerfully confirms the above-quoted observation made in Reynolds that “history has seen a continuing expansion of the scope of the right of suffrage in this country.” 377 U.S. at 555. Following Reynolds, the Supreme Court applied “equal population” principle first recognized in Reynolds to county

commissions exercising "general government powers." Avery v. Midland County, 390 U.S. 474 (1968). The Court thereafter extended the principle to specialized units of government exercising "general government powers." See Hadley v. Junior College District, 397 U.S. 50 (1970) (applying Reynolds principle to board of trustees of junior college exercising "general government powers"); Board of Estimate v. Morris, 489 U.S. 688 (1989) (applying Reynolds "equal population" principle to quasi-executive, quasi-legislative body exercising "general government powers"). These cases, and many others, are important not merely for their substantive holdings, but also as powerful evidence of the continuing judicial commitment to protect the electoral franchise in the face of changing political arrangements and shifting responsibilities for the delivery of government services.

In essence, Reynolds and its progeny established a still-evolving doctrine. Of most immediate relevance here is the aspect of the Reynolds doctrine that holds that, when it can be shown that an elected entity exercises "general governmental powers," Hadley, supra, 397 U.S. at 54, then voting for that entity is subject to certain constitutional constraints arising under the Fourteenth Amendment.

The particular analysis required by this aspect of Reynolds turns critically on whether the powers exercised by the elected entity are "general enough and have sufficient impact" to give rise to the constitutional mandate. Id. Moreover, if "general governmental powers" have been delegated, the fact of the delegation does not "insulate" the recipient of the power "from the [standard] of substantial voter equality." Board of estimate v. Morris, 489 U.S. at 693.

With this as background, we turn to the voting claim here at issue, which does not arise under the Fourteenth Amendment of the

United States Constitution, but instead arises under the New Jersey Constitution. Although the New Jersey Constitution must, of course, be at least as protective of individual rights as the Federal Constitution, the scope of protection of individual rights in New Jersey is by no means limited to those rights guaranteed by the Federal Constitution. See State v. Hempele, 120 N.J. 182, 197 (1990) (observing that federal constitutional law "establishes no more than [the] floor of constitutional protection"). Indeed, the New Jersey Supreme Court repeatedly has construed our Constitution "as providing greater protection to ... individual rights than accorded ... under the federal constitution." State v. Gilmore, 103 N.J. 508, 523 (1986) (citing State v. Williams, 93 N.J. 39 (1983); State v. Hunt, 91 N.J. 338, 353 (1982); State v. Schmid, 84 N.J. 39(1982)).

It is important to reiterate that, under Reynolds and its progeny, the voting right secured thereby is limited to circumstances when an elected entity exercises "general government powers," and, further, that the remedy for the violation of such right is to a voting plan of essentially "one person, one vote," that is, relative equality as to the voting power of each citizen. But the claim for voting rights here at issue -- arising as it does under the New Jersey Constitution -- *is neither limited to the right nor the remedy recognized under federal constitutional law.*

It is respectfully submitted that Twin Rivers satisfies the standard of "general government powers" under the Fourteenth Amendment (which may be deemed incorporated by reference into the State Constitution) or, in the alternative, satisfies the more expansive voting-protective provisions of the state Constitution. As previously noted, Twin Rivers, as described by its own former

administrator, operates as a "quasi-governmental entity" and is governed by an elected Board of Trustees which "operates like a township council" whose "governmental duties include the fiduciary responsibility to enforce the Trust documents as authored, to establish policy and to establish procedures to accomplish both." (Pa222) The Board of Twin Rivers makes and enforces community rules, provides services, assesses taxes on residents and exercises certain judicial authority over the violation of its rules. The Board's rule—making power includes regulation of conduct on common grounds, use of vehicles on trust property, procedures to be followed in snow emergencies and husbanding of pets. (Pa317-85). The Board also exercises a quasi—zoning power controlling what residents may do with the physical structure of their homes. (Pa148-49, No. 25) The Board can assess penalties for infractions of its rules, including fines (Pa149, No. 27 and Pa152, No. 40); denial of the use of common facilities (Pa318-27); and even denial of the right to vote in Board elections (Pa167, No. 122)

The TRHA also provides the following services to residents: trash removal, recycling, road repair and repaving of its privately owned roads and access roads, maintenance of 85 trust-owned parking lots, maintenance of the storm sewer system, street lighting, sidewalk and curb repair and replacement, snow removal, and tree and shrub replacement. (Pa387-88). The TRHA also sponsors community events, conducts elections, and conducts architectural inspections. (Pa248-53)

The foregoing unquestionably constitutes "general government powers." By contrast, the United States Supreme Court in Hadley, supra, determined that an elected board of trustees of a junior college exercised "general governmental power" because the board was authorized to "levy and collect taxes, issue bonds with certain restrictions, hire

and fire teachers, make contracts, collect fees, supervise and discipline students. . ., and in general manage the operations of the junior college." 397 U.S. at 53. The Hadley Court concluded that the powers exercised by the board were "general enough and have sufficient impact" to give rise to the constitutional mandate of one person, one vote under the Fourteenth Amendment. Id. at 54. Plainly, Twin Rivers exercises powers at least as extensive as the powers exercised by the Board in Hadley.

As previously noted, although the rights and remedies for a violation of the Reynolds principle are well established as a matter of federal constitutional law, the counterpart rights and remedies for a violation of the New Jersey Constitution are not clearly established. Nor is it clearly established, under federal or New Jersey constitutional principles, whether *nominally private* elected entities are subject to constitutional voting requirements, *although it would follow from both federal and state constitutional law principles that the mere denomination of an entity as "private" does not mean that the entity cannot, under the appropriate circumstances, be deemed to be the functional equivalent of a governmental entity and thereby subject to constitutional restraints.* See e.g., Coalition, supra; Galaxy Towers, supra; Mulligan, supra, 337 N.J. Super. at 305; Marsh, supra, 326 U.S. 501; Burton v. Wilmington Parking Authority, 365 U.. 715 (1961) (holding that privately owned business was subject to the requirements of the Fourteenth Amendment under facts and circumstances presented); Evans v. Newton, 382 U.S. 296 (1966) (holding that private operator of park was subject to the requirements of the Fourteenth Amendment). See also Lebron v. National Railroad Passenger Corp., 513 U.S. 374 (1995) (holding that "the final determination of Amtrak's status as a

government entity for purposes of determining the constitutional rights of citizens affected by its actions" was "not for Congress to make" but rather was a matter reserved exclusively for the courts).

Consistent with the doctrine of both the United States Supreme Court and the New Jersey Supreme Court favoring the expansion of equal voting rights so as to include all levels of government as well as entities with authority over governmental functions, this court properly should recognize TRHA as a "quasi-municipality," Mulligan v. Panther Valley Property Owners Association, supra, 337 N.J. Super. at 305, and thereby subject TRHA's present unjust and inequitable "weighted voting" scheme to constitutional scrutiny.

B. Twin Rivers' Weighted Voting Scheme Should Be Declared Unconstitutional and the Parties Should Be Directed to Submit Proposals for Reform

Plaintiffs recognize that, although Twin Rivers is properly subject to constitutional scrutiny, Twin Rivers nevertheless should not be treated as a constitutional actor *for all purposes*. The Appellate Division recognized as much in Mulligan when it observed, referring to the community association there at issue, that a community association may perform "quasi-municipal functions such that its actions perhaps should be viewed as analogous to governmental actions in some regard." 337 N.J. Super. at 305.

Similarly, our Supreme Court in Coalition, assessing the hybrid public-private nature of regional shopping malls, determined that it was inappropriate to treat shopping malls as constitutional actors *for all purposes*. Thus, the Court in Coalition determined that, although regional shopping malls must accommodate the rights of free expression consistent with their uses and functions that are analogous to town squares, such malls do not have to open themselves up for expressive

conduct to the same extent as do municipalities. The Coalition Court thereby limited the types of free speech the malls must permit to "leafleting and associated free speech." 138 N.J. at 375. Conversely, malls are under no obligation to open themselves up to other more intrusive forms of expressive conduct, such as speeches, parade, and demonstrations, which the Court expressly excluded, in consideration of the mall property owners' private interests. Id. at 377.

Following the principles laid down in Coalition, the Supreme Court in Green Party considered the reasonableness of a mall's rules governing expressive activity. The mall had attempted to require all applicants seeking to leaflet on its premises to procure a million insurance policy, which in the case of smaller groups would have been prohibitive. The Court in Green Party held that, although the insurance regulation violated the State Constitution, the standard to be applied in assessing the validity of the regulation was different, and less stringent, than the standard ordinarily applied against municipalities. 164 N.J. at 146—47. Because the regulation of speech on private property implicates countervailing considerations, the Green Party Court instructed that a reviewing court must balance the competing interests and strike a balance "giving proper weight to the [competing] constitutional values." Id. at 148—49.

This same constitutional balancing -- mandated by our Supreme Court in the content of free speech rights on private property -- properly should apply as well when, as here, the issue is the scope of the right and the fashioning of the remedy for a constitutional violation of voting rights with respect to nominally private entities that exercise traditionally governmental powers. Mechanical application of the Fourteenth Amendment's "one-person one-vote"

principle is not necessarily appropriate under the circumstances. Nor must that principle be applied, in light of the fact that the voting claim here at issue arises under our State Constitution, not the Federal Constitution.

Plainly, voting rights in the elections of a community association presents its own set of unique circumstances, which call for careful judicial review that considers all of the rights at stake, as well as the fashioning of a remedy that takes due account of those rights. Such an approach is consistent with the considered views of many commentators and scholars of community associations.

For example, even Defendants' own expert, Professor Katherine Rosenberry, acknowledged in her published writing that a state court could find unreasonable an association's voting scheme by looking to state constitutional provisions for guidance "unencumbered by the rigid results [of] strict application of the U.S. Constitution." Katherine Rosenberry, An Introduction to Constitutional Challenges to Covenant Enforcement, 1 Journal of Community Association Law 23, 27 (1998).

Similarly, the leading scholar on the law of community associations, Professor Wayne Hyatt, offered the following considered view on the issue:

> Public policy remains a determinant in the validity of a [community association] servitude and certainly of a rule adopted in accordance with that servitude. Courts can and should carefully examine the issue and determine whether there is a genuine constitutional issue. If so, the court would be justified in striking down the restriction or action on the basis that to enforce it would violate public policy. ...
>
> Constitutional issues must be considered and addressed in drafting common interest community documentation and in advising the community association on its operations. There are obvious issues affecting the association's members *such*

as voting...

Wayne S. Hyatt, Common Interest Communities: Evolution and Reinvention, 31 J. Marshall L. Rev. 303, 341-42 (1998 (emph. added)

In the final analysis, this Court must look to all of the foregoing sources of authority and fashion a remedy that addresses the countervailing considerations here at stake. In fashioning the remedy, the Court must draw on its inherent equitable powers. See Solario v. Glaser, 93 N.J. 447 (1983). It is well to recall our Supreme Court's articulation of the scope of those powers:

> We are not unmindful of our broad discretionary power in the balancing of all hardships and equities in shaping an equitable decree. Equity courts have often recognized matters of public policy, convenience of administration and practicality as matters to be weighed in the scales along with matters of justice and morality.... [E]quitable remedies are distinguished by their flexibility, by their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is, in fact, no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it to fit the changing circumstances of every case and the complex relations of all parties.

93 N.J. at 469 (internal cites and quotes omitted).

Plaintiffs are prepared to accept a remedy that provides an appropriate variation of the "one-person, one- vote" constitutional standard, that is, a modification that takes proper account of the countervailing considerations at stake in the special context of community associations. For example, Plaintiffs would accept an equitable remedy that recognized the separate interests of absentee unit owners and renters, by assigning the housing unit one *divisible* vote split between the owner and the renter. Such a remedy would accommodate the resident's interest in equitable community governance and property owner's interest in preservation of his or her investment. See Stephen E. Barton & Carol J. Silverman, Common Interest

Communities: Private Governments and the Public Interest 36 (1994)("An appropriate recognition of the dual nature of the interests in the common interest development would be to give two votes to each unit, one for the residents and one for the owner, with both being voted by resident owners.") See also N.J.S.A. 2A:62A-14(a) (authorizing community associations to adopt tort immunity regulations, but only if approved by a certain percentage of the *unit owners,* as distinct from approval by a percentage of shares assigned to units*);* Roxrun Estates, Inc. v. Roxbury Run Village Ass'n,Inc., 526 N.Y.S.2d 633, 636 (1988)(holding that "[s]ince the primary objective of a not-for-profit corporation is not to generate a return on invested capital, power is more appropriately shared on an between members equivalent basis, rather than on the degree of investment...").

In sum, the record discloses that Twin Rivers performs many traditional municipal functions. The Twin Rivers Board possesses the authority of a municipal council, and exercises that authority over some 10,000 residents. Those residents -- including Plaintiffs -- are entitled to a voting system that substantially comports with constitutional norms, albeit with appropriate modifications that reflect the special circumstances of community associations.[22]

Accordingly, Plaintiffs urge this Court to (1) hold the current Twin Rivers weighted-voting scheme unconstitutional; and (2) remand the fashioning of the remedy to the trial court with proper instructions. A remand will enable the trial court to consider various proposed remedies of the parties, and possibly consider proposals of other interested persons as well. These

[22] Inexplicably, the trial court below indicated a **belief** that tenants in New Jersey are not generally entitled to vote. The trial court stated: "Twin Rivers tenants are entitled to no more control over their community than are thousands of other tenants of property in New Jersey. Like other tenants, Twin Rivers tenants "vote with their feet" by choosing to lease the properties." Of course, all property qualifications for voting in New Jersey were abolished early in the Nineteenth Century.

proceedings on remand will enable the trial court to "devis[e] its remedy and shap[e] it so as to fit the ... circumstances of [the] case and the complex relations of all the parties." Solario v. Glaser, supra, 93 N.J. at 469.

VI. IT IS A VIOLATION OF NEW JERSEY LAW AND THE NEW JERSEY CONSTITUTION TO DISFRANCHISE A PERSON FOR FAILING TO PAY A FINE FOR A RULE VIOLATION

Plaintiffs' central contention in the trial court with regard to disfranchisement was that it is a violation of both the New Jersey Constitution and the Twin Rivers Articles of Incorporation for TRHA to punish an Association member who either challenges a home assessment or fails to pay the most minor of fines by denying that member's voting rights. Plaintiffs further contended that such disfranchisement is particularly egregious in light of the absence of an ADR policy that meets the mandate of PREDFA that all planned unit developments provide for its residents a "fair and efficient procedure for the resolution of disputes between individual unit owners and the association, and between unit owners, which shall be readily available as an alternative to litigation." N.J.S.A. 45:22A-44(c). The trial court, however, only rendered a decision as to the lawfulness of TRHA's ADR policy (Pa127), while entirely neglecting to reach a decision as to the lawfulness of TRHA's disfranchisement of its members for challenging or failing to pay fines and assessments. As such, the trial court's opinion spoke only to Plaintiffs' supporting argument and not to the meat of the argument itself.

Plaintiff Bruce Fritzges lost his right to vote in the Twin Rivers election because he refused to pay a $3 a month cable television assessment on the ground that he did not use cable. (Pa49) TRHA does not have the authority to disfranchise the Plaintiff under such circumstances.

PREDFA requires the association to "exercise its powers and discharge its functions in a manner that protects and furthers the health, safety and general welfare of the residents of the community." N.J.S.A. 45:22A-44(b). The intent of the statute is to "safeguard the interests of the individual owners or occupants." (Pa817) The terms of the statute must be construed in terms favorable to the individual owners.

PREDFA further allows the by-laws of the Association to include "a method for the adoption, amendment, and enforcement of reasonable administrative rules and regulations." N.J.S.A. 45: 22A-46. Although the statute does not further define "enforcement of reasonable ... rules," even the most liberal interpretation of that provision in favor of the Association would not allow it to unilaterally revoke the right to vote for failure to pay a small fine.

The right of a unit owner to vote, which is protected both by statute and the Twin Rivers Articles of Incorporation VI (Pa291, §2 at 3), may not be revoked by the Association on the basis of its own unilateral action in the face of its failure to provide the statutorily required ADR mechanism. Twin Rivers is the Fritzges' home. Consequently, the Association Board makes some of the most significant decisions in regard to their lives, particularly in regard to the major amenities of suburban living -- recreation, road maintenance, trash collection, aesthetics, vehicle regulation, parking, social activities -- as well as the assessments to pay for them. Plaintiffs do not question the authority of the Association to impose some sanctions for violations of its rules. However, disfranchisement is not a reasonable sanction in light of the importance of possessing voting rights in an Association that has such a pervasive effect and influence on the lives of its owners.

In addition, since Twin Rivers is a constitutional actor subject to the provisions of the New Jersey Constitution, it can no more disfranchise an owner for failure to pay a fine or assessment than the Borough of East Windsor can. As the United States Supreme Court has stated, "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, and any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." Reynolds v. Sims, 377 U.S. 533, 562 (1964). Our own Supreme Court has added that "other rights, even the most basic, are illusory if the right to vote is undermined." Gangemi v. Rosengard, 44 N.J. 166, 170 (1965)(citation omitted). As such, disfranchisement must only occur as the consequence for the most egregious of violations. In the

Borough of East Windsor, only imprisonment warrants disfranchisement. It hardly seems logical that, in comparison, TRHA should have the authority to disfranchise for the failure to pay a $3 cable assessment.

The Court should invalidate the Twin Rivers provision of disfranchising members for failure to pay a fine or assessment.

VII. PREDFA REQUIREMENTS PROVIDING MEMBERS ACCESS TO FINANCIAL DOCUMENTS APPLY TO TWIN RIVERS; AND RESOLUTION 99-1 VIOLATES THAT PROVISION

The trial court correctly decided that the 1993 amendments to the Planned Real Estate Development Full Disclosure Act (PREDFA) apply to Twin Rivers even if the Act itself does not. As a consequence of this determination, the court ruled in favor of the Plaintiffs on Count 6 of the complaint, invalidating Resolution 2000-1. (Pa113-117) Resolution 2000-1 contains a list of subject matters which are deemed confidential, so that Board members may not disclose them without incurring sanctions. The first four items are taken straight from PREDFA, which provides that the Board may exclude owners from having access to

> (1) any matter the disclosure of which would constitute an unwarranted invasion of individual privacy; (2) any pending or anticipated litigation or contract negotiations; (3) any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer, or (4) any matter involving the employment, promotion, discipline or dismissal of a specific officer or employee of the association.

N.J.S.A. 45:22A-46(a). The Board unjustifiably extended the list to include three other categories covering a large range of matters. (Pa815 - items 5-7)

The trial court held that the resolution was facially invalid, citing an opinion from the State Department of Community Affairs (Pa820), the agency enforcing PREDFA, because it "impermissibly expands the power of the Board to make any matter confidential and to then subject members to censure ..." for breaching that confidentiality. (Pa116). The court also determined that while the board of a private organization can impose rules, those rules must still

comply with the statutory regulations and can neither provide less confidentiality nor expand it beyond what is permitted by law. Id.

Inexplicably, the trial court then upheld the language of Resolution 99-1 (access to documents) despite having already determined that PREDFA applies to Twin Rivers and that Resolution 2000-1 violated the statute. Failure to consider PREDFA in its analysis of Count 5 led the trial court to wrongly conclude that Resolution 99-1 is valid on its face and as applied. Just as the PREDFA amendments apply to Resolution 2000-1, though, they also govern Resolution 99-1, which regulates access to financial and other documents. (Pa809-13) The Board divides all documents into three categories: permitted, confidential or discretionary. Resolution 99-1 limits permitted documents to governing documents, minutes of meetings and basic financial information. Permitted documents are available to members for inspection upon written request without any action by the Board. The resolution then lists a variety of confidential documents and designates all others as discretionary. Confidential and discretionary document requests must be approved by a majority of the Board, which considers whether the request is for a proper purpose and whether approval of the request is in the best interest of, and not too burdensome on, the Association.

As with Resolution 2000-1, the Board incorporated the language from PREDFA, N.J.S.A. 45:22A-46(a), supra, in promulgating Resolution 99-1, but again impermissibly expanded the statutory list of confidential matters. In addition to the confidential matters enumerated in PREDFA, Resolution 99-1 covers outstanding contract bids and proposals, employee applications, employee files, payroll records, legal files and unit owner lists. The Board essentially designated all but the original documents given to owners at the time of purchase as either confidential or discretionary. The Board can therefore deny requests for financial documents that would not otherwise be considered confidential because they do not fall within the limited range of permitted documents. This unauthorized and illegal expansion of confidential

documents not only violates PREDFA but also goes against the determination of the DCA. Just like Resolution 2000-1, Resolution 99-1 is invalid on its face because it enables the Board to limit access to all but the most basic documents, a large number of which are neither confidential nor too burdensome to produce.

Resolution 99-1 is not only invalid on its face but also as applied. The Board denied a request by Mr. Bar-Akiva for financial information because it found it to be unreasonable and burdensome. While Mr. Bar-Akiva did make a general request for financial documents for a five-year period, he also listed a number of specific documents. (Pa801) Among the specific requests were those that were not confidential in nature and not too burdensome, but because of the Board's overly broad definition it could arbitrarily refuse Mr. Bar-Akiva access to them. In particular, Mr. Bar-Akiva requested statements for litigation expenses that included his own litigation against the Association. These are documents that are not confidential, nor are they so numerous as can be considered burdensome. Another request was for documents related to a tax audit and one related to publishing expenses. (Pa807) None of these requests involve confidential matters and all are limited in scope. Nevertheless, the Board made an outright denial, rejecting all of Mr. Bar-Akiva's request.

While document requests cannot be too burdensome, PREDFA does not require that they cannot be a burden at all. Making documents available to members entails a certain amount of time and effort and it certainly is within reason to go through each request and determine which documents can be made available without violating privacy rights. Giving the Board too much discretion to review document requests entails a danger of abuse of such discretion. The Board's denial of every single request of Mr. Bar-Akiva is unreasonable and constitutes such an abuse of discretion.

VIII. THE TRIAL COURT ERRED IN DENYING CBTR STANDING TO SUE

NJSA 2A:64-1 provides that an unincorporated association may sue or be sued if it

consists of 7 or more *persons* and has a recognized name. The Committee for a Better Twin Rivers (CBTR) clearly satisfies both criteria. CBTR had at least 14 supporters/contributors at the time the suit was filed (Pa831[23]), and had one of the most recognized names in the Twin Rivers community, as perusal of almost any issue of *Twin Rivers Today* makes abundantly clear. For example, the front page of the August 2000 issue had a blaring headline "**THEY'RE BAAACK"** (Pa670), referring to the Plaintiff organization. The October 2000 issue derogatorily mislabeled CBTR, "the committee to BADGER Twin Rivers" and "committee to belittle Twin Rivers" (Pa853), and the March 2000 newspaper printed an article in which CBTR was referred to as "...the Committee to Disrupt Twin Rivers." (Pa852)[24] Likewise, CBTR occasionally publishes its own newspaper entitled *Twin Rivers Tomorrow*. Thus, CBTR's name is widely recognized in the community.

The court's suggestion that CBTR lacks standing because it has no formal *membership* requirement is akin to saying that Al Qaeda is not a recognizable entity because its supporters do not carry membership cards and do not wear uniforms.

As CBTR is an unincorporated association, has more than 7 persons associated with it, and has a recognized name, it is unmistakably the type of association contemplated by the statute.

In denying standing to CBTR, the court erroneously relied on a case that involved

[23] The 14 persons who comprised CBTR at the time suit was filed were: Haim Bar-Akiva; Edward McDonald; Emily McDonald; Marty Meltzer; Gus Mellon; Leroy Hackshaw; Scott Matlofsky; George White; Joan White; Bruce Fritzges; Terry Fritzges; Donald Sharp; Dianne McCarthy; and Beth Zurick.

[24] Copies of all issues of *Twin Rivers Today* were submitted to the trial court by

a defendant governmental entity's standing to challenge the constitutionality of a state statute. Booth v. Township of Winslow, 193 N.J. Super. 637, 640 (App. Div. 1984) certif. den. 97 N.J. 657 (1984), cert. den. 469 U.S. 1107 (1985). This case is not applicable to whether CBTR has *standing to* sue.

Furthermore, the court misinterpreted the holding in Booth. Booth does not stand for the proposition that the association will have standing *only* if it is in the public interest to grant it. Rather, the Booth court held,

> We are satisfied that the standing question is at least debatable, and...*rather than debate the question***we deem it preferable in the public interest to settle the constitutional questions presented on their merits.*" (emph. Supplied).

Id. at 640. The *Booth* court avoided deciding the issue of standing and decided that it was in the public interest to settle the constitutional questions presented.

Moreover, the trial court opined that this case was about individual rights and not public rights. (Pa73) However, there is no explanation offered for that statement. To the contrary, this is a test case raising the interests of the more than one million residents in the state of New Jersey who reside in community associations, as well as the approximately 10,000 residents of Twin Rivers. It is certainly in the public interest to resolve the constitutional status of entities such as Twin Rivers. See Mulligan v. Panther Valley Property Owners Assoc., 337 N.J. Super 293, 305 (App. Div. 2001).

The fact that New Jersey has traditionally taken a liberal approach to standing is readily apparent in both the New Jersey statute, N.J.S.A. 2A:64-1, and the seminal case in New Jersey, Crescent Park Tenants Assoc. v. Realty Eq., Corp. of N.Y., 58 N.J. 98 (1971). Thus, for CBTR, an association open to any individual interested in effecting change in Twin Rivers, to be denied standing runs afoul of well established precedent and

defies logic.

CONCLUSION

For the foregoing reasons, Plaintiffs request the Court to reverse the grant of summary judgment for defendants on Counts 1 restrictions on signs), 2 (excessive fee for rental of Community Room), 3 (access to the community newspaper), 5 (inspection of Association records), 8 (denial of voting rights to members who fail to pay small fines), and 9 (weighted voting), and for denying standing to the Committee for a Better Twin Rivers. Plaintiff further request the Court to remand to the trial court Count 9 to devise an appropriate and equitable voting system for the Twin Rivers Homeowners Association.

Respectfully Submitted

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Date:

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Counsel for Plaintiffs acknowledges the assistance of the following students enrolled in the Constitutional Litigation Clinic, Rutgers Law School, Newark, for their assistance in the preparation of this brief: