
STATE CONSTITUTIONAL LAW — FREEDOM OF SPEECH — NEW JERSEY SUPREME COURT HOLDS THAT RESTRICTIONS IN COMMON INTEREST COMMUNITY DO NOT VIOLATE THE STATE'S CONSTITUTION. — *Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 929 A.2d 1060 (N.J. 2007).

The rise to prominence of common interest communities¹ (CICs) is an immutable reality of modern residential patterns.² Since these communities require residents to abide by exacting rules and regulations, clashes between homeowners' associations fashioning CIC restrictions and residents subject to those restrictions are somewhat inevitable. While the Supreme Court has held municipal strictures on residential signs unconstitutional,³ analogous restrictions persist unfettered in CICs nationwide.⁴ Recently, in *Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*,⁵ the Supreme Court of New Jersey held that a homeowners' association did not violate its members' state constitutional rights by restricting their ability to erect signs, use a community room, and publish in the local newspaper.⁶ To reach this conclusion, the court misapplied the test it had previously fashioned to balance competing constitutional and property interests, and in so doing, detracted from New Jersey's broad freedom of speech protections and contravened the values espoused by its own precedent.

Twin Rivers is a CIC composed of privately owned residences and commercial buildings.⁷ Although the community is not gated and has public roads, its facilities are for the exclusive use of residents and their guests.⁸ The Twin Rivers Community Trust, a private corporation that owns and maintains the community's common property, has as its sole trustee the Twin Rivers Homeowners' Association⁹ (TRHA),

¹ A CIC is a community in which the property is burdened by servitudes requiring property owners to contribute to the maintenance of commonly held property or to pay dues to an owners' association that provides services or facilities to the community. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2(1) (2000).

² Whereas approximately 2.1 million Americans lived in 10,000 association-governed communities in 1970, some 57 million Americans lived in 286,000 such developments in 2006. Community Associations Institute: Industry Data, <http://www.caionline.org/about/facts.cfm> (last visited Nov. 10, 2007).

³ See *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) (holding that a city's ban on almost all residential signs was in violation of the First Amendment).

⁴ See Brian Jason Fleming, Note, *Regulation of Political Signs in Private Homeowner Associations: A New Approach*, 59 VAND. L. REV. 571, 573 (2006). For a discussion of signage restrictions, see Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 686–87 (1993).

⁵ 929 A.2d 1060 (N.J. 2007).

⁶ *Id.* at 1063.

⁷ *Id.*

⁸ *Id.* at 1073.

⁹ *Id.* at 1063.

whose membership consists of all Twin Rivers property owners.¹⁰ The TRHA makes rules and regulations that govern the conduct of its members, maintains communal facilities, and provides services to its members.¹¹

A group of dissident residents formed the Committee for a Better Twin Rivers,¹² which sued for relief from several such provisions in New Jersey state court.¹³ The plaintiffs took issue with rules limiting the ability of residents to post signs, use the community room, and publish in the local newspaper.¹⁴ They argued that since the TRHA had effectively supplanted the municipality as the government of Twin Rivers, TRHA rules ought to be subject to the free speech and free association clauses¹⁵ of the New Jersey Constitution.¹⁶

The trial court granted summary judgment for the defendants on the sign and newspaper claims and granted partial relief to the plaintiffs on the community room claim.¹⁷ The court reasoned that, in spite of the TRHA's influence in the daily lives of its members, the TRHA had not been delegated sufficient governmental powers to be considered a quasi-municipality.¹⁸ As such, the TRHA could not be bound by the constitutional strictures imposed on state actors.¹⁹ The court described the relationship between the parties as a contractual one²⁰ meriting business judgment analysis, not constitutional scrutiny.²¹

The appellate division reversed and remanded,²² holding that the trial court's focus on whether a governmental entity had officially delegated power to the TRHA was misguided.²³ The trial court ignored the fact that the protections of free expression in the New Jersey Constitution have been applied more broadly than just to public sector actors.²⁴ The applicability of these New Jersey constitutional provisions to a given actor — in this case, the TRHA — is determined not by quasi-municipal status, but by a test articulated in *State v.*

¹⁰ Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 890 A.2d 947, 953 (N.J. Super. Ct. App. Div. 2006). By acquiring property in Twin Rivers, residents automatically become members of the TRHA and subject to its Articles of Incorporation and Bylaws. *Twin Rivers*, 929 A.2d at 1063.

¹¹ *Twin Rivers*, 929 A.2d at 1063.

¹² *Id.* at 1064.

¹³ See *Twin Rivers*, 890 A.2d at 951.

¹⁴ See *Twin Rivers*, 929 A.2d at 1064–65.

¹⁵ N.J. CONST. art. I, paras. 6, 18.

¹⁶ *Twin Rivers*, 929 A.2d at 1064.

¹⁷ *Id.* at 1065.

¹⁸ See *Twin Rivers*, 890 A.2d at 954–55.

¹⁹ See *id.*

²⁰ See *Twin Rivers*, 929 A.2d at 1065.

²¹ *Twin Rivers*, 890 A.2d at 977–78.

²² *Id.* at 978.

²³ *Id.* at 954.

²⁴ See *id.* at 954–55.

*Schmid*²⁵ and *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*²⁶ Working within this *Schmid-Coalition* framework,²⁷ the court concluded that the balance of interests weighed in favor of the plaintiffs' right to engage in expressive activity.²⁸

The Supreme Court of New Jersey unanimously reversed, reinstating the trial court's judgment.²⁹ Writing for the court, Justice Wallace emphasized the breadth of New Jersey's free speech right and applied the *Schmid-Coalition* analysis to the facts of the case.³⁰ First, the court determined that the primary use of Twin Rivers was as a private residential community.³¹ Second, the court accepted the TRHA's assertion that, although Twin Rivers was not gated, it had "not invited the public to use its property."³² Finally, the court found that, in light of the plaintiffs' voluntary decision to enter a contractual relationship that enumerated the contested restrictions, their expressive activities had not been unreasonably restricted.³³ All these facts militated against a finding that the TRHA's restrictions violated the state constitution.³⁴ The court added that the minor restrictions on the plaintiffs' expressive activities were not unreasonable and hence not unconstitutional.³⁵ In conclusion, the court stated that its holding did not suggest that CIC residents could never successfully seek constitutional redress against a non-state entity, and reiterated that the business judgment rule continued to serve as a check against the untrammelled authority of homeowners' associations.³⁶

The tensions spurred by CIC growth are not unexpected. CICs have assumed responsibilities once firmly in the municipal ken, yet their regulations limit basic freedoms in a way that municipalities never could. The *Schmid-Coalition* test is highly appropriate in this context, which requires a careful balancing of private property and

²⁵ 423 A.2d 615 (N.J. 1980).

²⁶ 650 A.2d 757 (N.J. 1994).

²⁷ See *infra* note 42.

²⁸ *Twin Rivers*, 890 A.2d at 959. The court did not apply each *Schmid* factor individually but did engage in the overall balancing that the factors were designed to facilitate. See *id.* at 959–60.

²⁹ *Twin Rivers*, 929 A.2d at 1076.

³⁰ *Id.* at 1072–73. The New Jersey Constitution grants an affirmative right to speak freely, rather than a negative right not to have one's speech restricted by the government. See *id.* at 1066. This framing has led New Jersey courts to protect free speech both from abridgement by the government and "against unreasonably restrictive or oppressive conduct on the part of private entities." *Schmid*, 423 A.2d at 628; accord *Twin Rivers*, 929 A.2d at 1071–72.

³¹ *Twin Rivers*, 929 A.2d at 1072.

³² *Id.* at 1073.

³³ *Id.*

³⁴ *Id.* at 1074.

³⁵ *Id.* Although the court described the restrictions as reasonable in terms of their "time, place, and manner," *id.* (quoting *N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757, 775 (N.J. 1994)), it did not further discuss this reasonableness standard.

³⁶ *Id.* at 1074–75.

constitutional interests. The *Twin Rivers* court's application of the test, however, evinces indifference to these tensions and a failure to assess properly the plaintiffs' rights in the overall balance. The court's holding retreats from, and jeopardizes the ability of CIC residents to partake in, New Jersey's liberal free speech tradition.

As the state supreme court noted in *Twin Rivers*, New Jersey is somewhat sui generis in not requiring state action before free speech protections may be invoked.³⁷ This idiosyncrasy reflects the state constitution's "exceptional vitality . . . with respect to individual rights of speech,"³⁸ since dispensing with the state action requirement extends constitutional coverage to a broader range of private entities.³⁹ In keeping with this approach, the *Schmid* and *Coalition* courts devised an alternative to the state action requirement. In *Schmid*, the court faced the "need to balance within a constitutional framework legitimate interests in private property with individual freedoms of speech and assembly."⁴⁰ The test aimed to delimit "the parameters of the rights of speech and assembly upon privately-owned property and the extent to which such property reasonably can be restricted to accommodate" individual constitutional rights⁴¹ by illuminating the competing interests that inform this balance.⁴² Strengthening this function of the *Schmid* test, the *Coalition* court explicitly added a general balancing of expressive and private property rights.⁴³

Both *Schmid* and *Coalition* involved limitations on the rights of the general public.⁴⁴ In the context of such cases, the *Schmid-Coalition* test intuitively scrutinizes the interplay between the general public and the private entity. The restrictions in *Twin Rivers*, however, fell not on the general public but on individual residents within the CIC. In this context, the *Schmid-Coalition* test should be applied in a manner that focuses on the interplay between the homeowners' association and these individuals, not the general public. Proper use of

³⁷ *Id.* at 1072. Most other states have adopted the state action doctrine in some form. *See id.*

³⁸ *State v. Schmid*, 423 A.2d 615, 626 (N.J. 1980). Courts have also described New Jersey's free speech right as "affirmatively framed, imperatively announced, and broadly applicable," *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 890 A.2d 947, 959 (N.J. Super. Ct. App. Div. 2006), and "broader than the right against governmental abridgement of speech found in the First Amendment," *Coalition*, 650 A.2d at 770.

³⁹ *See Twin Rivers*, 929 A.2d at 1072.

⁴⁰ *Schmid*, 423 A.2d at 628.

⁴¹ *Id.* at 630.

⁴² The test requires courts to consider: first, the nature, purpose, and use of the property; second, the extent and nature of the public's invitation to use the property; and third, the purpose of the restricted activity relative to the use of the property. *Id.*

⁴³ *Coalition*, 650 A.2d at 775.

⁴⁴ In *Schmid*, Princeton University barred a member of the public from disseminating political literature on campus. *See Schmid*, 423 A.2d at 616-17. Similarly, in *Coalition*, a mall precluded members of the public from distributing anti-war leaflets. *See Coalition*, 650 A.2d at 762-63.

Schmid-Coalition would thus entail weighing the interests of community residents against those of the TRHA. Instead, the court employed the test as if the restricted party were the general public. That is, the court's *Schmid-Coalition* analysis focused exclusively on the general public's use of the private property, despite the fact that the rights of community residents, and not those of the public, were being curtailed. This improper focus precluded the court from availing itself of the proper balancing function of the *Schmid-Coalition* test. The interests of Twin Rivers residents were not given their due weight, since they were not specifically considered by the court.

By focusing on the general public when the aggrieved parties were Twin Rivers residents, the court essentially created a test that invariably favors private property rights. Since CICs are by definition private communities, consideration of the property's nature and purposes will always weigh in favor of the rights of homeowners' associations. Similarly, since CICs by their nature exclude the public, the second prong, examining the public's invitation to use the property, will always favor the homeowners' associations. However, whether the public was invited to use Twin Rivers should not bear on the rights of those residing in the community. If the test were functioning as it should, then in balancing the competing rights of two parties — the TRHA and the plaintiffs — concessions made by the property owners to the general public would be irrelevant. The "public" that the *Schmid-Coalition* analysis ought to have addressed in this case was not the public at large, but the community residents, to whom the TRHA has indisputably extended an invitation for use of the premises. Like the state action requirement used in other jurisdictions, the court's misguided application of the *Schmid-Coalition* test accords no import to the value of the restricted practice or the nature of the complainant's asserted right,⁴⁵ frustrating the test's core purpose.

Furthermore, the *Twin Rivers* court failed to engage in the general balancing required by *Coalition*. This omission was inimical to the plaintiffs' case because it allowed the court to avoid an examination of the factors identified in *Green Party of New Jersey v. Hartz Mountain Industries*⁴⁶ as vital components of the *Coalition* balancing. These factors include the nature and importance of the affected right, the extent to which the restriction impedes that right, and the need for retaining the restriction.⁴⁷ With no focus on the nature of the plaintiff-defendant relationship, the *Twin Rivers* court evaded the consideration it should have accorded to the fact that the restrictions in question im-

⁴⁵ See Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 224.

⁴⁶ 752 A.2d 315 (N.J. 2000).

⁴⁷ See *id.* at 327.

plicated homeowners' rights *on their own property*. Such rights are not insubstantial: it is well-settled that while freedom of speech "occupies a preferred position in our system of constitutionally-protected interests,"⁴⁸ free speech in the home resides in an even more protected sphere.⁴⁹ Aside from cursorily noting that the "minor restrictions" in question did not constitute "'untoward interference with' or a 'confiscatory restriction' on the [plaintiffs'] reasonable use" of their property,⁵⁰ the court did not acknowledge this special sanctity of residential free speech.

The general balance required by *Coalition*, but shirked by the court, should also have included an analysis of how restrictive the contested regulations were. To be sure, the plaintiffs' ability to post signs on their lawns was limited, not entirely prohibited.⁵¹ Residential signage, however, constitutes "a venerable means of communication that is both unique and important."⁵² Although the court found that the "plaintiffs' expressional activities [were] not unreasonably restricted,"⁵³ this conclusory finding was based on the fact that the restriction was contractual.⁵⁴ The court did not analyze how deeply the signage restriction cut into the plaintiffs' freedom of speech. Additionally, the court trivialized the restriction by offering alternative means for residents to engage in the same expressive activity,⁵⁵ but these alternatives have been characterized by the Supreme Court as inadequate substitutes for the prohibited mode of expression.⁵⁶

Finally, by foregoing the general *Coalition* balancing, the *Twin Rivers* court avoided having to explicate the TRHA's need for the restrictions. The assertion that the "reciprocal nature of [the] rules and regulations, and their enforcement, is essential to the fundamental nature of the communal living arrangement"⁵⁷ does little to account for the restriction's *raison d'être*. Signs "take up space and may obstruct views, distract motorists, [and] displace alternative uses for land."⁵⁸ They might also create clutter that runs counter to the CIC's aesthetic. The *Twin Rivers* court's failure to discuss these valid concerns suggests

⁴⁸ *State v. Miller*, 416 A.2d 821, 826 (N.J. 1980).

⁴⁹ See *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) ("A special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to *speak* there." (citation omitted)).

⁵⁰ *Twin Rivers*, 929 A.2d at 1073-74 (quoting *State v. Schmid*, 423 A.2d 615, 629 (N.J. 1980)).

⁵¹ The regulation limited residential signs to one per lawn and one per window. *Id.* at 1064.

⁵² *City of Ladue*, 512 U.S. at 54.

⁵³ *Twin Rivers*, 929 A.2d at 1073.

⁵⁴ See *id.*

⁵⁵ *Id.* at 1074 (suggesting that the "[p]laintiffs can walk through the neighborhood, ring the doorbells of their neighbors," or "distribute their own newsletter").

⁵⁶ *City of Ladue*, 512 U.S. at 56.

⁵⁷ *Twin Rivers*, 929 A.2d at 1073.

⁵⁸ *City of Ladue*, 512 U.S. at 48.

that it did not properly invoke the balancing function of the *Schmid-Coalition* framework.

The court thus eschewed the flexible *Schmid-Coalition* test in favor of a rigid analysis that balances the interests of property owners with those of the public, rather than with those of the individuals whose rights are actually being infringed. This shift retreats from New Jersey's expansive free speech right and is a problematic outcome in light of the proliferation of CICs. The growth of CICs stems from the interests of developers and local governments. For developers, CICs are lucrative since they are efficiently and homogeneously planned and since homebuyers pay a premium to have their investments safeguarded by community covenants.⁵⁹ For local governments, CICs are similarly appealing,⁶⁰ so cities have encouraged the development of such communities through land use and zoning restrictions.⁶¹ Some cities all but require that new homes be built in CICs.⁶² Thus, even if governments do not formally delegate responsibilities to homeowners' associations, de facto devolution has occurred.

The dual action of developers and local governments has created a situation in which one in eight Americans lives in a CIC.⁶³ In the past five to eight years, an estimated eighty percent of housing starts have been of the common interest variety.⁶⁴ The prospect of living in a community that is not governed by a homeowners' association is hence becoming more elusive for many Americans.⁶⁵ Homebuyers across the country increasingly have no choice "but to accept the often rigid restrictions placed on them by [CIC] covenants into which they must buy."⁶⁶

⁵⁹ See Laura T. Rahe, *The Right To Exclude: Preserving the Autonomy of the Homeowners' Association*, 34 URB. LAW. 521, 523–24 (2002).

⁶⁰ Subject to rigid resource constraints, municipalities view CIC development as a means of increasing tax revenues while slashing expenditures. See Lisa J. Chadderdon, *No Political Speech Allowed: Common Interest Developments, Homeowners Associations, and Restrictions on Free Speech*, 21 J. LAND USE & ENVTL. L. 233, 238 (2006). A CIC increases a city's population and tax base. At the same time, services typically provided by the city using taxpayer revenue are instead performed by homeowners' associations using the fees paid by residents. See *id.* at 239.

⁶¹ See *id.* at 238.

⁶² See *id.* at 237–38.

⁶³ See Adrienne Iwamoto Suarez, *Covenants, Conditions, and Restrictions . . . On Free Speech? First Amendment Rights in Common-Interest Communities*, 40 REAL PROP. PROB. & TR. J. 739, 740 (2006).

⁶⁴ See Fleming, *supra* note 4, at 576–77.

⁶⁵ See Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 WM. & MARY BILL RTS. J. 461, 469 (1997) (noting that CICs constitute almost all new residential development in California, Texas, and Florida, and half of all housing for sale in the nation's fifty largest metropolitan areas).

⁶⁶ Chadderdon, *supra* note 60, at 237.

Homebuyers thus feel compelled to purchase in CICs because of market dynamics beyond their control.⁶⁷ The New Jersey Supreme Court could have responded to this social change by properly employing its dynamic *Schmid-Coalition* test. Its use instead of an inflexible version of this framework is a sluggish response to CIC growth and suggests that in the process of being channeled into CICs, homebuyers may also be forced to cede certain freedoms. The inequity this scenario evokes is tempered by the fact that the court's constitutionally based decision does not foreclose the prospect of CIC restrictions being invalidated on common law grounds. The court explicitly left open the possibility of CIC residents being "protected under traditional principles of property law — principles that specifically account for the rights afforded under [the New Jersey] constitution's free speech and association clauses."⁶⁸ These traditional principles include the fact that New Jersey courts have found covenants contrary to the public interest unreasonable and unenforceable.⁶⁹ Since unreasonably burdening a constitutional right is grounds for invalidating a servitude on public policy grounds,⁷⁰ New Jersey courts could still invalidate CIC restrictions if their burden on a fundamental constitutional right was found to be unreasonable.

In *Coalition*, the court expressed disbelief that "those who adopted a constitutional provision granting a right of free speech wanted it to diminish in importance as society changed, to be dependent on the unrelated accidents of economic transformation, or to be silenced because of a new way of doing business."⁷¹ The rise of CICs is a significant social change, and it ought not erode constitutional rights. Yet, the *Twin Rivers* opinion, with its misguided application of the *Schmid-Coalition* test, portends exactly this sort of erosion. Although the opinion leaves open the possibility of common law invalidation of CIC regulations, the narrowing of the constitutional avenue of attack undoubtedly weakens New Jersey's liberal tradition of free speech protection.

⁶⁷ Furthermore, many homebuyers fail to comprehend the import of the rules or that they are buying burdened property at all. See, e.g., Siegel, *supra* note 65, at 468–69 (describing as illusory the notion of homebuyers' consent to CIC covenants). This reality led a New Jersey legislative task force to recommend implementing guidelines to ensure that association members are aware of their legal rights and responsibilities prior to sale. TASK FORCE OF THE ASSEMBLY TO STUDY HOMEOWNERS' ASSOCIATIONS 4 (1998), available at <http://www.njleg.state.nj.us/legislativepub/reports/homeown.pdf>.

⁶⁸ *Twin Rivers*, 929 A.2d at 1075.

⁶⁹ See, e.g., *Davidson Bros., Inc. v. D. Katz & Sons, Inc.*, 643 A.2d 642, 648 (N.J. Super. Ct. App. Div. 1994) (holding that a covenant prohibiting property from being used as a supermarket was so contrary to the public interest as to be unenforceable).

⁷⁰ See RESTATEMENT (THIRD) OF PROP: SERVITUDES § 3.1 (2000).

⁷¹ *N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757, 779 (N.J. 1994).