

## COMMUNITY ASSOCIATION LAW

### A NOTE FROM PARKER McCAY

Parker McCay is pleased to introduce to you the first edition of *Parker McCay Commentary: Community Association Law*. We hope that this, the first in a series, will provide interesting and informative articles for use by community association board members and property managers. We invite you to submit topics of interest for future issues via e-mail to David R. Dahan, Esquire, at [ddahan@parkermccay.com](mailto:ddahan@parkermccay.com).

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## Twin Rivers: Constitutional Rights Versus Association Rules and Regulations

by David R. Dahan, Esquire

The New Jersey Supreme Court recently overturned the Appellate Division's decision in *Committee for a Better Twin Rivers et al. v. Twin Rivers Homeowners' Association, et al.*, 2007 N.J. LEXIS 911 (2007), holding that rules and regulations enacted by the Twin Rivers Homeowners' Association do not violate protections afforded by the New Jersey Constitution.

The issue before the Supreme Court of New Jersey was whether the Association's rules regarding the posting of signs, the use of the community room, and access to its newsletter, violated the New Jersey constitutional guarantees of free expression.

### Background

Twin Rivers is a community development in East Windsor, New Jersey. It consists of privately-owned condominium duplexes, townhouses, single-family homes, apartments and commercial buildings.

Several Twin Rivers residents formed the "Committee for a Better Twin Rivers" to influence the manner in which Twin Rivers was governed. The Committee sought to invalidate various rules and regulations set forth by the Association, claiming that the Association acted as a governmental entity and the Association's rules and regulations should, therefore, be subject to

the free speech and free association clauses of the New Jersey Constitution. First, the Committee argued that the Association's policy relating to the posting of signs, which limited residents to posting one sign per lawn and one sign per window, and prohibited the posting of signs throughout the community, was invalid. Second, the Association's policy regarding the use of its community room, which is available to Twin Rivers residents and certain clubs, organizations, and committees for a rental fee, was challenged. Lastly, the Committee claimed that residents were

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## Unit Owners' Defamatory Remarks About Board Members

by David R. Dahan, Esquire and Scott Mahoney, Esquire (Mr. Mahoney recently left Parker McCay for another opportunity.)

Discussions of controversial issues between homeowners in community developments and the association's board of trustees can sometimes escalate to heated debates. Insults, name-calling and allegations of improprieties are not uncommon forms of expression for owners unsatisfied with board policies, members or candidates. Often, these verbal assaults are

accusatory, inaccurate and personal. In many cases, these remarks are made in writing, through emails to community members or flyers posted throughout the community, as opposed to public verbal statements. But are these statements defamatory? Trustees sometimes think so and seek to file suit against the offending owners to halt their tirades.

In defamation suits, courts will distinguish between defamation claims filed by "private persons," and claims filed by public figures, which are far more difficult to prove. This is important because courts in New Jersey have held that association trustees, by virtue of their leadership role in the community, inject themselves voluntarily into

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denied equal access to the Association's newspaper. The content of the newspaper is chosen by the editorial committee whose purpose is to provide residents of Twin Rivers with news and information concerning the community.

### **The Trial Court's Findings**

The trial court held that the Association's rules and regulations were not subject to the right of free speech and association clauses of the New Jersey Constitution, as Twin Rivers was not a quasi-municipality because the residents voluntarily entered into a contractual relationship upon purchasing property in the Twin Rivers community.

### **The Appellate Division's Findings**

On appeal, the Appellate Division reversed the trial court's determination, and held that the community had quasi-municipal status. As a result, the Appellate Division concluded that the Association's activities were subject to rights provided in the New Jersey Constitution.

### **The Supreme Court's Findings**

Beginning with the premise that all citizens of New Jersey possess the constitutional

right to free speech and assembly, the Supreme Court stated that those rights are not absolute, as citizens may waive or otherwise curtail their rights. However, any restrictions on the exercise of constitutional rights must be reasonable as to time, place and manner.

The Court applied the *Schmid*/Coalition multifaceted standard to determine whether rights of free speech and assembly under the New Jersey Constitution are secure

**Upon balancing the Committee's expressional rights with the Association's privacy interests, the Court held that "the minor restrictions on [the Committee's] expressional activities are not unreasonable or oppressive...**

from interference by the owner of private property. The *Schmid* factors are: (1) the nature, purposes, and primary use of such private property, generally, its "normal" use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken on such property in relation to both the private and public use of the property. In addition to the *Schmid* factors, the *Coalition* test is whether there exist convenient and feasible alternative means for individuals to engage in the same expressional activity.

This case involved restrictions on conduct both on the Association's property and on the homeowners' properties. Under *Schmid* factor (1), Twin Rivers is a common interest community "in which the property is burdened by [mandates] requiring property owners to contribute to maintenance of commonly held property or to pay dues or assessments to an owners association that provides services or facilities to the community," whose primary use is residential. Therefore, the nature, purposes, and primary use is for private purposes and does not favor a finding that the Association's rules

and regulations violated the Committee's constitutional rights. Under *Schmid* factor (2), the Association has not invited the public to use its property, and the public only has limited use of Twin Rivers despite the fact that it is not a gated community and its roads are accessible to the public. Consequently, the limited extent and nature of the public's invitation to use Twin Rivers does not favor a finding that the Association's rules and regulations violated the Committee's constitutional rights. Regarding *Schmid* factor (3), Twin Rivers residents have contractually agreed with the Association to abide by the common rules and regulations. To preserve the fundamental nature of the communal living arrangement that Twin Rivers residents enjoy, it is essential to enforce the Association's rules and regulations. As a result, the Committee's expressional activities are not unreasonably restricted.

Upon balancing the Committee's expressional rights with the Association's privacy interests, the Court held that "the minor restrictions on [the Committee's] expressional activities are not unreasonable or oppressive, and the Association is not acting as a municipality." The Court stated that these are reasonable restrictions concerning the time, place and manner of such restrictions. Thus, the Association's rules and regulations do not violate the free speech and right of assembly clauses of the New Jersey Constitution.

### **In Conclusion**

In applying the above reasoning, the Supreme Court of New Jersey held that the rules and regulations enacted by the Association do not violate the New Jersey constitutional guarantees of free expression. The Court reversed the Appellate Division's holding and reinstated the trial court's determination.

However, the Supreme Court appears to

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public debates, and therefore qualify as “limited public purpose” figures. *Gulrajaney v. Patricha*, 381 N.J. Super. 241 (App. Div. 2005); *Verna v. The Links at Valleybrook Neighborhood Association*, 371 N.J. Super. 77 (App. Div. 2004). As a result, in order to prove defamation, trustees must show not only that statements are untrue (the baseline requirement for private individuals), but also that the statements were made with actual malice—that is, that the individuals responsible knew the statements were false, or made them with “reckless disregard” for the truth. Additionally, the evidence presented to prove malice must

be “clear and convincing.” Furthermore, New Jersey courts have also held that a candidate for a seat on a community association’s board of trustees is a limited public purpose figure for purposes of defamation law.

Consequently, New Jersey courts have made it clear that there is a higher standard to prove defamation involving expressions of opinion about the activities of board members or candidates. However, such expressions must be made carefully and individuals making them must understand that they still could be held liable for their comments. ■

## Association Collection Policies

by Nikitas Moustakas, Esquire

An essential component of a well-run community association is the institution and maintenance of an efficient and structured collection policy. Additionally, a clear, comprehensive policy can protect an association from potential liability.

There are several important elements to a collection policy, including the maintenance of accurate financial records, a method to answering owner accounting inquiries, carefully imposed late charges, and timely action on delinquent payments. An association’s management agent will typically carry out the initial action on delinquent payments, but a policy should include an established time period after which a collection matter is turned over to the association’s attorney.

Once a collection policy is established, the association should clearly communicate the policy to the owners and strictly adhere to it. However, a policy may have some flexibility so that at the discretion of the association board, fines and interest can be removed when hardship befalls an owner precluding timely payments.

The following is an example of how a fully executed collection policy might play out:

- ✦ If an owner misses a monthly payment, a letter is sent to the owner as notice that full payment and any interest or fines incurred are due within 30 days.
- ✦ If the owner does not pay the debt within the 30-day period, the association notifies its attorney. Once the matter is turned over to the attorney, the account is reviewed for accuracy.
- ✦ The attorney prepares and records a notice of assessment lien and sends a demand letter to the owner.
- ✦ After the demand letter is sent, the owner has 30 days to pay the amount requested. Frequently, the owner will contact the attorney to discuss and clarify the delinquency.
- ✦ If the owner does not make payment 30 days after the demand letter, the attorney may initiate legal action, such as foreclosing the lien on the property or obtaining a judgment and collection on that judgment through various means. However, foreclosure should only be used as a last resort given the harshness and finality of such a remedy.

In closing, a comprehensive collection policy is critical to ensuring that all members

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pay their proper share of common expenses and that adequate cash flow is available to pay such expenses. However, strict adherence to the policy is necessary and cannot be selectively enforced. This will help to ensure that an association is collecting what is rightfully due in a timely manner and eliminate any defense that the policy is not equally applied to all. Otherwise, to the detriment of the association, members may take their time making payments with minimal concern for adverse action. ■

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have left the door open for similar cases. Specifically, the Supreme Court noted that its holding “does not suggest, however, that residents of a homeowners’ association may never successfully seek constitutional redress against a governing association that unreasonably infringes their free speech rights.” ■

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