

December 6, 2004

The Judges of the Appellate Division
Superior Court of New Jersey
Hughes Justice Complex
25 W. Market Street, P.O. Box 006
Trenton, New Jersey 08625-0006

RE: Committee For A Better Twin Rivers v. Twin Rivers Homeowners Association (TRHA), Docket No. C-121-00.

Dear Judges of the Appellate Division:

Please accept this letter brief in response to the amicus curiae brief (Acb) of the Community Associations Institute (CAI).

I. THE BUSINESS JUDGMENT RULE DOES NOT APPLY TO THIS CASE

As previously argued in Plaintiffs' Reply Brief, the business judgment rule is inapplicable to this case. The Plaintiffs' claims arise under the constitutional and statutory laws of the state, and such rights cannot be trumped by the business judgment rule. (Prb6) In Green Party of New Jersey v. Hartz Mountain Industries, the New Jersey Supreme Court clearly stated that the business judgement rule is inapplicable to a party who "seeks to enforce a constitutionally guaranteed right" or "to determine[] the reasonableness of time, place, and manner regulations of free speech" 164 N.J. 147, 148 (2000). Those are precisely the issues involved in this case. In the recent opinion of the Appellate Division in Verna v. The Links at Valleybrook Neighborhood

Association, the court held that the business judgement rule was inapplicable to decisions beyond the authority of the board of a community association. 371 N.J. Super. 77, 92-93 (2004).

The CAI's focus on case law that reviews the general authority of a community association board (ACb4-6) misses the mark. The Plaintiffs do not dispute the fact that a community association board manages common property and has the power to assess fees for common expenses. (ACb4-5) The Plaintiffs do, however, dispute rules and regulations that go beyond this mandate and serve to violate rights articulated by New Jersey courts. Further, the CAI's citation to case law in other jurisdictions whose constitutions include a state-action doctrine (ACb6-8) is unpersuasive under New Jersey case law. (Prb10-11)

TRHA's excessive and unfettered discretion to restrict the expression of members' dissenting views violates the equal access principle under Guttenberg Taxpayers and Rentpayers Ass'n v. Galaxy Towers Condominium Ass'n, 297 N.J. Super. 404 (Ch. Div. 1996), on remand from 296 N.J. Super. 101 (App. Div. 1995), aff'd, 297 N.J. Super. 309 (App. Div. 1996), certif. denied, 149 N.J. 141 (1997), which stands for the proposition that a community association cannot turn itself into a "political isolation booth." 296 N.J. Super. at 347; 297 N.J. Super. at 410; (see also Pb9-10).

TRHA's restrictions on political sign postings, imposition of excessive fees for renting common areas, denial of reasonable access to the community newspaper, and its various ways of diluting members' voting powers also violate the free speech rights articulated in New Jersey Coalition Against War in the Middle East v. J.M.B. Realty, 138 N.J. 326 (1994), cert. denied, 516 U.S. 812 (1995). See also Galaxy Towers, supra

(determining that a residential condominium is a constitutional actor subject to free speech provisions of the New Jersey constitution).

The record in this case is replete with evidence of TRHA's exercise of unfettered discretion infringing upon its residents' rights to free speech. Homeowners in Twin Rivers may not display political signs on their lawns; must pay \$165 (plus a \$250 refundable deposit) in order to hold a meeting at the community room already maintained by the board as a common area; have unequal access to voice their dissenting views on community governance in the monthly newsletter; are disfranchised if they contest petty regulations that impose unreasonable fines; and are subject to a weighted voting system in which one's vote is based on the value of one's property. (Pb4-9; Prb2-5)

The CAI disregards these many restrictions on its Twin Rivers residents' rights when it glosses over the entire record in blind reiteration of its claim that the business judgment rule fully protects residents from "invalid and unenforceable restrictions and improper board action." (ACb12) Freedom of communication cannot be left to the virtually unfettered discretion of the TRHA Board as would be permitted by the business judgment rule. If it were, communities like Twin Rivers would inevitably become the "political isolation booth[s]" warned against in Galaxy Towers. 296 N.J. Super. at 347.

Accordingly, any consideration of the business judgment rule is irrelevant to the case at hand. This case concerns the manner in which TRHA's regulations have gone beyond the purview of mere maintenance of common property and have improperly extinguished its residents' rights of expression. In these situations, state courts and constitutions are the only appropriate arena for resolving these constitutional issues.

See Wayne Hyatt, Common Interest Communities: Evolution and Reinvention, 31 J. Marshall L. Rev. 303, 340-341 (Winter 1998). Where an association like TRHA has over-controlled the process by which constituents may govern, courts can provide a remedy with some degree of autonomy, certainty, and predictability. See id. at 348.

II. The Law Requires State Constitutional Standards To Be Applied To Community Association Board Actions That Infringe On Basic Rights To Speech and Assembly

In all its arguments, the CAI disregards constitutional holdings on point and even mischaracterizes its own guru, Professor Wayne Hyatt.

The CAI incorrectly dismisses the importance of the recent Appellate Division opinion in Verna, 371 N.J. Super. 77 (App. Div. 2004) and its applicability to the case at bar. (ACb18) In finding plaintiff, who ran for a seat on the association's governing board, to be a public figure for the purposes of a defamation suit, the court held it was appropriate to apply constitutional standards to the governance of private homeowners' associations.¹ Id. at 96.

Just as in Verna, this case involves issues concerning the manner in which 10,000 residents of Twin Rivers are governed. The TRHA also must be accountable to

¹ A recent Wyoming Supreme Court decision comes to the same conclusion: "The directors [of a homeowners association] are analogous to a city council, and the general manager is comparable to a city manager. Entities that possess the characteristics of a governing body or are effectively the equivalent of such because they exercise traditional governmental functions ought to be regarded as the proper subjects of public controversies The lot owners of Star Valley Ranch should have the same rights as the citizens of a municipality to criticize or comment upon the actions of their elected representatives." Martin v. The Committee for Honesty and Justice at Star Valley Ranch, 2004 WL 2423518, *5 (Wyo.)

appropriate constitutional standards applicable to public entities when unreasonable restrictions are placed on the basic rights of speech and assembly. See id. at 96-98.

In concluding New Jersey to be “among the states in which residential community associations are most common,” the Verna court recognized the pervasive role associations like TRHA play in our larger community. 371 N.J. Super. at 97 (citing Mulligan v. Panther Valley Prop. Owners Ass’n, 337 N.J. Super. 293, 301 (App. Div. 2001); and David J. Kennedy, Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers, 105 Yale L.J. 761, 793 n.24 (1995)).

In light of this background, CAI’s assertion that the 1989 Bluvias opinion remains the controlling law rings hollow. (ACb15-17) Not only did the Bluvias majority fail to address the complex role of associations like TRHA today,² it also qualified its opinion to leave open the possibility of revisiting future cases that concerned “unreasonable restraints and restrictions on property in violation of . . . common law.” 114 N.J. at 590.

Unlike the Bluvias co-op, Twin Rivers operates as “a quasi-governmental entity”

² Significant differences of the authority of the Bluvias coop from associations like TRHA include nominal maintenance charges; an elected board only responsible for basic street cleaning, sewer maintenance and snow removal; and no authority governing matters such as architectural design, recreational amenities, pet control, parking regulation, or judicial authority to impose fines for rules violations. (Prb8-9) Moreover, there is no indication in the opinion that Bluvias’ board had any authority to restrain communications among residents such as sign-posting and community room operations. Id.

and the TRHA Board “operates much like a Township Council.” (Pa222) As its former administrator wrote, TRHA’s “governmental duties include the fiduciary responsibility to enforce the Trust documents as authored, to establish policy and to establish procedures to accomplish both.” Id. Even CAI itself previously acknowledged in an amicus curiae brief in another case that community associations “have quasi-governmental attributes.” (Pa465)

As this record demonstrates, Twin Rivers functions as a “quasi-municipality,” and, therefore, should also be held to some constitutional standards. See, Evan McKenzie, Privatopia: Homeowner Association and the Rise of Residential Private Government 178 (Yale Press 1994) (stating that “government now has no choice but to address the social and political consequences of the spread [of community associations]” and “the best way to do this is to view the spread of [community associations] as a de facto privatization decision [by government] and evaluate it in that context.”); (see also Prb17-18). Contrary to CAI, applying constitutional standards to TRHA’s restrictive governance rules will help free Twin Rivers homeowners from oppressive governance schemes and foster democratic procedures and proper self-governance. (See Prb19-22)

The CAI brief also takes out of context Professor Hyatt’s statement that “public policy is not a warrant for courts to run associations.” (ACb14, quoting Hyatt, Evolution at n. 173) In the same article, Professor Hyatt also states that in extreme cases it is justified to strike down restrictions if it appears to violate public policy. Hyatt, Evolution at 341.

A robust application of constitutional doctrine will ensure the protection of basic

rights of residents of New Jersey community associations in an era when community associations are rapidly becoming a dominant form of housing and municipal services delivery in major parts of this State. (Pb13 n.10-11; see Prb20-22) “[C]ommunity association law is [] sui generis, essentially quite new, and predominately judge-made law that is itself evolving. The evolution must keep pace with the industrial evolution and must be multidimensional.” Hyatt, Evolution at 307.

The CAI urges the judiciary to leave the rights of more than a million New Jersey homeowners to the discretion of boards bound only by the toothless standards of the business judgment rule. But as the United States Supreme Court once observed, a “prime history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored and excluded.” U.S. v. Virginia, 518 U.S. 515, 557 (1996).

Respectfully submitted,

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Dated: December 6, 2004

Counsel for Plaintiffs acknowledges the assistance of Mira Ohm, a student enrolled in the Constitutional Litigation Clinic, Rutgers Law School - Newark, in the preparation of this brief.