ORDER PREPARED BY THE COURT

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
CHANCERY DIVISION
GENERAL EQUITY

COMMITTEE FOR A BETTER TWIN RIVERS, (CBTR); DIANNE MCCARTHY; HAIM BAR-AKIVA; AND BRUCE FRITZGES,
Plaintiffs,

vs.

TWIN RIVERS HOMEOWNERS' ASSOCIATION (TRHA); TWIN RIVERS COMMUNITY TRUST (TRCT); SCOTT POHL ,
Defendants.

CIVIL ACTION

DOCKET NO. C-121-00

ORDER

This matter having been presented to this court on a motion for summary judgment filed by Plaintiffs and upon a cross-motion for summary judgment filed by Defendants; and the court having reviewed the submissions of counsel and having heard oral argument on September 30, 2003; and for good cause having been shown;

IT IS ON THIS 17th DAY OF FEBRUARY 2004,

ORDERED that summary judgment is GRANTED in favor of Plaintiffs on Counts 2, 6 and 7 and summary judgment is GRANTED in favor of Defendants on Counts 1,3,5,8 and 9.

The court has further ruled that TRHA is not subject to the Constitutional limitations imposed on State actors, at least in the factual context specifically presented in this case; that the 1993 amendments to PREDFA, as codified in N.J.S.A. 45:22A-43 to 48, ~~apply to Twin Rivers; and~~ that Plaintiff CBTR is dismissed from the case for lack of standing.

See Statement of Reasons attached.

Neil H. Shuster, P.J.Cv.

COMMITTEE FOR A BETTER TWIN RIVERS ("CBTR"); DIANNE McCARTHY; HAIM BAR-AKIVA; and BRUCE FRITZGES
v.
TWIN RIVERS HOMEOWNERS' ASSOCIATION ("TRHA"); TWIN RIVERS COMMUNITY TRUST ("TRCT"); SCOTT POHL

Docket No. C-121-2000

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

Twin Rivers is a planned unit development ("PUD") consisting of privately-owned condominium duplexes, townhouses, single family homes, apartments and commercial buildings located in the Township of East Windsor, New Jersey. The community covers about one square mile in area and contains a population of approximately 10,000 people occupying some 2,700 residences. The Twin Rivers Community Trust ("TRCT" or "Trust") was created by Indenture on November 13, 1969 for the stated purpose of owning, managing, operating and maintaining the residential common property of Twin Rivers. Each property owner is assessed a fee to fund the managerial and operational expenses of the Trust.

Twin Rivers Homeowners Association ("TRHA" or "Association") has sole discretion, under the indenture, to make reasonable rules and regulations

for the conduct of its members upon the land owned or controlled by the Trust. All property owners in Twin Rivers are automatically members of the Association and beneficiaries of the Trust. Purchasers are required, as a condition of purchase, to accept the regulations of the TRHA Articles of Incorporation and its By-Laws. Violations of the rules are punishable by fines, which can range in amount from $50 to $500. The Association is governed by a Board of Directors ("Board"), whose members are elected by all eligible voting members of the Association. The Board serves as trustee for TRCT. All members of the Association who are in "good standing" at the time of the elections are eligible to vote for nominees to the Board.

Twin Rivers provides various amenities for the exclusive use of its residents, including parks, four pool complexes, handball and basketball courts, ball fields, and playgrounds. Twin Rivers also offers certain services to its residents, including lawn maintenance, recycling, garbage collection for certain sections of the community, snow removal, and street lighting. Located within the "boundaries" of Twin Rivers are various private commercial businesses such as dry cleaners, gas stations and banks. Several public facilities are also located within the borders of Twin Rivers, including schools, a county library and a firehouse. These public facilities are provided and maintained by the

Township of East Windsor. In addition to the 34 private roads in Twin Rivers, a state highway also runs through the community.

The individual Plaintiffs are residents of Twin Rivers and members of the Association. Dianne McCarthy was also a member of the Board of Directors, (although now a former member). All of the Plaintiffs, with the exception of Bruce Fritzges, are also members of an unincorporated association known as The Committee for a Better Twin Rivers ("CBTR"). CBTR was organized for the stated purpose of focusing the efforts of Twin Rivers residents interested in changing the manner in which Twin Rivers is administered. It does not have any formal membership requirements, but it is recognized throughout the community, and its activities are regularly reported and commented upon in the community newspaper, Twin Rivers Today ("TRT"). CBTR is also a named plaintiff in this action.

Plaintiffs bring their suit against the Trust, the Association, and the President of the Association, Scott Pohl, individually. Plaintiffs' complaint involves challenges to several of the Twin Rivers regulations for use of facilities and their administrative policies. Plaintiffs are seeking changes to the community's sign policy, policy for the use of the community room, policies for the community newspaper, the document access policy, the policy concerning the designation of confidential matters, the voting policies, policies

for the use of membership lists, and the policy for the provision of alternative dispute resolution (ADR).

Before addressing the individual counts of the complaint, the court believes it necessary to resolve three overarching issues that weave through several of the arguments and will determine the level of analysis that is necessary for the court. Therefore, the court will first address the issues of whether Twin Rivers has "quasi-municipal" status, the applicability of PREDFA, and whether CBTR has standing to appear as a plaintiff in this case.

"QUASI-MUNICIPAL" STATUS: Plaintiffs claim that TRHA has substantially replaced the role of the municipality in the lives of its ten thousand residents, by providing various services that are traditionally performed by municipal bodies, and should therefore be subject to the same constitutional limitations as a municipality in creating "laws" for the community. The Board of the Association functions as a municipal council, and the mandatory assessments levied on owners are, they argue, the equivalent of a tax. Therefore, Plaintiffs argue, TRHA should be required to respect the same constitutional boundaries that would be required of a municipality. Plaintiffs further argue that the provisions of the Condominium Act at N.J.S.A 46:8B-15(f) which allow for an Association to impose fines as penalties for violation of its rules are a delegation of police powers which are unique to the

government, and therefore, the Association takes on "quasi-municipal" status, in part, because of this ability to impose fines. Defendants reject the assertion that Twin Rivers is equivalent to a municipality, and that the Constitution applies to TRHA in the same way it applies to state actors. THRA and the Trust are non-profit organizations, and Defendants claim that it is well settled law in New Jersey that the business judgment rule is the standard of review for the duly enacted policies and decisions of their board of trustees. Defendants argue that the burden is on Plaintiffs to show that the decisions of the Board were fraudulent, self-dealing or unconscionable; which Defendants assert they cannot and do not do in their pleadings.

There is no precedent for the concept that a homeowners' association could be a "quasi-municipality" other than Plaintiffs' attorney's own argument addressed by the Appellate Division in a prior case. The court in Mulligan v. Panther Valley Property Owners Assoc., 337 N.J.Super. 293, 305 (App. Div. 2001), references, but does not address, the possibility that "quasi municipal" status could devolve onto homeowners associations, citing to the same law review articles that Plaintiffs cite in their briefs here. The statutes and case law however, in this jurisdiction and elsewhere, presently do not support Plaintiffs' claim.

New Jersey law does not define a "quasi municipality", but the term "quasi municipal" has been used to describe entities that are created by a municipal body to perform a designated function on behalf of the municipality, such as boards of education, county freeholder associations or water districts. See, e.g. Housing Authority of City of Newark v. Sagner, 142 N.J.Super. 332, 335 (App. Div. 1976); Robertson v. Washington Tp. Mun. Utilities Authority, 211 N.J.Super. 504, 507 (Law Div, 1986) aff'd o.b. 215 N.J.Super. 239 (App. Div. 1987); Phelps v. State Bd. of Ed., 115 N.J.L. 310, 314 (N.J.Sup.Ct. 1935), aff'd o.b. 116 N.J.L. 412 (E. & A. 1936), aff'd 300 U.S. 319 (1937).

Private organizations, even when they perform municipal functions, do not become quasi-municipal agents. See, e.g. Island Improv. Assoc. v. Ford, 155 N.J. Super. 571, 575 (App. Div. 1978)("We make it abundantly clear that by the enunciation of this rule we are not establishing [a private organization formed to improve road maintenance] as a '*quasi*-municipal' agency.")

The distinction appears to be whether the municipality has delegated some of its authority to a corporation or organization. In other jurisdictions the term is used to designate "entities organized to perform some governmental function separately from the city or town which they serve." Williams v. Water Works and Gas Bd. of City of Ashville, 519 So.2d 470 (AL 1987). A quasi-municipal agency is "a corporation, created by the Legislature, that is a public

agency endowed with the attributes of a municipality that may be necessary in the performance of a limited objective," Whatcom County v. Taxpayers of Whatcom County Solid Waste Disposal Dist., 831 P.2d 1140 (WA App. Div. 1992); or "a public agency created by authority of the legislature to aid the state in some public or state work for the general welfare." In re Dissolution of Mountain View Public Utility Dist. No. 1, 359 P.2d 951, 955 (AK 1961).

This is not the case with Twin Rivers. Twin Rivers was not created by East Windsor Township and none of its authority to regulate within the community is delegated to it by the municipality. With the possible exception of trash collection and snow removal, none of the services provided by Twin Rivers to its residents are replacements for services that would otherwise normally be provided by a municipality. However, this clearly does not transform Twin Rivers into a "quasi-municipality". These functions are so commonly provided by private communities throughout the State of New Jersey that they are the subject of recent legislation, the Municipal Services Act, mandating reimbursement from the municipality for provision of these services. See N.J.S.A. 40:67-23.3.[1] This legislation applies to services provided by any "community trust or other trust device, condominium association, homeowners'

[1] In fact, this statute has been interpreted to mean that a municipality may not delegate its responsibility to either provide the services or reimburse the qualified private community. See Briarglen II Condominium Ass'n, Inc. v. Township of Freehold, 330 N.J. Super. 345, 348 (App. Div. 2000).

association, or council of coowners, wherein the cost of maintaining roads and streets and providing essential services is paid for by a not-for-profit entity consisting exclusively of unit owners within the community." N.J.S.A. 40:67-23.2. There is no mention in the statute that these services might clothe the housing development with quasi-municipal status. Although there are many municipal services that are provided to residents who live within the community of Twin Rivers, such as schools and libraries, they are provided by and are under the control of the municipal government, not TRHA[2].

Plaintiffs cite two New Jersey cases in support of its argument that the imposition of fines is a power unique to the government, Walker v. Briarwood Condominium Assn., 274 N.J. Super. 422 (App. Div. 1994), and Holbert v. Great Gorge Village, 281 N.J. Super. 222 (Ch. Div. 1994).[3] Both of these New Jersey cases cite a decision of the Virginia Supreme Court in Unit Owners Ass'n of Buildamerica-1 v. Gillman, 292 S.E. 2d 378 (Va. Sup. Ct. 1982) which states that "the imposition of a fine is a governmental power." Id. at 384. However, this court does not find that the reliance by the Holbert court on

[2] The municipality also retains control over the cost of services for which it will provide reimbursement to the qualified private community. Reimbursement is to be at a level so that the community can provide services "in the same fashion" as those services are provided on the public roads and streets. See Stonehill Property Owners Ass'n, Inc. v. Township of Vernon, 312 N.J. Super. 68, 76 (App. Div. 1998).

[3] Plaintiffs also cite State v. Celmar, 80 N.J. 405 (1979) which concerned delegation of police powers to a religious organization and resulted in the repeal of N.J.S.A. 40:97-1. Celmar involved the power to arrest and the private enforcement of criminal statutes, and also the application of the power to impose fines as criminal penalties outside of a contractual relationship. The legislation that authorizes Associations to impose fines for violation of its rules specifically excludes the type of moving violation that was involved in Celmar. N.J.S.A. 46:8B-15(f).

Walker for the proposition in Holbert that the "exaction of fines and penalties is a uniquely governmental function" is supported by Walker. Holbert, 281 N.J. Super. at 228.[4]

The power to impose fines on members of the Association is not necessarily a delegation of the police powers. Both Gillman and Walker establish that in order for the imposition of a fine to be a valid exercise of Association authority protected under the business judgment rule, the Association action must be authorized both by statute and by the by-laws of the Association. Prior to the decision in Walker, the Condominium Act only provided Associations with the authority to collect assessments and damages, not fines or penalties. This legislation was changed to allow Associations to enforce their rules by imposing fines under limited circumstances. N.J.S.A. 46:8B-15(e). The case relied upon by Plaintiffs and by the Walker court makes this clear: "A regulation [regarding parking spaces] ... is in no sense a zoning regulation adopted under the police power. Rather, when adopted lawfully and reasonably, it becomes a mutual agreement entered into by the condominium unit owners." Gillman, 292 S.E. 2d at 285. The Association's authority to impose fines must be provided by the Legislature in order for the administration

[4] Plaintiffs' briefs attribute this quote to the Appellate Division's decision in Walker, but this quote is actually taken from the decision in Holbert and does not appear in Walker. The Walker opinion merely states that "[The Virginia Supreme Court in Gillman] concluded by noting that the imposition of a fine is a governmental power." 274 N.J. Super. at 428.

of those fines to fall under the business judgment rule exempting them from judicial review, but the power to enforce the Association's rules against its members by assessing fines or late fees is not a delegation of police powers.

The court certainly recognizes that TRHA does have considerable impact on the lives of residents in the Twin Rivers community. TRHA and the Board make decisions that affect many of the extra amenities that homeownership in the community entitles them to, such as the use of pools and recreation facilities, parking, cable service, lawn care, and much more. But this impact is a function of the contractual relationship that residents choose when they elect to purchase property or live in Twin Rivers - its burdens come with concomitant benefits.

The community of Twin Rivers remains subject to the governance of East Windsor Township and all the laws of the State of New Jersey. It is no more a municipality than are malls, New Jersey Coalition Against War in the Middle East v. J.M.B Realty Corp., cert. den.138 N.J. 326 (1994), sub nom Short Hills Assocs. V. New Jersey Coalition Against War in the Middle East, 516 U.S. 812 (1995), or private universities, State v. Schmid, 84 N.J. 535 (1980) cert. den. 451 U.S. 982(1981). It is subject to the New Jersey State Constitution in the same way that any other private organization would be, but it is not a state actor or an arm of the municipal government Therefore, the court does not find that TRHA is subject to the Constitutional limitations

imposed on state actors, at least for the factual context and circumstances specifically presented in this case, and will conduct its analysis of the issues in this case accordingly.

APPLICABILITY OF PREDFA TO TWIN RIVERS: Because several of Plaintiffs' arguments rely on the applicability of N.J.S.A. 45:22A-43 to 48 to Twin Rivers and TRHA, the court must address whether TRHA is subject to any part of the Planned Real Estate Development Full Disclosure Act ("PREDFA" or "the Act"). N.J.S.A. 45:22A-21 et seq. Defendants ask for summary judgment on the counts involving Plaintiffs' challenges to Resolution 99-1, Resolution 2000-1 and Resolution 99-4 based on its claim that the PREDFA regulations do not apply to Twin Rivers and that the "business judgment" rule should be the standard used to evaluate resolutions duly enacted by the Association Board. Defendants claim that N.J.S.A. 45:22A-42 specifically exempts from the Act any portion of a planned real estate development already holding building permits or municipal approvals issued prior to 1977 when the Act was made effective. Since Twin Rivers was established in 1973, Defendants have argued that Twin Rivers falls within this exception and therefore none of the regulations of the Act apply to its by-laws.

Plaintiffs claim that 1993 amendments to the Planned Real Estate Development Act ("PREDFA") apply to Twin Rivers. They argue that while

developments approved or existing before PREFDA enactment in 1977 were naturally exempted from regulations involving pre-purchase disclosures and development stages of the communities, this exemption could not logically apply also to the 1993 amendments regarding governance of those communities through their associations. It would not be reasonable, they argue, for the New Jersey legislature to have protected the rights of residents in newer communities while ignoring the rights of residents in communities planned before 1977. Defendants counter that there is no indication that the legislature intended the amendments to apply where the original act did not, and the fact that the exemption provisions were not changed during the amendments supports this view.

PREDFA resulted from the Legislature's "recognition of the increased popularity of various forms of real estate development in which owners share common facilities, units, parcels, lots, areas or interests." N.J.S.A. 45:22A-22. The amendments to the Act passed in 1993 do not relate to the creation or sale of units within a development. Rather, they address the administration and management of planned real estate developments, and were "intended to prescribe a consistency of management methods in all types of PREDs, and to safeguard the interests of the individual owners or occupants." Committee Statement to Senate, No. 217-L.1993, c.30 (NJ 1993).

> "The bill also incorporates into PRED law certain provisions – relating to the bylaws of unit owners' associations, the establishment of members' voting rights, the allocation and collection of common expenses, the amendment of association by-laws and the adoption, amendment and enforcement of rules concerning the common elements – that are now found only in the statute on condominiums." Id.

Although the court will first look to the plain language of the statute in its judicial construction, N.J.S.A.1:1-1, it cannot ignore the intent of the Legislature by imposing a rule of strict construction that would defeat the apparent legislative design. Board of Ed. of Manchester Tp., Ocean County v. Raubinger, 78 N.J. Super. 90, 97(App.Div. 1963). Here it seems that the Legislature did not contemplate that the law would not extend to all PREDs, since the clear intent was to provide consistency of management and to safeguard the interests of owners. Where the drafters of a statute did not consider a specific situation, a court should interpret the enactment "consonant with the probable intent of the draftsman 'had he anticipated the situation at hand.'" Matlack v. Burlington Cty. Bd. of Chosen Freeholders, 194 N.J. Super. 359, 361 (App. Div. 1984) certif. den. 99 N.J. 191 (1984)(citations omitted). A literal interpretation of a statute will not be applied where to do so would distort the clearly expressed legislative intent. State v. Schumm, 146 N.J. Super. 30, 33 (App. Div. 1977), aff'd 75 N.J. 199 (1978).

It is reasonable to read N.J.S.A. 45:22A-21 through 45:22-41 as inapplicable to portions of communities where building permits were obtained and plans were already completed, since it would have required amendment of permits already in place, and would have subjected developers to fines for sales which had already taken place.[5] There is no similar logic for extending the exemptions to those sections of the Act that were added in 1993. The legislature clearly intended for any association not in compliance with the regulations prior to the effective date to make "proper amendment or supplementation of its by-laws", and failure or refusal to do so does not "affect their obligation of compliance therewith on and after that effective date." N.J.S.A. 45:22A-48.

It would be unreasonable to assume that the protections granted to all New Jersey condominium residents and residents of those portions of PREDs constructed after 1977 were not intended to apply to residents of portions of PREDs constructed prior to 1977. Such a literal reading of the Act could result in residents of older homes being given fewer rights regarding community maintenance and administration than their neighbors who may happen to live in a newer home. This court is not willing to find that this is what the legislature intended when enacting the amendments to PREDFA. Therefore, the court

[5] The court notes that, under the terms of N.J.S.A. 45:22A-37(e), individual owners were not permitted to waive compliance with the PREDFA requirements.

finds that the 1993 amendments to PREDFA, codified at N.J.S.A. 45:22A-43 through 48, apply to Twin Rivers; and any portion of the Association by-laws and resolutions not in compliance are in violation of the statute.

STANDING FOR PLAINTIFF CBTR: Defendants have challenged Plaintiff CBTR's standing as a party to this case, claiming that at no time since the filing of the suit have there been seven members of the organization as required by N.J.S.A. 2A:64-1, which provides in pertinent part:

> Any unincorporated organization or association, consisting of 7 or more persons and having a recognized name, may sue or be sued in any court of the state by such name in any civil action affecting its common property, rights and liabilities... N.J.S.A. 2A:64-1

"Common rights and liabilities" means rights and liabilities that members share or incur similarly, that is, those pertaining with like application and relevancy to the members of the group. New Jersey Bankers Ass'n v. Van Riper, 142 N.J. Eq. 301 (Ch. Div. 1948) reversed on other grounds, 1 N.J. 193 (1948).

Plaintiffs claim that CBTR has no formal membership, and consists of more than seven supporters. CBTR, they claim, has standing to sue in this case because it represents a "mini class" of interested parties who seek the same constitutional result as the individual Plaintiffs. Plaintiffs argue that the court should apply a liberal approach to standing because the case involves "public interest" or "group litigation".

Defendants argue that CBTR represents only the private interests of Twin Rivers homeowners, and its membership consisted of only six people when the suit was brought and that it is neither a public interest group nor is it group litigation. Although Twin Rivers is organized as a non-profit organization, Defendants contend that it is not a charitable corporation or an association dedicated to the public interest such that the threshold for standing in cases against it would be very low. *See* City of Paterson v. Paterson Gen. Hospital, 97 N.J. Super. 514, 527-528, (Ch. Div. 1967). Therefore, Defendants conclude that there is no public policy reason for the court to extend standing to CBTR where it does not meet the statutory requirements for standing.

Plaintiffs claim that the language of the statute implies that the requirement that an association consist of seven persons does not require seven members. The court declines to adopt this reading of the statute. The statute makes clear that the rights and remedies of the association are the same "as if the action were prosecuted by or against all the members thereof." N.J.S.A. 2A:64-1. The law further specifies that "an action shall not abate...by reason of any change in membership." Id. The court is unable to determine what rights and remedies the association may be entitled to or may be at stake without knowing what the rights of its members are. It would similarly be impossible

for a court to impose liability against an unincorporated association without any way to determine the identity of its members.

In order to possess standing, the plaintiff must have a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and there must be a substantial likelihood that the plaintiff will suffer harm in the event of an unfavorable decision. New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n, 82 N.J. 57, 67 (1980); Crescent Pk. Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 107 (1971); In re Tp. of Howell, 254 N.J.Super. 411, 416 (App. Div.), certif. denied, 127 N.J. 548 (1991). The court can determine none of this if CBTR has no formal membership and consists only of unnamed individuals who "share in its goals and participate in its activities."

CBTR did not have seven or more members when it joined as Plaintiff in this litigation, and is now comprised of only three members. The original six members were not without remedy, but were not entitled to standing as an organization. The attrition in CBTR's membership since the filing of the suit is immaterial to the issue of standing, since a change in the membership after the filing of suit does not affect standing at the time the suit was brought, but it highlights the reasoning behind the legislature's imposition of a seven member threshold. "[T]he essential purposes of the standing doctrine in New Jersey....

are to assure that the invocation and exercise of judicial power in a given case are appropriate...to generate confidence in the ability of the judicial process to get to the truth of the matter and in the integrity and soundness of the final adjudication...[and] to fulfill the paramount judicial responsibility of a court to seek just and expeditious determinations on the ultimate merits of deserving controversies." New Jersey Citizen Action v. Riviera Motel Corp., 296 N.J. Super. 402, 410 (App. Div. 1997), appeal dismissed 152 N.J. 361 (1998). Adjudication of the rights of large groups of individuals through an association is an appropriate invocation of judicial power and serves the goal of expediency. Adjudication of the rights of three individuals through an association adds nothing to the expediency or integrity of the proceedings. Where the issue of standing is at least debatable, the action will be permitted to proceed if the resolution of the issues is in the public interest. 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). Because there is no public interest at stake, but only the private rights of individuals within a contractual relationship, and because the interests of the members are still represented as individuals, the court will not extend standing to an unqualified organization. The rights of these three individuals are better adjudicated as individual co-plaintiffs. Therefore the

court holds that Plaintiff CBTR does not have standing to appear as a party to this suit.

COUNT ONE: The TRHA governing documents prohibit the placement of signs anywhere on Trust land without approval of the Board of Directors. The Board is also authorized to remove any unauthorized sign, and to charge the offending party with the cost of removal. This rule is repeated in the Declaration of Restrictions and Reservation of Easements, which also make up part of the governing documents of the Association. Current sign policy provides that upon discovery of an unauthorized sign, the Trust will send a letter to the offending party (if known) requesting the removal of the sign, and impose a $50 fine if it must remove a sign posted on Association property without permission. According to the Trust Administrator, the sign policy permits residents to post any sign in windows of residences and in garden beds, not more than three feet from a residence, throughout the community. At oral argument, Defendants clarified that the policy limits signs to one per lawn and one per window. Signs are also typically posted on non-Trust owned property surrounding the community. Signs may be posted in permitted areas throughout the year. The Board has also incorporated N.J.S.A. 27:5-9(f), part of the Roadside Sign and Outdoor Advertising Act, into its sign policy prohibiting placement of signs on utility poles and natural features within the

community. The stated purpose of the Twin Rivers sign policy is to avoid the clutter of signs and to preserve the aesthetic value of common areas, as well as to allow for maintenance of the lawns and collection of leaves in the fall.

Plaintiffs claim that the restrictions on the posting of political signs in Twin Rivers violate the free speech provisions of the State Constitution where the governing document bans all signs, and the policy as practiced is intrusive, arbitrary and selectively enforced. Since it would be unconstitutional for a municipality to ban posting of political signs on private property, Plaintiffs argue it should also be unconstitutional for TRHA to ban posting of signs on its residents' property. Plaintiffs analogize extending free speech rights to this relatively new but rapidly growing form of community government to the extension of Fourth Amendment privacy rights to new technologies like telephone and wireless service, arguing that constitutional rights have adapted and must continue to adapt to changing social and technological norms.

Plaintiffs also argue that, although the properties within the Twin Rivers community are privately-owned, or owned in trust for the benefit of all the residents, the community also contains stores, restaurants, public schools and state highways within its "borders" that invite non-residents into the community. As such, Twin Rivers is unlike a gated-community that excludes the public. It is a private space that "functions" as a public space, much like malls and

shopping districts. Citing the holding in Coalition, 138 N.J. at 326, Plaintiffs argue that where private space takes on the function of public space, the constitutional protection of freedom of speech "follows the public" on to that space.

Because the right to free speech is a constitutionally protected right, Plaintiffs argue that it cannot be waived by purchasing property in Twin Rivers subject to deed restrictions. Constitutional rights, they contend, can only be waived knowingly and voluntarily. Plaintiffs allege that Twin Rivers residents are not made explicitly aware at the time of purchase that they are agreeing to surrender some measure of their constitutional rights when they sign their purchase agreement, and are required to accept the terms of the deed restrictions in order to purchase. Even where they might understand the nature of the agreement they sign, Plaintiffs argue that it is essentially a contract of adhesion, with no alternative due to the lack of other available housing, and no room for negotiation of the terms due to the relative power of the developer over the buyer. Plaintiffs claim that under New Jersey law, the "take-it-or-leave-it" terms of sale, with no opportunity for negotiation in a market without alternatives, are unconscionable and unfair. The restrictions on signs in Twin Rivers are not reasonable time, place and manner restrictions, they claim, because the regulations are unreasonable. Plaintiffs assert that community

election signs are a form of political speech that should be entitled to full constitutional protection.

Defendants claim that the Twin Rivers sign policy is uniformly applied to all residents, and balances the need to place signs with the need to preserve the aesthetic appeal of the community and allow for routine lawn care and maintenance. Although Plaintiffs might wish for a less restrictive policy, Defendants assert that under the "business judgment" rule the Association has a right to implement the policy for the valid purposes of avoiding clutter, damage to lawns and higher maintenance costs. Even assuming arguendo that the Constitution applies to Twin Rivers, TRHA claims that the sign policy is a reasonable "time, place and manner" restriction on speech that the Constitution would allow.

The relationship between homeowners and the Association is a contractual one, formalized in the restrictive covenants appearing on the deeds of the properties with actual and constructive notice of the covenants having been provided to the Plaintiffs at the time of purchase. Throughout their briefs, Plaintiffs have argued that they are entitled to more judicial protection from the rules of the Association because they are members of the Association and not mere members of the public. In fact, it is that very factor, the privity of contract between themselves and the Association, which entitles them to less judicial

interference in the workings of the Association. 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.

A restrictive covenant is a contract. Any neighborhood scheme that flows from such restrictive covenant is incidental to such contract and has its virtue in the terms of that contract. McComb v. Hanly, 132 N.J. Eq. 182, 185 (App. Div. 1942). To constitute a real covenant rather than a personal covenant, a promise must exercise direct influence on the use or enjoyment of the premises and must be a promise respecting use of land. Caulette v. Stanley Stilwell & Sons, Inc., 67 N.J. Super. 111, 116 (App. Div. 1961). The placement of signs on the property is a real covenant that runs with the land, therefore it is to be enforced unless it is determined to be unreasonable. Graziano v. Grant, 326 N.J. Super. 328, 343 (App. Div. 1999).

The standard for reasonableness of a covenant under New Jersey law was applied by a federal court in Acme Markets, Inc v. Wharton Hardware, 890 F. Supp. 1230 (D.N.J. 1995). The court applied a comprehensive test to determine when a covenant running with the land is enforceable, which included (1)

whether there was lawful intent when the covenant of sale was drafted; (2) whether the covenant was part of the consideration for sale of property; (3) whether the covenant was clearly and expressly stated; (4) whether the covenant was written and recorded so that there was notice; (5) whether the covenant was reasonable concerning time, area and duration; (6) whether the covenant was an unreasonable restraint on trade or monopoly; (7) whether enforcement of the covenant would be interfering with the public interest; and (8) whether there were changed circumstances making enforcement unreasonable. Acme Markets, 890 F. Supp. at 1242 (citing Davidson Bros., Inc. v. D. Katz & Sons, Inc., 121 N.J. 196, 211-212 (1990)).

Applying this eight-part test to the case at hand, there was clearly lawful intent when the covenant was drafted, and adherence to the Association rules was consideration for the sale of the property. The covenant was included in the written documents provided to Plaintiffs, and there is no question of notice. There are no changed circumstances that would now make enforcement of the covenant unreasonable, and there is no issue of restraint of trade or monopoly. The only questions for the court to determine are whether the covenant is reasonable concerning time, area and duration, and whether enforcement of the covenant interferes with the public interest.

The goal of preserving the aesthetic value of a community has long been recognized as an appropriate one. See: State v. Miller, 83 N.J. 402, 415 (1980); Borough of Point Pleasant Beach v. Point Pleasant Pavilion, 3 N.J. Super. 222, 225 (App. Div. 1949); Lionshead Lake, Inc. v. Wayne Tp., 10 N.J. 165, 176 (1952), appeal dismissed 344 U.S. 919 (1953). The court also finds that the restriction of signs to windows and to the area adjacent to the buildings so that they will not interfere with lawn maintenance is a reasonable limitation on area. There are no restrictions on time or duration. Therefore, the restriction on the placement of signs meets the test of reasonableness concerning time, area and duration.

The more difficult question is whether the restriction on signs is an unwarranted interference with the public interest. It is only in this context that Plaintiffs' arguments invoking the New Jersey State Constitution become relevant, for surely it could not be in the public interest to impermissibly infringe upon a citizen's right to free expression. The extent to which the public interest controls over the property rights of a landowner is to be found by applying the test set forth in State v. Schmid, supra.

Application of the appropriate standard in this case must commence with an examination of the primary use of the private property, the extent and nature of a public invitation to use the property, whether the expressional activities are

discordant with the public and private uses of the property, and the necessity for and reasonableness of the regulation. Schmid, 84 N.J. at 564-565. The reasonableness of a regulation is determined by evaluating the standards governing the actual exercise of the freedom, the standards for granting or withholding permission, and the time, place and manner standards imposed by the regulation. Id. at 567.

In this case there is no question but that the use of the property in question, the lawns of Twin Rivers, are completely private. There is no invitation to the public to come on to the lawns of Twin Rivers. For members of the public to come onto the lawns of Twin Rivers and post signs of any kind would certainly be discordant with the exclusively private use of the property.[6] Defendants have stated that the regulation is necessary for maintenance of the property and for maintaining the aesthetic value of the community. There are clear limitations to the size and location of signs permitted, and clear standards limiting the right to post signs to residents and only in front of their own units.

Plaintiffs have claimed that the restrictions are more intrusive than necessary to allow for ease of maintenance and to maintain the aesthetic value of the property. But there is no requirement that the regulations be narrowly

[6] While the posting of signs by the residents of Twin Rivers would not be discordant with the private use of the land, it is the interests of the public that the Schmid test addresses, not the interests of the Association members. That relationship is governed by the covenant and privity of contract. It is only where restrictions on public expression are discordant with the use of the land that this prong of the Schmid test applies.

tailored to accomplish their purpose so long as they are reasonably related to that purpose.[7] So long as the rules enacted by the board are reasonable and in good faith, are consistent with state regulations and its own governing documents, and are free of fraud, self-dealing or unconscionability, the judiciary will not interfere. Billing v. Buckingham Towers Condo Assoc., 287 N.J. Super. 551, 563 (App. Div. 1996). The owner of private property "is entitled to fashion reasonable rules to control the mode, opportunity and site for the individual exercise of expressional rights upon his property." Schmid, 84 N.J. at 563. "The power to impose regulations concerning the time, place and manner of exercising the right of free speech is extremely broad." Coalition, 138 N.J. at 377. Plaintiffs have made no showing that the sign regulations were enacted in bad faith, unreasonably or fraudulently; therefore the court will not substitute its judgment or Plaintiffs' judgment for that of the Board.

Application of the Schmid test shows that there is no public interest that is interfered with by the restrictions on signs at Twin Rivers. Plaintiffs' claim that an "outsider" would have more rights than a resident is inaccurate. Members of the public have no constitutional right to place signs on private

[7] Plaintiffs' argument that TRHA 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..." relies on the standard imposed on state actors. Township of Saddlebrook v. A.B. Family Ctr., 156 N.J. 587, 598 (1999). Defendants are not state actors, and are not subject to the same requirements. When applied to private property owners, the standard for regulations is one of reasonableness. The balancing test does not require restrictions on expression to be narrowly tailored.

lawns, and they would have no constitutional right to do so in Twin Rivers, even absent this regulation. It is only the private interests of Plaintiffs that are limited by the restriction, but this limitation is imposed by the covenant to which they are a party.

Contract law requires a different analysis, but yields the same result. Plaintiffs argue that the limitations on freedom of expression imposed by the Association rules should be unenforceable because they did not knowingly and voluntarily agree to limit their expression when they contracted to purchase their residences. Plaintiffs claim that the contract of sale contains no notice that buyers are waiving rights under the State Constitution. However, it is not clear that Plaintiffs have waived a Constitutional right that they held prior to the purchase of the property in question. Plaintiffs are now no more restricted from posting signs on Twin Rivers common property than they were prior to purchase.[8] As for the restrictions on the signs on resident's own lawns, there is the same expectation that Plaintiffs will make themselves aware of the restrictions that might be applicable in the same way that any other zoning regulation would apply. New Jersey law provides that the recording of covenants gives residents constructive notice of the same, rendering such

[8] The Court noted in Schmid that "[t]he public's right to exercise its freedom of speech does not mandate unrestricted access to [the private property]. Even with respect to public property, the public's use of that property for First Amendment activity may be restricted, if not actually prohibited." Schmid, 84 N.J. at 567 note 12.

covenants fully enforceable. Leisuretown Assoc. Inc. v. McCarthy, 193 N.J. Super. 494 (App. Div. 1984) (holding that governing fees for administering, maintaining, and operating retirement village association gave residents of the village constructive notice of the same, rendering such covenants fully enforceable against village residents).

Plaintiffs have also argued that their limited bargaining power in negotiating the terms of their purchase agreements makes the agreements contracts of adhesion under New Jersey law. A contract of adhesion has been defined as a contract where one party must accept or reject the contract. Gras v. Associates First Capital Corp., 346 N.J. Super. 42, 48 (App. Div. 2001) certif. den. 171 N.J. 445 (2002). "[T]he essential nature of a contract of adhesion is that it is presented on a take- it-or-leave-it basis, commonly in a standardized printed form, without opportunity for the 'adhering' party to negotiate except for perhaps on a few particulars." Rudbart v. North Jersey Dist. Water Supply Comm'n, 127 N.J. 344, 353 (1992) cert. denied sub nom First Fid. Bank v. Rudbart 506 U.S. 871 (1992). However, the mere fact that a contract is adhesive does not render it unenforceable. Gras, 346 N.J. Super. at 48 (citing Vasquez v. Glassboro Serv. Ass'n Inc., 83 N.J. 86, 104 (1980)). Finding adhesion "is the beginning, not the end of the inquiry." Rudbart, 127 N.J. at 353. Unequal bargaining power is not the only factor in deciding if a contract

provision is unconscionable. Jefferson Loan Co. v. Livesay, 175 N.J. Super. 470 , 479 (App. Div. 1980). The appropriate analysis requires a consideration of the subject matter of the contract, the relative bargaining powers of each party, the degree of economic compulsion motivating the adhering party, and the public interests affected by the contract. Rudbart, 127 N.J. at 356. Plaintiffs must demonstrate unconscionability by showing some overreaching or imposition resulting from a bargaining disparity between the parties, or such patent unfairness in the contract that no reasonable person not acting under compulsion or out of necessity would accept its terms. Rotwein v. General Accident Groups & Casualty Co. 103 N.J. Super. 406, 417-418 (Law Div. 1968). Having already determined that there is no public interest affected by the restrictions on posting of signs, and having determined that the restrictions are reasonable and therefore not unconscionable, the mere fact that there was unequal bargaining power over the specific terms of the sale does not make the sales contract unenforceable.

Other jurisdictions have similarly held that restrictive covenants are enforceable where the restriction is reasonable. See Midlake on Big Boulder Lake Condominium Assoc. v. Cappuccio, 673 A.2d 340, 342 (Pa. Super.), App. Denied, 679 A.2d 230 (Pa. 1996)(sign restrictions upheld as reasonable), Nahrstedt v. Lakeside Village Condominium Ass'n, 878 P.2d 1275, 1290 (Ca.

1994)(pet restrictions upheld as reasonable); Levandusky v. One Fifth Avenue Apartment Corp., 75 N.Y.2d 530, 538 (NY Ct. App. 1990)(reasonableness similar to business judgment rule standard). Because the covenant restricting signs on residents' properties is enforceable under New Jersey law, and because it does not interfere with public interests which would invoke a constitutional analysis, and because the contract subjecting Plaintiffs to the restrictive covenants found in their deeds is valid and enforceable, the court grants summary judgment to Defendants on count one of the complaint.

COUNT TWO: Twin Rivers maintains a Community Room, designated for the development of educational, social, cultural and recreational programs under the supervision of the Trust. The room is available to individual Twin Rivers residents as well as clubs, organizations and committees approved by the Trust who want to rent the room for parties or other events. The fee for rental of the room is $165, with an additional $250 security deposit required. The fee covers the cost of personnel for opening and closing the room for these events, clean up, replacement of consumables, utilities and repair of normal wear and tear. Normal depreciation of the building and furnishings is factored into the rental fee. The security deposit is refundable after the event once the room has been inspected and is found to be in good condition. Residents wishing to rent

the Community Room are also asked to provide a certificate of insurance showing that their homeowner's policy will cover the event. TRHA reserves the right to refuse rental of the room for any reason.

Private events account for approximately 14% of the total use of the Community Room. The remainder of the events held there are sponsored by the Trust. Before every election for the Board of Trustees, all candidates are invited to appear at a meeting in the Community Room to introduce themselves to residents, but there has never been a political event for any specific candidate held in the Community Room.

Plaintiffs argue that the rental fee of $165 and the required $250 security deposit are excessive because they are not related to the actual costs of the rental incurred by the Association. They claim that the Community Room is a community asset, and since the Association is not entitled to retain a profit from the use of a community asset, the rental fees in excess of the cost are an unfair retention of profit. The requirement that renters provide a certificate of insurance is unreasonable, Plaintiffs claim, because the cost of insurance is already included in the fees and because there is little likelihood of damage to the room occurring from a meeting. Plaintiffs also claim that the room is the only meeting room available in Twin Rivers for public discussion of community affairs, and is regularly used by the Association for that purpose,

but because the Association has the authority to unilaterally refuse rental if it disapproves of the subject matter, it impermissibly censors Plaintiffs only forum for community-wide discussion.

Defendants assert that requiring renters to obtain a Certificate of Insurance from their homeowner's insurance policy provider is not unreasonable where obtaining the certificate does not involve any additional cost to the resident. There is no profit to the Association from the fees for the use of the room, Defendants claim, since the fee is calculated to cover the cost of personnel, cleanup, repair of normal wear and tear of the room and a percentage of the annual depreciation of the building and furniture. TRHA claims that Plaintiffs are simply trying to substitute their own judgment on which costs should be included in the rental fee for that of the duly elected Board of Trustees. Defendants argue that there is no evidence of fraud, self-dealing or unconscionability that would allow the court to disturb the policy enacted by the Board.

Plaintiffs raise three issues regarding the use of the community room, claiming that Resolution 2002-08 permits TRHA to engage in arbitrary restriction of the use of the room, and imposes fees and regulations regarding insurance that are unrelated to the actual use of the room by residents. The

issues of fees and insurance requirements are less theoretical and more easily addressed, and make for an efficient place to begin the analysis.

TRHA and the Board of Trustees are clearly authorized by statute, either directly by the application of PREDFA at N.J.S.A. 45:22A-46, or indirectly by applying the New Jersey Condominium Act[9] in N.J.S.A. 46:8B-14(c), to create rules for the control of common elements. N.J.S.A. 45:22A-46 states:

> The by-laws may also provide a method for the adoption, amendment, and enforcement of reasonable administrative rules and regulations relating to the operation, use, maintenance and enjoyment of the units and of the common elements, including limited common elements.

"By-laws", within the definition of the Condominium Act and as defined by the New Jersey Non-Profit Associations Act, refer to the governing regulations adopted for the purpose of administration and management of the association, regardless of what those regulations are called by the association.[10] N.J.S.A. 15A: 1-2(c); N.J.S.A. 46:8B-3(c).

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. Chin v. Coventry Square Condo., 270 N.J. Super. 323,

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[9] Both Plaintiffs and Defendants have argued, albeit on separate issues and at varying points, that the New Jersey Condominium Act, while not binding here, can be "instructional."

[10] In their brief, Defendants attempt to discriminate between "by-laws" and "resolutions", but they are one and the same for statutory purposes. While "by-laws" are not defined in PREDFA, the sections relating to by-laws are derived from the relevant portions of the Condominium Act.

330 (App. Div. 1994), Thanasoulis v. Windsor Towers 200 Assoc., 110 N.J. 650, 653 (1988). The court must decide if the fee imposed is reasonably related to the actual costs incurred by the owner's activity. The owner who claims that a fee is actually a discriminatory revenue-raising device has the burden of showing a prima facie case of disparate treatment. Chin , 270 N.J. Super. at 331. If the owner is able to do so, the association then has the burden of demonstrating that the fee is reasonably related to costs incurred by it. Id.

Plaintiffs have claimed that the only cost to the Association for the rental of the room is the administrative cost to open and close the room for each event. Defendants, however, have provided a breakdown of the complete annual costs of the use of the room showing how the $165 rental fee is calculated.[11] Thus the court finds that Defendants have made a satisfactory showing that the rental fee is reasonably related to the incurred costs of the use of the room. This court rejects Plaintiffs' claim that the furnishings and the fixtures in the room would have depreciated anyway and that therefore depreciation should not be included in the costs for the use of the room. If rental of the room contributes to the depreciation and the rental charge includes only that percentage of annual

[11] The court notes that at the time of filing the complaint the policy for the use of the room involved a two-tier rental charge that discriminated between various uses of the room. This earlier policy, Resolution 98-15, clearly violates the principle established by the courts in Chin and Thanasoulis, but that policy has been superceded by Resolution 2002-08, which the court addresses today.

depreciation attributable to the actual use, then the expenses are reasonably related to the use of the room.

The regulation also requires renters to provide a certificate of insurance naming TRHA as an additional insured for the duration of the event. Plaintiffs object to this requirement because the Association already insures the property. In support of their proposition that the certificate requirement is unreasonable, Plaintiffs cite Green Party of New Jersey v. Hartz Mountain Industries, Inc., 164 N.J. 127 (2003), where the New Jersey Supreme Court held that requiring insurance riders for those wishing to hand out leaflets in malls was an unreasonable burden on free expression. In Green Party, the Supreme Court found that small organizations wishing to petition in the mall would not be able to afford the $250 per day rider cost, so although the requirement may have been reasonable from the perspective of the mall owners, it amounted to a *de facto* denial of access. The situation is quite different in the case at hand. Here there is no cost and the requirement of a certificate of insurance places no burden on the member other than the need to make a telephone call to their insurer. This "burden" to the use of the room, when balanced against the Association's interest in protecting against potential liability claims, is miniscule and does not deny Plaintiffs' access to the forum they are seeking.

Therefore the court does not find this requirement to be an unreasonable administrative rule regarding the use of the community room.

The question of censorship in denying Plaintiffs' access to the room at the Trust Administrator's unfettered discretion is a far more complicated one, made even more difficult by the vague wording of Paragraphs 1 and 7 under the "General" category in Resolution 2002-08. If it were clear from the policies or the pleadings that the use of the Community Room was limited to Association members and their guests, then the business judgment rule would be the appropriate standard for judicial review of the administrative decisions of the Board of Trustees.[12] As represented in the pleadings and in the colloquy at oral argument, it would appear that the use of the Community Room has generally been limited to the Trust, the members and their licensees, or organizations affiliated with or sponsored by the Association. But Resolution 2002-08 states: "The Community Room shall be made available to individual Twin Rivers residents, as well as clubs, organizations and committees approved by the

[12] The business judgment rule bars judicial inquiry into the decisions of the board of directors made in good faith. See Maul v. Kirkman, 270 N.J. Super. 596, 614 (App. Div. 1994). Although in Green Party the court held that the business judgment rule had limited relevance in its analysis because the parties were not involved in business dealings, nor were they seeking redress of rights owing to them as a consequence of share ownership; here, both of those factors are present, indicating that the business judgment rule is the more relevant analysis. Resolution 2002-08 would fail under a business judgment rule analysis due to the vagueness of Paragraph 7, as discussed infra. The unfettered discretion to refuse rentals does not provide any way for the court to evaluate whether any such refusal was in good faith and in furtherance of a legitimate goal of the Association. As such, the business judgment rule would direct the court to interfere to strike down the Resolution. "The refusal to enforce arbitrary and capricious rules promulgated by governing boards of condominiums is simply an application of the business judgment rule." Papalexiou v. Tower West Condominiums, 167 N.J. Super. 516, 527 (Ch. Div. 1979) (citing Henn, Law of Corporations (2nd Ed 1970) § 242 at 482-482).

Trust." It is unclear to what extent these clubs, organizations and committees involve a public invitation to be on the premises. Because the resolution does not preclude public invitation, within limited context, to the Community Room, the court cannot preclude consideration of the public interest.

New Jersey has generally avoided establishing tiers of constitutional analysis, preferring instead to balance the competing interests while giving proper weight to constitutional values. Green Party, 164 N.J. at 148-149. The standard for balancing private property interests and the constitutional freedom of speech and assembly must take into account: (1) the nature, purpose, and primary use of such private property, generally, its "normal" use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property. Coalition, 138 N.J. at 354 (citing Schmid, 84 N.J. at 563).

Resolution 2002-08 makes clear that the nature, purpose and primary use of the Community Room is "the development of educational, social, cultural and recreational programs under the supervision of the Trust." However, the Association has made use of the room for various community forums, including a "Candidate's Night" for introduction of candidates for the Board of Trustees. It would be inaccurate to state that the room is not also used for political

activity, although such activity may have been limited in the past to expression controlled by the Association. Meetings to discuss community issues would seem to fall within the "normal use" of the room.

Plaintiffs have argued that the Community Room functions as the central "meeting place" for residents, in much the same way that malls and town squares serve as meeting places for the public. It is unclear to the court to what extent the public is invited to use the Community Room, but it would seem that the majority of the events held in the room are specifically limited to Association members, or are private parties limited to members and their guests. New Jersey recognizes that the more a private space is made open to the public for a variety of activities, the more an owner's rights become circumscribed by the rights of the public who use it. Schmid, 84 N.J. at 562-563. Under this type of "sliding scale" analysis articulated in Schmid, it would seem that the public access to the Community Room is relatively limited, and therefore the restriction of the Association's property rights should be minimal.[13]

It is undeniable, however, that the purpose of the expressional activity that Plaintiffs sought to undertake on the property was directly related to the

[13] An alternate factor in many of the "public function" tests, both in New Jersey and in Federal cases, has been the availability of alternate means of accessing the public or disseminating protected expression. "[T]he content of such regulations, recognizing and controlling the right to engage in expressional activities, may be molded by the availability of alternative means of communication". Schmid, 84 N.J. at 568. "Where the presence of such alternatives will not eliminate the constitutional duty, it may lighten the obligations on the private property owner..." Id. at 563. The court notes that Plaintiffs contend there are no alternate fora for the type of meetings they wish to hold. Since it appears that the actual public use of the room is, in fact, minimal, this lack of alternative is perhaps the more persuasive factor. The results reached by the court remain the same under either analysis.

private and public use of the property. Certainly a community forum addressing election issues would be highly relevant to community members. It has the potential to also impact the public use of the property. Given the broad scope of political, educational, social, cultural and recreational programs that could be authorized by the intended use of the room, it is hard to imagine what types of expressive activity would not constitute a "related use". Under the Schmid test, it would seem that there is some public interest that would outweigh the complete control over expressive activity TRHA has by virtue of their property rights.

While TRHA is within its rights to make rules concerning the use of the room as a forum for expression, having determined that there is some public interest the question then becomes: what is the necessity for and reasonableness of the regulation over speech. Schmid, 84 N.J. at 567. Here the court must evaluate (1) the standards governing the actual exercise of the freedom, (2) standards for granting or withholding permission; and (3) time, place and manner standards. Id. The defendant's regulations concerning the right to petition on its private property in Schmid were considered a reasonable limitation in light of the need to protect the safety and welfare of its students and staff.[14]

[14] The regulations approved in Schmid were implemented after the plaintiff's arrest for trespass. The court noted that, while the current regulations were reasonable, the plaintiff's conviction for trespass

TRHA's regulations for the use of the Community Room do not meet the standard articulated in Schmid. Paragraph Seven of the General Regulations for the use of the room states: "The trust shall reserve the right to refuse said request for any reason, and, if the Trust Administrator deems it necessary, refer the request to the Board of Trustees for a final determination." This grants unfettered discretion to the Administrator to refuse rentals, and does not provide an objective means for determining when the use of the room is improperly withheld. There are no standards articulated for the granting or withholding of permission. The court cannot apply a reasonableness test, or even the business judgment rule, where the rule is too vague to allow the court to make a determination of good faith in the treatment of requests or good cause shown for any denial of use.

Given that the public use of the room is slight, TRHA has broad discretion in establishing regulations that are reasonably related to the normal use of the room; however, it cannot arbitrarily deny all access to the room. Although there are reasonable time, place and manner standards articulated in the rules for the use of the room, there are no standards for granting or withholding permission. Therefore, the court finds that the fees for the use of the room and the insurance requirements are valid, but that the regulations for

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had to be overturned since it was based on unreasonable restrictions that were in place at the time of his arrest.

the use of the room are impermissibly vague. The court grants summary judgment for Plaintiffs on count two, and directs that the regulations for the use of the room be modified to provide clear standards for the granting or withholding of permission for its use.

COUNT THREE: TRHA also creates a monthly newsletter, Twin Rivers Today ("TRT"). TRT is published by a private publisher, who finances the publishing costs with paid advertising. Candidates for the Board have placed paid political ads in TRT. Scott Pohl, the current president of the Association, has also served as editor of TRT. The purpose of the newsletter is to inform residents of Association news of importance to the community or that otherwise may affect them. The newsletter contains articles about Twin Rivers, a "President's Message" from the current president of the Association, letters to the editor from Twin Rivers residents, and other items that the editorial committee feels may be relevant and of interest to residents. The newsletter averages between 10 to 16 pages in length. TRT is delivered to all Twin Rivers' residents, and is also available at the Trust office and in various other locations throughout the community. It is not distributed to the general public.

The editorial policy of TRT provides for the publication of all submitted letters to the editor that do not contain libelous comments. Letters to the editor

appear on page four or later in the publication. TRT has published all articles and letters submitted by Twin Rivers residents, with the exception of one letter that contained potentially libelous language and was deemed improper for publication by the Association's attorneys. That letter was returned to the author for revision, but was never resubmitted.

An article by the President of the Association appears in each issue of TRT, in a section titled "President's Message." Except for two issues, the President's Message section has been on page three of the publication. The President may address any subject he or she feels may be of concern to the Twin Rivers community. In this section, Scott Pohl, as President of the Association, has discussed the present lawsuit, including the costs of the lawsuit and the reasons the Association is defending the lawsuit. Other information about the lawsuit has been included in TRT in sections about budget issues and legal fees incurred. Three issues of TRT featured a thermometer showing the costs incurred by the Association in this litigation.

Plaintiffs contend that they are being denied equal access to "Twin Rivers Today", the community's monthly newsletter, because the President of the Association, also the editor of the newspaper, uses his access to the publication to advance his own views. Plaintiffs claim that their submissions are given less visible placement, are often appended with rebuttal, and that their

organization has been maligned on its front pages on several occasions. They object to the graphic of a thermometer illustrating the cost of this litigation. Plaintiffs claim that Pohl and his running mates have enjoyed free advertising space in the publication, and that the publisher has profited from having his bills for distribution services from TRHA go unpaid without collection. As the "official newspaper of Twin Rivers," Plaintiffs claim that there is no adequate substitute for TRT as a means of communication with the residents of Twin Rivers. Plaintiffs contend that allowing Pohl to exclude or diminish opposing opinions would transform Twin Rivers into a "political isolation booth." Plaintiffs also claim that the editors of "Twin Rivers Today", as trustees of the Association, have a fiduciary duty to all its members not to use the newspaper to present only one side of a debate.

TRHA denies that Plaintiffs have ever been "denied" access to the community newsletter, TRT. Defendants claim that TRT has published every article or letter submitted by a Twin Rivers resident, with one exception where the submitted item contained statements that were, in the opinion of the Association's attorney, potentially libelous. But even if that were not the case, Defendants maintain that editorial decisions about the content of the publication are protected under the business judgment rule and private property rights. TRHA disputes Plaintiffs' claim that their submissions to TRT are entitled to

equal prominence with the President's Message column written by the duly elected President of the Association. Defendants also maintain the right to append editor's comments to submissions if those submissions contain inaccurate or misleading information. This in no way "censors" Plaintiffs, TRHA claims, because both views are expressed and left to the reader's own judgment. Defendants assert that it is entirely appropriate for the Association newsletter to inform community residents about the costs associated with this litigation, and that all the information published has been accurate. As a purely logistical matter, TRHA argues it would be impossible to accommodate Plaintiffs' demands if, every time the Association or its President mentions any individual or any matter, they would then be required to grant equal space and prominence on the same page to the mentioned party for reply or rebuttal. Defendants TRHA and Pohl claim that summary judgment in their favor should be granted because, under the business judgment rule, the fact that Plaintiffs disagree with the content of TRT or the location of articles is an insufficient basis for the court to overturn the editor's decisions and regulate the content of the newsletter. Since Plaintiffs have not submitted evidence of fraud, self-dealing, or unconscionable conduct, TRHA and Pohl claim that the decisions of the Board should not be judicially reviewed.

Pohl also argues that Plaintiffs are not entitled to the same access to the community newspaper as the editorial committee appointed by the Board. Pohl claims Plaintiffs enjoy the same access to TRT as all the other residents of Twin Rivers, and there is no obligation for the Board to place Plaintiffs' letters or articles in the same location as the President's Message. All of Plaintiffs' submissions to TRT have been published, Pohl asserts, and they are merely objecting to the fact that their submissions did not appear in a specific location in the paper.

Pohl denies Plaintiffs' characterization of his role as Association President as giving him "unfettered access" to TRT, and denies that he has ever received free advertising space in TRT to promote his candidacy for office. He testified that he paid for the advertisement, and that it is simply a matter of not being able to produce old receipts. Finally, Pohl objects to Plaintiff's claim that TRT is a "common element" of the Association, claiming that TRT in no way fits within the statutory definition of "common element" found in N.J.S.A. 46:8B-3(d); which in any event is not applicable to Twin Rivers. Therefore, Pohl seeks summary judgment for himself and his co-Defendants on count three of the complaint.

Both Plaintiffs and Defendants concede that, if this court was to hold that the Association Newsletter, Twin Rivers Today, fits within the definition of

"press" for the purposes of the First Amendment, then the issues Plaintiffs raise become moot. A homeowner's association newsletter has never been defined as "press" by the New Jersey courts, but neither has it been specifically excluded from the category. The most recent case of this kind, William G. Mulligan Foundation v. Brooks, 312 N.J. Super. 353 (App. Div. 1998), does not address the question[15], but bases its decision on common law principles of private property. There, the court engaged in a Schmid analysis and found that the publication was insufficiently "public" to warrant a limitation of the defendants' rights as owners of public property. Mulligan Foundation, 312 N.J. Super. at 363. [16] Plaintiffs argue that TRT is not "press" as we know it[17], but this court finds nothing intrinsic in the publication that would disqualify it as "press", and nothing in the tradition of "free press" that confines protection to broadsheet publications. In fact, the origins of our freedom of the "press" grew out of humble leaflets printed and distributed by individuals. Nevertheless, this

[15] The court in Mulligan Foundation declined to consider this issue, as it was not briefed in the case, but in its footnote 2 references Branzburg v. Hayes, 408 U.S. 665, 704-705 (1972), and Lovell v. City of Griffin, Ga., 303 U.S. 444, 405-52 (1938); both of which stand for the proposition that freedom of the press extends to all forms of published material.

[16] The constitutionality of defendant's regulation of private speech in TRT is not subject to the "forum" analysis used by the Appellate Division in Rutgers 1000 Alumni Council v. Rutgers The State University of New Jersey, 353 N.J.Super. 554 (App. Div.2002) There, the court held that the magazine in question was owned by a state actor, Rutgers University, which raised the state action doctrine under the 1st amendment to the US Constitution triggering forum analysis. Since this court does not find that TRHA functions as a state actor, the court will not engage in forum analysis.

[17] Plaintiffs mistakenly cite to N.J.S.A. 35:1-2 in their discussion of New Jersey Shield law. The shield law was enacted to protect journalists from prosecution for refusing to divulge information sources, and can be found at N.J.S.A. 2A:84A-21(a). It does not list "homeowners' association newsletters" among the forms of press it protects, but it is in no way exhaustive and in any event is inapplicable here.

court does find an important distinction, which the United States Supreme Court found to be the decisive factor in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), in the nature of the relationship between the publisher of TRT and its audience.

Unlike Tornillo, where the Court found that a publisher performed no governing functions and had no fiduciary duty to its readers, 418 U.S. at 251 (denying the plaintiff's claims that newspapers function as surrogates for the public with a concomitant fiduciary obligation); and in Mulligan, where the plaintiff was not a member of the association, 312 N.J. Super. at 364, here there exists a much different relationship between the recipients of TRT and the Association Board. Because editorial control is vested in the Board, and the newspaper is the official voice of the Association to its members, the fiduciary relationship between the Board and the Association members extends to its decisions regarding the contents of the newsletter. Fitzgerald v. National Rifle Assoc. of America, 383 F. Supp. 162, 165 (D.N.J. 1974).[18] It would be clearer, perhaps, to establish a fiduciary duty between THRA and the TRT readership if the Association dues of the members were used to finance the publication and

[18] In Fitzgerald the court never addressed whether the publication was public or private in nature, and never implied that the association was subject to the "semi-public forum" constraints that state actors face.

distribution of TRT. Although this is not the case with TRT[19], where the costs of publication are covered by advertising sales, the editorial control vested in the Association Board, which in turn holds a fiduciary responsibility towards its members, is not so far removed as to make the link too tenuous.

Plaintiffs object to a graphic that shows how much money the Association has spent to defend this lawsuit. Plaintiffs do not contend that the information is inaccurate, but merely object to its publication. This court can find no reason why the legal expenses of the Association and information concerning an ongoing lawsuit are not relevant and of interest to the community. Even if the Association were not a named defendant in the case, it would still be within their editorial discretion to write about a lawsuit they deemed relevant to the community. Mulligan involved an editorial position taken by community newsletter publishers on the outcome of a suit to which it was not a party. The plaintiff in Mulligan, also a non-party but closely affiliated with the case, wanted to publish an ad expressing an opposite view on the outcome, but the Appellate Division held that there was no duty for the association to accept the ad. In the case at hand the Association is a named defendant. It would be unusual, absent any ruling by the court requiring confidentiality, for the

[19] The court notes from Plaintiffs' briefs its argument that TRHA has effectively subsidized the distribution of the paper, by ignoring the previous publisher's non-payment of its bills for distribution. To what extent this could be considered the use of Association resources for distribution is not clear, but the question does not need to be addressed in analyzing the issue as a whole.

newsletter not to report on the suit, and to represent its own position. Because the Plaintiffs here, unlike in Mulligan, are also members of the Association, there is a duty for their Association newsletter to also represent their views, but not to the exclusion of, or even to the same extent as, those of the Association. In Fitzgerald, the District Court specifically limited the nature of the rights plaintiffs had regarding their association's publication. 383 F. Supp. at 167. The plaintiff had the right to let the membership know his position, and to inform the membership of the plaintiff's candidacy for office. This was to fulfill the defendant's fiduciary duty to the association to conduct fair and open elections[20]. But the court found that the plaintiff had no rights regarding the content of the publication outside of his paid advertisement, and even within the ad had no right to solicit campaign contributions. Id.

The editorial committee of TRT selects the content of the newsletter. There is also a policy and guidelines for letters to the editor, and these guidelines are frequently published in that section to make members aware of them. The guidelines, while not exhaustive, allow ample opportunity for Plaintiffs to express their views to their community in TRT. Neither are they so vague as to allow the editors to effectively deny Plaintiffs access to its pages.

[20] In Fitzgerald the court emphasized the special duty of the association to its membership regarding elections, and found it significant that the plaintiff had no other access to the membership to inform them of his candidacy and his position. Here the court notes that CBTR publishes its own newsletter, which it delivers to homes in Twin Rivers, so that there are not the same issues of access to members. The court also notes that TRT's election issue provides all candidates with equal space to present their platforms, and that the publication has not refused any campaign advertising.

The newsletter is free to write and articulate any position it deems appropriate. If submitted articles are written to conform to the guidelines and contain information that the editorial board feels is timely and relevant to the community, there is no indication that those articles would not be published. Plaintiffs are free to express their dissatisfaction with published views, either by submitting an article that is factually relevant and meets with the approval of the editorial committee, or by submitting a letter to the editor that conforms to the published guidelines for that section. Past issues of the newsletter show that this is the practice of the editors of TRT, and Plaintiffs do not claim that their letters were improperly omitted from publication.

It is not inappropriate for the editors to append factual corrections or clarification to the reader where those corrections are necessary for accuracy or to provide needed context. For example, where a letter refers to an individual by name without mentioning the position that he holds within the association, and where that title is relevant to the subject, it is entirely appropriate for the editors to supplement the letter with factual information that will explain the subject's role to the readers. Similarly, where the letter writer represents an organization, and that affiliation is relevant to the subject matter, it is common practice for editors to add this factual information to the end of the writer's submission. Plaintiffs object to an instance where a lengthy letter to the editor

was published, and another letter appeared alongside which addressed the specific issues raised in Plaintiffs' letter. The court notes that the exchange of views was not within the context of an article, nor was the rebuttal printed in the italicized style indicating that the rebuttal comments were from the editor. Rather, the information was in another letter to the editor submitted by Mr. Evan Greenberg. Mr. Greenberg obviously had access to the letter prior to its publication, but his submission was not on behalf of the Board or any other entity other than himself. It may not have been appropriate, under the standards of strictest journalistic integrity, for a member of the editorial committee to have addressed issues raised in the letter in his own voice and the same issue. However, in the context in which both letters were presented the reader can clearly understand that the views expressed are those of the individual writers. To deny Mr. Greenberg his own voice in that context would be the very censorship that Plaintiffs decry.

Although Defendants' duty to all members includes a responsibility not to exclude opposing viewpoints, there is no affirmative duty for Defendants to seek out and promulgate Plaintiffs' opposing views. Fitzgerald, 383 F. Supp. at 167 (holding that the defendant publisher was not required to do "more than is absolutely necessary."). It would be unreasonable, as Defendants argue, to require TRT to devote equal space to all opposition to every view it espouses in

its articles. If TRT seeks to maintain credibility with its readers it will, like a commercial newspaper, strive to maintain objectivity, but it is not required by law to do so.[21] Certainly it is not immune from claims of libel, but no such claim is before this court. TRT is the newspaper of the Association, and it is appropriate that it reflect the position of the Association leadership regarding community issues, provided that it does not seek to silence those members who may wish to use it as a forum to promote an opposing view. Therefore, the court does not find that TRT has inappropriately censored or deprived Plaintiffs of their voice in the community newsletter and grants summary judgment for Defendants on count three.

COUNT FIVE: [22] Twin Rivers' document policy is set forth in Resolution 99-1, which was enacted on January 14, 1999. It contains the Board's policy regarding inspection of Trust records and documents. Resolution 99-1 replaced the previous policy contained in Resolution 95-3. This was done in order to comply with an order by the now retired Honorable Samuel D. Lenox, Jr., A.J.S.C., (then sitting on recall in the Chancery Division – General Equity) in prior litigation challenging the Association's document

[21] The U.S. Supreme Court stated in Tornillo, "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." 418 U.S. at 256.

[22] Count Four of the complaint was dismissed by stipulation of the parties

policy. In Kerekes Associates v. Twin Rivers Community Trust, Docket No. C-26-95, Judge Lenox held that Resolution 95-3 required modifications. The policy provided for "permitted documents", which were automatically to be provided to any owner and/or beneficiary; and "discretionary documents" which were provided upon simple majority vote of the Board. In compliance with Judge Lenox's directive, the new resolution requires the Board to consider four factors in response to any request for documents, so that there would be a standard of "good cause" for any denial of access: (1) whether the stated purpose of the request is inimical to the best interests of the Trust and/or Association or constitutes an unwarranted invasion of privacy; (2) whether compliance with such request will impose an unreasonable administrative burden or expense upon the Trust and/or Association; (3) the advice of counsel; or (4) any other matters which are relevant to the welfare of the Trust and/or Association and its Members. The Board was also directed to inform the requesting party of its basis for any denial of inspection of requested documents within ten business days of such denial.

In a letter dated October 3, 2000, Plaintiff Haim Bar-Akiva ("Bar-Akiva") requested "all original books and records for fiscal year 1995 to the present." The Trust administrator notified Bar-Akiva that his request did not fall within the scope of "permitted documents" and therefore would be considered at the

next Board meeting, scheduled for October 12, 2000. At that meeting the Board explained to Bar-Akiva that his request was being denied because of privacy concerns and because it was overly broad and would be burdensome on the Trust.

Plaintiffs claim Resolution 99-1 is unenforceable because it denies members access to information that should be provided according to PREDFA and according to the ruling by Judge Lenox. Plaintiffs argue that the present policy denies Plaintiffs access to documents that they allege are neither confidential in nature nor burdensome on the Association to produce, and they contend that the Association Board administers the policy arbitrarily.

Defendants note that the portion of Resolution 99-1 that Plaintiffs are challenging was included at the direction of Judge Lenox in his ruling in Kerekes Associates. Where the earlier rule did not provide a clear standard for granting or refusing a member's request for documents, the current rule is modeled on Judge Lenox's ruling in the case involving TRHA's limiting members' access to documents. Defendants assert that the Resolution complies with the ruling, and that it has fully complied with the policy. THRA claims that any denial of inspection of documents was within the standards approved by Judge Lenox, so it should be granted summary judgment on Count Five regarding access to Association records.

The current policy provides that certain categories of documents are "permitted" documents, and their production should automatically be granted to any member who requests them. Other categories of documents are "discretionary", in that the Board must apply several criteria in determining whether or not the request for production should be granted. The purpose of the ruling was clearly to prevent arbitrary refusal by the Board or the Trust administration to produce documents properly requested by members. At the same time, Judge Lenox recognized the Board's right to refuse requests that were invasive, inappropriate or burdensome.

Unlike its predecessor, Resolution 99-1 imposes standards that the court can consider in determining whether the Board has acted in good faith and whether any denial can be shown to be for good cause. Resolution 99-1 requires that the Board must consider the four factors that were approved by Judge Lenox. The resolution, on its face, is not impermissibly vague or arbitrary; and the discretion given to the Board to evaluate requests for production of documents is within the powers granted to the Board by the governing documents. Therefore, the court does not find that Resolution 99-1 is facially invalid.

The business judgment rule applies in determining the reasonableness of a housing association's enforcement of rules. Courts at Beachgate v. Bird, 226

N.J. Super. 631 (Ch. Div. 1988). If a board's actions are authorized, fraud, self-dealing or unconscionable conduct must be shown to justify judicial action prohibiting enforcement of bylaws. Id. Plaintiffs claim that the denial of Bar-Akiva's request was unreasonable, and therefore an abuse of the Board's discretion. This court does not agree. It is hard to imagine a request that would be more burdensome on the Association than Bar-Akiva's request to produce "all association documents" for a 5-year period. Where Bar-Akiva claims that his request went on to list several specific documents, it is more accurate to say that he requested several specific categories of documents, the production of any one of which would have still required considerable amounts of time and expense.

The stated purpose for requesting the documents, to verify the statements of the Association President, does not seem like a "proper purpose" for requesting such a vast quantity of documents, but this was a matter for the Association Board to decide. Bar-Akiva had the opportunity to explain his request to the Board, and it was only denied after the Board reviewed his request according to the standards established by Judge Lenox. While it may be true that the production of any single document falling within the broad categories requested by Bar-Akiva would not be "burdensome" on the Trust to produce, the fact remains that Bar-Akiva requested a vast number of individual

documents, which in total amounted to a substantially burdensome request on the Trust. Plaintiffs' claim that his request was improperly denied because some of the thousands of documents in his request could have been related to a valid purpose, and because the production of any one of those documents would not have been burdensome, reduces the argument to the absurd. It is not only to Bar-Akiva that the Board owes a fiduciary duty. It must also determine the best use of the Association's resources for all of its members. It was the Board's determination that the expense and time of collecting and redacting the thousands of documents requested by Bar-Akiva would impose too great a burden on the Association.

Resolution 99-1 provides a standard of good cause based upon specific considerations that were made by the Board. In denying Bar-Akiva's request, it does not appear that the Board abused its discretion by acting other than in good faith, from proper motives, and within the bounds of reasonable judgment. Judge v. Kortenhaus, 79 N.J. Super. 574 (Ch. Div. 1963). Therefore this court will not interfere in their exercise of their discretionary powers. Because the Resolution is neither improperly applied nor invalid on its face, the court will grant summary judgment to Defendants on Count Five of the complaint.

COUNT SIX: Resolution 2000-1 contains Twin Rivers' policy regarding confidential subject matters for Board members, and provides for the authority

to sanction a Board member for a breach of confidentiality or fiduciary duty. In addition to the matters set forth in N.J.S.A. 45:22A-46 as confidential and not subject to disclosure, Resolution 2000-1 adds three other categories of confidential information, disclosure of which will subject a Board member to sanctions.

Pursuant to this resolution, charges were brought against Plaintiff Dianne McCarthy ("McCarthy") alleging that she had breached her fiduciary duties as a Board member. The Board moved to censure McCarthy, and provided her with a hearing in which she could defend herself against the allegations. The process was explained to McCarthy in a letter sent by the Board, and she consulted with an attorney. The Board granted requests by McCarthy to postpone the hearing date. Prior to the start of the hearing, McCarthy left the meeting and chose not to participate. McCarthy was censured in absentia.

In September of 2000, Mr. Edward Hannaman, a representative of the Department of Community Affairs ("DCA")[23] wrote to Scott Pohl advising him that his Department's review of Resolution 2000-1 found that it unduly expanded the Board's ability to deem any matter confidential. It was the DCA's finding that Resolution 2000-1 was invalid and in violation of

[23] Hannaman is with the Planned Real Estate Development Unit in the Bureau of Homeowner Protection in the Division of Codes and Standards of DCA.

PREDFA.[24] However, the Board did not revoke Resolution 2000-1 and it is presently in effect.

Plaintiffs claim that Resolution 2000-1 violates PREDFA and grants too broad of a discretion to the Board in determining what matters are confidential such that their disclosure by a Board member would be subject to sanction. Defendants claim that if the court holds that PREDFA applies to Twin Rivers, Plaintiffs' challenge to Resolution 2000-1 would not fall under the provisions of N.J.S.A. 45:22A-46(a) since this section only applies to when meetings of an association board can be closed to members. Defendants claim that §46(a) does not address what information provided to Board members can be deemed confidential, it only applies to association by-laws, and it was not intended to provide the exclusive criteria for confidentiality. Defendants contend this policy should be evaluated under the business judgment rule and the reasonable application of reasonable standards for confidentiality should compel summary judgment in its favor on this count.

The New Jersey legislature appointed the Department of Community Affairs as the administrative agency for PREDFA, and charged it with ensuring its compliance. See N.J.S.A. 45:22A-24. The DCA evaluated Resolution 2000-1, and in its letter to TRHA of September 2000 determined that it violated

[24] The Division of Housing and Development in the DCA is charged with enforcement and administration of PREDFA according to N.J.S.A. 45:22A-24.

PREDFA. Under the doctrine of primary jurisdiction, when enforcement of a claim requires resolution of an issue within the special competence of an administrative agency, a court may defer to a decision of that agency. Archway Programs, Inc. v. Pemberton Township Bd. of Educ., 352 N.J. Super. 420, 425 (App. Div. 2002)(citing Campione v. Adamar of New Jersey, Inc., 155 N.J. 245, 263 (1998)). Having found that the 1993 amendments to PREDFA are applicable to Twin Rivers, the court will defer to the DCA's finding that Resolution 2000-1 impermissibly expands the power of the Board to make any matter confidential and to then subject members to censure for failing to maintain that confidentiality. If it is the determination of the DCA that the rule is impermissible and therefore invalid, the court will defer to the agency charged with enforcement of the relevant statutory scheme.

The court notes that the DCA's advisory letter does not limit confidential matters to the categories enumerated in PREDFA, but strikes down the ruling for its arbitrary expansion of those categories in such a way that the Board could deem any matter confidential. The board of a private organization has broad discretion to impose other rules, but those rules must comply with statutory regulation and must also meet the standard required by the business judgment rule. In other words, the Board cannot provide less confidentiality than the law requires, but they also cannot expand confidentiality in such a way

that it also violates the law. The rules for determining what is confidential must be specific enough to allow the court to be able to determine when their application is in good faith. Rules that are vague or arbitrary cannot be enforced under the business judgment rule. See, e.g. Papalexiou, 167 N.J. Super. at 527.

Resolution 2000-1 is unenforceable for the vagueness of sections v. through vii., as also determined by the DCA. The court grants summary judgment for Plaintiffs on count six of complaint, concurring with the decision of the DCA that the resolution is facially in violation of N.J.S.A. 45:22A-46a.

COUNT SEVEN: Twin Rivers residents and owners are required to sign an agreement in order to obtain access to a list of voting members of the Association for election purposes. The agreement specifies that the recipient will keep the list confidential and not release it in whole or in part to any other entity or use it for any purpose unrelated to election of Board members. If the list is released or misused, the agreement provides for indemnification of the Trust for any liability, fees and costs resulting from misuse. The agreement also includes a provision for liquidated damages of $1,000 or any profits resulting from misuse, whichever is greater, to be paid to the Trust. It further

specifies that the member will be liable for all attorney's fees and costs incurred in enforcing the agreement.

Relying on the reasonableness standard, Plaintiffs claim that TRHA's policies regarding access to the membership voting lists are unenforceable and should be declared illegal. Plaintiffs contend that it is imperative that the list define which members are eligible to vote, and that they should not be required to sign a confidentiality agreement before being granted access to the membership list. As members of the Association, Plaintiffs claim that they have a statutory right under N.J.S.A. 15A: 5-24(a) to a membership list for a "proper purpose", and voting and election purposes are "proper" uses of the list. They assert that there is no mandate of a confidentiality agreement under this law. Even if a confidentiality agreement were appropriate, Plaintiffs argue that the liquidated damages provided under the agreement are unreasonable and constructively deny them any access to the list.

TRHA defends its policy of requiring a signed Confidentiality Agreement before releasing its membership list. Defendants claim that this policy was instituted in response to residents' privacy concerns, since the list contains information about the assessed value of owners' properties. Defendants further claim that they have not denied anyone access to the list for election purposes. The confidentiality agreement and the liquidated damages

clause it contains are reasonable measures to preserve the privacy of residents, and Defendants claim the policy meets the standard of the business judgment rule.

Liquidated damages provisions in contracts are valuable tools for the court in situations where the actual damages may not be readily determinable, but parties to a contract may not fix a penalty for its breach. The settled rule in this State is that such a contract is unlawful. Westmount Country Club v. Kameny, 82 N.J.Super. 200, 205 (1964). Regardless of the language used in the contract, courts have long relied on the "circumstances of the case and not on the words used by the parties" in determining whether an amount is an unenforceable penalty or an enforceable stipulated damages clauses. Gibbs v. Cooper, 86 N.J.L. 226, 227-28 (E. & A.1914); Wasserman's Inc. v. Township of Middletown, 137 N.J. 238, 251 (1994).

New Jersey courts have viewed enforceability of stipulated damages clauses as depending on whether the set amount "is a reasonable forecast of just compensation for the harm that is caused by the breach" and whether that harm "is incapable or very difficult of accurate estimate." Westmount Country Club, 82 N.J. Super at 206. If it is doubtful whether the sum is intended as a penalty or as liquidated damages, it will be construed as a penalty, because the law favors mere indemnity. Id. and see Monmouth Park Assoc. v. Wallis Iron

Works, 55 N.J.L. 132, 141 (E. & A. 1892). Plaintiffs have claimed that the $1000 damages clause is not a reasonable forecast of harm that would be caused by an unauthorized use of the voting list, and serves to deny them access to the list. The court is inclined to agree that the $1000 liquidated damages, in light of the totality of circumstances of the case, is actually a penalty, regardless of what Defendants choose to call it in the contract; nor has any sufficient justification been shown as to how the $1000 sum reasonably relates to the harm alleged.

Every contract contains an implied covenant of good faith and fair dealing. See Bak-A-Lum Corp. v. Alcoa Building Prod., 69 N.J. 123, 129-130 (1976). The implied covenant of good faith and fair dealing requires a contracting party to act in good faith when exercising either discretion in performing its contractual obligations or its right to terminate. Seidenberg v. Summit Bank, 348 N.J. Super. 243,251 (App. Div. 2002). The right to seek a penalty in this case could properly be viewed as a discretionary exercise of a contractual right, requiring TRHA to act in good faith. Similarly, Plaintiffs owe a good faith effort to safeguard the list and not allow it to be used for any unauthorized purposes. The problem at the heart of this case is that neither party has any confidence in the other to act in good faith.

Plaintiffs are concerned that they would have no remedy against an arbitrary and unfair assessment of a $1000 penalty. They are understandably

reluctant to place themselves in a position where the exercise of their membership right to obtain a voting list puts them at the mercy of what they perceive to be a hostile body. At the same time, Defendants are understandably reluctant to release a valuable asset that their members have requested that they make secure to individuals who have expressed animosity towards the Board and who themselves may be inclined to be vindictive. Defendants have argued that Plaintiffs are protected against any unfair penalty because they can make use of the ADR process to arbitrate any disputed assessment. While this does provide a recourse for Plaintiffs, it is only available once a penalty has already been assessed.

The court is concerned that, given the unequal bargaining power between the two parties, the list use agreement constitutes a contract of adhesion. In this case the $1000 penalty is an "overreaching or imposition resulting from a bargaining disparity between the parties, or such patent unfairness in the contract that no reasonable person not acting under compulsion or out of necessity would accept its terms." Rotwein, 103 N.J. Super. at 417-418. The court finds that the $1000 "liquidated damages" clause is in fact a penalty for breach of contract, and that this penalty clause renders the contract unenforceable. Defendants are certainly entitled to require users to enter into a contractual agreement prior to releasing the list, and to actual damages for any

improper use of the voting list, but the contract provisions must be reasonable and the damages claim must be related to the harm caused by any such breach. Therefore the court grants summary judgment to Plaintiffs on count seven.

COUNT EIGHT: Resolution 99-4 sets forth the Trust's Alternative Dispute Resolution ("ADR") policy. The rule provides for ADR for disputes between unit owners or disputes between individual owners and the Association. The policy requires that the party requesting ADR submit a $150 deposit along with the application for ADR, but the costs of ADR are to be split equally between the parties. The rule specifically exempts three types of disputes from ADR eligibility: (1) the payment or nonpayment of regular and/or special common expense assessments levied against a unit in accordance with the governing documents; (2) election issues; and (3) alleged noncompliance by the Association or the Board with the governing documents or applicable law. Plaintiff Bruce Fritzges ("Fritzges") objected to an assessment of $3.00 per month for cable fees that was duly assessed on all owners. Under the current policy, Fritzges cannot apply for ADR to challenge this assessment.

Plaintiffs seek to have Resolution 99-4 regarding alternative dispute resolution ("ADR") declared unlawful and unenforceable because the high cost and limited availability do not allow for the "fair and efficient" procedure that

PREDFA requires. This is important, Plaintiffs claim, because members are denied voting rights for even the smallest disputed assessment or fine. Without affordable and accessible ADR, Plaintiffs argue, members face a choice of paying a disputed assessment, paying expensive fees to settle the limited disputes covered under the current ADR policy, or relinquishing their voting rights in the Association.

Defendants deny that the Association's ADR provisions in Resolution 99-4 must comply with PREDFA guidelines, since they maintain that PREDFA is inapplicable to Twin Rivers. TRHA claims that it would be paralyzed by constant claims were it to provide ADR for any disagreement with its decisions and assessments. Defendants point to the ADR provisions of the New Jersey Condominium Act, N.J.S.A. 46:8B-14(k), limiting application to "housing-related disputes", to defend TRHA's exemption of certain types of disputes from its own ADR policy. Defendants assert that it is well within their rights under the Nonprofit Corporations Act to suspend the voting rights of any member in default in the payment of any assessment levied by the Association. Under the business judgment rule, Defendants claim that they are entitled to summary judgment on Count Eight.

Having found that the requirements of N.J.S.A. 45:22A-44 are applicable to TRHA, the provisions mandating ADR in N.J.S.A. 45:22A-44(c) are also

applicable. However, Plaintiffs misread the scope of the statutory provision when they imply that ADR must be made available for every dispute between a member and the Association. The statute specifies: "The association shall provide a fair and efficient procedure for the resolution of disputes between *individual unit owners and the association...* which shall be readily available *as an alternative to litigation".* N.J.S.A. 45:22A-44(c) (emphasis added).

In order to evaluate whether TRHA's provisions for ADR meet the requirements of N.J.S.A. 45:22A-44(c), the court must first consider the plain meaning of the statute. National Waste Recycling, Inc. v. Middlesex County Improvement Authority, 150 N.J. 209, 223 (1997). Language in the statute should be 'given its ordinary meaning and construed in a common sense manner to accomplish the legislative purpose." N.E.R.I. Corp. v. New Jersey Hwy. Authority, 147 N.J. 223, 236 (1996)(quoting State v. Pescatore, 213 N.J. Super. 22, 28 (App. Div. 1986) aff'd 105 N.J. 441 (1987)). Particular words and phrases found in the statute "must be construed within their context and unless inconsistent with the Legislature's manifest intent or unless another meaning is expressly indicated, they must be given their generally accepted meaning." Stevenson v. Keene Corp., 254 N.J. Super. 310, 317 (App. Div. 1992) aff'd 131 N.J. 393 (1993). The meaning of words within a statute may be indicated or controlled by those with which they are associated. State v.

Mortimer, 135 N.J. 517, 536 (1994), cert. denied 513 U.S. 970 (1994); Germann v. Matriss, 55 N.J. 193, 220 (1970).

A plain reading of N.J.S.A. 45:22A-44(c) indicates that the requirements for ADR are meant to apply to justiciable cases and controversies between the association and individual members. This interpretation is reinforced by the public policy favoring ADR, which is to relieve the burden on the courts. Cf. Faherty v. Faherty, 97 N.J. 99, 105 (1984)("In this state, as in most American jurisdictions, arbitration is a favored remedy."); Barcon Assoc., Inc. v. Tri-County Asphalt Co., 86 N.J. 179, 186 (1981)(stating that arbitration is favored by the courts in this State). It is not to provide a forum for every disagreement between members and their association, nor to insulate associations from accountability. The requirement that ADR be "readily available" cannot be read outside the context of the phrase that immediately follows, "as an alternative to litigation." It would require a contorted reading of the language and the legislative intent of the statute for the court to hold that the ADR requirement was meant to apply to any dispute between an individual member and an association.

Whether a complaint is justiciable will depend in large part on the form of the association. By law, the association can be formed as a for-profit or non-profit corporation, unincorporated association, or any other form permitted by

law. N.J.S.A. 45:22A-43. TRHA is a non-profit corporation, and claims by members against it are regulated by the New Jersey Non-Profit Corporations Act, N.J.S.A. 15A:1-1 et seq. Members can bring suit against a non-profit corporation either as individuals or as a derivative claim on behalf of the corporation. R. 4:32-5. Individual claims must assert that the acts of the corporation impose a special harm to them as individuals. Derivative claims are brought on behalf of the corporation for ultra vires acts or acts that are fraudulent, self-dealing or unconscionable in which the harm is to the corporation and not to a particular member or class of members. Because derivative claims are not disputes between individual members and the association, but are brought to assert rights on behalf of the corporation, they do not fall under the regulation of N.J.S.A. 45:22A-44(c).

Plaintiffs complain that certain disputes are improperly excluded from the ADR policy. Disputes that do not qualify for ADR under Resolution 99-4 include 1) the payment or non-payment of assessments levied in accordance with the Governing Documents, 2) election issues and 3) alleged noncompliance by the Association or the Board with the Governing Documents or applicable law. Individual unit owners cannot, under New Jersey law dispute duly enacted assessments or fines or, as in the case with Fritzges, exempt himself from a common expense, so these claims are properly excluded.

[A] unit owner shall, by acceptance of title, be conclusively presumed to have agreed to pay his proportionate share of common expense... No unit owner may exempt himself from liability of common expenses by waiver of the enjoyment of the right to use any of the common elements... N.J.S.A. 46:8B-17.

With the exception of a denial of individual voting rights, election issues are derivative claims. Election irregularities do not cause special harm to an individual, but rather cause harm to the entire corporation. But because voting rights are only limited due to non-payment of assessments, which are not justiciable, disputes concerning individual voting rights are also not justiciable. Therefore, election issues are properly excluded from ADR.[25] A claim of ultra vires acts, noncompliance with the governing documents, or noncompliance with applicable law constitutes the quintessential derivative claim, and is also properly excluded from ADR. Because it does not withhold ADR from any claims that might be legitimately justiciable, the court cannot find TRHA's ADR policy embodied in Resolution 99-4 to be in violation of the requirements of N.J.S.A. 45:22A-44(c).

[25] The court notes that this provision currently withstands review because there are no other situations, other than non-payment of valid assessments or fines, which would result in suspension of a member's voting rights. Should TRHA withhold voting rights for any other reason, the blanket exemption of voting issues from the ADR policy would have to be changed in order for it to remain in compliance with the requirements of N.J.S.A. 45:22A-44(c).

The court is also unwilling to hold that a $150 deposit[26] to be submitted by a petitioner requesting ADR under the policy unreasonably denies access to ADR, especially in light of the comparative cost of litigation. ADR is to resolve disputes that would otherwise be litigated, but it does not preclude litigation and the Association cannot mandate that an individual unit owner submit their dispute to ADR. It is offered to provide a quicker and perhaps more efficient method of resolution of issues that would otherwise be subjected to lengthy and potentially expensive court proceedings. If an individual unit owner is not able to afford the $150 deposit, there is no bar to the filing of a complaint with the court to seek their remedies and to represent themselves pro se or seek less costly counsel. Cf R.4:4-2. Therefore, the court grants summary judgment for Defendants on count eight.

COUNT NINE: For all voting purposes of the Association, each member receives one vote, which is weighted according to the value of the member's holdings in Twin Rivers. Residency is not a factor, so non-owner tenants have no vote while non-resident owners have, in some cases, considerable influence by virtue of the value of their property. Members who have unpaid fines for rule violations or who are not current with payment of

[26] Under the terms of Resolution 99-4 the party requesting ADR is required to submit a $150 deposit along with the application for ADR, but the costs of ADR are to be split equally between the parties.

their assessments are not eligible to vote in Association elections. The Trust Administrator maintains the list of eligible voters.

Plaintiffs object to the weighted voting system, claiming that the present system disenfranchises a large percentage of community residents, the tenants in the apartment buildings, and unfairly accords more weight to the votes of owners of expensive properties and less weight to owners of less expensive properties. This, say Plaintiffs, is incongruent with the goals of the Association – which is to administer the common elements of the community to the benefit of all the residents, since the administration of common areas such as pools and parking lots has a much greater impact on the lives of the tenants than it does on the lives of absentee owners, and has an equal impact on resident homeowners regardless of the value of their individual properties. As a result, Plaintiffs contend that the weighted voting system does not represent the interests of the residents, and does not rationally represent the interests of the owners. Because of the municipal character of Twin Rivers and the powers of the TRHA, Plaintiffs argue that voting rights within the association are as important to its residents as voting rights in any public elections. Where the property rights of owners conflict with others' fundamental rights, such as free speech, association or voting, Plaintiffs claim that the State's interest in the individual liberty of its citizens should prevail. Even in cases where TRHA is acting less

like a municipality and more like a non-profit corporation, since their primary purpose is not to yield a profit for its members, Plaintiffs argue that power is still more appropriately shared between members on an equal basis rather than their degree of investment. Therefore, Plaintiffs claim that a system that allocates votes by residential unit is more appropriate, and is also authorized by the New Jersey legislature. Plaintiffs assert that disfranchisement for failure to pay minor assessments is not a reasonable policy for the Association, and that Defendants' arguments invoking corporation law regarding their weighted voting policies are inapplicable because they do not address Plaintiffs' claims that constitutional provisions regarding voting should be expanded to include novel forms of governance such as homeowner's associations.

TRHA defends its voting system against Plaintiffs' claim that weighted voting according to the value of each owner's property is unconstitutional. Defendants assert that TRHA's weighted voting system is permitted under the New Jersey Nonprofit Corporations Act. N.J.S.A. 15A:5-10, 20. Defendants argue that this voting system is set forth in the Governing Documents of the Association, including the Association By-laws, Articles of Incorporation and Declaration of Restrictions. Defendants claim that Plaintiffs' own arguments are inconsistent, invoking constitutional requirements of "one person, one vote"

to challenge the current voting system, but then asking for a "one unit, one vote" system not supported by the Constitution.

Plaintiffs have argued that the court should apply the reasoning of Coalition and Green Party, which extended the constitutional right of free expression to private property, to extend the constitutional right of "one person, one vote" to a homeowner's association. Unlike both Coalition and Green Party, which dealt with a private property owner's rights versus the public, this case concerns an incorporated non-profit association and its members. Unlike the relationship of mall owners to the public, the voting rights of members of an association such as TRHA are governed by contract law and by the relevant statutes for non-profit associations.

Plaintiffs cite two New York cases where the voting rights of homeowner association members have been challenged in court. The holdings in both Roxrun Estates v. Roxbury Run Vill. Ass'n, Inc., 526 N.Y.S.2d 633 (NY App. Div. 1985) app. den. 72 N.Y. 2d 808 (1988); and Delafield Estates Homeowners' Ass'n, Inc. v. Delafield 426 Corp., 721 N.Y.S.2d 621(NY App. Div. 2001), however, both rely on a specific provision of New York's Non-Profit law which states: "In any case in which a member is entitled to vote, he

shall have no more than, nor less than, one vote..." NY Not Prof Corp § 611(e)[27]. The comparable provision in New Jersey Nonprofit law reads:

> The right of the members, or any class or classes of members, to vote may be limited, enlarged or denied to the extent specified in the certificate of incorporation or by-laws. Unless so limited, enlarged or denied, each member, regardless of class, shall be entitled to one vote on each matter submitted to a vote of members. N.J.S.A. 15A:5-10.

Defendants argue that PREDFA specifies that election of board members should be done on a one vote per unit basis, unless the bylaws provide for some other voting system. N.J.S.A. 45:22A-47(b). To hold that anything but a one-person one vote system is unconstitutional would require this court to also find that N.J.S.A. 45:22A-47(b) is unconstitutional.

The court is also persuaded by New Jersey's application of contract law to voting rights of stockholders. According to New Jersey law, the certificate of incorporation, constitution and by-laws of a corporation constitute a contract between the corporation and its stockholders. Faunce v. Boost Co., 15 N.J. Super. 534 (Ch. Div. 1951). A stockholder owning voting stock has a basic contractual right to vote incident to membership or to the property in the stock, of which the stockholder cannot not be deprived without his consent. Id. at 539. This does not limit an Association's right to withhold voting rights for non-payment of fees and assessments. N.J.S.A. 15A:5-10 entitles Defendants to

[27] The court also notes that both New York cases, cited by Plaintiffs to support their argument against weighted voting systems, specifically strike down the very "one-unit, one-vote" system that Plaintiffs now seek to adopt for TRHA.

withhold voting rights from members that have not paid fines or assessments, provided that these limitations to voting rights are set forth in the governing documents of the Association. The owner's agreement to be bound by the governing documents constitutes his consent to the voting conditions they contain.

It is true that many Twin Rivers residents live in apartments as tenants, and have no voting rights in Association governance. Tenants who are not property owners are not members of the Association and therefore have no voting rights and no standing to bring suit against the Association for denial of franchise. While tenants of Twin Rivers properties may wish for more influence over the way their community is run, the fact that their landlords provide them with the benefits of the Association does not entitle them to a voice in the affairs of the Association. Twin Rivers' tenants are entitled to no more control over their community than are the 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.

New Jersey courts have been cognizant of tight housing markets when shaping a remedy for injured tenants. See Marini v. Ireland, 56 N.J. 130, 146 (1970) (recognizing the impact of housing shortage in allowing tenant to abate conditions rather than claim constructive eviction). But a court cannot craft a

more favorable contract than the one the parties themselves have entered into, to grant tenants rights they are not otherwise entitled to and are not included in their lease. See Bar on the Pier, Inc. v. Bassinder, 358 N.J. Super. 473 (App. Div. 2003) certif. den. 177 N.J. 222 (2003)(citing Graziano, supra, 326 N.J. Super. at 342). Plaintiffs have implied that a tight housing market leaves residents no choice but to accept rental or purchase agreements that would otherwise be repugnant to them. But denial of association voting rights is not an unconscionable lease provision that would allow this court to void the lease. Absent some legitimate grounds for rescission, the parties must live with the rental agreements they have signed.

Plaintiffs' final argument, that the weighted voting scheme is not a legitimate tool for enhancing property values and is misplaced as a form of community governance, is only subject to review under the business judgment rule. Plaintiffs are simply questioning the governing rules enacted by the Board. Where the Board is authorized to make a decision, the business judgment rule bars judicial inquiry into the decisions of the board of directors made in good faith. See Maul v. Kirkman, 270 N.J. Super. 596,614 (App. Div. 1994). The Board is authorized under N.J.S.A. 15A:3-1(a)(11) to make and alter the bylaws for the administration and regulation of the affairs of the corporation. Plaintiffs do not claim that TRHA's voting provisions were

instituted through fraud, self-dealing or in bad faith. Therefore, the court will grant summary judgment for Defendants on count nine.

CONCLUSION

For all the reasons set forth above, summary judgment is GRANTED in favor of Plaintiffs on Counts 2, 6, and 7 and summary judgment is GRANTED in favor of Defendants on Counts 1, 3, 5, 8 and 9. The court has further ruled that TRHA is not subject to the Constitutional limitations imposed on State actors, at least in the factual context specifically presented in this case; that the 1993 amendments to PREDFA, as codified in N.J.S.A 45:22A- 43 to 48, apply to Twin Rivers; and that Plaintiff CBTR is dismissed from the case for lack of standing.