

## **PRIVATE CONDO GROUPS SUBJECT TO FREE SPEECH RIGHTS**

### **N.J. Court Extends State Constitutional Mandates to Homeowners Associations**

BY DAVID L. HUDSON JR.

Former U.S. Supreme Court Justice William Brennan wrote a *Harvard Law Review* article in 1977 calling for the use of state constitutions as a greater protector or "font" of individual liberties. The former justice from New Jersey likely would have smiled at a recent groundbreaking ruling from his home state.

The New Jersey Superior Court, Appellate Division, ruled Feb. 7 that privately owned homeowner associations may be subject to free speech and other guarantees under the state's constitution. [\*Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Association\*](#), No. A-4047-03T2.

The ruling is significant because it extends to private entities such as condo associations the same state constitutional mandates that would apply to the actions of government bodies. New Jersey already is on the forefront of such law by allowing free speech rights in private shopping malls.

"In the exercise of fundamental rights, we discern no principled basis for distinguishing between the general public at large and the members of a community association," the court wrote.

A committee of homeowners in the association and three residents of Twin Rivers sued the association in a nine-count complaint. Among their complaints were that the Twin Rivers Homeowners' Association restricted their display of political signs, denied access or a right of reply in the association's newsletter, refused to rent the community room in the association at a reasonable fee and weighed voting rights based on property values.

The plaintiffs alleged that such restrictions violated their expressive rights under the New Jersey Constitution. They point to two provisions that allow broader freedom of expression than the First Amendment of the U.S. Constitution:

"Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."

"The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances."

The homeowners association contended the plaintiffs' grievances could be advanced only through contractual—not constitutional—arguments. A lower court judge granted summary judgment to the defendants on many of the claims.

The judge also made the "overarching" ruling that the state constitution provided no relief to the plaintiffs because the homeowners association was a private, not a governmental, actor.

Federal constitutional law recognizes the "state action" doctrine, under which constitutional limitations have applied mostly to state or federal governmental bodies, not to private parties.

However, a few states have interpreted their state constitutions to extend to certain private entities, such as large shopping malls. For example, the New Jersey Supreme Court in 1994 extended the state constitution to a large shopping center, writing: "We know of no private property that more closely resembles public property." *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757.

In the homeowners' case, the New Jersey appeals court extended this ruling, writing that "plaintiffs' rights to engage in expressive exercises ... must take precedence over the TRHA's private property interests."

"Expressive exercises, especially those bearing upon real and legitimate community issues, should not be silenced or subject to undue limitation because of changes in residential arrangements, such as where lifestyle issues are governed or administered by community associations in addition to being regulated by governmental entities," the court said.

The appeals court remanded the case to the trial court to determine the merits of the plaintiffs' expressive-rights claims, noting that "such rights, while fundamental, are not absolute." The court explained that "the expressive exercises involved in sign-posting, the use of meeting space and access to a print medium" were the three claims that implicated fundamental rights.

Rutgers School of Law-Newark professor Frank Askin, who represented the plaintiffs, says the case was significant "because an appellate court has recognized for the first time that residents of homeowners associations have the right of democratic governance in these so-called private communities."

"The court held that homeowners' rights are to be determined by constitutional standards, not contract," Askin says. "It is a Magna Carta for the million-plus residents of such communities in New Jersey and, hopefully, will pave the way for the extension of similar rights to the 50 million Americans who live in such communities across the country, frequently under tyrannical rule."

Criticizing the ruling, Florham Park, N.J., attorney Samuel J. McNulty, representing the amicus curiae Community Associations Institute, says the court extended expressive rights "even to nongovernmental actors, even if the nongovernmental actors—community associations in this case—have not invited the public onto their property."

Adds McNulty: "The way that this opinion is written, community associations and their counsel do not have clearly defined parameters."

"For the past 25 years, a community could have self-governance and self-identity through contract, governed by reasonableness and the business judgment rule," McNulty says. "Three judges in New Jersey have just changed that."