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CONDO OWNERS MAY BENEFIT FROM APPEAL FOR FREE-SPEECH RIGHTS

By Linda Rappattoni

Daily Journal Staff Writer

SACRAMENTO - A groundbreaking New Jersey court decision if affirmed on appeal would give California homeowners a new tool to assert their constitutional rights in community associations, lawyers say.

"New Jersey is the first to recognize that these private governments are constitutional actors who must respect the fundamental rights of members of their associations," said Frank Askin, a Newark professor who represented the plaintiffs in *Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Association*, A4047-03t2.

However, Ron Perl, president-elect of Community Associations Institute, which filed an amicus brief in the case on behalf of the association, cautioned the decision applied only to political free-speech rights.

"It's clearly a significant case, but at the moment it is being terribly over-read," Perl said.

Barry Goodman, a partner in Greenbaum, Rowe, Smith & Davis, of Woodbridge, N.J., who represented the association, could not be reached for comment. However, wire stories quoted him saying he would appeal the decision. Perl said CAI plans to file an amicus brief in the New Jersey Supreme Court.

Lawyers in California and elsewhere who have watched the New Jersey case closely said it could influence California policy in favor of individual homeowners because the constitutional free-speech guarantees of the two states are very similar. Both are broader than the federal constitution.

"This is potentially a significant case outside of New Jersey, because when other plaintiffs make the same argument in other states they can now cite a published appellate-court opinion in an important state," said Evan McKenzie, a political science professor and lawyer at University of Illinois at Chicago. "Until now there has been nothing, so every case was an invitation to a court to be a pioneer."

Perl said the Community Associations Institute believes the decision is wrong and threatens the governing ability of association boards. He said the institute again would file an amicus brief in favor of Twin Rivers Homeowners' Association when it is appealed.

One in four Californians lives in a common-interest development, in which homeowners abide by a set of covenants and rules that can regulate what colors they paint their houses, where they park their cars and how they must maintain their property.

Failure to abide by the rules can lead to fines, and failure to pay fines can lead to homeowners' loss of their homes through foreclosure by the association.

McKenzie, who in 1994 published "Privatopia," the first comprehensive study of the political and social issues of common-interest developments, testified as an expert witness for the plaintiffs in the Twin Rivers case.

"The fact is that homeowner associations are a form of unregulated privatization of local government, and if our liberties are going to have any meaning, those liberties must apply to association private governments," he said.

Tensions between individual homeowners and their association governing boards have sparked legislation to ensure boards don't smother individual rights. Last year, Gov. Arnold Schwarzenegger signed into law a bill that placed new restrictions on how and when associations can use foreclosure to collect delinquent assessments.

Groups representing association boards, like the Community Associations Institute, say most homeowners are happy with their governing boards. Consumer groups say there are many fine boards but there are also plenty that are abusive.

In the Twin Rivers case, three plaintiffs sued their association asserting the right to place political signs in their front yards, to use a community room and to obtain access to the community newspaper equal to the association management.

A trial court ruled against them on summary judgment, but an appellate court overturned portions of the ruling. The higher court said the association must allow free-speech rights guaranteed by the New Jersey constitution when public interests outweigh private-property rights.

The defendants argued that only the business-judgment rule and contractual standards, not the constitution, should apply to private entities like them.

The court agreed that when it comes to voting methods and alternative dispute resolution, the business-judgment rule applies, and the court dismissed those challenges by the plaintiffs.

"Yes, it's significant this court said the state constitution provides a right to free speech, but as a practical matter, I don't think the case will result in massive changes that people are predicting," Perl said.

Associations ultimately will not lose editorial control over their newsletters, he said.

McKenzie said he is not surprised the associations are downplaying the significance of the ruling.

"It is threatening to their control over the policy process," he said. "They basically get most of what they want from the California Legislature, and the courts have been pro-association in California since the Nahrstedt ruling."

In *Nahrstedt v. Lakeside Village Condominium Association*, 8 Cal.4th 361 (1994), the court majority said a condominium association can prohibit an owner from keeping cats inside her unit, even if they did not disturb her neighbors, because it was a reasonable policy.

David Kahne, a Houston, Texas, sole practitioner who has represented individual owners against associations, said New Jersey is a leading state in applying the state constitution to private entities.

"California is one of the states that has considered using the state constitution to cover nongovernmental associations," Kahne said. "This opinion will support people who would like to see that approach expanded."

Public entities like cities and states cannot forbid a citizen from exercising his or her free speech.

"Twin Rivers Homeowners Association said we do, and Community Associations Institute said they can and should be able to," Kahne said. "That battle is critically important."

Principles of constitutional law influence public policy and help determine what is reasonable, Kahne said. California and Texas are among the states that take that approach, he said.

"So this opinion should influence opinions in other states when they use other doctrines to decide what associations can and shouldn't do," he said.

California is "on the cutting edge" of adopting legislation to protect individual homeowners along with Florida, Kahne said. But McKenzie disagreed. California actually is borrowing ideas from Florida and Nevada, he said.

Jim Lingle, a Camarillo lawyer who has drafted nearly a dozen bills in favor of homeowner associations, said the New Jersey opinion likely would have "persuasive" value in California because both states' constitutional statutes on free speech are "very close or identical."

A long line of cases including *Pruneyard Shopping Center v. Robins*, 447 U.S. 44 (1980), supports the right to free speech even on private property, Lingle said. In *Pruneyard*, a group of high-school students were ordered out of a shopping center for distributing political pamphlets and gathering signatures on petitions.

But community associations are not shopping centers, where commerce is conducted, Lingle said.

"I'm not certain as a matter of policy, we want to as a society extend political free-speech rights into people's homes the same way we do in commercial settings," he said. "We do have in California some pretty effective corporate rules of removing the worst of the bad players [in associations]. Because we have all these to redress grievances, I'm a little reluctant to see a whole panoply of constitutional rights imposed on associations. We run the added danger of imposing on associations constitutional guarantees to individuals with no parallel government immunity."

Lingle said the Twin Rivers case is limited to free speech.

"The rest of constitutional guarantees won't be imposed on associations in my life time," Lingle said.

"[Covenants, conditions and restrictions] really are contracts. I think the full range of constitutional guarantees can't apply."