

COMMITTEE FOR A BETTER TWIN  
RIVERS (CBTR), DIANE McCARTHY,  
HAIM BAR-AKIVA and BRUCE  
FRITZGES,

Plaintiffs/Respondents,

vs.

TWINRIVERS HOMEOWNERS'  
ASSOCIATION (TRHA), RIVERS  
COMMUNITY TRUST (TRCT) and  
SCOTT POHL (TRHA PRESIDENT),

Defendants/Appellants.

SUPREME COURT OF NEW JERSEY  
DOCKET NO. 59,230

Civil Action

On Appeal from a Final Judgment  
of the Superior Court of New  
Jersey, Appellate Division

Sat Below:

Hon. Harold H. Kestin, P.J.A.D.  
Hon. Steven L. Lefelt, J.A.D.  
Hon. Jose L. Fuentes, J.A.D.

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BRIEF OF AMICUS CURIAE AARP

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**INTEREST OF AMICUS CURIAE AARP**

AARP is a nonpartisan, nonprofit membership organization of more than 36 million persons age 50 and older, including 1.3 million members who reside in New Jersey. Through education, publications and advocacy in cases such as this one, AARP seeks to enhance the quality of life for all by promoting independence, dignity and purpose. AARP endeavors to ensure that Americans age 50 and older have affordable housing options that enable them to age in place and to ensure that their home equity is preserved.

An analysis of the Census Bureau's American Housing Survey by AARP's Public Policy Institute found that (1) 46 percent of homeowners of single-family community associations are over the age of 50; and (2) 56 percent of homeowners of condominium and co-op communities are over the age of 50. In addition, a significant proportion of "retirement communities" are governed by community associations.

In New Jersey, approximately one in eight individuals is governed by a community association. Pa235. The large number of community association residents in New Jersey (and throughout the country) has given rise to a substantial number of complaints in which association residents state that their basic rights -- including expressive and associational rights -- have been infringed or abridged by associations.

AARP is deeply concerned about these developments, and, as a result, has engaged in extensive public policy research concerning

community associations. For example, AARP recently published A Bill of Rights for Homeowner Associations: Basic Principles of Consumer Protection and Sample Model Statute (available at [www.aarp.org/.../2006\\_15\\_homeowner.html](http://www.aarp.org/.../2006_15_homeowner.html)). AARP's intent in publishing this Bill of Rights was to provide information and to foster a discussion between homeowners, community associations, and states and localities concerning the rights of homeowners, although the views expressed do not necessarily represent official policies of AARP.

AARP believes that fair and balanced procedures for information sharing, governance and dispute resolution promote healthy interaction between residents and their associations. In turn, these recommended procedures help to avoid conflict when possible, and to resolve conflict equitably when it occurs, thus making for better, more livable communities.

At the core of this appeal is the principle that community association residents have certain basic rights -- including expressive and associational rights -- and that these rights are of constitutional dimension. Consistent with its overarching goals of strengthening livable communities and of protecting the rights of older homeowners, AARP seeks to assist this Court with respect to the important issues of public policy and issues of constitutional dimension that are raised by this appeal.

## LEGAL ARGUMENT

### POINT I

THE DECISION OF THE APPELLATE DIVISION BELOW RESTS NOT ONLY ON THE WELL-ESTABLISHED DECISIONAL LAW OF THIS STATE, BUT ALSO ON (1) CRITICALLY IMPORTANT DATA AND PUBLISHED REPORTS THAT ARE CONTAINED IN THE COMPREHENSIVE RECORD ON THIS APPEAL; AND (2) OTHER PUBLISHED MATERIALS OUTSIDE OF THE APPELLATE RECORD, INCLUDING AUTHORITATIVE SECONDARY LEGAL SOURCES AND THE CONSIDERED VIEWS OF MANY DISTINGUISHED LEGAL SCHOLARS

The substantial legal foundation underlying the decision of the Appellate Division below includes not only the well-established decisional law of this State but also the comprehensive record on this appeal, which, among other things, includes numerous reports and studies that are pertinent to the legal issues here presented. We need not reiterate all of the important constituents of this extensive record. Instead, we highlight what we regard as some of the key elements contained in this record. We also bring to this Court's attention certain material extrinsic to the record on appeal (and which are well within the scope of judicial notice), including pertinent law review articles and scholarly commentary.

#### **A. The Hannaman Report**

The Appellate Division below -- in applying the constitutional principles here at issue to the Twin Rivers community association - - critically relied on a certain published report prepared by Edward Hannaman. See Twin Rivers, 383 N.J. Super. 22,36 (App. Div. 2006) (citing Edward R. Hannaman, State and Municipal Perspectives - Homeowners Associations, presented to Rutgers University Center

for Government Services, March 19, 2002) (Pa231-241) (hereafter "the Hannaman Report"). Mr. Hannaman was, at the time of the report, the "association regulator" in the Bureau of Homeowner Protection of the New Jersey Department of Community Affairs (DCA). Pa231.

The Appellate Division's reliance on the Hannaman Report is appropriate and warranted, in light of Mr. Hannaman's key role in the state agency charged with monitoring the complaints of residents of New Jersey community associations.<sup>1</sup> C.f. In re Adoption of N.J.A.C. 13:38-1.3(f), 341 N.J. Super. 536, 442-43 (App. Div. 2001) (noting that courts "accord considerable weight and deference to ...[an] agency's expertise"). In particular, Mr. Hannaman was uniquely situated to understand and grasp the practical difficulties faced by New Jersey community association residents, since Mr. Hannaman himself was employed by the State of New Jersey to help address and resolve those difficulties.

The Hannaman Report is notable for its candor and its breadth. For example, Mr. Hannaman states: "It is obvious from the complaints [to DCA] that that [home]owners did not realize the extent association rules could govern their lives." Pa237. Mr. Hannaman goes on to set forth at length numerous examples of abuse

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<sup>1</sup> DCA's jurisdiction over community associations is exceedingly limited. Mr. Hannaman estimates that only one-third of the complaints filed by community association residents fall within DCA's limited jurisdiction. Pa236. Moreover, the entire thrust of Mr. Hannaman's paper is that the current DCA dispute-resolution process is ineffective and unworkable, in light of the narrow scope of DCA's regulatory jurisdiction. Pa236-241.



of homeowner rights by New Jersey community associations, and the ineffectual and inadequate safeguards that presently exist to prevent and remedy such abuse. As to this point, the following extended quotation is instructive:

Overwhelmingly ... the frustrations posed by the duplicative complainants or by the complainants' misunderstandings are dwarfed by the pictures they reveal of the undemocratic life faced by owners in many associations. Letters routinely express a frustration and outrage easily explainable by the inability to secure the attention of boards or property managers, to acknowledge no less address their complaints. Perhaps most alarming is the revelation that boards, or board presidents desirous of acting contrary to law, their governing documents or to fundamental democratic principles, are unstoppable without extreme owner effort and often costly litigation.

Problems presented by complainants run the gamut from the frivolous (flower restrictions and lawn watering), to the tragically cruel (denial of a medically necessary air conditioner or mechanical window devices for the handicapped),<sup>2</sup> to the bizarre (president having all dog owners walk dogs on one owner's property, air conditioners approved only for use from September to March. Curiously, with rare exceptions, when the State has notified boards of minimal association legal obligation to owners, they dispute compliance. In a disturbing number of instances, those owners with board positions use their influence to punish other owners with whom they disagree. The complete absence of even minimally required standards, training or even orientations for those sitting on boards and the lack of independent oversight is readily apparent in the way boards exercise control.

...[C]omplaints have disclosed the following acts committed by incumbent boards: leaving opponents' names off the ballots (printed up by the board) by "mistake"; citing some trivial "violation" against opponents to make

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<sup>2</sup>These particular examples cited by Mr. Hannaman -- *i.e.*, examples of New Jersey community association boards abridging or denying the basic rights of older and/or disabled residents -- are of special concern to AARP. For further discussion of this issue, see Point IC, infra.

them ineligible to run; losing nominating petitions; counting ballots in secret -- either by the board or their spouses or someone in its employ -- such as the property manager deciding to appoint additional board members to avoid the bother of elections; soliciting proxies under the guise of absentee ballots; holding elections open until the board obtains the necessary votes to pass a desired action; declaring campaign literature by their opponents to be littering; using association newsletters to aggrandize their "accomplishments" but forbidding contrary opinions by owners ...; routinely refusing to release owner lists to candidates-despite the board mailing owners (at association expense) their positions (it has become routine for the State to refer candidates to the municipal tax office to obtain the names of their fellow association owners); rejecting candidate platforms or editing them to conform to the board's idea of fair comment which includes eliminating any criticism at the board.

[Pa237-38]

The Hannaman Report is a scathing indictment of the status quo system of community association regulation in New Jersey. The Report might be easy to dismiss if the author were a homeowner-rights advocate or interest group. In that event, it would be all too easy to characterize the Report as biased or untrustworthy. But, in light of the fact that the Report instead constitutes a published statement of the State of New Jersey's "association regulator" entrusted with oversight of community associations in this State, the Report obviously assumes heightened significance and carries considerable weight.

The import of the Hannaman Report is this: in light of the fact that private community associations in this State have assumed powers and functions that historically were carried out only by

public entities -- as expressly found by the Appellate Division below as well as by a task force of the New Jersey Assembly -- then the rationale for application of constitutional principles to protect basic homeowner rights in New Jersey becomes *even more necessary and compelling*, in view of the pervasive infringements and inadequate safeguards of basic rights detailed in the Hannaman Report.

#### **B. The Report of the New Jersey Assembly Task Force to Study Homeowners' Associations**

Ten years ago, the New Jersey Assembly established a Task Force To Study Homeowners' Associations, which was charged with making findings and recommendations "concerning the functions and powers of homeowners associations." Pa440. After nearly two years of study, the Task Force prepared its final report setting forth a blueprint for reform of the legal regime governing community associations in New Jersey. **Eight years after the publication of the Task Force Report, not a single one of its legislative recommendations has been enacted.**

In its Final Report, the Task Force put forth the following key finding:

Current law provides ...[homeowner] association boards great flexibility in their rulemaking and administrative powers... [T]hese associations have traditionally been treated as corporations managing a business. **Some modifications of this model appears to be necessary to address the increasingly governmental nature of the duties and powers ascribed to the homeowners association board.**

[Pa439 (emphasis added)]

In 2006, the "model" remains unmodified. New Jersey community associations perform more governmental functions than ever<sup>3</sup> but remain subject to "flexibl[e]" standards that are at wide variance with the necessarily more stringent standards associated with the exercise of duties and power of a "governmental nature." Ibid.

**C. The experiences of community association residents in other States, as reported by AARP and by the popular press**

Unfortunately, the lack of adequate safeguards for the rights of community-association residents is not a circumstance that is unique to New Jersey. On the contrary: AARP's publication, A Bill of Rights for Homeowners Associations: Basic Principles of Consumer Protection and a Sample Model Statute, details the abuses of power suffered by community-association residents in many other states. See www.aarp.org/A Bill of Rights, at 4-8. The examples of resident

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<sup>3</sup> Many community associations carry out such traditionally municipal functions and services as maintenance of streets and open space, collection of curbside trash, review of proposed architectural changes to homes and the promulgation of rules governing home occupancy. Moreover, the broad powers granted by the Legislature to community associations include the power to levy fines and penalties against unit owners, see N.J.S.A. 46:18B-14(d), 46:8B-15(f), a power that the Appellate Division has expressly termed a "governmental power." Walker v. Briarwood Condo Ass'n, 274 N.J. Super. 422, 428 (App. Div. 1994).

Furthermore, many community associations in this State receive direct public subsidies under the Municipal Services Act, N.J.S.A. 40:67-23 et seq., for the cost of maintaining **privately owned** streets situated on community association property. Although there exists no current estimates of the total statewide cost for this benefit to community associations, the Office of Legislative Services estimated the cost as \$62 million as of 1990, at a time when there were far fewer community associations in this State. See Senate Revenue, Finance and Appropriations Committee Statement No. 2869, L. 1989, c. 299, reprinted in N.J.S.A. 40:67-23.2. As of 2006, this statewide expenditure must surely exceed \$100 million. Such an enormous public expenditure for traditionally municipal services **on community-association property** further undercuts the claim that community associations *in this State* are purely "private" entities.

abuse set forth in the AARP report are similar to the experiences recounted in the Hannaman Report.

Moreover, examples abound, in New Jersey and elsewhere, of the abridgement of basic rights of *older residents* of community associations. Thus: a Florida community association fined an 89 year-old widower for having an unauthorized "social gathering" when he was joined on his front lawn by two friends to chat. See Bridget Hall Grumet, "Three a Crowd, Condo Group Rules," St. Petersburg Times, Nov. 18, 2003, at 1. A California community association officially warned a 51 year-old grandmother of an association rule violation after she was seen in front of her home kissing a date good-night. See David J. Kennedy, Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers, 105 Yale L.J. 761, 763 n.11 (1995).

Furthermore, many community associations have denied or abridged the rights of older and disabled residents to use medically necessary equipment and services. See, e.g., Brian Elasser, "Out of the Shadow Government," Sacramento News and Review, Jan. 30, 2003 (describing a community association board's refusal to plow a private street to accommodate a resident's physical disability because some board members wanted to ski and snow board on the street); Richard Jerome, et al, "Loathe Thy Neighbor," People, Oct. 4, 2004, at 123 (describing a community association board's denial of a wheelchair-bound resident's access through the front door of the condominium by reason of the board's

concern that the wheelchair might damage the front door). As to reported decisions involving the rights of older and disabled New Jersey residents of community associations, see, e.g., Berner v. Enclave Condo. Ass'n, 322 N.J. Super. 229, 234 (App. Div. 1999); Gittleman v. Woodhaven Condo. Ass'n, 972 F. Supp. 894, 900 (D.N.J. 1997).

AARP's extensive public policy research concerning community associations revealed that the basic rights of older residents are often subject to abuse by their community association. The constitutional rights and remedies at issue in this litigation are not inconsistent with -- *but rather are complementary to* -- the statutory rights that would be secured by AARP's proposed bill of rights for community-association residents.

**D. A review of the legal literature discloses that many distinguished legal commentators and scholars have strongly advocated the application of state constitutional provisions to community associations**

The nationwide trend toward community association governance as an alternative means to provide traditionally municipal functions and services has led many distinguished scholars and commentators to call for heightened judicial scrutiny of community associations, including application of state constitutional protections to those affected by the actions of community associations. For example, Wayne Hyatt, a widely regarded scholar on the law of community associations, has offered the following

view on the application of state constitutional provisions to community associations:

The conclusion [of some commentators] is that in the absence of unusual circumstances or perhaps an emotionally driven decision, the United States Constitution does not apply in common interest community situations today. **However, state constitutions can and do apply in numerous situations.** In fact, state courts and constitutions may be the appropriate arena for resolution of issues often characterized as constitutional. In a recent case, the New Jersey Superior Court found a violation of free speech rights under the state constitution and overturned a condominium's regulation regarding distribution of literature [citing to Galaxy Towers in a footnote]. The United States Supreme Court in Pruneyard Shopping Center v. Robins made clear that a state's constitution might provide protection for an individual's activities even when the federal constitution would not, and this protection does not constitute a taking.

There are situations both in existing association operation and in evolving activities that could give rise to application of the United States Constitution but for the absence of state action. These might include community building and outreach, privatization, closer relationships with local government, the assumption of responsibilities because local government mandates that assumption, and a wide variety of other activities that make the community association more governmental. The breadth of these association activities may support a finding of state action. The constitutional challenge may arise from the state or federal constitution.

The absence of state action does not necessarily resolve the issue. There may be association actions that infringe on rights that would be constitutionally protected if the actions were governmental. In such situations, there are arguments that other remedies should be available even in the absence of state action. Public policy remains a determinant in the validity of a servitude and certainly of a rule adopted in accordance with that servitude. **Courts can and should carefully examine the issue and determine whether there is a genuine constitutional issue. If so, the court would be justified in striking down the restriction or action on the basis that to enforce it would violate public policy. This does not foreclose the**

**regulation of fundamental rights....**

Constitutional issues must be considered and addressed in drafting common interest community documentation and in advising the community association on its operations. **There are obvious issues affecting the association's members such as voting, occupancy restrictions, use of the property, leasing and transfer restrictions, sign restrictions, and access among others.**

[Wayne S. Hyatt, Common Interest Communities: Evolution and Reinvention, 31 J. Marshall L. Rev. 303, 340-42 (1998) (emphasis added)]

Other distinguished scholarly commentators have reached similar conclusions concerning the compelling need for all branches of government, including the judiciary, to recognize the emerging phenomenon of large-scale community associations as an alternative de facto form of municipal government. For example, Gerald Frug, Professor of Local Government Law at Harvard University, presciently observed in the early 1990's: "The privatization of [local] government is the most important thing that is happening [in local government law], but we're not focused on it. We haven't thought of [community associations] as government yet." Joel Garreau, Edge City: Life on the New Frontier 185 (1991) (quoting Gerald Frug, Professor of Local Government Law, Harvard University). A Federal Government advisory panel reached essentially the same conclusion, albeit expressed in more measured prose: "In all probability, residential community associations account for the most significant privatization of local government responsibilities in recent times."

U.S. Advisory Council on Intergovernmental Relations, Residential



Community Associations: Private Governments in the Intergovernmental System? 18 (1989).

In 1994, Professor Evan McKenzie, a prominent scholar on community associations (and Plaintiffs' expert in the trial court proceedings), published his path-breaking scholarly work entitled Privatopia.<sup>4</sup> Although there is insufficient space here to summarize McKenzie's many insights, this particular finding perfectly encapsulates McKenzie's research and his conclusions: that "government now has no choice but to address the social and political consequences of the spread [of community associations]" and, further, that "[t]he best and most logical way to do this is to view the spread of [community associations] as a de facto privatization decision [by government] and evaluate it in that context." Evan McKenzie, Privatopia 178.

Others scholars and commentators have drawn on McKenzie's insights and have gone on to propose policy recommendations that contemplate an increased role for all branches of government in response to the "de facto privatization" of municipal government. For example, in a thoughtful article entitled, Private Communities or Public Governments: The State Will Make the Call, 30 Val. U. L. Rev.

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<sup>4</sup> Professor McKenzie's book has been called "the best book ever written about ... homeowner associations and the threat they pose to traditional notions of equal opportunity and fair play." Statement of Kenneth T. Jackson, Professor of History, Columbia University, *quoted in* [www.yale.edu.vup](http://www.yale.edu.vup). See also statement of Dennis Judd, Professor of Political Science, University of Missouri, *quoted at* [www.yale.edu.yup](http://www.yale.edu.yup). ("McKenzie succeeds in persuading the reader that to understand local and even national politics, it is essential to understand our notions of participation, community and citizenship are being changed by the proliferation of [community associations] as privatized, quasi-autonomous governments").

509 (1996), the authors, Harvey Rishikof and Alexander Wohl, opined that "state courts...will need to work to balance these interests [in community associations] ...and ultimately delineate the line between public and private [in that setting]." Id. at 550. The authors conclude: "[T]he idea that states are able to either equate provisions of their state constitutions with the comparable provisions in the federal Constitution or, in the alternative, to interpret the language of these provisions more broadly and thus provide more expansive protections of individual rights, will likely have significant implications for private residential associations... This is an example of how our Federalism works, as both state and federal powers define and protect our liberties." Ibid.

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In short, the substantial legal foundation underlying the decision of the Appellate Division below includes not only the well-established decisional law of this state, but also (1) the comprehensive record on this appeal, which includes, among other things, numerous reports and studies that are highly pertinent to the legal issues here presented; and (2) other materials extrinsic to the record on appeal, including law review articles and scholarly commentary.

## POINT II

CONTRARY TO APPELLANTS' CONTENTION, THE APPELLATE DIVISION BELOW DID NOT ERR IN HOLDING THAT, CONSISTENT WITH THIS COURT'S DECISION IN COALITION AND WITH MANY OTHER DECISIONS OF THE COURTS OF THIS STATE, COMMUNITY ASSOCIATION RESIDENTS ARE ENTITLED TO THE PROTECTIONS OF THE STATE CONSTITUTION

The rate of growth of community associations in this State<sup>5</sup> -- and their gradual assumption of functions and services traditionally provided by municipalities -- leads inexorably to the conclusion that the rights guaranteed by our State Constitution **cannot** be denied or abridged merely by reason of the nominally private status of community associations. On the contrary:

The significance of the historical path of free speech is unmistakable and compelling: the parks, the squares, and the streets, traditionally the home of free speech, were succeeded by the downtown business districts... These districts have now been substantially displaced by [] [shopping] centers. **If our State constitutional right of free speech has any substance, it must continue to follow that historic path.**

[New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 138 N.J. 326, 368 (1994) (emphasis added)]

The record on this appeal conclusively establishes that the "historic path" has moved from *public* squares and streets to *private* squares (*i.e.*, regional shopping centers, as in Coalition)

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<sup>5</sup> A review of the record on appeal -- as well as other data sources subject to judicial notice -- discloses that New Jersey is among the leading states with respect to the number, prevalence and growth of community associations in recent years. See, e.g., David J. Kennedy, Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers, 105 Yale L.J. 761, 765, n.24 (1995). Approximately 1 million New Jerseyans (1 out of 8) live in community associations. See Hannaman Report, at 2 (Pa235). In 2002, the estimated number of association-related housing units in New Jersey was 494,000 and growing at the rate of approximately 7 percent per year. See id.

and *private* streets situated in community associations.

To hold otherwise would be a repudiation of this Court's decision in Coalition and, as well, of the core free speech principles enshrined in the New Jersey Constitution. See Coalition, supra, 138 N.J. at 369 ("In New Jersey, we have an affirmative right of free speech, and neither government nor private entities can unreasonably restrict it").

It is no answer to say (as Appellants do) that private contractual agreements, or the "business judgment rule," somehow trump constitutional principles, and that New Jersey community association residents have no constitutional rights because of some sort of "waiver" arising from the documents they signed when purchasing their homes. The "waiver" and "business judgment" arguments fail for the reasons identified by the Appellate Division below as well as for the reasons set forth in Plaintiffs' briefs to the Appellate Division.

To those cogent reasons we add the following additional rationale, which also establishes the untenability of Appellants' central argument. Appellants' contract-based arguments, taken to their logical conclusion, would lead to the anomalous result that that outsiders to Twin Rivers would have *more rights* to engage in expressive and associational conduct on Twin Rivers' streets than the residents of Twin Rivers. But that can't be so.

In particular, Appellants' argument leads to the paradoxical and wholly unacceptable circumstance whereby: (1) a member of the

public would have greater rights to campaign for public office in the public areas of Twin Rivers than a Twin Rivers homeowner campaigning for public office in the public areas of Twin Rivers; (2) a member of the public would have greater rights to enter upon Twin Rivers and hold up a political sign and distribute leaflets in the public areas of Twin Rivers than a Twin Rivers homeowner would have the right to hold up a political sign and distribute leaflets in the public areas of Twin Rivers; and (3) a member of the public would have greater rights to enter upon Twin Rivers and urge election of a candidate for the Twin Rivers Board of Trustees than a Twin Rivers homeowner would have the right to urge election of a candidate for the Twin Rivers Board of Trustees. This state of affairs is not only intuitively wrong, it is foreclosed by core principles of First Amendment and corollary State Constitutional doctrine.

Thus, for example, the Appellate Division's decision in Galaxy Towers is premised not only on an individual's right to free expression, but also on the corollary right of an individual to receive another's information and expression. See Guttenberg Taxpayers and Ratepayers Association v. the Galaxy Towers Condominium Association, 297 N.J. Super. 309 (App. Div. 1996), certif. denied, 149 N.J. 141 (1997) (holding that "the relief granted ... afford[s] plaintiffs, **as well as the residents of Galaxy Towers**, the basic freedom of expression guaranteed by our State and

Federal Constitutions")(emphasis added). By the same token, the United States Supreme Court's seminal decision in Marsh v. Alabama is premised on the recognition that the residents of company towns have a constitutional right to *receive information*. The lynchpin of Marsh is this observation of Justice Black:

Many people in the United States live in company towns. These people, just as residents of municipalities, are free citizens of their state and country... **There is no more reason to depriving these people of the liberties guaranteed by the First Amendment than there is in curtailing these freedoms with respect to any other citizen [in a public municipality]."**

[Marsh, 326 U.S. at 508 (emphasis added)]

Thus, although the Marsh case arose because of the efforts of an "outsider" to exercise her First Amendment rights in a private municipality, the Supreme Court made clear that its concern plainly was directed as much -- if not more -- toward the *residents' rights to receive information* as it was directed toward the outsider's right to convey information to those residents.

More fundamentally, the right to free expression and the right to receive the free expression are plainly two sides of the same coin, complementary and inseparable. Those essential and complementary rights of free expression have never been bifurcated; nor could they be. Indeed, to bifurcate these complementary rights would run afoul of the core principles of free expression under the Federal and State Constitutions, because the right to speak is rendered a nullity if there is no corollary right to listen, and

the right to listen is rendered a nullity if there is no corollary right to speak. Each right implies the other. See, e.g., Island Trees Union Free School District v. Pico, 457 U.S. 853, 867 (1982) (“[T]he right to receive ideas follows ineluctably from the sender’s right to send them”); Lamont v. Postmaster General, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (“The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers”); Martin v. Struthers, 319 U.S. 141, 143 (1943) (“The right of freedom of speech and the press ... embraces the right to distribute literature, and necessarily protects the right to receive it”).

Nor is it tenable or supportable under core First Amendment principles and related State Constitutional doctrine that an outsider to Twin Rivers could engage in political speech on Twin Rivers property and a Twin Rivers homeowner would have the constitutional right to receive that speech, but the same Twin Rivers resident would have no right to engage himself or herself *in the very same speech*. It is perhaps unnecessary to state that a principle that would confer a right to speak based solely on the identity of the speaker has no place in our law. Moreover, a circumstance whereby a speaker has an acknowledged right to speak and a recipient has an acknowledged right to receive the speech but the recipient has no right to engage in the same speech runs counter to the fundamental precept that “the right to receive ideas

is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press and political freedom." Island Trees Union Free School District v. Pico, supra, 457 U.S. at 867.

The proposition that residents of Twin Rivers have no less a right to speak than nonresidents flows inexorably from these core principles. And the same result obtains by application of the "unconstitutional conditions" doctrine, and by application of the principle that servitudes that are either contrary to public policy or unconstitutional are unenforceable. See, e.g., Restatement (Third) of Property (Servitudes) § 3.1 (stating that "a servitude ... is valid unless it is illegal or unconstitutional or violates public policy"). These further arguments were fully set forth in Plaintiffs' briefs to the Appellate Division, and need not be repeated here.

#### CONCLUSION

For the reasons set forth above as well as for the reasons set forth in the briefs of the Plaintiffs/Respondents, the decision of the Appellate Division below should be affirmed.

Respectfully Submitted,

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