PROCEDURAL HISTORY

Amicus curiae Community Association Institute ("CAI") adopts the Procedural History as set forth by the parties in this matter and takes no position in connection with the parties' differences, if any, with respect to same.

STATEMENT OF FACTS

CAI adopts the Statement of Facts as set forth by the parties in this matter and takes no position in connection with the parties' differences, if any, with respect to same.

INTEREST OF AMICUS CURIAE

CAI maintains 55 chapters throughout the United States and also has members in several foreign countries, with over 16,000 members. CAI was organized in 1973 as a non-profit educational organization designed to serve as a national voice for community associations. The primary purpose of CAI is to provide education, legislative advocacy, and to act as a clearinghouse for ideas and practices that encourage the successful operation and management of all types of residential common-interest housing and community associations.

PRELIMINARY STATEMENT

This case at its core involves the rights and responsibilities of homeowners and homeowner-elected community representatives in a community association. The

trial court reaffirmed settled legal principles, largely embodied in the business judgment rule, that govern judicial review of decisions of community associations. These principles permit community association trustees to fulfill their fiduciary duties and to exercise judgment in balancing the needs and obligations of the community as a whole with those of individual homeowners and residents, without undue judicial interference.

Plaintiffs' argue for a vision of community association governance that includes required government review of association newsletters before they are published (Pb51, n. 19), the disparagement of investor owners as "absentee landlords" whose statutory and contractual rights and expectations relative to association voting and management can be summarily eliminated,(Pb52), and the promotion of inefficient and costly judicial review into the minutiae of community association operations under a heightened "constitutional standard" by which, as interpreted by Plaintiffs, courts evidently are authorized and encouraged to substitute their preferences for the judgments of elected community representatives.

Plaintiffs concede that their legal theories do not apply to all community associations. They exempt, for example, at least some "highrise" buildings and common

interest communities that are not "territorial." (Prb14). They are apparently unconcerned with the precise breadth or scope of their theories, evidently preferring to leave associations and owners in a state of uncertainty as the case law develops. (Prb15).

This Court must balance the plaintiff's claims that focus on their perceived individual "rights" versus the rights and legitimate economic expectations of other homeowners. As discussed below, it is CAI's position that the continued application and development of the business judgment rule by the courts best accommodates this balance.

LEGAL ARGUMENT

POINT I.

THE BUSINESS JUDGMENT RULE IS THE CORRECT LEGAL STANDARD FOR REVIEWING COMMUNITY ASSOCIATION BOARD DECISIONS

Generally, contract law and the law of servitudes govern the validity and enforceability of the restrictions which limit the use of real property by a purchaser of a unit, lot or interval in a community association. The trial court in this case followed a model of analysis for review of community association restrictions that is based on settled legal principles in New Jersey and nationally. It is appropriate therefore, for this Court to review the decision of the trial court in the context of the developing body of State and national case law on these issues.

A. THE PROPER FRAMEWORK FOR JUDICIAL REVIEW

Those purchasing into a community association do so with knowledge that their use of the real property will be restricted pursuant to "governing documents" of the association. See Woodside Vill. Condo. Ass'n., Inc. v. Jahren, 806 So. 2d 452 (Fla. 2002) (discussing the background and rationale for such a restriction); see also Shorewood West Condominium Ass'n. v. Sadri, 140 Wash. 2d 47, 992 P.2d

1008 (2000); N.J.S.A. 45:22A-21 et seq. They know or should know that a board will manage the common property; that the board will have the power to assess them for common expenses; that they will be required to adhere to architectural standards; that the board will enforce the rules and regulations of the association.

In Fox v. Kings Grant Maint. Ass'n., Inc., 167 N.J. 208 (2001), the New Jersey Supreme Court recently observed:

> Although a statute or declaration may curtail those powers, 'to the extent these powers are necessary for maintenance of common property; limitations on the powers should be narrowly construed.' Ibid. Accordingly, the association acts as the 'collective vehicle' for the management of the commonly held property, and is the 'structure, organization, and legal entity that is the method of operation for the planned unit development or condominium.' Hyatt, supra, Condominiums and Homeowner Associations: A Guide to the Development Process § 1.04 at 5-6; see also Restatement (Third) of Property: Servitudes § 6.3 (1998).

Fox, supra, 167 N.J. at 222-23.

Other states have made similar observations regarding the limits of review. In Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180 (Fla. Dist. Ct. App. 1975), a condominium common interest community case, the court stated:

> [I]nherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of

> freedom of choice which he might otherwise enjoy in separate, privately owned property.

Id. at 181-82.

The trial court in this case was correct to focus first on the validity and enforceability of the policies in question. In essence it focused its inquiry on the "restrictions" imposed on the complaining unit owners. In connection with Count One relating to sign restrictions, for example, the trial court assessed whether the restrictions met the standard for reasonableness and enforceability of a real covenant as set forth in Acme Markets, Inc. v. Wharton Hardware, 890 F.Supp. 1230 (D.N.J. 1995), including a "public interest" test that is not constitutionally based. Having concluded that they were valid and enforceable restrictions, the trial court then applied the business judgment rule. The trial court's analysis in this regard is entirely consistent with common trends that have developed nationally in connection with judicial review of similar issues.

1. IS THE RESTRICTION VALID AND ENFORCEABLE?

The primary inquiry in a challenge to a restriction in the community association context is whether the restriction is authorized by statute. The second inquiry is whether the restriction is authorized by a recorded instrument that is binding on the parties. See Reedeker v. Salisbury, 952 P.2d

577 (Utah Ct. App. 1998)(holding that the governing documents constitute a contract between the member and the community association).

The Florida courts, for example, have held that restrictions found in the recorded declaration or master deed itself "are clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed." See Hidden Harbor Estates v. Basso, 393 So. 2d 637 (Fla. Dist. Ct. App. 1981) citing White Egret Condominium, Inc. v. Franklin, 379 So. 2d 346 (Fla. 1979). The Basso court observed:

> Thus, although case law has applied the word 'reasonable' to determine whether such restrictions are valid, this is not the appropriate test, and to the extent that our decisions have been interpreted otherwise, we disagree. Indeed, a use restriction in a declaration of condominium may have a certain degree of unreasonableness to it, and yet withstand attack in the courts. If it were otherwise, a unit owner could not rely on the restrictions found in the declaration of condominium, since such restrictions would be in a potential condition of continuous flux.

Basso, supra, 393 So. 2d, at 638. Accordingly, most courts have first looked to the recorded documents of the community association to determine whether the restriction in question is valid and enforceable. Justice Garibaldi, writing for the dissent in

Thanasoulis v. Winston Towers 200 Ass'n, Inc., 110 N.J. 650 (1988), similarly recognized the primacy of rules when stating that:

> Ownership of a condominium differs in significant respects from other traditional forms of property ownership. Unlike the more traditional property owner, an owner of a condominium unit faces certain restrictions of ownership rights when entering into a condominium arrangement. In the condominium context, for instance, courts have consistently rejected individual unit owners' challenges to condominium rulemaking when the challenged restrictions have been promulgated by the Association in order to benefit a majority of the condominium's unit owners. Id at 665. (Citations omitted.)

In this case, the trial court specifically relied upon the comprehensive eight-part test set forth in Acme Mkts., to assess the validity and enforceability of the challenged restrictions. In so doing, Judge Shuster noted that "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 and unconscionability, the judiciary will not interfere," (Trial Ct. Op. at 27.)(citing Billig v. Buckingham Towers Condo Assoc., 287 N.J. Super. 551, 563 (App. Div. 1996)). Accordingly, Judge Shuster applied the correct judicial standard in assessing the validity and enforceability of the restrictions involved in this case.

2. IS THE BOARD'S ACTION PROTECTED?

Once a reviewing court has concluded that the restriction in question is valid and enforceable, the inquiry should then shift to the question of whether the board action was protected action. In other words, how may a board of trustees act in the governance of the community association? What rules apply to their actions?

Wayne Hyatt and Professor Susan French in their textbook Hyatt and French, Community Association Law: Cases and Materials on Common Interest Communities, 257 (Carolina Academic Press 1998)(hereinafter referred to as "Hyatt"), observed as follows:

> The rule of reasonableness and the business judgment rule are the two frequently discussed and relied upon standards, although judicial analysis frequently blurs distinctions in seeking to articulate what is applicable in a particular case. This brings us to the questions of what rules apply, what do the rules mean, what should the standard be. A suggestion for any standard is that it should be predictable, that it should provide for autonomy for the governing body, and that it should be fair.

Hyatt also observed at page 301-302 that the business judgment rule:

> defends the procedure under which the board has acted and the right of the board to be the sole arbiter of the issue involved. The result is that if the procedure is valid, the court will not second guess the substance of a board's action. Consequently, the court upholds the

> decision without subjecting the wisdom of the board's action to judicial scrutiny. . . [Speaking of the basic justifications for the business judgment rule] First, the rule encourages competent people to serve by providing a degree of 'safe harbor.' Second, it acknowledges that making decisions involves a degree of risk and thus protects discretion without 'second guessing' the decision. Third, it provides for judicial efficiency in that it keeps courts from becoming involved in decisions that are better made by those closer to the situation or with greater skill or understanding.

Indeed, a review of case law from other jurisdictions indicates adherence to the business judgment rule within the community association context. See e.g., Ocean Trail Unit Owners Ass'n. v. Mead, 650 So. 2d 4,7 (Fla. 1994); Levandusky v. One Fifth Ave. Apt. Corp., 553 N.E.2d 1317, 1318 (N.Y. 1990); Jeffrey A. Goldberg, Community Association Use Restrictions: Applying the Business Judgment Doctrine (1988) 64 Chi.-Kent L. Rev. 653, 674; Karyn Kennedy, The Community Association Chameleon: A Study of the Multiple Roles of the Board of Directors and the Applicable Standards of Judicial Review CAI's Journal of Community Association Law, Vol. 4, No. 1, at 51 (2001).

The values inherent in the business judgment rule encourage self-determinative community association governance. The business judgment rule "allows an association's board the proper degree of discretion to manage the day-to-day affairs of the community." See Wayne S.

Hyatt, The Business Judgment Rule and Community Associations: Recasting the Imperfect Analogy, CAI's Journal of Community Association Law, Vol. 1, No. 1, at 2 (1988). Indeed, in Levandusky v. One Fifth Ave. Apt. Corp., supra, 553 N.E.2d at 1322, the court applied the business judgment rule in a case involving a cooperative common interest community, stating "[e]ven if decisions of a cooperative board do not generally involve expertise beyond the usual ken of the judiciary, at least board members will possess experience of the peculiar needs of their building and its residents, not shared by the court." Further,

> . . . the prospect that each board decision may be subjected to full judicial review hampers the effectiveness of the board's managing authority. The business judgment rule protects the board's business decision and managerial authority from indiscriminate attack. At the same time, it permits review of improper decisions, as when a challenger demonstrates that the board's action has no legitimate relationship to the welfare of the cooperative, deliberately singles out individuals for harmful treatment, is taken without notice or consideration of the relevant facts, or is beyond the scope of the board's authority.

Id. at 1323.

New Jersey law, similarly, is squarely in accord with the trial court's application of the business judgment rule. See Walker v. Briarwood Condo Ass'n., 274 N.J. Super. 422, 426 (App. Div. 1996); Owners of the Manor Homes for

Whittingham v. Whittingham Homeowners Association, Inc., 367 N.J. Super. 314, 322 (App. Div. 2004); Mulligan v. Panther Valley Property Owners Association, 337 N.J. Super. 293, 299-300 (App. Div. 2001); Verna v. The Links at Valleybrook Assn., 371 N.J. Super. 77, 93 (App. Div. 2004).

It is noteworthy that Judge Shuster's adherence to existing case law led him to uphold certain restrictions and actions challenged by Plaintiffs here, and to invalidate or overturn others. Amicus curiae does not take a position with respect to the trial court's application of the business judgment rule to the particular issues in this case, except to note (as discussed in Point II) that it is clear that heightened judicial scrutiny under a constitutional standard is not necessary for courts to balance properly individual homeowner rights and responsibilities with the needs and obligations of the community as a whole. Homeowners are fully protected under the proper framework of judicial review from invalid or unenforceable restrictions and improper board action.

Accordingly, for the reasons set forth herein, the Court should affirm the trial court's use of the business judgment rule as the appropriate analytical framework for judicial review of common interest community association board actions and rulemaking.

POINT II.

THE LAW DOES NOT REQUIRE HEIGHTENED JUDICIAL SCRUTINY OF COMMUNITY ASSOCIATION RESTRICTIONS AND ACTIONS UNDER STATE CONSTITUTIONAL STANDARDS

Plaintiffs' singular focus on their perceived individual rights in total disregard of their own responsibilities, and in disregard for the rights of others in the community, lead them to see constitutional issues lurking in every community association corner. Accordingly, they envision a world of community association governance subject to heightened judicial and governmental review, where courts or state agencies[1] are invited to substitute their views for the judgment of elected community representatives on such issues as the placement of articles in community newsletters, or the precise location of permitted signage on lawns. Their position, however, is not supported by public policy or the case law.

As previously noted, and as applied by Judge Shuster below, the judicial review of community association

[1] Plaintiffs' frequent reliance on letters and other writings of Edward R. Hannaman, a minor functionary in the New Jersey Department of Community Affairs, is seriously misplaced. His views are not reflective of official administrative policy, expressed in duly promulgated regulations, to which courts would normally defer. See Sherman v. Citibank (S.D.) N.A., 143 N.J. 35, 65 (1995) vacated on other grounds, 517 U.S. 1241 (1996). (noting that an "informal and isolated agency interpretation" of an official in the Department of Banking has limited utility, unlike duly promulgated regulations, adopted after notice and public participation, which are given authoritative weight).

restrictions certainly has a "public interest" or public policy component. Acme Mkts., supra. 890 F.Supp. at 1245. However, "[p]ublic policy is not a warrant for courts to run associations." Wayne S. Hyatt, Symposium: Common Interest Communities: Evolution and Intervention, 31 J. Marshall L. Rev. 303, n.173. Community association homeowners, through their elected representatives, should be empowered by the courts to implement their own view of their community, subject to a standard of review that not only protects individual rights but allows for a necessary balance between those rights and group rights. Moreover, the case law in New Jersey and elsewhere does not support Plaintiffs' position that a heightened standard of judicial scrutiny is required under the New Jersey State Constitution.

In this regard, in State v. Schmid, 84 N.J. 535 (1980), appeal dismissed sub nomen Princeton University v. Schmid, 415 U.S. 100, (1982), the court found that state constitutional speech and assembly freedoms apply to private property that has been dedicated to public use. The test established by Schmid requires a review of:

> '(1) the nature, purposes, 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.'

Id. at 563.

In Schmid, the Court found that a private university had dedicated its facilities and property to achieve educational goals including "the transmission of knowledge and learning to society at large." Id. at 564. The court determined that the university, based upon its own educational mission statement, had invited "public use of its resources in fulfillment of its broader educational ideals and objectives." Id. at 564-565. The Schmid court, under these circumstances, found that a member of the public had a right of access to the university to distribute political literature subject to reasonable university regulation. Id. at 566.[2]

Several years after the Schmid decision, in Bluvias v. Winfield Mut. Housing Corporation, 114 N.J. 589, 590 (1989), the New Jersey Supreme Court faced the issue of determining whether a housing corporation, the equivalent of a non-profit community association, was a state actor for purposes of the Federal and New Jersey Constitution. The Court determined that the association did not exercise the "governmental powers of the community" and, therefore, "no issue of constitutional dimension" under either the United States

[2] The court nonetheless acknowledged that a private property owner may establish reasonable regulations governing the time, place and manner of constitutionally-protected speech. See Id. at 568.

Constitution or the New Jersey State Constitution existed. Id. The New Jersey Supreme Court could have used Bluvias to extend the application of State Constitution to private property beyond Schmid, but chose not do so.

In Bluvias the issue before the Court centered upon a dispute between the association and its members. The Appellate Division in Bluvias v. Winfield Mut. Housing Corporation, 224 N.J. Super. 515 (App. Div. 1988) determined that the association owned all land areas of the municipality except for the roads, including all of the dwelling units, the municipal building, school and shopping area. The New Jersey Supreme Court nonetheless found that that the actions of the board did not amount to state action as it was not a "company town" under Marsh v. Alabama, 326 U.S. 501 (1946). Blauvis, supra, 114 N.J. at 590.[3] The Court made this determination despite the fact that the association provided sewer service, water service, street cleaning, snow removal

[3] Other courts using a similar mode of analysis of the application of constitutional provisions to private community associations have uniformly rejected the application of constitutional standards to community associations, usually based on "state action analysis". See Midlake On Big Boulder Lake, Condominium Association v. Cappucio, 673 A.2d 340, 342 (Sup. Ct. Pa. 1976) (Constitutions should not be applied to private common interest condominium association); Goldberg v. 400 East Ohio Condominium Association, 12 F.Supp. 2d 820, 823 (N.D. Ill. 1998) ("... demonstrating that condominiums do certain things that state governments also do doesn't show that condominiums are acting as the state or in the state's place."); Brock, et al. v. The Watergate Mobile Home Park Association, Inc., 502 So. 2d 1380, 1382 (Fla. App. 1987) (a homeowners association is "merely a supplement to, rather than a replacement for" local government services and its activities are therefore not subject to state action analysis.)

and other such services. Indeed, the Appellate Division held that since the municipality provided municipal services such as "police and fire protection and a municipal court," and the municipality was governed by a separate committee, the community was not a "company town" under the definitions established in Marsh and Schmid. Blauvis, supra, 224 N.J. Super. at 521. The association's actions were, therefore, deemed to be "in a private rather than a public setting." Id.[4] The same analysis applies to all community associations in this State.[5]

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[4] In one instance, a trial level court did find that a condominium association had "significant dedication" of its property "from private to political and thus public use" based upon the particular facts of that case. Guttenberg Taxpayers and Rentpayer Ass'n v. Galaxy Towers Condominium Ass'n, 297 N.J. Super. 404, 688 (Ch. Div. 1996), affirmed 297 N.J. Super. 309, 688 A.2d 108, (App. Div. 1996), A.2d 156, certification denied 149 N.J. 141, 693 A.2d 110 (1997). The court in that case was analyzing the access rights of non-members to the private property as opposed to the enforcement of and challenge to association rules and regulations between the association and its members.

[5] Amicus curiae also note that the law is absolutely devoid of authority to strike down a private community association's limitation of voting rights in its organization to unit owners (as opposed to tenants or others), as set forth in its governing documents. Indeed, unit owner voting is required by both the Condominium Act and the Planned Real Estate Development Full Disclosure Act ("PREDFDA"), the statutes governing community associations created after the effective date of those laws. See N.J.S.A. 46:8B-12.1 (requiring developers to turn over voting control of a condominium association to "unit owners" once 75% of the units in a condominium have been conveyed); N.J.S.A. 45:22A-47 (requiring surrender of control of a community association to the owners in a planned development after conveyance of 75% of the lots). Similarly, weighted voting is permitted by the Nonprofit Corporations Act, N.J.S.A. 15A:5-10, the Condominium Act, N.J.S.A. 46:8b-9(h) and PREDFDA, N.J.S.A. 45:22A-47(b). Against the presumed constitutional validity of these statutes, Plaintiffs offer an interpretation of Board of Estimate v. Morris, 489 U.S. 688 (1989) that requires this Court to find that community associations are the equivalent of local governments for constitutional purposes, a theory already rejected by the New Jersey Supreme Court in Bluvias.

This Court's recent decision in Verna v. The Links at Valleybrook Neighborhood Association, Inc., 371 N.J. Super. 77 (App. Div. 2004) does not compel a contrary conclusion. Rather, this Court in Verna merely determined that a candidate for the homeowner association board was a limited purpose public figure for purposes of determining whether the "actual malice" standard in a defamation suit was the appropriate standard. Id. at 97. However, the Court dismissed as "clearly without merit" the plaintiffs' contention that the association's restrictions were unenforceable because they failed to meet certain constitutional standards. Id. at 84.

The New Jersey Supreme Court has applied the Schmid standard to find that regional shopping centers, and certain community shopping centers, are required to permit leafleting, subject to reasonable restrictions. New Jersey Coalition Against War in the Middle East, et al. v. J.M.B. Realty Corporation, et al., 138 N.J. 326, 333 (1994). The Coalition court, in applying the Schmid test, found the public's invitation to use the property was "broad" and "all-inclusive." Id. at 333-334. In fact, the Coalition court found that the public use of the shopping centers was "so pervasive that its all-embracing invitation to the public

necessarily includes the implied invitation for plaintiff's leafleting." Id. at 355.[6] In fact, the relevant cases in New Jersey have all involved disputes between members of the public and an association rather than disputes between members and associations.

In the context of community associations, the unwise extension of constitutional rights to the use of private property by members (as opposed to the public) raises the likelihood that judicial intervention will become the norm, and serve as the preferred mechanism for decision-making, rather than members effectuating change through the democratic process. This result is not mandated by existing case law, and it is respectfully submitted that this Court should decline Plaintiffs' invitation to create such a new rule in this case.

[6] The Court nonetheless reiterated the power of the shopping center to "adopt rules and regulations concerning the time, place and manner" of the leafleting. Id. at 362.

CONCLUSION

Community Associations Institute respectfully requests that the Court affirm the decision of the trial court with respect to the appropriate framework of judicial review of community association restrictions and actions.

Respectfully submitted,

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