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### **The NJ Supreme Court Helps Establish the New America of private government HOAs**

To this non-lawyer, homeowner rights activist, the New Jersey Supreme Court's opinion in the Twin Rivers HOA case was another instance, like the US SC Kelo decision on eminent domain (*Kelo v. City of New London*, No. 04-108. (2005)), of further establishing and legitimizing the NEW AMERICA dominated by planned communities and homeowners associations. The Court held that,

In applying the Schmid/Coalition multifaceted standard, the twin Rivers Homeowners' Association's policies, as set forth in its rules and regulations, do not violate the New Jersey constitutional guarantees of free expression.

The New Jersey Schmidt case (*State v. Schmid*, 84 N.J. 535 (1980)), established certain criteria for the protection of free speech, which appear very similar to the tests found in the antiquated US Supreme Court's 1946 decision in Marsh (*Marsh v. Alabama*, 326 US 501 (1946)) relating to company towns. Marsh established the long-standing "public functions" test similar to the following Schmid tests:

Under that test, the courts consider: 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 on such property in relation to both the private and public use of the property.

The Court, deliberately ignoring the federal requirement for state action (a prior court decision denying constitutional rights), did not consider the more current views of state action as summarized in the 2001 US Supreme Court decision in *Brentwood* (*Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, (2001)), which established tests like,

State action may be found only if there is such a "close nexus between the State and the challenged action" that seemingly private behavior "may be fairly treated as that of the State itself

A nominally private entity may be a state actor when it is entwined with governmental policies or when government is entwined in its management or control

Unequivocally show that a legal entity's character is determined neither by its expressly private characterization in statutory law, nor by the law's failure to acknowledge its inseparability from recognized government officials or agencies

Or, making use of other US Supreme Court tests as summarized in Steven Siegel's paper (*The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities*, William & Mary Bill of Rights J, Spring 1998),

Functional equivalency of a municipality

Judicial-Enforcement Theory

The Mutual-Contacts/Symbiotic-Relationship theory [entwinement]

Of particular concern, the NJ Justices, in their analysis, relied on arguable doctrine and beliefs (emphasis added),

We acknowledge, however, that those rights are not absolute, as citizens may waive or otherwise curtail their rights.

Additionally, its members are afforded extensive statutory protections, and the business judgment rule protects members from arbitrary decision-making. Further, the Association contends that the relationship with its members is a contractual one, set forth in reasonable and lawful that appear in all property deeds.

Thus, the [Collation case] Court not only relied on the three-pronged test in Schmid, but also on the general balancing of expressional rights and private interests.

“the fundamental nature of a constitution is to govern the relationship between the people and their government, not to control the rights of the people vis-a-vis each other.”

The mutual benefit and reciprocal nature of those rules and regulations, and their enforcement, is essential to the fundamental nature of the communal living arrangement that Twin Rivers residents enjoy.

Moreover, common interest residents have other protections. First, the business judgment rule protects common interest community residents from arbitrary decision-making.

That is, a homeowners' association's governing body has “a fiduciary relationship to the unit owners, comparable to the obligation that a board of directors of a corporation owes to its stockholders.”

Finally, residents are protected under traditional principles of property law . . . One owning a tract of land may convey a portion of it, and by appropriate covenant or agreement may lawfully restrict the use of the part conveyed for the benefit of the unsold portion, providing that the nature of the restricted use is not contrary to principles of public policy. . . . that “[r]estrictions in a master deed” should be enforced “unless those provisions ‘are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right’”

**Our holding does not suggest, however, that residents of a homeowners’ association may never successfully seek constitutional redress against a governing association that unreasonably infringes their free speech rights.**

Still, in spite of all the above justifications, guarantees and assurances that homeowners are protected by our system of government, and by implication, the courts, the NJ Justices decided:

In applying the Schmid/Coalition multifaceted standard, the twin Rivers Homeowners’ Association’s policies, as set forth in its rules and regulations, do not violate the New Jersey constitutional guarantees of free expression.

The justices present a case that ignores judicial review doctrines that specify the degree to which due process is required in order to surrender fundamental and constitutional rights. Constructive notice of CC&Rs does not satisfy judicial review requirements. The justices ignore the court holdings that satisfaction of open-ended amendment procedures in adhesion contract CC&Rs, alone, is sufficient to bind homeowners to financial obligations that could not be reasonably anticipated or expected by such amendments. Many of these amendments that courts have upheld that allow for ex post facto covenants, bylaws and rules in spite of judicial pronouncements of violations of public policy and the constitution are invalid. The scary justification offered by the Justices, and by other judges across the country, is

The mutual benefit and reciprocal nature of those rules and regulations, and their enforcement, is essential to the fundamental nature of the communal living arrangement . . . .

**This justification, all by itself, undermines the fundamental nature of our American system of governance and its foundation of individual, unalienable rights that any government cannot take away.** What we are witnessing is the placement of a social democracy of the community above all other concerns, first and foremost. Read your private HOA constitution, the CC&Rs, or the strongly CAI promoted UCIOA, and you will not find any bill of rights or protections as found in our public government. What you find is the objective of maintaining property values uber alles (German for “over all”). And our courts and legislators believe that this is good for America.

Once again we see the sanctity of unregulated private contracts deliberately embedded in covenants running with the land being upheld as separate and independent laws. Covenant-contracts that govern a people within the territory of the planned community. The justices have

made it clear, in total disregard to all the promotion and failures to disclose material facts in plain, understandable English, that the homeowner is buying into a business operated not as a community or public government, but as a business under business laws.

Once again we see the establishment and protection of the New America of homeowners associations.

**Note:**

In *Kelo*, the justices re-interpreted the eminent domain precedent of “public use” to mean “public purpose”, and in *Twin Rivers* we have justices insisting on antiquated, selective precedent. For an interesting look into how the justices, particularly the US Supreme Court Justices, arrive at their opinions, see *The Politics of Precedent On the US Supreme Court*, Thomas G. Hansford and James F. Spriggs II, (Princeton University Press 2006).

**References:**

Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Association (A-118-122-05) -  
- Decided July 26, 2007 (<http://www.judiciary.state.nj.us/opinions/supreme/A-118%20-%20122-05%20Twin%20Rivers.pdf>)