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Summary of *Moore v. Radburn Assn Civil Action (NJ)*

(NJ Appellate Court, Part F, A -004284-07-T2; Docket No. C-394-06 (Bergen County Superior Court 2006)).

1. Historical Radburn Association

The Radburn Association was formed in the idealistic, utopian days of 1929 as an early concept of a planned community. Radburn is mentioned in *Privatopia* (McKenzie), *Community Associations* (Stabile) and in the 1964 *Homes Association Handbook*, p. 73 - 76, (ULI) as a model for the beneficial impact of planned communities. As a utopian concept, Radburn would represent a better community with a better governing body for the benefit of all the stakeholders. As it turned out over the past 80 years, "stakeholders" has come to mean not just the owner of supposedly private property, but the municipality, the HOA as a separate person, the management firms, the HOA attorneys, and the other service providers like landscapers.

In its counterclaim, Radburn states (p. 18) :

[Radburn] is the result of the collaborative genius of world-famous architects/planners Clarence Stein and Henry Wright. . . . The Radburn concept was a step forward in suburban living. . . . Moreover, this independent not-for-profit entity was needed to collect and make appropriate use of assessments from residents. J.P. Morgan, John D. Rockefeller, Eleanor Roosevelt, William Sloan Coffin and other notable citizens supported the Radburn community concept. Some of them invested in it.

The Declaration of Restrictions was intended to assure that the founders' vision for Radburn would be realized and maintained over the long term. The Radburn Association's enforcement of the Declaration of Restrictions has been so successful that the Radburn community became a municipal, county, state and National Historic Site on the Federal Register of Historical Places and eventually achieved National Landmark status.

[Note: the owners have formed their own organization, the Radburn Citizens Association, that possesses no political power within Radburn.]

The Complaint (*Moore v. Radburn*, Docket No. C-394-06 (Bergen County Superior Court)).

The charges/complaints are noted as "counts".

- a. Count I seeks to include all the owners as members and not only those who reside in Radburn. It seems that there are on 55 such persons out of an adult population of some 1,900 persons (per the Complaint). The court is asked to require the existing Trustee board of 9 people to amend the governing documents to open the membership to all owners.

- b. Count II seeks to revise the election process that currently permits only current Trustees to nominate 8 of the 9 Trustees. (In the past election the Plaintiffs allege that it reform candidate had more votes than the Trustee's candidate, yet the Trustee's candidate was elected). The court is asked to have the governing documents amended in conformity to the NJ Constitution and state laws for HOAs, granting suffrage to all owners in Radburn.
- c. Count III seeks to open the board meetings to access by the owners, including attendance, and to provide owners with the minutes. These meetings are currently closed and secretive, allegedly in violation of state laws. The court is asked to have the governing documents amended in conformity to the NJ Constitution and state laws.
- d. Count IV seeks disclosure of Radburn's financial records, which have been withheld and denied to owners in violation of state laws. The complaint alleges that the denial of access to financial records

impose an unreasonable restriction (in violation of common law) on the right of residents to participate in the governance of their community and unduly burden (in violation of the New Jersey Constitution) their right to cast an informed, and therefore effective, vote for Board trustees.

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- e. Count V deals with alleged discriminatory behavior against the one Trustee elected by the membership. It is ignored for my purpose here.

2. Answer/counterclaim

As I have mentioned on numerous occasions, an Answer must address each and every paragraph of the Complaint, either by denying it, affirming it, providing alternative information, or a general disclaimer of *"the Defendants have insufficient knowledge or information to form a belief as to the truth of the allegations"*. The Defendants take some 12 pages, which consist mainly of standard defenses: res judicata, failure to state a claim, estoppel, etc. The one HOA related defense was: Defendants, the HOA, *"owe no duty to the Plaintiffs."* Failure to answer each charge can result in the very common HOA lawyer filing for Summary Judgment in that there are no issues of disagreement, and no reason to be here.

counterclaim: The HOA defends itself by stating that the Trustees have obeyed the governing documents, have acted in the best interest of the members, and have not harmed their interests. It proceeded to charge the one Trustee with numerous violations as a Trustee.

The defense fell to a tale of the historical nature of Radburn, and

In its more than seventy-seven year history, The Radburn Association has faced significant challenges. Its volunteer-Trustees have successfully guided The Radburn Association through those challenges on each occasion.

The HOA then characterized the Plaintiffs as dissenters opposed to the development of a fourth Radburn: *"In furtherance of their conspiracy and in furtherance of their efforts to tortiously [wrongfully, not "twistedly"] interfere with The Radburn Association . . ."* (It is a common practice to claim that the homeowners are troublemakers). Radburn counterclaimed:

Count I: The member elected Trustee and a plaintiff failed in her obligations as a Trustee.

Count II: Plaintiffs were co-conspirators assisting Trustee in Count I in the violation of her duties.

Count III: Plaintiffs acted in concert to commit wrongful acts against Radburn.

Count IV: Plaintiffs interfered with Radburn contractual obligations (relating the fourth Radburn).

Count V: Plaintiff's tortious interference harmed Radburn.

3. Superior Court decision (April 2008)

The judge immediately highlights that *"The community is historically significant. In 1974, the Radburn Association site was included in the National Register of Historic Places and the New Jersey State Register."* He summed up the case as,

The plaintiffs argue that the Radburn government violates the law because 1) all residents are not included as "members" of Radburn; 2) residents do not nominate (although they do vote for) candidates to serve on the Board of Trustees; 3) certain meetings of the Board of Trustees are not open to the public; and 4) Radburn does not provide sufficient documentation regarding its operating budget. One of the plaintiffs, board of trustees member June Meyerson, claims that her fellow trustees discriminated and retaliated against her because she "disagreed with and worked against them in her attempts to prevent the sale of Daly Field."

It appears that the undoing of the Plaintiff's arguments was:

Although the plaintiffs initially based their complaint on a wide-ranging body of state and constitutional law, the parties stipulated at oral argument that the governance issues the Court must decide are based on only The Planned Real Estate Development Full Disclosure Act (PREDFDA), N.J.S.A. 45:22A-21 to -56 and the New Jersey Nonprofit Corporation Act.

This gave the judge justification to ignore constitutional questions. (This same pre-trial agreement to limit the applicable laws also occurred in the 2009 Arizona superior court decision to declare a statute unconstitutional based on the underlying case that was restricted to using just one "controlling" precedent as the basis for the decision. (*Waugaman v. Troon*).

The judge held that the NJ statutes applied retroactively as decided by the appellate court in Twin Rivers. Yet, with respect to universal suffrage of the members, the judge somehow cannot interpret the statute to require Radburn to install membership upon all lot owners, even though the statute applied retroactively. Additionally, in essence, the judge would have to do a lot of studying of the issues (p.6). With respect to the nomination/election process, *"What the Court has before it is a random sampling of election law cases, and it simply cannot bloat the protections of PREDFDA with constitutional case law taken way out of context."*

Counts I and II: The reasoning for the decision included (emphasis added),

There is no doubt that the current nomination procedure offends pure democratic sensibilities. . . . **[however] neither PREDFDA nor Title 15A mandates pure democratic procedures within planned residential communities** [as] illustrated by the Appellate Division's decision in Twin Rivers to sustain that association's rules permitting so-called weighted voting.

This un-democratic, un-representative system was sustained on summary judgment despite attacks on it as being at variance with the New Jersey Non-Profit Corporation Act and PREDFDA. "The arguments advanced by plaintiffs import to elections in community associations the standards heretofore applied only in public sector elections. **Without a basis in legislation, it is beyond our authority to effect such a change in the relationships between Community Associations and their members**". Committee v. Twin Rivers, 383 N.J. Super. 22,68 (App. Div. 2005), rev'd on other grounds, 192 344 (2007).

The plaintiffs are essentially asking the Court to interpret Title 15A's "fair and reasonable" language to require a straight democracy, or republic, with a method of nominating residents not beholden to Board pre-approval. **But absent any authority, the Court cannot do that.** [Ever heard of the Constitution? Perhaps if Radburn were viewed as a de facto government within the USA and state of NJ, although not recognized as such, democratic principles would be mandated.]

Count III: With respect to the meeting disclosure violations the judge quickly dismissed this as a technical refinement to show the Radburn policy reflected in the bylaws, and since there were no public comment meetings, nothing was lost to the Plaintiffs.

Count IV: With respect to financial disclosures, the court chooses another very limited requirement on the board to use generally accepted accounting procedures (GAAP), but does not mandate full disclosure of any kind: *"As to the specific content of the disclosures, the Court will go no further in this litigation than to note that the Condominium Act requires Radburn to apply generally accepted accounting principles."*

In summary:

The Court today has ruled as follows: Radburn's summary judgment motion is granted insofar as it extinguishes Counts I, II, III and V of plaintiffs' complaint. But Radburn must amend its bylaws to incorporate its policy that was described in the Court's discussion of Count IV. Plaintiffs' summary judgment motion is granted as to Count IV of its complaint and as to the extinguishment of Radburn's counterclaim.

The Appeal A -004284-07-T2 (Part F)

4. Plaintiff (homeowner) Appellate Brief (Aug. 2008)

In their opening statement,

There is little doubt that PREDFDA [NJ statutes] was designed, consistent with the common law governing servitudes, to safeguard the ability of all homeowners in a given community to have the power through political processes to control the actions of the association. It is therefore inconsistent with PREDFDA for an "exclusive club of current and former trustees" (Pa1052) to do what they like with community resources regardless of the will of the majority, and never have to face an election in which people with different views might be elected.

Similarly, within the context of a common interest community such as Radburn, a "fair and reasonable" nomination process under N.J.S.A. 15A:5-20(e) must be one that protects homeowners from arbitrary, retaliatory or unfair treatment by a board; which, like a local government, has the power to assess homeowners, make rules governing behavior within the community, and enforce such rules with fines and other penalties.

In regard to the appeal procedure, the argument is an "error of law" by the trial

[I]f the trial judge misconceives the applicable law, or misapplies it to the factual complex . . . it is the duty of the reviewing court to adjudicate the controversy in the light of the applicable law in order that a manifest denial of justice be avoided.

[The judge] refused to look to all such provisions to understand the Legislature's intent when employing the term "member" in the statute. Plaintiffs contend that the language, structure, and purpose of the Act require that all unit owners of a common interest association must be members of the association that governs them. The trial court disagreed.

PREDFDA is a consumer or homeowner oriented statute, remedial in nature; it must be interpreted expansively rather than narrowly, and liberally construed to protect the rights of homeowners.

With respect to fair election/nomination procedures, the brief argues,

Given the fact that common interest associations, like local governments, have the power to make and enforce rules governing behavior and affecting owners' financial interests within a community, it is appropriate to look to First Amendment principles of expression developed

within the context of public election cases to assist in determining whether an association's election procedures satisfy PREDFDA's mandate requiring effective representative democratic processes.

Similarly, principles and policies of representative government and democratic election processes set forth throughout Chapter 6 of the Restatement (Third) of Property: Servitudes (2000) should be employed when determining what constitutes a "fair and reasonable" nomination procedure in the context of a common interest association, as the court is required to do in accordance with N.J.S.A. 15A:5-20.

In *Committee for Better Twin Rivers*, 192 N.J. at 47, the New Jersey Supreme Court acknowledged the relevance of constitutional principles regarding free speech when evaluating the legality of association practices related to the election of its directors. It noted, "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."

Finally, Radburn's Summary of Radburn Protective Restrictions also explicitly recognizes that the Association "is undertaking activities . . . much like those of a municipality."

First, like a private trust, the purpose of common interest associations is to manage property for the benefit of its members, but unlike trustees, directors of common interest associations are "elected by popular vote," "answer to political considerations," and are "subject to election and removal from office in a democratic process." Restatement (Third) of Property: Servitudes § 6.14 cmt.a (2000). For it is only through democratic processes that homeowners are provided some protection against arbitrary, intrusive or unfair treatment of the directors.

With respect to open meetings and financial disclosures, the brief argued,

Radburn, in turn, adopted a new policy in which it simply renamed two of every three board meetings a "working session" and limited the third meeting to "public vote taking" on matters previously reached by consensus.²⁰ The court below did not find this superficial act of renaming offensive or an attempt to circumvent the purposes underlying PREDFDA's open meeting requirement

Plaintiffs assert that in order to protect their rights and investments as well as those of all other current and future owners of property within Radburn, this Court should require the Association to adhere to AIPCA's [sic] standards of transparency to financial disclosure. It also requires CIRAs [under the AICPA [American Institute of Certified Public Accountants] guidelines, Common Interest Realty Associations] to disclose supplementary information outside of the basic financial statements indicating the financial soundness of the community, (Pa528) and it includes Illustrative Financial Statements in its appendix. AAG-CIR, Appendix A. (Pa841-854). ["AAG" refers to Audit and Accounting Guide].

Plaintiffs assert that in order to protect their rights and investments as well as those of all other current and future owners of property within Radburn, this Court should require the Association to adhere to AIPCA's [sic] standards of transparency to financial disclosure.

And in conclusion, the brief seeks,

Plaintiffs therefore request that this Court compel Radburn to amend its By-laws to assure fair and open elections, open board meetings, and financial disclosure in accordance with GAAP. This Court must prohibit the Trustees from perpetuating themselves and their selected nominees in office, and keeping all operational affairs of Radburn confidential.

5. ACLU brief in support of Plaintiffs (homeowners) (Nov. 2008)

In ACLU's opening statement (Jeanne LoCicero as the attorney), it argues that,

Though these residents agree to certain terms when they purchase their homes, it is not unreasonable for them to expect that the governance of their communities be fair, democratic, and transparent. Yet, time and again, these expectations are not met with reality. . . . [H]omeowners are frustrated and angry over restrictive rules, regulations and procedures which make it difficult for challengers to compete for seats on association boards at the same time as they allow directors to perpetuate themselves in office.

It is essential to the well-being and democratic New Jersey residents who live in common interest that this Court repudiate the trial court's holding electoral procedures that "offend[] pure democratic sensibilities" are acceptable under New Jersey law. . . . DCA [Dept of Consumer Affairs has oversight responsibilities] , however, has categorically refused to assert its jurisdiction over common interest association election disputes. This Court should clarify the meaning of "fair and open" elections to make clear that PREDFDA was enacted, in part, to protect voting rights of community association residents. This would dissuade ill-meaning association boards from taking actions that impede fair elections and would encourage DCA to exercise the authority it currently holds.

The ACLU brief continued by describing six other NJ associations and their violations of democratic processes. It summarizes its position with,

Associations must know that PREDFDA has a clear mandate for fair and open elections that DCA would be willing to enforce; otherwise, residents are facing long and expensive court battles on a case-by-case basis. Further, clarification of the term "fair and open" would prove useful not only to resolving - but also to avoiding - incidents such as those described above.

ACLU concludes it brief as follows,

An increasingly large number of New Jerseyans live in communities where important aspects of their lives are governed by the boards of community associations. These boards derive their governing authority from statutes and municipal regulations and must be held accountable when they violate the law or exceed their authority.

Because the procedure used by the Radburn defendants does not comport with well-established principles of fairness and openness, the trial court decision must be overturned and Radburn's rules must be set aside.

6. Radburn brief (to be added)