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ISSUE 4

**Homeowner Associations:
Problems and Solutions**



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INTRODUCTION TO SYMPOSIUM EDITION ON HOMEOWNER ASSOCIATIONS: A DISCUSSION OF THE PROBLEMS AND SOLUTIONS¹

In May 2007, the *Homeowner Associations: Problems and Solutions Conference* was held in Trenton, New Jersey. The Conference was funded by the Lois and Stan Pratt Foundation and co-sponsored by Rutgers School of Law- Camden, Seton Hall Law School, and Rutgers Newark Law School. American Civil Liberties Union- New Jersey, League of Women Voters, AARP, Common Interest Homeowners Association, and New Jersey Appleaseed were among the organizations that participated in the May Conference.

This symposium edition offers a pragmatic examination of the unique legal and social issues encountered by residents of plan communities organized through homeowner associations. Through the participation of leading legal scholars, attorneys, New Jersey politicians and government representatives, and private citizens residing in planned communities the Conference proved to be a representation of the myriad of perspectives on the attempts to reconcile the structure of privately organized communities and public laws. The transcript of the Conference is accompanied by two additional articles. The first, written by Paula A. Franzese and Steven Siegel, comments on the recent New Jersey Supreme Court case, *Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Association*. The second article, by Ed Hannaman provides a comprehensive analysis of the structural issues inherent in homeowner associations.

¹ Co-sponsor, Rutgers Journal of Law and Public Policy takes this opportunity to thank all of the participants that made the Homeowner Association Symposium possible.



HOMEOWNER ASSOCIATIONS: PROBLEMS AND SOLUTIONS CONFERENCE 2007

First Session:
*An Overview Of HOAs In The United States:
The Development Of Mini-Municipalities*

RENEE STEINHAGEN, MODERATOR:

Good morning. My name is Renee Steinhagen. I'm the Executive Director of New Jersey Appleseed, the Public Interest Law Center. I want to welcome you here this morning for what is a very important conference. This conference is being sponsored by the three law schools of New Jersey: Rutgers Law School in Newark, Rutgers Law School in Camden, and Seton Hall Law School; it is funded by the Lois and Stan Pratt Foundation. Mr. and Mrs. Pratt were founders of the Common Interest Homeowners Coalition, and are extremely responsible for all of you in this room. The conference is going to be published by the *Rutgers Journal of Law and Public Policy*. Now, there are several organizations that are participating: the New Jersey ACLU, the League of Women Voters, which many of you know, because they often run the elections in your homeowners, AARP, the Common Interest Homeowners Association, and New Jersey Appleseed.

Now, we've learned from society's experience with various policy issues that impact a significant number of people that the path to dealing adequately with the problems begins with talking openly about the problem, confronting reality, and not ignoring it. New Jersey has thousands of planned communities with over one million people in them, and they generate

constant and widely varied problems with some common threads. And here today we're going to try to figure out what those common threads are. Unfortunately, however, only the people experiencing the problems are aware that significant social concerns even exist.

Since the Legislative Task Force examination completed ten years ago, there has been no open public discussion of homeowners' problems. In the 30 years since the Legislature passed to protect purchasers, there's been no conference like this one today that formally recognizes homeowner problems, and considers some of the possible solutions. It's our intent today to publicize that there are serious problems to be addressed, to keep these problems in the open, and to continue to solicit and propose solutions until New Jersey homeowners are heard and adequately protected.

These solutions range from changing the legal framework and institutional structure, to changing the legislative scheme. Now, I'm going to turn this conference over to our panelists. Our first panelist is Professor Frank Askin. He's a professor of law, and the Director of the Rutgers Law School Constitutional Clinic. He has been the attorney for the Plaintiffs in the *Twin Rivers* case, and that's what he'll be discussing here today. Thank you.

PROFESSOR FRANK ASKIN:

Good morning. I welcome you all today. We meet today in the shadow of a widely anticipated decision in the *Twin Rivers* case, which the State Supreme Court is likely to announce before the end of June. However, it should be understood that no matter what the decision in *Twin Rivers* it will cover only the tip of an iceberg. The issues before the court in *Twin Rivers* are limited to matters of freedom of speech and communication in common interest communities. The problems confronting the million plus residents of these communities in this state extend far beyond, issues which will be discussed by those caught up in them a little later this morning.

But as practically the only lawyer in the state available to provide at least on occasion free legal assistance to such homeowners, I have been hearing about these problems constantly for the past several years. Barely a week goes by that I do not get a phone call or e-mail from several beleaguered

homeowners begging for assistance from me and my students in the Rutgers Constitutional Litigation Clinic, and I have to explain to them that the most we can do is take an occasional test case. We are not free legal services for a million homeowners in this state.

The immediate issues involved in all of these disputes are varied, but there is one complaint common to every case, and that is the inequality of legal resources. Anyone who has a dispute with their association quickly discovers that they can't afford it. If they are lucky enough to have a decent alternative dispute resolution system, it will still probably cost them a minimum of \$150 to invoke it, and it seems that few associations even have such accessible systems. If the wind up being sued by their association, they discover they're going to have to pay for both sides' lawyers; that is, they have to hire their own lawyer, and also pay their pro rata share of the cost of the association's lawyers.

In the *Twin Rivers* case, even though the Plaintiffs' costs were picked up by the American Civil Liberties Union, and their lawyers were provided free, the Plaintiffs still had to pay their share of a \$300,000 assessment levied by the homeowners' association to hire outside counsel to oppose them. The most heart-rending calls I get are from homeowners who are on the verge of bankruptcy or foreclosure as a result of fines and legal fees, resulting from some petty dispute over alleged violation of association rules, which escalated beyond all reasonable bounds.

In many of these cases, the homeowners are represented by a lawyer who is in over his or her head, which is not at all surprising, since the only lawyers really knowledgeable about community association law all work for the associations and management companies, not for homeowners, so the homeowners wind up represented by the lawyer who did their house closing, prepared their will, and are totally unprepared to respond to an avalanche of motions and briefs dealing with subjects quite foreign to their own legal experience. Eventually, the lawyer is worn out; the homeowner cannot keep paying the legal bills, and are left with some judgment they're unable to appeal. And that's when they call me begging for assistance. And there's absolutely nothing I can do.

And that's why I am convinced we must have some legislation that will provide some level of protection for homeowners who get into disputes with their boards that may

behave in an arbitrary and unreasonable manner. And let's make no mistake: Among the thousands of associations in the state, there are such boards, and they can inflict great harm on innocent people.

By the way, there are some laws already on the books in New Jersey that do provide some protection for homeowners. The problem is no enforcement, and no resources to enforce them. And I'd really like to acknowledge at this time in our audience, the one man in the state who has made some effort to enforce those laws, Ed Hanna man – (applause and cheers) – but Ed has a Herculean task as a one-man army to try to enforce the laws that protect homeowners. I should also mention that Ed was invited to speak here today on our third panel. However, his superiors and the Department of Community Affairs' bureaucracy have forbidden him to speak on pain of dismissal. So, Ed will remain in the audience and listen.

Now, let me be clear, I believe that most of the community associations in the state are well run by hard-working volunteers. My wife and I happen to belong to two such associations, one in West Orange, and one in Monroe Township. But unfortunately, that is not always the case. There is much truth to the old adage that power tends to corrupt, and some people get into positions of governance in these associations, and forgot that they are there to serve their neighbors, not lord over them. And if I might close with some words about the *Twin Rivers* case, itself, I think it exemplifies such abusive behavior by an entrenched and self-perpetuating board.

Two of the free speech issues in the *Twin Rivers* case have to do with what I consider the misuse of governing power to perpetuate incumbents in office. For years *Twin Rivers* had a regulation forbidding the posting of signs on homeowners' lawns and in common areas, but it was never enforced. Then in one board election an opposition group successfully campaigned in one election by posting signs around the community. The remaining board majority then decided to enforce the sign rule, and limit them to a sign in a flowerbed next to the house, where they were not visible to passers-by. That sign prohibition is one of the issues before our Supreme Court.

A second issue has to do with the misuse of the community newspaper, which is a common element belonging to all the homeowners. But the president of the association turned the newspaper into his political soapbox, denouncing his critics in

the most unflattering terms on the front page, and allowing them to respond only with a letter buried inside the paper. Of course, the overriding issues in *Twin Rivers* are whether these associations are constitutional actors, subject in any way to the kinds of constraints the New Jersey Constitution places on public entities, such as municipalities, and if so whether purchasers of homes in these communities waive their Constitutional rights by buying property subject to prerecorded deeds restrictions, buried in hundreds of pages of offering statements and governing documents, which nobody ever reads.

And even if the plaintiffs should prevail in those issues, as we did in the Appellate Division, it will mean very little unless the state enacts some kind of legislation to provide accessible and affordable remedies to homeowners who may be abused by their association boards. Thank you.

RENEE STEINHAGEN MODERATOR:

Our next speaker is Professor Evan McKenzie. He teaches political science at the University of Illinois in Chicago, and he also teaches a course in the law of comprehensive housing at the John Marshall Law School. He is the author of *Privatopia: Homeowner Associations and the Rise of Residential Private Government*, and numerous other publications. He was an expert witness of the Plaintiffs in the *Twin Rivers* case.

PROFESSOR EVAN MCKENZIE:

Well, thank you very much, and I'd like to thank Frank and the other sponsors of the conference for allowing me to be here. It's a real pleasure, and I think this is a very important conference, and I can't wait to hear from you, and to hear what everybody has to say about this. Since the title of the conference is "Problems and Solutions," I thought I would follow that structure, and I've identified what I think are five problems – what to me are the five most important problems, and I thought I would very quickly list them for you, and then expand on them and the little bit of time that we have here, and then see where this takes us.

The first problem, I think, is what I would call the structure of the relationship between the owners of units in common, just housing and their private government. This is a huge topic. I'm

going to come back to this in just a minute; that is, I think the relationship is structured in such a way that it creates a lot of problems inherently, and potential for abuse is very high, even though I agree with Frank that most associations are well run most of the time, the potential for abuse is enormous, and there's really nowhere for owners to turn.

Second, is the over-reliance on untrained and unsupported volunteers to do an enormous amount of work that would otherwise be done by municipal governments. These volunteers are an enormous source of unpaid labor, and they have virtually no institutional support, which leads them to rely heavily on attorneys, and we all know where that leads.

Third, the imbalance of legal power between the associations and their members, which is what Frank referred to in his talk; it's to me an enormous problem, because in an adversary system you cannot have one side getting high quality representation, and the other habitually not getting represented at all. This is just a recipe for disaster.

Fourth, is what we call in economics and political science the "Collective Action Problem," which has to do with the fact that the producer interests, that is the attorneys and those who supply services to associations, the contractors and so forth, are all organized, and it makes perfect sense for them to be organized, and there's nothing wrong with that; they should get organized; that's logical that all trades and professions in this society are organized. But the owners are not because they are consumers, and this has caused a problem in the policy process, so not only are owners underrepresented in the courts; they're underrepresented in the legislature, as well.

And lastly, is a rhetorical issue: The consumer sovereignty rhetoric, this notion that a deal is a deal, and you negotiated to buy this unit, and you signed a contract, and this sort of thing. And therefore, it's all a matter of private contract law, and the government and concepts of public law are totally irrelevant to that. These are all, I think, issues that have to be addressed.

So, let me go back to this now, and start with just quickly on the structure of the relationship. What we have are standardized contracts – standardized by large institutions, standardized initially by the Urban Land Institute, by the Federal Housing Administration, by Fannie Mae, by the Veterans Administration, mortgage banks – in other words, there's an enormous institutional overlay here, and these contracts are standardized

for reasons, because the property that they regulate is very valuable, and a lot of people have interests in it, and institutions have interests in it. But this standardization is a problem because if these contracts were being negotiated they'd all be different.

I mean, there are many different types of developments, and there are many different individuals within them, and if people actually did what the rhetoric says and they got together and negotiated a set of rules to live by, like the Mayflower compact or something, which is the sort of rhetoric that is applied here; you know, you'd think they sat down around a table and took out a quill pen and drew this all up, because we want to live by these rules. If that were the case there'd be a lot of variation, much more variation than there is in these documents, and people would probably be happier with them, because they would actually have subscribed to them, and negotiated them.

But these are very close to what we call "Adhesion Contracts," that is, "take it or leave it contracts," like if you parked your car someplace nearby, maybe you got one of those little tickets, and it says, "Please read this." Why? Can you negotiate it? What's the point of reading it? Where else are you going to park? Are you going to park in Hackensack or something? I mean, you have to park in certain lots, and this is the contract. It's a "take it or leave it." Did you negotiate this contract? Well, it's fine for parking your car, but how about for living in a house for 20 years? I mean, maybe there should be some concept here of remaking these contracts.

Now, there are various solutions for this, but what it leads to, I think, is a whole set of typical problems having to do with elections, covenant enforcement, architectural review, assessment collection, access to records, and then what Frank has worked on here, encroachment on really important, protected civil liberties. And this is all done in the name of contract, and contracts you really can't negotiate.

What would be some of the solutions? Well, we see the state level, a lot what I call "Process Regulation" the way associations do the things that they do. And potentially you could have low-cost dispute resolution procedures; you could create a regulatory agency of some sort, and this is one of the things, I think, we'll be talking about here today. And the *Twin Rivers* Principle: Setting certain things off-limits. In other words, saying there are Constitutional limits to what these private governments can

do, which I think is a very important thing to do. We have limits on public governments, and if we're going to have private governments doing the same things, it seems to me there ought to be some limits on what they can do, as well.

But these solutions lead to what you might call "Second Generation Problems." I mean, in California the process regulation is becoming so detailed that it's becoming a real challenge just for people to understand what the heck they're supposed to do. The election procedures in California now are astonishing; all the associations in California are supposed to hire election monitors now, and the model that they use for passing rules is modeled on that used by the California State Legislature, which is interesting.

So, there's a real challenge here. Can owners understand and implement, given that they have lives? Apart from running their association, can they actually understand and implement these rules? And I think legislators need to be very cautious about this. It's certainly an issue. And then you have the question of the cost of regulation, as well. Now, in my view the cost of regulation is a small one, probably relative to the risks that are involved with the kinds of liabilities that your association directors can expose you to. We can get into this, but I mean, there are associations in California that have made mistakes that have exposed the owners to multi-million dollar uninsured judgments to the tune of \$5-\$6 million judgments. And so, you might want to keep this sort of thing in mind when you say you don't want regulation, because regulation does cost money, but if you get a \$20,000 per unit special assessment, that's pretty expensive, too.

The second issue has to do with the over-reliance on volunteers. Even if there's no abuse; even if people are well-intentioned, there are issues of the competence of boards, generally, that simply result from over-reliance on volunteers to run the institution without institutional support, without oversight, and the state keeps burdens on people, and doesn't pay to train them. And so, the industry steps forward and might say, well, we'll train them, but then the question is will that be owner-friendly education or not?

I think, personally, there are some real dangers here, down the road, because of under-reserved associations. I've been talking of writing a little bit about this recently. Most associations probably don't have enough in reserves, and there's

a python that's swallowed a pig, you know? And the pig starts out up near the head, and inevitably it moves all the way down the python toward the end. Well, the end of python is obsolescence of major building components, and that simply will happen. Streets will wear out; they just will. That's all there is to it. The roof will wear out, and somebody – it's like musical chairs, somebody is going to get stuck with that liability, and I guess everybody's hoping it won't be them. But unless there's some sort of regulation about the quality of reserves, we can see what has happened in many, many old condominium developments in Chicago. We have a lot of old ones in Chicago on Lake Michigan, where \$20,000 special assessments happen all the time. There's nothing unusual about that at all.

So, the third issue – the imbalance of legal power – even if you change the law; even if you're successful in implementing these reforms, what do you do about the fact that the boards and their professionals sometimes don't follow the law? In other words, they just say, well, that's the law, or you think that's the law, well we disagree. We're not going to do it. You're entitled to the records, but you can't have them. You know, you just can't have them. If your only recourse is to turn to the courts and file a civil suit, if you lose you have to pay for the association's lawyer, and you can't get an attorney anyway. This is a real issue. And I think that what we need here, maybe, are some sort of private Attorney General provisions and reciprocity of attorneys' fees provisions that allow for the creation of a group of attorneys in many different states, who represent owners; right now there are very few of us. I do this on occasion, and it's a real challenge.

Then we have the collective action problem. What do you do about the fact that the producer interest in this society are very well organized, always? They are all well organized, not just in this area; it's not just the attorneys in this area. They're organized everywhere, and consumers are not. And this is a real issue.

You also have the problem that cities are getting fat off this. Cities are increasingly mandating the creation of homeowner associations in all new housing, and so they're getting fat off this in the short run, and the answer to all this is, I think obviously is organization; secondly, finding some sort of patron, that is, owner organizations probably need somebody who acts as a benefactor. Sometimes it's foundations, wealthy individuals;

maybe you should turn to George (Cerros), I don't know; that's just a thought. Or get established interest groups involved, and this is why I think it's very interesting that AARP has recently weighed in with its proposed Bill of Rights, because there you have what I'm talking about, which is an organization with resources that's able to really present a very comprehensive package that it's understood.

And, finally, the logic of consumer sovereignty: The problem here is it is often perceived that the people who don't like the rules are basically rich white suburbanites who want to go back on the deal that they made whenever it imposes costs instead of just benefits, or else they are crazy neighborhood malcontents who can't get along with anybody anyway. And this is the way the industry portrays people, and it is very difficult sometimes to get people to understand that most of the people who are – that this type of housing, the net had swept so widely now, that it's become the predominant form of new housing construction, all over the country, and that it cuts across all races, and ages, and income levels. I mean, in Chicago, we have redeveloped public housing in places like Cabrini Green, and Robert Taylor Homes, and there are people who are former public housing tenants living in these associations. They're not allowed to be members of the associations, because they're tenants, but they are living under those rules. And people need to understand this is not a case of a bunch of rich people; it's becoming everybody; everybody who buys a house, increasingly. And also, I don't think that the people who complain are necessarily crazy. I think that people have disputes over very important parts of their lives, and the way the rules are administered make them seem very angry at times, because it touches on things that are very close to their psychological well-being, their sense of security in their home.

Well, I think that people, academics and other law professors, and so forth, have to start calling attention to the public aspects of this; The fact that what we have here is a massive privatization of local government, and the fact that municipalities are driving this to a large extent now, that this takes on some increased public dimensions. And of course, we need a lot more information about this. We need to collect more data, and it needs to become more publicly available, so people can understand what's really happening.

What would happen if nothing is done? I'll give you three potential scenarios: One is I think it is – just as a thought experiment, it is possible that this type of housing, this housing sector could suffer major failures. I mean, the savings and loan industry failed; it's possible that an institution can fail. And I think people, at least as a thought experiment, ought to keep in mind that it could happen. You could have what I call failure from without; that is collapse of demand through just bad press and people thinking I don't want to live in one of those associations. And that can happen, although in many cases you have no choice, but still I think that bad press, and the industry, by the way, is very concerned about this issue; they're very concerned about it.

Secondly, a failure from within, that is collapse of the institution due to financial mismanagement and/or failure of volunteerism. The cover story in CAI's publication, *Common Ground*, a few months ago was the failure, the collapse of volunteerism in associations, if the same people have to serve on the board all the time, because they can't get anyone else to do it. And so, again, you know, these are real legitimate concerns, and you can also have these infrastructural issues that I talked about. This can happen on a wide scale; however, that's just one possibility. Another possibility is a gradual reform of the institution, and over time it becomes a working part of the inter-governmental system through reform efforts, like the kinds of things we're talking about here. And I think that's a very likely scenario, but it could be a bumpy road.

And lastly, the Libertarian theorists like my friend Bob Nelson and other people could prevail, and common interest housing could come to replace municipalities, all over the country, so we have an entirely privatized set of cities all over the country; nothing but private cities everywhere. This is something that has been speculated. I don't think it's likely to happen, because I don't think that the government is going to go away. I don't think that local government is going to go away, but I do believe that over time it's going to become necessary for state, county, and municipal governments to get involved in these efforts, because right now what we see in the state of legislatures around the country is the owner groups against CAI or other industry groups, and then other professional organizations, as well. And I think increasingly, it's going to have to be a three-way conversation, where the municipalities

begin to understand that if they don't do something other than view this as a cash cow they're going to be saddled with increasing demands for bail-outs and other conflicts, such as requests to takeover our streets, that sort of thing, that it will become more and more of a municipal and county and state-level problem unless they get involved in some of the reform efforts. So, I hope that we can take some of those issues and some other issues forward, and discuss them in the remainder of the conference. Thank you.

RENEE STEINHAGEN MODERATOR:

The last speaker on this panel is Professor Paula Franzese, who is a professor of law at Seton Hall Law School, and she's currently chair of the Governor's Commission on Ethics.

PROFESSOR PAULA FRANZESE:

Good morning. I am immensely delighted to be with you today. This is truly a spectacular occasion. When Justice O'Hern and I were appointed by Governor Codey to serve as Special Ethics Counsel, we quickly came to the realization – certainly within the context of the reform of state government – that sunlight is, indeed, the best disinfectant, that to the extent that one can cast light upon abuses, and excesses, and mismanagement, and the trampling upon those, who as Professor McKenzie and Professor Askin state so eloquently, tend to be without the upper hand, as we let that sunshine in, solutions can be found. Today is an immensely important day, and I wish to join first in thanking you for finding the time to be here, to vet so many of the relevant issues. I thank you, as well, for working collectively with us to find solutions to a larger dilemma.

It's referred to as "privatization." It's the shift from the government provision of so many services to the more privatized realms. The homeowners association phenomenon is a very significant manifestation of privatization. It is, indeed, a goliath-like form of manifestation with more than 60 million Americans now living in some form of common interest community, with more than 250,000 homeowners associations now in place across the United States, this is no longer the

residential domain of the more affluent, of the more privileged, of exclusively the haves.

This is, indeed, a phenomenon, a reality of residential living that is crossing all economic strata, all race lines, all ethnicities, and indeed all areas of geography. How homeowners associations continue to function is a matter that commands our individual and collective attention, because when you think about it, where we live, the communities that we're building or not building has everything to do with what it is, and who it is we are to become as a nation.

So, where are we headed? Yes. As the professors have made plain, so many of these homeowners associations are functioning quite effectively. But many are not. The problems that plague this arena have to do first with this notion that one size does fit all. The declarations of covenants, conditions, and restrictions that residents are essentially forced to acquiesce to with very little, if any, room for negotiating with very little, if any room for bargaining, with very little knowledge of their most essential terms, tend to be onerous to put it modestly.

Very extensive covenants; very extensive rules have been devised to regulate everything from whether pets are permitted to the weight restrictions to be imposed on pets, to the colors of one's shutters, to the posting of signs, to in fact the landscaping, to the permissibility of the basketball hoop, to in New York City the permissibility of wok cooking, because wok cooking can be stinky over time, and thereby offensive to some residents.

This notion of excessively regimenting, and regulating is rooted, I think, in an impulse, at least initially, by developers and other architects of this larger phenomenon to promote a sense of order, a sense of predictability, a sense of cleanliness, a sense of control, a sense of the preservation of property values, a sense of residents' and prospective buyers' parts that we'll all be living in a place that's nice. And wouldn't it be nice to live in a place that's nice?

We live in increasingly frightening times, don't we? We live in times where government seems to have failed us in getting the job done right. We live in times where crime rates are on the rise. We live in times where the investment in our domain, in our home, is our one and only safe harbor in the changing economic winds and climates. Wouldn't it be nice to live in a place that's nice?

And that question takes on almost tragic poignancy when one answers the lore of the nice has yielded oftentimes anything but that. The promise of community, rooted in the essential question, “How are you doing, my neighbor?” has been perverted into in too many vicinages, “And what are you doing, neighbor?” The patterns of excessive regimentation administered by governing boards that are not trained, that can devolve into autocracies, rather than participatory democracies where power is cultivated for the sake and virtue of amassing power. They don’t work. Finding solutions matters, because community does matter. Our essential interconnectedness, where we live and how we choose to do that, does matter.

If the one size fits all archetype for covenants, conditions, and restrictions is flawed, then how should it be scaled down? That’s an important question for us to think about in the collective today. If we have so much to learn, as I think we do, from the model of government reform, the analogs on the government side to what these privatized forms of government are doing or trying to do, then what are the lessons to be learned?

Well, certainly in the context of reforming homeowner association governance, transparency must be the norm. The Open Public Meetings Act and Open Public Records Act has to become a basis for imposing access upon residents who wish to know about the management and the ministerial and the financials to attend their particular development. Access needs to be essentially an integral part of the promise of any participatory system of governance. To the extent that we have something to learn from the manifestos of ethics reform, how about mandatory training for all those who do wish to serve on boards, and mandatory fiscal responsibility training almost the equivalent to a Sarbanes-Oxley form of corporate governance model? How about the notion of audits, financial audits at the behest of residents? How about those audits occurring if not twice a year, then perhaps even on a quarterly basis? How about the possibility of reporting and mandating that reporting to residents take place on a regularized basis? We are making great strides, I think, within the context of government reform. If indeed the phenomenon of privatization is to persist, and we are to be delighted sometimes and frustrated other times by its manifestations, how might we in partnership with our public sector equivalents, make real the promise of community, that

the very lure of the common interest community holds out? It is, indeed, an essential question.

How many of you saw a few years ago the very beautiful movie, "Contact"? Jodie Foster was in it; it's based on the Karl Sagan book. In that movie, the one quintessential scene, the apex, occurs when Jodie Foster is able to transcend all time-space barriers, and finds herself having communicated with a far more sophisticated alien life form galaxies away, and the alien life form manifests in the shape and guise of Jodie Foster's late dad, for whom she had tremendous affection, so Jodie Foster's trust is instantly earned. As the alien life force in the shape of her deceased dad approaches, Jodie Foster quickly learns this is actually the immense intelligence of that faraway galaxy. She becomes frightened, but then her scientist's deductive mind kicks in, and she asks the question, "What's the point of it all? What do I go back and tell our people, who struggle every day trying to derive meaning from their associations, from their lives?" And the immensely intelligent being responds, "We haven't figured out the point of it all, but we'd like you to tell your people this: The only contexts, the only places in which you might ever help to derive meaning will arise from your relationships and from your connections with each other. What you do for each other, you do for yourselves. What you do to each other you do to yourselves."

What are we doing? What are we doing? What is it that is somehow being done to us? And how do we work together to be part of the solution that we all aspire to? With those as the bigger questions of the day, I am delighted to conclude and look forward to hearing from you, learning from you, celebrating the promise of this day with you at its conclusion. Thank you very much.

Second Session:
*Homeowners Speak Out:
The Problems Of Private Governance*

MARGARET BAR-AKIVA, MODERATOR:

Thank you. Good morning, and welcome to the second panel of today's conference. My name is Margaret Bar-Akiva, and I live in a planned unit development called *Twin Rivers* in East Windsor. It is an honor to be moderating the homeowners' segment of this program today. During the past couple of weeks, whenever I felt nervous about this conference, I reminded myself that nothing could be more nerve-wracking than the seven-hour deposition we had to sit through over our storm door. The lawsuit was filed, despite the fact that the ADR Committee had unanimously decided in our favor, saying it had found no evidence that architectural standards on storm doors had been legally adopted. Shortly thereafter, the board disbanded the ADR Committee, and put a new ADR procedure in its place. The board's explanation for abolishing the in-house ADR Committee was that the members had no training in resolving disputes. The fact that one of the committee members was actually a professional mediator with the New Jersey courts was clearly of no interest to him.

In place of the ADR Committee, the board instituted a new procedure, which took the form of an eight-page resolution. It requires owners to go to the American Arbitration Association, pay an initial filing fee of \$150, and leaves the cost of the entire process open-ended. But the worst part is that the new resolution prohibits so many issues from even being brought to ADR, that it renders the new procedure worthless. It excludes, for instance, all issues involving assessment, regular or otherwise, all issues pertaining to elections, and believe it or not, all violations by the board of its governing documents or even state law.

The year my husband and I were sued was also the year we had formed the Common Interest Homeowners Coalition, a statewide organization dedicated to bringing about democratic reform in homeowner associations. Two of its founding members were Doctors Lois and Sam Pratt, whose foundation has made today's conference possible. While I was honored to serve as its founding president, it was the Pratt's vision, their scholarship, and their unfaltering courage that set the stage for the social movement currently underway. The homeowners on this stage exemplify that courage and tenacity. Their stories, as well as the stories belonging to so many of you in this audience,

have helped expose the dangers of these private governments, and have set in motion the wheels of true reform.

We will now be going to the stories of the individual homeowners. Our first speaker is Janet Huet-Cleary. Janet lives in Rossmoor, an age-restricted community in Monroe Township. While Janet loves her community, she has found herself becoming an activist during her retirement years in order to protect her rights and those of her neighbors.

JANET HUET-CLEARY:

Rossmoor is a community of 3,000 residents and 15 separate condo sections. At Rossmoor, owners are rarely informed properly as to the meaning of a document, and are often misled about the intent behind management's actions.

At one meeting, the assigned use of a clubhouse room was going to be voted on by a committee of directors. The room in question had been used by a social group since the clubhouse was built more than 30 years ago, and was taken away from them on what they had been told was a temporary basis. When they learned that they would not be permitted to use the room again, it caused quite an uproar. Many owners attended the meeting, but were not permitted to speak before the committee proceeded with the vote, despite the fact that Resolution 91-18, of management's bylaws, which are read into the minutes before every committee meeting, states that owners will have the opportunity to speak publicly upon any matter prior to a vote being taken.

On this occasion, the chairman of the committee told the owners that they should hold their comments and speak at the end of the meeting. So, the owners sat and waited their turn, as the committee voted. The vote went against the wishes of the owners who were present. The chairman then stated that the meeting had run too long, thus ending the meeting, and depriving the owners of the right to speak.

A few days later, the administration distributed a three-page legal opinion upholding the chair's actions. The memo indicated that both the resolution and *Robert's Rules of Order* may be ignored by any chairperson or officer. Evidently, management can legally deprive us of our right to speak by disregarding their own bylaws when it suits their purposes.

Then, in 2003, management proposed amending our bylaws. Since it was written in legal language, we relied on our management for guidance. We were strongly encouraged to vote in favor of it, which we did. What we didn't realize is that we had unwittingly voted in favor of amendments that transferred the responsibility of very costly repairs to the condo owners. It took a few months for owners to realize that we were now responsible for repairing the piping in the walls and under the concrete floors, as well as other utilities. Some of us hired an attorney, who wrote a letter to the directors stating that they did not fulfill their fiduciary duty. The attorney noted that as part of the directors' fiduciary duty, an amendment to the deed must be properly authorized, and cannot involve fraud, self-dealing, or be unconscionable. He also said that because the owners were not properly informed about the maintenance and repair obligations associated with the amendment to the master deed, it was unconscionable and not properly authorized.

Now, four years later, the majority of the condo sections have returned some, but not all of the cost of repairs back to management. It certainly seems unfair that in addition to the time spent over the years to spread the word about these issues throughout our community, we also had to spend thousands of dollars for an attorney to assist us. It is even more upsetting when you realize that during all this time, we were paying for management's legal fees through our monthly fees. Steps must be taken to protect our rights as citizens, and to insure that the people who manage these communities do not deceive the owners. Thank you.

MARGARET BAR-AKIVA, MODERATOR:

Our next speaker is Joe Randazzo. Joe is from Greenbriar Oceanaire in Waretown. Joe served as the former chair of the Finance Committee of his association.

JOE RANDAZZO:

I would like to tell you a very interesting story about our community and its unique problems. As everyone knows, moving is one of the most traumatic experiences in one's life, and it is magnified even more when you're a senior citizen. The last thing we were focused on was reading and understanding

the Public Offering Statement. That's the Bible for what governs your community. You receive this when you purchase a home. The Public Offering Statement in its current form has the following problems: It contains approximately 200 pages in lawyer-like language that the buyers don't understand. It also contains many budgets that are understated, and difficult to interpret. In short, the Public Offering Statement favors the board, and the developer, and there is very little protection for the homeowner, once you've signed it and you receive the document. The content and rules are unclear, outdated, and difficult to change.

Now, I'll tell you a little bit about Waretown. Waretown is a very small town that's not known, and very difficult to attract potential buyers. Now, most communities like ours, which, when finished, we'll have about 1,425 homes, and we have a large clubhouse, I believe it's 38,000 square feet, and we have an 18-hole golf course. In the normal Public Offering Statement, the builder pays the difference between the expenses and revenues with a builder's deficit check that is not repayable, and the developer has control of the board and the finances. That's your normal Public Offering Statement. In addition, the golf course and the clubhouse are normally built in the last three or four years, so the expense of carrying those facilities does not occur in the beginning.

Now, because Waretown was so unattractive, and they needed some marketing ploy, they decided to build the clubhouse and the golf house in the first four years. The problem is with so few residents, how could you collect enough monthly maintenance to support these entities? And these two entities cost \$1.6 million per year to maintain.

Now, our POS, what the builder did was very unique; it does not contain a builder's deficit check. What it contains is a loan from sponsor, where they lend you the money to make up the differences between the expenses and revenues, and then you pay it back at prime plus one over a 15-year period. What that means in finance terms: For every dollar you borrow, you pay back \$1.85. This loan was not fully disclosed in the Public Offering Statement, and not understood by the overwhelming majority of the homeowners. The loan was estimated to cost the association \$6 million, so what the builder did, he came up with this unique way of having the homeowners pay the operating costs for his marketing ploy. The developer still controlled the

board, the budget, and the finances, as if he was donating a builder's deficit check. And he did not contribute one cent to the operating budget; not one penny. The POS also positions the developer, as both the lender and the borrower, while he still controls the board and the finances. How would you like to be a bank, and have someone walk into you and say, "Manage my expenses, and you know what? I'll leave you alone now." And what the bank does is they manage your expenses, and they don't care if they go high, because they're going to lend you the money, and get back \$1.85 for every dollar. Well, that's kind of strange.

This entire situation just defies logic, and makes one wonder how this Public Offering Statement was approved with this major conflict of interest. This is a major conflict of interest, because you're being rewarded for doing a terrible job of managing expenses by increasing the loan. It is my opinion that if this Public Offering Statement was successful, it may have been used to finance other communities at the expense of the homeowners. It is also my opinion that this Public Offering Statement was unethical and maybe even illegal. While senior communities are socially very healthy, and many new friendships are created, they also put us in the position to be taken advantage of by the developer, the board, and government via fees and other expenses due to our minimal knowledge and protection.

Well, we developed a strategy, and opposed this POS eEven though we were told, "you signed it, and it's legal." What we did was we pushed for the creation of a Finance Committee, educated the community on the issues, and we purchased develop stock to use as leverage with its corporate officers, because the board ignored our concerns. Tthat was very effective. We also formed a group to negotiate with the developer, and named it the Concerned Residents and Shareholders. We sought assistance from Senator Connors, Governor Corzine, and various state agencies. We also challenged the developer's clear and full disclosure practices, his financial and budget practices, his fiduciary responsibilities to homeowners, his governing methods and processes, and finally, his zero contribution to the budget. We challenged all of that with hundreds of letters. The results after two years of exchanging communications via registered letters, telephone calls, and face to face meetings with our developer, various

Senators, the Department of Community Affairs, and the Office of Legislative Services, this complex issue was finally rectified as follows: We received letters from the DCA basically stating the developer will contribute its fair share to the common areas, i.e., the clubhouse and the golf course. And it will be retroactive to the beginning. Our community realized a \$6 million savings, or approximately \$4,200 per home. Various newspapers published articles about our story and hopefully, it educated and assisted some other communities. This was accomplished due to the efforts of Senator Connors, who was our champion and quarterback; Senator Rice, who wrote a letter to the DCA requesting immediate action; the OLS lead counsel, who provided legal research; the (PRED) Unit of the DCA, who assisted in correcting the Public Offering Statement; and the concerned residents and shareholders whose strategy, strong resolve, efforts and persistence overcame all the obstacles. It was nice to see government work for its citizens, and our residents recaptured some faith in government and its processes. I have a couple of recommendations.

The first one is: the developer should never, ever be in control of the board. Their focus is as a part-timer at best, and they do not have the same vested interest that you do. They're going to finish the homes and go on. You're going to live there forever. You must establish a mandatory Finance Committee. You must check what the community manager is doing, and what the board is doing. You need balance. And the associations must take steps to prevent themselves from becoming a cash cow for the state or any other entity. And I would like to see all the support organizations, like CAI, CIHC, and the other one become one agency that helps the homeowners, and have it contain some judges that could legally arbitrate disputes where you don't need attorneys. And I thank you for your time.

MARGARET BAR-AKIVA, MODERATOR:

Our next speaker is Emily Meyers. Emily lives in a (self-active) community called Four Seasons at Mapleton, which is located in Columbus. Emily is a grandmother to 11 children, all of whom are 11-years-old or younger.

EMILY MEYERS:

My name is Emily Meyers. In June of 2005 we decided we wanted to install a solar electric generation system on our home, because of its well-known economic and environmental advantages. I will give you the short version of the very long and frustrating events that followed. Since this project would involve a modification to the exterior of our home, we needed approval from our Architectural Control Committee. A solar panel installation was not covered in our association rules and regulations. It was neither specifically prohibited nor allowed. We included all the information necessary about solar in our application for the Architectural Control Committee meeting on July the 22nd. On August the 10th, we received formal notification that our application had been disapproved by the Architectural Control Committee on the basis of aesthetics; “No addition or modification to any home or any other structure shall be permitted, which is deemed to be inharmonious with the character of the community.” Throughout the month of August, we entered a series of discussions with the ACC and the Board of Trustees that concluded with a formal appeal to the Board of Trustees to overturn the Architectural Control Committee’s recommendation. On September the 21st, we got an official letter from the board dismissing our plea. We appealed the board’s decision under the New Jersey Alternative Dispute Resolution Procedure, and we were referred to our Judiciary Committee. This was the first time anyone in our community had involved the ADR procedure, so there were a number of false starts in implementing the hearing before it was finally scheduled for October the 24th. The evening before our hearing, on October 23rd at 10:00 p.m., this hearing was cancelled by the Judiciary Committee because the head of the Architectural Control Committee, who had just been informed that his presence was required the next day, was unable to attend. The ADR proceeding was held on November the 7th, and we made a detailed presentation on the system, including its environmental advantages. On November the 21st, the Judicial Committee rules against our appeal, and it was a very narrow ruling, simply upholding that the Architectural Control Committee acted within their authority, and making no statement on the issues involved. They referred the decision back to the board.

Verbally, the board said that they would approve the system with some restrictions and guidelines. We emphasized that time was critical. The New Jersey Board of Public Utilities offered a substantial rebate when we first applied for solar in June that was valid for six months. If we did not receive our approval to install by the end of December, we would be ineligible for the rebate, making the installation far less attractive, economically. At this point, we went into a major panic mode, and consulted an environmental attorney. He thought our case was strong and that we would probably prevail, but the case would end up in court. On the basis of this talk, we decided to go ahead with the installation, and risk having to remove it later, if we could not get approval. We then discovered another road block. The township would not issue a building permit without the approval from the Board of Trustees.

So, the clock continued to tick even louder. On December the 3rd, we instructed our attorney to send nasty attorney letters to the association and the board members. On December the 10th, they came out with reasonable guidelines, so we reapplied to the Architectural Control Committee, stating and demonstrating how our installation met these guidelines. On December the 20th, our application was approved, and we got the letter we needed for a building permit. On the basis of construction having begun, we were able to get an extension from the Board of Public Utilities and our system did install in mid-January of 2006. Although our story does have a happy ending, I do need to stress to you here today that the citizens in New Jersey living in homeowner associations need to do something to prevent these types of situations from arising. No one, no one, should have to endure six months of frustration and panic to implement a system that is beneficial economically and environmentally. Thank you so much for giving me this opportunity to present my situation.

MARGARET BAR-AKIVA, MODERATOR:

Thank you, Emily. Our next speaker is Gina Riggi. Gina lives at Galaxy Towers in Guttenberg. She is the former chairperson of Community Cable TV, Channel 26.

GINA RIGGI:

Hi, everybody. Thank you. I just wanted to say before I start that our condo complex has major problems, an \$18 million loan and rising, and I was on the Executive Counsel of the board for seven years, and I resigned out of protest. I do own another condo down the shore, and I am on the board there. It costs \$700 to do a mailing at our condo to the 3,000 residents, so I'd like to ask you when a condo association comprised of nearly 3,000 residents allows for only 30 minutes per year at the annual homeowners' meeting, where owners can express their opinions—is that truly freedom of speech? Our condo association controls our community access television channel, Channel 26, a channel which owners strongly prefer would be used as a tool to promote open communications within our association. After all, these owners' monies are used to pay for supplies, salary, and cameraman for Channel 26, and a television broadcast that repeats four times daily, seven days a week, is a perfect way to inform residents of the workings of the association. Instead, the Board of Directors chooses to manipulate Channel 26 to convey their one-sided message that all is well. They refuse to give equal time to owners who wish to question or contribute to our association, nor will they present the pertinent issues dealing with construction projects, maintenance of our complex, or even fire safety. The board calls Channel 26 a feel-good channel that shows Galaxy parties and events predominantly featuring the Galaxy Club and committee members who are their troops to get out the vote for the board's favorite candidates. You see, it's good to have these friendly faces on TV so that owners can relate to them, come election time.

All meetings of the Board of Trustees are broadcast live over Channel 26, and then rebroadcast daily until the next board meeting, but only board members are allowed to speak at the meetings. If a homeowner attempts to speak, the meeting is halted and the cameras are shut down. Thus, incumbent board members are allowed to use the meetings as their soap box, and opposition voices are not allowed to be heard. Sometimes board members defame their critics, who are not allowed the right of response. In fact, the cameraman of our feel-good channel is instructed to highlight the board's preferred candidates throughout the election process, and told to keep other

candidates off-camera. And during any taping, the cameraman is given instructions to make tape changes at crucial moments, thus keeping the revealing questions or incidences from the viewers.

As added insurance, many a libelous statement about certain owners has been made throughout the year at monthly board meetings, annual home meetings, meet the candidates, and at the annual budget meeting. These individuals' viewpoints are totally discredited, and their reputations are discredited, as well, by the board members, thus insuring a shoe-in for the board's candidates at election time.

In the past, the tallying of the votes of our Board of Directors elections used to be videotaped. However, that practice was discontinued to avoid the existence of an historical reference. The board even censors fellow board members on our feel-good channel. If they strongly exhibit a difference of opinion and have the courage to speak up at meetings, there's a recess called, the filming is stopped, the parties in question are given a reprimand off-camera, the security staff is called in, and they even threaten to call the local police on the board members. So, not only does the board control discourse through their monopoly of Channel 26, but it forbids residents from communicating with each other by knocking on doors, or even putting flyers under doors.

Historically, strategic and repetitive defamation has been aimed at any resident who has an opposing viewpoint or dares to ask how their maintenance money is being used, yet homeowners are not allowed equal time on Channel 26 to rebut. The board calls Channel 26 a feel-good channel, but owners tell me that they'd feel a whole lot better if they knew what was going on with their money, their home, and their investment. Thank you.

MARGARET BAR-AKIVA, MODERATOR:

Thank you, Gina. Our next speaker is Bill Giovannetti, who is a resident of Locust Hill Adult Community in Hamilton Township. He's part of the Concerned Citizens Group in his association.

BILL GIOVANNETTI:

Thank you for having me here to speak. My name is Bill Giovannetti. I'm also representing the twin community, which is Evergreen. We're about 250 residents; they're about 500, the same builder, the same homes, the same problems. The problem at Locust Hill began with the developer. After many people bought their homes, the developer announced plans to build a high-rise residential building on the land designated for a mini-mall in our Public Offering Statement. When we tried to prevent the developer from going forward with this plan, the township ignored us, because we were not professionals and could not speak. The developer's plans were approved shortly thereafter. Also, the quality of the construction has caused many problems. The sidewalks in our community have been replaced twice since 2002, when Locust Hill was first opened. I, like the other homeowners in the community, have a list that is pages long of home repairs that needed to be made repaired by the developer.

As you probably know, having a good first board is crucial in part because they are in power so long. In our case, they were in power for four years. Unfortunately, at Locust Hill we were not so lucky, and it caused a variety of problems. Some of these problems are easily fixable, while others are not, making it hard for the new board members to get on with our community running properly. For example, the board's actions appeared to have been made in the interests of the developer, and not the homeowners, as a result.

Locust Hill residents could be burdened with paying to repair the roads, which were not properly paved. The board entered into a lease with the developer on terms that appeared to unfairly take advantage of the developer at the expense of the community. Locust Hill will be left with a clubhouse that cannot accommodate all of the residents of the community. We are still working on this with our transition. Evergreen has not signed off on it after eight years; we're five years still into our transition.

Similarly, the board members used the positions to benefit themselves and their family members without thinking about the needs of the community. The board initially hired a board member's daughter to be the attorney for the board, but she was forced to withdraw due to a conflict of interest. However, she

was replaced by the same board's member's future son-in-law. The board also awarded the landscaping and snow removal contract to another board member's son, who was initially the lowest bidder. The son agreed to lower his bid, but as a result, cut back on the service he's offered to the community. And old member installed a wireless Internet system without resident approval. Now the board member is no longer on the board; the board member refuses to give the new password to use the computer system. To make matters worse, many of the homeowners cannot use the system because the signal does not reach their homes, and yet, they're paying for the cost of it.

In response to all these problems, some of the homeowners have formed a group called the Concerned Citizens of Locust Hill. One of the goals of the group was to get some new board members elected. Initially, the group met resistance from the board. The board would not let us distribute information to the homes in the community. We were unable to get access to the community newsletter to publicize our views. However, with legal assistance and pressure, we were able to get the board to back down and allow a fair board election. Because of the elections, board members of concerned citizens of Locust Hill are now sitting on the board, and we are working very hard to undo some of the problems created by the first board. For example, the board was able to hire a new lawyer to represent the community for future legal matters. The board also hired a new landscaping and snow removal company. Community members now have more faith in the board because they feel that the board is looking out for them.

In addition to that, I can recap a lot of other issues. Also if it sounds confusing because this has revolved for five years, anyone is welcome to call me, just to look at the documentation, because it's all documented. My phone number is 609-587-7215 – 609-587-7215. When we asked about why the homes were not constructed well, they told us we have tract homes, whatever they mean, right? And through this whole process, I unfortunately, because I spent a lot of effort and time with the Concerned Citizens, was taken to court on false arrest charges by the board member that resigned, who is now the future son-in-law, and is our lawyer. Naturally, he used his lawyer, free of charge, to take me to court, but the case was thrown out of court. So, that's been an issue in itself. Also, like I said, we're working on the transition, and we hope we can move ahead on that. But

again, this is quite confusing, and I'd be glad to talk to anyone as to how we proceeded on this. I really do appreciate your time. Thank you.

MARGARET BAR-AKIVA, MODERATOR:

Thank you, Bill. Our next speaker is Jackie Garfunkel, who comes to us from a senior community in Freehold. She has been in her condominium since this condominium community opened 20 years ago. Last year she was elected to the Board of Directors, and is now serving as the president.

JACKIE GARFUNKEL:

The year 2005 – 2005, was a time of strife in our senior community because our lawyers, who are paid by the residents, led our board down the wrong path on several issues. I led a group of volunteers who had created and published a community newsletter for 17 good years at no cost to the residents. After printing a letter to the editor from a resident complaining about conditions at the pool, the board had the law firm send me a letter claiming that we could not criticize the board by editorial or letter to the editor in the future, or I would be removed as publisher. I signed the agreement under protest, and kept to it for the next five months.

During that time, after repeated harassment by the board, the staff and I resigned, rather than take this treatment. The board then took over the newsletter for the next three years, up to date. Shortly afterward, this same board announced to the community that they had signed a huge master insurance policy on the exterior maintenance of our detached single-family homes with no prior discussion at meetings. Our lawyer stated publicly that, in their opinion, this policy was necessary, and in concert with the Condominium Act. Everyone in the community was told to change their insurance to condominium insurance, rather than homeowner insurance. The board then added a fee for maintenance of the exterior of our homes. Everyone now paid an additional \$65 a month at this point.

Needless to say, the residents were in an uproar about the entire program. We had taken care of our individual homes for 19 years in accordance with our master deed, which states that we are responsible for the repair, maintenance, and replacement

of the interior and the exterior of our detached, free-standing homes. We are a condominium only in that we own our homes or units, but we own the land in common.

A committee was formed to research and fight the issue. It was David versus the Goliath board. We petitioned the community to recall the board, according to our master deed, and we got a 70 percent vote to try to force their hand. At the end of the year, a summary judgment opinion in a neighboring community required the board to recall the insurance and maintenance program. If another community had not been fighting the same issue, we would have had to come up with the court costs to fight the fees that our own lawyers had imposed. Everyone in the community now changed their insurance back to homeowners insurance. In the next election, I ran against the board president, and won by a landslide. I'm working hard with some new and past members on the board to restore harmony to the community. This year, the past editor-in-chief of the newsletter, who had worked with me for 13 years on the volunteer newsletter, won a seat on the board, and I'm happy to report that we'll be doing the newsletter again.

MARGARET BAR-AKIVA, MODERATOR:

Thank you, Jackie. Our next speaker is Martha Gomez. Martha is from Clearbrook, an adult community in Monroe Township. She's president of a grassroots organization called Residents for Equity, and has been a member of CIAC for eight years.

MARTHA GOMEZ:

I wish to thank everyone who made this conference possible, affording me the opportunity to address you today. My name is Martha Gomez. I am a resident of Clearbrook, and age-restricted community of 2,026 units in Monroe Township, New Jersey. I'm also the president of the Clearbrook Residents for Equity, a grassroots organization established in September of 1999.

At an open meeting in April of 1999, our board advised that each unit owner was going to be assessed \$1,680 to refurbish the clubhouse and install a cold cover over one of our outdoor pools. The reason for the cover was so that the residents could

swim in the winter, but very few did. I might add that the board did not take into account how very expensive it would be to maintain such a facility. The initial cost of the construction project was over \$3 million.

After the board announced their plans, Clearbrook unit owners were not afforded the right to discuss or to vote on the expenditure or the special assessments. CRE, Incorporated was founded as a result of this undemocratic decision. In fact, when our group wanted to hold a meeting to discuss the assessment, the board refused to let us use the clubhouse. As a result, we had to assemble at a local movie house, where 700 people attended, some in wheelchairs. Notice of the event appeared in the local newspapers.

Our bylaws allowed unit owners to propose amendments to it if 500 signatures were obtained. The CRE collected 996 signatures, and proposed an amendment that we would require 51 percent of all unit owners to approve any proposed expenditure over \$175,000 for capital improvements. The board ignored our petition. We had no choice but to raise money, hire a lawyer, and go to court. The judge ruled in our favor, and ordered that our bylaw amendment be put to a vote in the community. Even though we won the amendment, the litigation cost the community over \$100,000.

In 2002 we re-introduced another bylaw amendment to permit unit owners to vote on a yearly common operating budget from May to November, when most residences are residing in Clearbrook. We were ignored once again by the board. Unfortunately, we simply did not have the funds to go to court at that time. Bottom line, the New Jersey Condominium Act introduced in 1969 has to be revised and amended. Our experience showed us that people living in adult retirement communities – condos and homeowner associations – are at the mercy of their boards. The S-1608 Turner-Rice Bill, known as “ORCID,” which has been introduced in the New Jersey Legislature needs to be passed. Once we enter our respective communities, we leave our Constitutional rights behind.

I might add that the paper written by the late Dr. Sam and Lois Pratt – may they rest in peace – entitled, “The Search to Improve Living in Residential Community Associations,” should be enacted as a Bill of Rights in all homeowner association. At the beginning of this 11-page document, it has a quote from Thomas Jefferson: “A Bill of Rights is what the people are

entitled for against every government on earth, general or particular, and what no just government should refuse.” Thank you.

MARGARET BAR-AKIVA, MODERATOR:

Thank you, Martha. Our next speaker is Bob Gulack from the community of Radburn in Fair Lawn. He is a lawyer and union leader with the federal government. For the last three years he has been a leader in Fair Lawn’s (inaudible words) movement, and was elected last year in Bergen County Democratic.

BOB GULACK:

The Radburn community has been located in Fair Lawn since 1929. About 3,000 people live there. Radburn’s use of superblocks has been so influential that the community was recently designated a national landmark by the United States Department of the Interior. The common facilities are owned and operated by the Radburn Association. Radburn homeowners are obligated to fund Radburn’s million-dollar a year budget, and they have a right of prior notice before any of the common areas are sold off. A majority of property owners can veto such a proposed sale.

An important thing to understand here is that the document outlining this obligation to pay the assessments, and guaranty the prior notice, that’s called the “Radburn Restrictions.” It’s prominently featured on the official Radburn Association Web site. But there’s another document. It’s called “The Radburn Bylaws,” and this is the document that explains that our community is not controlled by the people who live there. It’s controlled by about 50 of the adults, 5 percent of the adult population. The Radburn Association does not put the bylaws on its Web site; it does not provide these bylaws to people before they buy homes or after they buy homes. The Radburn Association, thus, does its very best to conceal that Radburn is governed by a self-appointed oligarchy.

What I’m about to explain is unlike, I believe, everybody else here, we don’t have elections in Radburn; only one of the nine Radburn trustees is selected by the community, following an open nomination process. In addition to that one freely-selected

trustee, the community votes to fill six seats on the Board of Trustees, but in these elections, the community is only allowed to choose among candidates pre-selected for the community by the sitting trustees. They get to pick the candidates; we get to choose which ones we like. When write-in candidates beat the candidates printed on the ballot, the write-in votes are thrown in the garbage, even when the write-in candidates win two-to-one. The association then takes the defeated candidates and seats them on the Board of Trustees. The remaining two trustee seats are filled with people selected by that small group of 50 or so former and current trustees. Only these 50 people are given the title “members” of the Radburn Association. The other 1,000 people, who just happen to have bought homes in Radburn, are not members. You don’t get to be a member until the club selects you to be a member of the club. Under the bylaws, our community has no right to amend the election procedures for Radburn trustees, so as to allow for community self-government. Only the trustees can change the election rules, which guarantee the current trustees the right to select their successors forever. The trustees have always refused to end their control over the nomination process.

Under the current self-appointed government, hundreds of thousands of dollars were spent by the association in 2003 to 2005 without any notice given to the community whatsoever, and it’s still unclear exactly where all that money went. The community only found out about this secret spending by getting IRS documents after it happened. The secret spending all but wiped out Radburn’s financial accounts after nearly 80 years of existence. The self-appointed trustees also signed in 2004 a contract attempting to sell off one of our parks, so a developer could make the recreational fields into high-density townhouses. This sales contract was signed by the trustees in secret without the required prior notice to the community.

The Radburn Democratic Reform Movement went to court last year, seeking a court order instituting democratic self-government for the Radburn community. The (PREDFDA) Statute requires that trustees are to be elected by the community in a manner that makes them responsible to the community. It was obviously the intention of our legislature to require meaningful elections, as opposed to fixed elections with pre-selected candidates. The Reform Movement is also seeking a

court order invalidating the sales contract that was signed without the required prior notice.

Now, the Reform Movement of which I'm a member sought only democracy and the protection of the right to prior notice, and no monetary damages were sought whatsoever. The response of the Radburn trustees was to counter-sue the Reform group as individuals for \$1.6 million in alleged damages. The counter-suit alleges that the Reform group damaged the Radburn Association's financial interest by encouraging voters throughout Fair Lawn to sign petitions to save the recreational fields. The Fair Lawn Bureau Council has stated on the record that the counter-suit is an improper Slapp suit (SLAPP), a strategic lawsuit against public participation in which the Radburn Association is simply trying to use our courts to frighten people out of using their legal right to petition their government.

The Radburn Association has turned down all offers to reach a compromise. They refuse to mediate. They've raised assessments by more than a third, charging the increase was necessary to fend off the lawsuits. This is not true. Their defense is to the democracy and park lawsuits are both covered by insurance. The improper counter-suit is not covered by insurance, but they went forward with that one anyway.

In 2004, the Radburn community elected a democracy advocate by a margin of three-to-one to the only democratically-selected seat on the Board of Trustees. In 2005, Reform candidates forced to run for trustee on a write-in basis, defeated the official candidates two-to-one, but were not seated. The Fair Lawn election districts containing Radburn elected Reformers to every one of the eight Democratic and Republican party committee seats, and they also helped replace the incumbent Fair Lawn Mayor with an attorney who had been working pro bono for us, the Reform Movement. The Radburn Association has not been impressed by any of these elections. It continues to insist that DCA is wrong when it applies the PREDFDA Statute to Radburn. It continues to insist that the Radburn community is better off under the absolute rule of a self-appointed clique who refuses their neighbors the right to hold elections. Both the democracy and park issues now remain before the New Jersey courts.

MARGARET BAR-AKIVA, MODERATOR:

Thank you, Bob. Our next speaker is Lamouria Boyd, and Lamouria is the mother of two children, an attorney by profession, and lives in Society Hill One in Newark.

LAMOURIA BOYD:

Good morning. I'd like to thank you all for giving me this opportunity to address you. I'll try to be brief, but I have a way, because I'm in court every day, of being very concise and getting a lot in in a little period of time. I want to correct something that was in the little bio on me. I think in the last line it said I did not prevail. I'd like to correct that. I did prevail, because I'm standing here today, and I still own my condo. The foreclosure proceeding that was initiated against me came about as the result of a deposit which the condo board's attorney said I had not paid, which I knew nothing about prior to closing. And my attorney that I retained failed to see. So, the first lesson I'd like to impart to you – all of you – is that if you have not read your governing documents, your master deed, your bylaws, do so. If you know someone who's buying into your common interest community, please encourage them or their counsel to do so. It is violently important, and if I had to advocate for any laws with respect to closings, I would ask that the law require that the master deed and governing documents and bylaws of common interest communities be required to be written in plain language so that everybody can understand them.

Although I am an attorney, I wasn't motivated to pursue a counter-claim or third-party claim against my condo association, because I'm an attorney. When I first got notice from the condo association regarding the so-called deposit, I said, wow, they're really aggressive over a deposit. I wasn't behind in my maintenance. And then I thought about my numerous neighbors who were seniors, and I said if they're pursuing me, trying to foreclose upon a condo over a deposit, what are they doing to my neighbors?

So, one of my jobs – because being a mother is a job – but one of my other jobs is I'm an Assistant County Counsel, and in six counties, so I'm familiar with the courts, and a lot of people in the courts, and I called a friend. I said, you know, I want to know how many foreclosures are going on in Society Hill? And I found out that the rate of foreclosure was about 150 percent, so

let's just say there's 100 units in Phase One, where I live. Well, in the last five years, they had done like 154 foreclosures. Something's wrong with that picture. So, with a picture like that I decided to get my computer out, and I wrote the Legislature and I wrote some Senators that I know, and Assemblymen that I know. One of the Assemblymen is one of my past law school professors, and Professor Franzese was my Property professor. So, I knew a few people who could probably give us some insight on this, and I got very little response. And that concerned me, as well, because I said, now, I'm an attorney; I know a few people. I can write people and ask questions. Why is it that I'm not getting the response that I think that people should get? So, I said if I'm going through this, what must other people be going through?

So, I decided to not lie down and take it; I decided to file the requisite counter-claims and third-party complaints that I thought were necessary. And if I had to give you a little bit of free advice, I would say that if you find yourself foreclosed upon, try to take it out of the context of the foreclosure proceeding against you, because ultimately what happened was they tacked on those fees, and they said that they were -- in violation of my bylaws by the way -- related to the foreclosure. And the judge agreed with them, even though I thought it was the wrong decision, the judge nonetheless awarded them fees, as a result of my third-party and counter-claims against them. So, I would say take it out of the context of the foreclosure, so they can't claim that under the Condominium Act and under your bylaws, those were fees related to foreclosures.

I'd like to see stronger enforcement; I'd like to see statutorily-imposed fines for violations of bylaws by the association and their counsel, and I would also like to see that those attorneys who are assessing fines against you as residents be accountable. I can't tell you how many times I asked for audits; how many times I questioned the election procedures. There are egregious violations of our bylaws going on in the Society One in Newark, which I affectionately call Society Hell. And I'm going to tell you when you see that those violations are going on, you may have remedies even at the federal level, so you may consider federal complaints for violations of the Fair Debt Collection Practices at or violations under the Non-profit Organization Law. I'm tired of seeing these volunteers on these boards relying on the fact that they are involved in nonprofit

organizations to shield themselves from liability. I believe there ought to be some contractual accountability, and there ought to be some tortious liability for breach of their fiduciary duties to you as homeowners. I want you to empower yourselves. If you have not read your governing documents, do so. If there is something in there that you take exception to, read those documents with respect to changes. My board has made amendments to our governing documents in violation of our governing documents, and they have not contacted the homeowners in doing so. They make these changes, and then they send us notice that we made some changes.

And the problem is apathy. You talk to your neighbors and you say in order to make these changes, if it requires 67 percent of the vote of homeowners who are entitled to vote, you get them on board and make sure that they're on board with you, because it is the homeowners who are sitting back and doing nothing who are part of the problem, as well.

I could go on and on. I can't even get to the meat of my case, but I will say this, and I will leave you with this: When I called a meeting as homeowners amongst my fellow homeowners, I actually had more people there than the board had at its meeting. What does that tell you? But in parting, I'd just like to thank you for this opportunity to address you. I cannot begin to tell you all that I have been through. It would take up too much of your time, but I would just like to say keep fighting. Hopefully, we can make changes at the legislative, the state level. Thank you.

MARGARET BAR-AKIVA, MODERATOR:

Thank you, Lamouria. Our next speaker is Ellen Vastola, who has lived in a homeowners association for the past 20 years. She was sued by her board, but is now serving on that board as an alternate. She is dedicated to owners' rights, and she passed legislation to protect the 1.2 million homeowner associations.

ELLEN VASTOLA:

Good morning. And I'm really pleased to be here, and I have to say following all these other impassioned speakers, I want to throw my statement out, because they've covered so much, but the last speaker, Lamouria, she hit upon the new theme that I

wanted to bring to you, because it's prevalent in my community, and it is apathy. My community is a small one. It's part of Quail Brook in Central New Jersey, I guess a bedroom community outside of New Brunswick. We have – it's an apartment condominium community, and we have a lot of upwardly mobile people. Young people come in; it's probably their first purchase. It was my first purchase. This is not their prime focus of their lives, to be involved in their community. They come, the way I used to come home, close the door, breathe a sigh of relief, take off your beeper, and sit down and just trust – trust your board that your board is doing what they need to do for you, that they take care of your property values, your grounds, that they are doing what they are supposed to be doing.

Well, I got a wake-up call in 2002. I was lucky enough to early retire from Rutgers, and then I decided I wanted to put up a storm, which I had not wanted to put up, because I saw the predominant style was a Crossbuck. And this is where my life changed, and this is how I feel standing here you've gone from the totally egregious and catastrophic to me, the ridiculous. I think I'm the comic relief of the panel here today. It was my storm door style. I spent \$250 on a Pella Midview. They wanted the \$99 Crossbuck Special, which I think is disgusting. So, I lived without it. But I saw – I walked around my community, and I saw several other storm door styles up, and they had showed signs of wear and tear. And I went, "I guess I missed something. I don't go to my monthly meetings. I'm lucky if I go to the annual meeting." So, I thought, oh, my mistake was I didn't ask. My mistake was I didn't check with the board. So, I am not a person who is absolutely correct in everything I've done in this fight. I'm just an owner who just made a mistake. And when I found out about, when my board did their property walk, which they don't always do, and they go, "Ellen, you've got a problem," from September 2002 to the summer of 2006, I fought a paper battle. I had a pro bono attorney. I then had to get a paid-for attorney, because my board decided, "We've got to end this. We're going to sue her." I never got ADR. I have to like thank the DCA – oh, my God. Here I've heard some awful stories, and poor Ed and Janet (DiCristina) at the DCA Homeowner Protection were listening to me, and it's like I made a mountain out of my little storm door. But it's – you know, it's the tip of the iceberg. It's how ridiculous the situation can be.

I want to tell you, too, I've come to realize now that I'm on the board, my board members are not bad people. I went through a phase where I absolutely hated them. Why are they doing this to me? My board is entrenched. Most of them have been on the board 10-15 plus years. Our community is very apathetic, but my board, I do feel, is well intentioned. But I got the feeling from them why is she doing this to us? She doesn't trust us. Why? We give all our time. We come to these meetings; no owners come. We work for them, and this person is not listening to us. I didn't do it to make them wrong. I apologized three times in different meetings, in person for my door. I'm sorry, I didn't ask, but you allowed that other door up in the adjacent building. It was up. I didn't understand. Why did they choose me, and they shouldn't have chosen me, because I don't back down. I spent thousands of dollars, and the outcome was when I finally got ADR, and to get ADR, I did resist the list that came from the CAI. I did not want a CAI-trained attorney who pays dues to the CAI, who represents boards, property managers, other dispute attorneys. I wanted for once a level playing field, because I felt I hadn't gotten up till then. Thank you.

So, I rejected their list. My board did not like that. It's like what's the matter? Let's pick somebody close off of this list. No. I kept checking with my attorney. I kept checking with Nevi at the CIHC. So, I finally got an attorney that I felt was impartial. I went through ADR. My door is down. It's lying on its side in my foyer. But the board now has to annually ask – put out a call to the residents to – do they want to join an aesthetics committee? So, I'm making sure that they do that. So, I'm here now just to raise to you the demographics of these communities are different. A lot of people are very apathetic. They want to trust. They don't want to know what's going on, and it's the few of us, we have to be as my mother says the squeaky wheel, because then we'll get the grease. We have to be very vocal. We have to stand up for our rights, because I've been telling everybody that since I found out since I came into this unit, I left the United States of America behind. I am not happy about this. We have to stand up and be counted. We have to go to our meetings. We have to let our boards know what's going on, and how we're feeling, and then we have to vote accordingly. And yes, we have had election improprieties. We have open closed-card ballots, and the results can change from election night from

what they post in our newsletter, so bottom line is, I've learned a lot from this whole experience. You can't -- you need to get the governing documents before closing, because getting them at closing, you can't read 200 pages. You go home, you read it, and you're in regulation shock. So, we have to overcome the apathy; we have to educate people. We need good people who are trained, and we need oversight, and I tell you, Ed, everyone here, I would pay \$5 a year if 1.2 million owners and homeowners associations paid \$5 a year to the DCA, if they could then protect us. Thank you.

MARGARET BAR-AKIVA, MODERATOR:

Thank you, Ellen. And I've been given strict instructions to keep this going, so I'm going to ask our next three speakers to please trim your remarks, if possible. Our next speaker is Dr. Amy Neustein from Admiral's Walk Association in Edgewater. She is a sociologist, author, and researcher of criminally corrupt social systems. She is now the lead in a civil rights action against her association.

DR. AMY NEUSTEIN:

Thank you very much for giving me the opportunity to speak today. I'm living under a cloud of tyranny that is so dark and forbidding that I'm kind of restrained as to what I can say today. So, I have a short statement, which explains how I became involved with this cause, and I was advised early this morning to bring with me one of the attorneys that was hired by the Admiral's Walk Unit Owners, who will just speak for two minutes or less, just to fill you in on the legal aspects, because we commenced legal action last week.

Here's my story: In the wake of 9/11, I fled the town of Manhattan to a haven across the Hudson known as Admiral's Walk in Edgewater, New Jersey, which is by the way, where the ferry just opened up -- the ferry that was restored after a 60-year hiatus. There's a ferry from midtown Manhattan to Edgewater. Our building is right next door to that ferry. My nerves were shattered from the devastation of the World Trade Center bombing. Desperate to find peace, I ran to the Admiral's Walk Condominium Complex, paying full asking price, and closing within 30 days. Living at Admiral's Walk I thought I had found

peace, especially running away after 9/11, and having lived in midtown, here was a nice area, several acres' worth of grounds. It was just beautiful. I unwound from my work as an author of academic books on criminally-corrupt systems by taking walks each day along the Admiral's Walk private walking trail overlooking the Hudson. It is just beautiful. Very relaxing. I thought I found Shangri-La. I used to tell all my friends this place is blessed. I am so happy here. I was solicited for prestigious committees: The Finance Committee, the ADR Committee, and the Lobby Décor Committee, which I accepted gladly. I came to start a happy new life in New Jersey, and I was sort of part of the clique – the in crowd, the people who are very close with the board, and the board members. They liked me. Tragically, my naïveté did not last, neither did my peace. I began to hear horror stories of residents whose apartments were ruined by floods stemming from problems in the building. I recall one evening standing at the cashier at the Edgewater Pathmark when a young woman, whose family came to Admiral's Walk when she was a child, pleaded with me to investigate the corruption that caused her and her now-widowed mother to live with their clothes and belongings wrapped up in plastic bags, because the closet ceilings of their penthouse condo were constantly leaking. This young woman told me of the upbraiding she received from the board and management company each time she asked for help. The young woman eventually left Admiral's Walk, but her story never left my heart. As the year's went on, I heard similar stories of cruelties, neglect, retaliation, and worst of all, unbridled meanness by management and board members, similar to what we've heard today from the former speakers.

I distanced myself from these stories I heard, so that I could devote my attentions to my work and professional duties, but I found I could no longer run from the tidal wave of corruption. Then one day, that tidal wave of corruption engulfed me. A huge renovation project was forced upon us, which included stripping down of the terrace balconies, and replacing them with either new metal railings, or glitzy glass that would run us into an assessment of hundreds of dollars a month for three years, and occlude the air from our windows and our terrace doors for a minimum of four months without any back-up ventilation system.

Now, even though the project failed to receive two-thirds of the vote, as stipulated by the association's bylaws, it's going through. I was shocked by this. I broke into a cold sweat, as I recalled just how days before the vote, the community was threatened at an open board meeting, that even if the project was voted down, it would go through anyway. The cold reality seeped in. I realized this was not the usual blustering of a board, but the tyranny of a mini-government unanswerable to its own constituents. Along with everyone else in Admiral's Walk, I was trapped; trapped in my home, which is the worst. This is corporate warfare. You change jobs if it becomes intolerable in the work setting, but this is being trapped in your own home, and you have nowhere to go. I was trapped by bureaucracy, and what had the ominous appearance of self-dealing and greed. I knew this had to be stopped at once, and I pray that my statement here today will be heard and heeded. Very good. Thank you very much.

MARGARET BAR-AKIVA, MODERATOR:

Thank you. Our next speaker is Nevi Baker, who lives in Florence Tollgate in Florence. She is the current president of the Common Interest Homeowners Coalition, and an advocate for homeowners' rights. And, I can say personally that I've seen her work, and it's amazing.

NEVI BAKER:

Hello. I'd like to thank Professor Evan McKenzie for writing that wonderful book, "Privatopia," which opened our eyes, and I want to thank Professor Askin for helping us with some of our cases, particularly with *Twin Rivers*. After many years of hearing that there were financial problems in our community, we still never expected the shut-off notice we received from PSE&G at the beginning of the winter season in December 2001. The notice from PSE&G was publicly-posted on all 40 buildings, indicating that the heat and the hot water would be turned off to all 320 units in our community for an indefinite period of time. In addition, there was a long-standing and unresolved dispute with the township, creating a very large debt, and water and sewer bills.

The undesirable financial situation was public knowledge, and seriously affected the property value for all the owners of units who were trying to sell. The Board of Trustees was being irresponsible in fulfilling its fiduciary duties to the homeowners, even though the owners were paying a considerable annual fee to a large well-known management company for on-site services, which included financial advice. A group of about 20 owners formed a task force, and initiated a campaign asking owners to please pay attention to what was going on with the finances of the association. Letters sent to the board requesting access to financial records were answered with a statement, "You all received proposed budget. That's all there is." This is a classic example of the arrogance many boards display when dealing with New Jersey homeowners.

The task force was planning an election campaign, and made many requests through the board for a complete and accurate list of homeowners' addresses, and for a list of those who were deemed not eligible to vote. The board would not release the list. A motion was filed in Burlington County Superior Court by the task force attorney, asking the court to postpone the annual election in May to allow the Board of Trustees to provide the information to the task force for the campaign purpose. The list of names and addresses was finally given to the task force, but immediately thereafter, the board filed for protection under Bankruptcy Chapter 11. In the bankruptcy filing, the board asked the court to allow them to stay in office until the hearings were conducted, and a court decision was issued. What, besides arrogance, could possibly motivate a board which disgraced the association into bankruptcy to ask to participate in an after-election transition process? Thankfully, the request was not permitted by the court and the entire board resigned before the next election.

As a result of the bankruptcy filing, each unit owner had to pay an average of \$4,000 in full before December 31st of that year. Why couldn't the association's attorney negotiate with the debtors to avoid filing for bankruptcy? That is money that will never be recovered. It's essential for New Jersey homeowners living in associations to have strong support within state government that will fight for the rights of homeowners. At this time, there is only limited authority within state government and relative powerlessness in state enforcement. The state cannot fine or dismiss based on reported abuse of self-serving

and self-appointed board members who had their own agency, or they may have been compromised by special interest groups and wanted the power and authority to boss their neighbors. State legislators need to create laws that protect homeowners, and make boards accountable to an agency, such as the Department of the Public Advocate. I once again thank you all – CIHC’s own members, and friends who have attended today, and to David Kahne, who has written in association with the Homeowners’ Bill of Rights.

MARGARET BAR-AKIVA, MODERATOR:

Thank you, Nevi. Our final speaker for today is Jerry Cosulich, who lives in Crownview Manor One Condominium in West Orange. His perspective on HOA’s is focused on mortgage underwriting and credit analysis. He is designing a system that will identify lending-related lists in community associations.

JERRY COSULICH:

Thank you. I must open my story with an expression of gratitude and appreciation to the conference organizers, participants, and funders for the invitation to me to speak out regarding HOAs and the problems of private governance. Thank you very much.

Ladies and gentlemen, my name is Jerry Cosulich. In late December 2003, my wife and I moved into Crownview Manor One Condominium in West Orange, New Jersey. Not long after I moved in, I encountered John (Tye), who was a long-time resident and also an advocate for financial transparency. He told me that he could not get access to financial documents, so I joined with him to advocate for financial transparency. In March 2004, after John Tye submitted a request for copies of bank statements, our managing agent wrote to the condominium’s attorney. In his letter he stated, “[a]s you are aware, we have been notified with a request for documents from Mr. Tye and Mr. Cosulich.” It ended with, “[t]he conduct of these two individuals is out of control, and we have to make a strong effort in putting a stop to it immediately. We need your counsel in these matters and the association needs you to take the lead in an offense against these unreasonable requests.” I ask you, is it unreasonable for a homeowner to ask for financial

documents, when the association has not had part of its books audited since 1998?

MANY VOICES: Yes.

JERRY COSULICH:

Also in March, one night, our presidents met me in the lobby and said to me, “do you know what we do to people who question us?” “We chew them up and spit them out.” Love your neighbor. Due to John Tye’s effort to ask for financial transparency, in May 2005, John Tye was falsely accused by the board of being witnessed by two employees of stealing a 5-gallon jug of spring water from the association. It’s funny, but it’s like Dave Barry said, “I’m not making this up.”

In June 2006, I introduced John Tye to a law firm. The attorney wrote a letter to request the board to give the two names and to have an ADR resolve the dispute. As the board did not want to give the names of the two employees claimed as the witnesses, and as the board made no response to the request for an ADR, John Tye had to file a lawsuit against the board in August 2005. As I had been advocating with John Tye, in mid-2006, I sent out memos raising questions about the lawsuit. Without any regard to our bylaws, without any warning, and ignoring any sense of due process, the board levied fines of \$35,600, plus association’s attorney fees for the four memos I sent out under the doors of unit owners. The board also put a lien on my property.

My experience proved to me how unprotected one’s property is in the homeowner association. Within the United States, every citizen has a Constitutionally protected say. Why do citizens living within homeowners associations not have the same protection? Are we considered second class citizens? With one out of every six Americans living in HOAs, homeowners associations house as many people as Texas and California combined. They act as a fifty-first state without any of the Constitutional or legal rights to protect their inhabitants. So, I leave you with this, how can we turn an HOA into a better place to live? Thank you.

Third Session:
*Creating Workable Solutions:
Working with the State to Regulate These New
Governments*

PROFESSOR PAULA FRANZESE, MODERATOR:

We're back. Excellent. Ladies and gentlemen, thank you very much for your patience and the very significant, very poignant, and very important nature of your reflections today. There will be a significant opportunity immediately following this program for you to speak, because that really is the heart of the matter. As Professor Askin just mentioned, the adjournment time is not set in stone. So, we will, in fact, engage in a dialogue for as long as you wish to. So, it could be days. We'll settle in. We have lots of water and bagels. We have an exquisite array of leaders, thinkers, and visionaries in this context, as we take up the task of reform. And I would like to have us begin by asking the question, what are the lessons to be learned from our sister states? Because while New Jersey can boast, if that's the appropriate word, a preponderance in terms of sheer numbers of homeowners associations, as well as residents living under their aegis, certainly we did not devise the concept. It originated in the sunbelt states, most specifically within the purviews of Florida, Arizona, and California. Florida, as a pioneer in the context of devising the paradigm for homeowners associations, has had its share of problem with that paradigm. Danielle Carroll is an immensely wise woman. The Florida ombudsman, who is on the frontlines, reckons with the good, and also the not so good, and how best to accommodate both in making real the promise of community within common interest communities. I am delighted that we begin with Danielle, who has come all the way up from sunny Florida to share with us, first, what can the Florida experience teach us, as we move forward with the task of legislative, as well as policy-based reform? Ladies and gentleman, I give you Danielle Carroll. Thank you.

DANIELLE CARROLL:

Hello. My name is Danielle Carroll. I'm the Condominium Ombudsman for the state of Florida. It's a pleasure to be here today. Actually, listening to the stories that were being told earlier, they sound very familiar. I've heard these stories before, and so it basically tells you no matter what differences there are between the communities that we live in, we really are all the same. We have the same issues in Florida, and are dealing with some of the same issues that you're dealing with here. And I have to say, in preparing for coming here, I have been looking at what other states do, and I have to tell you, I really came away with the fact that Florida is doing a pretty good job in handling these issues. It's not perfect; it never will be perfect, because nothing ever is. It's hard work, and so when we're looking at what are the solutions to the problems, because there's numerous, the solution is to look around. It's you. That is the solution. It's everybody up here. It's everybody working together to have a better place to live. Professor Franzese was talking before, and I was thinking, you know, when I go home at night, I want to go home and enjoy my home. That's what I want to do. I deal with a lot of other stuff during the day, and we all do, and we want to come home and enjoy where we live. And that's really important. So, how do we do that? How do we enjoy where we live? And in the spirit of full disclosure, I have to tell you I don't live in a condominium. (Laughter.) And my homeowners association is voluntary. You pay \$5, that's it. So, it really allows me to do what the Florida Legislature intended, which is for me to be a neutral resource, because I don't have the viewpoint of somebody who's living in a condominium, and dealing with those pressures; I don't go in with that bias, because it's hard enough to stay neutral without having experienced those things that are going on and that people are complaining about. And you'd be very empathetic to their cries.

I have to tell you that I was listening to everything, and everybody was talking about audits and financial statements and elections. In Florida, we regulate those things in condominiums. They're regulated. Elections are regulated, and the beauty about condominium elections is that the Florida Statutes, the Condominium Acts, and Chapter 718 of the Florida Statutes, actually tell you how to run an election in a condominium. It's secret ballot. You have to give a 60-day

notice of election. You have a timeframe that people can actually go and say I'm interested in running for the board. They give their information sheets, and after that, 14 days before the election, the ballots go out; you know who's on the ballot. You have to actually put them alphabetically, the names of the people. That way, you're not giving any preference to anybody that's currently on the board. So, there's a whole process to it, and you have 14 days to send in your ballot. I always tell people, if you're afraid that somebody is actually going to do something with your election, bring your ballots in on the night of the election, because you can do that in Florida. You don't have to send them in. You can carry them in. You can carry in your friend's ballots, and they're secret ballots, so nobody knows how you voted, because Florida allows you to have an outer envelope; you can check to make sure that that person is a unit owner, but the inner envelope does not have any identifying information on it. It gets separated, and the people just vote. I think that's really great, but what's also beautiful in Florida is the fact that in my job, if you really think that somebody is doing something inappropriate with that election, you can petition the ombudsman to appoint an election monitor. And it takes 15 percent of the unit owners in that community to petition for a monitor. Now, of course the association has to pay for the monitor, and we try to make sure that the monitors keep the price down, so it's affordable. But basically, somebody will come in and conduct the election to make sure that, at least, the vote count is correct. And also, because we're regulated, those ballots, even after the election, all of that information from the election is part of your association records, and you have to keep them for a year, because we have annual elections. They're every year, and so you have to keep that information in your association record. And also, you're required to have association records, and guess what? In Florida, you get to look at your records. You can send by certified mail, and say I want to look at my association records. Within five days, the association has to allow you to review your records. And that's a good thing.

PROFESSOR PAULA FRANZESE:

Danielle, if I might interject, who enforces that five-day rule?

DANIELLE CARROLL:

And the beauty of it, again, the state. The state collects \$4 from every condominium owner in the state of Florida.

PROFESSOR PAULA FRANZESE: Per year?

DANIELLE CARROLL: Per year.

PROFESSOR PAULA FRANZESE: Only \$4?

DANIELLE CARROLL:

\$4. So, the association has to pay for it, so if it's a 300-unit condominium, the association would pay \$4 for every single unit owner. And the state will come in and enforce those kinds of issues, because there are state statutes; there are state rules, and the state is the agency that enforces them. And so, we do have regulation in the state. Now, for homeowners associations, it's a little different. What they did was, before you can file suit in a homeowners association, you have to go to mediation. And the state mediates it. So, you have an avenue prior to going to litigation, to actually have the state come in and mediate those issues for you.

PROFESSOR PAULA FRANZESE:

And Danielle, how fair and impartial is that process?

DANIELLE CARROLL:

Now, it depends on who you talk to. (Laughter.) Because there's those who don't trust the state, of course; people are out there that don't trust the state, and I'm not saying this because I'm a state employee. I'm saying this because I've seen and witnessed this. The state is fair; they're neutral. They're not taking sides. And I have to say that, I'm going to go back a moment to say I was appointed by Governor Jeb Bush to be the Ombudsman, and my statutory language actually says that I work at the pleasure of the Governor, and so I could lose my job at any minute if the Governor decides they don't want me there. So, currently we have a new Governor, Governor Crist, and as the Ombudsman, part of the statutory language for my position is to be a neutral resource for everybody, for unit owners, board

members, attorneys, anybody who needs assistance, we're there. We have numbers people can call and ask questions; we will actually go out and do educational training. Somebody was talking before about board members who actually don't or may not even know what they're doing. They're taking over boards, and that's a big problem, and we don't have mandatory education in Florida. But you have the Ombudsman's office, which is a resource for you. So, if you have questions, or you would like our office to come out to your community, and assist you in your board meetings or to try to get you on track, we'll be happy to do that. That is free, and it doesn't matter, anyone in the state of Florida that's in a condominium can ask me to come there or one of my staff members, and we'll come there. And it's no cost to that association, because one of the key proponents of the legislation is it's about education, because the more informed you are the better decisions you're going to make. And that is really, really the key, and we had a home owner up here earlier, who was an attorney who was telling you to read your documents. That's never been truer. I mean, you have to read your documents. You need to know what you're getting into, and the thing is I know as a kid, I always like to throw the rules out in Monopoly or whatever I liked to play, because I didn't want to play it the real way. I wanted to play it the way I wanted to play it. It was easier; it was quicker. So, if I just made up the rules, it went along a lot smoother. Of course, I pulled out the rules if somebody told me they wanted to do something. Then I'd pull out the rules, and say, "Wait a second. The rules say you can't do that." And that's kind of like associations. I mean, that's homeowners associations. Everybody's throwing the rules out. You know? Don't pay attention to your bylaws; don't pay attention to your condo document; don't pay attention to the statutes or rules. I don't want to play by that game. I always tell myself, as the Condominium Ombudsman, I always feel like I'm playing survivor, because I'm always outwitting, outlasting, outplaying people, because that's what you have to do, because everybody has an agenda, and the thing is, as a neutral resources, I don't take sides. I don't have a horse in this race, so I have to sit through and listen to what everyone says.

And the things that I've found out as the Condominium Ombudsman is that everybody sounds really rational and sane when they're talking to me. So, that person that somebody's complaining about, when they're talking to me, they are sane;

they're not doing anything inappropriate; they're just explaining what's happening in their community. That board member they're complaining about, that they're saying is out of control, when I talk to them, they're sane; they tell their story, and you say, wow, I can't believe this person is doing that. And you know somewhere in there is the truth . But it's not for me to take a side. It's for me to say: how do we resolve this issue? How do we get this done? And I think part of it is actually going by the statutes and rules. And so, now as an adult, I actually follow the rules. I'm a stickler for rules.

PROFESSOR PAULA FRANZESE:

But Danielle, excuse me, what result when the rules themselves are unfair? When the contract may, in fact, be one of adhesion, when there was perhaps an absence of meaningful choice on the buyer's part in buying into what she or he has now bought into, and what result when those rules, although they are in black and white, are being enforced selectively?

DANIELLE CARROLL:

That's when you have to turn to the state to enforce those rules, even if they're bylaws. The state of Florida will not enforce your document. But they do have an arbitration program to help you figure out what your documents really say and do. But if there is a problem, and this is what I say, because I'm a stickler for rules, and following the statutes, when things are ambiguous, a lot of times people are going to interpret it the way they want to interpret it. And that's a really big problem, and we have that problem in Florida. What you have to do, and one of the things that I do as the Ombudsman, is make recommendations to the Governor, to the Legislature, because sometimes getting rid of that ambiguity in the law is really coming down to a legislative action. And I always tell people, "You as a community have to tell your legislators when something isn't working." When things aren't working right, you have to tell them, because that's what's going to get things done. And somebody said earlier:, the squeaky wheel gets the oil. You're right,the squeaky wheel does get the oil. The thing that I've noticed in state government, is that the people who contact their legislators, the people are writing in, somebody's

going to have to deal with that. It usually doesn't get ignored, you know? And if you have a whole community of people that are writing in, and telling their legislator, hey, we're not happy with this. Do you know what's going on in our community? That legislator usually comes and shows up at things like this; they usually actually are involved in forming that legislation that will help correct that problem. But also, you have to go to your state regulators, your government agencies, and say these things don't work. They need help. They need to be fixed. And the thing that I've noticed in state government, too, is that there's a lot of agencies that have rule making authority within that government agency, so you can actually go and they can actually fix the problem. Some things statutory, and the legislator is going to have to fix, but you have to do that. You have to tell people like myself, who are in those positions who have the ear of the Governor's office, and the legislators to push forward legislation's slate of changes.

I did that this past year. There were things that I saw within the statute that I felt were not clear.

PROFESSOR PAULA FRANZESE:

Danielle, in the context of the legislative process and legislators weighing in, how formidable is the CAI as a lobbying influence?

DANIELLE CARROLL:

I have to disclose this, because since we're talking about CAI, and I'm neutral, CAI is currently the contract-holder for the state of Florida's educational program. They do the education for the state of Florida. Obviously, the state of Florida oversees the education process, so they basically cannot do whatever they want to do, and it has to actually be within the contract that Florida has with them.

PROFESSOR PAULA FRANZESE:

How did they get that contract?

DANIELLE CARROLL:

It's a bid process, and in essence what we do with CAI is regrettably CAI was the only bidder for that educational contract, so they have been doing our educational process I have to say I have not heard anyone complaining about the educational courses, but there's another source of educational courses, which is our office, and like I said we will come to you. We're neutral, and we will actually do the educational training if somebody wants us to.

PROFESSOR PAULA FRANZESE:

And Danielle, the point was made by Professor McKenzie this morning that the process under the Goliath-like form of the CAI can't help but be infected with self-interest. It's the same cadre of attorneys, as well as developers, as well as others who stand to gain financially as a consequence of the havoc often wreaked at residents' expense. What is Florida's perception of that indictment of sorts?

DANIELLE CARROLL:

Part of the problem that we have in homeowners associations and condominium associations is self-interest. that's what's ruling this. whether it's a board member; whether it's an outside source –that is what's ruling this, and causing a lot of the problems. If we could regulate common decency, courtesy, people being right all the time; we would have no problems, because basically people would be doing the right thing. The thing is it's a balance of. Of course, there are going to be people who have their own interests, and are going to be pushing that agenda. The key is having equal sides that are pushing for that not to be the primary agenda.

PROFESSOR PAULA FRANZESE: Yes.

DANIELLE CARROLL:

That's when I say it takes all of us to take care of that, because no one organization can cause you to have a system you don't want unless you stand by and let people do it.

PROFESSOR PAULA FRANZESE: Yes. Yes!

DANIELLE CARROLL:

And I think that that's the key, that if we stand by and sit on the sidelines, of course this is going to happen. The key is getting off the sidelines, being a participant, and actually being on your board, removing those boards when you don't like them, actually showing up at your meetings, because people tend to not do a lot of things if people are watching. That's been really a key component I think that we've learned in Florida is education – educating people on how to be good board members, because you know the best board would be if you had an attorney, engineer, CPA, but you don't get that. You get whoever comes through the door, and is willing to step up to the plate. And unless you're willing to step up to the plate, it's really hard for you to say something is going wrong when you're not willing to be a part of the solution. So, I would say that you have to be part of the end solution joined into your life; be an active participant. Don't stand on the sidelines.

PROFESSOR PAULA FRANZESE:

And you were broadly stating limits and the follow-up question becomes how is it in New Jersey that we might level the playing field so that resources are more evenly distributed to allow each voice to be heard? My dad was very fond of saying that if you think you're too small to be effective, you've never been in bed with a mosquito. So, how is it that those who are disaffected might, in fact, enhance their capacity not simply to persist, but to actually make the difference? I'm going to ask Danielle, who is a gift to us today to sit with me here and help me to respond to our own legislators who have proposals.

DANIELLE CARROLL:

Can I just add something? I know you guys are battling with having this Uniform Common Interests Act.

PROFESSOR PAULA FRANZESE: Ownership Act.

DANIELLE CARROLL:

Ownership Act, and I have to say last year Governor Bush asked the Department of Business and Professional Regulation to look at that, to see if this would be something for the state of Florida to have. And I just want to read what the department recommended: That we should the Uniform Act. And it says Florida law is more evolved, mature, and has a greater emphasis on consumer protection.

PROFESSOR PAULA FRANZESE: Oh, what is that?

Say that again.

DANIELLE CARROLL:

That our Florida law is more evolved, mature. It has a greater emphasis on consumer protection, and that was the reason why the Department of Business and Professional Regulation after looking at it, taking in input from the public, and also hold a meeting where people were able to talk about this issue, came to this conclusion. And we have such differences between condominiums and homeowners associations; there's a lot of differences. There are things that you could shore up, and that are more in common, like elections, financial audits. Condominium Act of Florida actually requires financial audits. There's things that you can do, but that did not serve the purposes of what Florida wanted to protect the public, and so that was the recommendation from a state agency to the governor, who asked for us to look at that. And I just wanted to put that out.

PROFESSOR PAULA FRANZESE:

Immensely helpful. You've got to sit with me. Immensely helpful! Sit with me, Danielle. Pull up a chair. Very good. Let's hear about what's happening on the front lines in New Jersey. We've got competing bills at stake, as we speak. Let's have Senators Martin, as well as Rice provide us with an overview of the legislative response. Senator Rice. Thank you.

SENATOR RONALD L. RICE:

Thank you very much. I'm going to try to push through this very quickly. Unfortunately, it's a bad day for me; 40 state senators, and I think I'm the only one in the primary fight for trying to help people. I should be in my district, and we have two committee meetings; I have to chair one, as we go. So, if the Senator will allow me, let me just get through this very quickly. First, there are two bills. I sit with both sponsors. I spent a lot of time with staff trying to reconcile the two bills; we couldn't get agreement. And there are two different bills we thought we were getting there. Some of this stuff is being driven by money; some of it is being driven by selfishness, and so I say here's what we're going to do: I'm going to personally take the time as chairman of the committee; I'm going to go up and down the state, and hold hearings. I want to hear from the people. I did that. Whether people appreciate or not, and you still may not get what you want, but I tried. I'm dealing with 39 others. But the Senate Turner Bill, which I joined in, that bill really supplements current law and provides guidance in areas of election, access to records, and (alternative) dispute resolutions concerning matters that affect all of the homeowners equally, because up and down the state we heard the complaints that we can't get certain documentation that you're entitled to, that we can't settle disputes, that we're paying twice. We have to engage attorneys and then pay the board, as well, to engage attorneys to fight us. Those are the kinds of things that were coming out of these hearings, and they were very serious pieces. Also, this bill clarifies the applicability of the planned real estate development for disclosure, and the powers of the commissioner of those communities – community affairs through forced act. And that was really the *Twin Rivers* case that came down. And Senator Martin can speak more about that; they're attorneys, I'm not, and maybe that's a good reason I didn't finish law school, because I (didn't use) common sense here. The bill established an advisement committee. And one other thing I want to say about 1608 now, doing the analysis for you: It follows current court decision, basically, which place limits on certain action by associated boards, and this is really based on decisions which have been held that the Governor (buys so) such entities may not exercise (penalties), and not grant them by statute. But that's in every case that we go through.

Well, where are we? We have S805, which is referred to as the Doria Bill. And the other one is 1608, which is called the Shirley Turner Bill, which I joined in. What do we have? Issues: Fair elections. The right for any owner to run for the board; that became an issue, and I've lived with that even in my district. 805 contains procedure for monitoring elections, and has specific requirements for holding them. Disputes regarding elections are to be submitted to DCA. 1608, which is the Turner Bill, contains provisions to have monitoring by monitoring groups, or may be internal, something like the League of Women Voters; oversight by the Public Advocate, if fraud is involved. We have a Public Advocate now. We worked hard to bring him back. We have to give him something to do, besides messing with me all the time.

Access to records. Senator Doria Bill 805 requires access with seven business days upon written request, and is 20 cents per page –and allow outreach charges for voluminous requests. The dispute goes to the DCA – Department of Community Affairs. Under the Turner Bill 1608, it treats record requests as if association is a public body, and owners are the public. Any (refusal) by a board may be appealed to the Public Advocate to be handled through the ADR. In other words, they have to give you certain records.

Open meeting and right to speak. The Doria Bill, S805, requires all meetings to be open to owners. Tape recordings, only, allow the board to get prior approval. Under the Turner Bill, all meetings open to owners, tape recordings allowed in line with the *Twin Rivers* case. Problems with the developer, control of the board, and the government documents: Under Senate Bill S805 -- the right to review government documents prior to closing -- the 805 provides for that. Senate Bill 1608 assumes that the current law provides for this already under DCA review. Need for a homeowner advocate: Since developers are familiar with the DCA procedures, we think that there's a need for a homeowners advocate. So, Senate Bill S805 provides for Ombudsman and DCA. Senate Bill – which is the Turner Bill 1608 moved that function to the Public Advocate's office in order to afford conflict of interest with the developers' issues, also handled by the DCA. Better disclosure governing documents; neither bill really provides for this, but prior to this new bill coming, and new section, the Senator Turner Bill was 2016; they're providing for this, and it's something that we have

to revisit. The need for alternative dispute resolution with developers and control of the board: that kind of ties us into some of their CR reports that we received. Senate Bill 805, the Doria Bill provide for owners to form an independent committee of the Executive Board prior to the developer submitting to ADR through the courts. The Turner Bill, 1608, would allow two or more owners to bring disputes to Public Advocates for review; a big difference there.

Need for bidding laws and conflict of interest rules for board members and management Both S805, which is Doria, and 1608 provide for biddings on contracts. Exceptions are greater under S805. In other words, there's less exceptions to the rule on 805; the Turner Bill will try to put more exceptions in there to kind of balance the thought in the rules. Need for licensing of common interest property managers: Neither bill provides for the licensing of these property managers. There should be penalties for breach of fiduciary duties, and they should be statutory penalties to the board members. So, we have to revisit that.

The state enforcement of statutory owners' rights: Senate Bill 805, which is the Doria Bill leaves the enforcement in the Department of Community Affairs. It creates new powers sessions with less fining powers, by the way, \$1,000 than the New Jersey State Statute under the present law, because the Senator Turner's Bill, 1608, assumes enforcement for open meetings, and association level ADR will be the main – with DCA – and be enforced through the plan redevelopment –that big name statute, okay? Up to \$50,000 against a board. Issues with board actions violate internal documents is (reviewable) through the ADR at the Public Advocate's location again. I've got to keep him busy; he's been on my case, you know? Give him something to do.

And then there's the right of the owners to vote on items. That becomes a real serious issue throughout the state: The right of owners to vote on items which dramatically increases their monthly fees. Senate Bill 805 does not provide for this. Senate Bill 1608 does provide a requirement for you to vote on those things, and the requirement right now that's been reviewed has been 75 percent of the people can vote on that item; there's been talk about that it may be too harsh; it should be 51 percent, or something like that. That's reviewable, but at least it's in there, and that's for items over \$20,000. And they're

going to go out there and spend millions of dollars, and you have no say-so, but you're going to pay, and so we're looking at that particular language, the right of owners to block litigation by the board when the majority of the owners do not want to litigate.

Senate Bill 805, the Doria Bill, does not provide for this. Senate Bill 1608 does provide for it. Training the board members: 1608 provides for two hours mandatory training. The Doria Bill not provide for mandatory training at all. We made training possible in Doria and then voted for it for planning boards. Why not have two hour training for these boards, so they know what the heck they're doing sometime? And some of them do, some of them don't.

Common misconceptions -- because some of that I was faced with coming in here: Senate Bill 805 would allow the state to manage the homeowners associations? That's not true. 1608 would abolish the master association? That's not true. What 1608 does is actually says that you can have the master association, but it really reiterated the court decision that the association cannot go beyond its overall powers of maintenance and things of that nature. If they do -- and say you usurp or abuse those powers, then they're going to be hoarded. That's like anything else. And so, there is a clear difference between the two bills. I'm still trying to figure the best way to reconcile the bills, and they may both come up in committees when I get back, if I survive these trying times and tribulations; for hearing let the chips fall where they may. I may get them both out of committee, and let everybody vote on them, but we're trying to still reconcile. I know Senator Doria is not going to return. I know Senator Martin and others are not going to return. I expect to return, and if I do return, then the chips are going to fall on me, and I'll bite the bullet where I have to, because I'm probably put more time in this up and down the state than anyone else with staff. Hopefully, you'll appreciate it, but I wanted to give you that summary before I go to committee. Thank you very much.

SENATOR ROBERT J. MARTIN:

I'm Senator Martin. I'm a Republican from Morris County. Like Senator Rice, we have committee meetings at 1:00 o'clock. Our new prosecutor is supposed to be at a committee meeting. I was supposed to meet him 10 minutes ago, so I'll be relatively

short, and I want to make some comments. Yes, Ron was correct; I'm not running for re-election. I'm retiring. I think legislators at some point should retire and let others carry on, but I'd like to see something happen in the next seven months that deals fundamentally with this issue.

Ron did a very good job of talking about the two competing pieces of legislation that have been introduced into the legislature. Instead of going through what he just did about what the bills are, let me just talk a little bit about the process. Many of us – and I think almost everybody in this room is concerned about the one piece of legislation that previously passed the Assembly, Assembly Bill 798 that Ron referred to as the Doria Bill, but it's also an Assembly Bill that had previously cleared the Assembly, both committee as well as the Assembly, itself.

It was to Ron's credit blocked in the Senate, because his committee – as chairman, he wanted to take the time to look at that bill and look at other competing bills just before somebody went ahead and enacted this. That bill – A798 – was represented as, I think many of you know, as being in the best interests of all CICs, both condominiums, homeowners associations, as a major reform. It was brought to my attention fairly early, and not the least of which by Professor Frank Askin of Rutgers and Professor Paula Franzese that there was some real serious problems with this legislation, and I think most senators, including Senator Rice recognize that at the very least, as much as 798 pretended – if I can use that word – to give certain protections, and it offers some protections. It also left open many other areas that are very important to property owners.

There are some real issues here, and what I just want to suggest at this point in time is we don't have to live by one of two bills. There is time to get this right, and we will look to the state of Florida; we will look to other venues and other states, success stories, and also your own input as to how things really work in the real world. I know a little bit about the attorney who did most of the drafting of this bill, which is like 110 pages. I'm a lawyer, but I can tell you I don't understand everything that's in this piece of legislation, but I am a little fearful, and I can tell you somebody – the people who did draw this up, every section is in there for a reason, and don't think otherwise. There's no fluff; there's meaning in this, and I would like to know before we

get done with it, since it's going to affect so many people – a million people in the state of New Jersey – what its impact is going to be. Rather than just live by this legislation, or the competing Shirley Turner Bill – Assemblyman Bateman Bill – I think we should look at other alternatives. There are fundamental issues with condominium associations, and homeowners, property owners associations. First Amendment rights, as you know, issues about how maintenance fees can be arrived at. As I talked to somebody earlier, stealth liens and the way in which liens can be placed on people for missing purported dues or other payments.

But I think the biggest issue is one of basic due process: the procedures in which homeowners have an opportunity to be participants in the process. I can tell you, since I've been in the legislature over 20 years, that I have had continued complaints by individuals who have had serious disputes with their board, and usually it has to do with the fact that they are not listened to, and they are shut out when they try to voice something that seems to be at a disagreement with a majority, or whoever is in control of the board. So, I think the most important thing we can do with a piece of legislation is make sure that there's transparency about what is going on, that there's enough notice that all owners recognize what's going on; if there's going to be a change in the bylaws, and things of that nature, that it is given its full opportunity to be reviewed and voted on, and also if there are complaints that we set up an alternate dispute process that isn't going to cost a leg and an arm, and one that the homeowners association is going to have confidence in.

I heard applause with the Public Advocate. I think he's a – I don't know whether he needs more work, as Ron suggested, but there's an office that at least I think most of us, including myself, does have confidence in. If the trust were reposed with Mr. Chen and his office, at least everybody would be getting a fair shake through the process. So, I think that's a possibility that really needs to be looked into. So, let me just close by saying that you should be concerned; there is real interest in getting legislation passed. It's complicated, and it could be tricky, and if you're not careful and forceful enough, there could be provisions in there that leave you worse off than where you are right now. (Applause.) With that, I will turn the matter over to Professor Franzese.

PROFESSOR PAULA FRANZESE: Thank you, Bob.

Thank you.

SENATOR ROBERT MARTIN:

We are going to have to do our business over in the next room.

PROFESSOR PAULA FRANZESE:

You're a statesman, my friend, a statesman. I'll see you this evening. Good. Very good. The reaction from the body presently charged with administering and insuring the integrity of the various rules; the DCA's response. We are disappointed, and certainly that is an understatement that we have somehow been denied the wisdom of Ed Hanna man today. Ed, who is on the frontlines, very much a statesman, and a person of immense principle, had elected on his own time to be with us today, speaking solely from his own vantage point, rather than on behalf of the DCA, and we remain confused as to how it is that somehow he has, as well as all of us have been deprived the opportunity to hear from him. And we will learn more about that deprivation, I can assure you, as we assiduously follow up with this matter in the days to come, our First Amendment values are too sacred in this cause. We are pleased to have with us Michael Ticktin, who unfortunately for Michael, finds himself in the hot seat of sorts. I encourage you to please continue to be gracious, and open-minded, as Michael has taken the time to be with us to talk about the DCA more official response. And Michael, I don't want you to feel that you're being potentially put in an awkward position by asking you what the heck happened in the context of Ed Hanna man? So, I'm not going to ask you to respond to that question unless you perhaps choose to, but it is very helpful to us to hear what DCA's response is to the legislative opportunities as they continue to manifest. Thank you.

MICHAEL TICKTIN:

Thank you very much. The Department of Community Affairs is involved in this issue by virtue of its enforcement of

the Planned Real Estate Development Full Disclosure Act, as Mr. Randazzo pointed out earlier in our enforcement of the PRED Act, we're dealing with a situation where we have statutory authority. We have funding, and as he reported, we were able to bring about a satisfactory resolution of the problem with the developer. The problem is that the PRED Act is essentially directed at problems with developers, and marginally does refer to associations, but doesn't really give us the power that we would need. Ed Hanna man, of course, and Janet DiCristina are doing an excellent job of trying to do what they can under existing law to provide assistance to homeowners who are faced with difficulty with their associations. It's our hope that there will be legislation in the future that will better resolve this problem, create better powers at the state level, to enable the state to be a full part of the battle to help in righting injustices and to correct the problems that are constantly being brought to our attention in many areas. Just for one example: One of the principles that we're concerned about and that is in all the legislation that has come forward is the recognition of the quasi-governmental nature of the associations. This is something the traditional CAI-supported model traditionally had said, no, these are private; this is all contractual. And of course, now you're getting a recognition, including a recognition of the New Jersey CAI that this isn't the case anymore, and it should not be the case. The election issue, of course, is crucial, be it state agency, be it DCA, be it the Public Advocate, be it somebody who's in a position to oversee elections. Go back to the Civil Rights Movement, Lyndon Johnson pointed out the Voting Rights Act was the crucial thing in the ending of the segregation problem in the South, because he knew the Southern politicians, and once they had to listen to the entire population, their behavior would change, and it did over time.

So, in any event, we feel that moving forward is essential. In getting involved in this, our initial involvement was simply opposing the Ukiyo as it was drafted, and supporting the homeowner bills as they were drafted, and all we saw was the complex legislation was inevitably leaning to stalemate with some input from the Governor's Counsel's office at the time – we met with the representatives of both organizations, and we basically came to the idea that it was possible to reconcile the CAI's overlying concern with the organization of planned development common interest communities, so that there were

up-to-date laws governing all of them, not just condominiums, with the concern of CIHC and others about the recognition of homeowner rights. And we move forward with a process to try to achieve this sort of consensus. We think we made significant progress on this at a certain point. CIHC felt that it was not satisfied with the results and exercised its right, which it obviously has, and had to withdraw from the process.

So, the trouble is that this brings us back to the situation of legislative stalemate. Now, conceivably, CIHC will mobilize tens of thousands of people to come forward and by the force of their political power, get through what CIHC sees as necessary to be done. However, in the interim, there's a stalemate. Now, who benefits by the stalemate? Essentially, we saw the benefits by the stalemate at the hearing – Senator Rice's committee had a hearing in Ocean County last summer, which I had the opportunity to attend, and there was this huge gymnasium filled with people who were basically screaming let us alone; get the state out of homeowner associations. We don't want any – they already said we don't want any – they got the fees out of the bill already, which creates a problem. We have powers but no fees; that limits our ability to do anything to begin with, so that was something we weren't happy about, but this has happened before. The bills have gone through, and the fees have come later when people saw that this was something that had to be done.

So, basically, the committee got this barrage, and that was directed at CAI for going along with the compromise for the state, of course, and CIHC, and everybody; they just want to be left alone. They're the ones who – these associations who mobilize their people; they're the ones who are benefiting by the stalemate. They were trying to push to get – you want a bill? Fine. But take the retirement communities out of it. Okay. That's the bulk of where the complaints are coming from, retirement communities, so that really isn't a very good solution.

Senator Rice has spoken of trying to work out something that would work for everybody's legitimate interests. Hopefully, this can be done. The Department is certainly interested in doing what it can to bring this about, encouraging further discussions of some attempts to build consensus; you know, just our experiences in the absence of some reasonable consensus, nothing is going to happen. And we don't think that's in the interests of the homeowners, but nothing happened. So, on that

thought, and that remembering that oftentimes the best is the enemy of the good, that bear this is mind in approaching legislative procedures, and then seeing how the legislature works, and I will reply to same. Thank you.

PROFESSOR PAULA FRANZESE:

Very good. Thank you. Stick around. All of our panelists are gracious enough to stay with us during the question and answer portion. We are now honored and privileged to have with us Public Advocate Ron Chen, a supremely capable attorney for the public interest, a person of tremendous heart, as well as mind, and he is going to be helping us to make some sense of where the road ahead should lead. Public Advocate Ron Chen. You're so good, thank you.

RONALD CHEN:

Thank you very much, Professor Franzese for that warm introduction. I have been referred to already several times before I've said anything. And I've been just absorbing this all. And I come to you right now, actually. I'll candidly admit to you right now, despite my prior profession, more as a student than anything else. This issue is one of obvious public importance; at least the numbers you know already – 1,000,000, over 40 percent of our private residents are now governed by some form of private homeowners association, and those numbers alone make this one of immense public interest, which is why the public advocate in one of its first appearances before the Supreme Court...Well, the numbers alone make it one of immense public importance, which is why we decided to become involved in the *Twin Rivers* case, as a friend of court in the Supreme Court. And there, given my prior background, along with my old – well, my long-standing friend, Professor Askin, the organizer of this conference, in civil liberties, the issue as I saw it was to what extent the State Constitution guarantees a free expression, and association, limit the authority of private community associations to make it administer rules for that community. It also raises significant issues about how to reconcile the expressive rights of residents with the private property interests of the community's residents, and it also requires the court, which it is doing now to consider to what

extent a homeowner association for a large private community might be considered to function as the equivalent of a municipal government. If these associations are essentially considered to act as a municipality, and there is some strong evidence that they perform that function, the question becomes whether they should be held responsible to the same Constitutional standards as a public government.

That's the position we took in the *Twin Rivers* case and we have also been monitoring the legislative proposals, which you've heard about before, now called S805 and S1608, as Senator Rice mentioned, at least S805 would be of particular concern to me, because of all these additional honors and responsibilities they would shift to the Public Advocate, you know, without taking possession, because frankly, we're still studying these bills. I'm glad to hear Senator Martin say that – as (forward) in his legislature – he doesn't quite fully grasp all the complexities, at least of 805, because when I downloaded it and printed it, it's not a quick read.

S1608 is a little bit shorter, and I think probably more geared towards affecting and bringing about the opinion in the *Twin Rivers* bill, but nonetheless, they both obviously would make significant changes in the way homeowners associations operate, including recognizing – both of them in their own ways – that these homeowner associations do possess, at least quasi-governmental powers. They do obviously differ in many different respects, and we're looking at it. Before I express an opinion on either one of them, I want to continue that study. But I would also highlight something that Senator Martin said, which is that – I've been in Trenton now over a year; learned some things, as well. Legislation sometimes is the art of the compromise. Sometimes compromise can be also the problem and not the cure, so we will be looking at those very, very carefully.

One thing, though, I did want to stress is that any legislative remedy, and both bills kindly do this certainly philosophically in different ways, is that they should include some meaningful access to fair, neutral, alternative dispute resolution. That's something that's near and dear to my heart. Within the Department of the Public Advocate there is the Office of Dispute Resolution, which actually trains most of the mediators or a lot of the mediators in a variety of contexts from homeowners' warrantee disputes to Constitutional cases, and although I'm an

old litigator at heart, at least by experience and practice, I certainly have become convinced of the utility for disputes in which access to inexpensive, accessible and fair and impartial, both in reality and in perception, to ADR of that type is just as important sometimes as whatever the immediate issue may be.

Both bills do provide for an ombudsman, which would serve as an ADR coordinator of volunteer mediators, and I understand that Senator Rice would like to see that come to the Department of Public Advocate, and we'll certainly look at it. Let me just say this and without expressing any opinions: There sometimes is a difference between a public advocate, and advocate who is in there taking a side -- that's what I'm supposed to do -- and someone who adjudicates. And I just want to make sure that whatever proposal is adopted doesn't create sort of a conflict of interest between the Public Advocate as an advocate, which is my primary duty, and have me involved in enforcement or regulatory matters in which in some odd circumstance I could have sue myself for something.

I would just want to add, though, generally on ADR that I think this is access to such a meaningful, neutral, and inexpensive method of dispute resolution is something hopefully we can all agree upon. And I will say this: The Office of Dispute Settlement, which is now in my department would be happy to assist in training mediators -- volunteers mediators -- to resolve disputes without the expense and dislocation of adversarial proceedings, if that can solve the problem.

In the current case -- back to *Twin Rivers* now -- in the current case that the court is currently considering, the Appellate Division found that the homeowners associations are indeed subject to state Constitutional prescriptions when it comes to impinging on members' exercise of fundamental expression rights. That case association rules governing signs, but I think it also stands for a larger proposition, which is that you cannot regulate homeowners associations as a corporate entity the same way you regulate corporations whose purpose is to manufacture widgets. There is a fundamental difference, and I think the fact that we have special legislation proposed for them recognizes this.

Between a corporation whose function is mainly commercial and business, and with whom we might be involved as an employee or as a shareholder, but still your home and the sacrosanct nature of your home, and your ability to engage in

your own process of self-definition, which was very important, I think one of the most important civil liberties that I can imagine, and the interaction with the association that is involved in that process seems to me a very, very fundamentally different process that rules governing business and other types of business associations. It's just apples and oranges in my view.

So, if *Twin Rivers* were a conventional municipality, then, subject to the first amendment, the rights to regulate the signs, including the signs for political purposes would fall under the protection of the First Amendment, the uninhibited, robust, and wide open debate on public issues that is part of the American way of doing things. The Appellate Division held that the state Constitution applies to the association speech regulations and therefore rejected the association's argument that it should be viewed as a private corporation – as a corporation making widgets, and making its members entitled to less stringent Constitutional protections.

We have argued, and we will continue to argue in our brief and like situations that since homeowners associations have steadily expanded their role as private governments, and especially their regulatory control over residents' ability to speak, meet, interact, and make their views and public opinions known to their neighbors and the community at large, that roles governing speech should apply to them as they apply to municipal governments.

As residents in particular develop the homeowners are entitled to more than rather less Constitutional protections. There have been some who predicted a set of adverse consequences that will result if the court subject associations to the state Constitution. We have taken the position, and take the position that their predictions are ill-founded, and rest on overstatement of a plaintiff's claim. What we as far as the ability of residents and homeowner associations to engage in the same activity that anyone else can engage in the context of their own home.

The Appellate Division also found that homeowners associations, in general, have increasingly come to supplant the role that only towns or villages once played in policy. Well, that may be true, as an empirical observation. It concluded that fundamental rights must be protected, even where modern societal developments have created new relationships or changed old ones. I absolutely agree. As homeowners

associations continue to expand their role in governing the conduct and rights of a growing living in developments, we must act to insure that our fundamental rights are preserved and protected. And that's a position I have taken, and will continue to take.

As I said, on the proposals, particularly the legislative proposals, my legislative staff is busy studying, working, and trying to figure out which provisions would be most in the public interest, and I look forward to meeting with a lot of you, as you continue to help educate me on this subject matter. Thank you.

PROFESSOR PAULA FRANZESE:

Perfection. We are delighted that our panelists are gracious enough to stay with us for a bit longer to begin the more interactive portion of today's program. Am I delighted to introduce a dear colleague, who will serve as moderator, Professor Bob Holmes.

Fourth Session:
Audience Participation

SECTION OMITTED.
[END OF CONFERENCE]



HOMEOWNER ASSOCIATION PROBLEMS AND SOLUTIONS

Edward R. Hannaman, Esq.¹

Agreement on a goal is a prerequisite to classifying situations or conditions as problems. Mere identification of problems, however, is insufficient. One cannot propose solutions without adequately understanding the problems. If society's intention in setting up associations is to encourage the formation of undemocratic Gulags ruled by unaccountable boards and for the enrichment of those who profit from owner ignorance or impotency- we have succeeded completely. Alternatively, if the intention is that associations be formed as microcosms of democracy in which informed owners collectively wield power, maintain their freedoms and are honestly served by their neighbors and trades people- we have failed miserably. This conference itself, although thirty years overdue, is evidence that enlightened people are focused on true public interest and are aiming for democratic models.

For those in agreement with the democratic model, the solutions are often apparent from problems themselves. And the problems are not what the critics claim them to be; namely owners who wish to avoid following rules they agreed to. In dealing directly with thousands of homeowners over twelve years, I have found the opposite to be true. It is the board members, uneducated and untrained for their roles, often

¹ The author was unable to participate at the conference but provided this submission at the request of the sponsors. For the past 12 years he has worked with homeowners who have had complaints about the operation of their associations. He previously wrote a paper for a Rutgers Symposium on Homeowner Association problems that was cited by the Appellate Division in Twin Rivers and cited by respondents to the Supreme Court.

misguided by attorneys and property managers, who refuse to follow not only the rules but any semblance of responsible corporate stewardship. That current laws are inadequate in protecting owners is now obvious. The curious thing is that on the surface they appear adequate to the task. Boards are required to act in public, comply with their fiduciary obligations, allow owners access to financial records and provide a means to resolve disputes.²

The existence of many individual problems statewide and even institutional ones does not mean that every association is necessarily poorly managed and oppressive. There are many associations among the thousands that are well governed, honestly served by professionals and operate in the best interests of the owners, despite the absence of effective laws, governing documents and oversight conducive to that end. Just as there are many dedicated board members throughout the State who are laudable examples of adherence to the highest fiduciary standards, there are attorneys and property managers who strive to represent the best interests of the owners collectively. Unfortunately there are also many who, either deliberately or from a misunderstanding of their roles, comprise the opposite end of the spectrum. The crucial point unfortunately lost on many owners happily residing in well-run association is the fragility of their situation. The election of the wrong type of person as the board president, the hiring of the wrong attorney or property manager, or even a change in the attitude of a previously good board president and a previously trouble-free association becomes the nightmare all too familiar to many owners throughout the State.

In the case of boards failing to comply with governing documents, effective dispute resolution (meaning a process that is fair, inexpensive and administered by knowledgeable dispute resolvers) offers a potential remedy.³ Although the law does not compel a board to comply with the result, one would expect that

² See, e.g., N.J. STAT. ANN. §§ 45:22A-44 to -45, 46:8B-13, -14 (West 2007).

³ Unfortunately the Appellate Court in *Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 890 A.2d 947 (N.J. Super. Ct. App. Div. 2006), determined that owners in homeowners' associations faced with renegade boards must bring derivative suits. Unless counsel fees are awarded to such owners, this is only a hypothetical solution.

it would since it set up the system. Boards, however, not only feel free to ignore compliance with an outcome, there is an amazing lack of compliance with the very provision of the dispute resolution procedure. This type of situation highlights the need to train board members and provide a system of oversight to encourage compliance. There are other deeper problems to remedy if the system is to adequately protect owners faced with what amounts to a layer of essentially unaccountable government.⁴ Problems in fact arise from the very nature of the manner in which planned developments are created, marketed and administered before the first owner even buys a unit. Thus, one must look initially at the current statutory construct and the Public Offering Statement (POS) mandated by The Planned Real Estate Development Full Disclosure Act.⁵

Relatively speaking, condominiums and homeowner associations are recent statutory creatures. The only, albeit crucial, difference from traditional homes is the factor of common ownership and the concomitant obligation to manage it. The overwhelming choice is through the formation of a homeowner's (or condominium or co-operative) association. There are reasons why developers feel compelled to impose restrictions on personal conduct that are completely unrelated to those necessary to address common ownership problems. After all, restrictions on parking, plantings, placement of lawn furniture, etc., may facilitate the sales of homes. This is no different than a realtor encouraging a seller to eliminate clutter

⁴ Although courts apply a business model, one is hard-pressed to find a business like the one one is compelled to participate in by buying a home; that acts through an elected body which passes and enforces rules governing everyday behavior, that is duty bound to maintain common property and which compels regular and special payments that are liens on one's home. The only way to avoid the board's jurisdiction is to sell one's home and move- exactly as if one desires to avoid State or local government jurisdiction. Arguably the court already acknowledged this by noting that candidates for association office were public figures. *Verna v. Links at Valleybrook Neighborhood Ass'n*, 852 A.2d 202, 213-14 (N.J. Super. Ct. App. Div. 2004). The court also recognized that the power to levy fines is a "governmental power." *Walker v. Briarwood Condo Ass'n*, 644 A.2d 634, 638 (N.J. Super. Ct. App. Div. 1994).

⁵ N.J. STAT. ANN. §§ 45:22A-21 to -56 (West 2007) [hereinafter the PREDFDA].

and clean their home to encourage a sale. But do realtors expect the buyers to maintain their house as it was when they purchased it-under penalty of fines? It is doubtful that the developer would care that the restrictions continue to apply once he has sold all his units and turned the project over to the owners. Frankly, if he did, the owners should resent it.

Unlike traditional homes, most planned developments have their documents registered by the State.⁶ The PREDFDA grants the State broad power in registering developments. As noted above, it is not a mystery why a developer may impose numerous personal restrictions while he is selling units in his development. What is a mystery is why the State would allow them to remain wholesale and require unorganized and usually unaware (see below) owners to remain subject to them. Logic and a desire to instill a democratic sense of self-governance would suggest that the owners be allowed to impose such restrictions as they determine are necessary. Every municipality has health, safety and welfare ordinances to protect owners so allowing owners to start anew would not place them in any jeopardy.⁷

As prospective purchasers enter into this association realm, individuals are faced initially with advertising that never mentions any association or rules as well as an offering statement that is a densely written compilation of hundreds of pages of turgid legalese about the project, ostensibly intended to assist them. The POS, although it contains bylaws, fails to directly inform owners that ultimately they will be responsible

⁶ In accordance with N.J. STAT. ANN. § 45:22A-25 (West 2007), and N.J. ADMIN. CODE § 5:26-2.2 (2008), certain developments, either due to size or make-up (e.g. all low or moderate income units or fewer than 10 condominium units) need not submit offering plans or governing documents to the State for review. Although not mentioned in the statute, the Regulation is clear that the State only accepts the documents- it does not approve them. State reviewers provide no special guidance to owners on general potential problems, e.g. consequences of the developer's failure to sell a majority of units or inclusion of a large rental building with many units, each with a vote, assuring one corporate owner of complete control over individual owners.

⁷ Naturally, exceptions could be made for any rules shown to be specifically necessary to protect the owner's well-being in a project. It is doubtful that many rules would fall into this category. The advantage is that they could easily be listed for owners to understand.

for governing the development. It contains little if anything about what to expect in association living, has no indexed list of rules or restrictions and varies widely from development to development. Perhaps the most glaring deficiencies are that it fails to inform owners of their rights, makes no mention of the standards expected from boards and neglects to inform owners where they may turn for help should they encounter problems. In evaluating the reality of the POS one must consider that section 28d of the PREDFDA states:

The public offering statement shall, to the extent possible, combine simplicity and accuracy of information, in order to facilitate purchaser understanding of the totality of rights, privileges, obligations and restrictions, comprehended under the proposed plan of development. In reviewing such public offering statement, the agency shall pay close attention to the requirements of this subsection, and shall use its discretion to require revision of a public offering statement which is unnecessarily complex, confusing, or is illegible by reason of type size or otherwise.⁸

That current POS' do not meet either this standard or the owners' needs is not simply the opinion of owners and attorneys who have tried to read a POS. A leading publication in the field written by attorneys representing developers states:

Because of its sheer volume, many purchasers fail to read the POS prior to signing a contract to purchase, or during their seven-day rescission period after signing. Accordingly, the real informational value of the POS to a purchaser is questionable.⁹

⁸ N.J. STAT. ANN. § 45:22A-28d (West 2007).

⁹ WENDELL A. SMITH & DENNIS A. ESTIS, NEW JERSEY CONDOMINIUM & COMMUNITY ASSOCIATION LAW 163 (2004). The authors note that the State requires complex plans to list "special risks." *Id.* The authors, however, encourage sponsors' attorneys to supplement the POS "with a booklet summarizing the most important and most often misunderstood facts about a particular offering." *Id.*

The statutory mandate for the POS' content is suspect on at least two counts. It requires such things as the inclusion of entire management contracts and recreational leases¹⁰- as if a purchaser will even read, no less understand them- which is irrelevant since the entire transaction is a contract of adhesion. It would seem preferable for the State to ensure that they were not unfair to the owners. Moreover, one wonders why there is no parallel provision to that in the Condominium Act which simply voids the management contract 90 days after the owners assume control.¹¹ Much of the general information that congests the POS is various general municipal community information mandated by the statute (and further amplified by the PREDFDA Regulations).¹² In this modern information age all of this is readily obtainable over the Internet or from any broker.

Notably, the POS stands in stark contrast to the short, effective, easy to read booklet published by the State to assist renters in understanding their legal rights. The POS is so intimidating that, faced with the inherent demands and distractions in buying and selling a home and moving, few owners even bother to read all, or sometimes any, of it.

Only two conclusions are possible; either the statutory standard for the POS cannot be met or, the State is not ensuring that it is met. Whichever is the case, it is instructive that even leading developer attorneys counsel others to provide purchasers with a separate informational booklet. Unfortunately, these are targeted to specific facts about the offering. It is clear that the effect, if not the purpose, of overwhelming disclosure is to protect the developer. Logically and practically, the greater the volume of material disclosed and the more legalistic the contents, the less chance there is of any purchaser bothering to wade through it.

As noted above, the POS includes a copy of the bylaws, which may recite multiple restrictions on owner conduct. Unfortunately, not only are they rarely ever indexed, there is not even a standard format for indexing them in useful categories

¹⁰ N.J. STAT. ANN. § 45:22A-28a(3) (West 2007).

¹¹ § 46:8B-12.2.

¹² N.J. ADMIN. CODE § 5:26-4.2 (2008).

such as: pets, lawn furniture, garage use, permitted vehicles, etc. Rules often differ for each developer and each development, as do association bylaws. Despite 30 years of State administration of the statute, no State official has publicly proposed a standard format for any governing documents. Inasmuch as most of the bylaws concern such things as elections, board procedures and board powers and other purely governance matters, they are largely unaffected by the nature of each development.¹³ Considering that the purpose of bylaws is to direct how the owners govern their own association, one can validly question why developers should write them. Moreover, there is no logical reason that bylaws should not be initially standardized with an option for owners themselves to vote to revise them.

As one may expect, if a potential buyer happens to notice and object to a restriction, it is not uncommon for sales agents to downplay it as nothing to be concerned about. Developers themselves have been known to waive restrictions to encourage a sale by eliminating a concern. This would not pose a problem for the benefited owner if it were not for the fact that owner-elected boards do not consider themselves bound by such waivers and will penalize the owner. Despite the industry claims to the contrary, it is not only highly doubtful that many people buy in such communities because of all the rules (how could they when no prominent mention is even made of them)- it is doubtful that many are even aware of them until after they move in and receive a violation notice. Anyone conversant with basic human nature realizes that people purchase homes in developments for a multitude of reasons- location, affordability, aesthetics, amenities, the unavailability of non-association homes, and desire to avoid property maintenance chores.¹⁴

¹³ While document authors should recognize the differences in administration between, for example, a two- unit condominium and a 200 unit one, that is frequently not the case. As a result there are many two- unit condominiums that have bylaws requiring them to operate with boards of five members. At least as troublesome are those with six units in which one owner is left out.

¹⁴ One need merely peruse real estate advertisements in a weekend newspaper to confirm this fact. Ironically, not only must owners pay for maintenance, they cede all control over it to the board. In other parts of the country where the adverse effects of association living are more well known, advertising for single family homes often carries the notation “No homeowner association” to better attract purchasers.

In addition to building the units, the developer (or in reality, his attorney) establishes both the method of governing the development and all the rules. They both will continue to apply to the owners after the developer sells all the units and departs, unless a majority (or at times even two-thirds) of owners can organize themselves to overturn them. The difficulty for owners is compounded by the fact that they can usually expect their own board to vehemently oppose them. Fewer rules not only mean less power and authority for the board, but listening to owners is contrary to the board's training. Under the current system, owners begin serving on the board while the developer is in control. They are, therefore, not exposed to a democratic manner of governing a development. The developer, after all, is running a business and not administering a democracy. If he wants to change some aspect of the development he does not survey the owners- he simply implements it. As noted above, developers are often flexible with rules. For reasons perhaps best left to psychologists, owner elected boards are demonstrably more dedicated to enforcing and preserving every small rule than developers ever are.¹⁵ Professor Evan McKenzie, an authority in the field, characterized such board members as enjoying the "perceived pleasure of wielding power over others" and he noted that those members with an authoritarian bent receive strong support from the trade group's attorney's and managers.¹⁶ In fact, Professor McKenzie observed that managers and lawyers routinely advise boards to be extremely aggressive and inflexible in enforcing rules.¹⁷

Although developers typically (and quite practically) only enforce the rules necessary for them to sell units, it is common for owner-run boards to seize on unnecessary, unwanted and

¹⁵ A request to see complaints filed with the State while the developer is in charge would reveal that construction matters dominate and rule enforcement is rarely an issue. Developers are focused on selling- not enforcing such things as bans on barbecuing, pet ownership or flowerpots on steps.

¹⁶ EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 131-32 (1994).

¹⁷ *Id.* at 13. For a non academic but thorough view of the numerous pitfalls (the book is 519 pages) of associations, see DONIE VANITZIAN & STEPHEN GLASSMAN, VILLA APPALLING: DESTROYING THE MYTH OF AFFORDABLE COMMUNITY LIVING (2002).

often undesirable rules to dominate their neighbors- especially those who ask questions or otherwise annoy an untrained (and unrestrained) board's sense that it rules by divine right. While rules regarding common property are essential and in fact the reason for the formation of the association, all associations have numerous restrictions on owners' personal conduct on their own property (e.g., restricting drapes as they appear to the outside of a window or working in one's own garage). The numerous rules facilitate harsh boards in exercising an "enforcer mentality" and create an "us v. them" atmosphere.

Although the PRED supplement gives the State broad authority to act on the owners' behalf and the court has found it to have broad incidental and implied remedial powers, the State confines itself to three areas: open meetings, access to financial records and dispute resolution.¹⁸ Despite the legislative mandate to prepare and distribute "explanatory materials and guidelines" to assist associations, executive boards and administrators "in achieving proper and timely compliance with the requirements of P.L. 1993, c.30" (the legislative supplement which includes provisions for owner rights and elections),¹⁹ the responsible agency has not issued any guidelines to associations not already contained in the statute on anything other than open meetings²⁰ and the location of a suitable meeting room.²¹ Even when implored by owners in Radburn to exercise its authority to require fair elections under section 45a of the PREDFDA and pursuant to the decision of the Appellate Division in *Twin Rivers* (before the Supreme Court's decision and unaffected by it), the State refused to intervene to stop blatantly unfair

¹⁸ See N.J. STAT. ANN. § 45:22A-48 (West 2007); *Coastal Group v. Planned Real Estate Dev.*, Dep't of Cmty. Affairs, 630 A.2d 814, 819 (N.J. Super. Ct. App. Div. 1993); *Enfield v. FWL, Inc.*, 607 A.2d 685, 689 (N.J. Super. Ct. Ch. Div. 1991), *aff'd* 607 A.2d 666 (N.J. Super. Ct. App. Div. 1991), *cert. denied*, 611A.2d 648 (N.J. 1992); Assemb. Local Gov't Comm. Statement to S. 217- L.1993, c.30 (1993).

¹⁹ § 45:22A-48. The provision states: "[s]uch guidelines may include the text of model bylaw provisions suggested or recommended for adoption." *Id.*

²⁰ N.J. ADMIN. CODE § 5:20-1.1 (2008).

²¹ § 5:26-8.2.

elections.²² Compounding this deficiency is the State's failure to provide practical information to owners or State-sanctioned training courses to educate board members as to their duties or the meaning of the "fiduciary obligation" applicable to their service. Uneducated board members are easy prey for unscrupulous attorneys, property managers and trades-people. They, in turn, find it easy to prey upon uninformed owners who have no idea of board fiduciary obligations. Just as bad, even if owners are aware of their rights, they have nowhere to turn for protection from board malfeasance, other than to unaffordable private lawsuits.

From the development's inception, the applicable statute provides that the developer exercises authority in the name of the association. This continues until 75% of units have been sold and the development's governing board is fully elected by the owners.²³ Until such time, anything the developer does, even in his own interest, is done in the name of the "association" and thus appears to be done by the owners. This can have and has had seriously detrimental consequences for owners. As one participant in the Homeowners Conference reported, the developer, acting as the association, can make agreements and represent both sides, such as making a loan from himself to the association. Although it appears that two parties are involved, there is really only one- the developer- engaged in self-dealing. Although, if discovered, such self-dealing can be undone, neither statutes nor state review should permit even its possibility.

The association environment, even as owners are added to the board after 25% and 40% of the units are sold, is not in line with a democratic model. The business model tolerates no

²² The Radburn Board only allows election of candidates it sanctions. It disregards owner petitions for candidacy and summarily rejects owners who get more write-in votes than the board's candidate. The court in *Twin Rivers* noted that while sections 44 and 45 of the PREDFDA did not address the conduct of elections the requirement for elections "must be taken to connote fair and open processes, in which opposition candidates are entitled to campaign." Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 890 A.2d 947, 964 (N.J. Super. Ct. App. Div. 2006). The court also noted that any suppression of opposition or skewing of elections "would be viewed as an improper exercise of legislatively established powers." *Id.*

²³ N.J. STAT. ANN. §§ 45:22A-47a, 46:8B-12.1a (West 2007).

effective opposition, nor does it incorporate a balance of powers or any effective checks and balances on board power. (For example, in the crucial financial area there are no state regulations and there is rarely any provision for a finance committee composed of non board members that the board must satisfy). Needless to say, even if there is a community newsletter, the board runs it and can edit it to effectively undermine owner opposition to board conduct.²⁴ For the initial owners, service on a developer-run board is the only “training” they receive in preparation to exercising essentially unbridled power. Subsequent owners are thus inured to this model of governance. Expecting democracy to flourish in such an environment is like expecting plant seeds to germinate in concrete. Like seeds, democracy needs the right conditions to take root and grow.

To complete the abysmal situation for owners, the dominant force in the association arena is comprised mostly of and ruled by the professionals and trades-people that profit off of associations. Although this trade group originated many years ago as an organization which included owners in positions of leadership and was intended to benefit associations, as Professor McKenzie documented in *Privatopia*, the trade group organization became dominated by attorneys, property managers and other trades people profiting off of associations.²⁵ He succinctly describes those who build and service developments as a “typical trade association petitioning for legislative beneficence for its members.”²⁶ Moreover, he states that it has “become a significant force in interest group politics

²⁴ In the *Twin Rivers* Supreme Court decision the court recognized it as sufficient if the community newsletter allowed owners access to it. It failed to note that it was paid for by the owners and was their free press right- not that of the board president. Thus, it allowed him to insert rebuttals to newly submitted letters on the first page with the letter being criticized relegated to an inner page. He also routinely used the newsletter to boldly personally name and criticize opposition owners. The owners’ rights are supposedly to publish and distribute their own newsletter— naturally at their own expense. If either political party in our democracy were permitted to operate under this standard we would have the same one party rule common to all associations.

²⁵ MCKENZIE, *supra* note 16, at 106-21.

²⁶ *Id.* at 119.

in many states. To a large extent, they have been able to shape legislation and judicial policy making, prevent meaningful regulation of CID [Common Interest Development] activity, and keep the discourse on such matters largely private.”²⁷

This group is currently lobbying for a statute written by its members (serving on national law commissions) that provides owner “rights” that are more apparent than real.²⁸ This group argued before the New Jersey Supreme Court in the *Twin Rivers* case that homeowners in associations should be denied the State Constitutional Rights afforded every other homeowner in the State.²⁹ (Sadly, since some board members favor this denial to further enhance their power over owners, the owners themselves were required to pay the trade attorneys fees to pay for litigation to deny them fundamental rights).³⁰ It also argued

²⁷ *Id.* at 26.

²⁸ For example, in its approximately 118 page Uniform Common Interest Ownership Act (UCIOA), which largely parallels issues and concerns covered by the existing PREDFDA (only approximately 20 pages of it deal with owner “rights”), financial record access for owners is allowed but only for two hours in any week, after which the association can charge any amount it desires. Assemb. Res. 798, 212th Leg. (N.J. 2006), available at http://njleg.state.nj.us/2006/Bills/A1000/798_I1.PDF; S. 805, 212th Leg. (N.J. 2006). This rewards inefficient boards and punishes owners. It provides less protection than the current statute, which does not allow a charge for access. Similarly, theirs makes no provision for educating board members or for such necessary protections as counsel fees for owners. Its concept of bidding requirements is swallowed up by a far lengthier list of exceptions. The trade group vehemently opposes the owners’ protection bill (17 pages long), which contains actual owner protections such as those and more. S. 1608, 212th Leg. (N.J. 2006). The trade group’s legislation parallels the POS in using bulk to deter effective review. Since the vast majority of its Bill concerns development issues, it is arguably unnecessary. Any such concerns would be better addressed through amendments to the State’s PREDFDA. Unlike the few states which have adopted the complete UCIOA, New Jersey has comprehensive legislation.

²⁹ They supported the association’s position that the New Jersey Constitution did not apply to its rules and regulations. Notably, the Appellate Division had remanded the matter to work out specific restrictions in accordance with the New Jersey Constitution. Since the owners were willing to accept limitations under standard “time, place and manner” considerations, there was no reason to bring the matter to the Supreme Court other than to solicit a denial of constitutional rights.

³⁰ One presumes that if the trade group succeeded, developers would not be prominently disclosing this fact in either their POS or advertisements. It is

that the PREDFDA supplement that provided owners with certain minimum statutory rights should not apply to any development in existence prior to its enactment. Fortunately both the Appellate Division and the Supreme Court disagreed with the trade group position that would have led unjustly to differing rights for owners depending on the date their development was established.

What is amazing is that in the past 30 years, until the Public Advocate intervened on behalf of the owners in the *Twin Rivers* Case, there is no record that any ranking State Executive Official or entity has ever publicly spoken out for owner rights. Even more disheartening for owners is the fact that the agency charged with protecting their rights has never shown any interest in intervening in any suit to help establish or protect owner rights in associations.³¹ When the trade group toured the State holding its “town meetings” to support its own proposed legislation and to attack owner protective legislation introduced by Senator Turner³² at the behest of owners, the State said nothing and did nothing to oppose that presentation.³³ It could have held public information meetings at various public places and at association community rooms to inform the owners the truth; namely that the proposed owner Bill³⁴ gave the State no power to interfere in authorized and properly made internal

doubtful that advertisements with banners such as: “Buy here and leave those pesky Constitutional Rights behind” would enhance marketability.

³¹ Equally disheartening, as well as mysterious, is the fact that the agency has never sought to participate in any Institute for Continuing Legal Education courses on the subject of its administration of the PREDFDA.

³² S. 1608, 212th Leg. (N.J. 2006).

³³ One immediate benefit of the Conference is that the agency’s representative stated for the record that the agency was not supporting any particular legislation on owner rights. This is notable in that the same representative, in commenting upon the pending introduction of S. 2016, 211th Leg. (N.J. 2004), by Senator Shirley Turner, stated publicly at a workshop on homeowner associations, whose attendees included owners at an Atlantic City conference in 2004, that this bill would not pass, and that the agency instead supported UCIOA, which he was helping to re-write in consultation with the Trade group.

³⁴ See *supra* note 33.

decisions. Nor would it be charging huge fees since the original bill only had a two-dollar annual fee (capable of being increased over years to an annual maximum of four).³⁵ Most importantly, it could have answered owners' concerns and put to rest their completely unfounded fears- fanned by the trade group- that it would allow State take-over of their associations or even abolish their associations. (The bill contains a provision, in line with case law, that curtails unnecessarily over reaching umbrella associations so that the owners in their individual associations retain the powers granted them by statute).³⁶

The State's failure to act in the owners' interests places owners at a severe disadvantage and explains in large part why the current problems persist. In response the owners themselves were compelled to form The Common-Interest Homeowners Coalition (CIHC), which is currently the only statewide owners group advocating for owner rights.³⁷ When they have attempted to try to present their position before the legislative or executive branches one inevitably finds a few lay people- usually retired- confronted by the highly organized well funded nationally connected trade group packed with attorneys. Perhaps fearing that its powerful, well-financed organization of professionals was not enough to insure a sufficient imbalance against the owners, the trade group hired additional professional lobbyists to advocate for its preferred law. Owners alone cannot hope to match the resources that professional financial interests have arrayed against them.³⁸

³⁵ The trade group's cries of alarm over a two dollar fee to help owners (the Bill was subsequently revised to eliminate any fee) stands in sharp contrast to it's position when it is the cause and the likely beneficiary of additional and considerably larger funds owners will be forced to pay. See *infra* note 26.

³⁶ See *Fox v. Kings Grant Maint. Ass'n.*, 770 A.2d 707, 719 (N.J. 2001). *Fox* is another in a seemingly endless stream of cases that the "responsible" agency refuses to follow, allowing boards to perpetuate an improper violation of owner rights.

³⁷ See generally Common-Interest Homeowners Coalition, <http://www.c-ihc.org> (last visited Apr. 11, 2008).

³⁸ Professor Wolff of Columbia precisely identified the problems of new interest groups (such as the CIHC) in a pluralistic society competing against established ones in an essay entitled "Beyond Tolerance." Robert Paul Wolff, *Beyond Tolerance*, in A CRITIQUE OF PURE TOLERANCE (1965). His basic thesis is that it is extremely difficult for new interest groups to reach the plateau on

In identifying problems, the agency charged with the responsibility for protecting owners did not have to rely solely on its own experiences. In 1998 the Legislature published a report of the Task Force of the Assembly to Study Homeowner Associations which identified virtually all of the problems extant today.³⁹ Despite years of compelling and mounting evidence of the problems confronting owners, there have been no revised regulations, statutes, POS changes or form documents to assist and protect owners. In fact it is difficult for owners to find the agency providing governmental support since it receives absolutely no publicity.⁴⁰ Generally (and logically), owners with problems try either Consumer Affairs or the Attorney General (neither of which to date have opted to exercise any jurisdiction they may have in the area of homeowner rights).⁴¹

which groups can compete equally and get governmental recognition. Even worse for new groups was a government that saw its role as mediator; that position inevitably favored the more powerful. This is exactly the situation that occurred in considering proposed legislation to protect owners when the state agency charged with owner protection brought the owners together with the trade lobby. The trade lobby, as expected, took as its starting point not owner needs but its ponderous and largely irrelevant UCIOA. It dominated to the extent that the owners wisely withdrew to preserve their ability to independently seek and, with S. 1608, 212th Leg. (N.J. 2006), get needed legislative support.

³⁹ N.J. GEN. ASSEMBLY, ASSEMBLY TASK FORCE TO STUDY HOMEOWNERS' ASSOCIATIONS, Assemb. Res. 47, 201st Leg. (1996), available at <http://www.njleg.state.nj.us/legislativepub/reports/homeown.pdf>.

⁴⁰ The staff consists of one person assigned full time and one with part-time duties to assist homeowners with their association problems. They must contend with all statewide complaints as well as with association attorneys only too happy to bill to oppose any State requests. They are located in the Homeowner Protection Bureau in the Codes Division within Community Affairs. To find them on their Department web site one must correctly make several counter-intuitive choices-such as selecting "Codes" then "new home warranties" to proceed further in finding help with their homeowner association problem. Considering their workload, it is perhaps fortunate that the Department provides no publicity for this function. See generally Bureau of Homeowner Protection, http://www.state.nj.us/dca/codes/newhome_warranty/nhw.shtml (last visited Apr. 11, 2008).

⁴¹ Query whether the Division of Consumer Affairs in the Department of Law and Public Safety could exercise jurisdiction over associations that are non-profit corporations since it has jurisdiction over same.

In the current scheme, except for very basic statutory rights such as the right to access meeting minutes, financial records and dispute resolution, owners are left to seek justice individually and at great cost. Even with constitutional rights at stake, without the intervention of the Rutgers Constitutional Law Clinic, the owners would have been unable to afford to advocate for their rights in court, or, as happened to the owners' rights advocacy group in *Valleybrook*,⁴² exhausted their funds trying their case and thus had no funds available to enforce their favorable arbitration decision. They were initially successful in preventing the board from obligating owners to pay millions of dollars for capital improvements (consisting mainly of a heated indoor swimming pool) without first allowing the owners to vote on the expenditure. The board, with the unlimited ability to impose special assessments, since it is essentially a taxing authority, naturally never runs out of money for "its" attorneys.⁴³

An excellent example of the current imbalance, even when one is represented by counsel, is the situation following the wake of *Micheve*.⁴⁴ In *Micheve*, the Appellate Division construed the Condominium Act to limit initial association charges to purchasers in accordance with what all the owners would pay according to their percentage interest.⁴⁵ Association

⁴² See *supra* note 4

⁴³ In *Twin Rivers* the board unflinchingly, and without any owner approval, authorized close to one million dollars to oppose owners' Constitutional Rights. One wonders at the fiduciary implications if not the practical business sense of such a course of conduct.

⁴⁴ *Micheve v. Wyndham Place at Freehold Condo. Ass'n*, 885 A.2d 35 (N.J. Super. Ct. App. Div. 2005). Following the decision there were a number of concerned buyer attorneys who wondered why the State refused to help individuals who could not afford to litigate blatant association violations of the Condominium Act, even though it was an easily winnable summary judgment case. To avoid the possibility that someone actually might put principle over money, the trade group lobbied successfully for A-2822/S-2188 amendments to the Condominium Act allowing associations to charge purchasers nine times the monthly fee to be used for any purpose the board may desire. Even a modest monthly maintenance fee of \$250 would force an owner to pay an extra \$2,250 if the Governor signs the bill. The effect it will have on those scrimping to purchase low or moderate housing is obvious.

⁴⁵ *Id.* at 38-39.

attorneys promptly strained to narrowly construe the decision, or simply ignored the decision, and challenged purchasers to expend the significant legal fees necessary to contest their position. Although a purchaser would easily win in court, it was obviously not economically prudent to spend thousands of dollars to save far less- even though unjustly charged. If the State promptly issued public guidance to associations and attorneys on this decision and intervened on behalf of initial purchasers faced with such legal bullying, associations' willingness to ignore the holding in *Micheve* would have lessened considerably.

When boards openly abuse their powers, owners have no simple or cost-effective recourse. Moreover, there is no personal consequence to Board members who deliberately violate their fiduciary obligations or refuse to follow bylaws. Even if dispute resolution is available, it is a process set up by the board and not binding on it. Board members can, and have, encouraged the association attorney to resist affording owners statutory rights without fear of consequence other than incurring significant legal expenses for all the owners. Owners can file a lawsuit to force boards to act properly (and must if they are in a homeowner's association as opposed to a condominium or cooperative) but without the prospect of counsel fees being paid for, that remedy is more theoretical than real.

Alternatively, the few owners who are both paying attention to and understanding what is happening can attempt to educate their fellow owners and organize an opposition to vote the board out. But as anyone who has ever tried to unseat what is essentially a dictatorship can attest, it is extremely difficult and usually unsuccessful if the board is determined- as they inevitably are- to remain in power.⁴⁶ Unlike the board, which can use all the association's resources including the newsletter, property manager and attorney to advance its position, owners are left to fund opposition themselves. Boards have owner lists

⁴⁶ If the association is a nonprofit corporation, the owners can pursue a Superior Court summary proceeding under the Non Profit Corporation Act (*See* N.J. STAT. ANN. § 15A: 5-23 (West 2008)) to challenge unfair elections, but otherwise are left on their own since, as noted previously, the only State entity with jurisdiction to ensure fair elections refuses to exercise it. *See supra* note 12. Boards have been known to simply ignore requests for recall elections as well as the outcomes from unfavorable ones.

they virtually always deny opposition owners so the board can effectively use its franking privilege to disparage those in opposition. Unfortunately, for various reasons, too many owners show little concern for board violations of governing documents and less for board discrimination against a few of their neighbors. Sadly they do not accept that one day they may be the recipients of the board's wrath.

In response to owner attempts to unseat them, boards have done such things as: destroyed opposition campaign literature; failed to acknowledge candidate petitions; left opposition candidates off of ballots; declared opposition candidates ineligible because of alleged rule violations; counted ballots themselves in secret (the more "enlightened" ones use friends or spouses); refused to schedule recall elections or refused to accept the outcome of unfavorable elections, etc. When there is only one "party" and it controls all the resources and all the governmental apparatus, there are no checks and balances to protect owners. Their only recourse is an enormously expensive and therefore highly impracticable recourse to the courts. Ironically, the suing owner will pay both sides' legal costs to get simple justice.

It would obviously be far more difficult for boards to behave in an undemocratic manner were it not for the willing complicity of too many association attorneys. These attorneys operate in a manner more correctly characterized as the board president's personal attorney rather than what they are required to be; namely the "association" attorney. The combination of misguided attorneys and uneducated board members with no personal risk for misbehavior is a fatal combination for owner rights.⁴⁷

⁴⁷ Unfortunately for owners, there is far greater profit for an attorney for fanning flames than putting them out. Thus, many times, when owners bring problems to the State and the State informs the association it needs to provide the owners with their minimal rights, the attorney supports the board's position, which is adversarial to owner rights. One would expect that in a business, which the trade group maintains an association is rather than a government, good "business judgment" would compel a board to minimize its legal costs and willingly comply with the law, especially when compliance is free; it benefits its members and disputing it is very expensive. This is compounded when the laws are for the protection of the very owners who run the association and on whose behalf the board members are supposedly exercising good "business judgment." Again, there is no better example than the *Twin Rivers* case. Could one imagine a board spending many hundreds

Although attorneys are bound by the Rules of Professional Conduct to represent the association as an entity and specifically not the Board, many of them have invented a convenient fiction.⁴⁸ They contend as follows: the board runs the association; therefore it is the association ergo whatever the board wants is, by definition, in the interest of the association. By that illogical, but quite profitable fiction, if the board does not want to comply with owners' statutory rights- or the bylaws- that becomes the association's position and it legitimizes spending owner money for legal expenses to pursue that position.⁴⁹ Essentially board members get an attorney to serve their personal interests for a tiny fraction of the cost and attorneys have a satisfied "client" happy to pay whatever they may bill.⁵⁰

of thousands of dollars of otherwise "profits" on lawyers to impose burdens on owners' rights to use their own clubhouse to discuss association concerns- or to stop editing opposing letters to the association newsletter? Any real businessperson would quickly settle the matter since they would not be simply able to pass costs along (as HOA boards are able to through special assessments).

⁴⁸ See generally N.J. RULES OF PROF'L CONDUCT R. 1.13, available at <http://www.judiciary.state.nj.us/rpc97.htm>.

⁴⁹ See MCKENZIE *supra* note 16, at 132. As Professor McKenzie noted "[c]ovenant enforcement litigation has become a profitable legal specialization for attorneys in states with many CIDS." *Id.* He further notes that attorneys also profit from members forced to sue their boards for breach of their fiduciary duties, negligence, abuse of authority, etc. *Id.* While association attorneys handling litigation advised the board of what was necessary, Professor McKenzie queries whether there is a prerequisite disinterestedness on the attorney's part. *Id.*

⁵⁰ As an example, in an association with 300 owners, the board members each pay \$1 an hour of the attorney's \$300 per hour bill. This basic flaw is naturally continued in full force in the UCIOA legislation being advanced by the trade group. Although its bill allows for the removal of board members who refuse to comply with the law- but not with bylaws- it allows for them to appeal any such removals, naturally at the owners' expense. The only adverse consequence to the board member is that he may lose his office. Meanwhile, all his legal fees are paid for by the association. The trade group adamantly opposes any personal fines on corrupt board members. Conversely, they have no objection to having owners pay board-imposed fines, along with both their own and the association's, legal fees.

SOLUTIONS

1. Replace the current passive State Paradigm with an active one beginning at the point that a common ownership development is established.⁵¹

There is a reason this is number one. All the developments in question are creatures of statute. As a consequence, the government has a special responsibility to protect the rights of those living in them. Owners are entitled to and desperately need a willing and activist State agency with the proper authority and responsibility to act publicly for the owners. It is important to recognize that these are two crucial and separate concepts. The designated State agency must act publicly and unequivocally in the owners' best interests. It cannot, as the current agency has, refuse not only to do everything it is statutorily authorized to do, but even refuse to acknowledge what has repeatedly been stated by the legislature and the courts, namely, that the PREDFDA is remedial legislation. Additionally, an effective agency cannot refuse to enforce owners' rights recognized by the courts; especially not the right to fair elections as the agency did in Radburn. Most importantly, no agency can have- or deserves- the owners' trust if it is willing to work behind closed doors with any trade group lobbying in the interests of those profiting off of associations and which actively opposes any meaningful owner rights.

There has been nothing preventing the State from recognizing the impracticality of the current POS, not only from an owner's viewpoint, but also from that of the state reviewers forced to cope with them. Common sense dictates that reviewers forced, under time constraints, to wade through five inch thick piles of paper consisting of pure legalese, searching for problems, are doomed to failure. Note must also be taken of the imbalance in participants. Just as in football, one would not expect even the best 175 pound lineman to consistently block highly motivated opponents weighing 295 pounds, no one can expect employees (often non-attorneys) earning perhaps \$70,000 to successfully do battle with attorneys earning \$250,000 and up when the latter's interest is to prevail with

⁵¹ The solutions are numbered for convenience in referencing them and, except for the first one, do not necessarily reflect their importance.

their clients wishes – which may not be compatible with the owners’ interests. At the least, in this modern age, developers should be required to submit applications in electronic form capable of review with word processing programs. Along with a requirement for form documents, electronic assistance would significantly ameliorate the burden on reviewers. Currently, the considerable imbalance in favor of the development applicant and against those attempting to protect prospective purchaser interests weighs heavily against the public.

To properly fulfill its role of protecting owner rights, the State needs to do things such as: hold press conferences; issue public service announcements; intervene in cases crucial to define owner rights; hold informational meetings around the State at association clubhouses and convenient public venues to solicit owner concerns and provide objective information. Currently the trade group occupies the field without any effective challenge and cooperates with boards seeking to minimize owner input and rights. As a result the only source of information to owners is that of a group serving its own special interests-which are too often diametrically opposed to those of owners.⁵²

2. With 30 years’ experience reviewing planned developments, the State is long overdue in preparing and distributing a simple functional brochure to prospective purchasers that actually educates them about the nature of association living and provides them with necessary information including where to go to seek help. In addition to informing owners, the State must provide for mandatory objective education for owners elected to the board to inform them of their obligations and owner rights.⁵³ The State must do this in

⁵² One of the first things to eliminate is allowing any trade group to include its fees in initial association budgets. If not prohibited outright, at least owners should be allowed to vote on whether to allow the board to pay such fees. If they failed to get their fees into the initial budget, it is not uncommon for a property manager trade member to simply include them as “routine” expenses. After all, there is no objective education to allow board members to protest. One wonders if the trade group informed owners of its fees while railing against legislation having a two-dollar annual fee to protect owners.

⁵³ To anticipate, and therefore eliminate, the effect of two immediate trade group objections; this will not be a year-long course, nor will it cost thousands of dollars. Rather it would occupy a few hours at a local community college or at

conjunction with recognized independent educational institutions such as state and county colleges that have no financial interest in association operations.

3. The State must develop standard association governance documents that could be revised by owners once they assume control. One of the first should be a standard association budget.⁵⁴ If other POS documents were standardized, reviewers could focus on specific project issues rather than starting from scratch on every application. Standard documents would have the additional effect of aiding developers by streamlining the approval process and reducing their costs. Although standardized, if necessary developers could modify them and, by specifically noting changes, State reviewers would save the current time necessary to read all of documents (approximately five inches thick) as they must do presently.

4. The Legislature needs to revise statutes in accordance with actual owners' experiences over the past 30 years and as documented in its own Task Force Report, which highlighted many of the problems.⁵⁵ These revisions must protect owners from documented and anticipated board abuses, especially in the areas of conflicts of interest, disclosures, bidding, record access and proper use of the association attorney.⁵⁶ Because experience amply demonstrates that neither the legislature nor

one of the numerous adult education courses offered at local schools and cost less than one hour of their standard hourly rates. Most importantly, it must be an objective course and not a course developed and taught by fellow trade group members-as in Florida, as its Ombudsperson related at the Conference.

⁵⁴ Considering that NJSA 40A:5-48 (2007) mandates the same format for all of New Jersey's widely disparate municipalities, all of which have financial considerations far more complicated than any association, this should not be a difficult task.

⁵⁵ See ASSEMBLY TASK FORCE TO STUDY HOMEOWNERS' ASSOCIATIONS, *supra* note 39.

⁵⁶ Although the legislature does not regulate attorneys, it can and should impose conditions on a board's use of them without owner approval. Owners must be allowed to determine whether they want to pay for attorneys to oppose their own interests.

any regulatory agency can expect uniform good faith compliance, statutes and necessary implementing regulations must be carefully and comprehensively drafted if they are to result in compliance.⁵⁷

5. A truly owner-protective statute must establish a clear separation of the developer from the owners' association. The developer controls the development- he cannot control the owner's association nor should he be allowed to act as or in the name of the association. This will avoid all confusion between acts of the developer and acts of the association. Additionally, because the developer has the right to control the development until 75% of the units are sold, any rules he wants (other than those infringing on constitutional rights) to enable him to market the property should be permitted. Once all the units are sold, or the developer has ceased to market units or an unreasonable time has elapsed, all developer rules (except those few expressly excepted by the State as necessary) should expire. Thereafter the only rules imposed on the owners will be those the owners themselves specifically and individually voted into effect.

6. A dedicated, energetic and owner protective State regulatory agency should be created, empowered to enact regulations to provide necessary details in or for such areas as governance (election procedures, voting, passing rules, etc), record access and dispute resolution. The absence of any such regulations, especially in light of N.J. STAT. ANN. 45:22A-48, is further evidence that the current agency has failed to meet the owners' needs.

7. Appropriate State regulators, in conjunction with independent educational institutions (such as the Bloustein Center for Government Services), should formulate standard

⁵⁷ To illustrate, Section 14(k) of the Condominium Act requires associations to provide a fair and efficient procedure for the resolution of disputes. N.J. STAT. ANN. § 46:8B-14(k) (West 2007). One notable trade group attorney refused to acknowledge that the statute required the procedure to be described in any authoritative writing. The due process implications of either an unwritten procedure, or one a board can secretly change at will, are obvious and severely detrimental to owner rights.

governing documents for associations and mandate them as initial documents.

8. To properly recognize the owners' true right of self-determination, owners must be allowed to impose restrictions on themselves that they vote for, pursuant to appropriate regulatory guidance. It is the owners themselves who should decide what rules to live by. The rules they decide to impose on themselves are simply, obviously and literally, none of the developer's business.⁵⁸ Most importantly, owners should not be required to undertake the heavy burden of organizing themselves to overturn existing developer-imposed restrictions.⁵⁹ If owners believe a restriction or rule is important let them vote for it or lose it. Equally important, any regulatory or statutory provision must prohibit "wholesale" adoptions of the existing rules, as the trade group would undoubtedly urge. Let the owners read and evaluate the long list of restrictions on their freedom and agree- or disagree- with them each in turn. The notice this would provide alone is worth the exercise.

9. Provide effective State oversight. To be effective, the State must be empowered to remove Board members found to have acted contrary to law, to association governing documents as well as for violations of election regulations, ethical restrictions, etc. Moreover, if the association bylaws allow the board to fine owners- fines should be imposed individually on culpable board members who refuse to correct their behavior or who are found culpable of having knowingly committed wrongful acts. Crucially, a board member under charges should be denied the

⁵⁸The best analogy I have heard about this, which applies to this entire area, is attributable to a radio host Shu Bartholomew (SP) observed in her program "On the Commons" that when our founding fathers were writing the Declaration of Independence and the Constitution they did not feel bound by the wishes of, nor did they seek the advice of, King George the Third.

⁵⁹ In answer to the trade group's protestations that many restrictions won't be enacted- welcome to true democracy. If the board with all its resources cannot convince owners to saddle themselves with numerous onerous restrictions, then why should such restrictions be imposed? In democracy we have accepted that people are competent to govern themselves. Moreover, if the owners should subsequently determine that a previously rejected restriction should be adopted, they could easily do so.

right to use the association attorney to oppose the action. In fact, a true “association” attorney would be supporting the action to rid the association of a board member demonstrating improper behavior. If the association insurer will not participate on the board member’s behalf, the member should provide for his own defense subject to reimbursement only if he successfully rebuts all the charges.⁶⁰

The trade group opposes all attempts at holding board members effectively accountable (they naturally support either State or owner actions which will either employ board attorneys or be too costly for owners to pursue). Ostensibly the basis for such over-protectiveness of board members is that true accountability deters people from volunteering. In contrast, experience has shown many board members’ desire to remain on the board can be viewed as an “unrelenting hunger” for recognition and special treatment.⁶¹ Additionally, the lack of volunteers is often a byproduct of the way the association itself is established and run. It has been observed that homeowners are not naturally or inherently apathetic. Rather, they are “browbeaten, penalized, erroneously charged and invoiced, ignored and silenced into apathy. Contrary to what one might have heard, American homeowners *want* to participate in how their association is run but they are effectively and very calculatingly prevented from that participation.”⁶²

⁶⁰ Inevitably, any attempt to hold any board member actually accountable leads to vociferous protestations from the trade group. Their argument is that this will eliminate volunteers. First, judging by the extremes to which board members go to cling to their positions- especially board presidents, this is a blatant bluff. Secondly, if the board member’s condition of service is to be able to violate owner rights, the bylaws and laws as well as their fiduciary obligations with impunity, who wants them? Finally, one trusts that board members subscribing to this position have turned in their driver’s licenses. The police can stop them at any time and charge them with a violation leading to a fine-or worse. Most importantly, the police are not generally inclined to issue a warning to them after they’re caught speeding past the clearly posted speed limit sign. A board member should know his obligations and, if not, he will be informed. If he thereupon refuses to comply- why should he not be penalized? On the topic of fines, one must note that the trade group has no such concern for any owners the board chooses to penalize.

⁶¹ See VANITZIAN & GLASSMAN, VILLA APPALLING, *supra* note 17, at 428.

⁶² *Id.* at 100.

10. Board powers must be limited to those absolutely necessary to manage common property and protect owners' interests. This is in stark contrast to current statutes that provide boards with broad powers. While boards must be afforded legitimate "business judgment" leeway, they should be constrained in the area of governance decisions. The fact that statutes and courts do not currently consistently reflect that associations are governmental entities should not prevent measuring a board's conduct against the appropriate standard. That is, when a board is exercising judgment, it must adhere to business judgment standards. However, when it acts in its governmental capacity, such as when passing an enforcing rules, it must be held accountable to governmental principles, not the business judgment rule. Boards should have no power to impose personal restrictions on owners without the owners' open and knowing consent as evidenced by an owner vote. It is also critical that owners be given the right to decide on all expenditures that are significant in the context of their association's budget and for all capital improvements regardless of the cost. Association bylaws should set specific dollar limits on board expenditure authority proportionate to the overall budget.

Currently, boards have virtually unlimited powers- especially when one considers that the owners must seek court action to stop boards from violating their own bylaws or statutes.⁶³ The limit on board authority should specifically include use of (what should be known as) the "owners' attorney." For example, other than in defense of third party actions, suits on contracts or for collections, the owners must be allowed to decide whether they

⁶³ Far too much emphasis is placed on broad grants of power under Title 15A and the Condominium Act and not enough on Section 44(b) which states that an association "shall exercise its powers and discharge its functions in a manner that protects and furthers the health, safety and general welfare of the residents of the community." N.J. STAT. ANN. § 45:22A-44(b) (West 2008). Note that the Condominium Act provides a different and lesser standard, namely: "[a]n association shall exercise its powers and discharge its functions in a manner that protects and furthers *or is not inconsistent with* the health, safety and general welfare of the residents of the community." N.J. STAT. ANN. § 46:8B-14(j) (West 2007) (emphasis added). The latter language benefiting boards and not owners is obviously preferred by the trade group and is repeated in its UCIOA.

want to incur legal fees. Since it is the owners who pay, it should be they who decide. As noted above, this is especially important with regard to use of the association attorney if the board wishes to contest State orders issued to protect owner rights.⁶⁴

11. Provide for independent oversight to ensure fair elections. As the Appellate Division found in *Twin Rivers* that the PREDFDA Supplement mandates, any owner-generated appeal should be simplified. Presently, pursuant to the Nonprofit Corporations and Associations Act, summary proceeding is required in Superior Court.⁶⁵ This is beyond the ability of owners who cannot afford counsel.

12. Change the nomenclature for boards- they should be called exactly what they are. They are neighbors elected to manage common elements and enforce community-adopted rules. They are not members of some grandiose “Board of Directors.” An appropriate title for them would be something like “Members of the Governance Committees” and the lead person elected by ones’ neighbors should be the “Committee Chairperson” - NOT the President of the Board of Directors (an actually absurd title in a neighborhood association).⁶⁶ Associations are only nonprofit corporations as a structural necessity because no other form currently exists to provide

⁶⁴ One expects that this will draw the loudest and most extreme protests from the trade group attorneys since it will cut heavily into their easy profits. Instead of convincing a few compliant board members of the desperate need to incur legal expenses, they would have to convince the owners. Again, welcome to actual democracy. Owners are not likely to be easily persuaded to pay tens or even hundreds of thousands of dollars for legal action against their own interests- as for example to pursue actions to avoid the board having to comply with owner rights.

⁶⁵ N.J. STAT. ANN. § 15A: 5-23 (West 2007).

⁶⁶ Other states have not seen grandiose terms as necessary for those governing common ownership associations. For example, in Maryland’s Montgomery County, they are referred to in general as Common Ownership Community boards; as the “Council of Unit Owners” in Condominiums. In homeowners’ associations they are the “Governing Body” and only in cooperative housing corporations are they the “Board of Directors” Montgomery County Code 10B-7.

necessary legal protection to this relatively new neighborhood configuration.⁶⁷

The corporate terminology in an association context facilitates confusion between acts that are governmental – such as enacting rules and penalizing people – with strictly corporate ones. However, considering the similarity of the actions taken by associations and municipalities, the fact that one is accepted as governmental and the other not, appears to be an illogical distinction. In any event, those elected by their fellow neighbors to hire landscapers should not be unnecessarily elevated simply because they live in an association. Logically, the less separation from being another neighbor- the less the encouragement for the abuses of power that are currently rampant.

13. Empower and encourage a suitable state entity to sue on behalf of owners in deserving, far-reaching cases to create a body of comprehensive case law supporting general owner rights. Currently case law is a haphazard compilation useful only to the owner with particular problems and sufficient financial resources. No doubt many owners with far better cases are left without redress due to a lack of resources. Ideally, once a body of reliable case law is established, the legislature should provide counsel fees for owners who are compelled to sue their board for deficiencies. Such fees should be contingent on establishing a case that the board failed to comply with its obligations and proof that the board was provided notice of the deficiency prior to the suit and did not take appropriate action to remedy the deficiency or agree voluntarily to comply.

14. The State needs to convene a panel including municipal and developer representatives to address the current widespread municipal practice of mandating an association in developments with *de minimus* common areas. It is not uncommon for municipalities to require a developer building a few homes to form a homeowner's association to maintain a simple detention basin. In addition to being an unnecessary response to a minor concern, it saddles all the owners in perpetuity with another

⁶⁷ Notably, our municipalities are called "municipal corporations" but they are led by Mayors and Councilpersons and not Presidents of Boards of Directors, etc.

layer of government- or at least another entity to maintain and obey. Notably, passage of the Municipal Services Act⁶⁸ should have signaled an end to attempting to use common area developments as a means to eliminate normal municipal services. One shudders to think of all the existing home developments that would be associations if this mentality had existed 50 years ago. There are other methods to ensure that taxpayers are not burdened with private property maintenance without forming an association (such as by dedication, or establishing trusts or simply by special improvement assessments to account for the services).

15. Provide for State licensing or certification of, and oversight of, property managers to ensure both competency and accountability. Currently, anyone can present himself or herself as a property manager and owners have no venue to lodge complaints against unscrupulous managers. Without standards of conduct, good managers are at a disadvantage to those lacking any moral compass. There have been cases in which boards fired a competent, experienced property manager and hired one of their unqualified fellow board members to take the position. Presumably conflict of interest rules would prohibit such ill-advised actions. With standards, property managers will also have a basis to resist hiring relatives or companies wishing to “share” profits.

In enacting solutions the aim should be to remain true to the fundamental truth that democracy depends upon the informed, freely given consent of the governed. This includes the necessary corollary that people must be educated to allow them to properly exercise their vote. In the current situation there is not, nor can there be, any meaningful requisite consent to the contracts of adhesion imposed by developers with the State’s imprimatur. In the absence of a loyal opposition party in associations or any of the checks and balances expected in a democracy, such as an independent press and judiciary, special precautions must be provided to protect owners from board abuses.

Equally important, we must not lose sight of the central concept of democracy, namely that people can best decide for

⁶⁸ N.J. STAT. ANN. § 40:67-23.2 et. seq. (West 2007).

themselves what rules they should live under. This is in stark contrast with, for example, communism, the fundamental tenant of which is that people cannot be trusted and a central party should set the rules for them. Unfortunately, the latter has thus far been our model in the case of homeowner associations, with the developer playing the role of the party. We need to provide the requisite safeguards for owners at the outset to allow democracy to take root and flourish in associations if specific solutions are to have a positive effect. The simple fact of sharing property should not be the basis for lessening people's rights to self-government and self-determination.



THE *TWIN RIVERS*¹ CASE: OF HOMEOWNERS ASSOCIATIONS, FREE SPEECH RIGHTS AND PRIVATIZED MINI-GOVERNMENTS

By Paula A. Franzese* and Steven Siegel**

INTRODUCTION

One in eight New Jersey residents live in common interest communities (“CICs”),² a form of housing and community governance that encompasses planned housing developments,

¹ Comm. for a Better Twin Rivers v. Twin Rivers Homeowners’ Ass’n, 929 A.2d 1060 (N.J. 2007) [hereinafter *Twin Rivers*].

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² Edward R. Hannaman, *State and Municipal Perspectives - Homeowners Associations*, Rutgers University Center for Government Services Conference, at 2 (March 19, 2002) [hereinafter *Hannaman Report*].

condominiums, and housing cooperatives.³ In the fastest growing parts of the State, CICs— particularly planned housing developments governed by *homeowner associations*—are the dominant form of new housing.⁴ In 2002, it was estimated that the number of CICs in the State was growing at the rate of over six percent per year.⁵

The implications of this trend on the State’s body politic are profound. Today, many larger CICs operate as an alternative to

³ In a planned single-family home development, a homeowner generally holds title to both the exterior and interior of a residential unit and the plot of land around it. The planned development association (often called a homeowners association) owns and manages common properties, which may include streets, parking lots, open spaces, and recreational facilities.

In a condominium, a homeowner holds title to a residential unit (sometimes just the interior of an apartment) and to a proportional undivided interest in the common spaces of an entire condominium property. A condominium association manages the common spaces, but does not hold title to any real property. A condominium property is usually situated in either a single high-rise apartment building or in attached housing units frequently known as “townhouses.” In general, an owner of a condominium unit does not own, in individual fee, the ground under his or her unit, in contrast to the owner of a home in a planned single-family home development.

In a housing cooperative, the entire property is owned by a cooperative corporation, and the members of the cooperative own shares of stock in the corporation and hold leases that grant occupancy rights to their residential units. Housing cooperatives usually, but not always, are situated in apartment buildings. In the United States, the cooperative form of housing ownership is exceedingly rare, and is largely confined to owner-occupied apartment buildings in New York City.

⁴ For example, the Twin Rivers community is located in Mercer County, a fast growing county in central New Jersey. As reported by the New Jersey Department of Community Affairs (“DCA”), greater than fifty percent of all purchasers of new homes in Mercer County in the years 1996-2000 were required to participate in a homeowners association. See Brief of Plaintiffs at 30, *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners’ Ass’n*, 890 A.2d 947 (N.J. Super. Ct. App. Div. 2006), *rev’d*, 929 A.2d 1060 (N.J. 2007) (quoting DCA records). Moreover, Plaintiffs argued that “[t]he current figures [on homeowners association participation in Mercer County] are probably closer to [seventy-five] percent since the statewide figures on community association participation increased by [fifty] percent between 1996 and 2000.” *Id.*

⁵ *Hannaman Report*, *supra* note 2, at 2.

traditional government with respect to a wide range of services. Many CICs maintain streets and parks, provide curbside refuse collection, operate water and sewer service, regulate land use and home occupancy, impose rules of general applicability on constituent homeowners, and collect fees from homeowners that are in many ways the functional equivalent of property taxes.⁶ Not many years ago, those were the functions and services performed exclusively by local government.

Just as important, what was once public space has become private space. New Jersey has 566 municipalities.⁷ Not too long ago, residents of those municipalities walked and drove on public streets, engaged in recreation and other activities in public parks, and held important meetings and gatherings in public squares. If present trends continue, New Jersey residents increasingly will live on private streets, will engage in recreation and other activities in private facilities, and will meet and discuss important issues in private “community centers.”

Those trends lead inexorably to the conclusion that CICs play an increasingly central role in the daily life of New Jersey residents. New Jersey law, however, has continued to regard CICs as wholly private organizations that are largely exempt from any form of regulation or oversight. The *laissez-faire* approach to CIC regulation is reflected in the statutory law, which affords exceedingly few rights and protections to homeowners association residents, and in the common-law principles applied by New Jersey courts when resolving disputes arising over CIC governance.

In 1996, the New Jersey General Assembly appointed the Task Force to Study Homeowners’ Associations. The Task Force was charged with making findings and recommendations “concerning the functions and powers of homeowners

⁶ See U.S. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 12-14 (1989) (hereinafter U.S. ADVISORY COMM’N REPORT).

⁷ See New Jersey State League of Municipalities, <http://www.njslom.org/njlabout.html>.

associations.”⁸ In its Report, the Task Force put forth the following key finding:

Current law provides . . . [homeowners association] boards great flexibility in their rulemaking and administrative powers. . . . [T]hese associations have traditionally been treated as corporations managing a business. *Some modification of this model appears to be necessary to address the increasingly governmental nature of the duties and powers ascribed to the homeowners association board.*⁹

Today, despite the Task Force’s recommendations, the model remains unmodified. Legislation to reform CICs has not been enacted.¹⁰

On the judicial front, though, change is in the winds. The New Jersey Supreme Court recently decided *Committee for a Better Twin Rivers v. Twin Rivers Homeowners’ Association* (“*Twin Rivers*”).¹¹ That case squarely addressed the scope and extent of free speech rights of residents of CICs. In turn, that critical issue forced the Court to first address the antecedent question: What is a CIC, and what legal paradigm should govern it?

In answering that critical question, the Court in *Twin Rivers* was confronted with a variety of doctrinal choices. Those choices included, most fundamentally, a robust expansion of constitutional doctrine to protect the free-speech rights of CIC residents. At the other extreme, the Court could have used the case simply as a means to ratify the application to CICs of

⁸ *Assembly Task Force to Study Homeowners’ Associations Report*, January 1998, at 1, available at <http://www.njleg.state.nj.us/legislativepub/reports/homeown.pdf> [hereinafter *Assembly Task Force Report*].

⁹ *Id.* at 2 (emphasis added).

¹⁰ See, e.g., Common Interest Community and Homeowner’ Association Act, S. 308, 213th Leg. (N.J. 2008); New Jersey Uniform Common Interest Ownership Act, A. 1991, 213th Leg. (N.J. 2008) (pending legislation pertaining to homeowners associations and other common interest communities).

¹¹ 929 A.2d 1060 (N.J. 2007).

existing laws of contract and property. Those laws traditionally have been applied to CICs and, most importantly, to the conduct of their governing boards. Ultimately, the Court's resolution places it somewhere in the middle of that range, providing a framework for a new constitutional approach to free speech in the context of homeowners associations, while also making clear that traditional private law concepts remain fully applicable to homeowners associations. The Court, however, left the contours of the new constitutional framework largely undefined.

In this essay, we discuss the array of doctrinal choices that were before the Court. We then turn to analyze the somewhat ambiguous—yet exceedingly significant—doctrinal choice that the Court actually made. Although at first glance the *Twin Rivers* decision does not appear to constitute a bold proclamation of new doctrine, a more careful analysis of the Court's opinion reveals that the Court did indeed announce the framework of a new constitutional approach to CICs. That framework, although largely undefined in its details, provides a conceptual basis for a robust constitutional right of free speech and assembly applicable to CIC residents. In the following analysis, we describe the Court's new constitutional approach and identify the many critical questions that will need to be answered in future decisions by the Court.

I. RELEVANT ANTECEDENTS: FEDERAL AND STATE CONSTITUTIONAL FREE SPEECH DOCTRINE AS APPLIED TO PRIVATE PROPERTY

The critical question before the New Jersey Supreme Court in the *Twin Rivers* case was whether, and under what circumstances, residents of homeowners associations may invoke constitutional free speech protections against the actions of their governing boards.¹² Significantly, the constitutional question posed in *Twin Rivers* did not arise under the First Amendment of the Federal Constitution. Rather, the constitutional question concerned the application of the free speech guarantee of the New Jersey Constitution.¹³

¹² *Twin Rivers*, 929 A.2d at 1063.

¹³ *Id.*

The free speech clause of the First Amendment and the counterpart free speech guarantee of the New Jersey Constitution are not identical. For example, although both the First Amendment and New Jersey's free speech guarantee apply to certain forms of *non-governmental* abridgement of speech and expression, the scope of New Jersey's protection is considerably more robust than that of the First Amendment.

The application of First Amendment protection to speech on private property is governed by the "state action" doctrine. The seminal case is *Marsh v. Alabama*,¹⁴ in which the United States Supreme Court held that First Amendment protections extended to certain forms of private property held open for public use.¹⁵ In particular, the Court in *Marsh* determined that the First Amendment was violated when the private owners of a company town prevented the distribution of literature in its downtown business district.¹⁶ The Court, in essence, held that the company town had all the essential attributes of a municipality, and, accordingly, the private owner's action amounted to state action sufficient to trigger the application of the First Amendment.¹⁷

Two decades after *Marsh*, the United States Supreme Court considered the application of state action doctrine to privately owned shopping centers. In *Amalgamated Food Employees Union Local 509 v. Logan Valley Plaza, Inc.*,¹⁸ the Court held that a privately-owned shopping center held open to the public was subject to the requirements of the First Amendment.¹⁹ The Court noted that the Logan Valley Plaza shopping center was "clearly the functional equivalent of the business district . . . in *Marsh*."²⁰ That expansive reading of *Marsh* remained the law for fewer than ten years.

¹⁴ 326 U.S. 501 (1946).

¹⁵ *Id.* at 509.

¹⁶ *Id.* at 508-09.

¹⁷ *Id.* at 506.

¹⁸ 391 U.S. 308 (1968).

¹⁹ *Id.* at 319.

²⁰ *Id.* at 318.

In *Hudgens v. NLRB*,²¹ the Court expressly overturned *Logan Valley* and adopted a considerably more narrow reading of *Marsh*. Under this reading, it is not enough that private property held open for public use is the functional equivalent of a portion of a town, such as a town's business district. Significantly, the Court in *Hudgens* determined that, for constitutional purposes, an "entire town" must consist of a totality of major features, including "residential buildings, streets, a system of sewers, a sewage disposal plant and 'business block' on which business places are situated."²² Under this reading, First Amendment guarantees do not apply to expressive activity undertaken in privately-owned shopping centers. The *Hudgens* standard remains the prevailing federal constitutional template.

Against this backdrop of federal constitutional doctrine, the New Jersey Supreme Court, in *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*,²³ considered the application of the state constitution's free speech guarantee to privately-owned shopping centers.²⁴ The Court made it clear that New Jersey's free speech guarantee, unlike its federal counterpart, was "not limited to protection from government interference."²⁵ Instead, "[p]recedent, text, structure and history all compel the conclusion that New Jersey Constitution's right of free speech is broader than the right against governmental abridgement of speech found in the First Amendment."²⁶ New Jersey's right of free speech was "affirmative," and under certain conditions, protected free speech "even when exercised on . . . private property."²⁷ Applying the broad speech-protective principles of the state

²¹ 424 U.S. 507 (1976).

²² *Id.* at 516 (quoting *Marsh*, 326 U.S. at 502).

²³ 650 A.2d 757 (1994).

²⁴ *Id.*

²⁵ *Id.* at 770.

²⁶ *Id.*

²⁷ *Id.*

constitution, the Court in *Coalition* determined that the state constitution's free speech guarantee applies, under certain circumstances, to speech and expression undertaken in privately-owned shopping centers.²⁸

Coalition applied a three-part test to balance the relevant free speech and private property rights. That test requires that a court consider "(1) the nature, purposes, and primary use of such 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."²⁹ Applying those factors, the Court, in essence, concluded that privately-owned shopping centers were sufficiently "public" in character that the expressional activity at issue—leafleting—could not be unreasonably infringed by the owners of the shopping centers.³⁰

In determining that New Jersey's regional shopping centers could, in effect, be deemed constitutional actors for purposes of the state constitution's free speech guarantees, the Court in *Coalition* carefully considered the dramatic growth of New Jersey's shopping centers in recent decades, and their assumption of a critical public role once exclusively played by downtown business districts. In this regard, it is instructive to quote at length from Chief Justice Wilentz's opinion:

Statistical evidence tells the story of the growth of shopping malls . . . [F]rom 1972 to 1992, the number of regional and super-regional malls in the nation increased by roughly 800%.

. . . .

The converse story, the decline of downtown districts is not so easily documented by statistics. But for purposes of this case, we do not need

²⁸ *Id.* at 783.

²⁹ *Coalition*, 650 A.2d at 771 (citing *State v. Schmid*, 423 A.2d 615, 630 (N.J. 1980)).

³⁰ *Id.* at 775.

statistics. This Court takes judicial notice of the fact that in every major city of this state, over the past twenty years, there has been not only a decline, but in many cases a disastrous decline. This Court further takes judicial notice of the fact that this decline has been accompanied and caused by the combination of the move of residents from the city to the suburbs and the construction of shopping centers in those suburbs. See *Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.*, 512 Pa. 23, 515 A.2d 1331, 1336 (1986) (“Both statistics and common experience show that business districts, particularly in small and medium sized towns, have suffered a marked decline. At the same time, shopping malls, replete with creature comforts, have boomed.”).

That some downtown business districts have survived, and indeed thrive, is also fact, demonstrated on the record before us. The overriding fact, however, is that the movement from cities to the suburbs has transformed New Jersey, as it has many states. The economic lifeblood once found downtown has moved to suburban shopping centers, which have substantially displaced the downtown business districts as the centers of commercial and social activity.

The defendants in this case cannot rebut this observation. Indeed, the shopping center industry frequently boasts of the achievement. The industry often refers to large malls as “the new downtowns.” Note, *Private Abridgment of Speech and the State Constitutions*, 90 Yale L.J. 165, 168 n. 19 (1980) (citation omitted). It correctly asserts that “the shopping center is an integral part of the economic and social fabric of America.” International Council of Shopping Centers, *The Scope of the Shopping Center*

Industry in the United States, 1992-1993, ix (1992).

Industry experts agree. One recent study asserted “[t]he suburban victory in the regional retail war was epitomized by the enclosed regional mall. . . . [Regional malls] serve as the new ‘Main Streets’ of the region—the dominant form of general merchandise retailing.” James W. Hughes & George Sternlieb, *Rutgers Regional Report Volume III: Retailing and Regional Malls* 71 (1991). Beyond that, one expert maintains that shopping centers have “evolved beyond the strictly retail stage to become a public square where people gather[]; it is often the only large contained place in a suburb and it provides a place for exhibitions that no other space can offer.” *Specialty Malls Return to the Public Square Image*, Shopping Center World, Nov. 1985, at 104.

Most legal commentators also have endorsed the view that shopping centers are the functional equivalent of yesterday’s downtown business district. *E.g.*, James M. McCauley, Comment, *Transforming the Privately Owned Shopping Center into a Public Forum: PruneYard Shopping Center v. Robins*, 15 U. Rich. L. Rev. 699, 721 (1981) (“[P]rivately-owned shopping centers are supplanting those traditional public business districts where free speech once flourished.”); Note, *Private Abridgment of Speech and the State Constitutions*, *supra*, 90 Yale L.J. at 168 (“[T]he privately held shopping center now serves as the public trading area for much of metropolitan America.”).

Statisticians and commentators, however, are not needed: a walk through downtown and a drive through the suburbs tells the whole story. And those of us who have lived through this transformation know it as an indisputable fact of

life, and that fact does not escape the notice of this Court.³¹

In light of those considerations, the Court in *Coalition* did not hesitate to conclude that shopping centers are, in effect, the new downtowns, and consequently, that the free-speech rights secured by the state constitution could not be denied or abridged merely by reason of their nominally private status. The Court held:

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 Those 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.³²

The *Coalition* Court's careful consideration of New Jersey's changing public/private dynamic seemed to provide a solid conceptual foundation to the resolution of the closely analogous constitutional question presented in *Twin Rivers*. In *Coalition*, the Court concluded that the "historical path of free speech"³³ had led from downtown business districts to privately-owned shopping centers, and that the "State constitutional right of free speech . . . must continue to follow that historic path."³⁴ Similarly, in *Twin Rivers*, the relevant constitutional question was whether the "historical path of free speech" has moved from *public* municipalities to *private* homeowners associations.

The New Jersey Supreme Court in *Twin Rivers*, however, declined to directly answer this critical constitutional question arising from the Court's analysis of the public/private dynamic

³¹ *Id.* at 766-68.

³² *Id.* at 778.

³³ *Id.*

³⁴ *Id.*

in *Coalition*. Instead, the Court adopted an altogether different approach to the resolution of the constitutional issue.

In Part II, we analyze the approach adopted by the Court. The Court's approach raises as many questions as it answers. Although the approach is not free from ambiguity, the Court unmistakably signaled its intention to apply constitutional constraints to homeowners associations when associations unreasonably abridge the speech of their residents. We consider some of the many implications that flow from this ruling.

In Part III, we delineate the constitutional road *not* taken by the Court. That road, succinctly stated, would have had the Court apply the spirit (if not the letter) of *Coalition*, to declare that the New Jersey Constitution properly applies to homeowners associations for the same reason that it applies to shopping centers: *i.e.*, the constitution must adopt to new realities as formerly public space becomes privatized. In particular, we advance the premise that the "historical path of free speech," so eloquently identified in *Coalition*, is leading away from *public* municipalities and leading toward *private* homeowners associations. We argue that that the Court, consistent with its holding in *Coalition*, should have "follow[ed] that . . . path."³⁵

II. THE *TWIN RIVERS* DECISION: THE COURT'S DEPARTURE FROM THE *COALITION* DOCTRINE AND ITS ADOPTION OF A NEW *SUI GENERIS* FREE SPEECH STANDARD FOR HOMEOWNERS ASSOCIATIONS

The *Twin Rivers* case involved the application of free speech principles to a private community of approximately 10,000 residents.³⁶ The Twin Rivers development is comprised of homes, retail businesses, streets, and common areas.³⁷ The community has within it various commercial businesses such as

³⁵ *Id.*

³⁶ 890 A.2d at 953.

³⁷ *Id.*

dry cleaners, gas stations, and banks.³⁸ Several public facilities operated by the municipality are also located within Twin Rivers, including schools, a county library and a firehouse.³⁹ There are thirty-four private roads within the community that are open to public traffic.⁴⁰ In addition, a state highway runs through the development.⁴¹ The homeowners association maintains the streets and common areas, provides street lighting and snow removal, and operates a refuse collection service.⁴² It is vested with rule-making and enforcement powers. Violations of the rules are punishable by fines, which can range in amount from \$50 to \$500.⁴³ The homeowners association collects fees and dues from residents that are the functional equivalent of real estate taxes.⁴⁴

The key free-speech issues in *Twin Rivers* involved the association's policies concerning the posting of signs and the use of the community room. The association's sign-posting policy permits each homeowner to "post a sign in any window of [his or her] residence and [to post a sign] outside in the flower beds so long as the sign was no more than three feet from the residence."⁴⁵ The policy also prohibits the posting of signs on community property.⁴⁶ The association's policy governing the use of its community room requires that a resident post the sum of \$415, of which \$250 constitutes a refundable security

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Twin Rivers*, 929 A.2d at 1064.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

deposit.⁴⁷ Additionally, a resident desiring use of the room is required to procure a certificate of insurance.⁴⁸

The critical question presented to the Court was whether the homeowners association's regulation of expressive activity is subject *exclusively* to the traditional private-law doctrines of contract and property, or is also subject to the requirements of the New Jersey Constitution. The Court held that a homeowners association's regulations are not subject *exclusively* to the private-law doctrines of contract and property. Rather, aggrieved residents may also seek constitutional redress.⁴⁹

The *Twin Rivers* decision is not a model of clarity. A substantial portion of the Court's opinion is devoted to underscoring that homeowners associations generally should be treated as entirely private entities, and thereby principally governed by the traditional laws of contract and property. The Court found that the "nature, purposes and primary use of Twin Rivers' property is for private purposes."⁵⁰ Elsewhere in the opinion, the Court stressed that traditional private-law doctrines—such as the business judgment rule—are unquestionably applicable to the actions of homeowners associations.⁵¹

Although the Court reaffirmed the applicability of private-law doctrines to homeowners associations, it also recognized

⁴⁷ *Id.*

⁴⁸ *Twin Rivers*, 929 A.2d at 1064. For a discussion of *Twin Rivers*' present policy concerning the use of its community room, see *infra* notes 105-113. Notably, *Twin Rivers*' present policy *precludes* the use of the community room for any "political purposes." Resolution 2004-05 of the *Twin Rivers Homeowners Association, Policy for Establishing Rules and Regulations for the Use of the Community Room*, ¶ 7. That policy (which was adopted during the pendency of the appeal of the *Twin Rivers* litigation to the Appellate Division) was not before the Supreme Court, and, consequently, the Supreme Court's decision did not pass on the reasonableness of the Association's policy banning all political use of the community room. See *infra* notes 105-107 and accompanying text.

⁴⁹ *Id.* at 1074.

⁵⁰ *Id.* at 1072-73.

⁵¹ *Id.* at 1074-75.

that, in certain circumstances, residents may invoke the state constitution's free-speech protections against the actions of those associations. The lynchpin of the Court's opinion is this passage:

We recognize the concerns of plaintiffs that bear on the extent and exercise of their constitutional rights in this and other similar common interest communities. At a minimum, any restrictions on the exercise of those rights must be reasonable as to time, place, and manner. 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.⁵²

The contingency of this language does not, at first glance, suggest that the Court was boldly proclaiming the recognition of a new constitutional right. Nevertheless, the Court's determination is clear and unmistakable: constitutional protections, under appropriate circumstances, *do apply* when homeowners associations abridge the free speech of their residents. That pronouncement represents a fundamental doctrinal clarification with respect to the status of homeowners associations in New Jersey.

Perhaps the most ambiguous and confusing aspect of the opinion is the Court's recitation of why the *Coalition* doctrine—*i.e.*, the established tripartite test for application of the state constitution's free speech clause—is *inapplicable* to homeowners associations. As noted, the *Coalition* test requires that a court consider “(1) the nature, purposes, and primary use of such 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.”⁵³ In *Coalition*, the Court applied those factors and

⁵² *Id.* at 1074.

⁵³ *Id.* at 1068 (quoting *State v. Schmid*, 423 A.2d 615, 530 (1980)). See also *Coalition*, 650 A.2d at 771.

concluded that privately owned shopping centers are sufficiently “public” in character that the expressional activity at issue—leafleting—could not be unreasonably infringed by the owners of the shopping centers.⁵⁴

By contrast, the Court in *Twin Rivers* determined that *none* of these factors applied to the Twin Rivers community. With respect to the first factor in the *Coalition* test—*i.e.*, the “primary use” of the property—the Court found that the “primary use” of Twin Rivers is “residential.”⁵⁵ In so finding, the Court appeared to discount certain undisputed facts in the record, including the facts that the Twin Rivers community contains retail businesses and contains streets (including a State highway) open to public traffic.⁵⁶ Furthermore, the Court equated “residential” with inherently “private”—a determination made without explanation, and one that is inconsistent with the long held notion that streets held open to the public serve a vitally important function in connection with the rights of free expression and assembly.⁵⁷ Based on the foregoing

⁵⁴ *Coalition*, 650 A.2d at 780-83.

⁵⁵ *Twin Rivers*, 929 A.2d at 1072.

⁵⁶ *See id.* at 1073.

⁵⁷ The branch of First Amendment jurisprudence known as the “public forum” doctrine is premised on the Supreme Court’s recognition that speech conducted on streets—including streets situated in residential areas—is entitled to special protection and solicitude under the First Amendment. See, e.g., *Schneider v. Irvington*, 308 U.S. 147, 151-52 (1939); *Hague v. Comm. of Indus. Orgs.*, 307 U.S. 496, 515-16 (1939) (Roberts, J., plurality opinion). The doctrine is generally confined to publicly owned streets and parks. But see *Marsh v. Alabama*, 326 U.S. 401 (1946) (applying limited free speech rights to a privately owned street situated in a “company town”). For a discussion of the United States Supreme Court’s more recent narrow construction of the *Marsh* doctrine, see *supra* notes 18-22 and accompanying text.

The streets in Twin Rivers are not publicly owned streets, and thus are not literally traditional public fora under the First Amendment (unless the *Marsh* doctrine were to apply). However, for present purposes, the important point is that the Supreme Court’s recognition of the public forum doctrine is grounded in the historical fact that the property in question—*i.e.*, streets held open for public use—is vitally important to the freedom of speech and assembly. Justice Roberts’ famous plurality opinion in *Hague v. Committee of Industrial Organizations* is instructive:

determinations, the Court concluded that “the nature, purposes and primary use of Twin Rivers’ property is for private purposes and does not favor a finding that the association’s rules and regulations violated plaintiffs’ constitutional rights.”⁵⁸

The Court also found that the Twin Rivers community did not satisfy the second *Coalition* factor. The Court held that there was no public invitation to use Twin Rivers’ property. Here again, the Court discounted or disregarded the undisputed facts that the streets in the Twin Rivers community were open to public traffic and that there existed several retail businesses in the community.⁵⁹ Furthermore, the Court rejected the alternate

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Hague v. Comm. of Indus. Orgs., 307 U.S. 496, 515-16 (1939) (Roberts, J., plurality opinion).

Justice Roberts’ observation is certainly relevant to the precise issue that was before the Court in *Twin Rivers* when that Court applied the *Coalition* factors to the streets of Twin Rivers. As previously noted, it is undisputed that the streets in the Twin Rivers community—although owned by a private homeowners association—are held open to the public. See *Twin Rivers*, 890 A.2d at 953. It is therefore puzzling that the Court in *Twin Rivers*, in applying the first and second *Coalition* factors, summarily concluded—without any discussion whatsoever—that a “residential” street held open to the public is deemed “private” for purposes of the Court’s analysis under the state constitution. *Twin Rivers*, 929 A.2d at 1072-73. That conclusion seems antithetical to the Court’s prior expansive view of the extent of free speech rights secured by the New Jersey State Constitution as well as to the long-held notion that streets held open to the public (even when such streets are situated in residential areas) are of special significance with respect to the freedom of speech and assembly. See *Coalition*, 650 A.2d at 775-76.

⁵⁸ *Twin Rivers*, 929 A.2d at 1072-73.

⁵⁹ *Id.* at 1073.

theory of “public invitation” arising from the fact that members of the public may purchase or rent homes in Twin Rivers.⁶⁰

Finally, the Court found that the Twin Rivers community did not satisfy the third *Coalition* factor. That factor “concerns the purpose of the expressional activity in relation to both the public and private use of the property.”⁶¹ The Court, examining the association’s restrictions on sign posting and use of the community room, determined that “[P]laintiff’s expressional activities are not unreasonably restricted.”⁶²

The Court concluded: “Neither singularly nor in combination is the *Schmid/Coalition* test satisfied in favor of concluding that a constitutional right was infringed here.”⁶³ Because the *Coalition* doctrine is the Court’s established constitutional standard applicable to the abridgement of free speech on private property, that determination could be understood to mean that an aggrieved homeowner’s sole remedy against an association’s speech-infringing regulations lies *exclusively* in the private-law doctrines of contract and property.

That is decidedly not the case. The Court in *Twin Rivers*, following its application of the *Coalition* test, went on to recognize the following separate and distinct constitutional standard that is applicable to homeowners associations’ regulation of expressive activities:

We recognize the concerns of plaintiffs that bear on the extent and exercise of their constitutional rights in this and other similar common interest communities. At a minimum, any restrictions on the exercise of those rights must be reasonable as to time, place, and manner. Our holding does not suggest, however, that residents of a homeowners association may never successfully seek constitutional redress against a governing

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 1074.

association that unreasonably infringes their free speech rights.⁶⁴

The Court in *Twin Rivers* left undefined the scope and application of this constitutional remedy.⁶⁵ Suffice it to say that it may well require many years of appellate litigation before the precise contours of this remedy are fully delineated.

For present purposes, some aspects of the *Twin Rivers* constitutional remedy can be readily inferred. The remedy appears to implicate an entirely new standard, wholly distinct from the established *Coalition* framework. It can be presumed that the standard is *sui generis* with respect to homeowners associations.

The remedy contemplates a test of reasonableness with respect to a homeowners association's regulation of the time, place and manner of expressive conduct. Perhaps the Court

⁶⁴ *Twin Rivers*, 929 A.2d at 1074.

⁶⁵ The Court's application of its own "reasonableness" standard offers some clues with respect to the future application of that standard to the regulations of other homeowners associations. For example, the record in *Twin Rivers* reflected that the association allowed the posting of as many as two signs on each homeowner's property. The association also permitted door-to-door solicitation and distribution of leaflets. In the context of the issues presented in the case, the Court found the association's restrictions on expressive conduct to be reasonable, in light of the availability of the aforementioned alternate channels of communications.

Some New Jersey homeowners associations, however, may ban door-to-door solicitation and prohibit the posting of signs. In the wake of the *Twin Rivers* decision, such blanket prohibitions of expressive conduct by homeowners associations are unlikely to survive a Court challenge.

An important corollary to this point is the New Jersey Supreme Court's disposition of the matter in comparison to the disposition of the matter by the Appellate Division below. The Appellate Division in *Twin Rivers* remanded the case to the Law Division for a determination of whether the challenged regulations of the association were reasonable in light of the Appellate Division's newly announced constitutional standard. *Twin Rivers*, 890 A.2d 947. Although the New Jersey Supreme Court in *Twin Rivers* upheld the validity of the association's regulations (meaning that no remand was necessary), the Court's opinion strongly suggested that an outright ban of such channels of communications might be unreasonable as a matter of law. In this sense, the New Jersey Supreme Court's decision in *Twin Rivers* could be said to be more speech-protective than the decision of the Appellate Division below.

intended to incorporate by reference the well-settled approach to content-neutral government regulation of speech that has long been a part of First Amendment jurisprudence.⁶⁶ If so, questions abound as to whether that line of federal constitutional authority will be adopted unmodified, or instead tailored to account for any considerations peculiarly applicable to homeowners associations.

The most substantial unresolved question concerns the proper standard of review to be applied to speech-abridgement by homeowners associations. For example, under settled First Amendment doctrine, government regulation of speech in traditional public fora is subject to heightened judicial scrutiny.⁶⁷ In that context, government may enforce such reasonable time, place, and manner restrictions *only if* “the restrictions are content-neutral, are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication.”⁶⁸ The following subsidiary questions thus arise in the particular context of homeowners associations: Should a street or a common area in a homeowners association be treated as analogous to a street or park owned by a municipality? Is a reasonable time, place, and manner regulation of expressive conduct in a homeowners association properly considered in light of pertinent provisions in the association’s governing documents, or should regulation be considered under a uniform constitutional standard? Is First Amendment case law to be liberally invoked by analogy, or must New Jersey courts start afresh in fashioning a new framework for constitutional regulation of expressive conduct in homeowners associations?

Regardless of the answers to those questions, the most important conclusion to be drawn from *Twin Rivers* is this: the

⁶⁶ See *infra* note 57 and accompanying text.

⁶⁷ See *Madsen v. Williams Health Center, Inc.*, 512 U.S. 752, 790-91 (1994) (Scalia, J., concurring and dissenting) (distinguishing between various forms of heightened scrutiny as applied to speech in a public forum).

⁶⁸ *United States v. Grace*, 461 U.S. 171, 177 (1983); see also *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323, n.3 (2002); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992); *Clark v. Comty. for Creative Non-Violence*, 469 U.S. 288, 293 (1984); *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48 (1981).

Court applied a First Amendment-type test to homeowners associations, notwithstanding that homeowners associations generally are not “state actors” under the Federal Constitution⁶⁹

⁶⁹ In what may qualify as the supreme irony of this litigation, the plaintiffs in *Twin Rivers* chose not to seek a federal constitutional remedy—*i.e.*, the *Marsh/Hudgens* test of “state action”—and instead sought relief only under the state constitution—*i.e.*, the *Coalition/Schmid* test of whether a private property owner is subject to state constitutional restraints with respect to the abridgement of speech. This strategic decision arose from the general understanding that the “state action” test under the Federal Constitution is less speech-protective and more difficult to satisfy than the *Coalition/Schmid* test under the New Jersey Constitution. See *supra* notes 13-29 and accompanying text. As matters turned out, the New Jersey Supreme Court determined that the Twin Rivers community did *not* satisfy the *Coalition/Schmid* test, although the Court did hold that the state constitution may provide redress against a homeowners association that unreasonably infringes free speech rights. See *Twin Rivers*, 929 A.2d at 1074.

The specific irony is this: Notwithstanding that the *Marsh/Hudgens* test under the Federal Constitution is less speech protective and more difficult to satisfy than the *Coalition/Schmid* test under the New Jersey Constitution, the Twin Rivers community would probably—on its face—satisfy virtually all of the elements of the *Marsh/Hudgens* test. That is to say: one potential outcome of this litigation—had a federal claim been pursued—would have been a determination that the Twin Rivers community satisfies the *Marsh/Hudgens* test, but (as, in fact, the Court in *Twin Rivers* actually held) does not satisfy the *Coalition/Schmid* test.

Under the *Marsh/Hudgens* test, a private community, in order to be treated as a “state actor,” must be, in essence, the functional equivalent of an entire town. *Hudgens v. NLRB*, 424 U.S. 507, 516-17 (1976). Under this test, an entire town consists of certain essential physical elements:

The question is, [u]nder what circumstances can private property be treated as though it were public? The answer that *Marsh* gives is when that property has taken on [a]ll the attributes of a town, [*i*].*e.*, “residential buildings, streets, a system of sewers, a sewage disposal plant and a ‘business block’ on which business places are situated.”

Id. at 516-17.

Notably, the Twin Rivers community—unlike most suburban subdivisions that are subject to governance by a homeowners association—contains a variety of retail businesses. *Twin Rivers*, 890 A.2d at 953. These retail businesses may be fairly characterized as a “business block” under the *Marsh/Hudgens* test. *Hudgens*, 424 U.S. at 516-17. Although the record in *Twin Rivers* does not make clear as to whether or not the community contains a “sewage disposal

and are not constitutional actors under the state constitution by operation of the *Coalition* standard. The necessary implication is that the Court in *Twin Rivers* determined that homeowners associations play an important role in the civic life of New Jersey, and thereby warrant a new standard—a constitutional standard—that reflects the special status of associations. The Court left for another day the delineation of that standard.

III. THE *TWIN RIVERS* DECISION AND THE CONSTITUTIONAL ROAD NOT TAKEN

The Court in *Twin Rivers* reached what we consider to be the correct result: Residents of homeowners associations, under appropriate circumstances, should be protected by the free-speech guarantees of the New Jersey Constitution when their governing boards unreasonably deny or abridge the right to engage in expressive conduct and assembly. Still, the *Twin Rivers* decision is unsatisfactory in many respects, because it lacks clarity and a firm underpinning in settled constitutional doctrine.

The Court's failure to anchor its decision in established constitutional doctrine is particularly unfortunate, because there is substantial precedent available and adaptable to the homeowners association paradigm. Had the Court availed itself of its own existing doctrine, its ultimate conclusions might well have been more principled and persuasive, and less fraught with ambiguity. We therefore turn to a delineation of the constitutional road *not* taken.

plant" within its territorial limits, it is perhaps difficult to credit a literal construction of *Hudgens* such that the presence or absence of a sewage disposal plant should make a constitutional difference with respect to a determination of whether a community is the functional equivalent of a municipality. Of greater importance, the Twin Rivers community unquestionably contains almost all of the elements of the *Marsh/Hudgens* test that constitute the *sine qua non* of a town. See *supra* notes 36-44 and accompanying text.

In short, the Twin Rivers community might well qualify as a "state actor," for federal constitutional purposes, under the *Marsh/Hudgens* test. However, most New Jersey homeowners associations unquestionably would not qualify as a "state actor," since most associations do not contain retail businesses.

In *Coalition*, the Court did not hesitate to conclude that shopping centers are, in effect, the new downtowns, and, consequently, that the free-speech rights secured by the state constitution could not be denied or abridged merely by reason of the nominally private status of the shopping centers.⁷⁰ The Court in *Coalition* concluded that the “historic path of free speech” had led from downtown business districts to privately-owned shopping centers, and that the “State constitutional right of free speech . . . must continue to follow that historic path.”⁷¹ In *Twin Rivers*, the analogous constitutional question, in essence, was whether the “historic path of free speech” has moved from *public* municipalities to *private* homeowners associations.

The road not taken would have applied the spirit (if not the letter) of *Coalition*, to declare that the New Jersey Constitution properly applies to homeowners associations for the same reasons that it applies to shopping centers: *i.e.*, the constitution must adapt to the contemporary reality of the large-scale privatization of formerly public space. The “historic path of free speech,” so eloquently identified in *Coalition*, has indeed shifted from *public* municipalities to *private* homeowners associations.⁷² The Court in *Twin Rivers*, consistent with its holding in *Coalition*, “should [have] follow[ed] that path.”

Important legal and political trends in New Jersey have transformed homeowners associations into full-fledged players in the intergovernmental system of service delivery and tax collection.⁷³ Closely related to this trend, homeowners associations are the inheritors of the realm of open public discourse that once was exclusively undertaken in town halls and on public streets. Today, that discourse often occurs in private “community centers” and on streets that are open to the

⁷⁰ *Coalition*, 650 A.2d at 766-69.

⁷¹ *Id.* at 778.

⁷² *Id.*

⁷³ See *supra* notes 74-80 and accompanying text.

public⁷⁴ and maintained by the public with taxpayer dollars, yet nominally under the ownership of homeowners associations.

The scale and scope of the dramatic emergence of homeowners associations as quasi-governmental actors can only be summarized briefly here. New Jersey ranks among the leading states in the nation with respect to the number, prevalence, and growth of homeowners associations.⁷⁵ Approximately one million residents of the state live in common interest communities.⁷⁶ In 2002, the estimated number of association-related housing units in New Jersey was 494,000 and growing at the rate of approximately six percent per year.⁷⁷

Many homeowners 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.⁷⁸ These powers were once exclusively reserved to municipalities. Moreover, the broad powers granted by the New Jersey Legislature to homeowners associations include the power to levy fines and penalties

⁷⁴ Some streets owned by homeowners associations are open to the public. Other association-owned streets are gated, thereby limiting access to association *residents* and their guests. However, in New Jersey, even restricted-access streets are maintained with taxpayer dollars. See *infra* note 95 and accompanying text. Furthermore, the fact that a street is not open to the public need not end the constitutional analysis, since the primary beneficiary of an enhanced constitutional remedy are the residents themselves. *C.f.* *Marsh v. Alabama*, 326 U.S. 501, 508 (“Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their [s]tate and country *There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen [in a public municipality].*”) (emphasis added).

⁷⁵ 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).

⁷⁶ *Hannaman Report*, *supra* note 2, at 2.

⁷⁷ *Id.*

⁷⁸ U.S. ADVISORY COMM’N REPORT, *supra* note 6, at 3.

against unit owners,⁷⁹ a power that the New Jersey Appellate Division has expressly termed a “governmental power.”⁸⁰

The Twin Rivers community is itself illustrative of this trend toward privatization of traditionally municipal functions. Twin Rivers is home to 10,000 residents. The community has within it various commercial businesses such as dry cleaners, gas stations and banks.⁸¹ Several public facilities operated by the municipality are also located within the borders of Twin Rivers, including schools, a county library and a firehouse.⁸² There are 34 roads within the community that are open to public traffic. In addition, a state highway runs through the development.⁸³ The homeowners association maintains the streets and common areas, provides street lighting and snow removal, and operates a refuse collection service.⁸⁴ It is vested with rule-making and enforcement powers. Violations of the rules are punishable by fines, which can range in amount from \$50 to \$500.⁸⁵ The homeowners association collects fees and dues from residents that are the functional equivalent of real estate taxes.⁸⁶

Why is this privatization occurring? Many factors have fueled the growth of homeowners associations.⁸⁷ Perhaps surprisingly, a principal factor is local government’s deliberate

⁷⁹ N.J. STAT. ANN. § 46:8B-14(d), 46:8B-15(f) (West 2007).

⁸⁰ Walker v. Briarwood Condo Ass’n, 644 A.2d 634, 638 (N.J. Super. Ct. App. Div. 1994).

⁸¹ Twin Rivers, 890 A.2d 947, 953 (N.J. Super. Ct. App. Div. 2006), *rev’d*, 650 A.2d 757 (N.J. 2007).

⁸² *Id.* at 953.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *See id.*

⁸⁷ See Steven Siegel, *The Public Role in Establishing Private Residential Communities: Towards a New Formulation of Local Government Land Use Policies That Eliminate the Legal Requirements to Privatize New Communities in the United States*, 38 URB. LAW. 859, 866-73 (2006).

policy choice to encourage the formation of homeowners associations as a means to load-shed its traditional obligation to provide certain services such as roadway maintenance and refuse collection.⁸⁸ Indeed, mounting evidence suggests that the establishment of a homeowners association is often a *requirement* of local government land use policy.⁸⁹

The Township of Jackson's zoning code is illustrative of this trend. The township's ordinance requires the creation of a homeowners association in all residential developments in areas zoned as planned mixed use residential districts, multifamily housing districts and "planned retirement communities" districts.⁹⁰ The homeowners association is responsible for maintenance of common property, solid waste disposal and "the replacement, repair and maintenance of all private utilities, streetlighting, . . . sidewalks, landscaping, common open space and recreation facilities and equipment."⁹¹

Even when this form of municipal land-use policy is not expressly codified, the result is often the same. Municipalities simply can decide, on an informal basis, that a developer must establish a homeowners association as a condition of land-use approval. Developers have no choice but to acquiesce if they wish to obtain the necessary municipal approvals.⁹²

Some residential developers have gone on the record and have spoken quite candidly of certain municipalities' informal practices to require the establishment of a homeowners association as a condition of land-use approval.⁹³ For example, a representative of one prominent New Jersey developer observed that "about one-half" of the state's municipalities impose requirements with respect to the establishment of a

⁸⁸ *Id.* at 873-98.

⁸⁹ *Id.* at 887-98.

⁹⁰ TWP. OF JACKSON, N.J., ZONING CODE ch. 109, art. VI, §§ 109-46J, 109-48L, 109-49N (2007).

⁹¹ *Id.* § 109-46J(2)(d).

⁹² Siegel, *supra* note 87, at 895-98.

⁹³ *Id.*

homeowners association as a condition of land-use approval.⁹⁴ In many fast-growing parts of New Jersey, there is often little choice but to buy into the privatized regime of heretofore-municipal services now provided by homeowners associations.

We previously made reference to a report issued by a special Task Force of the New Jersey General Assembly in connection with homeowners associations.⁹⁵ The Task Force Report, issued in 1998, recommended comprehensive reform of the statutory regime governing homeowners associations. The report included the following key finding:

Current law provides . . . [homeowners] association boards great flexibility in their rule-making and administrative powers. . . . [T]hese associations have traditionally been treated as corporations managing a business. Some modification of this model appear to be necessary to address the increasingly governmental nature of the duties and powers ascribed to the homeowners association board.⁹⁶

Today, despite the Task Force's recommendations, the model remains unmodified.⁹⁷

Not only do New Jersey's homeowners associations collectively perform more government-like services than ever before, those services are often paid for by New Jersey taxpayer,

⁹⁴ *Id.* at 897 (citing Unpublished Written Statement of Steven Dahl, Vice President, K. Hovnanian Companies, Edison, New Jersey) (July 31, 2006).

⁹⁵ *Assembly Task Force Report*, *supra* note 8; *see also* text accompanying note 9.

⁹⁶ *Assembly Task Force Report*, *supra* note 8, at 2.

⁹⁷ In the ten years since the enactment of the Task Force report, many bills to reform state regulation of homeowners associations have been introduced in the Legislature. As of this writing, reform legislation is pending before the New Jersey Senate and the Assembly. *See e.g.*, Common Interest Community and Homeowner' Association Act, S. 308, 213th Leg. (N.J. 2008); New Jersey Uniform Common Interest Ownership Act, A. 1991, 213th Leg. (N.J. 2008). For a discussion of the relative merits of these bills pending before the Legislature, *see infra* note 125.

and not merely homeowner, funds.⁹⁸ Under New Jersey's Municipal Services Act, many homeowners associations receive direct public subsidies from local governments for the cost of maintaining the privately-owned streets situated on association property.⁹⁹ Although there are no current estimates of the total statewide cost for this benefit to homeowners associations, the New Jersey Office of Legislative Services estimated the cost as \$62 million as of 1990, at a time when there were far fewer homeowners associations.¹⁰⁰ As of 2008, the statewide expenditure must surely exceed \$100 million. This enormous public expenditure (for the provision of traditionally municipal services on "private" property) further undercuts the claim that homeowners associations are merely private entities.

In short, the legal and political trends of the past several decades suggest that New Jersey homeowners associations, consistent with more national trends: (1) are assuming many functions and services traditionally provided by municipalities; (2) are often performing those functions and services with the use of taxpayer funds; (3) are often the product of conscious and deliberate municipal land-use policy; (4) represent the standard template for new community development in many parts of the State; and (5) own networks of streets and open space that, if owned by a municipality, would serve as public forums for free speech and assembly.

As noted previously, more than one million New Jersey residents live in association-related housing. As developers continue to build even more of the same, the number of association-related housing units will continue to rise.¹⁰¹ Indeed, it can be expected that, in certain fast-growing areas of New Jersey, association-related housing will be the only housing available or affordable to middle-income homebuyers.¹⁰²

⁹⁸ See, e.g., N.J. STAT. ANN. § 40:67-23 (West 2007).

⁹⁹ *Id.*

¹⁰⁰ SENATE REVENUE, FINANCE AND APPROPRIATIONS COMMITTEE STATEMENT, *as reprinted in* N.J. STAT. ANN. § 40:67-23.2 (West 2008).

¹⁰¹ See *supra* notes 4-5, 77 and accompanying text.

¹⁰² EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENTS 11-12 ("In many rapidly growing areas . .

The foregoing facts (most of which are subject to judicial notice) would have provided a firm doctrinal underpinning for the vital constitutional decision actually reached in *Twin Rivers*. As previously noted, the Court in *Twin Rivers* held that residents of homeowners associations, under appropriate circumstances, should be protected by the free-speech guarantee of the New Jersey Constitution when association governing boards unreasonably deny or abridge the right to engage in expressive conduct and assembly. That holding is unquestionably the right result, but, as we have said, suffers from a lack of clarity and a firm underpinning in settled constitutional doctrine.

Chief Justice Wilentz's opinion in *Coalition* laid out a sound constitutional basis for the result reached in *Twin Rivers*. The free-speech clause of the New Jersey Constitution is broader than the First Amendment, and must be applied expansively. Thus, as the Court in *Coalition* made clear, "if our [s]tate constitutional right of free speech has any substance, it must continue to follow [its] historic path."¹⁰³ The "historic path of free speech"—just as surely as it has moved from public squares to privately-owned shopping centers—has moved, as well, from *public* municipalities to *private* homeowners associations. The Court in *Twin Rivers*, consistent with its holding in *Coalition*, should have "follow[ed] that historic path."¹⁰⁴

IV. POSTSCRIPT: SPEECH REGULATION AT THE TWIN RIVERS COMMUNITY AFTER THE CONCLUSION OF THE LITIGATION

In the wake of the Supreme Court's decision, an action taken by the Twin Rivers Association trust administrator in late 2007¹⁰⁵ underscores both the conceptual shortcomings of the

. nearly all new residential development is within the jurisdiction of residential community associations").

¹⁰³ *Coalition*, 650 A.2d at 778.

¹⁰⁴ *Id.*

¹⁰⁵ See *infra* notes 106-107 and accompanying text.

Court's decision and the very real difficulties experienced by community association residents at Twin Rivers and elsewhere. The trust administrator's action, unfortunately, places a substantial crimp on the ability of Twin Rivers' residents to engage in a meaningful dialogue with respect to issues of concern to all members of the community.

By way of background, the Twin Rivers Association Board in 2004 adopted a new policy governing the use of the community room that *precluded* the use of the room for any "political purposes."¹⁰⁶ Significantly, that policy was adopted during the pendency of the appeal of the *Twin Rivers* litigation to the Appellate Division, and, consequently, the policy was *not* contained in the record that was before either the Appellate Division or the Supreme Court. Thus, the Supreme Court's decision did not pass on the reasonableness of the Board's policy banning all political use of the community room. Instead, the Court merely held that the Board's content-neutral restrictions concerning the use of the community room (principally pertaining to the amount of a rental fee and security deposit) were reasonable.¹⁰⁷

Against this backdrop, the Twin Rivers trust administrator denied a resident's post-litigation request seeking use of the community room for discussion of the upcoming board

¹⁰⁶ Resolution 2004-05 of the Twin Rivers Homeowners Association, Policy for Establishing Rules and Regulations for the Use of the Community Room," ¶ 7. Although the Regulation *precludes* the use of the community room for any "political purposes," the Regulation expressly *authorizes* the use of the Room "for the development of educational, social, cultural and recreational programs under the supervision of the Trust." *Id.*, ¶ 1. Furthermore, the Regulation provides that the Community Room shall be made available to individual Twin Rivers residents as well as clubs, organizations and committees approved by the Trust." *Id.* Thus, the Regulation, on its face, evidences an intent to open up the Community Room to a broad range of speech and associational activities, but to exclude from such range of activities political speech and association.

¹⁰⁷ *Twin Rivers*, 929 A.2d at 1074. In particular, the Association's content-neutral restrictions governing the use of the community room included: (1) a policy that requires a resident to post the sum of \$415, of which \$250 constitutes a refundable security deposit; and (2) a policy that requires a resident to procure a certificate of insurance. *Id.* at 1064. *See supra* note 48 and accompanying text.

elections.¹⁰⁸ The action by the trust administrator was taken just four months after the Supreme Court's decision. The stated reason for the denial was that "use [of] the community room for political purposes cannot be approved."¹⁰⁹

Recall that the Supreme Court in *Twin Rivers* held that a community association regulation is unconstitutional if it "unreasonably infringes the free speech rights of its residents."¹¹⁰ The "unreasonable infringement" test is presently undefined.¹¹¹ However, as previously noted, it would appear likely that the test will be defined by reference to the corollary and analogous free speech rights that are secured by the First Amendment and that are applicable to speech in a government-controlled public forum.¹¹² If that assumption were correct, there can be no question but that a complete ban on political speech in a forum that was expressly designed for community-wide speech and associational activities amounts to an "unreasonabl[e] infringe[ment] of the free speech rights" of *Twin Rivers* residents.¹¹³

¹⁰⁸ Letter dated November 26, 2007 of Jennifer L. Ward, *Twin Rivers* Trust Administrator, to Haim Bar-Akiva (on file with the authors). Haim Bar-Akiva was one of the plaintiffs in the *Twin Rivers* litigation.

¹⁰⁹ *Id.*

¹¹⁰ *Twin Rivers*, 929 A. at 1074.

¹¹¹ *See supra* note 65 and accompanying text.

¹¹² *See supra* notes 66-68 and accompanying text.

¹¹³ If the *Twin Rivers* community were deemed a "state actor" for purposes of federal constitutional law, *see* notes 14-19 and 69, *supra*, then the actions of the *Twin Rivers* association board (hereafter "Association") would be subject directly to the strictures of the First Amendment. Under settled First Amendment principles, there can be no doubt that the Association's complete ban on political speech strikes would be struck down as unconstitutional. This is so for many reasons.

First, the Association's regulation purports to ban a particular category of speech and, as such, amounts to a content-based restriction. Under well-established First Amendment principles, content-based restrictions are subject to the most exacting scrutiny. *See Perry Education Ass'n v. Perry Educators' Ass'n*, 460 U.S. 37, 45 (1983). In particular, "a content-based prohibition [on speech] must be narrowly drawn to effectuate a compelling state interest" *Id.* at

V. TWIN RIVERS: THE ROAD AHEAD

Every path-breaking case has a human side, and the *Twin Rivers* case is no exception. Professor Frank Askin,¹¹⁴ who represented the plaintiffs in *Twin Rivers* and who has represented many other aggrieved residents of associations, offered the following observation with respect to the litigants in *Twin Rivers*:

In all of the disputes I am aware of, there is a total absence of trust between the [Twin Rivers] board and the complaining homeowner. In *Twin Rivers*, there is no love lost between the two sides. The

45. Applying this stringent standard, a court almost certainly would invalidate the Association's sweeping content-based regulation.

Second, the content sought to be prohibited — *i.e.*, political speech — is the very category of speech which lies “at the core of what the First Amendment was designed to protect.” *Virginia v. Black*, 538 U.S. 343, 365 (2003). More particularly, First Amendment jurisprudence distinguishes between different classes of speech, and holds that “[c]ore political speech occupies the highest most protected position . . . [in the] rough hierarchy . . . [of] constitutional protection.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992). *See also* *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 187 (1999) (holding that protection of the First Amendment “is at its zenith” when regulation implicates political speech) (quoting *Meyer v. Grant*, 486 U.S. 414, 422 (1988)). Because the Regulation authorizes the use of the community room for virtually all types of speech *except political speech*, *see supra* note 106, the particular content restriction here at issue strikes at the very heart of the vales secured by the First Amendment.

Third, the regulation is not merely a restriction on political speech; it is a complete ban on such speech. The regulation is thus overbroad, and could not satisfy a test that requires that any content-based limitation of speech be “narrowly drawn.” *Perry Education Ass'n v. Perry Educators' Ass'n*, 460 U.S. 37, 45 (1983).

In short, the Regulation, on its face, would violate the First Amendment. Indeed, it is difficult to conceive of a speech regulation that is more offensive of First Amendment values than one—as here—that purports to impose a complete ban on political speech in a forum that was expressly designed for community-wide speech and associational activities.

¹¹⁴ Frank Askin is a professor of law at Rutgers University School of Law-Newark. He is the director of the Rutgers Constitutional Litigation Clinic.

complaining homeowners consider the board despotic and tyrannical—often with good reason. The Twin Rivers dispute flared because a couple of dissidents won election to the board with a campaign that relied heavily on lawn signs in violation of long-standing rules that were never enforced. As soon as the dissidents won, the majority of the board decided to enforce the rules for future elections.¹¹⁵

Consistent with the acrimony that attended the *Twin Rivers* litigation, the board’s attorney stated that if residents are “not happy with [Twin Rivers] policies, they should look elsewhere to live.”¹¹⁶ This type of statement, unfortunately, is all-too-common among the boards and professionals who manage homeowners associations. The reports in the popular press and elsewhere are legion of homeowners associations in which boards have abused their power, and where a cottage industry of professionals get paid significant sums to oppose the rights of the very homeowners who pay their bills.¹¹⁷

One document contained in the appellate record of the *Twin Rivers* litigation is particularly revealing with respect to what precisely ails the present CIC paradigm, and why a new paradigm is required. The opinion of the Appellate Division in *Twin Rivers* devoted particular attention to a report by Edward Hannaman, the “association regulator” in the Bureau of Homeowner Protection of the New Jersey Department of Community Affairs (“the Hannaman Report”).¹¹⁸ The Appellate Division in *Twin Rivers* quoted the Hannaman Report as follows:

¹¹⁵ Interview with Frank Askin, Professor of Law, Rutgers School of Law—Newark, in Newark, N.J. (Feb. 19, 2007) (on file with the authors).

¹¹⁶ Paula Franzese & Margaret Bar-Akiva, *Homeowner Boards Can’t Exclude Democracy*, STAR LEDGER, Feb. 20, 2006, at 15.

¹¹⁷ See *infra* note 123 and accompanying text.

¹¹⁸ *Twin Rivers*, 890 A.2d at 955-56 (citing *Hannaman Report*, *supra* note 2).

Hannaman said that complaints revealed an “undemocratic life” in many associations, with homeowners unable to obtain the attention of their board or manager. Boards “acting contrary to law, their governing documents or to fundamental democratic principles, are unstoppable without extreme owner effort and often costly litigation.” Board members “dispute compliance” with their legal obligations and use their powers to punish owners with opposing views. “The complete absence of even minimally required standards, training or even orientation for those sitting on boards and the lack of independent oversight is readily apparent in the way boards exercise control.”

Hannaman described instances of abuse of power in some detail while conceding that there were “many good associations.” He stressed, however that typically, power was centralized in boards, which acted as executive, legislature and judiciary.¹¹⁹

The Hannaman Report itself is notable for its candor and its breadth. For example, Mr. Hannaman states: “It is obvious from the complaints [to the state regulatory agency] that [home]owners did not realize the extent association rules could govern their lives.”¹²⁰ Mr. Hannaman goes on to set forth at length numerous examples of abuse of homeowner rights by New Jersey CICs, and the ineffectual and inadequate safeguards that presently exist to prevent and remedy such abuse.¹²¹ 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

¹¹⁹ *Id.*

¹²⁰ See *Hannaman Report*, *supra* note 2, at 4.

¹²¹ *Id.* at 4-5.

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), 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 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 of the board.¹²²

The Hannaman Report is a significant indictment of the *status quo* system of CIC regulation in New Jersey. As a published statement of the State of New Jersey’s “association regulator” entrusted with oversight of CICs in New Jersey, the Report and its findings cannot be ignored.

Thus, the *Twin Rivers* experience is, unfortunately, far from unique. Within New Jersey as well as across the country, residents of homeowners associations have found themselves at odds with their governing boards, with litigation seemingly constituting the preferred remedy, rather than the remedy of last resort.¹²³ Ultimately, the true “costs” of these disputes are

¹²² *Id.*

¹²³ For example, in Arizona, Barbara and Dan Stroia paid nearly \$8,000 to attorneys collecting what began as a \$66 debt. The Stroias had not known of a \$6 increase in quarterly charges, or a \$30 one-time assessment. A lawsuit first sought \$565. A month later, the Stroias tried to pay \$850, and ultimately had to pay more than \$7,000 more for disputing the fees. The association attorney blamed the family: “People just get emotional about things because it’s their home. . . . The Stroias, unfortunately, reacted very emotionally.” In Texas, Wenonah Blevins owed \$814.50 in back dues, and said she never knew she faced foreclosure until after the association had sold her \$150,000 home for \$5,000. [A former official of the Community Association Institute] said the association “did everything right in the foreclosure, other than realize the lady is [82] years old.” DAVID KAHNE, A BILL OF RIGHTS FOR HOMEOWNERS IN ASSOCIATIONS: BASIC PRINCIPLES OF CONSUMER PROTECTION AND A MODEL

far more than the economic losses. The costs extend, as well, to the intangible losses of reciprocal trust and a sense of community.¹²⁴ Certainly, the *Twin Rivers* case—and its back story—help to inform these considerations, and will be useful to continued attempts to meaningfully reform the CIC paradigm.

The *Twin Rivers* decision is thereby important for reasons beyond the Court's actual holding. The case has drawn considerable attention to the desultory state of the law of homeowners associations in New Jersey, and to the compelling need for statutory reform to protect the rights of the more than one million New Jersey residents who own homes in common interest communities. The *Twin Rivers* decision itself offers some welcome relief in the area of free-speech rights, but the free-speech rights of CIC residents is just one area of many that cry out for reform.

Legislation is required that would acknowledge the increasingly important role played by homeowners associations in the State's intergovernmental system.¹²⁵ Presently,

STATUTE 5-7 (2006), available at http://www.aarp.org/research/legal/legalrights/2006_15_homeowner.html.

In North Carolina, a CIC homeowner was fined \$75 per day because his dog exceeded the weight limitation imposed by the servitude regime. He was forced to declare bankruptcy after he was ultimately assessed \$11,000 in fines. A Court eventually voided the foreclosure. Paula A. Franzese, *Does it Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community*, VILL. L. REV. 553, 574 (citing Laura Williams-Tracy, *Covenants Gain Clout in Neighborhood Governance*, CHARLOTTE BUS. J., Sept. 8, 2000, at 27).

In Florida, an association fined a homeowner for having an unauthorized "social gathering" when he was joined on his front lawn by two friends to chat. Bridget Hall Grumet, *Condo Board Says Three's a Crowd*, ST. PETERSBURG TIMES, Nov. 18, 2003, at 1B.

¹²⁴ See, e.g., Paula A. Franzese & Steven Siegel, *Trust and Community: The Common Interest Community as Metaphor and Paradox*, 72 MO. L. REV. 1111, 1150-56 (2007).

¹²⁵ As of this writing, reform legislation is pending before the Senate and the Assembly. See, e.g., Common Interest Community and Homeowner' Association Act, S. 308, 213th Leg. (N.J. 2008); New Jersey Uniform Common Interest Ownership Act, A. 1991, 213th Leg. (N.J. 2008).

Although it is beyond the scope of this Article to compare at length the relative merits of the two pending bills, it is our opinion that the Senate bill is, in

homeowners associations: (1) are assuming many functions and services traditionally provided by municipalities; (2) are often performing those functions and services with the use of taxpayer funds; (3) are often the product of conscious and deliberate municipal land-use policy; (4) represent the standard template for new community development in many parts of this State; and (5) own networks of streets and open space that, if owned by a municipality, would have served as provide traditional public forums for speech and assembly. In the face of these realities, it is simply untenable to continue a laissez-fare regime that presupposes that homeowners associations are wholly private organizations.¹²⁶

general, far superior to the Assembly bill. The Senate bill would make clear that “[homeowner] associations are quasi-governmental entities, subject to transparent government models, not merely the corporate business model” N.J. S. 308, at 87 (2008). Consistent with this express statement of legislative intent, the Senate bill would, among other things, (1) broaden state regulatory authority over homeowners associations; (2) establish a State Office of the Ombudsman with specific powers to assist governing boards and homeowners; (3) expand the requirement for alternative dispute resolution; (4) establish specific requirements for access to records by owners; (5) mandate audit requirements; (6) promulgate specific guidelines for open meetings by governing boards; (7) provide more flexibility for associations to maintain customized rules, provided that a majority of homeowners ratify such rules; (8) impose competitive bidding requirements on association contracts; (9) impose conflict-of-interest rules applicable to members of governing boards; and (10) impose a modest registration fee to be paid by each unit owner to pay for the increased cost of oversight and regulation. N.J. S. 308. These measures would amount to a much needed “bill of rights” for association owners, and would provide meaningful oversight of homeowners associations without unduly restricting the power of governing boards to carry out their duties and obligations. The Assembly bill, by contrast, lacks many of these essential reforms. N.J. A. 1991.

In a recently published article, we have identified and recommended additional measures to be included as part of a comprehensive statutory reform of homeowners associations. See Franzese & Siegel, *supra* note 124, at 1139-49.

¹²⁶ It is by no means inconsistent to assert the need for *both* judicial recognition of baseline constitutional rights in a particular context *and* a program of statutory reform that accomplishes similar purposes and objectives in that context. This is so for several reasons.

First, as discussed in the text above, the constitutional rights at issue in *Twin Rivers* (i.e., speech and associational rights) are far narrower in scope than the full panoply of homeowner rights that can only be secured by statute.

VI. CONCLUSION

The most critical and far-reaching aspect of the *Twin Rivers* decision is this: the Court applied a First Amendment-type test to homeowners associations, notwithstanding that homeowners associations generally are not “state actors” under the Federal Constitution and are not constitutional actors under the New Jersey State Constitution by operation of the *Coalition* standard. The necessary implication is that the Court in *Twin Rivers* determined that homeowners associations play an important role in the civic life of New Jersey, and thereby warrant a new standard—a constitutional standard—that reflects their special place in the polity. Still, the Court left undefined the precise dimensions of its newly defined constitutional remedy, now applicable to residents of homeowners associations.

The *Twin Rivers* decision is also important for reasons that extend beyond the Court’s actual holding. The case has

As a practical matter, only the Legislature can implement such necessary reform measures as low-cost dispute resolution and the establishment of an ombudsman office to assist homeowners.

Second, the judicial recognition of constitutional rights and the enactment of new statutory rights are not contradictory developments in the law but rather are most often complementary. For example, even in those circumstances when the respective constitutional and statutory rights may overlap, the respective remedies are, by their very nature, separate and distinct.

Third, history has shown that enhanced constitutional rights often lead legislative bodies, at some future date, to enact statutes that implement or reinforce those constitutional rights. Compare *Brown v. Board of Education*, 374 U.S. 483 (1954) (holding unconstitutional state-sponsored racial segregation in public schools) with Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 243 (codified at 42 U.S.C. §§ 2000a *et seq.*) (prohibiting racial discrimination in public education, employment and public accommodations). It is doubtful that Congress would have then enacted the Civil Rights Act had not the Supreme Court, ten years earlier, handed down the landmark *Brown* decision. See generally RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND AMERICA’S STRUGGLE FOR BLACK EQUALITY (1976).

Similarly, it is to be hoped that the *Twin Rivers* decision itself—as well as the issues and controversies raised by this high-profile decision—may induce the New Jersey Legislature to enact much needed legislation to reform New Jersey homeowners associations.

highlighted the urgent need for statutory reform of the law of homeowners associations in New Jersey. Although the *Twin Rivers* decision is a landmark of New Jersey constitutional law in the area of free speech rights, much more must be accomplished in order to fully protect the rights of the more than one million New Jersey residents who own homes in common interest communities. Only comprehensive reform legislation can secure the full panoply of basic rights that residents of New Jersey homeowners associations need and deserve.¹²⁷

¹²⁷ See *supra* notes 124 and 125.