

DOES SIZE MATTER?

by

Michael T. Schulman, Esq.

Recently, the New Jersey Supreme Court handed down its decision in the case of *Committee for a Better Twin Rivers v. Twin Rivers Community Association*. In the case, the Court unanimously confirmed the ability of an association to impose reasonable limitations, through its rules, bylaws or covenants, on the display of political signs, use of community property and content of the Association's newsletter. What really was at issue, and what will continue to be at issue, is whether large associations are quasi-municipalities subject to federal constitutional limitations.

Normally, the rights afforded individuals in the U.S. Constitution or a state constitution cannot be abridged by "state action." Traditionally, no state, municipality, county or similar governmental entity could enact a statute, code or rule, which prohibits someone from exercising a constitutionally guaranteed right. By way of example, a state could not enact a law prohibiting someone from exercising his/her right to free speech. No law could state that a person cannot stand in a public place and speak his/her mind. While certain limitations may be enacted (one cannot yell "fire" in a crowded theater), most speech is protected.

Attorneys and others involved with associations have always believed that members of associations can, by agreement (i.e. submitting to the CC&Rs), give up certain rights, including

rights that otherwise might be guaranteed by state and federal constitutions and which could not be abridged by state action.

In the *Twin Rivers* case, the Committee for a Better Twin Rivers (the “Committee”) through certain members, challenged certain restrictions of Twin Rivers Community Association (the “Association”). The restrictions limited the placement of political signs (owners were limited to one sign on their own property). No signs were allowed on the Association’s property. The plaintiffs objected to the restrictions on signs and the restrictions which required a deposit and fee for the use of the community rooms. The plaintiffs also objected to the Association’s control of the Association’s newsletter by arguing that their free speech rights were abridged.

At the trial court, the Committee argued that the Association was a “quasi-government” because of: (i) the number of people living in the Association; (ii) the number of people who live in associations in the aggregate; and (iii) the Association performed government-like duties (cleaning streets, picking up trash).

The trial court found in favor of the Association. The trial court based its findings on precedents which treated covenants as contracts. The plaintiffs appealed, and the New Jersey Appellate Court reversed the trial court’s decision. The Appellate Court did not state that associations are governments, but it did state that the Association was a “constitutional actor,” a relatively new term in the law. The Association appealed and the New Jersey Supreme Court reversed the Appellate Court’s decision and reinstated the trial court’s findings.

What does this mean for the Association and for associations throughout the country and in Nevada? In the short term, the Association has prevailed, and based on the ruling by the New Jersey Supreme Court, the Association is not a “state actor” required to insure its restrictions do not abridge rights protected by the New Jersey State Constitution. While the original plaintiffs may appeal the decision to the U.S. Supreme Court, experts believe that is unlikely, because the case was based on the free speech clause of the New Jersey Constitution, which is broader than the free speech clause in the U.S. Constitution. In the long run, the legislators in New Jersey are already proposing laws to limit the ability of an association to require its members to give up certain fundamental rights by agreeing to covenants. For example, a proposed law might specifically state that an association cannot prevent an owner from placing more than one political sign on his/her own lot. Nevada, in fact, has such a statute (NRS 116.325) which limits the size of the sign, but arguably does not limit the number of signs.

In Nevada, during the 2007 legislative session, the Legislators and the Legislative Counsel Bureau, which drafts bills, were both very aware of the *Twin Rivers* case. They were certainly waiting to see the results. You can surely expect that in 2009 the results of *Twin Rivers* will be utilized to argue both the benefits and detriments of proposed legislation. In the end, as associations become larger (e.g. 20,000 units), as governments defer to developers, and as governments require developers to build and maintain all the infrastructures of associations, there will be a push to treat such associations as “quasi-governments.”

For us in Nevada, there are a number of issues that would have to be resolved before any

legislator should consider treating associations as “quasi-governments.” First, one size does not fit all. Even if the Legislature wanted to treat associations as “quasi-governments” it would not be appropriate for small associations. Second, legislators would have to agree that there is some public benefit to limiting a party’s right to contract away certain rights in exchange for other benefits. Finally, the legislature would have to afford board members, officers and volunteers of associations the same immunity from liability that government officials have. It is not appropriate to treat private corporations and associations as governments. It is not appropriate to dictate to homeowners that they cannot, by contract, give up certain rights in exchange for living in a community in which they desire to reside. However, be assured that somewhere (perhaps even in Nevada) there will be proposed legislation aimed at chipping away at the results of *Twin Rivers*.

Finally, *Twin Rivers* is law in New Jersey. While attorneys and judges in other jurisdictions may cite *Twin Rivers*, it is not binding in any jurisdiction except New Jersey. Therefore, in Nevada the issues remain undecided. If the same issues were tested in Nevada, one hopes the Nevada Supreme Court would give the same deference to a party's right to agree, by contract (the CC&Rs), to forego certain rights that the New Jersey Supreme Court gave members of *Twin Rivers*.