

Community Association Residents Granted Greater Protection of Speech

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“Contrary to popular belief, the First Amendment to the U.S. Constitution does not protect speech on private property or in private organizations...”

Taking a unique approach, the New Jersey Supreme Court has extended state constitutional protection of speech to residents of private common interest communities regardless of whether the community invites public access. In the case of *Dublirer v. 2000 Linwood Avenue Owners, Inc.*,¹ decided December 3, 2014, the Court partially abrogated the long-standing *Schmid/Coalition* test, which applied constitutional protection to private property only where such property was open to public access or expression. The decision culminates a trend by the Court expanding the rights of individual owners while downplaying the distinction between private and public property and entities and makes New Jersey the only state to so broadly apply its Constitution's free speech clause.

State Constitution Controls

Contrary to popular belief, the First Amendment to the U.S. Constitution does not protect speech on private property or in private organizations; the First Amendment prevents only the government from barring speech. However, every state also has a free speech provision in its constitution, and the

U.S. Supreme Court has held that states may give their state constitutional speech clauses broader control than the First Amendment. A minority of states have accepted that invitation and have interpreted their own free speech clauses to impose constitutional protections of speech on private property in certain circumstances. New Jersey is one.

In 1980, in *State v. Schmid*,² the New Jersey Supreme Court held that speech on private property may be protected under the New Jersey Constitution. The Court formulated a three-part test for determining when the Constitution applied, requiring evaluation of the following:

- (1) *The nature, purposes and primary use of such private property, generally, its 'normal' use*
- (2) *The extent and nature of the public's invitation to use that property*
- (3) *The purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property*

The Court held that speech is protected on private property where such property is

substantially open to public use or access and the speech in question is compatible with such public use or access. The Court later expanded the test in *New Jersey Coalition against War in the Middle East v. J.M.B. Realty Corp.*³ by adding a balancing of the expressional rights and the private interests.

Application to Common Interest Communities

In 2007, the *Schmid/Coalition* test was applied in *Committee for a Better Twin Rivers v. Twin Rivers Homeowners Association*⁴ to determine the validity of community association rules regulating speech within the community. Several owners had challenged a number of association regulations and policies, particularly those concerning the posting of signs, the use of a common room for meetings and access to the association newsletter. The Court unanimously determined that the plaintiffs had failed to satisfy any of the *Schmid* prongs and so ruled in favor of the association. In that case, though, the association permitted the posting of signs in limited numbers and limited locations and allowed use of the common room and access to the newsletter, subject to certain restrictions.

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In retrospect, it appears that even then, the justices had some concern over whether the *Schmid/Coalition* test was the appropriate test. *Schmid/Coalition* had been developed to evaluate situations where members of the public sought access to private property for purposes of expression. In *Twin Rivers*,

therefore, the Court recharacterized the third prong from “the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property” to “the fairness of the restrictions imposed by the Association in relation to plaintiffs’ free speech rights” and whether

the restrictions are reasonable. It also stated that it was not ruling out the possibility of constitutional protections applying in an appropriate case.

In *Mazdabrook Commons Homeowners’ Association v. Khan*,³ though, the Court was faced with the situation where an association homeowner sought to display a political campaign poster not on common property directly but rather in the window of his unit, contrary to the association’s rules. The Court struggled with how the *Schmid/Coalition* test could apply so as to not inordinately interfere with an owner’s use of his own private property, that is, his unit. The Court modified the test by determining that the first prong, the use of the property, should focus on the owner’s unit and the owner’s point of view, and the second prong, the extent of the public invitation, should be disregarded.

New Test Established

In *Dubliver*, a shareholder/tenant of a cooperative sought to distribute under other shareholder/tenants’ doors fliers promoting his campaign for election to the board. However, the cooperative’s rules prohibited such distribution without board consent, and the board denied consent. The Court apparently recognized that applying the *Schmid/Coalition* test in that case would have negated constitutional protection. However, the Court apparently was distressed by the cooperative board’s restrictions on speech and exceptions to its rules that it applied for its own benefit. For example, although the board prohibited residents from distributing literature door-to-door, it did so itself and used its notices to attack its opponents. Meanwhile, it prohibited shareholders from posting signs within the cooperative except for a single bulletin board in the rear of the building. In addition, although the board rule prohibited all solicitation, the cooperative allowed the police and fire fighters to solicit contributions within the cooperative.

The Court noted that the cooperative’s rule banned distribution of written materials anywhere on the property without written authorization of the board but set forth no written standards to guide the board’s discretion. In addition, the Court rejected the cooperative’s argument that the board was not subject to the rule, stating that the board’s policy allowed it to praise itself and criticize its opponents while prohibit-

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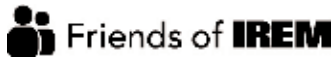


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ing detractors a similar opportunity. Also, by allowing police and fire fighters to solicit contributions despite its no-solicitation regulation, the board was limiting free expression based on the identity of the speaker and the content.

Although non-constitutional justifications could have been relied upon to have enabled Mr. Dublirer to communicate with his fellow shareholders – such as application of the board's fiduciary duty, the obligation of the cooperative under the Planned Real Estate Development Full Disclosure Act to protect the welfare of owners, fundamental fairness, and an implied covenant allowing owners to reasonably communicate with each other to be able to participate in the governance of the cooperative – the Court chose not to take that road. Instead it decided that the *Schmid/Coalition* test was inappropriate in this case. It therefore adopted a new standard for such situations, requiring courts to “focus on ‘the purpose of the expressional activity undertaken’ in relation to the property’s use” and to “consider the general balancing of expressional rights and private property interests” to determine “‘the fairness of the restrictions imposed’ with regard to residents’ free speech rights.”

The Court held that Mr. Dublirer's attempt to communicate with other shareholder/tenants regarding his election campaign was protected speech, compatible with the residential nature of the property. In addition, it determined that allowing Mr. Dublirer to slide pamphlets promoting his campaign under the doors of other shareholder/tenants would have a minimal impact on those tenants, there were insufficient alternatives available to speak directly to other tenants and the cooperative's rules against solicitation were so restrictive as to be unreasonable.

Effects of Dublirer

The decision, however, also reaffirmed the propriety of reasonable time, place and manner restrictions on residents' speech. For example, the board may limit the number of written materials that a resident may distribute in a given period or limit the hours of distribution to prevent early morning or late evening activities. Boards probably may still limit locations for signs and periods for posting. Also, the Court ratified the *Schmid/Coalition* test for situations where an outsider rather than a resident seeks to speak on private property.

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Unfortunately, *Dublirer* has raised a number of questions about the extent of associations' authority. The opinion refers to "residents'" rights to speech, so one issue that remains is whether non-owner tenants also have the same constitutional rights as association members. Because *Mazdabrook* and *Dublirer* dealt with political literature, another question is whether associations may ban divisive material such as hate speech. Furthermore, if a unit owner runs for public office and distributes campaign literature within his or her community, does a non-resident opponent also have the right to distribute literature in the community to provide equal access?

Nevertheless, *Dublirer* provides a clear message to association boards that they must provide adequate means for members to be able to inexpensively communicate with each other and with the board and should not try to prevent debate over association political issues or criticism of the board. Boards retain the right to adopt reasonable restrictions on the time, place and manner of speech, to protect the interests of other residents, maintain aesthetics and prevent interference with or obstruction of community operations. However, an association that unreasonably inhibits members' speech invites court intervention and risks a lessening of its ability to regulate the use of common property. Governing boards need to find the appropriate balance between allowing members adequate means to communicate and protecting other members' rights, promoting cooperation and mutual respect among residents, and providing for the efficient operation of the community. ■

ENDNOTES:

- 1 - N.J. -, -A.3d - (2014).
- 2 84 N.J. 535, 423 A.2d 615 (1980), appeal dismissed *sub nomen Princeton University v. Schmid*, 455 U.S. 100, 102 S.Ct. 867, 70 L.Ed.2d 855 (1982).
- 3 138 N.J. 326, 650 A.2d 757 (1994), *cert. denied sub nomen Short Hills Associates v. New Jersey Coalition Against War in the Middle East*, 566 U.S. 812, 116 S.Ct. 62, 133 L.Ed.2d 25 (1995).
- 4 192 N.J. 344, 929 A.2d 1060 (2007).
- 5 210 N.J. 482, 46 A.3d 507 (2012).

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