KATHY MOORE, ZDENA NEMECKOVA, MAUREEN MORIARTY, ROBERT GULACK, MICHAEL RONEY, RITA YELISEYEV, IGOR YELISEYEV, STAN HAYDEN, MAY HAYDEN, SUZANNE DIGERONIMO, LOUIS DIGERONIMO, WOLF TERNER, EUGENE GERLANTS, RACHEL BOYLAN, JANNA GERLANTS and JUNE MEYERSON.

Plaintiffs/Appellants

--vs.--

The RADBURN ASSOCIATION, INC. DONALD F. MORRIS, in his capacity As President of The Radburn Association, and LOUISE ORLANDO, in her capacity as Manager and Secretary of The Radburn Association.

Defendants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-4284-07T2

On Appeal From:
Superior Court of New Jersey
Chancery Division: Bergen County
Docket No. BER-C-394-06

Sat Below:
Hon. Robert P. Contillo
J.S.C.

PLAINTIFFS'/APPELLANTS' BRIEF IN SUPPORT OF PLAINTIFFS' APPEAL

Renee Steinhagen, Esq.
NEW JERSEY APPLESEED
PULBIC INTEREST LAW CENTER
744 Broad Street, 16th Floor
Newark, New Jersey 07102
973-735-0523

Frank Askin, Esq.
RUTGERS SCHOOL OF LAW- NEWARK
CONSTITUTIONAL LAW CLINIC
123 Washington Street
Newark, New Jersey 07102
973-353-3190

On the brief:
Renee Steinhagen, Esq.
Frank Askin, Esq.

TABLE OF CONTENTS

Table of Authorities iii

PRELIMINARY STATEMENT. 1

STATEMENT OF FACTS 4

Radburn: History and Governance Structure 4

Circumstances Surrounding This Action. 9

The Decision Below 16

PROCEDURAL HISTORY. 18

LEGAL ARGUMENT. 19

I. THE TRIAL JUDGE'S DENIAL TO PLAINTIFFS OF MEMBERSHIP IN THE RADBURN ASSOCIATION AND THE POWER THROUGH DEMOCRATIC PROCESSES TO CONTROL THE ACTIONS OF THE ASSOCIATION IS ENTITLED TO *DE NOVO* REVIEW. 19

II. RADBURN HOMEOWNERS ARE ENTITLED TO MEMBERSHIP IN THE RADBURN ASSOCIATION. 21

III. RADBURN HOMEOWNERS ARE ENTITLED TO NOMINATE CANDIDATES TO SERVE ON THE ASSOCIATION'S BOARD OF TRUSTEES IN ACCORDANCE WITH PINCIPLES OF REPRESENTATIVE DEMOCRACY 28

A. Radburn's By-Laws Governing the Election of Its Trustees Violate N.J.S.A 45:22A-45(a) and N.J.S.A 45:22A-47(a)(3)insofar as Its Unit Owners Do Not Elect The Entire Executive Board Pursuant to Fair and Open Processes. 30

B. Given Radburn's Nature As a Common Interest Community, Its Nomination Procedure Is Not Fair and Reasonable Thus Violating New Jersey's NonProfit Corporation Act. 39

IV. RADBURN HOMEOWNERS ARE ENTITLED TO OPEN BOARD MEETINGS REGARDLESS OF WHETHER SUCH MEETINGS ARE NOMINALLY CHARACTERIZED AS WORKING SESSIONS. 45

V. RADBURN HOMEOWNERS ARE ENTITLED TO DISCLOSURE OF ASSOCIATION'S FINANCIAL RECORDS REQUIRED TO BE MAINTAINED IN ACCORDANCE WITH GENERAL ACCOUNTING AND AUDITING PRINCIPLES. 52

CONCLUSION 57

TABLE OF AUTHORITIES

Cases:	Page
American Party of Texas v. White, 415 U.S.767 (1974).	36
Anderson v. Calebrezze, 460 U.S. 780 (1983).	32,33
Baker v. Carr, 369 U.S. 186 (1962).	29 n11
Balsamides v. Protameen Chems. 160 N.J. 352 (1999). .	20
Bullock v. Carter, 405 U.S. 134 (1972) (Texas). . . .	37
Committee for a Better Twin Rivers v. Twin Rivers Homeowner Ass'n, 383 N.J. Super. 22 (App. Div. 2006), rev'd on other grounds, 192 N.J. 344 (2007)	passim
DiProspero v Penn, 183 N.J. 477 (2005).	22
Fred v. Old Tappan, 10 N.J. 515 (1952)	54 n22
Gilhooley v. County of Union, 164 N.J.. 533 (2000). .	22
Iganamort v. Borough of Fort Lee, 62 N.J. 521 (1973).	54 n22
Jenness v. Fortson, 403 U.S. 431 (1971).	.46,37
Kavanaugh v. Quigley, 63 N.J. Super. 153 (App. Div. 1960).	20
Kimmelman v. Henkels & McCoy, Inc. 108 N.J. 123(1987)..	23
Levin v. Township of Parsippany-Troy Hills, 82 N.J. 174 (1980)	22
L.P. Marron & Co. v. Mahwah Township, 39 N.J. 74 (1963).	47
Lubin v. Panish, 415 U.S. 709, 716 (1974)	32,37
Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366 (1995)	20
Mulligan v. Panther Valley Property Owners Ass'n, 337 N.J.Super. 293 (App. Div. 2001). . .	57

New York State Bd. Of Elections v. Lopez Torres, 128 S.Ct. 79 (2008) 37

Seatrain Lines, Inc. v. Medina, 39 N.J. 222 (1963) . . . 47

Tarr v. Bob Ciasulli's Mack Auto Mall, Inc., 181 N.J. 70 (2004) 22,47

Thanasoulis v. Winston Towers 200 Ass'n, 110 N.J. 650 (1988) 26

Tupp v. Brian & Park Homes, Inc., 287 N.J. Super. 232 (App. Div. 1996) 26

Statutes and Regulations:

Open Public Meetings Act N.J.S.A. 10:4-6 et seq. 49

N.J.S.A. 10:4-8 48

N.J.S.A. 15A:5-20(e) 3,30, 42

Home Rule Act, N.J.S.A. 40:48-2. . . . . .31n12 54n22

Planned Real Estate Development Full Disclosure Act, N.J.S.A. 45:22A-21 et seq. 1

N.J.S.A. 45:22A-22. 26,38

N.J.S.A. 45:22A-43 through 48 21

N.J.S.A. 45:22A-44(b). 31n11 34n14

N.J.S.A. 45:22A-44(c). 23

N.J.S.A. 45:22A-45(a). . . . . passim

N.J.S.A. 45:22A-46(a). . . . . passim

N.J.S.A. 45:22A-46(b). 23

N.J.S.A. 45:22A-46(c). 23

N.J.S.A. 45:22A-47 21

N.J.S.A. 45:22A-47(a). 23,25 30,34

N.J.S.A. 45:22A-47(b) 24n8

N.J.S.A. 45:22A-47(c) 23

N.J.S.A. 46:8B-14(g) 53

N.J.A.C. 5:20-1.1 48

N.J.R. 201 (b)(2). 54n21

38 N.J.R. 4531(a) 49

Other Authorities:

AICPA Audit and Accounting Guide for
Common Interest Realty Associations (AAG-CIRA). . . 53-55

Ken Budd, "Fair Elections," Common Ground
(Jan./Feb.1998), http://www.caionline.org 36

Committee Statement to Senate, No. 217,
L.1993, c.30 (1993). . . . . passim

Legislative Fiscal Estimate to Senate No. 217 . . . . 25n9

Merriam-Webster's Online Dictionary 23

Restatement (Third) of Property: Servitudes §6
Introductory Note (2000). 29,31n12
32n13

Restatement (Third) of Property: Servitudes §6.2
(2000) 29

Restatement (Third) of Property: Servitudes §6.2(4)
(2000) 25

Restatement (Third) of Property: Servitudes §6.13
cmt. b (2000) 41

Restatement (Third) of Property: Servitudes §6.14
cmt.a (2000) 41

Restatement (Third) of Property: Servitudes §6.16
cmt. c (2000). 32,42

Restatement (Third) of Property: Servitudes §6.17 cmt. a (2000) 29n11

Restatement (Third) of Property: Servitudes §6.18 (2000) 48

Restatement (Third) of Property: Servitudes §6.18 cmt. a (2000). 43,47

Radburn's Summary of Radburn Protective Restrictions. 31n12, 44

PRELIMINARY STATEMENT

This case presents for review whether a servitude that substantially denies homeowners of a common interest community the ability to participate democratically in the governance of their community is invalid and against public policy and New Jersey statutory law. Plaintiffs, a group of homeowners residing in the Radburn planned community in Fair Lawn, New Jersey, seek to compel the association governing Radburn - the Radburn Association — to comply with the 1993 amendments to the Planned Real Estate Development Full Disclosure Act ("PREDFDA" or the "Act"), N.J.S.A. 45:22A-21 et seq., which is intended to "prescribe a consistency of management methods in all types of [planned real estate developments], and to safeguard the interests of the individual owners and occupants." Committee Statement to Senate, No. 217, L.1993, c.30 (1993).

The Radburn Association, to date, has refused to amend its by-laws to comply with PREDFDA. To the contrary, the Radburn Association characterizes Plaintiffs' efforts as an attempt to "seize control" that is doomed to result in "mob rule." Dfs. Trial Br. at 20. Defendants go as far as saying that Plaintiffs' efforts to secure homeowners the right to nominate their trustees are intended "to interfere with and

disrupt the essence of The Radburn Association, possibly with the result of destroying it." Id.

Although the trial court does not appear to share the Association's sentiment, and indeed, acknowledged that "the current nomination procedure offends pure democratic sensibilities," (Pa1052), it nonetheless held that neither PREDFDA nor Title 15A, New Jersey's Nonprofit Corporation Act mandate democratic procedures within planned communities. (Pa1053) This holding is wrong as a matter of law and public policy.

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

As the Appellate Division found in Committee for a Better Twin Rivers v. Twin Rivers Homeowner Ass'n, 383 N.J. Super. 22, 51 (App. Div. 2006), rev'd on other grounds, 192 N.J. 344 (2007), "fair and open processes" are implicit in

PREDFDA's requirement that the executive board of the association must be "elected by and responsible to its members," N.J.S.A. 45:22A-45(a). Accordingly, all owners should have the opportunity to stand for election, and not just those who are pre-selected by the board.

Similarly, within the context of a common interest community such as Radburn, a "fair and reasonable" nomination process under N.J.S.A. 15A:5-20(e) must be one that protects homeowners from arbitrary, retaliatory or unfair treatment by a board; which, like a local government, has the power to assess homeowners, make rules governing behavior within the community, and enforce such rules with fines and other penalties. For this reason, legal precedents concerning public elections are appropriate guidelines for what constitutes "fair and open" election processes as well as a "fair and reasonable" nomination procedure.

Accordingly, the decision below must be reversed in part and affirmed in part, thus affording Plaintiffs and all other unit owners residing in common interest communities throughout the State the opportunity to enjoy rights of membership in an association to which they must, by deed, pay assessments. Such rights include the authority to participate in the governance of the community

and include democratic speech and associational rights such as: the right to nominate candidates or stand for election to the board of directors, make their views known to the community, attend meetings of the board, and secure access to information about the affairs of the association.

STATEMENT OF FACTS

Radburn: History and Governance Structure

Radburn was established in 1929 as a nonprofit corporation for the purpose of operating a planned community for "the mutual benefits of [its] residents." (Pa182) All property within the community property is subject to the Declarations of Restrictions, No. 1, Affecting Radburn, property of City Housing Corporation in the Borough of Fair Lawn, Bergen County, New Jersey. (Pa160;300).

Radburn consists, in part, of separately owned housing areas that have been offered and disposed of by several developers at various periods of time under the name of Radburn. (Pa300) The physical plan of Radburn has been an inspiration to planners and architects in the United States and abroad for almost 80 years. In 1974, Radburn was included as a national historic site on the Federal Register of Historic Places, and was elevated to National Historic Landmark status in 2005. (Pa301).

Radburn consists, in part, of 149 acres of interior parks, 2 swimming pools, 1 Tot bathing pool, tennis courts, 2 Tot Lots, 3 hardball fields, 2 softball fields, 2 playgrounds, an archery plaza, 2 outdoor basket ball courts and many walks. There is also a community center which houses administrative offices, a library, a gymnasium, a clubroom and maintenance shops. (Pa301) The Radburn Association currently maintains swimming pools, indoor spaces for activities and tennis courts for residents of property subject to the Declaration of Restrictions and their invited guests. (Pa301).

The deeds under which the Radburn Association acquired parkland from the City Housing Corporation, and later, Radburn, Inc., uniformly recite that the land is being transferred

> [u]pon trust . . . for the common use, benefit and enjoyment as a park, playground and commons by the owners and inhabitants of any and all lands now or hereafter or from time to time subjected to the provisions of an instrument entitled 'Declaration of Restrictions No.1'. (Pa301;726;731)

While the Board of Trustees of the Radburn Association is charged with maintaining, improving and developing property within its control for "the mutual benefit of the residents," purchasers of any parcel covered by the Radburn Restrictions whether that property was purchased from the

City Housing Corporation or another is "deemed to covenant and agree to pay to the Radburn Association an annual assessment or charge to be fixed . . . from year to year by the Board of Trustees of the Radburn Association;" is prohibited from constructing or altering any building without first securing the approval of the Radburn Board of Trustees; has the right to be notified as to any proposed modification of the Radburn Restrictions and the right thereafter to join in a property owner veto of such proposed modification. (Pa160-181).

Under the Radburn Association By-laws as they stand, the purchaser of any parcel covered by the Radburn Restrictions is not automatically a member of the Radburn Association. Rather, the Radburn Association membership is comprised of former elected and current trustees. There are currently approximately 70 members of the Radburn Association. (Pa302;148) More than 1,000 adults reside in Radburn; and therefore less than 10% are members of the Radburn Association. (Pa744) This oligarchic structure has remained in place despite the vision of its founders that "eventually the entire administration of and membership in

The Radburn Association will be in the hands of the residents and owners or their representatives." (Pa277).[1]

Pursuant to the current Radburn By-Laws, only one member of the Board of Trustees is nominated and elected by all Radburn adults. That one person is the President of the Radburn Citizen Association who is nominated and elected at meetings of the Radburn Citizen Association (hereinafter the "RCA"), and who in her capacity as President of the RCA serves on the Radburn Association Board.(Pa303;187-188)[2]

Two members of the Board of Trustees are nominated and elected solely by the group of former and current trustees who are members of the Radburn Association. Id. The remaining six seats are filled with candidates selected for

---

[1] See also (Pa161)(noting that it is the desire and intent of the City Housing Corporation that "membership in and control of [the Radburn Association] shall ultimately be vested in the inhabitants and/or property owners of the community of RADBURN . . .or in representatives and of such inhabitants and/or property owners.")

[2] The purpose of the RCA is, inter alia, to present to the Radburn Association "community opinion arrived at through public discussion and other appropriate means." The President of the RCA is required to attend all Radburn Association Board of Trustee meetings to "carry all motions" passed at Citizen Association meetings "for action by the Radburn Association trustees, support the motion and to report the action, vote, etc. taken at the trustees meeting." (Pa575) Membership in the RCA is open to all persons over the age of 18, who reside in property subject to the Radburn Property restrictions and to Radburn Association charges as well as all owners of record of the property subject to the Declaration of Restrictions. Id.

nomination solely by the current trustees, and voted upon by all Radburn households. Each Radburn household receives two ballots regardless of the number of adults residing in the property unit. (Pa777-8) Thus, under the plain terms of the Association By-laws, majority control of the board is permanently vested in candidates pre-selected for the community by the current board.

No plaintiff in this lawsuit received a copy of the Radburn By-Laws prior to consummating the purchase of their home. (Pa303) The By-Laws are not currently filed with any deed from (a) the City Housing Corporation to Radburn, Inc. or the Radburn Association, or (b) Radburn Inc. to any subsequent developer, or Radburn Association or individual homeowner. (Pa341) The Radburn Association does not even contain a link to the full text of the Radburn By-Laws on its webpage. However, currently, the RCA's webpage has a link to an electronic copy of the Radburn Association By-Laws.(Pa750).

Except for members of the Radburn Association and current trustees, Radburn property owners have no power to amend the process by which trustees are nominated and elected; and have no power to amend the definition of membership of the Radburn Association. (Pa205-6) Nonetheless, the Association's By-Laws do not explicitly

state that write-in votes for trustee candidates will not be considered. (Pa744).

Circumstances Surrounding This Action

In March 2004, Radburn residents were informed by a letter from the Radburn Association that it intended to sell a significant portion of Radburn park land for high density housing. (Pa368;535) One month earlier than its announcement, Radburn had signed a contract of sale with a developer. (Pa369) In a letter dated May 19, 2004, plaintiff Michael Roney wrote the Association requesting "any and all agreements currently in existence between The Radburn Association and any contractor or developer with regard to Daly Field," in order to find out the extent and character of the proposed housing development. At that time, Mr. Roney, a member of the Association, was denied access to such agreements. (Pa623-24).

Unable to have a say in the sale of Daly Field, or even to read the relevant contract, homeowners started to organize; and in November 2004, the Radburn community elected June Meyerson to be President of the RCA. (Pa377-8) Ms. Meyerson had campaigned on a platform to influence the development of Daly Field so as to preserve it as recreational space and to bring greater transparency and accountability to the Radburn Association. Id. In an

election in which all adult residents of Radburn were permitted to participate, Ms. Meyerson was elected in a landslide victory by a very large turnout. Id.

At the February 2005 meeting of the RCA a motion was made and passed requesting that Ms. Meyerson appoint a legal committee to try to bring democratic reforms to Radburn. She appointed Robert Gulack, also a plaintiff in this action, to chair this legal committee. (Pa313) In his capacity as chair of the legal committee, Mr. Gulack assisted Ms. Meyerson in drafting a letter to President Matule dated May 14, 2005, in which she requested a commitment from the Board of Trustees to bring Radburn into compliance with PREDFDA. (Pa313-14) In response to this letter, at the May 2005 Board meeting[3] Mr. Matule made it clear to Ms. Meyerson that the Radburn Association would not make such commitment.

As a result of the Association's response, Ms. Meyerson wrote a letter to the Department of Community Affairs ("DCA"), dated June 2, 2005, in which she requested that the Department advise her as to whether PREDFDA

---

[3] According to Radburn Association's By-Laws "regular meetings of the Board of Trustees shall be held at the office of the Association in the Borough of Fair Lawn on the third Monday of each month, at 7:30pm, subject to change by the Board. (Pa196).

applied to Radburn and whether Radburn's current policies and practices were in compliance with PREDFDA. (Pa314) On August 8, 2005, DCA informed the Radburn Association of its determination that PREDFDA applied to the Association and solicited its "formal position regarding compliance with the law protecting homeowners." (Pa306) The letter put Radburn on notice that DCA was requesting Radburn to consider modifying current policies regarding attendance at board meetings, access to minutes, alternative dispute resolution and access to financial records. (Pa791-92).

In the Fall of 2005, a motion was made and passed at an RCA meeting to conduct a primary in which write-in candidates could be selected by an open and democratic vote to run for two seats on the Radburn Association Board of Trustees. (Pa304) Seven Radburn residents agreed to be included in the primary, and plaintiff Kathy Moore and Felice Koplik were selected based on a majority vote. Id. The two women conducted a write-in campaign in the trustee election that Fall; and each received 199 votes, which were far more votes than any other candidate. Id. Despite their victory, the Association refused to seat them on its Board. Id.

In the Fall of 2005, plaintiff Robert Gulack, believing that he had the right to attend meetings of the

Board of Trustees under PREDFDA, repeatedly attempted to attend such meetings. On each occasion, the Board of Trustees voted to ask him to leave the room and he did. (Pa307) In November 2005, Robert Gulack was joined by approximately two dozen residents in their attempt to attend the November monthly Board meeting. They were all turned away following a vote by the Board. Id.

In a letter dated December 20, 2005, Ms. Meyerson requested back up documentation for finances associated with the Radburn pre-school, payments made to attorneys from 2004 to present, and each of the legal matters referred to in the Radburn Budget letter of December 2, 2005.[4] (Pa249) In a letter dated January 12, 2006. Mr. Morris denied her request to review all information except that concerning the Radburn pre-school because she has a "hostile motive" and an "adversarial position to the Board." (Pa308)[5] Around this time, however, in accord with Ms. Meyerson's wishes, the Board decided to arrange the

[4] In the December budget letter, the Association provides to all residents the proposed Operations Budget and annual Statement of Assets, Liabilities and Net Assets on an annual basis as required under its By-Laws. (Pa141;225).

[5] Nonetheless, four months later, Mr. Morris informed Ms. Meyerson that the remaining three requests for back up documentation will be made available to her to read under the condition that she cannot make copies or take notes.(Pa308;250).

first audit of Radburn's finances in approximately 19 years. (Pa308).

On January 10, 2006, DCA informed the President of the Radburn Association that "Radburn must comply with PREDFDA requiring open meeting requirements, access to financial documents and dispute resolution." DCA also stated that Radburn was not in violation of Section 47(b) of the Act providing that "the owners shall elect the entire executive board." (Pa620) It was also DCA's position that it did not have authority or jurisdiction to determine whether an association's elections comply with "any applicable standards," under Section 45(a) of the Act, but noted that such determination could be made by a court. (Pa799-800).

After DCA's decision, plaintiff Maureen Moriarty requested to review back up information for professional legal fees, but was denied access because she is not a member. (Pa153) She made this request because, beginning in 2003, data regarding professional fees expended for the previous year in the financial documents distributed to residents failed to tally with the same professional fee information as it appeared in the Association's 990 forms filed with the Internal Revenue Service for the relevant year. (Pa309) In a letter dated July 25, 2006, Mr. Morris denied Ms. Moriarty request to see the legal bills for 2003

and 2004, because "the Radburn Association's policy does not provide for the disclosure of the requested documents to individuals other than Trustees of the Association."(Pa855).

On or about July 17, 2006, the Association adopted a new "Policy for Certain Procedures Concerning Meetings of the Board at Which Binding Votes Are Taken," effective October 15, 2006. This new meeting policy entails open public Board meetings every three months, with closed "working sessions" the remaining nine months of the year. (Pa253) Prior to October 15, 2006, the Radburn community was not given notice of Association Board of Trustee meetings, with the exception of the annual budget meeting; was not invited to attend meetings of the Radburn Association Board of Trustees, with the exception of the annual budget meeting; and was not provided access to the minutes of Board of Trustee meetings. (Pa304-5).

Since October 15, 2006, the Board of Trustees has discussions and makes decisions by "consensus" during its closed working sessions; and everything discussed at these meetings is strictly confidential. (Pa307) The agenda for the four public meetings is set by President Morris; Ms. Meyerson has never been asked what topics she would like to have on the agenda, and once the agenda is announced, no

trustee can add items to the agenda at the meeting or raise any topic that is not on the agenda. Id. At the public meetings, trustees other than Ms. Meyerson arrive with prepared motions to read out loud. Following each motion a vote is taken, and Ms Meyerson is never given these motions in advance or asked to read any of them. Id.

Pursuant to the Radburn Association open meetings policy, "comments made by the residents at a Voting Meeting shall be limited to matters on the agenda for such meeting and matters regarding which a binding vote is to be taken at such meeting." (Pa254-5) If no votes are to be taken, the public meeting is adjourned without discussion of any matters. The Radburn Association did not amend its By-Laws to reflect this new Voting Meeting policy. (Pa307)

On November 5, 2006, the Plaintiffs, convinced that they had exhausted all other options to bring Radburn Association into compliance with state law, commenced this action. (Pa1-43) In November, 2006, five days after filing this lawsuit, June Meyerson was reelected as President of the RCA. (Pa316).

After the initiation of this action, Gary Konecky, a Certified Public Accountant residing in Radburn, requested in a letter dated December 1, 2006, financial information from the Association's Manager, based on information that

appeared in the Radburn Bulletin. (Pa839) Mr. Morris denied Mr. Konecky's request, stating that he would not comply with the request until Mr. Konecky was able to provide him with relevant "legal authority." (Pa840) The American Institute of Certified Public Accountants (AICPA) professional standards and the AICPA audit and accounting guide for Common Interest Realty Associations provide appropriate guidance for the preparation of financial statements by a planned common interest community, and, in the professional opinion of Gary Konecky, such financial statements should be made available to him and all property owners. (Pa309)

The Decision Below

In his decision, dated April 1, 2008, the Hon. Robert P. Contillo, J.S.C. held that PREDFDA applies to Radburn;[6] the 1993 amendments to the Act are retroactive;[7] and state

---

[6] The Court found that Radburn falls within the definition of "planned real estate development" set forth in PREDFDA, N.J.S.A. 45:22A-23(h). Judge Contillo stated:

> The very essence of Radburn is that it is a planned community, developed along certain guidelines, with property held for the use and enjoyment of its citizens. These guidelines are set forth in restrictive covenants within all the individual properties of Radburn. (Pa1048)

[7] Under the authority of Twin Rivers, 383 N.J. Super. at 50-51 (App. Div. 2006), rev'd on other grounds, 192 N.J. 344 (2007) the trial judge noted that it was "bound to

policy regarding disclosure requires that Radburn maintain accounting records in accordance with generally accepted accounting principles, which are open to inspection at reasonable times by all unit owners. (Pa1054-56).

On the other hand, he rejected Plaintiffs' claims regarding membership, fair and reasonable elections (*i.e.*, open Board nominations), public board meetings and alleged discriminatory and retaliatory treatment of Ms. Meyerson due to her dissenting views. He also dismissed each of Defendants' counterclaims. (Pa1056-61) With respect to the Counterclaims, the Court wrote:

---

interpret the 1993 amendments to PREDFDA to apply retroactively to communities created prior to their enactment." Following the appellate court in Twin Rivers, Judge Contillo adopted the findings and the reasoning of the Twin Rivers trial court judge, Neil Schuster, P.J. Ch. as follows:

> It would be unreasonable to assume that the protections granted to all New Jersey condominium residents and residents of those portions of PREDs constructed after 1977 were not intended to apply to residents of portions of PREDS constructed prior to 1977. Such a literal reading of the Act could result in residents of older homes being given fewer rights regarding community maintenance and administration than their neighbors who may happen to live in a newer home. This court is not willing to find that this is what the Legislature intended when enacting the amendments to PREDFDA. Therefore, the court finds that the 1993 amendments to PREDFDA, codified at N.J.S.A. 45:22A-43 through 48, apply to Twin Rivers; and any portion of the Association by-laws and resolutions not in compliance are in violation of the statute. (Pa1048)

> [T]he Court cannot see how Meyerson's desire to preserve open space for the residents of Radburn, even at the expense of a multi-million dollar deal, could possibly lead to a finding of bad faith. Reasonable minds can differ . . . [and] [s]he is completely entitled to express [her] views to all potential listeners, including to representatives of the State of New Jersey, the media, the Court and the general public.
>
> Without the "original sin" of Meyerson's alleged breaches, Counts II (aiding and abetting breach of fiduciary duty) and III (conspiracy to breach fiduciary duty) fail as a matter of law.

(Pa1060-61) Plaintiffs seek reversal of the trial court's decision only with respect to membership, elections and board meetings.

PROCEDURAL HISTORY

On November 8, 2006, Plaintiffs filed a Five Count Complaint seeking injunctive and declaratory relief with respect to the governance structure and practices of the Radburn Association, its current President, Donald Morris, and its then Manager, Louise Orlando (hereinafter "Defendants"). (Pa1-44) On February 2, 2007, Defendants filed an Answer and Counterclaim alleging several intentional torts (*i.e.*, breach of fiduciary duty, conspiracy to breach fiduciary duty, aiding and abetting breach of fiduciary duty, and interference with contract and economic advantage). (Pa46-78) On December 6, 2007, Plaintiffs served Defendants with a Rule 1:4-8 Notice and

Demand to Withdraw Counterclaim, (Pa131-35) and on January 4, 2008, Defendants filed their Motion for Summary Judgment seeking dismissal of Plaintiffs' Complaint. (Pa136) On January 28, 2008, Plaintiffs submitted their Cross-Motion for Summary Judgment seeking judgment on their Complaint and dismissal of the Counterclaims as a matter of law. (Pa296-1037).

The trial court heard oral argument on March 3, 2008; and issued its decision on April 1, 2008. (Pa1045) Plaintiffs filed their Notice of Appeal on May 9, 2008, (Pa1065), and a scheduling Order was filed June 9, 2008.

LEGAL ARGUMENT

I. THE TRIAL JUDGE'S DENIAL TO PLAINTIFFS OF MEMBERSHIP IN THE RADBURN ASSOCIATION AND THE POWER THROUGH DEMOCRATIC PROCESSES TO CONTROL THE ACTIONS OF THE ASSOCIATION IS ENTITLED TO *DE NOVO* REVIEW.

In its decision, the court below held that neither PREDFDA nor Title 15A require that all Radburn unit owners should have the opportunity to stand for election to its board, rather than those who are pre-selected by the current membership and/or board. The court also denied Plaintiffs' claims that PREDFDA requires that, at minimum, all homeowners of a common interest community are entitled to membership within the governing association, and that such members are entitled to attend all regularly scheduled

and special board meetings. These errors of law are subject to *de novo* review.

When the question presented on appeal is a matter of law, the decision below is subject to *de novo* review. Balsamides v. Protameen Chems. 160 N.J. 352, 372 (1999). This means that a reviewing court need not show any special deference to the trial court's opinion when it misstates or misapplies the law. Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995) (affirming application of *de novo* review when evaluating a trial court's decision that is inconsistent with well-settled law). "[I]f the trial judge misconceives the applicable law, or misapplies it to the factual complex . . . it is the duty of the reviewing court to adjudicate the controversy in the light of the applicable law in order that a manifest denial of justice be avoided." Kavanaugh v. Quigley, 63 N.J. Super. 153, 158 (App. Div. 1960).

In this case, because the trial court misconstrued PREDFDA with respect to the protections it affords homeowners to participate democratically in governance of their community association, and New Jersey's nonprofit law concerning board nominations, *de novo* review is appropriate.

II. RADBURN HOMEOWNERS ARE ENTITLED TO MEMBERSHIP IN THE RADBURN ASSOCIATION.

Although the trial court accepted the holding of the Appellate Division in Twin River that all the 1993 amendments to PREDFDA (codified as N.J.S.A. 45:22A-43 through 48) were retroactive, it refused to look to all such provisions to understand the Legislature's intent when employing the term "member" in the statute. Plaintiffs contend that the language, structure, and purpose of the Act require that all unit owners of a common interest association must be members of the association that governs them. The trial court disagreed.

Instead, the lower court misapplied the common sense meaning of the term "member" and ignored legislative history to conclude that PREDFDA permits the owners of a common interest community to delegate at any time (without specifying the percentage of votes needed to effect such delegation) the control of the Association (otherwise given to them pursuant to N.J.S.A. 45:22A-47) to a small group of owners (or others) in perpetuity. (Pa1051) Such interpretation defies the explicit language of the statute and the purpose of the Act - *i.e.*, to prescribe a consistency of management methods in all types of planned communities, and to safeguard the interests of the

individual owners with respect to various governance issues. See Committee Statement to Senate, No. 217, L.1993, c.30 (1993).

Review of PREDFDA indicates that "members" is not a defined term, and it is employed only once throughout the 1993 Amendments. See N.J.S.A. 45:22A-45 (a)("The form of administration of an association . . .shall provide for the election of an executive board, elected by and responsible to the members of the association") Failure of the Act to define the term simply means one must apply the general principles of statutory construction. Upon doing so, it becomes apparent that under PREDFDA the term "members" means "unit owners".

First, in interpreting a statute, one looks to the "ordinary and well understood meaning" of the words therein. Tarr v. Bob Ciasulli's Mack Auto Mall, Inc., 181 N.J. 70, 82 (2004). See also DiProspero v Penn, 183 N.J. 477, 492 (2005)(the "ordinary meaning and significance" of a statute's terms is the best indicator of legislative intent); Levin v. Township of Parsippany-Troy Hills, 82 N.J. 174, 182 (1980)(court should give language its plain meaning.) Words are construed in a series consistent with the words surrounding them, Gilhooley v. County of Union, 164 N.J.. 533 (2000); and often, the plain meaning of a

specific provision may only be determined by reviewing the entire legislative scheme of which it is part. Kimmelman v. Henkels & McCoy, Inc. 108 N.J. 123, 129 (1987).

As noted above, the only provision within the 1993 amendments that uses the term "members" is N.J.S.A. 45:22A-45(a) concerning the election of the executive board of the relevant association. N.J.S.A. 45:22A-44(c) gives unit owners alternative dispute resolution rights; N.J.S.A. 45:22A-46(a) requires the by-laws to permit unit owners to attend board meetings and to give them notice thereof; N.J.S.A. 45:22A-46(b) requires the by-laws to include the method for calling meetings of unit owners; and N.J.S.A. 45:22A-46(c) requires the by-laws to set forth the manner of collecting assessments from unit owners. Lastly, N.J.S.A. 45:22A-47(a) sets forth the manner in which control of an association is surrendered by the developer to the owners and explicitly calls for the executive board of the association ultimately to be elected by the owners. See also N.J.S.A. 45:22A-47(c)("Upon assumption by the owners of control of the executive board of the association. . .")

Pursuant to the Merriam-Webster's Online Dictionary, a "member" is "one of the individuals comprising a group," therefore "members" are the individuals comprising a group.

Substituting the phrase "individuals comprising a group" into N.J.S.A. 45:22A-45(a), the statute reads that an association must "provide for the election of an executive board, elected by and responsible to the individuals comprising the association."[8] A review of all the above provisions *read together* leads to the conclusion that the individuals comprising the association are indeed the unit owners. See Committee Statement to Senate, No. 217, L.1993, c.30 (1993)(stating that S.217 "addresses the

[8] The lower court disagreed and concluded that substitution of such meaning results in the "election of an executive board, elected by and responsible to the individuals comprising a group of the association." (Pa1050) The court, however, did not analyze whether such definition makes sense within the context of the Act. That is, if the statute actually permits delegation of control to a subgroup of owners, why does the statute fail to address the size of such subgroup of owners; how such subgroup is delimited (*e.g.*, wealth, race, gender, tenure of ownership, etc.); or how many owners are needed to approve such delegation. If the court had tried to answer such questions, it may have realized that the statute's silence on such matters rendered the court's construction of the statute improbable. Indeed, the statute explicitly provides for unit owners to take control on an accelerated basis, and specifies what percentage vote is necessary for this to occur. N.J.S.A. 45:22A-47(b). Taking power early is obviously far less significant than divesting oneself of power forever. The trial court provides no explanation why the Legislature would offer careful safeguards for less important things while neglecting any such safeguards for vital and permanent changes of control. Furthermore, the court's interpretation would defeat the stated purpose of the Act by creating the opportunity for "[in]consistency of management methods in all types of [planned communities]." Committee Statement to Senate, No. 217 L.1993, c.30 (1993).

transition of control over the common elements and facilities in planned real estate developments (PREDs) from a developer to an association composed of unit owners)(emphasis added). See also Restatement (Third) of Property: Servitudes §6.2 (4)(2000)(defining "member" for purposes of section concerning common-interest communities as "the owner of property burdened by a servitude" that imposes an obligation that cannot be avoided by nonuse or withdrawal)

Such a conclusion is the only way one can reconcile Section 45(a) with Section 47(a), and to understand why the statute gives unit owners the rights needed to hold the executive board accountable, such as the right to attend board meetings, and to receive minutes of such meetings.[9] N.J.S.A. 45:22A-47(a)(3) requires "the owners [to] elect the entire executive board, while N.J.S.A. 45:22A-45(a) requires the executive board to be "elected by and

[9] In the Legislative Fiscal Estimate to Senate No. 217, the Senate Affairs Committee Statement and Assembly Local Government Committee Statement, it is noted that "the bill introduces the requirement that meetings of an association's executive board be open to all members of the association."(emphasis added). As noted above, the actual statute gives the right to attend board meetings to unit owners, indicating the Legislature's interchangeable use of the two terms.

responsible to the members of the association."[10] Obviously, the owners and the members are intended to be the same set of people.

This position is consistent with the entire public policy of the Act which is to foster "understanding and trust" in the various forms of ownership regulated by Act. N.J.S.A. 45:22A-22. PREDFDA is a consumer or homeowner-oriented statute, remedial in nature; it must be interpreted expansively rather than narrowly, and liberally construed to protect the rights of homeowners. Tupp v. Brian & Park Homes, Inc., 287 N.J. Super. 232, 237-38 (App. Div. 1996).

Although Plaintiffs acknowledge that there may be other older communities in the United States such as Radburn in which membership in the association and the obligation to pay assessments is independent, most common-interest communities are created by a declaration, which not only imposes the servitude, but also provides automatic and mandatory membership in an association of property owners. See Thanasoulis v. Winston Towers 200 Ass'n, 110 N.J. 650, 656 (1988)(in which the New Jersey Supreme Court

[10] PREDFDA's requirement that the owners control the entire executive board may be imposed on a pre 1977 community without retroactively imposing the statute's sequence of events involving the transfer of control from a developer to unit owners.

summarized the typical condition of a planned common interest association as follows: "An association is comprised exclusively of the unit owners who, through their individual deeds, automatically become members.") It is this common practice that the Legislature intended to make uniform within the state; a requirement needed to guarantee to all individual owners residing within a common interest community the full panoply of political rights needed to protect their respective interests from arbitrary or unreasonable imposition by those in control of the association.

As such, PREDFDA makes sure that such unit owners are the class of individuals that is entitled to elect the governing board to which the board must be responsible. Accordingly, PREDFDA must be understood to confer membership rights on all Radburn homeowners who do not automatically become members of the Radburn Association through deed. The lower court, therefore, erred as a matter of law by refusing to compel Radburn to conform its by-laws to satisfy this mandate.

III. RADBURN HOMEOWNERS ARE ENTITLED TO NOMINATE CANDIDATES TO SERVE ON THE ASSOCIATION'S BOARD OF TRUSTEES IN ACCORDANCE WITH PRINCIPLES OF REPRESENTATIVE DEMOCRACY.

In his decision, Judge Contillo acknowledges that Radburn is governed by a "small group of `members,' essentially an exclusive club of current and former trustees," but, nonetheless, finds no basis in New Jersey law to impose principles of representative democracy on Radburn or other common interest associations generally. (Pa1052).

Plaintiffs strongly disagree; and cite the Twin Rivers appellate court for the proposition that PREDFDA contemplates "fair and open" election processes and procedures, which implement common sense American principles of democracy, to ensure that those elected, i.e. the governing board, are accountable and "responsible" to those governed, i.e., the owners of property burdened by the relevant servitude. N.J.S.A. 45:22A-45(a). Given the fact that common interest associations, like local governments, have the power to make and enforce rules governing behavior and affecting owners' financial interests within a community, it is appropriate to look to First Amendment principles of expression developed within the context of public election cases to assist in

determining whether an association's election procedures satisfy PREDFDA's mandate requiring effective representative democratic processes. See also Restatement (Third) of Property: Servitudes §6.2 (2000)(entitled "Representative Government").[11]

Similarly, principles and policies of representative government and democratic election processes set forth throughout Chapter 6 of the Restatement (Third) of Property: Servitudes (2000) should be employed when determining what constitutes a "fair and reasonable" nomination procedure in the context of a common interest

[11] Plaintiffs acknowledge that voting power in common interest communities is often based on property ownership or financial contribution, rather than residency. Accordingly, "the rationale for allocating voting power on the basis of one unit, one vote, rather than one person, one vote is that the primary focus of the association is property ownership." Restatement (Third) of Property: Servitudes §6.17, cmt. a (2000). The Appellate Division in Committee for a Better Twin Rivers, 383 N.J. Super. at 68 adopted this rationale when affirming the lower court's holding that N.J.S.A. 45:22A-47(b) permits weighted-voting and is not subject to an *equal protection* challenge brought under the "one person, one vote" principle established in Baker v. Carr, 369 U.S.186 (1962). Contrary to the trial court's belief herein, the Appellate Division's holding in Twin Rivers does not preclude use of constitutional principles of *speech and association* as a source of rules to interpret PREDFDA's election requirement pursuant to N.J.S.A. 45:22-45(a). Indeed, principles governing the conduct of public elections are the most appropriate reference to determine the procedures common interest associations must employ to ensure that the board that is elected is responsible to the unit owners that elected them -- and is truly representative of their interests.

association, as the court is required to do in accordance with N.J.S.A. 15A:5-20.

Pursuant to such standards, it is clear that Radburn's refusal to provide a reasonable opportunity for all homeowners to become candidates for election to its board of trustees is neither fair, open nor reasonable.

A. Radburn's By-Laws Governing the Election of Its Trustees Violate N.J.S.A 45:22A-45(a) and N.J.S.A 45:22A-47(a)(3)insofar as Its Unit Owners Do Not Elect The Entire Executive Board Pursuant to Fair and Open Processes.

The 1993 Amendments to PREDFDA clearly incorporated "into the general PRED law certain provisions -- relating to the bylaws of unit owners' associations [and] the establishment of members' voting rights." Committee Statement to Senate, No. 217. Simply because the word "nomination" cannot be found in the statute does not mean that the statute is silent as to the legality of Radburn's nomination process. Common law and a long tradition of legal precedent that informs citizens' rights to vote and the electoral processes in which they exercise that right offer appropriate principles to assist in interpreting the language of PREDFDA and the Legislature's intent when codifying owners' voting rights.[12]

[12] The court below expressed concern that there is no authority to import constitutional principles of speech developed in the

context of public elections to the context of common interest association elections. Such concern is unfounded for the following reasons:

1) In Committee for Better Twin Rivers, 192 N.J. at 47, the New Jersey Supreme Court acknowledged the relevance of constitutional principles regarding free speech when evaluating the legality of association practices related to the election of its directors. It noted, "Our holding does not suggest, however, that residents of a homeowners' association may never successfully seek constitutional redress against a governing association that unreasonably infringes their free speech rights."

2) It is apparent upon the face of PREDFDA that the Legislature understood that common interest communities share many features of municipalities. Indeed, the Legislature specifically included in the 1993 Amendments the "health, safety and welfare" language from New Jersey's Home Rule Act, N.J.S.A. 40:48-2. Like local governments, associations have the power to levy assessments on individually owned property; and like such governments, they have the power to make rules governing the community and the power to enforce the servitudes through judicial action. See Restatement (Third) of Property: Servitudes §6 Introductory Note (2000). This legislative power, like the "reservoir of police power" given to municipalities pursuant to N.J.S.A. 40:48-2, is incorporated in N.J.S.A. 45:22A-44(b) that empowers associations to "exercise [their] powers and discharge [their] functions in a manner that protects and furthers the health, safety and general welfare of the residents of the community." It therefore follows that the Legislature also intended that such legislative power be kept in check by the election of the association by its members (N.J.S.A. 45:22A-45(a)) pursuant to some of the same principles of representative democracy prevailing in local government elections. A board that never has to face a meaningful election has no motivation to deal fairly with the vast majority of the community.

3. Finally, Radburn's Summary of Radburn Protective Restrictions also explicitly recognizes that the Association "is undertaking activities . . . much like those of a municipality." Id. at 3 (Pa277) As a result, the Association "has been organized on the model of the best modern practice in municipal government" corresponding to

The U. S. Supreme Court has repeatedly emphasized that the right of candidates to have a fair process for appearing on the ballot must be secured if the right to vote is to be meaningful. "The right to vote would be empty if the State could arbitrarily deny the right [of a candidate] to stand for election. . . . Such an election would be a sham." Anderson v. Calebrezze, 460 U.S. 780, 787 (1983). See also Restatement (Third) of Property: Servitudes §6.16 cmt. c (2000)(reasonable opportunity for eligible owners in common interest communities to become candidates and make views known); §6.18 (owners have the right to stand for election to Board).[13]

The right of an individual to a place on a ballot – *i.e.*, be nominated – is "intertwined with the rights of voters" and must be protected. Lubin v. Panish, 415 U.S. 709, 716 (1974). This "right of [an] individual to a place on a ballot" is the single most important expressive right

---

the Mayor-Council-City Manager form of government. Id. If the incorporators intended the Association to be governed like a municipality, it follows that they also intended association elections to be conducted pursuant to principles prevailing in such municipal elections.

[13] When enacting the 1993 Amendments to PREDFDA, the New Jersey Legislature was acting to secure democratic rights for residents in planned communities, not to weaken those rights already recognized under the common law in accord with Restatement (Third) of Property: Servitudes Chapter 6 (2000).

both for that individual and for those who would like to vote for that individual, and it is founded "directly on the First . . . Amendment." Anderson v. Calebrezze, 460 U.S. at 787 n.7. See also Twin Rivers, 383 N.J. Super. at 27 (acknowledging homeowners' constitutionally protected rights "to engage in expressive exercises" related to the election of candidates to their association's board), rev'd on other grounds, 192 N.J. 344 (2007).

Furthermore, despite the fact that PREDFDA does not expressly address the conduct of association elections (in contrast to Title 15A), this Court in Twin Rivers has already found that the specific election requirements found in sections 45(a) and 47(a)(3) "must be taken to connote fair and open processes, in which opposition candidates are entitled to campaign," let alone be placed on the ballot. Twin Rivers, 383 N.J. Super. At 42, rev'd on other grounds, 192 N.J. 344 (2007).[14] Plaintiffs submit that Radburn's By-

[14] Since PREDFDA contains two specific provisions dealing with the election of an association's governing board, Plaintiffs' do not seek relief pursuant to N.J.S.A.45:22A-44(b)-- the source of an association's general legislative power. However, it should be noted that both the Appellate and Supreme Courts in Twin Rivers noted that "restrictive covenants established by homeowners' associations that unreasonably limit speech and association rights could be challenged under *subsection (b)* of the statute." Committee for Better Twin Rivers, 192 N.J. 34, 47 (2006); see also, Committee for Better Twin Rivers, 383 N.J. Super. at 42 ("if TRHA has denied a voice to challengers, thereby

laws permitting only current trustees or members to nominate candidates to serve on its governing board, coupled with its practice of denying the validity of write-in candidates do not pass muster under this standard.[15]

Section 47(a)(3) of PREDFDA

Two of the nine seats on the Radburn Association's Board of Trustees are nominated and voted upon solely by the group of current and former trustees who are members of the Radburn Association. (Pa187) For this reason, it is clear that the owners, as a class, do not elect "the entire executive board," as N.J.S.A. 45:22A-47(a)(3) expressly requires. Setting the entire question of nominations to one side (to be dealt with below), Radburn owners can only be said to elect seven of the nine sitting trustees, not "the entire executive board."

Section 45(a) of PREDFDA

Pursuant to the Radburn By-laws, six seats out of nine are filled by a process under which the current trustees select a list of candidates and effectively compel more

---

suppressing opposition and skewing elections," such conduct would be viewed "as against the welfare and best interests of the community" thus violating N.J.S.A. 45:22A-44(b)).

[15] In this regard, it should be noted that Radburn property owners, except for members of the Association and current trustees, also have no power to amend the process by which trustees are nominated and elected further rendering the election process unfair and closed. (Pa205-6).

than 1000 of their neighbors to vote for a candidate appearing on that list. (Pa187) Under this circumstance, any homeowner desiring to serve on the Board of Trustees must first seek the support of the current trustees before appearing on the ballot. Although the By-laws of the Radburn Association do not explicitly state that write-in votes for trustee candidates will not be considered, it appears to be the practice of the Radburn Association not to do so. (Pa304).

Given the apparent need of any homeowner seeking election to first meet with the approval of the current board, and the inability of any homeowner to self-nominate through a write-in campaign, the current system precludes or greatly diminishes the likelihood of any oppositional candidate ever appearing on the ballot. For example, if 90% of the community favors Position A, and the Board favors Position B, the community, in all likelihood, will simply never get a chance to vote for a candidate favoring Position A. This is because it is more likely for the Board to nominate someone who shares their view, even if it is a minority position, than to nominate someone who has taken a stance in opposition to them. As a result, Radburn homeowners are not only disenfranchised, as will be

discussed below, but they are effectively denied the opportunity to influence Board policy.

It is Plaintiffs' contention that an election system that allows those currently in power to deprive the majority of the community of any future influence over policy is not one that satisfies the requirement of Section 45(a) that the elections in question must effectively render those elected "responsible to" those who voted for them. Indeed, the Radburn election system has resulted in the trustees being responsible, at best, to each other (in the event a trustee seeks re-nomination), and not all the homeowners as required by the statute.

Clearly, the current Radburn Association By-laws and practices represent a constant temptation to the current Board of Trustees to freeze the political *status quo* by nominating candidates who share the views of the current Board. But election laws may not "operate to freeze the political *status quo*." Jenness v. Fortson, 403 U.S. 431, 438 (1971). Election regulations cannot "be so excessive or impractical as to be in reality a mere device to always, or almost always, exclude [candidate] with significant support from the ballot." American Party of Texas v. White, 415 U.S.767, 783 (1974). See also Ken Budd, "Fair Elections," Common Ground (Jan./Feb.1998)("Fair elections start with a

fair nominating processes. Directors should not hand-pick their successors . . . There should be no signs of favoritism") located at http://www.caionline.org/.

In order to ensure that voters, such as Radburn homeowners, may vote "effectively," the Supreme Court has required that "ballot access must be genuinely open to all, subject to reasonable requirements." Jenness v. Fortson, 403 U.S. at 439. Pursuant to this standard, the Supreme Court has thrown out, in both California and Texas, nominating procedures that denied candidates both the right to be nominated by petition and the right to run a write-in campaign. See Lubin v. Panish, 425 U.S. at 709 (California); Bullock v. Carter, 405 U.S. 134 (1972) (Texas). Where, on the other hand, a right to petition onto the ballot existed, the Supreme Court has viewed that as a crucial factor in rendering an otherwise unlawful election process lawful. New York State Bd. Of Elections v. Lopez Torres, 128 S.Ct. 79 (2008).[16] In short, the Supreme Court

---

[16] Justice Kennedy in his concurring opinion wrote:

> Were the state-mandated and -designed nominating convention the sole means to attain access to the general election ballot there would be considerable force, in my view, to respondents' contention that the First Amendment prohibits the State from requiring a delegate selection mechanism with the rigidities and difficulties attendant upon this one. . . . As the Court is

has consistently held that the right to "elect" candidates includes the right to "nominate" them. Since the Radburn's election system fails to permit homeowners the opportunity to nominate candidates for the position of trustee either through a petition process or write-in campaign, it falls far short of the "fair and open" standard implicit in N.J.S.A. 45:22A-45(a).

To conclude otherwise would subvert the stated purposes behind the 1993 PREDFDA amendments: "to foster public understanding and trust." N.J.S.A. 45:22A-22. Allowing total board control of the nomination process can only engender *dis*trust - the very reasonable suspicion that the board is selecting only candidates who agree with the board's policies. See T33-18 to 23 (Radburn's counsel admitting that the trustees feel entitled to exclude from nomination candidates alleged to have a "political agenda")

In addition, Radburn's closed nomination process fails to ensure the accountability and transparency of governance sought by PREDFDA in order to protect homeowners' interests For example, if the Radburn Board of Trustees can,

---

careful to note, however, New York has a second mechanism for placement on the final election ballot. . . The petition alternative changes the analysis.

Id. at 802 (Kennedy, J. concurring)

consistent with the Act, select candidates from whom all other owners must choose, there is no point in requiring open meetings of the board or access to minutes of those meetings. N.J.S.A. 44:22A-46(a). There is simply no reason for owners to attend such meetings, if they cannot subsequently vote to alter the policies they see being supported by members of the governing board. The closed and unfair nature of Radburn's elections is obvious and thus fails to satisfy PREDFA's requirements that "the entire board" be "elected by" and "responsible" to all homeowners.[17]

B. Given Radburn's Nature As a Common Interest Community, Its Nomination Procedure Is Not Fair and Reasonable Thus Violating New Jersey's NonProfit Corporation Act.

The trial court accepted that the Radburn Association's nomination process, under the Nonprofit Corporations Act, must be "fair and reasonable," but it held that such standard does not "require a straight democracy or republic, with a method of nominating residents not beholden to Board pre-approval." (Pa1052-3) This conclusion is clearly inconsistent with the notion

[17] In this way, Plaintiffs' situation differs from the plaintiffs' reality in Twin Rivers, where the New Jersey Supreme Court found that "[a]s members of the Association, plaintiffs can vote, run for office, and participate through the elective process in the decision-making of the Association." Committee to Better Twin Rivers, 192 N.J. at 45.

that the law was intentionally left flexible in order to determine an appropriate nomination process based on the specific type or nature of the organization or one that is tailored to meet the needs of the charitable purpose or mission of the nonprofit.

"Flexibility" is necessary where the statute covers such a diverse number of nonprofits for what is "fair and reasonable" in one context is not "fair and reasonable" in another. For example, something that constitutes a 'fair and reasonable" nomination practice for the governing board of a nonprofit set up to promote the appreciation of opera may fail to pass muster when asked to serve as the nomination process for a nonprofit corporation charged with governing a planned community. Plaintiffs submit that what is "fair and reasonable" in the context of Radburn, and other similar common interest communities, must be informed by the differences that exist between such corporations and other nonprofit corporations in addition to constitutional principles concerning voting rights and other expressive activity described above.

First, like a private trust, the purpose of common interest associations is to manage property for the benefit of its members, but unlike trustees, directors of common interest associations are "elected by popular vote,"

"answer to political considerations," and are "subject to election and removal from office in a democratic process." Restatement (Third) of Property: Servitudes § 6.14 cmt.a (2000). For it is only through democratic processes that homeowners are provided some protection against arbitrary, intrusive or unfair treatment of the directors.

Second, unlike other nonprofit organizations, directors of common interest associations are entrusted with protecting unit owners' homes. For this reason, more protection should be provided for such homeowners than afforded members of a country club or other nonprofit organization. As the Restatement (Third) of Property: Servitudes explains:

> There are three significant differences between . . . other types of nonprofit corporations and common-interest-community associations. . . . First, the stakes of association members are generally much higher. . . . The member's investment is the member's home, which is often the largest single asset the member owns, and which has personal and social significance far beyond the monetary value of the asset. Second, the range of power the association holds over the member's well-being and the range of decisions the association is called on to make is significantly broader than in the typical business corporation. . . . . The third difference is that association members cannot ordinarily sell their homes as easily as they can sell shares of stock in a business corporation. Association members are more like shareholders in closely held corporations where liquidity is absent. . . .

Restatement (Third) of Property: Servitudes § 6.13 cmt. b (2000): see also Id. Chapter 6 Introductory Note (noting the importance afforded the home in American society is an "important factor in determining rules appropriate for residential common interest communities").

Given these three distinctions, it is clear that the homeowner in a planned community is virtually held hostage to a very large and very personal investment that may be suddenly devalued at any time by poor community governance. Under these extreme circumstances, homeowners must be extended the maximum possible protection: the right to participate in a fair and open electoral process whereby each is afforded the opportunity to run himself or nominate others for the position of trustee. Restatement (Third) of Property: Servitudes § 6.16 cmt. c (2000)("Except as otherwise authorized by statute, election procedures must provide a reasonable opportunity for eligible members to become candidates and make their views known to the electorate, and a reasonable opportunity for eligible voters to cast their votes.")

Because Radburn's By-laws unreasonably restrict Plaintiffs' rights to become candidates or nominate candidates for the position of trustee, they clearly violate N.J.S.A. 15A:5-20 and New Jersey public policy. As

explained in the Restatement (Third) of Property: Servitudes § 6.18 cmt. a (2000) the rationale behind the rule that members of a common interest community have the right to stand for election to the board of directors is as follows:

> One of the primary justifications for permitting the creation of servitudes that subject property owners to the often extensive powers of common-interest-community associations to affect their property values and quality of life is that the members have the power through political processes to control the actions of the association. The rules set forth in this section are designed to safeguard the opportunities of community members to participate democratically in governance of the community association.. . .
>
> Although the governing documents may prescribe reasonable procedures for the exercise of these rights. . . a servitude that substantially denied community members the ability to participate in governance of the association would be invalid as against public policy. . .

(emphasis added)

Effective representative government is thus essential to the validity of the servitude underlying planned residential communities; without such form of government assessments can not be exacted or architectural guidelines imposed.

The need to provide unit owners with a full range of democratic rights to participate in the governance of their community and, specifically, to hold their directors

responsible was also understood and underscored by the original incorporators of Radburn. As it is stated in the Summary of Radburn Protective Restrictions distributed to all homeowners by the Radburn Management Corporation:

Residents Will Control

> For the present, until Radburn is a more fully developed community, the members of The Radburn Association are the nine Trustees named in the Certificate of Incorporation and such other persons as they may elect to membership. It is the expectation of the City Housing Corporation and of the incorporators of The Radburn Association that as the population of Radburn increases and the residents and owners organize themselves, the right to designate one or more Trustees of The Radburn Association will be given to their representatives, and that eventually the entire administration of and membership in The Radburn Association will be in the hands of the residents and owners or their representatives.

Summary of Radburn Protective Restrictions (Pa277)[18]

[18] This summary is based on a WHEREAS clause contained within the Declaration of Restrictions that also indicates the incorporators intent that "membership in and control of said Association shall ultimately be vested in the inhabitants and/or property owners of the community RADBURN . . . or in representatives of such inhabitants and/or property owners." Like the Summary, the Declarations are distributed to property owners upon purchase of their home, (Pa741); not the By-Laws that effectively restrict the control of the Association to a subgroup of residents and/or property owners that are not necessarily representative of the inhabitants and owners as a whole. (Pa303). It should be noted that failure to record the bylaws of an association with the master deed is a violation of PREDFDA, N.J.S.A. 45:22A-46.

If control is to be lodged in the hands of representatives, then owners must be given the means democratically to elect such representatives. Accordingly, Title 15A as applied to common interest communities generally, and Radburn specifically, requires nomination procedures consistent with principles of representative democracy that permit all homeowners, not just a small group of homeowners who are handpicked by the current trustees, to be in control.

For the foregoing reasons, Radburn must be ordered to conform its By-laws to satisfy PREDFDA's mandates regarding "fair and open" elections and Title 15A's "fair and reasonable" nomination requirements.

IV. RADBURN HOMEOWNERS ARE ENTITLED TO OPEN BOARD MEETINGS REGARDLESS OF WHETHER SUCH MEETINGS ARE NOMINALLY CHARACTERIZED AS WORKING SESSIONS.

Pursuant to its By-Laws, Radburn is required to hold "regular meetings of the Board of Trustees . . . the third Monday of each month." (Pa196) Prior to October 15, 2006, these meetings and all special board meetings were closed to homeowners and all information discussed therein was deemed confidential; that is, members of the Radburn community were not given notice of such meetings, were not

invited to attend such meetings and were not provided access to the minutes of those meetings. See (Pa304-5)[19]

In response to Plaintiffs' complaint filed with DCA, the Division urged the Radburn Association to comply with PREDFDA's open meetings requirement set forth in N.J.S.A. 45:22A-46(b) requiring "all meetings of the executive board, except conference or working sessions . . .[to] be open to attendance by all unit owners." (Pa791-2) Radburn, in turn, adopted a new policy in which it simply renamed two of every three board meetings a "working session" and limited the third meeting to "public vote taking" on matters previously reached by consensus.[20].

The court below did not find this superficial act of renaming offensive or an attempt to circumvent the purposes underlying PREDFDA's open meeting requirement: to assure accountability and "opportunities [for] community members to participate democratically in governance of the

[19] Despite Ms. Meyerson's role on the Radburn Board as a "liaison" to the RCA, she was told that she could not share minutes of Association Board meetings with fellow homeowners nor the content of any discussions. (Pa398).

[20] On July 17, 2006, the Radburn Association adopted its "Policy for Certain Procedures Concerning Meetings of the Board at Which Binding Votes are Taken" which went into effect October 15, 2006. The new policy entails public board meetings every three months, with closed "working sessions" the remaining nine months of the year.(Pa307) No change was then made to the By-Laws to reflect this new policy.

community association." Restatement (Third) of Property: Servitudes § 6.18 cmt. a (2000)(Meetings and Elections). Plaintiffs submit that Radburn's current policy is contrary to PREDFDA as a matter of law.

As noted previously, in interpreting a statute, one looks to the "ordinary and well understood meaning" of the words therein. Tarr v. Bob Ciasulli's Mack Auto Mall, Inc., 181 N.J. at 82. However, in some instances, one cannot determine the plain meaning of a provision without first ascertaining the purpose for which it was enacted. L.P. Marron & Co. v. Mahwah Township, 39 N.J. 74, 80 (1963). A fundamental rule of statutory construction is that the Legislature's intent should be derived from an interpretation of the entire statute and all statutory sections must be read in light of this intent. See Seatrain Lines, Inc. v. Medina, 39 N.J. 222, 226 (1963). This principle, together with the fact that PREDFDA is remedial in nature, must be interpreted expansively rather than narrowly, and must be construed liberally to protect the rights of homeowners, leads to the conclusion that Radburn's new Voting Meetings policy violates the Act.

It is clear from the face of the statute that the Legislature intended that all regularly scheduled and special board meetings of an association "be open to all members of

the association, with certain specified exceptions." Committee Statement to Senate, No. 217. See also Restatement (Third) of Property: Servitudes § 6.18 (2000)("Except when the board properly meets in executive session, members of the association are entitled to attend meetings of the board of directors and to a reasonable opportunity to present their views to the board.") The statute provides:

> The bylaws of the association . . . shall include . . .[a] requirement that all meetings of the executive board, except conference or working sessions at which no binding votes are to be taken, shall be open to attendance by all unit owners, . . . except that the executive board may exclude or restrict attendance at those meetings, or portions of meetings, dealing with (1) any matter the disclosure of which would constitute an unwarranted invasion of individual privacy; (2) any pending or anticipated litigation or contract negotiations; (3) any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer, or (4) any matter involving the employment, promotion, discipline or dismissal of a specific officer or employee of the association.

N.J.S.A 45:22A-46(a)(emphasis added) See also N.J.A.C. 5:20-1.1 (same).

Unfortunately, neither the Legislature nor DCA has defined "meetings of the executive board," "conference sessions," or "working sessions;" and, according to several dictionaries, the word "meeting" is interchangeable with the word "session." Cf. Open Public Meetings Act, N.J.S.A. 10:4-

8(defining "meeting" to include any "gathering which is attended by, or open to, all of the members of a public body, held with the intent, . . .to discuss or act as a unit upon specific public business of that body"; and excluding such gatherings attended by less than an effective majority).

Nonetheless, the notice provision of the statute, set forth in regulation, was modeled after the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., 38 N.J.R. 4531(a); and like that law, PREDFDA's open meetings requirement was enacted to increase confidence in governance, enable residents to see how decisions are made, keep owners informed of pertinent information that affects their community, permit them to make well-informed decisions when electing their boards and, generally, to assure board responsiveness and accountability -- goals achieved by section 46 working in concert with other provisions in the Act.

In light of these statutory purposes, it is reasonable to conclude that board meetings, pursuant to N.J.S.A.45:22A-46(a), must include all gatherings of the board at which a quorum is present and association affairs are discussed or voted upon. Whereas working or conference sessions involve a subgroup of board members discussing matters that will be communicated to the rest of board at an open meeting (such as a committee meeting, or a meeting with a consultant or the

association's manager) during which the full board can act upon the information reported. The intent to exclude gatherings where less than a quorum is present from the statute's open meeting requirement is indicated by the specific language of the provision stating that "no binding votes are to be taken" at such working sessions. N.J.S.A 45:22A-46(a).

In accord with this understanding of the phrases "board meetings" and "working sessions," Radburn's so-called working sessions are in fact board meetings. This is the case because under its new policy, the Radburn Trustees have discussions and make decisions by "consensus" during closed gatherings that in content and form resemble board meetings that were previously held at the same designated time and place. Everything discussed at these alleged working sessions is strictly confidential, and unit owners are deprived of the opportunity to evaluate for themselves the information on which their trustees are making decisions. (Pa507-8).

Conversely, the Association's alleged "board meetings" are not, in substance, actual board meetings at which matters are discussed. Rather, such Public Voting Meetings, which occur every third month of the year, provide a forum at which board members merely announce, by taking binding votes, decisions they have reached during previous "sessions." The

agenda for such Public Voting Meetings is set by the President of the Association, defendant Morris, and no trustee, let alone homeowner, can add items to the agenda at the meeting or raise any topic that is not on the agenda. (Pa307) Trustees arrive to these meeting with prepared motions to read out loud, and following each motion a vote is taken. Id. Although owners are permitted to make comments on matters on the agenda, (id.), there is minimal interchange between the trustees and the residents and among the trustees themselves. The Public Voting Meetings are a place at which residents are able to observe the Board actually taking a binding vote, but gain little, if any, insight into the workings of the Board, which still occur behind closed doors. If no votes are to be taken, the meeting is convened, the minutes of the previous meeting are read and adopted, and the meeting is adjourned.

In an attempt to meet the words of the statute while maintaining minimum disclosure of its deliberations, the Radburn Association has subverted the purposes of the statute and has failed to meet its requirement that "all meetings of the executive board . . . must be open to attendance by all unit owners." N.J.S.A. 45:22A-46(a). The fact that binding votes cannot be taken at working sessions does not mean, as Radburn's new policy wrongly assumes,

that all board meetings at which no binding votes are taken are by definition "working sessions."

For the foregoing reasons, this Court cannot permit Radburn to disregard the right of its owners to participate in the governance of their community by attending board meetings simply by sanctioning the renaming of its board meetings to working sessions (despite the nature of such meetings remaining the same). Plaintiffs' civic rights must be respected and may not be treated in such a cynical and cavalier manner.

Accordingly, the decision below must be reversed and Radburn must be ordered to conform its by-laws to satisfy PREDFDA's open meetings requirements.

V. RADBURN HOMEOWNERS ARE ENTITLED TO DISCLOSURE OF ASSOCIATION'S FINANCIAL RECORDS REQUIRED TO BE MAINTAINED IN ACCORDANCE WITH GENERAL ACCOUNTING AND AUDITING PRINCIPLES.

In his opinion, Judge Contillo correctly found that Radburn provides to homeowners and other residents only the following financial information: "[T]he balance sheet at the end of the preceding fiscal year, a statement of income and expenses for that year, and the tax returns." (Pa1054) He found such disclosure inadequate, and held that "the public policy of the state is reflected in the Condominium Act, which specifically provides that condominium associations must maintain records in

accordance with generally accepted accounting principles." ("GAAP") He further directed Radburn to use N.J.S.A. 46:8B-14(g) "as its guideline for determining what and when it must disclose to the residents of the community." (Pa1056)

N.J.S.A.46:8B-14(g) specifically mandates that associations maintain "accounting records, in accordance with generally accepted accounting principles, open to inspection at reasonable times by unit owners." It further notes that such records must include receipts, expenses, common expenses owed by units, and "any interest in common surplus." This list, however, is not exhaustive of the GAAP documents that must be provided to all unit owners upon request.

Unfortunately, while the trial court was very clear about requiring "Radburn to apply generally accepted accounting principles" (Pa1056), it did not specify what those principles were. Plaintiffs contend that this Court should affirm the decision below, clarifying that "generally accepted accounting principles" referred to in the statute are the standards set forth by the American Institute of Certified Public Accountants (AICPA) for common interest realty associations. The AICPA Professional Standards and the AICPA Audit and Accounting Guide for Common Interest Realty Associations (AAG-CIRA) provide the proper guidance for the preparation of financial statements by a

planned common interest community, such as Radburn. (Pa525)[21] Reference to such professional guidelines is in accord with the broad "general welfare" provision found in PREDFDA, N.J.S.A. 45:22A-44(b).[22]

The Guidelines specify that the primary users of the financial information of a CIRA are unit owners, but goes further to state that potential buyers are entitled to and have a need for the CIRA's financial information. AAG-CIR 1.33 and 35. (Pa1033) AAG-CIR 1.37 recommends disclosing "financial information about amounts due from unit owners and about a CIRA's policies for accumulating funds to meet future major

---

[21] Without stating any reason, the court below declined to take judicial notice of the AAG-CIRA, despite the fact that it is an authoritative publication issued by the American Institute of Certified Public accountant setting forth the professional standards and audit and accounting guidelines to be used by common interest association. See N.J.R. 201(b)(2) (permitting judicial notice of "propositions of generalized knowledge which are capable of immediate determination by resort to resources whose accuracy cannot reasonably be challenged).

[22] The Legislature's inclusion of the language of New Jersey's Home Rule Act, N.J.S.A. 40:48-2 indicates that it intended N.J.S.A. 45:22A-44(b) to be a general source of legislative power for the association, obviating the need to first identify an explicit grant of power before acting. Cf. Iganamort v. Borough of Fort Lee, 62 N.J. 521 (1973) (concluding that N.J.S.A. 40:48-2 is itself a "reservoir of police power"); Fred v. Old Tappan, 10 N.J. 515 (1952)(explaining that in enacting such provision, the Legislature recognized that local government must be given the authority to take any action it deemed necessary for "the preservation of the public health, safety and general welfare of the municipality and its inhabitants").

repair and replacement costs on common property." Id. It also requires CIRAs to disclose supplementary information outside of the basic financial statements indicating the financial soundness of the community, (Pa528) and it includes Illustrative Financial Statements in its appendix. AAG-CIR, Appendix A. (Pa841-854).

Plaintiffs assert that in order to protect their rights and investments as well as those of all other current and future owners of property within Radburn, this Court should require the Association to adhere to AIPCA's standards of transparency to financial disclosure. Further support for using the AIPCA standards to define GAAP is found in N.J.S.A. 45:22A-46(a) mandating open board meetings.

As noted in the previous section, PREDFDA specifically limits board meetings or portions thereof to which community association boards may exclude homeowners to those considering private, litigation and contract negotiations, privileged, and employment matters. Id. Implicitly, common interest association boards, such as Radburn, are thus expected to share all matters outside of the scope of these exceptions with their members at open board meetings. This includes, by logical inference, most financial documents produced by an association including invoices, receipts, audits and monthly financial statements in

addition to other documents concerning all matters central to the governance of the association.

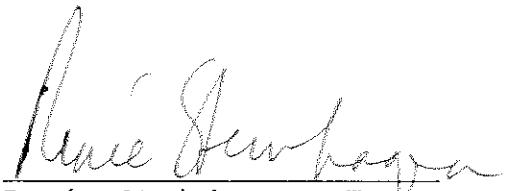
As a result, in accordance with PREDFDA's statutory scheme designed to protect the interests of all homeowners residing in a common interest community, this Court should require Radburn to comply with standards set forth by the American Institute of Certified Public Accountants (AICPA) specifically for common interest realty associations.

CONCLUSION

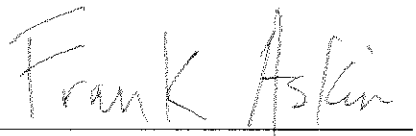
For the foregoing reasons, this Court should affirm the lower court's decision as to Count IV of the Complaint, but reverse it with respect to Counts I-III. Because the members of the Association's board occupy a fiduciary position to the Association and its property owners, its By-laws "cannot be structured with an eye to self-protection." Mulligan v. Panther Valley Property Owners Ass'n, 337 N.J.Super. 293, 309 (App. Div. 2001)(Pa1055).

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

Respectfully submitted,



Dated: August 19, 2008 — Renée Steinhagen, Esq.



August 19, 2008 — Frank Askin, Esq.