



The New Jersey Supreme Court Again Addresses Restrictions On Speech On Private Property

Limits On The Ability Of Property Owners To Restrict Speech On Their Property In New Jersey

In *Dublirer v. 2000 Linwood Avenue Owners, Inc., et al.* (A-125-11) (169154), an opinion issued on December 3, 2014, the New Jersey Supreme Court addressed a conflict between private property rights and the New Jersey Constitution's freedom of speech guaranty – a topic the Court has considered repeatedly over the past twenty years. *Dublirer* specifically concerns restrictions by common-interest communities, such as co-ops or planned developments, on “expressive activity” by residents.

The ability of property owners to restrict such activity is subject to the New Jersey Constitution's free speech guaranty. In addition to providing that “[n]o law shall be passed to restrain or abridge the liberty of speech or of the press,” Article I, ¶ 6 of the New Jersey Constitution also states that “[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right.” Thus, unlike the First Amendment to the U.S. Constitution, which only protects speech against restriction by the government, the New Jersey Constitution has been held to protect against infringement upon speech even if it is imposed by nongovernmental actors. This free speech guaranty is “an affirmative right, broader than practically all others in the nation.” *Green Party of New Jersey v. Hartz Mtn. Industries, Inc.*, 164 N.J. 127, 145 (2000).

With respect to limits on speech imposed by private property owners, *Dublirer* distinguishes between two relevant lines of cases. The first involves restrictions on the speech of “outsiders” on private property. The leading cases are *Green Party, supra*, N.J. *Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 138 N.J. 326 (1994), cert. denied, 516 U.S. 812 (1995) and *State v. Schmid*, 84 N.J. 535 (1980), *appeal dismissed sub nom. Princeton Univ. v. Schmid*, 455 U.S. 100 (1982).

The second category of cases concerns the free speech rights of owners within common-interest communities in

which they reside. Prior to *Dublirer*, the leading cases on this subject were *Mazdabrook Commons Homeowners' Ass'n v. Khan*, 210 N.J. 482 (2012) and *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 192 N.J. 344 (2007).

Limits On The Rights Of Outsiders To Exercise Free Speech On Private Property

Schmid, decided in 1980, set forth three considerations to be applied to limitations on the speech of outsiders on private property: (i) “the nature, purposes and primary use of [the] property”; (ii) “the extent and nature of the public’s invitation to use that property”; and (iii) “the purpose of the expressional activity . . . in relation to both the public and private use of the property.” *Coalition* added a fourth consideration: “the general balancing of expressional rights and private property rights” – i.e., balancing “private owners’ interest in controlling and limiting activities on their property” and outsiders’ free speech rights.

In both *Schmid* and *Coalition*, the property at issue (a university and a group of regional malls) was open to the public. The university’s purpose was education, and the malls were, the Court held, both commercial and similar to a public square or “downtown business district.” The Court held bans on the distribution of political and anti-war materials, respectively, to be unconstitutional. However, the Court noted that “reasonable rules to control” speech, which provided “convenient and feasible alternative means of expression” – or reasonable time, place and manner restrictions – were permissible.

Limits On The Rights Of Common-Interest Communities To Restrict The Speech Of Their Own Residents

Twin Rivers and *Mazdabrook* concerned limits imposed by homeowners’ associations on signage posted on private dwellings within a planned development. Although the context was different, those cases applied the *Schmid/Coalition* four-part analysis. However, the Court in *Mazdabrook* modified the analysis, in the context of common-interest communities, to place more emphasis on the third and fourth factors – i.e., the purpose of the speech in relation to the property’s use and the general balancing of speech and property rights.

In *Mazdabrook*, a homeowners’ association banned all residential signs, except “For Sale” signs, and directed the plaintiff to remove signs on his property supporting his candidacy for town council. The Court held the ban to be unconstitutional, but again noted that the association could place reasonable time, place and manner restrictions on signage in the development.

Twin Rivers concerned a limit of one sign per window and one sign per yard – as opposed to an outright ban – which was also imposed by a homeowner’s association. The Court held that these restrictions were reasonable and “allowed expressional activities to take place.” The restrictions thus were not unconstitutional.

Dublirer

Dublirer simplifies the analysis developed in *Schmid*, *Coalition* and *Mazdabrook* with respect to restrictions on the speech of members of common-interest communities. In considering such restrictions, *Dublirer* holds that courts should “focus on” the third and fourth factors of the *Schmid/Coalition* test: i.e., (i) “the purpose of the expressional activity . . . in relation to the property’s use” and (ii) “the general balancing of expressional rights and private property rights.”

Dublirer considered a ban on the distribution of any written materials within a cooperative apartment building without the authorization of the co-op’s board of directors. When the plaintiff, who had been a critic of the board, was denied permission to distribute materials supporting his candidacy for a seat on the board, he filed suit contending that the ban violated his free speech rights. In response, the board argued that the ban was a legitimate restriction designed to preserve the residents’ quiet enjoyment of their premises and to minimize “paper pollution.”

The New Jersey Supreme Court held that the plaintiff’s speech was protected, and the ban unconstitutional. The Court reasoned that the speech was compatible with the intended use of the property because it concerned that property’s governance, and the impact of distributing campaign materials would be minimal. Because the speech was political in nature, it enjoyed the highest level of constitutional protection. The Court concluded that that right outweighed the “minor interference” that the residents would experience by the distribution of campaign materials. The Court also noted that the board itself distributed materials supporting the candidacy of its own members and criticizing their opponents. However, the Court stated that the ban was unconstitutional irrespective of the unequal treatment of non-board members.

Reasonable Time, Place And Manner Restrictions on Speech

Each of these cases addressing the conflict between free speech and property rights has validated reasonable time, place and manner restrictions. While not every case has discussed the issue at length, the cases provide some guidance to assessing such restrictions.

Limits On Permissible Modes Of Speech At Regional Shopping Malls

Green Party and *Coalition* provide guidance on reasonable restrictions in the context of regional shopping malls. In evident recognition of their commercial purpose and concerns that political speech in open, public forums could be disruptive or volatile, *Coalition* emphasized that the type of speech it protected was limited to “leafletting and associated free speech: the speech that normally and necessarily accompanies leafletting It does not include bullhorns, megaphones, or even a soapbox; it does not include placards, pickets, parades, and demonstrations.”

The Court also noted that its decision did not protect commercial speech, or “the sale of literature and solicitation of funds on the spot,” which could contradict the interests of the mall owner and tenants. *Coalition* also stated that “in most cases malls can limit the time of leafletting to specific days, and a specific number of days” and that outsiders would not “be entitled to be present any more often than is necessary to convey the message.”

The Green Party Test For Assessing Time, Place and Manner Restrictions At Malls

Green Party held that the following considerations apply to restrictions on speech by outsiders at a regional mall: “the nature of the affected right, the extent to which the mall’s restriction intrudes upon it, and the mall’s need for the restriction.” Further, *Green Party* held that the mall’s need for the restrictions had to be shown by “objective factors.”

Green Party considered a request by the plaintiff to set up an “informational table” to distribute political information and to collect ballot signatures for a gubernatorial nominating petition. The Court invalidated the mall owner’s requirements that the plaintiff (i) obtain \$1,000,000 in general liability insurance naming the owner as an additional insured, (ii) hold the owner harmless from liability arising out of its activities and (iii) could only engage in activities on the mall one day per year without approval. The insurance and hold harmless requirements were invalidated because the mall did not provide evidence that it would be exposed to any significant risk of increased liability based on the plaintiff’s activities. The one-day per year restriction was held to unreasonably limit the plaintiff’s speech rights.

Reasonable Time, Place And Manner Restrictions on Speech in Common-Interest Communities

Dublirer only considered the distribution of campaign materials by one co-op unit owner to other owners. It did not address other potential types of speech. *Dublirer* also did not discuss *Green Party*’s test for assessing time, place and manner restrictions at malls. However, *Dublirer* is, nonetheless, instructive with respect to what restrictions are permissible. For one thing, the board’s unfettered authority to permit distribution of materials was inadequate, as there were no guidelines to govern its exercise of discretion. For the same reason, *Schmid* held that Princeton University’s discretion to permit outsiders to disseminate information on campus was constitutionally insufficient. Thus, both cases indicate that if property owners or governing boards retain discretion to allow or deny speech activities, there must be guidelines in place to govern the exercise of that discretion.

Dublirer also held that restrictions on protected speech in common-interest communities must permit “convenient, feasible and alternative means . . . to engage in substantially the same expressional activity.” *Dublirer* held that a bulletin board in the rear lobby of the co-op’s building and the ability to mail information or to distribute it at board meetings did not afford the ability to engage in “substantially the same” speech as distributing materials door-to-

door. The Court emphasized that such distribution was “the most direct and least expensive way” for the plaintiff “to communicate with fellow co-op members.” Thus, as with its rejection of the mall owner’s insurance requirement in *Green River*, the Court indicated that restrictions could be invalid based on costs they impose on the exercise of protected speech.

In addition, while the Court protected the plaintiff’s right to distribute pamphlets, it stated that the board “could reasonably limit the number of written materials” that could be distributed “in a given period” and “the hours of distribution to prevent early morning or late evening activities.” The Court compared such restrictions to the limit on the number and location of political signs upheld in *Twin Rivers*, and noted that such restrictions would be appropriate to “promote quiet enjoyment” in residential settings.

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