

## DING-DONG DITCHED: CULTURES CLASH AS A TOWN ATTEMPTS TO STOP REAL ESTATE SOLICITATIONS

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### I. INTRODUCTION

In the fall of 2015, James Jackson, a Toms River resident, was working outside his home.<sup>1</sup> A stranger wearing an all-black suit approached Jackson with a proposition.<sup>2</sup> The man wanted to buy Jackson's house even though the house was not on the market.<sup>3</sup> After Jackson refused the offer, the conversation, as Jackson claims, became "darker."<sup>4</sup> The man persisted and mentioned that Jackson's neighbors had already sold their homes to him, and, in turn, he was going to sell them to Orthodox Jewish families.<sup>5</sup> The man prodded Jackson by asking why Jackson would want to live in an Orthodox neighborhood.<sup>6</sup> Jackson described the man's tactics as "mind games."<sup>7</sup>

The encounter described by Jackson in the *New York Post* is not unique to him, as other Toms River residents have experienced similar encounters.<sup>8</sup> The recent increase in unsolicited offers can be traced to the neighboring town of Lakewood, New Jersey, which houses the second largest Orthodox

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<sup>1</sup> Associated Press, *Towns Restrict Door-to-Door Solicitation amid Hasidic Influx*, N.Y. POST (Feb. 23, 2016, 1:07 PM), <http://nypost.com/2016/02/23/towns-restrict-door-to-door-solicitation-amid-hasidic-influx/>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Associated Press, *supra* note 1.

<sup>8</sup> See PAUL J. SHIVES & KENNETH B. FITZSIMMONS, REPORT ON REAL ESTATE CANVASSING ACTIVITIES IN THE TOWNSHIP OF TOMS RIVER 4-9 (Feb. 5, 2016) [hereinafter TOMS RIVER REPORT]; see also David O'Reilly, *Doorbells Ring, Charges Fly at Shore Towns*, INQUIRER DAILY NEWS (May 1, 2016, 11:59 PM), [http://www.philly.com/philly/news/new\\_jersey/20160501\\_Doorbells\\_ring\\_charges\\_fly\\_at\\_Shore\\_towns.html](http://www.philly.com/philly/news/new_jersey/20160501_Doorbells_ring_charges_fly_at_Shore_towns.html).

Jewish population in the United States.<sup>9</sup> The Orthodox population is looking towards expanding in Toms River because Lakewood is running out of space, prices are increasing, and the Orthodox population continues to grow.<sup>10</sup>

As more and more residents were subjected to real estate solicitations, angst in Toms River grew to a boiling point.<sup>11</sup> On February 23, 2016, the Toms River Township Council yielded to residents' complaints and banned real estate solicitation in the most affected areas, those that border Lakewood.<sup>12</sup> The town argues it is protecting residents' privacy and protecting its neighborhoods from attempted blockbusting.<sup>13</sup> The Orthodox population argues Toms River is resisting change and trying to keep the Orthodox population out.<sup>14</sup>

This Comment will analyze the cease and desist ordinance and address the legal challenges that may be brought against it. Part II will explore Lakewood's history and the growth of the Orthodox population. Part III will examine why Toms River residents fear a changing neighborhood. Part IV will provide an overview of the Toms River ordinance. Part V will discuss blockbusting and the township's ability to combat the practice. Part VI will analyze potential First Amendment challenges to the ordinance and their likelihood of success. Part VII concludes.

## II. LAKEWOOD AND THE GROWTH OF THE ORTHODOX JEWISH POPULATION

Originally called "Bricksburg," Lakewood, New Jersey, was first settled in the early 1800s on a plot of land that was no more than dense forest.<sup>15</sup> The settlement grew, and Lakewood was incorporated in 1893.<sup>16</sup>

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<sup>9</sup> O'Reilly, *supra* note 8.

<sup>10</sup> *Id.*; Associated Press, *supra* note 1; Shannon Mullen, *Is Lakewood Growth Slowing Down?*, ASBURY PARK PRESS (Apr. 18, 2016, 10:02 AM), <http://www.app.com/story/news/local/communitychange/2016/04/14/lakewood-growth-slowing-down/82713230/>.

<sup>11</sup> Alex Napoliello, *Toms River Bans Real Estate Solicitation amid Orthodox Jewish Boom*, NJ.COM (Feb. 25, 2016, 2:21 PM), [http://www.nj.com/monmouth/index.ssf/2016/02/toms\\_river\\_bans\\_real\\_estate\\_solicitation\\_in\\_2\\_area.html](http://www.nj.com/monmouth/index.ssf/2016/02/toms_river_bans_real_estate_solicitation_in_2_area.html).

<sup>12</sup> TOMS RIVER, N.J., MUN. CODE § 391-55(D) (2016), <https://ecode360.com/30747352>. See Napoliello, *supra* note 11.

<sup>13</sup> TOMS RIVER REPORT, *supra* note 8, at 16.

<sup>14</sup> See Shannon Mullen & Jean Mickle, *Culture Shock Over Orthodox Expansion: Surging Home Sales in Toms River and Jackson Are a Windfall for Some, a Source of Anxiety for Others*, ASBURY PARK PRESS (Mar. 16, 2016), <http://www.app.com/story/news/local/communitychange/2016/03/18/orthodox-home-sales-jackson-toms-river/81091688/>; see also Napoliello, *supra* note 11.

<sup>15</sup> Charles Mandell, *History of Lakewood*, <http://www.lakewoodnj.gov/history.php> (last visited Nov. 1, 2017).

<sup>16</sup> *Id.*

Lakewood became a resort town and retreat for millionaires and other influential people, such as the Vanderbilts, Rockefellers, Runyard Kipling, Supreme Court Justice Oliver Wendell Holmes, and President Grover Cleveland.<sup>17</sup>

The biggest turning point in Lakewood's history came in 1943 when Rabbi Aaron Kotler opened a yeshiva, Beth Medrash Govoha.<sup>18</sup> A yeshiva is a Jewish school for religious instruction.<sup>19</sup> At its opening, the yeshiva accommodated thirteen students.<sup>20</sup> Now, Beth Medrash Govoha educates more than 6,500 students and is one of the largest yeshivas in the world.<sup>21</sup> As Beth Medrash Govoha grew, so did Lakewood's Orthodox Jewish population.<sup>22</sup> According to the 1990 United States Census, Lakewood had a population of 45,000 residents.<sup>23</sup> In 2000, its population grew to 60,000 residents.<sup>24</sup> In 2010, Lakewood's population grew to approximately 93,000 residents, a fifty-four percent increase in population.<sup>25</sup> This 32,000 increase in residents, between 2000 and 2010, earned Lakewood the distinction of being the fastest growing township in New Jersey.<sup>26</sup> Since 2010, Lakewood's exponential growth has persisted. Presently, township officials estimate the town population to be approximately 120,000.<sup>27</sup> Thus, in six years, Lakewood's population has increased by 27,000 residents, or by thirty percent.<sup>28</sup> With 4,000 births per year,<sup>29</sup> Lakewood's population is expected

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Yeshiva Definition*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/yeshiva> (last visited Nov. 4, 2016).

<sup>20</sup> Jeanette Rundquist, *Lakewood, N.J.'s Fastest-Growing Town, Is Defined by its Diversity*, STAR-LEDGER (Feb. 6, 2011, 12:00 PM), [http://www.nj.com/news/index.ssf/2011/02/lakewood\\_is\\_njs\\_fastest-growin.html](http://www.nj.com/news/index.ssf/2011/02/lakewood_is_njs_fastest-growin.html).

<sup>21</sup> Shannon Mullen, *Boom Town: Growth and Conflict in Lakewood*, ASBURY PARK PRESS (Aug. 7, 2015), <http://www.app.com/story/news/local/jackson-lakewood/2015/08/08/lakewood-growth-boom-changing-ocean-county/31318143/>; Mark Oppenheimer, *The Beggars of Lakewood*, N.Y. TIMES MAG., Oct. 19, 2014, at MM40, <https://www.nytimes.com/2014/10/19/magazine/the-beggars-of-lakewood.html>.

<sup>22</sup> Rundquist, *supra* note 20.

<sup>23</sup> U.S. Census Bureau, *New Jersey Resident Population by Municipality: 1930–1990* (1990), <http://lwd.dol.state.nj.us/labor/lpa/census/1990/poptrd6.htm>.

<sup>24</sup> U.S. Census Bureau, *Urban and Rural Population: New Jersey, Counties and Municipalities Census 2000* (2000), [http://lwd.dol.state.nj.us/labor/lpa/census/2kcensus/sf1/ur\\_pop.pdf](http://lwd.dol.state.nj.us/labor/lpa/census/2kcensus/sf1/ur_pop.pdf).

<sup>25</sup> U.S. Census Bureau, *Total Population: 2000–2010 New Jersey Municipalities* (2010), <http://lwd.dol.state.nj.us/labor/lpa/census/2010/2010data/totPop.pdf> [hereinafter *2010 Census*].

<sup>26</sup> *Id.*

<sup>27</sup> Associated Press, *supra* note 1.

<sup>28</sup> *See id.*; *see also* O'Reilly, *supra* note 8.

<sup>29</sup> *See* Mullen, *supra* note 21.

to continue to grow and double to 220,000 residents by the year 2030.<sup>30</sup> For reference, New Jersey's two biggest municipalities, Newark and Jersey City, have populations of 277,000 and 247,000, respectively.<sup>31</sup>

Orthodox Jews constitute about sixty percent of Lakewood's current population, which ranks as the second highest Orthodox Jewish population in the country behind Brooklyn, New York.<sup>32</sup> Much of Lakewood's growth is attributed to Brooklyn Orthodox Jews relocating for a quieter, more affordable area with a strong traditional Jewish community already in place.<sup>33</sup> The twenty-five-square-mile township boasts more than eighty synagogues and one hundred religious schools and yeshivas.<sup>34</sup> Through the first quarter of 2016, the Lakewood Planning Board approved four synagogues and three schools, in addition to thirty-eight residential units.<sup>35</sup>

Where there is a finite amount of space, an increase in population creates a decrease in available space. With the continued influx of Orthodox Jews and the growth of families, Lakewood is running out of space to accommodate its new residents.<sup>36</sup> Furthermore, the Lakewood real estate demand continues to rise, in part, because Orthodox Jews do not drive on the Sabbath; therefore, housing near Lakewood's synagogues is priced at a premium.<sup>37</sup> Consequently, Orthodox Jews wanting to live in the area have turned their sights to towns neighboring Lakewood, such as Toms River.<sup>38</sup>

As Orthodox Jews have turned their gaze outside of Lakewood, towns neighboring Lakewood have ratcheted up their zoning laws to make it harder for yeshivas and synagogues to be opened.<sup>39</sup> Yeshivas and synagogues are linchpins to an Orthodox Jewish community because Orthodox Jews cannot drive on Sabbath; therefore, they must live close enough to walk to their yeshivas and synagogues.<sup>40</sup> Thus, stunting yeshiva and synagogue development makes it less likely that Orthodox Jews will move to a particular area.<sup>41</sup>

The Toms River Township Council and its governing bodies have taken

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<sup>30</sup> Mullen, *supra* note 10.

<sup>31</sup> 2010 Census, *supra* note 25.

<sup>32</sup> O'Reilly, *supra* note 8.

<sup>33</sup> See Mullen & Mickle, *supra* note 14; see also Mullen, *supra* note 21.

<sup>34</sup> See Mullen, *supra* note 21; see also O'Reilly, *supra* note 8; Mark Di Ionno, *Lakewood Busing Issues Expose Private School Rides on Public Dollars*, STAR LEDGER (May 14, 2017), [http://www.nj.com/news/index.ssf/2017/05/lakewood\\_busing\\_issues\\_expose\\_private\\_school\\_rides.html](http://www.nj.com/news/index.ssf/2017/05/lakewood_busing_issues_expose_private_school_rides.html).

<sup>35</sup> Mullen, *supra* note 10.

<sup>36</sup> See *id.*

<sup>37</sup> See O'Reilly, *supra* note 8.

<sup>38</sup> Napoliello, *supra* note 11.

<sup>39</sup> Mullen & Mickle, *supra* note 14.

<sup>40</sup> *Id.*

<sup>41</sup> See *id.*

similar actions that have fueled speculation that the town is trying to keep the Orthodox Jewish community at bay.<sup>42</sup> For example, in 2014, a Lakewood developer purchased empty acreage near the Lakewood border planning to build a temple.<sup>43</sup> At the time of the project's proposal, the property's zoning allowed for churches and synagogues to be built.<sup>44</sup> The Toms River Zoning Board, however, subsequently rezoned the property for residential use, and the town purchased the property from the developer.<sup>45</sup>

Additionally, in April 2016, the Toms River Township Council approved an ordinance allocating money to purchase fifty-six acres of land in the North Dover section of Toms River.<sup>46</sup> While billed as the protection of undeveloped land, others speculate that Toms River is attempting to purchase the land, which falls within the area where the town banned real estate solicitation, to remove the possibility of Orthodox Jewish developers acquiring the land.<sup>47</sup> A Lakewood developer had previously proposed to build townhomes and retail space on the property.<sup>48</sup>

Finally, in September 2016, the Toms River Township Council approved the purchase of an eight-acre horse farm for \$900,000.<sup>49</sup> Again, the land is located in the North Dover area and falls within a cease and desist zone.<sup>50</sup> The Township Council commented on the importance of preserving land in North Dover because of its rapid development.<sup>51</sup> Further, in October 2016, the Toms River Planning Board rejected the subdivision of a three-acre North Dover property into three lots, which would allow two additional homes to be built on the property.<sup>52</sup> The property fell within one of the cease and desist zones.<sup>53</sup> The board reasoned the subdivision would have a

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<sup>42</sup> Jean Mikle, *Toms River Planners Reject Small Subdivision*, ASBURY PARK PRESS (Oct. 6, 2016, 4:53 P.M.), <http://www.app.com/story/news/local/redevelopment/2016/10/06/toms-river-planners-reject-small-subdivision/91619010/>; see Jean Mikle, *Is \$10M Land Buy a Plan to Stop Lakewood?*, ASBURY PARK PRESS (Apr. 15, 2016, 7:58 AM), <http://www.app.com/story/news/local/redevelopment/2016/04/12/toms-river-spend-103-million-north-dover-land/82946422/>; see also Jean Mikle, *Toms River Approves Horse Farm Purchase*, ASBURY PARK PRESS (Oct. 12, 2016 4:43 AM), <http://www.app.com/story/news/local/redevelopment/2016/10/12/toms-river-approves-horse-farm-purchase/91924484/>.

<sup>43</sup> See Mullen & Mikle, *supra* note 14; see also Mikle, *Is \$10M Land Buy a Plan to Stop Lakewood?*, *supra* note 42.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Mikle, *Is \$10M Land Buy a Plan to Stop Lakewood?*, *supra* note 42.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Mikle, *Toms River Approves Horse Farm Purchase*, *supra* note 42.

<sup>50</sup> TOMS RIVER REPORT, *supra* note 8, at Appendix A; Google Maps, [maps.google.com](https://maps.google.com) (search "1270 Cox Cro Road, Toms River, NJ 08755").

<sup>51</sup> *Id.*

<sup>52</sup> Mikle, *Toms River Planners Reject Small Subdivision*, *supra* note 42.

<sup>53</sup> *Id.*

negative impact on the area.<sup>54</sup>

These past actions will shape how Orthodox Jews view the current Toms River ordinance, as some in the Orthodox community question the true purpose of the ordinance.<sup>55</sup> There is a feeling that real estate agents are being used as scapegoats in another attempt to keep the Orthodox Jewish community at bay.<sup>56</sup> Still, Toms River residents claim to be subjected to intense and intimidating solicitations regarding the sale of their homes.<sup>57</sup> Moreover, the residents' public outcry likely is not simply attributable to annoyance or inconvenience; it is probably also rooted in fear.<sup>58</sup> Naturally, this requires an exploration into why Toms River residents would fear the presence of an incoming Orthodox Jewish neighbor.

### III. THE RESIDENTS' PERSPECTIVE

In North Dover, front lawns are littered with signs that say "Don't Sell! Toms River Strong."<sup>59</sup> North Dover is at the center of the current controversy because it is the Toms River neighborhood bordering Lakewood.<sup>60</sup> Real estate brokers representing Orthodox Jewish clients have been soliciting North Dover homeowners to purchase their homes.<sup>61</sup> Generally, the homes solicited were not on the market for sale.<sup>62</sup> While some homeowners have happily agreed, or at least acquiesced, to the sale of their homes, others have complained about the tactics used by some of the real estate brokers.<sup>63</sup> Specifically, North Dover homeowners have accused the brokers of intense and intimidating direct solicitations.<sup>64</sup> Agents have gone as far as telling homeowners their plan to turn the homeowners' neighborhood into an Orthodox neighborhood.<sup>65</sup>

"Orthodox neighborhood" describes the dynamic of the neighborhood. Orthodox communities are especially tight-knit where community members take care of one another; however, secular neighbors usually are not included

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<sup>54</sup> *Id.*

<sup>55</sup> Napoliello, *supra* note 11.

<sup>56</sup> *Id.* See Mullen & Mikle, *supra* note 14; see also Mullen, *supra* note 21.

<sup>57</sup> TOMS RIVER REPORT, *supra* note 8, at 2.

<sup>58</sup> See Mullen & Mikle, *supra* note 14.

<sup>59</sup> See Napoliello, *supra* note 11.

<sup>60</sup> See TOMS RIVER REPORT, *supra* note 8, at 1.

<sup>61</sup> Napoliello, *supra* note 11; see TOMS RIVER REPORT, *supra* note 8, at 1; see also Associated Press, *supra* note 1.

<sup>62</sup> Napoliello, *supra* note 11; see TOMS RIVER REPORT, *supra* note 8, at 1; see also Associated Press, *supra* note 1.

<sup>63</sup> TOMS RIVER REPORT, *supra* note 8, at 1.

<sup>64</sup> *Id.*

<sup>65</sup> See *id.* at 12.

in this sense of community.<sup>66</sup> This is because, like the Amish, Orthodox Jewish communities are traditionally isolationist or separatist.<sup>67</sup> Generally, Orthodox Jews “attempt to create a bubble around their community.”<sup>68</sup> This makes it critical for Orthodox Jews to live close to one another.<sup>69</sup>

While signs that say “Don’t Sell! Toms River Strong” can be interpreted as an indignant command,<sup>70</sup> the more nuanced interpretation sees the signs as a plea rather than a command—“Please, don’t sell because I am not ready to sell.” To Toms River residents, when the first Orthodox Jewish person purchases a home in the neighborhood, it signals that more Orthodox families will populate the neighborhood and the dynamic of their neighborhood, demographically and socially, is facing inevitable change.<sup>71</sup> While non-Orthodox residents may live within an Orthodox neighborhood, dramatic cultural differences, such as insularity, make it less attractive for current non-Orthodox homeowners to remain, or prospective non-Orthodox buyers to purchase homes in the neighborhood.<sup>72</sup> Consequently, in the remaining homeowners’ minds, it is better to sell early because Orthodox Jews are willing to pay more to penetrate the neighborhood real estate market; thus, with the only willing buyers being Orthodox Jews, homeowners who remain may be at the mercy of whatever the Orthodox Jews are willing to pay—whether it be above, equal to, or below market value.<sup>73</sup> But there is no certainty that future home values will even be affected—whether it be positively or negatively. Therefore, the discussion must be broadened beyond home values.

Toms River residents are hesitant of their new neighbors because Toms River residents have witnessed first-hand the issues faced by the growing neighboring town of Lakewood. With most Toms River residents utilizing

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<sup>66</sup> *This American Life: A Not-So-Simple Majority*, CHI. PUBLIC RADIO (Sept. 12, 2014) (downloaded using iTunes) [hereinafter *This American Life*]; Mark Oppenheimer, *Beggarville*, N.Y. TIMES MAG., (Oct. 16, 2014), [https://www.nytimes.com/2014/10/19/magazine/the-beggars-of-lakewood.html?\\_r=0](https://www.nytimes.com/2014/10/19/magazine/the-beggars-of-lakewood.html?_r=0); Benjamin Wallace-Wells, *Them and Them*, N.Y. MAG., (Apr. 21, 2013), <http://nymag.com/news/features/east-ramapo-hasidim-2013-4/>; see Mullen & Mikle, *supra* note 14.

<sup>67</sup> See AARON J. HAHN TAPPER, *JUDAISMS: A TWENTY-FIRST CENTURY INTRODUCTION TO JEWS AND JEWISH IDENTITIES* 117 (Univ. of Cal. Press 2016); see also *This American Life: A Not-So-Simple Majority*, CHI. PUBLIC RADIO (Sept. 12, 2014) (downloaded using iTunes).

<sup>68</sup> HAHN TAPPER, *supra* note 67, at 117.

<sup>69</sup> See *id.*

<sup>70</sup> As a command, the sign may be interpreted as “Hey! Don’t sell your home because I don’t want to live next to an Orthodox Jew!” This opens the door for criticism that Toms River residents simply do not want to live in a neighborhood with Orthodox Jews for anti-Semitic reasons. Obviously, if the command is based on anti-Semitism, then it cannot be tolerated.

<sup>71</sup> See Mullen, *supra* note 21; see also Mullen & Mikle, *supra* note 14.

<sup>72</sup> See Mullen & Mikle, *supra* note 14.

<sup>73</sup> See *id.*

public schools to educate their kids, particularly disconcerting to Toms River residents is the decline of Lakewood's public school system. In the minds of those in the non-Orthodox community, the decline is attributed to the growth of the Orthodox Jewish population and a shrinking tax base due to the increase of tax-exempt properties.

First, property taxes are a point of contention. There is a widely-held belief among Toms River residents, and non-Orthodox Lakewood residents, that the Orthodox Jewish community fails to pay its fair share of property taxes because its synagogues, yeshivas, and other religious properties operate as tax-exempt properties.<sup>74</sup> In 2015, the Lakewood Township Tax Assessor debunked the rumor that the Orthodox Jewish community was responsible for "thousands" of tax exempt properties in Lakewood; instead, the number of tax exempt properties attributable to the Orthodox Jewish community was in the hundreds, approximately 350 properties in total.<sup>75</sup>

But approximately eight percent of Lakewood's total assessed value is tax-exempt properties owned by private schools, charities, and religious institutions.<sup>76</sup> Lakewood has the highest percentage in Ocean County.<sup>77</sup> In total, these tax-exempt institutions account for \$597 million in assessed value, and \$5.1 million local tax revenue lost.<sup>78</sup> Furthermore, the amount of these tax-exempt institutions has increased over time, having grown from only five percent in 2009.<sup>79</sup> In comparison, only one and one-half percent of Toms River properties are tax-exempt private schools, charities, and religious institutions.<sup>80</sup> Therefore, it is likely Toms River residents are concerned that an increase in the Toms River Orthodox Jewish population will increase the number of tax-exempt properties, thereby increasing the tax burden on current residents.

Property taxes are closely linked to public schools because property taxes are what fund public schools.<sup>81</sup> The Toms River School District is comprised of eighteen total schools: twelve elementary schools, three

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<sup>74</sup> See Shannon Mullen, *Lakewood: 350 Orthodox Properties Tax-Exempt*, ASBURY PARK PRESS (Oct. 9, 2015), <http://www.app.com/story/news/local/jackson-lakewood/lakewood/2015/10/09/tax-exempt-orthodox-property/73641878/>.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* In Lakewood, these tax-free properties include: 181 private schools, 77 synagogues, 23 churches, 18 dormitories, 52 rabbi residences, and 14 properties that are both rabbi residences and synagogues. *Id.*

<sup>77</sup> *Id.* Further, Lakewood's percentage of total tax-exempt properties, which include public schools and government-owned property, is seventeen percent—the highest in the county. *Id.*

<sup>78</sup> Mullen, *supra* note 74.

<sup>79</sup> *Id.*

<sup>80</sup> Mullen, *supra* note 74.

<sup>81</sup> *This American Life*, *supra* note 66.



intermediate schools, and three high schools.<sup>82</sup> In terms of enrollment, Toms River educates 15,934 students<sup>83</sup> and is one of the largest school districts in New Jersey.<sup>84</sup> A majority of Toms River residents rely on the public school system to educate their children.<sup>85</sup> Adding another layer to the issue, the school district has previously betrayed the trust of Toms River residents as it was embroiled in one of the biggest New Jersey corruption cases in recent history.<sup>86</sup> Therefore, Toms River residents are extremely cognizant of the public school situation in Lakewood, thus, creating a fear among residents that an increased Orthodox population in Toms River will diminish the quality and quantity of public schools on which they rely.

In Lakewood, roughly 30,000 students attend private schools, which are tuition-based yeshivas.<sup>87</sup> Comparatively, only about 5,900 students attend public school, most of which are minorities coming from low-income families.<sup>88</sup> As is representative of the population, Orthodox Jews make up a

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<sup>82</sup> TOMS RIVER REGIONAL SCHOOL DISTRICT, DEMOGRAPHIC STUDY FOR THE TOMS RIVER REGIONAL SCHOOL DISTRICT 4, 16 (2016), [http://www.trschools.com/docs/20162209\\_083511\\_8.pdf](http://www.trschools.com/docs/20162209_083511_8.pdf).

<sup>83</sup> New Jersey Department of Education, *2016–2017 Enrollment District Reported Data*, <http://www.state.nj.us/cgi-bin/education/data/enr11plus.pl>

<sup>84</sup> *See id.* *See* New Jersey Department of Education, *2016–2017 Enrollment District Reported Data*, <http://www.state.nj.us/education/data/enr/enr17/county.htm>. Toms River is the fifth largest school district based on student population. *Id.* Only Newark, Jersey City, Paterson and Elizabeth have larger student populations. *Id.*

<sup>85</sup> *See* U.S. CENSUS BUREAU, CENSUS 2010, PROFILE OF GENERAL POPULATION AND HOUSING CHARACTERISTICS (2010), [http://www.planning.co.ocean.nj.us/census/2010/MCD\\_profiles/2010\\_DP-1\\_Toms\\_river.pdf](http://www.planning.co.ocean.nj.us/census/2010/MCD_profiles/2010_DP-1_Toms_river.pdf). In 2010, there were approximately 20,000 residents that were nineteen years old or younger. *Id.* In 2017, 15,934 students attended public schools. NEW JERSEY DEPARTMENT OF EDUCATION, *supra* note 83. By comparing this data, an inference can be made that Toms River residents rely heavily on public schools to educate their children as opposed to private schools.

<sup>86</sup> Matt Friedman, *Former Toms River Superintendent Is Sentenced to 11 Years for Bribery, Tax Evasion*, NJ.COM (Sept. 15, 2012 2:11, PM), [http://www.nj.com/ocean/index.ssf/2012/09/former\\_toms\\_river\\_superintendent\\_is\\_sentenced\\_to\\_11\\_years\\_for\\_bribery\\_tax\\_evasion.html](http://www.nj.com/ocean/index.ssf/2012/09/former_toms_river_superintendent_is_sentenced_to_11_years_for_bribery_tax_evasion.html). In 2010, Toms River Regional School District Superintendent, Michael Ritacco, was arrested for taking between \$1 to \$2 million in bribes and kickbacks for setting up inflated insurance contracts, which resulted in the district paying \$500,000 to \$600,000 annually in excess fees. Press Release, Federal Bureau of Investigation, Former Superintendent of Toms River Regional School District Pleads Guilty to Corruption and Tax Fraud Charges (Apr. 5, 2012), <https://archives.fbi.gov/archives/newark/press-releases/2012/former-superintendent-of-toms-river-regional-school-district-pleads-guilty-to-corruption-and-tax-fraud-charges>. Ritacco pleaded guilty to charges of mail fraud and conspiracy to defraud the IRS. *Id.* In September 2012, Ritacco was sentenced to eleven years and three months in prison. Friedman, *supra* note 86.

<sup>87</sup> Di Ionno, *supra* note 34.

<sup>88</sup> NEW JERSEY DEPARTMENT OF EDUCATION, LAKEWOOD SCHOOL DISTRICT ENROLLMENT DATA (2017), <http://www.state.nj.us/education/> (select “Data”; then “Enrollment”; then “2016-2017”; then “District”; scroll down and select “Ocean”; and finally select “Lakewood Township”). Further illustrating the financial situation of public school families, 4,087.5 of 5,853.5 public school students qualify for the Free Lunch program. *Id.*

majority of Lakewood's Board of Education.<sup>89</sup> This creates an interesting dynamic because Orthodox Jewish children do not attend Lakewood's public schools.<sup>90</sup> Such a dynamic creates tension between public school families and Orthodox Jews sitting on the Board. With a multi-million dollar Lakewood School District budget deficit,<sup>91</sup> tensions run high between public school parents and the Lakewood Board of Education because budget cuts have left the public schools under-resourced and overcrowded.<sup>92</sup>

Recently, student busing has caused frustration because transportation costs have largely been responsible for the budget deficit.<sup>93</sup> In New Jersey, there are two types of busing: mandatory and courtesy.<sup>94</sup> The State requires mandatory busing for students living more than two miles away from their school, whether the school is public or private.<sup>95</sup> Thus, by law, Lakewood School District is required to bus about 21,000 of the 30,000 private school students because these students live more than two miles from their schools.<sup>96</sup>

Courtesy busing may be provided by the district to students living less than two miles from their school, public or private; however, the school district is solely responsible for footing the bill of courtesy busing.<sup>97</sup> While about 7,000 private school students use courtesy busing,<sup>98</sup> about 3,000 of the

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This equates to 69.8% of students attending Lakewood public schools.

<sup>89</sup> See Mullen, *supra* note 21; see also Meir Rinde, *Is Lakewood on the Verge of a Meltdown?*, NJSPLIGHT (June 21, 2016), <http://www.njspolight.com/stories/16/06/20/is-lakewood-on-the-verge-of-a-meltdown/>.

<sup>90</sup> See Di Ionno, *supra* note 34.

<sup>91</sup> Rob Spahr, *Christie Signs Bill to Fund Busing for Lakewood's Private Schools*, NJ.COM (Aug. 9, 2016, 2:35 PM), [http://www.nj.com/ocean/index.ssf/2016/08/christie\\_signs\\_bill\\_to\\_publicly\\_fund\\_busing\\_for\\_la.html](http://www.nj.com/ocean/index.ssf/2016/08/christie_signs_bill_to_publicly_fund_busing_for_la.html).

<sup>92</sup> Rob Spahr, *NJ School District in Crisis: 5 Things to Know*, NJ.COM (Feb. 12, 2016 6:58 PM), [http://www.nj.com/ocean/index.ssf/2016/02/nj\\_school\\_district\\_in\\_crisis\\_5\\_things\\_to\\_know.html](http://www.nj.com/ocean/index.ssf/2016/02/nj_school_district_in_crisis_5_things_to_know.html). See Rinde, *supra* note 89. In 2014, the New Jersey Department of Education appointed a fiscal monitor to oversee the Lakewood School District's finances and fix its budget. Nicholas Huba, *State Sends Fiscal Monitor to Lakewood*, ASBURY PARK PRESS (Apr. 26, 2014), <http://www.app.com/story/news/investigations/watchdog/taxes/2014/04/25/state-send-fiscal-monitor-to-lakewood-school-district/8162327/>.

<sup>93</sup> Spahr, *supra* note 91.

<sup>94</sup> N.J. ADMIN. CODE §§ 6A:27-1.4(a), 1.5(a) (2017).

<sup>95</sup> § 6A:27-1.4(a)(1). For high school students, the distance is increased to two and one-half miles. *Id.*

<sup>96</sup> Payton Guion, *Lakewood Busing: Oversight Committee Knows Little About Consortium*, ASBURY PARK PRESS (Jan. 18, 2017, 11:53 AM), <http://www.app.com/story/news/local/communitychange/2017/01/17/lakewood-busing-oversight-committee-knows-little-consortium/96241244/>.

<sup>97</sup> § 6A:27-1.5(a).

<sup>98</sup> Shannon Mullen, *NJ Senate Oks Aid for Lakewood Private School Busing*, ASBURY PARK PRESS (June 24, 2016, 3:41 PM), <http://www.app.com/story/news/education/2016/06/23/senate-busing-singer-lakewood-schools/86308310/>.

nearly 6,000 public school students rely on courtesy busing to get to school.<sup>99</sup> In total, Lakewood's transportation costs for both mandatory and courtesy busing reached \$23.9 million for the 2015–2016 school year.<sup>100</sup>

In early 2016, confronting a twelve-million-dollar budget deficit for the 2016–2017 school year, the Lakewood Board of Education was set to eliminate seventeen staff positions, including ten teaching positions, some middle-school activities, and courtesy busing.<sup>101</sup> Such cuts have increased tensions between public school families and the Board as public school families felt disproportionately affected.<sup>102</sup>

For instance, the proposed elimination of courtesy busing would have affected public school students far more than private school students. While a greater number of private school students (7,000) rely on courtesy busing, only about one-fourth, or twenty-five percent, of private school children would have been affected.<sup>103</sup> Further, it has been argued that because of the tight-knit nature of the Orthodox community, the private school parents were better equipped to deal with the elimination of courtesy busing through community coordinated car pools.<sup>104</sup>

Alternatively, while the overall number of public school students (3,000) affected by cuts to courtesy busing is less than private school students, the proportional number of public school students is far greater than private school students because roughly one-half, or fifty percent, of public school students rely on courtesy busing to get to school.<sup>105</sup> The non-Orthodox community, made up of mostly African American and Latino families, lack the support system seen in the Orthodox community.<sup>106</sup> Therefore, with the elimination of courtesy busing, many public school students are without an alternative means to get to school because their

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<sup>99</sup> *Id.*

<sup>100</sup> Spahr, *supra* note 91.

<sup>101</sup> Shannon Mullen, *Lakewood Monitor Imposes Teacher, Busing Cuts*, ASBURY PARK PRESS (May 12, 2016, 5:58 PM), <http://www.app.com/story/news/education/in-our-schools/2016/05/12/lakewood-monitor-imposes-teacher-busing-cuts/84282406/>.

<sup>102</sup> Shannon Mullen, *Lakewood Budget Plan Cuts 68 Teachers, Courtesy Busing*, ASBURY PARK PRESS (Mar. 22, 2016, 11:43 AM), <http://www.app.com/story/news/education/2016/03/21/lakewood-budget-cuts-teachers-busing/82090816/>; Shannon Mullen, *Lakewood School Board Votes to Save Courtesy Busing, Override Still Possible*, ASBURY PARK PRESS (Feb. 18, 2016, 12:54 PM), <http://www.app.com/story/news/local/communitychange/2016/02/17/lakewood-courtesy-busing-township-surplus/80449846/>; Spahr, *supra* note 92; see Mullen, *supra* note 101; see also Rinde, *supra* note 89.

<sup>103</sup> Rinde, *supra* note 89; see Shannon Mullen, *New Lakewood Bus Program is \$1M Short*, ASBURY PARK PRESS (Sept. 2, 2016, 8:05 PM), <http://www.app.com/story/news/education/in-our-schools/2016/09/01/lakewood-busing-private-consortium/89654944/>; see also Spahr, *supra* note 92.

<sup>104</sup> Rinde, *supra* note 89.

<sup>105</sup> See Spahr, *supra* note 91.

<sup>106</sup> See Mullen, *supra* note 21; see also Rinde, *supra* note 89.

parents do not know how to drive, or their parents cannot afford to own a car.<sup>107</sup> This is just one example of why tensions have grown between public school parents and the Orthodox community.

Lakewood school officials argue the blame belongs to the State because the funding formula accounts only for public school students, but disregards private school students, leading to the State underfunding of the school district.<sup>108</sup> In August 2016, New Jersey enacted legislation to help rectify the busing situation.<sup>109</sup>

While Orthodox Jewish residents lack the clout in Toms River to affect the school budget, the current situation in Lakewood cannot be comforting to Toms River residents, especially since the situation in Lakewood is not an anomaly. In East Ramapo, New York, the public-school parents have accused the mostly Orthodox-led board of cutting public school budgets, negatively impacting their children, and favoring private religious schools.<sup>110</sup> The East Ramapo School District has gone as far as closing two public schools, which, in turn, were sold to private Orthodox yeshivas.<sup>111</sup>

Again, the issues facing Lakewood and East Ramapo are not likely to affect Toms River in the immediate future. Toms River residents, however, are beginning to experience the effects an increased Orthodox Jewish population has on the school district, such as increased private busing costs.<sup>112</sup> Further, with property values generally tied to public schools,<sup>113</sup> it stands to reason that an increase of the Toms River Orthodox Jewish population is nerve-racking to Toms River homeowners.

Beside annoyance, the fears described above drive the public outcry

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<sup>107</sup> See Rinde, *supra* note 89.

<sup>108</sup> Spahr, *supra* note 92.

<sup>109</sup> *Id.* The State will provide the Lakewood School District \$7.2 million over three years, or \$2.4 million a year, for the purposes of transporting students to private schools. Spahr, *supra* note 91. The Lakewood Busing consortium was formed for the 2016–2017 school year and will be responsible for busing private school students at a cost of \$16 million per year—\$2.4 million funded by the state, and the remaining \$14.4 million funded by local taxpayers. Payton Guion, *Lakewood Busing: Oversight Committee Knows Little About Consortium*, ASBURY PARK PRESS (Jan. 18, 2017, 11:53 AM), <http://www.app.com/story/news/local/communitychange/2017/01/17/lakewood-busing-oversight-committee-knows-little-consortium/96241244/>.

<sup>110</sup> *This American Life*, *supra* note 66.

<sup>111</sup> *Id.*

<sup>112</sup> Mike Davis, *The Next Lakewood? Jackson, Other Districts Face Booming Private Bus Costs*, ASBURY PARK PRESS (Apr. 28, 2017, 7:07 AM), <http://www.app.com/story/news/investigations/watchdog/education/2017/04/27/nj-aid-in-lieu-of-school-transportation-nonpublic-lakewood/100616474/>.

<sup>113</sup> Michele Lerner, *School Quality Has a Mighty Influence on Neighborhood Choice, Home Values*, WASH. POST (Sept. 3, 2015), [https://www.washingtonpost.com/realestate/school-quality-has-a-mighty-influence-on-neighborhood-choice-home-values/2015/09/03/826c289a-46ad-11e5-8ab4-c73967a143d3\\_story.html?utm\\_term=.6ab1530a7ded](https://www.washingtonpost.com/realestate/school-quality-has-a-mighty-influence-on-neighborhood-choice-home-values/2015/09/03/826c289a-46ad-11e5-8ab4-c73967a143d3_story.html?utm_term=.6ab1530a7ded).

when confronting the intense real estate solicitations Toms River residents have experienced. After receiving a substantial amount of complaints, Toms River took action and passed an ordinance addressing real estate solicitation, specifically targeting the North Dover area.<sup>114</sup>

#### IV. THE TOMS RIVER ORDINANCE

In 2004, Toms River passed its original “no-knock” ordinance that banned door-to-door canvassing and solicitation.<sup>115</sup> Toms River passed this ordinance in the interest of public safety after the murder of a Toms River resident by a solicitor from out of town.<sup>116</sup> The ordinance created a registry in which residents could enroll if they did not want to be subjected to door-to-door solicitations.<sup>117</sup> Additionally, solicitors were required to obtain a license from the Toms River Clerk’s office.<sup>118</sup> Solicitors who violated this ordinance by soliciting residents on the registry were subject to fines, up to \$1,250,<sup>119</sup> and penalties, such as revocation of their solicitor’s license and/or ineligibility to apply for a new license.<sup>120</sup> Interestingly, the original “no-knock” ordinance did not specifically mention real estate solicitations.<sup>121</sup>

The second iteration of the “no-knock” ordinance was passed in 2015.<sup>122</sup> After many residents complained of real estate brokers soliciting door-to-door, using “intrusive, intimidating, and questionable tactics,”<sup>123</sup> Toms River adopted an ordinance to specifically outlaw real estate solicitations.<sup>124</sup> The ordinance achieved three results. First, the ordinance made real estate solicitation subject to Toms River’s general soliciting ordinances, requiring real estate solicitors to obtain solicitation permits.<sup>125</sup> Second, the ordinance explicitly prohibited blockbusting.<sup>126</sup> Third, the ordinance expanded the “no-knock” registry to apply to real estate

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<sup>114</sup> TOMS RIVER, N.J., CODE OF THE TWP. OF TOMS RIVER § 391-55(A)–(D) (2017); *see* Napoliello, *supra* note 11.

<sup>115</sup> *See id.* § 391-36.1.

<sup>116</sup> TOMS RIVER REPORT, *supra* note 8, at 2; Phil Stilton, *How a Grisly Murder Shaped Toms River’s No-Knock Ordinance*, SHORENEWSNETWORK.COM (Oct. 27, 2015), <http://www.shorenewsnetwork.com/2015/10/how-a-grisly-murder-shaped-toms-rivers-no-knock-ordinance/>.

<sup>117</sup> § 391-36.1.

<sup>118</sup> *Id.* § 391-31.

<sup>119</sup> *Id.* § 391-36.1(D)(1).

<sup>120</sup> *Id.* § 391-36.1(D)(2)–(3).

<sup>121</sup> *See id.* § 391-36.1.

<sup>122</sup> §§ 391-48–52.

<sup>123</sup> TOMS RIVER REPORT, *supra* note 8, at 2.

<sup>124</sup> §§ 391-48–52.

<sup>125</sup> *Id.* § 391-49.

<sup>126</sup> *Id.* § 391-51. For a thorough discussion of blockbusting, *see infra* Part VI.

solicitations and canvasing.<sup>127</sup>

Despite the Town's revisions to the "no-knock" ordinance, residents were still subject to unwanted real estate solicitations by permitted and unpermitted solicitors.<sup>128</sup> Further, the "no-knock" ordinance did not discourage solicitors from engaging residents on their front lawns or in the streets.<sup>129</sup> Yet again, Toms River revised its "no-knock ordinance."<sup>130</sup> In November 2015, the town adopted an ordinance authorizing the Township Council to ban real estate solicitations in certain areas of the town that were subject to excessive and unwarranted solicitations.<sup>131</sup>

This new ordinance required the town to fulfill certain procedural steps to determine whether a solicitation ban was warranted.<sup>132</sup> First, the Business Administrator and Township Attorney must conduct an investigation and the town must hold a public hearing to allow residents to express concerns over incidents of real estate solicitation.<sup>133</sup> Next, the Business Administrator and Township Attorney must release a report that explains their findings, recommends whether a solicitation ban should be adopted, and, if so, specifies the geographic area the ban covers.<sup>134</sup> After considering the report, the Township Council may impose a real estate solicitation ban for certain neighborhoods if it finds either of the following are present: (1) real property owners are subject to "intense and repeated" real estate solicitations for the sale of their homes; or (2) real property owners are subjected to discriminatory practices under section 391-51, which includes blockbusting.<sup>135</sup>

Once a cease and desist zone is established, real estate brokers are prohibited from soliciting the sale of real estate within the zone's boundaries as set out in the ordinance.<sup>136</sup> Additionally, these zones cannot prohibit solicitation for more than five years.<sup>137</sup> The cease and desist zone, however, may be re-established through the same procedural requirements used to create the zone in the first instance.<sup>138</sup> Penalties for solicitation include fines

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<sup>127</sup> *Id.* § 391-50.

<sup>128</sup> TOMS RIVER REPORT, *supra* note 8, at 2.

<sup>129</sup> *Id.*

<sup>130</sup> § 391-55(A)–(C).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* § 391-55(A).

<sup>133</sup> *Id.* § 391-55(B).

<sup>134</sup> *Id.* § 391-55(C)(1).

<sup>135</sup> *Id.*

<sup>136</sup> TOMS RIVER, N.J., CODE OF THE TWP. OF TOMS RIVER § 391-55(C)(2)–(3) (2017).

<sup>137</sup> *Id.* § 391-55(C)(5).

<sup>138</sup> *Id.*

of up to \$1250 per offense and/or revocation of any permit issued under the ordinance.<sup>139</sup>

On February 23, 2016, the Toms River Township Council passed an ordinance creating two cease and desist zones, wherein all real estate solicitation would be banned.<sup>140</sup> The two zones encompass the North Dover neighborhoods, which both border Lakewood.<sup>141</sup> Toms River satisfied the requirements necessary before establishing these cease and desist zones.<sup>142</sup> After conducting an investigation and a public hearing,<sup>143</sup> the Business Administrator and Township Attorney released their report, which pointedly stated “neighborhoods in the Township’s northwest quadrant have been heavily and repeatedly targeted for real estate solicitations.”<sup>144</sup> The report further found incidents of illegal behavior, such as blockbusting.<sup>145</sup> The report recommended that cease and desist zones should be established because the real estate solicitations were “ero[ding]” the residents’ quality of life.<sup>146</sup>

#### V. BLOCKBUSTING

Blockbusting is defined as the “act or practice, [usually] by a real-estate broker, of persuading one or more property owners to sell their property quickly, and often at a loss, to avoid an imminent influx of minority groups.”<sup>147</sup> Blockbusting arose after the ruling in *Shelley v. Kraemer*, where the United States Supreme Court struck down restrictive covenants which prohibited the sale of a home to buyers of a particular race.<sup>148</sup> Before *Shelley*, property owners could enter into restrictive covenants that prevented minorities from buying or renting property in a neighborhood.<sup>149</sup> These

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<sup>139</sup> § 391-53.

<sup>140</sup> *Id.* § 391-55(D).

<sup>141</sup> *Id.* See TOMS RIVER, N.J., CODE OF THE TWP. OF TOMS RIVER § 391 Attachment 1:1 (2017).

<sup>142</sup> TOMS RIVER REPORT, *supra* note 8, at 3.

<sup>143</sup> The public hearing was held on January 21, 2016, in the Toms River Town Hall. Jean Mikle, *Toms River to Introduce Cease and Desist Ordinance*, ASBURY PARK PRESS (Feb. 9, 2016 9:47 A.M.), <http://www.app.com/story/news/local/toms-river-area/2016/02/08/toms-river-introduce-cease-and-desist-ordinance/80024206/>.

<sup>144</sup> TOMS RIVER REPORT, *supra* note 8, at 3.

<sup>145</sup> *Id.* (“The evidence further established credible incidents of blockbusting and other suspicious behavior—in some cases tantamount to stalking or harassment—creating an atmosphere in which residents feel under siege, unsafe, and unduly pressured to sell their homes.”).

<sup>146</sup> *Id.*

<sup>147</sup> *Blockbusting*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>148</sup> *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

<sup>149</sup> *Id.* at 4.

covenants could be used by the homeowner to prevent sale to a minority, or could be enforced by third-party homeowners in the neighborhood if a homeowner tried selling or renting a home to a minority.<sup>150</sup>

After *Shelley*, blockbusting became a method of integrating segregated neighborhoods by creating a means for black entry into white neighborhoods.<sup>151</sup> Blockbusting grew in popularity because realtors used it as a way to generate profit.<sup>152</sup> Usually, blockbusting occurred in white neighborhoods bordering black ghettos.<sup>153</sup> Using the climate of the time to their advantage, real estate brokers incited fear into white homeowners by claiming minorities were moving into their neighborhood.<sup>154</sup> Many times, brokers would offer cash for homes.<sup>155</sup> By using these methods, real estate brokers were able to purchase homes from white homeowners at a discount, and then turn around and sell to black homebuyers for a profit.<sup>156</sup>

The practice continued unabated until Congress made blockbusting an illegal practice under the Fair Housing Act of 1968.<sup>157</sup> The Fair Housing Act outlaws inducement of home sales, “for profit,” in anticipation of entry or prospective entry of persons into the neighborhood based on certain characteristics, such as race and religion.<sup>158</sup> While not defined by the Fair Housing Act, “for profit” has been interpreted to mean any form of financial gain.<sup>159</sup> In addition, district courts have found inducements need not be explicit to constitute blockbusting, but that the acts and words should be interpreted as a reasonable man would in the circumstances.<sup>160</sup>

At the state level, New Jersey followed the federal government’s lead and outlawed blockbusting through its Law Against Discrimination Act (LAD).<sup>161</sup> New Jersey’s law is more comprehensive than the federal statute and creates a broader umbrella under which actions may constitute

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<sup>150</sup> *Id.* at 6–7.

<sup>151</sup> See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 37–38 (1993).

<sup>152</sup> Dmitri Mehlhorn, *A Requiem for Blockbusting: Law, Economics, and Race-Based Real Estate Speculation*, 67 *FORDHAM L. REV.* 1145, 1145 (1998).

<sup>153</sup> *Id.* at 1151.

<sup>154</sup> *Id.* at 1151–52.

<sup>155</sup> *Id.* at 1151.

<sup>156</sup> *Id.*

<sup>157</sup> 42 U.S.C. § 3604(e) (2012).

<sup>158</sup> *Id.*

<sup>159</sup> See, e.g., *Sanborn v. Wagner*, 354 F. Supp. 291, 294 (D. Md. 1974) (finding that a sale of property where the agent was entitled to a real estate commission was “for profit” under the Fair Housing Act); *United States v. Mintzes*, 304 F. Supp. 1305, 1311–12 (D. Md. 1969) (interpreting “for profit” to include entitlements to commissions for real estate sales).

<sup>160</sup> *Zuch v. Hussey*, 394 F. Supp. 1028, 1049 (E.D. Mich. 1975), *aff’d and remanded sub nom. Zuch v. John H. Hussey Co.*, 547 F.2d 1168 (6th Cir. 1977); *United States v. Mitchell*, 327 F. Supp. 476, 479 (N.D. Ga. 1971).

<sup>161</sup> N.J. STAT. ANN. § 10:5-12(k) (2017).



blockbusting.<sup>162</sup> By analyzing the state statute, it becomes clear that three requirements are necessary for words or actions to qualify as blockbusting. First, an individual must attempt to induce a transaction from which they *may gain financially*.<sup>163</sup> This language seems much broader than the Fair Housing Act's requirement that the inducement must be made "for profit."<sup>164</sup> Second, there must be a representation that a change has, will, or may occur in the composition of an area.<sup>165</sup> The LAD enumerates a list of characteristics for which representations may not be made, such as race, creed, and color.<sup>166</sup> Third, an additional representation must be made, directly or indirectly, to suggest that these changes may lead to undesirable consequences to the area.<sup>167</sup> An undesirable consequence includes but is not limited to, a decrease in property value, increase in crime or anti-social behavior, or decrease in quality of schools.<sup>168</sup> The statute does not require the actual occurrence of any of these consequences, just a representation that they may occur.<sup>169</sup>

Furthermore, the New Jersey Real Estate Commission has adopted rules against blockbusting.<sup>170</sup> The regulation prohibits the solicitation of residential property based on an alleged change of value relating to the entry, or prospective entry, of "another race, religion, or ethnic origin" into the neighborhood.<sup>171</sup> Unlike the Fair Housing Act or LAD, these rules apply only to licensed real estate agents.<sup>172</sup> Yet, like the LAD, a change in property values need not actually occur, but only be represented.<sup>173</sup> Additionally, the New Jersey Supreme Court has held municipalities are allowed to pass anti-blockbusting ordinances.<sup>174</sup> In *Summer v. Teaneck*, the court reasoned that municipalities were better situated than the State to uncover blockbusting because blockbusting depends on the locality, varying in its "intensity and

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<sup>162</sup> *See id.*

<sup>163</sup> *Id.*

<sup>164</sup> Compare 42 U.S.C. § 3604(e) (2012) ("For profit"), with N.J. STAT. ANN. § 10:5-12(k) (2017) ("may gain financially").

<sup>165</sup> § 10:5-12(k).

<sup>166</sup> *Id.* The statute includes the following characteristics: race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, familial status, pregnancy, sex, gender identity or expression, affectional or sexual orientation, disability, nationality. *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> N.J. ADMIN. CODE § 11:5-7.4(a) (2017).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *See Summer v. Twp. of Teaneck*, 251 A.2d 761, 765–67 (N.J. 1969); *see also Mogolefsky v. Schoem*, 236 A.2d 874, 880–82 (N.J. 1967).

hurt.”<sup>175</sup> Therefore, because municipalities were closer to the scene of the blockbusting, municipalities are better equipped to craft a strategy to solve their unique blockbusting problem.<sup>176</sup> Additionally, the court believed the “evils” of blockbusting were too cancerous to not allow the municipalities to combat such acts.<sup>177</sup> Thus, it is apparent from statutes and case law that blockbusting is illegal,<sup>178</sup> and that municipalities, such as Toms River, have a right to pass ordinances generally prohibiting blockbusting.<sup>179</sup> Nonetheless, the issue becomes whether the real estate brokers’ actions amount to blockbusting.

To start, the geography of the current neighborhoods draws comparisons of those subject to blockbusting in the 1950s. The Toms River neighborhoods encountering the alleged blockbusting are those bordering the Orthodox Jewish community in Lakewood;<sup>180</sup> likewise, the 1950s neighborhoods targeted for blockbusting bordered minority, often black, neighborhoods.<sup>181</sup> The situations contrast, however, when looking at the reasoning inciting fear. In the 1950s and 1960s, real estate agents predominately preyed on white homeowners’ real or assumed fears that black neighbors would bring increased crime and decreased safety to their neighborhood.<sup>182</sup> This, in the homeowners’ minds, decreased property values.<sup>183</sup>

To Toms River residents, an increase in crime is not fueling their fears because Lakewood has seen a decrease in crime since the growth of the Orthodox Jewish population.<sup>184</sup> Instead, Toms River residents likely fear a

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<sup>175</sup> *Summer*, 251 A.2d at 764.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* In describing the pitfalls of blockbusting, the court explained:

The inducement is the supposed loss in property values for those who remain. The evils are evident. Sellers are exploited, and hostility is excited both in those who are persuaded their economic interests are thus threatened and in the group of citizens who are given to understand their presence is a blight.

*Id.* at 764.

<sup>178</sup> See N.J. STAT. ANN. § 10:5-12(k) (2017).

<sup>179</sup> *Summer*, 251 A.2d at 765–67.

<sup>180</sup> TOMS RIVER REPORT, *supra* note 8, at 1.

<sup>181</sup> Massey & Denton, *supra* note 151, at 37–38.

<sup>182</sup> Mehlhorn, *supra* note 152, at 1151–52.

<sup>183</sup> *Id.*

<sup>184</sup> Compare FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES (2016), <https://ucr.fbi.gov/crime-in-the-u.s> (select “2016”; then “Crime in the U.S. 2016”; then “Table 6”; then “New Jersey”) (169 violent crimes reported), with FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES (2000), <https://ucr.fbi.gov/crime-in-the-u.s> (select “2000”; then “Table 8 – Offenses Known to Law Enforcement by City 10,000 and over, 2000”; then scroll down to “New Jersey”; and then “Lakewood”) (240 violent crimes reported).

decrease in property values because of an increase of anti-social behavior and decline in schools serving the area.<sup>185</sup> This can be gleaned from the Toms River code addressing blockbusting.<sup>186</sup> In the code, solicitations cannot be made when making specific representations that incite fear or panic to the homeowner.<sup>187</sup> Classic elements of blockbusting are noted, such as representations about decreasing property values, changes in the demographic of the neighborhood, and increase in crime rates.<sup>188</sup> As in the LAD, however, additional representations cannot be made about “an increase in . . . antisocial behavior in the area”<sup>189</sup> or “a decline in the quality of schools serving the area.”<sup>190</sup> Those two additional representations illustrate Toms River residents’ underlying fears regarding the influx of the Orthodox Jewish community; the underlying fears are related.

As previously mentioned, residents have complained of intense, intimidating, and unwanted solicitations for the sale of their homes.<sup>191</sup> A simple knock on the door from an unwanted real estate solicitor, however, does not constitute blockbusting because the solicitor must invoke elements of fear or panic in convincing the homeowner to sell his or her home.<sup>192</sup> Certainly, some of the interactions between homeowners and real estate agents fit this bill. For example, one homeowner was told “you wouldn’t want to live here when [I am] done”,<sup>193</sup> while another was told, “You really should sell your house. I’m sure you don’t want to be surrounded by Jews.”<sup>194</sup> Similarly, another homeowner was told, “We’re ready to buy the whole neighborhood[,]”<sup>195</sup> and asked, “Why do you want to live with us?”,<sup>196</sup> meaning Orthodox Jewish neighbors. Further, residents have described frequent “drive-bys” where agents took pictures of their homes.<sup>197</sup> These comments and actions seem to invoke elements of blockbusting because these real estate agents are trying to induce the sale of homes by the threatened entry of the Orthodox Jewish population. But, as admitted in the

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<sup>185</sup> See TOMS RIVER, N.J., CODE OF THE TWP. OF TOMS RIVER § 391-51(B)(3)–(4) (2017).

<sup>186</sup> *Id.* § 391-51(B).

<sup>187</sup> *Id.* § 391-51(G).

<sup>188</sup> *Id.* § 391-51(B).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> TOMS RIVER REPORT, *supra* note 8, at 1.

<sup>192</sup> See Mehlhorn, *supra* note 152, at 1151–52.

<sup>193</sup> O’Reilly, *supra* note 8.

<sup>194</sup> Shannon Mullen & Jean Mikle, *Culture Shock Over Orthodox Expansion: Home Sales in Toms River and Jackson Are a Windfall for Some, A Source of Anxiety for Others*, ASBURY PARK PRESS (Mar. 16, 2016), <http://www.app.com/story/news/local/communitychange/2016/03/18/orthodox-home-sales-jackson-toms-river/81091688/>.

<sup>195</sup> TOMS RIVER REPORT, *supra* note 8, at 12.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 13; O’Reilly, *supra* note 8.

Toms River Report, it is not evident that blockbusting is prevalent throughout the area—meaning not all real estate agents soliciting home sales are employing blockbusting tactics.<sup>198</sup>

In the 1950s and 1960s, real estate agents used fear tactics to induce white homeowners to sell their homes at a below value price.<sup>199</sup> While not statutorily required to prove blockbusting, home sales below market value can be an indication of the practice.<sup>200</sup> In Toms River, reports have shown that homes in the cease and desist zones are receiving higher purchase offers and are being purchased above their assessed value.<sup>201</sup> In some instances, houses in neighborhoods bordering Lakewood have sold for \$50,000 to \$250,000 above their assessed value.<sup>202</sup> Yet, the inducement for a homeowner to sell his or her home is the supposed loss of property value if he or she remains.<sup>203</sup> Therefore, it is possible that the economic effects of blockbusting are not felt by the homeowners that sell first, but by those clinging onto their old neighborhood and sell last. While homes are selling well above their market value, real estate solicitation by the Orthodox Jewish community is a relatively new issue facing Toms River, and the homes being sold are usually one of the first few homes sold in the neighborhood.

It should be stated, however, that future housing prices are unknown. It is uncertain whether property values will decrease for those remaining in a transitional neighborhood. For instance, as the Orthodox Jewish population has increased, Lakewood's property values have increased because it has become a desirable location for Orthodox Jews to live.<sup>204</sup> Therefore, it seems possible that property values in newly transitioned Toms River neighborhoods will not decrease because the remaining non-Orthodox houses will become desirable properties for Orthodox Jewish families.

Yet, blockbusting does not require an actual decrease in property values; it only requires a representation, direct or indirect, that undesirable consequences, including decreased property values, shall follow the entry of a religious group (i.e. Orthodox Jews) into the neighborhood.<sup>205</sup> Statements, such as “[you] wouldn't want to live here when [I'm] done”, made to Toms River homeowners by real estate agents,<sup>206</sup> seem to insinuate certain

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<sup>198</sup> TOMS RIVER REPORT, *supra* note 8, at 13.

<sup>199</sup> See Mehlhorn, *supra* note 152, at 1151–52.

<sup>200</sup> See *id.*

<sup>201</sup> Mullen & Mickle, *supra* note 14.

<sup>202</sup> *Id.*

<sup>203</sup> Summer v. Twp. of Teaneck, 251 A.2d 761, 762 (N.J. 1969).

<sup>204</sup> Mullen, *supra* note 10; Rinde, *supra* note 89; Associated Press, *supra* note 1; see also Mullen, *supra* note 21.

<sup>205</sup> See N.J. STAT. ANN § 10:5-12(k) (2017); see also 42 U.S.C. § 3604(e) (2012).

<sup>206</sup> O'Reilly, *supra* note 8.

undesirable consequences facing the homeowner's neighborhood and are clearly made as an inducement to sell. These statements implicate the very evils blockbusting statutes try to prevent: the incitement of hostility between those who believe their economic interest is threatened and the incoming population who "understand [its] presence [to be] a blight."<sup>207</sup>

Therefore, it is a town's responsibility to end potential blockbusting practices in their infancy before they become a wide spread issue and their cancerous effect infects the town and its residents. Consequently, it does not make sense for Toms River to have to wait for the practice to become prevalent to take action against it because, at that point, it will become too late to rectify. The Toms River ordinance seems to accomplish the goal of preventing blockbusting in the cease and desist zones; however, the cease and desist zones also prevent non-blockbusting solicitors from soliciting homeowners for the sale of their homes in those zones.<sup>208</sup> Thus, the next question to address is whether the cease and desist zone would withstand constitutional challenges by law-abiding solicitors.

#### VI. FIRST AMENDMENT CHALLENGES TO THE TOMS RIVER ORDINANCE

The First Amendment of the United States Constitution states, "Congress shall make no law . . . abridging the freedom of speech."<sup>209</sup> The Supreme Court of the United States has divided speech into two different categories: (1) commercial speech, and (2) non-commercial speech.<sup>210</sup> In *Bolger v. Youngs Drug Products*, the Court defined commercial speech as speech that puts forth a commercial transaction,<sup>211</sup> and in *Central Hudson Gas & Electric v. Public Service Commission*, the Court also defined commercial speech as speech for the speaker's economic benefit.<sup>212</sup> Until 1975, the First Amendment did not protect commercial speech.<sup>213</sup> Then, in *Bigelow v. Virginia*, the Supreme Court extended the First Amendment's protection to commercial speech, protecting it from government regulation.<sup>214</sup> These First Amendment protections are applied to the states through the Fourteenth Amendment.<sup>215</sup> The Court has refused to allow the

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<sup>207</sup> *Sumner*, 251 A.2d at 762. See *N.Y. State Ass'n of Realtors v. Shaffer*, 27 F.3d 834, 836 (2d Cir. 1994) (stating the evils of blockbusting include the "fanning of racial tensions and promoting of ethnic stereotypes").

<sup>208</sup> TOMS RIVER, N.J., CODE OF THE TWP. OF TOMS RIVER § 391-55(c)(3) (2016), <http://ecode360.com/30316219>

<sup>209</sup> U.S. CONST. amend. I.

<sup>210</sup> *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983).

<sup>211</sup> *Id.* at 66.

<sup>212</sup> *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980).

<sup>213</sup> *Bolger*, 463 U.S. at 65.

<sup>214</sup> *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Central Hudson*, 447 U.S. at 562–63.

<sup>215</sup> *Cent. Hudson*, 447 U.S. at 561 (citing *Va. Pharmacy Bd. v. Va. Citizens Consumer*

government to adopt a “highly paternalistic” role over commercial speech.<sup>216</sup>

While commercial speech is protected, the Court makes a “commonsense” distinction between commercial and non-commercial speech.<sup>217</sup> In *Central Hudson*, the Court ruled that commercial speech is not afforded full First Amendment protection under the Constitution, but a lesser protection than other forms of speech or expression, such as non-commercial speech.<sup>218</sup> To determine whether commercial speech is constitutionally protected, the Court considers two factors: (1) the nature of the speech or expression, and (2) the government’s interest in regulating the speech or expression.<sup>219</sup>

The First Amendment governs commercial speech because advertising serves an informational function to consumers.<sup>220</sup> The Court ruled that the Constitution will not protect commercial speech “more likely to deceive the public than inform it,<sup>221</sup> or commercial speech pertaining to illegal activity.<sup>222</sup> But, where the speech is not misleading or does not perpetuate illegal activity, the government’s power in regulating commercial speech is limited by *Central Hudson*.<sup>223</sup> Therefore, to regulate commercial speech, the government must satisfy the *Central Hudson* framework.<sup>224</sup> Further, the state must articulate a substantial interest achieved through the restriction of the commercial speech.<sup>225</sup> Finally, the restriction on commercial speech must be in proportion to the state’s interest.<sup>226</sup> In measuring adherence to the proportionality requirement, courts look to two factors.<sup>227</sup> First, the state’s interest must be “directly advance[d]” by the restriction on commercial speech.<sup>228</sup> This means “ineffective or remote support” of the state’s interest is insufficient to justify a restriction on commercial speech.<sup>229</sup>

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Council, 425 U.S. 748, 761–62 (1976)).

<sup>216</sup> *Id.* at 562 (rejecting the view that the government has “complete power to suppress or regulate commercial speech” and reasoning that people recognize their own best interests by being informed and, therefore, opening the channels of communication is the best way to achieve that end).

<sup>217</sup> *Id.* (quoting *Ohralik v. Ohio Bar Ass’n*, 436 U.S. 447, 455–56 (1978)).

<sup>218</sup> *Id.* at 562–63.

<sup>219</sup> *Id.* at 563.

<sup>220</sup> *See First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978).

<sup>221</sup> *Cent. Hudson*, 447 U.S. at 563.

<sup>222</sup> *Id.* at 564; *Pittsburg Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 388 (1973).

<sup>223</sup> *Cent. Hudson*, 447 U.S. at 564.

<sup>224</sup> *Id.* at 563–66.

<sup>225</sup> *Id.* at 564.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 564–65.

<sup>228</sup> *Id.* at 564.

<sup>229</sup> *Cent. Hudson*, 447 U.S. at 564.

Second, the restriction cannot be over-inclusive.<sup>230</sup> A restriction will be struck down if a more limited restriction would have advanced the state's interest in the same manner.<sup>231</sup>

The *Central Hudson* framework creates a four-part analysis to determine whether certain commercial speech enjoys First Amendment protection.<sup>232</sup> The Court considers whether: (1) the speech concerns unlawful activity or is misleading; (2) the state has a substantial interest; (3) the restriction is directly related to the state's interest; and (4) the restriction is not broader than necessary.<sup>233</sup>

The Second Circuit has applied the *Central Hudson* framework when interpreting the constitutionality of solicitation bans in certain communities.<sup>234</sup> In drafting its ordinance, Toms River relied upon a New York law allowing the creation of cease and desist zones to stop real estate solicitation<sup>235</sup> and Second Circuit opinions interpreting the law.<sup>236</sup> Under New York law, the Secretary of State may combat intense and repeated solicitations by issuing a non-solicitation order for certain areas<sup>237</sup> or by creating cease and desist zones, which ban solicitation where residential homeowners submit statements expressing their request to not be solicited by real estate brokers.<sup>238</sup> It is important to note the difference between the two types of solicitation restrictions. A non-solicitation order creates a blanket ban over an area for real estate solicitation, meaning no property falling within the area covered by the order can be solicited by a real estate agent.<sup>239</sup> In contrast, a cease and desist zone allows residents in that area to opt into the real estate solicitation ban, and real estate agents may not solicit residents who have opted into the cease and desist zone.<sup>240</sup> Real estate agents, however, may still solicit residents that have not filed a statement with the secretary expressing their intent to participate in the cease and desist zone.<sup>241</sup>

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<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 566.

<sup>233</sup> *Id.*

<sup>234</sup> See *Anderson v. Treadwell*, 294 F.3d 453 (2d Cir. 2002); see also *N.Y. State Ass'n of Realtors v. Shaffer*, 27 F.3d 834 (2d Cir. 1994).

<sup>235</sup> N.Y. REAL PROP. LAW § 442-(h)(2)-(3) (2002).

<sup>236</sup> *Anderson*, 294 F.3d at 456.

<sup>237</sup> N.Y. REAL PROP. LAW § 442-h(2) (2002).

<sup>238</sup> § 442-h(3).

<sup>239</sup> § 442-h(2); see *N.Y. State Ass'n of Realtors v. Shaffer*, 27 F.3d 834, 844 (2d Cir. 1994).

<sup>240</sup> N.Y. REAL PROP. LAW § 442-h(3) (2002).

<sup>241</sup> *Id.*

In *New York State Association of Realtors v. Shaffer* (NYSAR), real estate agents challenged the constitutionality of a non-solicitation order that banned real estate solicitation in certain areas of four New York counties.<sup>242</sup> In *Anderson v. Treadwell*, the plaintiffs, engaged in the real estate business, challenged the validity of the New York regulation permitting cease and desist zones on First Amendment grounds.<sup>243</sup>

In analyzing each case, the Second Circuit applied the *Central Hudson* framework.<sup>244</sup> First, in both cases, neither party disputed that the real estate solicitations contained non-misleading commercial speech related to lawful activity.<sup>245</sup> In *NYSAR*, the court found that the real estate brokers' solicitation of homeowners constitutes lawful activity and that housing solicitations are not *per se* misleading.<sup>246</sup> Similarly, in *Anderson*, the solicitations contained "truthful, non-deceptive information about themselves, the real estate market, the nature of their services, and those of their company."<sup>247</sup> Second, in each case, the court found the State's interest to be substantial. In *NYSAR*, the court ruled that the government had a substantial interest in thwarting blockbusting.<sup>248</sup> In *Anderson*, the court found that protecting the privacy of residents from harassing solicitation served a substantial government interest.<sup>249</sup>

The Second Circuit distinguished the two cases when applying the third and fourth *Central Hudson* factors. In *Anderson*, the court found that a direct relation existed between the restriction and the State's interest.<sup>250</sup> To establish a direct connection, the court required the State to show that its residents suffered real harm and that the restrictions would alleviate such harm "to a material degree."<sup>251</sup> The court found the record sufficiently demonstrated that the real estate solicitations caused real harm and that the

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<sup>242</sup> *N.Y. State Ass'n of Realtors v. Shaffer*, 27 F.3d 834, 835-37 (2d Cir. 1994). The real estate agents brought their constitutional challenge under the First Amendment. *Id.* at 835.

<sup>243</sup> *Anderson v. Treadwell*, 294 F.3d 453, 456 (2d Cir. 2002). In *Anderson*, the plaintiff sent a flier to a home owner residing in a solicitation cease and desist zone, asking the home owner to contact the plaintiffs if the homeowner wished to sell. *Id.* at 459. The Secretary of State deemed the flier to be a solicitation and fined the plaintiffs. *Id.* Subsequently, the plaintiffs challenged the validity of the New York law, arguing that the cease and desist zones violated the First Amendment. *Id.* at 459-60.

<sup>244</sup> *Anderson*, 294 F.3d at 460-61.

<sup>245</sup> *Id.* at 461; *N.Y. State Ass'n of Realtors*, 27 F.3d at 841.

<sup>246</sup> *N.Y. State Ass'n of Realtors*, 27 F.3d at 841.

<sup>247</sup> *Anderson*, 294 F.3d at 460.

<sup>248</sup> *N.Y. State Ass'n of Realtors*, 27 F.3d at 841.

<sup>249</sup> *Anderson*, 294 F.3d at 461-62. The State proffered an additional substantial state interest in protecting neighborhoods from blockbusting. *Id.* at 461. Finding the privacy interest substantial, the court did not address whether the State had a substantial interest in protecting neighborhoods from blockbusting. *Id.*

<sup>250</sup> *Anderson*, 294 F.3d at 461-62.

<sup>251</sup> *Id.*



cease and desist zones alleviated such harms by a material degree.<sup>252</sup>

Additionally, in *Anderson*, the Second Circuit found the restrictions to be a reasonable fit.<sup>253</sup> The court did not consider the cease and desist zones to be over-inclusive since the zones and the registry matched the homeowners who suffered the harm.<sup>254</sup> The court weighed heavily the fact that the zones were a “resident-activated restriction,” meaning the residents helped identify the banned areas for solicitations.<sup>255</sup> The areas identified as cease and desist zones were the same areas where a large numbers of homeowners complained about real estate solicitation.<sup>256</sup> Additionally, the registry was limited to the homeowners that did not want to be subjected to real estate solicitation.<sup>257</sup> By this reasoning, the Second Circuit upheld the state’s cease and desist zone restrictions banning real estate solicitation.<sup>258</sup>

Conversely, in *NYSAR*, the court found that some evidence of blockbusting existed; however, the court struck down the non-solicitation ban because the ban was not a reasonable fit compared to the degree of the harm.<sup>259</sup> The court reasoned that the restriction lacked a reasonable fit since a less restrictive measure, such as cease and desist zones, may have just as effectively combated the level of blockbusting present.<sup>260</sup> The court focused on the fact that, despite having cease and desist zones in place before the non-solicitation ban, the Secretary failed to prove that a non-solicitation order, rather than the resident-activated restrictions, would more effectively combat blockbusting. Therefore, as applied to the real estate agents, the court struck such restrictions down.<sup>261</sup>

The Second Circuit cases did not create precedent in New Jersey because New Jersey is within the Third Circuit.<sup>262</sup> The Second Circuit’s reasoning, however, is helpful to understand how the Third Circuit would apply the *Central Hudson* framework in determining the constitutionality of

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<sup>252</sup> *Id.* at 462. In reaching this opinion, the court found the popularity of the program, the statements in support of the cease and desist zones at public hearings, and complaints of violations to be sufficient to substantiate the harms. *Id.* at 462. Further, the same facts were sufficient to establish the harms were alleviated by a material degree as a result of the cease and desist zones. *Id.*

<sup>253</sup> *Anderson*, 294 F.3d at 462–63.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 462.

<sup>256</sup> *Id.* at 462–63.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 464.

<sup>259</sup> *N.Y. State Ass’n of Realtors v. Shaffer*, 27 F.3d 834, 843–44 (2d Cir. 1994).

<sup>260</sup> *Id.* at 844.

<sup>261</sup> *Id.*

<sup>262</sup> *See, e.g., Abdulai v. Ashcroft*, 239 F.3d 542, 553 n.7 (3d Cir. 2001) (“[W]e are not bound by precedent from other circuits.”).

restricting commercial speech related to real estate solicitation.<sup>263</sup> Likewise, the New Jersey Supreme Court uses the framework to make similar determinations.<sup>264</sup> Therefore, the Toms River cease and desist ordinance will be considered under the *Central Hudson* framework.

Under the *Central Hudson* framework, a federal or state court is likely to uphold the constitutionality of Toms River's cease and desist ordinance as constitutional under the First Amendment. As in *Anderson* and *NYSAR*, the application of the first two prongs is relatively straightforward. To start, the speech must be considered commercial speech.<sup>265</sup> The speech Toms River seeks to curtail is solicitations for the sale of residents' homes. This clearly constitutes speech advancing a commercial transaction, or speech for the economic benefit of the speaker, because it is speech proposing a real estate transaction. Real estate agents are using the speech for their economic benefit as agents attempt to solicit the purchase of homes for resale to their Orthodox Jewish clients at a profit. Therefore, because the real estate agents' speech is commercial, the ordinance must satisfy the *Central Hudson* framework.

Next, the speech being regulated by Toms River neither misleads nor relates to illegal activity because the speech is clear and straightforward, and regulates more than just speech related to blockbusting. It is hard to imagine either party perpetuating the argument that the speech in question is misleading. As mentioned above, misleading speech is afforded no First Amendment rights because it upends the informational aspect of consumer advertising.<sup>266</sup> Here, there is no advertising. The speech is explicitly clear—real estate agents want to buy residents' homes. Homeowners certainly understand the speech and the transaction it proposes.

Toms River is likely to argue that the regulated speech relates to illegal activity. Specifically, Toms River will most likely contend that solicitation tactics used by real estate agents perpetuate blockbusting, which is an illegal activity. Speech regarding illegal activity is not afforded First Amendment protection;<sup>267</sup> thus, if the speech is related to blockbusting, Toms River has the unfettered right to regulate the speech. That some of the speech may relate to illegal activity, however, does not stop the *Central Hudson* analysis because not all speech governed by the ordinance relates to blockbusting. The ordinance pertains to all real estate solicitation in two zones within Toms River despite whether the solicitations constitute blockbusting or not.

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<sup>263</sup> See, e.g., *King v. Governor of N.J.*, 767 F.3d 216, 233 (3d Cir. 2014).

<sup>264</sup> See, e.g., *E & J Equities, LLC v. Bd. of Adjustment of Franklin*, 146 A.3d 623 (N.J. 2016).

<sup>265</sup> *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980).

<sup>266</sup> *Id.* at 563–64.

<sup>267</sup> *Id.*

Therefore, the ordinance is subject to further analysis under the *Central Hudson* framework to determine whether the suppression of commercial speech is justified.

To be constitutional under *Central Hudson*, Toms River's cease and desist ordinance must advance a substantial governmental interest.<sup>268</sup> Similar to *Anderson* and *NYSAR*, Toms River is likely to proffer that substantial interests exist in (1) protecting the privacy of its homeowners, and (2) protecting its neighborhoods from being victimized by blockbusting. First, the Supreme Court has consistently held that there is a protectable privacy interest in the home.<sup>269</sup> Thus, there is no doubt that Toms River's protection of its residents' privacy in their homes is a substantial governmental interest. Second, protecting neighborhoods from blockbusting is likely a substantial government interest because it is protecting the neighborhood from an illegal activity. But, Toms River is likely to fail to constitutionally justify its ordinance on other grounds.<sup>270</sup> Therefore, going forward, Toms River's substantial interest is likely to be protecting its residents' privacy of their homes.

Next, Toms River must prove the restriction on commercial speech is "directly related" to the substantial interest the town holds in protecting the privacy of its residents' homes. Judging by the evidence, there is little doubt that the cease and desist zones are directly related to the residents' interest in the privacy of their homes. Given the findings in the Toms River report and public hearing comments,<sup>271</sup> it is evident that the solicitations exposed the homeowners' privacy interests to real harm. Examples of intrusions of the home include: "[d]rive bys" where real estate agents take pictures of residents' homes, frequent and repeated solicitations on weekends and holidays, and asking neighborhood children how many bedrooms are in their

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<sup>268</sup> See *id.* at 564.

<sup>269</sup> See *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995); *Frisby v. Schiltz*, 487 U.S. 474, 484–85 (1998).

<sup>270</sup> While protecting Toms River neighborhoods from blockbusting is likely a substantial interest, the ordinance would be over-inclusive in achieving that goal because speech relating to real estate solicitation, but not related to blockbusting, would also be restricted. Therefore, there would be less intrusive means of restricting speech related to blockbusting without restricting speech relating to real estate solicitation. For example, Toms River already enacted an ordinance which outlaws blockbusting. See *TOMS RIVER, N.J., CODE OF THE TWP. OF TOMS RIVER* § 391-51 (2016), <http://ecode360.com/30316219>. Therefore, the court would likely find the new ordinance over-inclusive and unnecessary to further the substantial governmental interest.

<sup>271</sup> *TOMS RIVER REPORT*, *supra* note 8, at 11–13.

homes.<sup>272</sup> These examples illustrate the clear invasion of privacy in the home.

Since the ordinance is Toms River's third iteration of non-solicitation ordinances, this further shows the harms were bona fide.<sup>273</sup> This illustrates the escalating demand to stop these unwanted and harmful solicitations because the original ordinances failed to deter such invasion of privacy since real estate solicitations kept occurring even after the first and second enactments of the non-solicitation ordinances. Additionally, the cease and desist zones alleviate the harms caused by the solicitations because the most frequent and intense solicitations occurred in the two zones where real estate solicitations are now banned.<sup>274</sup> Consequently, those willing to sell their homes in the no-knock zones may put their homes on the market to alert real estate agents of their interest or intent to sell their home, instead of real estate agents having to knock on every door trying to discern such information.

Finally, the *Central Hudson* framework analyzes whether the Toms River ordinance is broader than necessary to serve the homeowners' privacy interest in their homes. The cease and desist zones match the areas where residents are experiencing the harm because the cease and desist zones encompass the areas and neighborhoods where the most frequent and intense real estate solicitations occurred.<sup>275</sup> As in *Anderson*, residents helped create the cease and desist zones by identifying the most problematic areas for real estate solicitation through their complaints.<sup>276</sup>

While the Toms River ordinance resembles the resident-activated restriction praised in *Anderson*, it is important to note that the Toms River restriction is different than the *Anderson* restriction. Unlike the cease and desist zones in *Anderson*, the cease and desist zone under the Toms River ordinance creates a blanket ban for all real estate solicitation in the designated area.<sup>277</sup> Residents falling within the zone are covered by the solicitation ban, without regard to whether they want to be covered by the ban.<sup>278</sup> This type of ban seems more like the non-solicitation order seen in *NYSAR* than the resident-activated ban in *Anderson*, thus, possibly leaving

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<sup>272</sup> *Id.* at 13–14.

<sup>273</sup> *See* §§ 391-36.1, 391-48–55.

<sup>274</sup> TOMS RIVER REPORT, *supra* note 8, at 16.

<sup>275</sup> *Id.* at 14–15.

<sup>276</sup> *Anderson v. Treadwell*, 294 F.3d 453, 462 (2d Cir. 2002) (finding resident complaints helped identify the banned areas of solicitation).

<sup>277</sup> § 391-55.

<sup>278</sup> § 391-55(c)(3).

the Toms River ordinance on unstable constitutional grounds.

Unlike *NYSAR*'s blanket ban on solicitation, however, residents can opt out of the non-solicitation ban by filing an affirmative statement with the Township Clerk, asserting their wishes to receive real estate solicitation.<sup>279</sup> Toms River will likely argue that this essentially creates a reverse resident-activated restriction where the extent of the solicitation ban is defined by those opting out of the cease and desist zone, rather than the *Anderson* approach where residents had to opt into the cease and desist zone. Thus, in effect, the *Anderson* ban and Toms River ban reach the same outcome, just through opposite means.

If Toms River's ordinance is found to be more like *NYSAR* than *Anderson*, this does not necessarily mean that the ordinance will be found to be unconstitutional. While the ban in *NYSAR* was struck down, the court did not facially invalidate the law allowing solicitation bans, stating that, under different circumstances, it is possible that such a ban would be constitutional.<sup>280</sup> In light of this, Toms River's ordinance is distinguishable from *NYSAR* because the town took a different approach before passing the solicitation ban.

For instance, Toms River's progression to deal with its real estate solicitation problem differs from *NYSAR*. To start, the Toms River created a no-knock registry, which prohibited door-to-door solicitation of enrolled residents.<sup>281</sup> The original ordinance did not specifically include real estate solicitations, and, as a result, residents were subjected to real estate solicitations.<sup>282</sup> In response to residents' complaints, the town passed a general anti-solicitation ordinance, specifically implicating real estate solicitations.<sup>283</sup> Still, the problem of real estate solicitation remained unabated as evidenced by residents' complaints. The final step was passing the ordinance that allowed for the creation of cease and desist zones, and the ultimate creation of the current cease and desist zones to protect the most aggrieved areas of the town.<sup>284</sup> While *NYSAR* started with cease and desist orders and escalated to a blanket solicitation ban, the Secretary of State failed to provide evidence of the resident-activated restriction's ineffectiveness.<sup>285</sup> Unlike *NYSAR*, each of Toms River's previous efforts to combat real estate solicitations proved ineffective as evidenced by the continued complaints of residents.

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<sup>279</sup> § 391-55(c)(4).

<sup>280</sup> *N.Y. State Ass'n of Realtors v. Shaffer*, 27 F.3d 834, 844 (2d Cir. 1994).

<sup>281</sup> § 391-36.1 (2016), <http://ecode360.com/30316219>.

<sup>282</sup> *See id.* *See also* TOMS RIVER REPORT, *supra* note 8, at 2.

<sup>283</sup> §§ 391-48 to -52.

<sup>284</sup> § 391-55.

<sup>285</sup> *N.Y. State Ass'n of Realtors*, 27 F.3d at 844.

Furthermore, in *NYSAR*, the court took issue with the lack of investigation to determine the validity of the residents' complaints.<sup>286</sup> On the other hand, Toms River's solicitation ban was created only after an investigation by the Business Administrator and Town Attorney to verify the validity of residents' complaints.<sup>287</sup> Therefore, it is unsubstantiated to claim the ordinance is over-inclusive or broader than what is necessary to protect the homeowners' privacy interests.

After applying the *Central Hudson* framework, the Toms River cease and desist zone ordinance restricting real estate solicitation passes constitutional muster and should be upheld against a First Amendment challenge.

## VII. CONCLUSION

Toms River is dealing with a unique situation. Its neighbor, Lakewood, is in the midst of a population boom created by the exponential growth of its Orthodox Jewish community. With increasing real estate demands and decreasing space in Lakewood, Toms River neighborhoods have become the site of intense and frequent real estate solicitations as real estate brokers, representing Orthodox Jewish clients, attempt to penetrate the housing market in these neighborhoods. The result: tension between Toms River residents and the Orthodox Jewish community. In an attempt to protect the interests of its residents, Toms River outlawed real estate solicitation in two neighborhoods bordering Lakewood. The real estate agents affected, however, are mainly Orthodox Jews, or represent mainly Orthodox Jewish clients, leading to allegations, whether implicit and explicit, of anti-Semitism.

Yet, under New Jersey case law,<sup>288</sup> Toms River is allowed to enact ordinances to prevent blockbusting. While critics may argue that Toms River admitted blockbusting is not prevalent throughout the town, the intense and frequent real estate solicitations experienced by certain Toms River residents is the exact behavior the federal<sup>289</sup> and state<sup>290</sup> laws outlaw and it is essential for Toms River to halt the practice before it becomes prevalent throughout the town.

Further, as a restriction on commercial speech, Toms River's ordinance seems to be constitutional as viewed through the *Central Hudson* framework. Toms River acted within its power to create resident-activated cease and desist zones because it is protecting a substantial state interest in the privacy

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<sup>286</sup> *Id.* at 843.

<sup>287</sup> See TOMS RIVER REPORT, *supra* note 8, at 3–14.

<sup>288</sup> See *Summer v. Twp. of Teaneck*, 251 A.2d 761, 765–66 (N.J. 1969).

<sup>289</sup> 42 U.S.C. § 3604(e) (2012).

<sup>290</sup> N.J. STAT. ANN 10:5–12(k) (2017).

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of Toms River residents' homes, directly alleviating the problem of real estate solicitation, and the restriction is no broader than necessary. Therefore, Toms River's ordinance does not violate the First Amendment rights of real estate brokers, and it is within the town's authority to curtail solicitations as commercial speech.

By enacting this ordinance, Toms River is not closing its doors on the Orthodox Jewish community. If Toms River residents list their homes on the market for sale, nothing prevents those in the Orthodox Jewish community from purchasing houses within the cease and desist zones. Unquestionably, though, Toms River is slamming the door on real estate brokers' use of aggressive and intimidating tactics.