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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, Petitioner, v. OCEAN GROVE CAMP MEETING ASSOCIATION, Respondent.	ORDER DENYING STAY PENDING APPEAL OAL DKT. NO. ECE 13655-23 AGENCY DKT. NO. PEA230002, 1334-01-1002.5

INTRODUCTION

This matter involves the public's right to reasonable access to the beach in Ocean Grove, an enclave within Neptune Township, Monmouth County, to which public access has been restricted every Sunday morning during the peak summer beach season by the Ocean Grove Camp Meeting Association, a private beachfront property owner. The Department of Environmental Protection, which has the duty to protect the public's right of access to tidal waters and adjacent shorelines, has ordered the Association to cease its use of chains and padlocks or any other barriers that restrict reasonable public access to the beachfront. The Association now seeks a stay of such enforcement action while the Association further pursues an appeal of its public access obligations. Having presented no clear and convincing evidence that its public access restrictions should be continued during the pendency of its appeal, the Association's request to stay the Department's enforcement of public access requirements is hereby denied.

BACKGROUND

On April 12, 2024, pursuant to N.J.A.C. 1:1-12.6, Respondent, Ocean Grove Camp Meeting Association of the United Methodist Church ("OGCMA" or "Association"), filed an application for emergency relief from a New Jersey Department of Environmental Protection ("DEP" or "Department") Administrative Order dated October 12, 2023 ("AO"). Specifically, OGCMA seeks a stay of the Department's ability to enforce the AO, which orders the Association to cease the use of chain and pad lock barriers, or any other barrier, that prevents reasonable public access to the beach at Ocean Avenue, Block 101, Lot 5, in Neptune Township, Monmouth County ("Ocean Grove Beachfront"). OGCMA contests the enforceability of the AO, and ultimately, an underlying August 2022 Coastal Area Facility Review Act ("CAFRA") permit that requires the Association to allow reasonable access to the beach. OGCMA argues that such public access conflicts with the Association's longstanding practice of closing the Ocean Grove Beachfront from 9:00 a.m. to 12:00 p.m. on "Summer Sundays," *i.e.*, the fifteen Sundays from Memorial Day weekend up to and including Labor Day weekend. OGCMA submits that this closure allows opportunity for quiet reflection in accordance with the Association's religious beliefs.

On November 15, 2023, OGCMA requested an administrative hearing to challenge the AO, which request was granted and the matter transmitted to the Office of Administrative Law. The matter was expedited, with a plenary hearing scheduled to begin on April 17, 2024, before an Administrative Law Judge. On April 2, 2024, the Department moved for a revised scheduling order, which motion prompted OGCMA to file the instant application for a stay of enforcement. Having received the application for emergency relief, I elected to hear the matter pursuant to N.J.A.C. 1:1-12.6(c) and established a briefing schedule. The Department filed its opposition to OGCMA's application on April 22, 2024, and OGCMA filed a reply brief on April 29, 2024.

To be entitled to a stay, OGCMA must show by clear and convincing evidence, that: (1) it has a reasonable probability of success on the merits; (2) it will suffer irreparable harm if relief is not granted; and (3) the public interest and the relative hardships to the parties favor a stay. Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982); Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013); Waste Mgmt. of N.J., Inc. v. Union Cty. Utils. Auth., 399 N.J. Super. 508, 519-20 (App. Div. 2008). For the reasons expressed herein, OGCMA has failed to demonstrate that a stay is warranted under the governing standard. Accordingly, the request is denied.

ANALYSIS

I. OGCMA Has Not Demonstrated a Reasonable Probability of Success on the Merits of its Claims Contesting Public Access Obligations

Both parties acknowledge that the dispute in this case implicates the public trust doctrine, the principle that the "the land flowed by tidal water, which extends to the mean high water mark, is vested in the State in trust for the people." Matthews v. Bay Head Improv. Ass'n, 95 N.J. 306, 312 (1984); N.J.S.A. 13:1D-150(a) ("The public has longstanding and inviolable rights under the public trust doctrine to use and enjoy the State's tidal waters and adjacent shorelines for navigation, commerce, and recreational uses, including, but not limited to, bathing, swimming, fishing, and other shore-related activities.). This ancient doctrine, codified as part of Roman Law, maintained through English Common Law, and then vested in the States, N.J.A.C. 7:7-9.48(c), is a public property right that New Jersey has held since the Revolution. Arnold v. Mundy, 6 N.J.L. 1, 84 (1821). Thus, when OGCMA took title to the Ocean Grove Beachfront, it did so subject to a right of public access consistent with the public trust doctrine.

The public trust doctrine is not "fixed or static," but rather must "be molded and extended to meet changing conditions and needs of the public it was created to benefit." Matthews, 95 N.J. at 326 (quoting Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 309

(1972)). Over time, the doctrine has been found to encompass public access for recreational purposes, as well as reasonable access to dry sand areas, on both public and privately-owned beaches. Matthews, 95 N.J. at 316-24. Most recently, the Legislature passed P.L. 2019, c. 81 ("Public Access Law"), declaring that "[p]ursuant to the public trust doctrine, the State of New Jersey has a duty to promote, protect, and safeguard the public's rights and ensure reasonable and meaningful public access to tidal waters and adjacent shorelines." N.J.S.A. 13:1D-150(d). The Public Access Law requires the Department to "make all tidal waters and their adjacent shorelines available to the public to the greatest extent practicable," which includes exercising its authority to "remove physical and institutional impediments to public access to the maximum extent practicable," N.J.S.A. 13:1D-150(e), and requiring public access as a condition to the approval of certain permits, including those issued under CAFRA, N.J.S.A. 13:1D-151(a); N.J.S.A. 13:1D-153(a).

OGCMA argues that it has a reasonable probability of success on the merits because the AO seeks to enforce a CAFRA permit condition that exceeds the Department's authority and constitutes an unconstitutional taking of Association property. Resp't's Br. 23-41. OGCMA argues that the Association has a right to restrict access to the Ocean Grove Beachfront because the length of its "Summer Sundays" closure is reasonable in comparison to the length of a year. Id. at 23-35. According to OGCMA, its restrictions are reasonable because the Ocean Grove Beachfront is open every hour of every day of every year, except for the hours of 9:00 a.m. to 12:00 p.m. on Summer Sundays. Id. at 6-10. OGCMA also argues that, because the Association restricts public access on Summer Sundays to afford an opportunity for quiet reflection consistent with its religious beliefs, the Department's enforcement of the Public Access Law violates the Free Exercise Clause of the United States Constitution. Additionally, OGGMA argues that the Department is selectively

enforcing public access requirements against the Association because other beaches are allowed to be closed at night, or otherwise, from time to time. Id. at 42-44.

Based on the record, I find that OGCMA has not demonstrated a reasonable probability of success on the merits of its claim that the Department has exceeded its public access authority.

First, OGCMA seeks largely to challenge the authority vested in the Department under the Public Access Law and the Department's implementation of the public trust doctrine. While the courts have yet to fully adjudicate a relevant challenge to the Public Access Law,[1] it bears noting that the statute was based on and incorporates over two hundred years of New Jersey caselaw interpreting the public trust doctrine and its applicability in the Garden State. See N.J.S.A. 13:1D-150. The Department nonetheless has broad and preexisting authority to ensure reasonable public access pursuant to CAFRA and the Coastal Zone Management Rules. N.J.S.A. 13:19-5; N.J.A.C. 7:7-9.22(c); N.J.A.C. 7:7-9.48; N.J.A.C. 7:7-16.9(b)(2). And, importantly, both parties agree that the Department, as trustee of State's natural resources, has an obligation to ensure reasonable public access consistent with the public trust doctrine.

Second, OGCMA does not adequately support its argument that the Association's public access restrictions are reasonable. OGCMA summarily argues that the aggregate number of hours per year that the Ocean Grove Beachfront remains publicly accessible justifies the Association's ban on public access for three hours each Summer Sunday. Resp't's Br. 6-10. However, not all hours are equal. There is perhaps no greater demand for public access to New Jersey beaches than during daytime hours on weekends in the summer months. Yet, by its own admission, OGCMA only restricts public access to the Ocean Grove Beachfront during this time of peak demand for

[1] In the matter of Kevin Moran v. NJDEP, OAL DKT. No. ELU 04852-21, 2023 N.J. AGEN. LEXIS 621, Final Decision (Oct 6, 2023), I determined that that P.L. 2019, c. 81 effectively expanded the public trust doctrine. The Moran decision is currently under appeal.

public access, effectively preventing the public from accessing over a half mile of dry sand beach for three daytime hours every Sunday in the summer.

Viewed in context, this case does not appear to be one of reasonably restricting public access "only for a few hours just once in a while," as OGCMA suggests. Id. at 3. Nor are OGCMA's actions akin to those of municipalities who may restrict nighttime access to their beaches in order to protect public safety. While OGCMA's intent to comply with the Public Access Law during the majority of the calendar year is acknowledged, the Association's legal compliance at most times does not justify its illegal violations at other times. On the contrary, that OGCMA claims to afford reasonable public access at all other times only serves to demonstrate that its restrictions on Summer Sundays are not consistent with the public trust doctrine. See Matthews, 95 N.J. at 326 and N.J.S.A. 13:1D-153(a). In sum, as OGCMA has no right to unreasonably restrict public access, ibid., the Association has not demonstrated a reasonable probability of success on the merits of its administrative appeal that would warrant a stay of Departmental enforcement.

OGCMA has similarly failed to demonstrate a reasonable probability of success on the merits with respect to its takings claim. The Association offers no precedent, and I am aware of none, which suggests that Departmental enforcement of reasonable public access constitutes an unconstitutional taking. Cf. Nat'l Ass'n of Home Builders v. N.J. Dep't of Envtl. Prot., 64 F. Supp. 2d 354 (D.N.J. 1999). The absence of such precedent is perhaps owing to the fact that the Department, as trustee of the public's natural resources, including its tidal waters and adjacent shorelines, could not "take" a property right already held by the public by operation of law. As previously noted, the Ocean Grove Beachfront has always been encumbered by the public's right to reasonable access in accordance with the public trust doctrine. Arnold v. Mundy, 6 N.J.L. at 84. Moreover, public record indicates that OGCMA has explicitly granted public access easements to

the Township of Neptune for the property at issue pursuant to Aid Agreements conveying State and Federal funding for beach replenishment that benefits the Association and members of the public alike.

Lastly, OGCMA has not demonstrated a reasonable probability of success on the merits with respect to its free exercise claim. As a threshold matter, "[i]nquiries under [the Free Exercise Clause] are extremely fact sensitive." S. Jersey Cath. Sch. Tchrs. Org. v. St. Teresa of the Infant Jesus Church Elem. Sch., 150 N.J. 575, 587 (1997). It is well-established that "a generally applicable and otherwise valid regulatory law which is not specifically intended to regulate religious conduct or belief and which incidentally burdens the free exercise of religion does not violate the Free Exercise Clause of the First Amendment." Id. at 595. "A law is 'neutral' if it does not target religiously motivated conduct either on its face or as applied in practice." Combs v. Homer-Ctr. Sch. Dist., 540 F.3d 231, 241-42 (3d Cir. 2008) (citation omitted).

In this case, the Public Access Law and the accordant right of public access apply to all tidal waters and adjacent shorelines in New Jersey, whether publicly or privately owned. Matthews, 95 N.J. at 312, 316-24; N.J.S.A. 13:1D-150. The reasonable public access requirements that are the subject of Departmental enforcement here are neutral and generally applicable; these requirements do not target religious conduct on their face or in practice. See Combs, 540 F.3d at 241-42. Indeed, OGCMA does not allege that the Department has acted out of any religious animus toward OGCMA, nor does the Association argue with any specificity that the Department has imposed greater public access obligations upon religious beachfront property owners than upon secular ones. See Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 533 (1993) ("[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral."); Tandon v. Newsom, 593 U.S. 61, 62 (2021) ("[W]hether two

activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue."). Similarly unconvincing is OGCMA's claim of selective enforcement, which the Association again grounds in the flawed conclusion that the extent of unrestricted off-peak public access somehow justifies the Association's peak season restrictions on public access. Resp't's Br. 42-44.

Further, OGCMA does not explain how affording reasonable public access on Sunday mornings in the summer, *i.e.*, the same public access that OGCMA purportedly affords at every other hour of the year, would unduly burden the Association. OGCMA summarily argues that affording reasonable public access on Summer Sundays conflicts with the Association's interests in allowing opportunity for quiet reflection in accordance with its religious beliefs. However, OGCMA has provided no facts demonstrating that the Association's ability to practice its religion has been burdened in any way. For example, despite ample opportunity to present information for the record, OGCMA has not shown how reasonable public access on Summer Sundays has adversely impacted or would adversely impact or limit opportunities for quiet reflection or prayer. While OGCMA implied (for the first time, in a footnote in its reply brief) that the Association holds church services on the Ocean Grove Beachfront during the Summer Sunday restricted hours, the Association provides no facts demonstrating that reasonable public access would impose *any* burden, even an incidental one, upon its religious practice. Resp't's Reply 37 n. 3. Especially given the "extremely fact sensitive" nature of free exercise inquiries, see St. Teresa, 150 N.J. at 587, OGCMA cannot demonstrate a reasonable probability of success on the merits of its First Amendment claim with only threadbare allegations.

While public access to the beachfront does not preclude or interfere with OGCMA's ability to hold church services on the beach, it bears noting that the Association's website indicates that

the Ocean Grove Beach Church is located on the boardwalk, which is not alleged to be subject to any public access restrictions during services on Summer Sundays. Ocean Grove Beach Church, https://www.oceangrove.org/beach-church (last visited May 21, 2024). OGCMA is of course free to enjoy the "unobstructed natural setting" of the beachfront, Resp't's Br. 43, for its religious purposes or otherwise, but the Free Exercise Clause does not grant OGCMA the right to exclude the public from similarly enjoying the beachfront.

Contrary to OGCMA's merits arguments, the Sunday closures likely implicate the Religious Aid and Establishment clauses of the New Jersey State Constitution. See N.J. Const. art. I, ¶ 3 ("[N]or shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship . . . ."); N.J. Const. art. I, ¶ 4 ("There shall be no establishment of one religious sect in preference to another . . . ."). If, as OGCMA seems to assert, beach access must be restricted during certain hours on Sundays to conduct religious church services, the people of New Jersey would effectively be transferring their public trust rights, as well as taxpayer funded beach replenishment resources, to a place of worship. It is of no matter that the beachfront is also used for secular purposes, as this State's Supreme Court recognized in Freedom From Religion Foundation v. Morris County Bd. of Chosen Freeholders, 232 N.J. 543 (2018) ("[F]or most of its existence, the Religious Aid Clause has banned public funding to repair a house of worship without regard to some other non-religious purpose."). The Ocean Grove Beachfront is a public space, which OGCMA or others may use for religious purposes without impairing the rights of the general public. The beachfront is not a publicly funded private place of worship, and treating it as such, as OGCMA appears to argue, would likely violate the New Jersey Constitution.

Accordingly, OGCMA has not demonstrated that it has a reasonable probability of succeeding on the merits of its claims.

II. OGCMA Has Not Demonstrated Irreparable Harm

OGCMA has failed to demonstrate that the Association will suffer irreparable harm if a stay of Department public access enforcement is not granted. OGCMA claims that if the public is allowed access to the Ocean Grove Beachfront from 9:00 a.m. to 12:00 p.m. on Summer Sundays, the Association will suffer irreparable harm to its private property rights. Resp't's Br. 14-19. However, as discussed above, "[t]he Public Trust Doctrine has always been recognized in New Jersey." Van Ness v. Borough of Deal, 78 N.J. 174, 178 (1978). Thus, when the Association took title to the Ocean Grove Beachfront, it did so subject to a right of public access consistent with the public trust doctrine. OGCMA argues that the public's exercise of their access rights would constitute a trespass and adversely affect the Association's quiet enjoyment of its property. Resp't's Br. 14-19. However, these arguments are unpersuasive in light of the long-term encumbrance to which the Ocean Grove Beachfront has been subject and the fact that the Association claims to afford reasonable public access at all other times without alleged detriment. Further, OGCMA's property rights arguments neglect the public's contemporaneous rights to access their natural resources consistent with the public trust doctrine—a principle that too resounds in a right to property and quiet enjoyment. Were an intrusion upon property rights to constitute irreparable harm as OGCMA contends, the public would irreparably suffer if their beachfront access continues to be unreasonably restricted by the Association.

Additionally, there can be no irreparable harm if a party is merely prevented from engaging in otherwise prohibited conduct. See Garden State Equal., 216 N.J. at 321. Here, OGCMA has no right to unreasonably restrict public access to the Ocean Grove Beachfront. By requiring OGCMA

to afford public access consistent with the public trust doctrine, the Department, as trustee, is simply enforcing rights that have always been held by the public.

OGCMA has similarly failed to demonstrate irreparable harm based on its constitutional free exercise claims. Specifically, OGCMA claims that allowing the public to access the Ocean Grove Beachfront from 9:00 a.m. to 12:00 p.m. on Summer Sundays interferes with the Association's ability to allow for quiet reflection in accordance with its religious beliefs. Resp't's Br. 4. However, such harm is merely speculative where, as here, OGCMA fails to demonstrate with any specificity how reasonable public access would adversely impact or be detrimental to any religious exercise such as church services, prayer, or quiet religious meditation. Moreover, if reasonable public access has been restricted on Summer Sundays for the entirety of its ownership as OGCMA claims, the extent to which opportunities for quiet reflection would be affected in the absence of such restrictions is entirely unknown. See ibid. Further, and as discussed above, a neutral law of general applicability that presents only incidental burden on religion or religious practices does not violate the Free Exercise Clause of the United States Constitution. Again, it bears noting that OGCMA has offered no specific facts demonstrating that affording reasonable public access from 9:00 a.m. to 12:00 p.m. on Summer Sundays would impose any burden on the Association's ability to allow for quiet reflection, or why such opportunity would otherwise be unavailable.

As such, OGCMA has not demonstrated irreparable harm.

III. OGCMA Has Not Demonstrated that a Balancing of Hardships Favors a Stay

When balancing the interests in ensuring reasonable public access consistent with the public trust doctrine against any alleged hardship to OGCMA, a stay of enforcement is not warranted. As discussed above, the potential hardship articulated by OGCMA is speculative at

best. Such speculative hardship cannot outweigh the actual harm to the public who would be unlawfully excluded from accessing their public trust resource if reasonable public access was not ensured by the Department, which is duty-bound to enforce the Public Access Law, CAFRA, related permits, and the public trust doctrine for the benefit of all people of New Jersey. As explained above, there is perhaps no greater demand for public access to New Jersey's beachfronts than during daytime hours on weekends in the summer. OGCMA's actions restricting the public from accessing over a half mile of dry sand beach every Sunday morning of every weekend of every summer season is an actual and substantial interference with the public's rights to access, recreate upon, or otherwise make use of tidal waterways and associated shorelines consistent with the public trust doctrine. As such, the balancing of hardships does not support a stay of enforcement.

IV. OGCMA Has Not Demonstrated that a Status Quo Stay is Warranted

Notwithstanding the Crowe factors addressed above, which do not support a stay of public access enforcement, OGCMA contends that a stay is nonetheless necessary to preserve the status quo. Id. at 11-13. OGCMA circularly argues that the Association is entitled to continue restricting access to the Ocean Grove Beachfront from 9:00 a.m. to 12:00 p.m. on Summer Sundays because OGCMA has purportedly restricted public access on Summer Sundays in some form for over 154 years, *i.e.*, since the Association's founding in 1870. Resp't's Reply 2, 37 n. 3.

That "'a court may take a less rigid view' of the Crowe factors and the general rule that *all* factors favor injunctive relief 'when the interlocutory injunction is merely designed to preserve the status quo'" is acknowledged. Waste Mgmt. of N.J., Inc. v. Morris Cty. Mun. Utils. Auth., 433 N.J. Super. 445, 453 (App. Div. 2013) (quoting Waste Mgmt. of N.J., Inc. v. Union Cty. Utils. Auth., 399 N.J. Super. at 520 (emphasis in original). However, OGCMA's admittedly long-term

violations of the public trust doctrine do not entitle the Association to continue violating the law with impunity.

OGCMA's status quo argument implies that the Association's Summer Sunday restrictions on beachfront access are so historically ingrained as to that they are protected from the public trust doctrine. But neither the chains and padlocks most recently erected by OGCMA, nor any other public access restrictions that OGCMA may have exerted over the last 154 years provide the most appropriate point of historical reflection in determining the status quo. We must also look to the even longer standing rights of the public to access and enjoy their tidal waters and adjacent shorelines under the public trust doctrine. These rights, which stemmed from historic Roman jurisprudence and extended to English law, became common to all upon New Jersey's colonization by Britain in 1664, were later vested in the people of the State of New Jersey in 1787 following the American Revolution, further recognized by the New Jersey courts in 1821, abided by since, and most recently, were expanded by the New Jersey Legislature in 2019 under the Public Access Law. See N.J.S.A. 13:1D-150(c).

In short, the public's right to access and enjoy their tidal waters and adjacent shorelines has been the legal status quo for all of New Jersey's 360 years, regardless of whether and to what extent such rights may have been abridged by OGCMA. These public access rights remain of equal force and subject to enforcement even if OGCMA has violated them for all or a portion of its 154 years.

As the public's "longstanding and inviolable rights under the public trust doctrine," N.J.S.A. 13:1D-150(a), to access New Jersey's beachfronts represent the overriding status quo, OGMCA has not demonstrated its entitlement to a stay of enforcement on this basis.

CONCLUSION

For all of the foregoing reasons, I find that OGCMA has not demonstrated that a stay of Departmental enforcement of applicable public access requirements is warranted in this matter.

Accordingly, OGCMA's request for a stay is **denied**.

IT IS SO ORDERED.

Dated: May 21, 2024

Shawn M. LaTourette, Commissioner
Department of Environmental Protection