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January 7, 2008

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RE: **Bernstein and Paster v. Ocean Grove Camp Meeting Association**
DCR Docket No. PN34XB-03008
Moore and Sonnessa v. Ocean Grove Camp Meeting Association
DCR Docket No. PN34XB-03012

Dear Counsel:

The Director of the New Jersey Division on Civil Rights (Division) has considered the parties' submissions regarding the motions to dismiss filed by Ocean Grove Camp Meeting Association (Respondent or OGCMA). For the reasons discussed below, Respondent's motions are denied.

These matters arose when verified complaints were filed with the Division by Janice Moore and Emily Sonnessa and by Harriet Bernstein and Luisa Paster (Complainants), alleging that Respondent denied each couple use of its boardwalk pavilion based on their impending civil union status in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. The Division commenced an investigation, and prior to receipt of Respondent's written answers to the



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complaints,¹ the parties attempted to resolve the complaints through the Division's mediation program. After mediation failed, Respondent filed answers denying the allegations of unlawful discrimination, and simultaneously filed the within motions .

In support of its motions, Respondent argues that Complainants have failed to state a claim under the LAD, asserting that its rental of the pavilion is exempt from the LAD's prohibition against discrimination in rental of real property, and that the pavilion is not a public accommodation as defined by the LAD. In addition, Respondent argues that the complaints should be dismissed based on the First Amendment to the U.S. Constitution.

Initially, there is no merit to Respondent's argument that these matters should be dismissed under the LAD's exemption permitting a religious organization to select tenants or lessees for real property in a manner calculated to promote its religious principles, N.J.S.A. 10:5-5(n). First, the question of whether Respondent meets the definition of a religious organization is unclear, and must be addressed during the Division's investigation.² Moreover, based on the events as presented by Complainants, which are undisputed in all material respects by Respondent, the transaction in question is governed by the LAD's provisions for places of public accommodation, N.J.S.A. 10:5-12(f), rather than the sections governing the rental or lease of real property, N.J.S.A. 10:5-12(g) or (h).

Decisions of the New Jersey courts have made it clear that the LAD's protections for real estate leases and rental agreements are not intended to cover contracts for the use of facilities and/or services merely because the agreements convey the right to use all or part of a building or other piece of real estate.³ Court decisions addressing the use of motel rooms, banquet or meeting halls,

¹ Shortly after being served with the verified complaints, Respondent filed a federal court action against the Division Director, but not Complainants, relating to the DCR complaints in this matter. That federal action was pending at the time the within motions were filed. Respondent's request for preliminary relief was denied on October 4, 2007, and the U.S. District Court dismissed the complaint by order dated November 5, 2007. Respondent has filed appeals of both of those rulings.

² Although, as Respondent notes, in State v. Celmer, 80 NJ 405, 416 (1979) cert. denied 444 U.S. 951, the New Jersey Supreme Court found the OGCMA to be a religious organization, that was a factual determination based on the nature of the organization from its founding up to that time - now almost thirty years ago. In Celmer, the Court made its determination preliminary to concluding that a State statute giving Respondent police powers was an unconstitutional establishment of religion. That ruling may be substantial evidence that Respondent is currently a religious organization, however, it is not necessarily dispositive. Evidence of subsequent changes, such as those relating to Respondent's relationship with and funding by government entities, may demonstrate that Respondent is no longer a religious organization. This issue must be addressed during the Division's investigation.

³ Even if the real estate provisions of the LAD were implicated here, the exemption for religious organizations is not as broad as Respondent contends. As noted by the New Jersey Supreme Court shortly after the enactment of the LAD's real estate discrimination provisions, "...the statute does not exempt all sales or rentals of real property owned by a religious organization, but only those which are 'calculated by such organization to promote the religious principles for which it is established or maintained.' This limitation narrows the scope of the exception to transactions which are noncommercial in nature." David v. Vesta, 45 N.J. 301, 317 (1965). Based in part on the limited nature of this exemption for religious

and resort facilities have applied the public accommodation provision of the LAD, rather than the provisions applicable to rental of real property. See, e.g., Director, Division on Civil Rights v. Slumber, Inc., 166 N.J. Super. 95, 98-99 (App. Div. 1979), modified on other grounds, 82 N.J. 412 (1980) (rental of hotel rooms is subject to the public accommodation provisions of the LAD); Evans v. Ross, 57 N.J. Super. 223 (App. Div. 1959), certif. denied 31 N.J. 292 (rental of banquet or meeting room facilities are subject to public accommodation provisions of the LAD); Franek v. Tomahawk Lake Resort, 333 N.J. Super. 206, 210 (App. Div. 2000), certif. denied 166 N.J. 606 (privately-owned recreational resort facility offered to the public for activities such as family picnics is subject to the public accommodations provisions of the LAD). The pavilion rental at issue here is no different than rental of a banquet room or similar facility for an event, and is subject to the same provision of the LAD.

Evaluating these matters under the appropriate section of the LAD, N.J.S.A 10:5-12(f), will require a determination as to whether Respondent's pavilion rental is a public accommodation subject to the LAD's anti-discrimination provisions, or is exempt as a program which is distinctly private. The answer to this question turns on factual issues that are appropriately addressed during the Division's investigation. Although Respondent cites the Appellate Division's holding in Wazeerun-Din v. Goodwill Home and Missions, Inc., 325 N.J. Super. 3 (App. Div. 1999), for the proposition that churches and religious programs and activities are not public accommodations subject to the LAD, it is far from clear that Respondent meets the definition of a church or similar religious organization. Moreover, the Wazeerun-Din decision addressed the question of whether a specific addiction therapy program operated by Goodwill Missions was religious in nature, and explicitly noted that the court did not need to reach the question of whether other programs operated by that religious evangelical society would be considered public accommodations because they were secular in nature. 325 N.J. Super. at 13. Here, the investigation must determine whether the specific program or activity in question - Respondent's pavilion rental - is religious or secular in nature.⁴

Similarly, Respondent's First Amendment defenses cannot be properly evaluated without additional fact-finding. Respondent argues both that Complainants' claims abridge its First Amendment right to expressive association, and that Complainants' claims pose a substantial burden on its First Amendment right to free exercise of religion. Both of these defenses turn on the nature of the activity Complainants claim is discriminatory. Respondent argues that use of its boardwalk pavilion for civil union ceremonies would abridge its right to expressive association, more specifically, its right to use the pavilion to convey a message consistent with its religious principles and its right to refrain from conveying a message inconsistent with those principles. Evaluating this defense will require a determination as to whether Respondent's pavilion rental is expressive activity or non-expressive activity. If it is expressive activity, the investigation must then determine whether

organizations, the Court in David rejected an equal protection challenge to the newly enacted property discrimination law, concluding that there was a rational basis for exempting a narrow range of real estate transactions from the reach of the LAD. Ibid.

⁴ In its reply brief, Respondent inaccurately frames the issue as whether the pavilion is or is not public property. The reach of the LAD is not limited to public property. The applicability of the LAD instead turns on whether the enterprise, facility or service, whether privately or publically owned, is offered for use of the public, or is instead limited to members of the private club or other selective organization.

Complainants' civil union ceremonies are expressive activities that interfere with Respondent's right to convey its religious message or its right to refrain from conveying a conflicting message. In Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 567-568, 570 (1995), cited by Respondent, the Supreme Court made it clear that a determination as to the expressive nature of both parties' activity is a pre-requisite to properly evaluating a free exercise defense. In Hurley, the organizers of a St. Patrick's Day-Evacuation Day parade sought to exclude an organization of gays and lesbians of Irish ancestry from participating in the parade. The Court found that this type of parade by its nature constitutes expressive activity, and that the gay/lesbian organization's proposed participation in the parade was equally expressive, in part because the unit was formed precisely for the purpose of showing that there were Irish gays and lesbians in the community, and to support a similar group who sought to march in New York. Whether the activities here are expressive in nature is far from clear. Respondent has not presented evidence to show how use of its pavilion constitutes expressive activity, instead relying merely on its contention that it has a right to convey its religious message. Unlike the parade march in Hurley, the Complainants' proposed activity - - the gathering of a select group of invited guests to witness and celebrate the private civil union ceremony of a couple - - may have a non-expressive purpose. To the extent that the investigation may disclose that Respondent's use of its pavilion constitutes a form of expression, Respondent has thus far presented no evidence to demonstrate that Complainants' use of the pavilion would interfere with Respondent's expressive activity.

Respondent also cites Boy Scouts of America v. Dale, 530 U.S. 640 (2000), in support of its contention that use of its pavilion for civil union ceremonies interferes with its right to expressive association. In Dale, the Court held that the Boy Scouts organization engaged in expressive association by virtue of its mission to instill a specific value system on participating scouts, and that homosexual conduct was inconsistent with the Boy Scouts' avowed value system. Id. at 650, 655. The Court concluded that, as a gay rights activist, Dale's service as a scoutmaster within its organization would force the Boy Scout organization to send a message that homosexual conduct is acceptable. Id. at 655. Here, it has not yet been determined whether Complainants seek membership in or association with Respondent's organization, or whether their roles as one-time or occasional users of Respondent's property present images or messages that would reflect on Respondent. Respondent has so far presented no evidence that would demonstrate that Complainants' presence in its boardwalk pavilion sends a message (either consistent or antagonistic) that could interfere with any message Respondent seeks to convey.

To the extent that Respondent may wish to present evidence demonstrating that Complainants' use of its pavilion for their civil union ceremonies constitutes expressive activity, and that Complainants' message seriously impairs its own desired message, it is appropriate for such evidence to be presented and evaluated during the Division's investigation.

Finally, Respondent argues that permitting Complainants to hold their civil union ceremonies in its boardwalk pavilion would substantially burden its right to free exercise of religion. The question of whether Respondent's free exercise rights would be unconstitutionally burdened cannot be answered without first determining whether Respondent's pavilion rental is religious or secular in nature. That is a fact-dependent determination, which must be addressed during the Division's investigation. As noted by Complainants, if the Division failed to make such a determination, it

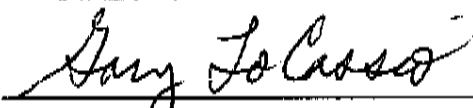
would risk violating the establishment clause of the First Amendment by providing a blanket exemption from the law based on the asserted religious nature of an organization. The investigation will need to determine whether Respondent is a religious organization, whether the OGCMA's overall use of the boardwalk pavilion constitutes religious activity and whether its pavilion rental is a religious activity. The Division's investigation of these matters in no way interferes with Respondent's free exercise of religion.

For all of the foregoing reasons, Respondent's motions to dismiss are denied.

Very truly yours,

J. FRANK VESPA-PAPALEO, ESQ.

DIRECTOR

By: 

Gary LoCassio

Assistant Director