OCCUPY NEW JERSEY & ALEXANDER HIGGINS, Plaintiffs, v. RAYMOND L. ZAWACKI, et al., Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION Docket No. MER- Civil Action

DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO TRANSFER MATTER TO APPELLATE DIVISION PURSUANT TO R. 1:13-4 AND IN OPPOSITION TO PLAINTIFFS' ORDER TO SHOW CAUSE

PAULA T. DOW
ATTORNEY GENERAL OF NEW JERSEY
25 Market Street, PO Box 112
Trenton, New Jersey 08625-0112
Attorney for Defendants

By: Robert Lougy
Assistant Attorney General
ROBERT.LOUGY@DOL.LPS.STATE.NJ.US
609-599-6868

Robert Lougy
Assistant Attorney General
Of Counsel and On the Brief

Susan Scott
Deputy Attorney General
On the Brief

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PRELIMINARY STATEMENT

The people of this State have seen fit to finance and build a memorial to the veterans of World War II in honor of their selflessness and sacrifice. To ensure that the Memorial is maintained, preserved, and accessible to the public, Defendants have established reasonable guidelines and taken reasonable steps applicable to these plaintiffs and others.

Plaintiffs come before this Court, sitting in equity, for an order requiring the State to permit them to leave items both unattended and unknown strewn about a public memorial, to co-opt public space into their living space, and to displace, denigrate, and endanger the use and enjoyment of the memorial and surrounding environs by others. Defendants urge this Court to deny them such incredible and unwarranted relief.

First, in asserting their challenges to actions of State agencies, plaintiffs are bound to pursue their claims in the Appellate Division. The Rules of Court command no less. Accordingly, this Court should decline to entertain plaintiffs' claims and transfer this action to the Appellate Division.

Second, in every respect, Defendants have satisfied all relevant constitutional provisions. On behalf of the State of New Jersey, they have acted consistent with the rights of any landowner to preserve and maintain their property. Above and beyond that, moreover, they have fully respected those rights

afforded plaintiffs by the Article I, paragraph 6 of the New Jersey Constitution. In gathering abandoned items from a public site, they have effectuated neither a seizure nor a search of property over which plaintiffs asserted neither ownership nor control despite the opportunity to do so.

Third, the balance of the factors relevant to injunctive relief weighs heavily against plaintiffs. The guidelines challenged here impose reasonable and necessary restrictions on non-expressive conduct and items that actually or potentially threaten public safety, accessibility, and enjoyment.

This action belongs in the Appellate Division. In any court, however, it does not warrant the granting of any injunctive relief. Accordingly, this Court should deny plaintiffs' pleas to the contrary.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

On May 4, 2004, by Executive Order #107, Governor James E. McGreevey established the World War II Memorial Commission. Exec. Order 107 (McGreevey 2004). Governor McGreevey determined that a State memorial was a fitting tribute to acknowledge and honor the over twelve thousand citizens from New Jersey that lost their lives fighting for their country during World War II, and the countless others who were wounded in or endured the hardships of the conflict. Ibid.; Zawacki Cert., ¶ 3. As a result, the World War II Memorial ("Memorial"), located on West State Street, directly across from and within 100 feet of the State House Complex, in Trenton, New Jersey, was developed. Exec. Order #107 (McGreevey 2004); Zawacki Cert., ¶ 2; Brosnan Cert., ¶ 2. The Memorial "stand[s] as a timeless reminder of the heroism, spirit, sacrifice, patriotism and commitment of those who defended this country and of the moral strength and power of a free people who are united in a common and just cause." Exec. Order #107 (McGreevey 2004); Zawacki Cert., ¶ 4.

The property on which the Memorial is located is state-owned, and DMAVA maintains custodial responsibilities for the Memorial. Zawacki Cert., ¶ 2; Brosnan Cert., ¶ 1; Lougy

[1] Because the procedural and factual histories in this matter are closely intertwined, they have been combined here for purposes of clarity and for the convenience of the Court.

Cert., Ex. A. As custodians of the Memorial, DMAVA must ensure the right of accessibility to all members of the general public, address the safety of those who wish to enjoy the Memorial, and maintain the aesthetic value of the site. Zawacki Cert., ¶ 5. To that end, DMAVA has never permitted behavior at the Memorial that would detract from its intended purpose of honoring those who have served and sacrificed in World War II. Zawacki Cert., ¶¶ 2, 6.

For example, DMAVA has never has never permitted camping at the site, as tents, coolers and other items would interfere with the nature of the Memorial as a public celebration honoring the sacrifice of the men and women of New Jersey. Zawacki Cert., ¶ 6. Likewise, DMAVA has strictly prohibited the general public from erecting any temporary or permanent structures at the Memorial. Id. at ¶ 7. Nor has DMAVA permitted the general public to affix or attach anything to the walls of the Monument. Id. Moreover, patrons of the Memorial are required to attend to items of personal property which are brought to the Memorial, and unattended items are considered to be abandoned or trash. Id.

DMAVA maintains electrical outlets at the Memorial; however, they are not for public use. Id. at ¶ 8. Rather, the electrical outlets are for the use of those officially authorized to operate maintenance equipment related to the

upkeep of the property and for other official activities in keeping with the Memorial's public purpose. Id. DMAVA does not permit visitors to use the Memorial's outlets to operate their personal electronic devices or other equipment. Id. Furthermore, the use of power generators by members of the public poses a safety concern and is inconsistent with the peaceful enjoyment of the Memorial. Id.

The State Police are responsible for providing security for over sixty state building and grounds, including the Memorial, as the property on which the Memorial is located is state-owned. Brosnan Cert., ¶ 1. The Memorial is easily accessible from nearby streets and roads, with no fence or other barrier that encompasses the perimeter of the Memorial. Id. at ¶ 2. As a consequence, the site afford the State Police no practical way to control who enters and leaves the site. Id.

On October 4, 2011, Captain Brosnan learned that plaintiffs were planning demonstrations in both Jersey City and in Trenton to begin on October 6, 2011, which were to be similar to or associated with Occupy Wall Street. Id. at ¶ 4. Therefore, he placed a number of State Police on standby to ensure that there would be adequate security for the demonstrations. Id.

On October 6, 2011, at approximately 2:00 p.m., plaintiffs began congregating at the Memorial located on West

State Street, directly across from the State House. Id. at ¶ 5. Approximately twenty participants arrived on site and began a demonstration. Id. At this time, plaintiffs possessed only a few signs, drums, chairs, and computer equipment. Ibid. Plaintiffs were holding the signs and none were left unattended. Ibid. There were no large items such as furniture and coolers on site. Ibid.

State Police monitored the activity of plaintiffs to maintain security at the site. Id. at ¶ 6. The security is necessary to ensure the safety of all persons who either participate in the demonstrations or are in close proximity to the demonstration. Ibid. Those persons include demonstrators, spectators, members of the public, persons seeking access to buildings in the area, and persons who work or live in the area surrounding the Capital Complex. Ibid.

At 6:30pm, State Police asked plaintiffs if they would be willing to accept a permit for the purpose of demonstrating on State Capital Complex grounds. Id. at ¶ 7. State Police made that request because they are better able to ensure the safety and security of demonstrators protesting under a permit on Capital Complex grounds because the permit provides the State Police adequate information regarding the number of participants and the items that they are utilizing or intend to use in their demonstration. Ibid. However, plaintiffs declined. Ibid.

During this conversation, State Police observed that plaintiffs were using electricity from an outlet located on the Memorial. Id. at ¶ 8. State Police advised plaintiffs to cease the use of any electricity on the site and explained that the electricity was intended only to power maintenance equipment at the Memorial. Ibid. As the State pays the utility bills for the Memorial, general public use of the Memorial's outlets is prohibited. Ibid. Therefore, State Police advised plaintiffs that the use of electricity for general public consumption is strictly forbidden on the site and that further attempts to use the outlets would require law enforcement action. Id.

Between October 8 and 10, 2011, State Police periodically monitored the safety of and public access to the Memorial. Id. at ¶ 9. State Police observed that plaintiffs had set up several sleeping tents during the night and that several plaintiffs slept throughout the night on the Memorial. Id.

The plaintiffs' closed tents present special security problems as they provide an opportunity for persons to conceal weapons, explosives or other hazardous materials. Id. at ¶ 10. Because the Memorial is easily accessible from nearby streets and roads, persons other than plaintiffs would have an opportunity to use the tents to conceal dangerous items. Id.

This makes it more difficult for the State Police to adequately monitor the site. Id.

On October 11, 2011, plaintiffs brought multiple cushions, an inner tube, a table set up as a "food station," a "medical station," and several laptop computers to the Memorial. Id. at ¶ 11, Ex. A. Additionally, there were multiple signs that were scattered on the ground and blowing into the street. Id. Plaintiffs continued to use the Memorial's electrical outlets, despite previous instruction to not do so. Id. at ¶ 12. At this time, plaintiffs had covered the extension cords and the outlet box with mulch in an attempt to conceal their use of the outlets. Id. Plaintiffs continuously disregarded instruction for proper use of the War Monument. Id.

Additionally, the numerous large items brought by plaintiffs physically blocked public access to the Memorial and obstructed the public's use and enjoyment of the Memorial. Id. at ¶ 13. Captain Brosnan even received a complaint from a local business person that plaintiffs were urinating in public behind the memorial. Id.

The large amounts of equipment and materials that had arrived on site presented significant safety and health concerns given the Memorial's proximity to the State House Complex. Id. at ¶ 14. None of the articles at the site had been screened for safety. Id. Such items provide an opportunity for persons to

conceal dangerous items, such as weapons, explosives, and hazardous materials. Id. Because the Memorial is easily accessible from nearby streets and roads, persons other than plaintiffs would have an opportunity to use the articles to conceal dangerous items. Id.

By October 12, 2011, the kinds and amount of material and equipment on site increased further. Id. at ¶ 15. For example, tarps were placed throughout the Memorial, numerous coolers and large "Tupperware" type bins were scattered through the site. Id. Plaintiffs had erected an eight foot by eight foot canopy-type structure and several sleeping tents. Id. There was also an old couch on site. Id. In addition, plaintiffs were now operating a generator, with a gasoline can located directly next to it. Id.

By this time, the expansion of the kinds and amount of material on site created significant safety concerns, particularly in light of the site's proximity to the State Capitol building. Id. at ¶ 16. Items such as coolers, containers, and tents can easily be used to conceal dangerous items. Id. None of these items had been screened for safety. Id. Moreover, because of the fluid nature of the demonstration, the State Police had no way of knowing who was coming on site and what additional items might be brought on site. Id.

Because of growing public safety concerns, at approximately 8:00am on the morning of October 12, State Police advised the group to take down the sleeping tents and the canopy structure. Id. at ¶ 17. Plaintiffs removed the tents, but not the canopy structure as requested. Id. Later that day, DMAVA's private contractor turned off the power to the outlets at the memorial. Id.

On October 13, 2011, DMAVA notified the State Police that the plaintiffs' expanding use of the site into a permanent-looking campground was, among other things, interfering with public access to the Memorial. Id. at ¶ 18, Ex. B. DMAVA provided a letter to the State Police outlining DMAVA's guidelines for use of the site. Id. at ¶ 18; Lougy Cert., Ex. B. At approximately 4:30 p.m., the State Police explained DMAVA's guidelines for the use of the site to plaintiffs. Id. at ¶ 19. Consistent with the guidelines established by DMAVA, State Police advised plaintiffs that they were welcome to continue their demonstration at the site, but in doing so they would be allowed to have in their possession only items pertaining to personal sustenance, or signs, placards, etc. being held or attended. Id. These guidelines are consistent with the rules applicable to demonstrations on the State Capital Complex grounds. Id. These basic rules ensure the safety and security of demonstrators, the public, and State property. Id.

Captain Brosnan advised the group that they had until 5:30 p.m. to comply with these rules. Ibid.

At 5:30 that evening, Captain Brosnan returned to the site, accompanied by Lieutenant Richard Finneran. Id. at ¶ 20. Captain Brosnan again advised plaintiffs that all unattended items and camping equipment must be removed. Ibid. Plaintiffs stated that they were trying to gather some support to accomplish the task. Ibid. For example, they were looking to a local food bank to take the excess food. Ibid. In light of plaintiffs' reasonable efforts to comply with the direction provided, Captain Brosnan advised them that the State Police would give them more time before taking any action. Ibid.

Captain Brosnan returned to the site with Lt. Finneran at approximately 7:00pm that evening. Id. at ¶ 21. He again advised plaintiffs that all unattended items and camping equipment must be removed. Ibid. Although plaintiffs had made progress in removing items, numerous coolers, bins, tarps, blankets, pillows, cushions, etc. remained on site. Id. at ¶ 21, Ex. B. Captain Brosnan offered to plaintiffs the use of a parking space that was well-lit and monitored via security cameras to store any excess equipment until the next day, when plaintiffs could make proper arrangements for removal of these items. Ibid. at ¶ 21. Plaintiffs declined this offer. Ibid. Thus, Captain Brosnan advised them that they would be given

until 12 noon the following day to remove any unattended items and that anything unattended would be considered abandoned and subsequently removed. Ibid.

On October 14, 2011, Captain Brosnan and other State Police officers returned to the site at several times throughout the morning and observed two piles of equipment and numerous signs left unattended. Id. at ¶ 22, Ex. C. They provided warnings at 8 a.m., 9 a.m., and 10 a.m. that any unattended equipment or signs would be considered abandoned and subsequently removed. Id. at ¶ 22.

At 12:30 p.m., the independent contractor who oversees the maintenance of the Memorial arrived to remove all unattended/abandoned items. Id. at ¶ 23. These items were transported to a Department of Treasury warehouse for storage. Id. Those plaintiffs in attendance were advised that any abandoned items could be claimed at the warehouse during business hours any time that day, or Monday or Tuesday of the following week. Id. These items remain at the warehouse and can still be claimed, thought these items cannot be held there indefinitely. Brosnan Cert., ¶ 23; Lougy Cert., Ex. C.

To date, the State Police have conducted numerous checks of the World War II Memorial. Brosnan Cert., ¶ 24. State Police regularly remind plaintiffs of DMAVA's guidelines for use of the Memorial. Ibid. Nonetheless, unattended items

remain at the site. Brosnan Cert., ¶ 24, Ex. C. Photos taken October 17, 2011, illustrate plaintiffs' non-compliance with guidelines established to ensure the public safety. Id. The continuing need to monitor the site and remind plaintiffs of these guidelines is becoming a significant drain on limited State Police Resources. Brosnan Cert., ¶ 24. The Office of State Governmental Security has responsibility for approximately sixty state buildings and grounds in Trenton. Id. The need to continually return to this site hampers the State Police's ability to respond to emergencies and perform its other duties throughout Trenton. Id.

ARGUMENT

Point I

THE COURT SHOULD NOT CONSIDER PLAINTIFFS' STAY APPLICATION BECAUSE THIS MATTER PROPERLY BELONGS IN THE APPELLATE DIVISION.

The Constitution and the Rules of Court assign resolution of Plaintiff's claims to the Appellate Division because they challenge the informal actions of DMAVA, a State agency. Accordingly, this Court should transfer this matter to the Appellate Division pursuant to R. 1:13-4.

To address various procedural complexities and injustices that resulted from the use of prerogative writs to contest agency action or inaction, the 1947 Constitution declared that the relief previously provided by the writs would

instead be afforded by the Superior Court "on the terms and in the manner provided by the Rules of the Supreme Court." N.J. Const. art. VI, § 5, ¶ 4; Central R.R. v. Neeld, 26 N.J. 172, 184, cert. denied, 357 U.S. 928 (1958). Since 1948, when the Supreme Court adopted the first court rules implementing this constitutional mandate, the rules have vested the review of action or inaction of State agencies in the Appellate Division. DeNike v. Board of Trustees, etc., Retirement System, 62 N.J. Super. 280, 184-85 (App. Div. 1960), aff'd, 35 N.J. 430 (1961). As the DeNike court observed: "it is only the identity of the defendant that determines whether one division or the other has jurisdiction": "if the defendant is a state agency, plaintiff should proceed in the Appellate Division." Id. at 291.

R. 2:2-3(a) embodies that principle. The Rule provides in pertinent part:

> Except as otherwise provided by R. 2:2-1(a)(3) (final judgments appealable directly to the Supreme Court), . . . appeals may be taken to the Appellate Division as of right . . . (2) to review final decisions or actions of any State administrative agency or officer . . . .
>
> [Ibid. (emphasis added).]

The allocation of judicial review to the Appellate Division of the actions of State officers is exclusive, regardless of the nature of the action or the relief sought. In Mutschler v. Department of Environmental Protection, 337 N.J.

Super. 1 (App. Div.), certif. denied, 168 N.J. 292 (2001), the Appellate Division emphasized that the "Appellate Division's exclusive jurisdiction does not turn on the theory of the challenging party's claim or the nature of the relief sought." Id. at 9. A trial court, it noted, lacks jurisdiction to review the actions of State agencies, id. at 8-9, and, furthermore, has the "responsibility" to transfer to the Appellate Division a challenge to the action of a State agency. Id. at 10.

The Supreme Court has rejected variations from this principle. In Infinity Broadcasting Corp. v. New Jersey Meadowlands Commission, the Supreme Court nullified a judicially-created "single locality" exception that allowed actions against those State agencies that had only local jurisdiction to be brought in the Law Division. 187 N.J. 212, 224 (2006). Noting that exceptions to the clear provisions of R. 2:3-2(a)(2) led to inconsistent results and unnecessary confusion, id. at 225, the Court "reaffirm[ed] once more the basic tenet of appellate jurisdiction that, save for condemnation or inverse condemnation actions, appeals from state agency actions lie in the Appellate Division." Ibid.

Accordingly, because plaintiffs here challenge DMAVA's determination to preclude the accumulation of items either unattended or otherwise inconsistent with ensuring the Monument's accessibility to the public, maintaining its

aesthetic value, and furthering basic precepts of public safety, this Court should transfer this matter to the Appellate Division.

Point II

THE COURT MUST DENY PLAINTIFFS' ORDER TO SHOW CAUSE BECAUSE THEY CANNOT ESTABLISH A REASONABLE LIKELIHOOD OF SUCCESS ON THE MERITS AND THE WEIGHT OF LEGAL AUTHORITY IS CONTRARY TO THEIR CLAIMS.

The court should deny plaintiffs' request for injunctive relief because their claims fail to satisfy the four-prong test established by the Supreme Court in Crowe v. DeGioia, 90 N.J. 126 (1982). The State, like any landowner, is able to govern the use of its property against uses inconsistent with the property's intended use and contrary to the property's preservation, aesthetic value, and enjoyment by others. In such a context, where the State acts in its proprietary rather than regulatory capacity, the Administrative Procedures Act is inapplicable. The State's legitimate and substantial interest in maintaining cultural and historical institutions demand that the State not stand idly by while Plaintiffs subject the Monument to uses and misuses for which it was never intended. Plaintiffs' due process arguments to the contrary are without merit. Moreover, the State's actions do not implicate the rights granted by Article I, paragraph 6 or plaintiffs' freedom of expression in any way. Accordingly, plaintiffs cannot

demonstrate a reasonable likelihood of success and fall far short of establishing irreparable harm.

A stay is "an extraordinary equitable remedy utilized primarily to forbid and prevent irreparable injury, and it must be administered with sound discretion and always upon consideration of justice, equity, and morality in a given case." Zoning Bd. of Adjustment v. Serv. Elec. Cable Television, 198 N.J. Super. 370, 379 (App. Div. 1985) (citing N.J. State Bar Ass'n v. N. N.J. Mortgage Assocs., 22 N.J. 184, 194 (1956); Citizens Coach Co. v. Camden Horse R.R. Co., 29 N.J. Eq. 299, 303 (1878)). Courts properly require a "strong showing of necessity" prior to considering such relief. A.O. Smith v. FTC, 530 F.2d 515, 527 (3d Cir. 1976). "Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative." In re Resolution of State Comm'n of Investigation, 108 N.J. 35, 46 (1987) (quoting Eccles v. Peoples Bank, 333 U.S. 426, 431 (1948)).

The party seeking a stay must establish each of the factors in the well-established test: (a) a reasonable likelihood of success on the merits; (b) that the moving party's legal rights underlying the request for relief are well-settled; (c) that the moving party will suffer irreparable harm if the stay is not granted; and (d) that, upon a balancing of the

relative hardships, the harm to the movant from denial of the relief requested outweighs the damage to other parties from granting the relief, and that the public interest supports granting the relief requested. Glassboro v. Gloucester Cty. Bd. of Chosen Freeholders, 98 N.J. 186, 191 (1984); Crowe, supra, 90 N.J. at 132-34. The grant of a stay is not a matter of right even if irreparable injury might result. Rather, such extraordinary relief involves the most sensitive exercise of judicial discretion. Virginia Ry. v. United States, 272 U.S. 658, 672 (1926); Crowe, supra, 90 N.J. at 132.

a. DMAVA's guidelines governing the use of its property are reasonable and thus fully comport with due process.

DMAVA's reasonable guidelines for the use of the Memorial property are not "rules" or "regulations" as contemplated by the New Jersey Constitution or the New Jersey Administrative Procedure Act ("APA"), N.J.S.A. 52:14B-1 et seq. Article 5, Section 4, Paragraph 6 of the New Jersey Constitution provides that

> No rule or regulation made by any department, officer, agency or authority of this state, except such as relates to the organization or internal management of the State government or a part thereof, shall take effect until it is filed either with the Secretary of State or in such other manner as may be provided by law.

The APA defines an administrative rule as any "agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency." N.J.S.A. 52:14B-2(e). DMAVA's guidelines do not "implement or interpret law or policy," nor do they "describe the organization, procedure or practice requirements" of DMAVA. Most importantly, the guidelines do not effectuate DMAVA's regulatory jurisdiction, implement legislative policy, or discharge DMAVA's statutory duty. See Coalition for Quality Health Care v. N.J. Dep't of Banking & Ins., 348 N.J. Super. 272 (App. Div. 2002).

Rather, the State, through DMAVA, acted in its proprietary, rather than regulatory function. "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." Adderley v. Florida, 385 U.S. 39, 47 (1966); see also Safari Club Int'l v. New Jersey Dep't of Environmental Prot., 373 N.J. Super. 515, 521 (App. Div. 2004) (finding that in issuing notice directing the closures of all lands owned, managed, or controlled by Department of Environmental Protection to bear hunting, Commissioner of Environmental Protection "was exercising the same authority as any other private or public landowners to control the use of its land.") "The United States Constitution does not forbid a State to control the use of its

own property for its own lawful nondiscriminatory purpose." Adderley, supra, 385 U.S. at 48. Such control over the use of a State's property for it own lawful nondiscriminatory purpose may be reasonably exercised. Safari Club Int'l, supra, 373 N.J. Super. at 521.

Here, DMAVA was acting with the same proprietary authority of any private or public landowner to establish guidelines for the use of the Memorial site. The New Jersey Constitution and the APA does not require an agency to engage in rule-making to simply maintain and protect the property under their care. It is absurd to suggest that DMAVA as the responsible agency for the Memorial is required to enact rules or regulations under the APA to maintain the Memorial property. A state agency is not required to engage in rule-making to keep its property free from debris, abuse, and misuse. DMAVA no more needed to enact rules or regulations under the APA governing the use of the Memorial site then it does to sweep up cigarette butts or pick up lost and found or abandoned property. These types of agency actions do not constitute "rules" or "regulations" under the New Jersey Constitution or the APA. Therefore, DMAVA was not required to comply with the APA when implementing property use guidelines to preserve the property under its control. The contrary conclusion would leave state

property subject to unforeseen abuses simply because they were unforeseen.

Plaintiffs' reliance on Woodland Private Study Group v. State of New Jersey, 109 N.J. 62 (1987), and Metromedia v. Division of Taxation, 97 N.J. 313 (1984), is based upon the false premise that DMAVA's action meets the definition of "rule making" under the APA. Only where the agency's actions effectuate the agency's regulatory jurisdiction, implement legislative policy, or discharge the agency's statutory duty, would an analysis under Metromedia be required to determine if the action constituted rule making under the APA. See Coalition for Quality Health Care, supra, 348 N.J. Super. at 294-295. However, as set forth above, DMAVA's property use guidelines was nothing more than the actions of a public landowner exerting control over the use of the State's property. Therefore, provided DMAVA's property use guidelines are not arbitrary and capricious, they are not prohibited by the Constitution or invalid under the APA.

DMAVA's guidelines for the use of the Memorial are reasonable. DMAVA is responsible for the care and maintenance of the Memorial. In carrying out that responsibility, DMAVA implemented reasonable guidelines governing the use of the Memorial site to protect the public, the accessibility of the Memorial, and to maintain the safety, condition, and aesthetic

value of the Memorial. As such, DMAVA acted pursuant to its proprietary authority to preserve and protect the Memorial for the use to which is was lawfully dedicated, a memorial to World War II. The photographs submitted along with Captain Brosnan's certification, as well as the citation provided by plaintiffs' counsel to "You Tube," demonstrate that DMAVA's property use guidelines are not only reasonable but indeed necessary. The images show unattended property, such as camping gear, pillows, blankets, etc. and trash were strewn upon and about the Memorial. Brosnan Cert., Exs. A-D. Accordingly, the guidelines were implemented in response to an abuse of the Memorial property and were not arbitrary or capricious.

The enforcement of DMAVA's property use guidelines by removing all unattended or prohibited items from the Memorial did not violate plaintiffs' due process rights. DMAVA's property use guidelines were read to plaintiffs on October 13, 2011, at approximately 4:30 p.m. Brosnan Cert., ¶ 19. Thus plaintiffs were afforded with notice that, although they were permitted to stay at the Memorial and exercise their First Amendment rights of expression, all property must be attended. Ibid. In addition, State Police notified plaintiffs as to what items were prohibited at the Memorial. Ibid.

Despite six separate notices that all unattended property and prohibited items not removed from the Memorial

would be considered abandoned and subsequently removed, and being given until 12:30 p.m. on October 14, 2011 to remove such items, there were two piles of unattended property and numerous signs that had been left at the Memorial. Id. at ¶¶ 19-22. The failure of anyone to assert ownership or control over the items taken or remove the prohibited items only supports the position that these items were unattended and abandoned. As a result, the independent contractor who oversees the maintenance of the World War II Memorial arrived to remove all abandoned items. Id. at ¶ 23. Those items were transported to the Department of Treasury warehouse for storage. Ibid.; Lougy Cert., Ex. C. State Police advised plaintiffs that any abandoned items could be claimed at the warehouse during business hours. Brosnan Cert., ¶ 23. In addition, counsel for plaintiffs was advised as early as October 14, 2011, that "any person seeking to pick up one or more of those items should contact the Operations Center of the State Police." Lougy Cert., Ex. C. To date, the property has remained unclaimed further supporting the State's position that the property remaining at the Memorial was abandoned. Brosnan Cert., ¶ 24.

Therefore, plaintiffs were provided with adequate notice to remove all unattended and prohibited items or such property would be considered abandoned and removed. Accordingly, the removal of only those unattended items,

unclaimed by any person, from the Memorial did not violate plaintiffs' due process rights.

b. DMAVA's reasonable guidelines allow for the full expression of Plaintiff's rights granted by Article I, paragraph 6.

The reasonable limitations placed upon uses of the Monument allow full expression of the rights afforded plaintiffs by Article I, paragraph 6 of the New Jersey Constitution. Because Plaintiffs fail to establish a reasonable likelihood that they will demonstrate otherwise, they are not entitled to any injunctive relief.

The guidelines challenged here stressed that plaintiffs "are welcome to stay on this site and exercise [their] First Amendment rights."[2] Moreover, it further advised plaintiffs that they may "use signs, flags, or other symbols in the exercise of [their] First Amendment rights."

1. The guidelines do not regulate any conduct protected by the Article I, paragraph 6 of the New Jersey Constitution.

Article I, paragraph 6 protects only expressive conduct. Plaintiffs bear the burden of demonstrating that the provision even applies. Tenafly Eruv Ass'n, Inc. v. Borough of

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[2] The protections afforded by the First Amendment and Article I, paragraph 6 of the New Jersey Constitution are equivalent for the purposes of this discussion. See Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 264-65 (1998) (stating that Court relies on federal constitutional principles in interpreting Art. I, ¶ 6 except in two areas not relevant here).

Tenafly, 309 F.3d 144, 161 (3d Cir. 2002) (stressing that obligation on person desiring to engage in "assertedly expressive conduct to demonstrate that the First Amendment even applies.") (quoting Clark, supra, 468 U.S. at 2). "'We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech.'" Ibid. (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)).

Plaintiffs' mere assertion that the regulations constrain conduct that is within the scope of the art. I, ¶ 6 is not sufficient. Rather, the question is whether the conduct is ""sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." Troster v. Pennsylvania Dep't of Corrs., 65 F.3d 1086, 1090 (3d Cir. 1995). Questions of actual intent aside, Tenafly Eruv Ass'n, Inc., supra, 309 F.3d at 161, plaintiffs cannot establish that observers will understand (*a*) that they are attempting to convey a message, Texas v. Johnson, 491 U.S. 397, 404 (1989), and (*b*) the particular message that they are attempting to convey. Spence v. Washington, 418 U.S. 405, 410-11 (1974) (per curiam); Tenafly Eruv Ass'n, Inc., 309 F.3d at 161. In other words, plaintiffs must demonstrate that "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." Spence, supra, 418 U.S. at 411.

Generators, tables, and coolers are not conduct at all, much less expressive conduct. They, themselves, do not convey messages nor, even under the most imaginative of theories, could an observer be expected to understand what message they convey. In Chief Justice Burger's powerful words, characterizing an attempt to bring mere camping within the Amendment's protections, "[i]t trivializes the First Amendment to seek to use it as a shield in the manner asserted here." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 300-01 (1984) (Burger, C.J., concurring). Rather, as DMAVA and the State Police concluded, these items impede the public's use and enjoyment of the Memorial, denigrate the Memorial's solemn and commemorative value, and represent a potential threat to public safety.

Restrictions on unattended items such as coolers or boxes do not implicate expressive activity. Boxes, bags, coolers, or parcels are "inherently less expressive" than signs or other forms of expressive conduct. White House Vigil for ERA Comm. v. Clark, 746 F.2d 1518, 1540 (D.C. Cir. 1984). In White House Vigil, supra, the court evaluated the constitutionality of regulations that, among other things, prohibited demonstrators from placing unattended parcels on the sidewalk near the White House. Id. at 1538-39 (quoting regulation that allowed owner of parcel only to "momentarily place[] or set [it] down in the

immediate presence of the owner"). Reversing the district court, the court concluded that the restriction did not even implicate the First Amendment because putting an item on the sidewalk is not expressive conduct. Id. at 1540.

Similarly, plaintiffs' desired items do not implicate expressive activity. A table or cooler does not convey a particular message. Spence, supra, 418 U.S. at 410-11. Nor can the protections of the First Amendment be so cheaply expanded by, for example, using a cooler to support or to hold a sign. Likewise, a generator does not convey a message; it produces electricity.

In short, State Defendants have gone to considerable lengths to accommodate plaintiffs' expressive conduct. State Police has respected to the utmost these plaintiffs' freedom of expression. The guidelines established by DMAVA facilitate and encourage activities protected by Article I, paragraph 6 while constraining those non-expressive activities that diminish the use and enjoyment of the Monument by others. This court should reject their various arguments to the contrary.

Thus, they fail to establish a reasonable likelihood of success on this claim, as well.

c. Even if the Court concludes that the guidelines implicate the First Amendment, they are content-neutral reasonable time, place, and manner restrictions.

The Court need not examine the guidelines under a First Amendment analysis because they do constrain or otherwise impede expressive conduct. Even if the Court evaluates them under the First Amendment / Article I, paragraph 6 rubric, however, the Court will conclude that they are reasonable and content-neutral time, place, and manner restrictions that comport with those constitutional provisions.

The guidelines exclude non-expressive activity and items that, at most, facilitate expression. In Clark, supra, the Supreme Court recognized that the "major value" of sleeping on the National Mall was "facilitative" of expressive conduct more than, by itself, expressive. 468 U.S. at 296. Similarly, in White House Vigil, supra, the court observed that "the first amendment protects facilitative activity only insofar as the restriction imposes burdens on expression itself." 746 F.2d at 1540. The court further noted that, "while it is obvious that not just any minimal effect will do," the Supreme Court had not established a test for how substantial a burden on facilitative conduct is required before implicating the First Amendment. Ibid. To avoid resolving that issue, the court turned to the traditional time, place, and manner analysis. Id. at 1541.

"The First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981). The Supreme Court has emphatically rejected plaintiffs' implicit "assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." Adderley v. Florida, 385 U.S. 39, 47-48 (1966).

Rather, the State may impose reasonable and content-neutral restrictions on the time, place, and manner of protected speech. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). The restrictions need not be the least restrictive or least intrusive means of serving the State's legitimate interests. Id. at 798.

The DMAVA guidelines are content-neutral. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." Id. at 791. Mr. Zawacki enumerated the justifications for the guidelines established by DMAVA: protection of demonstrators, public, and the Memorial and maintenance of the safety, condition, and aesthetic value of the Memorial.[3] The State

[3] In this context, Defendants use the phrase "aesthetic value" to refer "not so much to that which is considered

justifies any incidental effects of the guidelines on expression without reference to the content of the regulated speech. Clark, supra, 468 U.S. at 293. Accordingly, they are content neutral. Ward, supra, 491 U.S. at 791.

Additionally, the reasonableness of the guidelines is not "to be judged solely by reference to the demonstration at hand." Clark, supra, 468 U.S. at 296-97. Thus, the handful of demonstrators that plaintiffs have mustered notwithstanding, if the guidelines would be reasonable as applied to more robust demonstrations at the Memorial, State Defendants may apply them to plaintiffs.

Fundamentally, the guidelines are, in every respect, reasonable. Without exception, the guidelines "respond[] precisely to the substantive problem[s] which legitimately concern the [State]." City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 810 (1984).

First, the guidelines prohibit unattended items, including that subset which is actually expressive, on the site.[4]

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visually beautiful as to that which promotes or enhances the cultural identity of an area." White House Vigil, supra, 746 F.2d at 1537 n.117. Given the purpose of the Memorial, Zawacki Certif. ¶¶ 2-4, and its proximity to the State House, Zawacki Certif. ¶ 2, the aesthetic value in this instance includes buildings and grounds at the core of the State's cultural, political, and historical identity.

[4] Plaintiffs' discussion of "unattended" items attempts to introduce ambiguity where none exists. First, even crediting the description of plaintiffs' counsel in his letter of October

The threat posed by unattended items left in public spaces hardly needs explanation. The exclusion of unattended items in a Memorial easily accessible to all comers from nearby streets and roads is a reasonable restriction intended to deny persons other than the demonstrators an opportunity to conceal weapons, explosives, or other hazardous materials at a site immediately adjacent to the epicenter of the State's political institutions.[5] As the D.C. Circuit observed in upholding the National Park Service's regulations governing protests near the White House, "[t]he provision is narrowly tailored to address a security problem of the greatest magnitude." White House Vigil, supra, 746 F.2d at 1541. "Because any such parcel could contain an explosive device, all unattended parcels must be regarded as potentially suspect." Ibid.

Additionally, the State has a "substantial interest in maintaining the parks in the heart of our Capital in an

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24, 2011, the State's "rule that anything not directly on the person or within arm's reach is considered 'unattended'" is perfectly reasonable, understandable, and enforceable. Second, it would closely comport with the regulation upheld by the D.C. Circuit regarding unattended parcels, which prohibited the placement of parcels on the sidewalk except when "momentarily placed or set down in the immediate presence of the owner on those sidewalks." White House Vigil, supra, 746 F.2d at 1538-39 (quoting 36 C.F.R. §§ 50.7(h)(2), 50.19(e)(10) (1983) (now codified at 36 C.F.R. § 7.96)); see also, 36 C.F.R. § 7.96 (defining "attended" as "an individual being within three (3) feet of his or her sign(s)").

[5] Defendants do not suggest that plaintiffs themselves would engage in such activities or conceal such items.

attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence." Clark, supra, 468 U.S. at 296. That the State House or the Memorial does not draw the volume of tourists that visit the White House does not in any way diminish the vitality of the State's interest in maintaining and preserving them for the public's benefit.

Simply put, the messes associated with Plaintiffs' makeshift settlement do not enjoy the protections afforded by Article I, paragraph 6. The guidelines advance the State's "substantial interest in the preservation and enhancement" of the Memorial, id. at 1528, by prohibiting the denigration of the Memorial's beauty and solemnity. The photographs submitted to this Court along with Captain Brosnan's certification demonstrate that the guidelines were not only reasonable but indeed necessary to address the unattended items strewn haphazardly and sloppily across the Memorial's grounds. As Captain Brosnan further explains, the prohibition on unattended signs, in particular, relates additionally to preventing signs and other items from blowing into West State Street, interfering with the orderly and regular traffic flow, and, potentially, causing an accident.

Second, the guidelines preclude camping and the trappings that would reasonably indicate that demonstrators are

using the area as living accommodation, not a site of protest. (The First Amendment protects expression, not all human activity. White House Vigil, 746 F.2d at 1540 n.143.) The First Amendment does not deprive the State of the ability to "preserve the property under its control for the use to which it is lawfully dedicated." Adderley, supra, 385 U.S. at 47. The prohibition prevents denigration to the Memorial by uses for which it was neither intended nor designed and maintains the accessibility of the site to other members of the public. Zawacki Certif. ¶ 6. Thus, it is a reasonable restriction on the manner of expressive conduct permitted at the Memorial.

Third, the guidelines preclude plaintiffs from affixing things to the Memorial or erecting structure on the grounds of the Memorial. DMAVA has strictly prohibited members of the public from such activity. Zawacki Certif. ¶ 7. Much like the guidelines discussed above, these prohibited uses are contrary to the intent, design, and purpose of the Memorial and would substantially diminish and denigrate the accessibility and enjoyment of the Memorial by other members of the public. Additionally, structures that diminish visibility at the Monument pose the same risk as unattended items for concealment of items inimical to the public safety.

Finally, the guidelines prohibit the use of a generator on the site.[6] As Mr. Zawacki explains, DMAVA has never permitted the use of generators at the Memorial. Zawacki Certif. ¶ 8. First, a gasoline-powered generator poses safety concerns. Gasoline is, of course, highly-flammable in both its gaseous and liquid form. Ibid. And plaintiffs have treated the whole thing carelessly. See, e.g., http://www.youtube.com/watch?v=aNigWlc6M5s (video clip showing State Police sergeant instructing demonstrators that placing gas can near generator is safety hazard) (last visited Oct. 24, 2011). Article I, paragraph 6 does not afford these plaintiffs license to endanger either State property or members of the public through their accessories and appliances. Second, the use of the generator on-site is inconsistent with the enjoyment and accessibility of the site by other members of the public. Zawacki Certif. ¶ 8.

[6] DMAVA has discontinued power to the electrical outlet installed at the Memorial. The outlet, installed to assist in the care and maintenance of the site, is not intended for, and no longer available to, use by the public. Zawacki Certif. ¶ 8. Because power to the outlet has been discontinued, plaintiffs' use of that outlet is not at issue. The State has no obligation to provide electricity, paid for by the State, to these or any other users of the Memorial. That said, however, plaintiffs' blatant disregard of the instruction in Brigadier General James Grant's letter of October 7, 2011, that they not use electricity available on the site, and the need to reiterate that instruction on October 13, 2011, reflects poorly on their compliance with lawfully-given and reasonable instructions regarding their use of the site. The video referenced in counsel's letter of October 24, 2011, and the litter and other inappropriate uses of the Memorial evident in that clip, only underscores this point.

The Court should reject Plaintiffs' attempt to fashion the generator as central to their expressive conduct. First, as noted above, the generator itself is, like a light switch or an extension cord, not expressive of anything. It is an appliance. Second, the guidelines do not constrain plaintiffs' ability to advertise their activities via the internet. They do not prohibit cameras. They do not prohibit computers. They do not prohibit "live-streaming" or "live-blogging." Pls.' Verified Compl. ¶¶ 22, 23. Indeed, even the most cursory review of prominent video sites like Youtube demonstrates the plaintiffs' continuing ability to post video clips with remarkable frequency. Third, the exclusion of the generator leaves open ample alternative means of communication; that is, plaintiffs can still socialize online all they want, from wherever they want. They simply cannot bring a potentially dangerous tool onto the site. The First Amendment does not require the State to indulge such unreasonable demands.

Finally, the lack of any support for plaintiffs' claims that a generator is entitled to Article I, paragraph 6 protections precludes them from establishing that their legal rights in that respect are well-established. Because the restriction on such tools is reasonable and addresses the State's specific and legitimate concern, it is, to the minimal,

if any, extent that the First Amendment is relevant, fully consistent with the protections that the provision provides.

d. The State's gathering of unattended items left at the Memorial does not violate Article I, paragraph 7 of the New Jersey Constitution.

Plaintiffs fail to establish a reasonable likelihood of success on their claim that the State's gathering of the unattended items that remained at the Memorial at the time of clean-up violated the State Constitution.

The State reasonably and properly concluded that the property was abandoned and, further, that such unattended parcels violated the DMAVA guidelines as well as basic precepts of public safety. Members of the State Police had instructed plaintiffs to remove the items and, further, had informed them that unattended items were prohibited. Verif. Compl. ¶ 29. The persons present at the Memorial during the clean-up asserted neither ownership nor control of any of the unattended items. Had plaintiff Higgins actually asserted and maintained ownership or control over his laptop, id., it would not have been deemed abandoned. Rather than do so, however, he stood silent. (His failure to indicate ownership or control hardly establishes a constitutional violation by Defendants.[7])

[7] Similarly, it is hard to credit Plaintiffs' assertion that "the use of [Higgins'] computer and video equipment was therefore essential to conveying his message," Compl. ¶ 24, when

As the Supreme Court discussed, "unless there is some indication that someone owns or controls property left in a public place or on a public carrier, the property - for practical and standing purposes - is abandoned." State v. Carvajal, 202 N.J. 214, 226 (2010). Directly relevant here, the Court observed that the "an unattended bag on a subway platform or in a public park" is the "clearest example" of "property with no apparent owner." Ibid. It further noted that "[i]t is not unusual for police to take into possession lost or seemingly abandoned property." Ibid.

The State's clean-up of the Memorial most closely resembled that lost-and-found function or, less charitably, the collection of garbage. The State Police had, on several occasions, Brosnan Cert. ¶ 22, notified the persons present at the Memorial that the prohibited items at the site must be removed and that any unattended items would be removed. Id. at ¶ 22. Unlike the facts that motivated the Supreme Court's conclusion in State v. Hempele, 120 N.J. 182, 219-20 (1990), here, the State's actions were motivated not by law enforcement interests such as drug laws, ibid., but rather solely by its interest in maintaining the Memorial as a clean and safe site.

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he has made no effort to retrieve it from storage since October 14, 2011. Compl. ¶ 38.